No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, A NEW JERSEY MEMBERSHIP CORPORATION; SOCIETY OF AMERICAN LAW TEACHERS, INC., A NEW YORK CORPORATION; COALITION FOR EQUALITY, A MASSACHUSETTS ASSOCIATION; RUTGERS GAY AND LESBIAN CAUCUS, A NEW JERSEY ASSOCIATION; PAM NICKISHER, A NEW JERSEY RESIDENT; LESLIE FISCHER, A PENNSYLVANIA RESIDENT; MICHAEL BLAUSCHILD, A NEW JERSEY RESIDENT; ERWIN CHEMERINSKY, A CALIFORNIA RESIDENT; SYLVIA LAW, A NEW YORK RESIDENT, APPELLANTS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ROD PAIGE, IN HIS CAPACITY AS U.S. SECRETARY OF EDUCATION; ELAINE CHAO, IN HER CAPACITY AS U.S. SECRETARY OF LABOR; TOMMY THOMPSON, IN HIS CAPACITY AS U.S. SECRETARY OF HEALTH AND HUMAN SERVICES; NORMAN Y. MINETA, IN HIS CAPACITY AS U.S. SECRETARY OF TRANSPORTATION; TOM RIDGE, IN HIS CAPACITY AS U.S. SECRETARY OF HOMELAND SECURITY

Nov. 29, 2004

Before: AMBRO, ALDISERT and STAPLETON, Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

The Solomon Amendment, 10 U.S.C. § 983, requires the United States Department of Defense ("DOD") to deny federal funding to institutions of higher education that prohibit military representatives access to and assistance for recruiting purposes. Last fall, the Forum for Academic and Institutional Rights, Inc. ("FAIR"),[1] an association of law schools and law faculty, asked the United States District Court for the District of New Jersey to enjoin enforcement of the Solomon Amendment. The District Court denied FAIR's motion. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) ("FAIR"). On appeal, we hold that FAIR has demonstrated a likelihood of success on the merits of its First Amendment claims and that it is entitled to preliminary injunctive relief. Accordingly, we reverse.

I. Background Facts[2] and Procedural Posture

A. Law Schools' Nondiscrimination Policies

Law schools have long maintained formal policies of nondiscrimination that withhold career placement

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[1] Joining FAIR in its preliminary injunction motion and in this appeal are: the Society for Law Teachers, Inc.; the Coalition for Equality; Rutgers Gay and Lesbian Caucus; law professors Erwin Chemerinsky and Sylvia Law; and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild. For convenience, we refer to all plaintiff-appellants collectively as "FAIR."

[2] The facts on appeal are not in dispute. As the District Court noted, the Government did not challenge or supplement the factual assertions presented by FAIR in its motion for injunctive relief. *FAIR*, 291 F. Supp. 2d at 277.

services from employers who exclude employees and applicants based on such factors as race, gender, and religion. In the 1970s law schools began expanding these policies to prohibit discrimination based on sexual orientation as well. In response to this trend the American Association of Law Schools ("AALS") voted unanimously in 1990 to include sexual orientation as a protected category. As a result, virtually every law school now has a comprehensive policy like the following:

> [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.

B. Congress Passes the Solomon Amendment

The United States military excludes servicemembers based on evidence of homosexual conduct and/or orientation. *See* 10 U.S.C. § 654.[3] Citing their nondis-

[3] While the current statutory version of the military's exclusionary policy has existed since 1993, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (Nov. 30, 1993), the military has had formal regulatory policies excluding gays and lesbians since World War I and a practice of such exclusion since the Revolutionary War. *See, e.g.*, Articles of War of 1916, Pub. L. No. 242, art. 93, 39 Stat. 619, 664 (assault with intent to commit sodomy punishable by

crimination policies, some law schools began in the 1980s refusing to provide access and assistance to military recruiters. This caught the attention of members of Congress. In 1994, Representative Gerald Solomon of New York sponsored an amendment to the annual defense appropriation bill that proposed to withhold DOD funding from any educational institution with a policy of denying or effectively preventing the military from obtaining entry to campuses (or access to students on campuses) for recruiting purposes. National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994).

During debate in the House of Representatives, Representative Solomon urged the passage of his amendment "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military." 140 Cong. Rec. H3861 (daily ed. May 23, 1994). He argued that it was hypocritical for schools to receive federal money while at the same time denying the military access to their campuses: "[T]ell[ ] recipients of Federal money at colleges and universities

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court martial); *see generally* Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 11-17 (1994).

Under the current statute, a servicemember is separated from the military if it is found that he or she "engaged in . . . a homosexual act" or "stated that he or she is a homosexual" or "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b). It defines "homosexual" and "homosexual act" to include evidence demonstrating "a propensity or intent to engage in homosexual acts." *Id.* It also allows servicemembers to rebut findings of proscribed conduct with evidence of the lack of a propensity to engage in homosexual conduct, *i.e.*, evidence of a heterosexual orientation. *Id.* Law schools interpret the ban as conflicting with their policies against discrimination on the basis of sexual orientation.

that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your [F]irst [A]mendment right[ ]. But do not expect Federal dollars to support your interference with our military recruiters." *Id.* The amendment's co-sponsor, Representative Richard Pombo of California, said Congress needed to target "policies of ambivalence or hostility to our Nation's armed services" that are "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." *Id.* at H3863. He urged his colleagues to "send a message over the wall of the ivory tower of higher education" that colleges' and universities' "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.*

Other Representatives opposed the amendment, alleging violations of academic freedom and civil rights. *See, e.g., id.* at H3862 (Rep. Dellums) ("We should not . . . chill or abridge privacy, speech, or conscience by threatening a college with a Federal funds termination because it chose for whatever reason to deny access to military recruiters. . . . We should not browbeat them . . . into becoming involuntary agents of Federal policy."). In light of Vietnam War-era legislation, rarely invoked, that already granted the DOD discretion to withhold funding from colleges and universities that barred military recruiters, see Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972), the DOD itself objected to the proposed amendment as "unnecessary" and "duplicative." 140 Cong. Rec. H3864 (Rep.

Schroeder) (explaining the DOD's position). The DOD also feared that withholding funds from universities could be potentially harmful to defense research initiatives. *Id.* But the House voted for the amendment by a vote of 271 to 126. *Id.* at H3865. Several months later the Senate approved the defense spending appropriations bill, including Representative Solomon's amendment, and the "Solomon Amendment" ultimately became law.

C. Subsequent Amendments and Regulatory Interpretations

In 1997 Congress amended the Solomon Amendment by expanding its penalty to include, in addition to DOD funds, funds administered by other federal agencies, including the Departments of Transportation,[4] Labor, Health and Human Services, and Education.[5] Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996). This amendment was recodified in another amendment in 1999. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999). DOD regulations have clarified this expansion, penalizing an offending "subelement" of a college or university (*i.e.*, a law school) that prohibits or effectively prevents military recruiting with the loss of federal funding from all of the federal agencies identified in the statute, while withholding from the offending

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[4] Department of Homeland Security funds later replaced Department of Transportation funds. Pub. L. No. 107-296, § 1704(b)(1), 116 Stat. 2314 (2002).

[5] A separate amendment cancelled the application of the Solomon Amendment to direct student aid. Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999).

subelement's parent institution only DOD funds. 32 C.F.R. § 216.3(b)(1).

The 1999 amendment also codified exceptions to the Solomon Amendment's penalties for schools that (1) have ceased an offending policy or practice, or (2) have a longstanding religious-based policy of pacifism. § 549, 113 Stat. at 610(c) (codified at 10 U.S.C. § 983(c)). DOD regulations subsequently added a third exception for schools that provide military recruiters a degree of access equal to that provided to other recruiters. 32 C.F.R. § 216.4(c).

Following the 1999 amendment, the DOD enforced the Solomon Amendment consistent with its terms. Only schools whose policies or practices "prohibit[ed], or in effect prevent[ed]," military representatives "from gaining entry to campuses, or access to students . . . on campuses for purposes of military recruiting," were penalized. Thus, by merely allowing military recruiters to gain access to campuses, many law schools avoided the Solomon Amendment's penalty while reaffirming their opposition to the military's exclusionary employment policy by not providing them affirmative assistance in the manner provided to other recruiters. Harvard Law School, for example, allowed military recruiters on campus to recruit at the offices of its Veterans Association but did not volunteer its placement personnel to arrange interviews. Boston College Law School allowed military recruiters to conduct on-campus interviews, but kept their literature in the library rather than in the career services office. Until the fall of 2001, the DOD did not consider these and other similar "ameliorative measures" to violate the Solomon Amendment and expressed enthusiasm for the law schools' cooperation with what it described as

successful recruiting efforts. *See FAIR*, 291 F. Supp. 2d at 282 (citing record evidence).

But following the terrorist attacks in the United States in September 2001, the DOD began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters. As evidence of this informal policy, a letter from the DOD's Acting Deputy Undersecretary William J. Carr to Richard Levin, the President of Yale University, stated that universities are required "to provide military recruiters access to students equal in quality and scope to that provided to other recruiters."[6] The same letter stated that the "DOD requires that there not be a substantial disparity in the treatment of military recruiters as compared to other potential employers." This changed context meant that Yale's willingness to let military recruiters use a room in Yale Law School's building for interviews would not pass muster unless it also provided military recruiters with the same level of assistance from its career development office (arranging interviews, posting notices, *etc.*) provided to other recruiters. Furthermore, the DOD intimated that failure to comply would result in a loss to Yale University not only of DOD funds, but of all federal funds (a penalty that is not consistent with the DOD's existing regulations, under which the offending subelement's parent institution is penalized with the loss of only DOD funds, *see* 32 C.F.R. § 216.3(b)(1)).

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[6] In wording the new informal policy's substantive requirement, the DOD borrowed language from the existing policy's regulatory exception—32 C.F.R. 216.4(c) (exempting from Solomon Act compliance a law school that "presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers").

In another example, the DOD advised the University of Southern California Law School in 2002 that its past practice of accommodating military recruiters—providing them with standard employer information, referring them to the campus ROTC office for scheduling of interview office space, posting notices in the weekly newsletter for students, and making military recruitment materials available to students—would violate the Solomon Amendment unless its career services office invited military recruiters to participate in an off-campus job fair open to other employers. According to the DOD, anything less than equal treatment for military recruiters "sends the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations"—a dangerous message to be sending "in today's military climate." In light of the millions of dollars at stake, every law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.

This past summer Congress amended the Solomon Amendment to codify the DOD's informal policy. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub.L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). Now, under the terms of the statute itself, law schools and their parent institutions are penalized for preventing military representatives from gaining entry to campuses for the purpose of military recruiting "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b).

D. Current Litigation

In September 2003, FAIR sued the DOD and the other federal departments whose funds are restricted under the Solomon Amendment, seeking on constitutional grounds a preliminary injunction enjoining enforcement of the statute and the then-existing (now codified) informal policy. The Government defendants moved to dismiss for lack of standing. The District Court denied both the motion to dismiss and FAIR's motion for preliminary injunction. *See FAIR*, 291 F. Supp. 2d at 296, 322. This appeal followed.

II. Jurisdiction

Under 28 U.S.C. § 1331, a federal district court has original subject matter jurisdiction over an action for injunctive relief based on constitutional claims. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156 n. 12 (3d Cir. 2002), cert. denied, 539 U.S. 942, 123 S. Ct. 2609, 156 L.Ed.2d 628 (2003).[7] Our appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1).

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[7] Standing must also be proper for subject matter jurisdiction to exist. *See, e.g., Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003); 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531 (2d ed. 1984). The District Court held that FAIR had standing to seek a preliminary injunction against the Solomon Amendment, and the Government has conceded this issue on appeal. Acknowledging our continuing obligation to verify subject matter jurisdiction when it is in question, *see, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 104 (3d Cir.), cert. granted on other grounds, —- U.S. ——, 125 S. Ct. 310, 160 L.Ed.2d 221 (2004), we affirm the District Court's holding that FAIR's standing was proper for the reasons it provided. *FAIR*, 291 F. Supp. 2d at 285-91.

III. Analysis

To obtain a preliminary injunction FAIR must establish (1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm to FAIR absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest. *Tenafly Eruv Ass'n*, 309 F.3d at 157. While we review a district court's balancing of the preliminary injunction factors for abuse of discretion, we review "any determination that is a prerequisite to the issuance of an injunction . . . according to the standard applicable to that particular determination." *Id.* at 156 (citations omitted). Thus, because the District Court's ruling was based on its application of the First Amendment and other constitutional principles to the Solomon Amendment—issues of law to which a plenary standard of review applies—our review is plenary. *Id.*

A. Unconstitutional Conditions Doctrine

FAIR argues that the Solomon Amendment is an unconstitutional condition.[8] Under the unconstitutional

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While the Government does not concede that the non-FAIR plaintiffs had standing, the presence of one plaintiff with standing is sufficient to satisfy that requirement. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986).

[8] Our dissenting colleague urges us to begin our analysis with the presumption that congressional statutes are constitutional. It is a fundamental canon of statutory construction that, when there are "'two possible interpretations of a statute, by one of which it would unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105, 72 L.Ed. 206 (1927)). But in this case it is not argued that there are two possible

conditions doctrine, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). If Congress "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* Put another way, the Government may not propose a penalty to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958) (state could not condition property tax exemption on loyalty oath); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (public university could not condition funds for student publications on their secular perspective); *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (FCC could not condition federal funds to radio stations on editorial content). Thus, if the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.[9]

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constructions of the Solomon Amendment. The canons of statutory construction therefore do not apply. Moreover, "although a duly enacted statute normally carries with it a presumption of constitutionality, when a [statute] allegedly infringes on the exercise of [F]irst [A]mendment rights, the statute's proponent bears the burden of establishing [its] constitutionality." *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) (citing *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L.Ed.2d 1 (1971)).

[9] As the District Court noted, the Supreme Court's exception to the unconstitutional conditions doctrine for selective spending

B. First Amendment Analysis

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This simple commandment plays out differently depending on the avenue of analysis. Two avenues applicable here are: (1) whether the law schools are "expressive associations" whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses; and (2) whether the law schools are insulated by free speech protections from being compelled to assist military recruiters in the expressive act of recruiting.[10]

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programs does not apply here. *FAIR*, 291 F. Supp. 2d at 299-300. When the Government appropriates for a particular spending program, it may endorse one viewpoint over another by conditioning its spending on certain criteria. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211, 123 S. Ct. 2297, 156 L.Ed.2d 221 (2003) (providing library assistance funds to only those libraries who agree to block obscene Internet sites); *Rust*, 500 U.S. at 192-93, 111 S. Ct. 1759 (funding family planning services that eschew abortion counseling). In those cases, "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196, 111 S. Ct. 1759; *see also Am. Library Ass'n*, 539 U.S. at 211, 123 S. Ct. 2297. That exception does not apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty-the loss of general funds.

[10] FAIR also argues that the Solomon Amendment and the then-existing informal policy are void under the First Amendment's vagueness doctrine because they provide insufficient notice as to what activities will trigger funding penalties. But the statutory amendment enacted during FAIR's pending appeal, *see supra* Part I.C, has rendered moot both the challenge to the Solomon Amendment, *see Black United Fund of N.J., Inc. v. Kean*,

A violation of freedom of speech under either analytical approach draws down the curtain on Solomon Amendment enforcement unless the Government can establish that the statute withstands strict scrutiny. The levels of scrutiny applicable in the First Amendment context are crucial. A regulation that disrupts an expressive association or compels speech must be narrowly tailored to serve a compelling governmental interest, and must use the least restrictive means of promoting the Government's asserted interest (here, recruiting talented lawyers). *See infra* Parts III.B.1(c), 2(e). Needless to say, this is an imposing barrier.

The District Court, by contrast, emphasized a third potential theory of this case that invokes only intermediate scrutiny, *i.e.*, whether the government action at issue furthers an important government interest that would be achieved less effectively without that action. The Court asked whether the law schools' resistance to the Solomon Amendment is sufficiently communicative to bring it within the ambit of the First Amendment's protection for "expressive conduct," the suppression of which receives intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *See infra* Part III.B.3(b). We emphasize at the outset that we need not decide this issue because we conclude that the Solomon

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763 F.2d 156, 160 (3d Cir. 1985), and the challenge to the regulatory policy, *see Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004). The recent amendment to the Solomon Amendment does not, however, moot FAIR's other challenges to it. *See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 662, 113 S. Ct. 2297, 124 L.Ed.2d 586 (1993) (stating that a challenge to a statute is not moot when the new version of it "disadvantages [appellants] in the same fundamental way").

Amendment violates the First Amendment by impeding the law schools' rights of expressive association and by compelling them to assist in the expressive act of recruiting. Nonetheless, we explain briefly our conclusion that FAIR would prevail even under *O'Brien*'s less strict framework.

1. Expressive Association

FAIR argues that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of expressive association. The Supreme Court most recently addressed this doctrine in *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000). There the Court held that a state public accommodations law that prohibited discrimination based on sexual orientation could not constitutionally be invoked to force the Boy Scouts to accept openly gay James Dale as an assistant scoutmaster. *Id.* at 659, 120 S. Ct. 2446. Central to its analysis was the deference it gave to the Boy Scouts' "view of what would impair its expression," which compelled the Court's conclusion that Dale's presence would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Id.* at 653, 120 S.Ct. 2446 (citation omitted).

Under *Dale*, the elements of an expressive association claim are (1) whether the group is an "expressive association," (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association. *Id.* at 648-58, 120 S. Ct. 2446; *accord The Circle School v. Pappert*, 381 F.3d 172, 181-82 (3d Cir. 2004) (applying the *Dale* framework); *Pi Lambda Phi*

Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) (same). We apply each in turn to analyze FAIR's expressive association claim.

(a) *The law schools are expressive associations.*

A group that engages in some form of public or private expression above a de minimis threshold is an "expressive association." *Pi Lambda Phi*, 229 F.3d at 443. The group need not be an advocacy group or exist primarily for the purpose of expression. *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. The Supreme Court held that the Boy Scouts, which "seeks to transmit . . . a system of values, engages in expressive activity." *Id.* at 650, 120 S. Ct. 2446.

"By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *The Circle School*, 381 F.3d at 182. Because FAIR has shown that the law schools "possess[ ] clear educational philosophies, missions and goals," *id.*, we agree with the District Court's conclusion that they qualify as expressive associations. *FAIR*, 291 F. Supp. 2d at 303-04. Therefore, FAIR satisfies the first element of the *Dale* analysis.

(b) *The Solomon Amendment significantly affects the law schools' ability to express their viewpoint.*

FAIR argues that the Solomon Amendment significantly affects law schools' ability to express their viewpoint, reflected in their policies, that discrimination on the basis of sexual orientation is wrong. The Solomon Amendment compels them, they contend, to disseminate the opposite message. The schools believe that, by coordinating interviews and posting and publishing recruiting notices of an employer who

discriminates on the basis of sexual orientation, they impair their ability to teach an inclusive message by example. Put another way, FAIR maintains that the Solomon Amendment suppresses the law schools' chosen speech by interfering with their prerogative to shape the way they educate (including, of course, the manner in which they communicate their message).

In *Dale*, the Supreme Court recognized that "[t]he forced inclusion of an unwanted person in a group" could significantly affect the group's ability to advocate its public or private viewpoint. 530 U.S. at 648, 120 S. Ct. 2446. The viewpoint at issue in *Dale* was the Boy Scouts' long-held belief that "homosexual conduct is inconsistent with . . . the Scout Oath" and that "homosexuals [do not] provide a role model consistent with the[ ] expectations [of Scouting families]." *Id.* at 652, 120 S. Ct. 2446. Because the Boy Scouts' expressive purpose was to "inculcate [youth] with the Boy Scouts' values-both expressively and by example," *id.* at 649-50, 120 S. Ct. 2446, the organization believed that the presence of an openly gay assistant scoutmaster could be perceived as "promot[ing] homosexual conduct as a legitimate form of behavior," a message inconsistent with the expression it wished to convey and the example it wished to set. *Id.* at 651, 120 S. Ct. 2446.

The Supreme Court agreed. Because James Dale was openly gay, his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653, 120 S. Ct. 2446.

Just as the Boy Scouts believed that "homosexual conduct is inconsistent with the Scout Oath," *id.* at 652, 120 S. Ct. 2446, the law schools believe that employ-

ment discrimination is inconsistent with their commitment to justice and fairness. Just as the Boy Scouts maintained that "homosexuals do not provide a role model consistent with the expectations of Scouting families," *id.*, the law schools maintain that military recruiters engaging in exclusionary hiring "do not provide a role model consistent with the expectations of," *id.*, their students and the legal community. Just as the Boy Scouts endeavored to "inculcate [youth] with the Boy Scouts' values-both expressively and by example," *id.* at 649-50, 120 S. Ct. 2446, the law schools endeavor to "inculcate" their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies. FAIR Br. at 22-25. And just as "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," *Dale*, 530 U.S. at 653, 120 S. Ct. 2446, the presence of military recruiters "would, at the very least, force the law schools to send a message," both to students and the legal community, that the law schools "accept" employment discrimination "as a legitimate form of behavior." *Id.*

Notwithstanding this compelling analogy, the District Court distinguished our case from *Dale* by suggesting there was a critical difference between the forced inclusion of a gay assistant scoutmaster and the forced presence of an "unwanted periodic visitor," the military recruiter, in the context of a larger recruiting effort. *FAIR*, 291 F. Supp. 2d at 304, 305. While there was "no question" that the gay scoutmaster would "undermine the Boy Scouts' ability to . . . inculcate its

values in younger members," the District Court wrote, the Solomon Amendment does not compel the law schools to accept the military recruiters as a "member" and does not "bestow upon them any semblance of authority." *Id.* at 305.

But our Court has recently held that compulsory accommodation of a government-prescribed message may violate schools' First Amendment expressive association rights, even when that message involves our most revered affirmations of American patriotism—the Pledge of Allegiance and our National Anthem, is only minimally intrusive and lacks the schools' imprimatur. *The Circle School*, 381 F.3d at 182 (holding that a statute requiring private schools to lead the Pledge of Allegiance and National Anthem violates their rights under the expressive association doctrine—"Certainly, the temporal duration of a burden on First Amendment rights is not determinative of whether there is a constitutional violation. . . . Similarly, the fact that the schools can issue a general disclaimer does not erase the First Amendment infringement at issue here, for the schools are still compelled to speak the [Government's] message."). If the Pledge and Anthem "only take[ ] a very short period of time each day," and may be preceded by "a general disclaimer regarding the recitation," yet do not "erase the First Amendment infringement at issue here," *id.*, then focusing on the periodic nature of the military recruiter's visits[11] is similarly unavailing.

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[11] Furthermore, the Solomon Amendment requires law schools to do more than passively accept the presence of an "unwanted periodic visitor." They must actively assist military recruiters in a manner equal in quality and scope to the assistance they provide other recruiters. 10 U.S.C. § 983(b)(1).

Moreover, the District Court's scrutiny of the law schools' belief that the presence of military recruiters will undermine their expressive message about fairness and social justice violates the *Dale* Court's instruction to "give deference to an association's view of what would impair its expression." 530 U.S. at 653, 120 S. Ct. 2446.[12] In *Dale*, the Court did more than pay lip service to deference notions. Deference distinguished the

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[12] *Dale* may appear to depart from prior Supreme Court jurisprudence in this area. In two expressive association cases from the 1980s, the Court considered the claims of civic associations that state statutes forcing them to accept women as members violated their expressive association rights. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). Closer review explains the distinction from *Dale*. In both cases the Court examined the organizations' expressive charitable and humanitarian purposes and determined that they would not be impaired by the forced inclusion of women members. *Duarte*, 481 U.S. at 548-49, 107 S. Ct. 1940; *Roberts*, 468 U.S. at 626-27, 104 S. Ct. 3244. The difference in outcome between these cases and *Dale*—the civic associations had to admit women, but the Boy Scouts did not have to admit *Dale*—underscores the significance of the Court's decision to extend "deference to an association's view of what would impair its expression." 530 U.S. at 653, 120 S. Ct. 2446.

Moreover, we note that the Supreme Court had previously extended deference to what an expressive association said would impair its expression. *E.g.*, *Meyer v. Grant*, 486 U.S. 414, 424, 108 S. Ct. 1886, 100 L.Ed.2d 425 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24, 101 S. Ct. 1010, 67 L.Ed.2d 82 (1981) ("[A] court[ ] may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.").

Supreme Court's conclusion on the impairment question from that of the New Jersey Supreme Court, which had decided the case previously. The state court had ruled in Dale's favor, holding that because the Boy Scouts have a policy of "discourag[ing] its leaders from disseminating *any* views on sexual issues," Dale's presence would not significantly affect its ability to disseminate its message. 530 U.S. at 654, 120 S. Ct. 2446 (citing *Dale v. Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196, 1223 (1999) (emphasis in original)). But faced with competing views-the Boy Scouts' view that *Dale's* presence impaired their message and the state court's view that it could not-the Supreme Court deferred to the Boy Scouts' view. In other words, the reason why there was "no question" (in the District Court's words in our case, 291 F. Supp. 2d at 305) that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*. *Dale*, 530 U.S. at 653, 120 S. Ct. 2446. In our case, FAIR has supplied written evidence of its belief that the Solomon Amendment's forcible inclusion of and assistance to military recruiters undermines their efforts to disseminate their chosen message of non-discrimination. Accordingly, we must give *Dale* deference to this belief,[13] and conclude that FAIR likely

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[13] Furthermore, the law schools are entitled to at least as much deference as the Boy Scouts, as the Supreme Court has recognized in other contexts that universities and law schools "occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S. Ct. 2325, 156 L.Ed.2d 304 (2003), because of their "vital role in . . . democracy," *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L.Ed.2d 1311 (1957). The Court has acknowledged the importance of "autonomous decisionmaking by the academy." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12, 106 S. Ct. 507, 88 L.Ed.2d 523 (1985); *Sweezy*, 354

satisfies the second element of an expressive association claim.

(c) *Balancing of interests*

The third step in evaluating an expressive association claim is "balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries." *FAIR*, 291 F. Supp. 2d at 310.[14] We need not linger on this analysis. Rarely has government action been deemed so integral to the advancement of a compelling purpose as to justify the suppression or compulsion of speech. We presume that the Government has a compelling interest in attracting talented military lawyers.[15] But "[i]t is not

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U.S. at 263, 77 S. Ct. 1203 (Frankfurter, J., concurring) (recognizing "four essential freedoms" of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"). The Supreme Court's academic freedom jurisprudence thus underscores the importance of *Dale* deference in our case.

[14] The District Court rejected FAIR's argument that strict scrutiny applies because it did not believe that the Solomon Amendment directly burdens expressive association rights. *FAIR*, 291 F. Supp. 2d at 310-311. But because we concluded at step two that the Solomon Amendment impairs law schools' expression, strict scrutiny will apply. *Dale*, 530 U.S. at 659, 120 S. Ct. 2446 (rejecting the argument that only intermediate scrutiny should apply); *The Circle School*, 381 F.3d at 182 (applying strict scrutiny to statute impairing schools' expressive association rights by requiring them to lead the Pledge of Allegiance and National Anthem).

[15] Our colleague in dissent states that "[w]e do not write on a clean slate regarding the importance Congress places in access to college and university facilities by the military" and that "[w]e have already decided that issue contrary to the argument pressed by Appellants." In *United States v. City of Philadelphia*, 798 F.2d

enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

As we explain in the final section of our opinion, *infra* Part III.B.3(b), the Solomon Amendment could barely be tailored more broadly. Unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law

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81 (3d Cir. 1986), our Court acknowledged that "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *Id.* at 86. *City of Philadelphia*, however, is distinguishable from this case in two important respects. First, in that case the university invited the military recruiters on campus; the recruiters' presence was not effectively dictated by a statute, as is the case here. *Id.* at 83. Second, *City of Philadelphia* engaged in a conflict preemption analysis and held that, because it was not possible for the university to comply with both a Philadelphia anti-discrimination ordinance and the clear congressional policy concerning military recruitment on campus, the ordinance was preempted. *Id.* at 88-89. Our Court did not reach a balancing-of-interests inquiry. Therefore, neither this Court's prior acknowledgment of the importance Congress places on military recruiting on college and university campuses, nor our presumption in this case that there is an important governmental interest in attracting talented lawyers to the military, ends our analysis. Rather, we must go on to reach an issue that was not present in *City of Philadelphia*—whether the Solomon Amendment is narrowly tailored to achieve the Government's ends.

school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

The availability of alternative, less speech-restrictive means of effective recruitment is sufficient to render the Solomon Amendment unconstitutional under strict scrutiny analysis. *Sable*, 492 U.S. at 126, 109 S. Ct. 2829; *The Circle School*, 381 F.3d at 182. But our path in this case is even clearer. The Government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal. And not only might other methods of recruitment yield acceptable results, they might actually fare better than the current system. In fact, it may plausibly be the case that the Solomon Amendment, which has generated much ill will toward the military on law school campuses,[16] actually impedes recruitment.[17]

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[16] See, *e.g.*, *FAIR*, 291 F. Supp. 2d at 282 (describing record evidence of student protests over military recruiting).

[17] The dissent, applying the balancing-of-interests test from *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244, comes to the opposite conclusion—"that the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—'where that relationship's objective characteristics locate it . . . [near] the most attenuated of personal attachments.'" This balancing test, however, comes not from the portion of *Roberts* dealing with freedom of expressive association, but from the portion dealing with freedom of intimate association. The law schools are clearly not intimate associations, and where they may fall on the spectrum articulated by Justice Brennan for determining whether particular relationships merit protection under that doctrine is irrelevant to our analysis here. In *Roberts*, the Court went on to engage in a strict scrutiny expressive association analysis and applied the balancing test we apply here, determining that the Government

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FAIR likely satisfies the three elements of an expressive association claim. The law schools are expressive associations, they believe the message they choose to express is impaired by the Solomon Amendment, and no compelling governmental interest exists in the record to justify this impairment. Therefore, FAIR has a reasonable likelihood of success on the merits of its expressive association claim against the Solomon Amendment.

2. Compelled Speech

The Supreme Court has long recognized that, in addition to restricting suppression of speech, "the First Amendment may prevent the government from . . . compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001) (citing, *inter alia*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994).

Consistent with this principle, the Supreme Court has found impermissible compelled speech in three categories of government action. The first is government action that forces a private speaker to propagate a particular message chosen by a government. *See*

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had a compelling interest in eliminating discrimination and that the statute at issue was the least restrictive means of achieving that end. *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244.

Barnette, 319 U.S. at 642, 63 S. Ct. 1178 (state could not enforce compulsory flag salute statute); *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (state could not require drivers to display state motto on their license plates). The second is government action that forces a private speaker to accommodate or include another private speaker's message. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 581, 115 S. Ct. 2338, 132 L.Ed.2d 487 (1995) (state nondiscrimination statute could not be constitutionally applied to require parade organizers to include a contingent of gay marchers behind their own banner); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-16, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (state regulatory commission could not require public utility to distribute ratepayer-group's message in the extra space of the utility's billing statements); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974) (state could not force newspaper to provide equal editorial-page space to candidates it opposes). The third category is government action that forces an individual to subsidize or contribute to an organization that engages in speech that the individual opposes. *See United Foods*, 533 U.S. at 413, 121 S. Ct. 2334 (Congress could not require mushroom growers to pay assessments to fund advertisements to promote mushroom sales); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977) (state could not compel non-union employees to pay union dues to promote union causes).[18] FAIR argues that the

[18] We note that the subsidization line of compelled speech case law is the only one of these three categories addressed by the dissent.

Solomon Amendment forces law schools to propagate, accommodate, and subsidize the military's recruiting, and therefore implicates each of the three varieties of compelled speech cases.

The District Court rejected FAIR's argument and held that the law schools are not compelled to express a particular ideological message by admitting and actively assisting the military recruiters. We disagree. As we explain in the analysis that follows, the military's recruiting is expressive of a message with which the law schools disagree. To comply with the Solomon Amendment, the law schools must affirmatively assist military recruiters in the same manner they assist other recruiters, which means they must propagate, accommodate, and subsidize the military's message. In so doing, the Solomon Amendment conditions funding on a basis that violates the law schools' First Amendment rights under the compelled speech doctrine.

(a) *Recruiting is expression.*

The expressive nature of recruiting is evident by the oral and written communication that recruiting entails: published and posted announcements of the recruiter's visit, published and oral descriptions of the employer and the jobs it is trying to fill,[19] and the oral communication of an employer's recruiting reception and one-on-one interviews. The expressive nature of recruiting is

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[19] For example, most recruiters submit a National Association for Law Placement ("NALP") form that, as NALP puts it, "offers employers a thorough yet succinct way to tell their story to candidates" and includes a "narrative" section to "discuss the special characteristics" of the employer. NALP compiles these forms into a directory, which is distributed and/or made available by both law schools and employers to prospective employees.

also evident in its purpose—to convince prospective employees that an employer is worth working for. So understood, recruiting necessarily involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes"—the hallmarks of First Amendment expression. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (soliciting for charitable cause is expression entitled to First Amendment protection); *see also Thomas v. Collins*, 323 U.S. 516, 538, 65 S. Ct. 315, 89 L.Ed. 430 (1945) (recognizing First Amendment protection for the solicitation of union members).

The District Court held that recruiting is not expressive activity because it "differs dramatically" from other forms of expressive activity, such as soliciting contributions and proselytizing. While soliciting and proselytizing cannot be separated from the "concomitant advocacy of a particular case or viewpoint," the District Court reasoned, recruiting does not advocate any particular cause but only has "an economic or functional motive." *FAIR*, 291 F. Supp. 2d at 307-08.

We agree with the District Court that soliciting and proselytizing are obvious forms of expressive activity. We part, however, on the notion that efforts to raise a legal staff are "economic or functional" while efforts to raise funds and membership are not. Recruiting, soliciting and proselytizing are similarly economic and functional and, at the same time, similarly expressive. Recruiting conveys the message that "our organization is worth working for," while soliciting and proselytizing convey the similar functional message that "our charity is worth giving to" or "our cause is worth joining."

Having determined that recruiting is expressive, we now turn to the law schools' disagreement with that expression.

(b) *The law schools' disagreement with the speech of military recruiters.*

Military recruiters visiting law school campuses undoubtedly speak to students about the benefits of a career in the military, and the Solomon Amendment requires law schools to accept this speech. The law schools do not seem to take issue with most of the "expressions of value, opinion, or endorsement," *Hurley*, 515 U.S. at 573, 115 S. Ct. 2338, made by military recruiters on campus (to the extent recruiters suggest that military careers are honorable and rewarding experiences). Nor, for the most part, do military recruiters describing careers in the military make "statements of fact the [law schools] would rather avoid." *Id.*

The law schools' lack of objection to most of the speech they are forced to accept within their fora raises a key question under the compelled speech doctrine: to what extent must they disagree with the Government's message in order for strict scrutiny to apply? Justice Souter's dissent in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), summarized the Court's jurisprudence to that time in suggesting that it is not necessary to show disagreement in order to sustain a compelled speech challenge.

> [T]he requirement of disagreement finds no legal warrant in our compelled-speech cases. In *Riley* [*v. Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988)], for example, we held that the free-speech rights of

charitable solicitors were infringed by a law compelling statements of fact with which the objectors could not, and did not profess to, disagree. *See* 487 U.S., at 797-98, 108 S. Ct., at 2677-2678. *See also Hurley*, 515 U.S., at 573, 115 S. Ct., at 2347 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . [.]"); *Barnette*, 319 U.S., at 635, 63 S. Ct., at 1183-1184 (if the Free Speech Clause bars the government from making the flag salute a legal duty, nonconformist beliefs are not required to exempt one from saluting). Indeed, the *Abood* cases themselves protect objecting employees from being forced to subsidize ideological union activities unrelated to collective bargaining, without any requirement that the objectors declare that they disagree with the positions espoused by the union. *See*, *e.g.*, [*Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-02, 106 S. Ct. 1066, 89 L.Ed.2d 232 (1986)]; *Abood*, 431 U.S., at 234, 97 S. Ct., at 1799. Requiring a profession of disagreement is likewise at odds with our holding two Terms ago that no articulable message is necessary for expression to be protected, *Hurley*, *supra*, at 569, 115 S. Ct., at 2345; protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference . . . . One need not "disagree" with an abstractionist when buying a canvas from a representational painter; one merely wishes to support a different act of expression.

Glickman, 521 U.S. at 488-89, 117 S. Ct. 2130 (Souter, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.).

Despite the numerous precedents to the contrary discussed by Justice Souter, it is possible to read the *Glickman* majority as implicitly endorsing a disagreement requirement in the compelled speech context. *Glickman* involved a First Amendment challenge to regulations requiring fruit growers, handlers, and processors to finance generic advertising of California nectarines, plums, and peaches. *Id.* at 460, 117 S. Ct. 2130. The majority "presume[d]" that the fruit growers, handlers, and processors "agree[d] with the central message of the speech that is generated by the generic [government] program [at issue]," and stated that "compelled speech case law" was "inapplicable" because the scheme at issue did not, *inter alia*, "require them to use their own property to convey an *antagonistic* ideological message," or "force them to respond to a *hostile* message when they would prefer to remain silent," *id.* at 470-71, 117 S. Ct. 2130 (citations and internal quotation marks omitted) (emphases added). However, because the degree of disagreement that may be required is minimal and in any event is present in this case, we need not determine whether such a requirement exists nor, if so, decipher its precise bounds.

As our dissenting colleague recently explained, the "individual's disagreement [in a compelled speech case] can be minor, as '[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.'" *Cochran v. Veneman*, 359 F.3d 263, 275 (3d Cir. 2004) (quoting *United Foods*, 533 U.S. at 411, 121 S. Ct. 2334). In *Cochran*, we held

unconstitutional a law requiring dairy producers to pay small assessments in support of "generic advertising that promotes milk." *Id.* Although the aggrieved dairy producers did not disapprove of the pro-milk message at issue, the ads featured milk "produced by methods they view[ed] as wasteful and harmful to the environment," and did not promote milk produced by their own favored methods. *Id.* The ads, in effect, served to promote milk produced by efforts with which the plaintiff dairy producers disagreed.

Here the law schools similarly object to conveying the message that all employers are equal, and instead would rather only open their fora and use their resources to support employers who, in their eyes, do not discriminate against gays. This objection constitutes as much of a protected First Amendment interest as the objection of the dairy farmers in *Cochran*. Moreover, there is at least one important sense in which the law schools strenuously disagree with the very words spoken by military recruiters that the Solomon Amendment compels them to accept and to which they have been forced to respond. 10 U.S.C. § 654(b) prohibits open, practicing gays from serving in the armed forces. Military recruiters undisputedly are bound by § 654(b), and do not recruit gay persons for service. Unsurprisingly, in light of § 654(b), the record demonstrates that openly gay persons who meet with military recruiters are told by the recruiters that they may not pursue military careers.[20] Such speech by military recruiters is perhaps the most discordant

[20] See JA107 (former ROTC student who had "wanted to be an officer in the JAG Corps since high school" interviewed with military recruiter, admitted his homosexuality, and was told that he was "ineligible due to his sexual orientation").

speech the Solomon Amendment compels the law schools to accept. Yet, as we have indicated, the act of being forced to accept speech promoting an employer whose discriminatory policies the law schools disagree with is sufficient "disagreement" to bring the Solomon Amendment within the Supreme Court's compelled speech jurisprudence.

Thus, unlike the regulatory scheme at issue in *Glickman*, the Solomon Amendment, by requiring law schools to open their fora to military recruiters when they would prefer to do so only for non-discriminating employers, "require[s] them to use their own property to convey an antagonistic ideological message." *Glickman*, 521 U.S. at 471, 117 S. Ct. 2130. Likewise, by directly providing "access" to campuses for speech by military recruiters where law students are told that openly gay applicants may not serve, the Solomon Amendment requires the law schools to allow an objectionable message counter to their beliefs. In addition, both forms of speech with which the law schools disagree have resulted in, according to the record, hundreds (if not thousands) of instances of responsive speech by members of the law school communities (administrators, faculty, and students), including various broadcast e-mails by law school administrators to their communities, posters in protest of military recruiter visits, and open fora held to "ameliorate" the effects of forced on-campus speech by military recruiters. All of these represent instances in which the schools were "force[d] . . . to respond to a hostile message when they would prefer to remain silent." *Id.* (internal quotation marks omitted). Therefore, the degree of the law schools' disagreement with the military recruiters' expression is sufficient to

warrant First Amendment protection. We now determine whether the Solomon Amendment compels the law schools to engage in that expression.

(c) *The law schools must propagate, accommodate, and subsidize the military's expressive message.*

Reasoning that the Solomon Amendment was not "an outright regulation on speech," the District Court held that the Supreme Court's compelled speech doctrine did not apply. *FAIR*, 291 F. Supp. 2d at 309. Put another way, the District Court concluded that the statute does not "directly requir[e] a private speaker to participate in the dissemination of a particular message." *Id.*

We disagree. Having concluded above that recruiting is expression, we believe that the Solomon Amendment compels the law schools to engage in that expression in all three proscribed ways: propagation, accommodation, and subsidy. The statute insists not only on access to campus for military recruiters, but the active and equal assistance of law schools' career services offices. For example, Harvard Law School's career services staff offers to assist employers to "get [their] message out to students in an effective manner." Like many law schools, the assistance Harvard provides includes coordinating interviews with students, counseling employers on effective recruiting, stuffing students' mailboxes with employers' information, scheduling social receptions for students, and printing employers' announcements in the School's newsletter. Under the express terms of the Solomon Amendment, law schools like Harvard must do the same for the military recruiters.

By requiring law schools to help military recruiters "get [their] message out to students" by distributing newsletters and posting notices, the Solomon Amendment compels law schools to propagate the military's message. Like the forced display of an unwanted motto on one's license plate, or the compulsory recitation of a pledge, this is compelled speech. *Wooley*, 430 U.S. at 717, 97 S. Ct. 1428; *Barnette*, 319 U.S. at 642, 63 S. Ct. 1178. By requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange, the Solomon Amendment compels the schools to accommodate the military's message in the recruiting-assistance programs they provide for other employers. Like the forced inclusion of a parade contingent, a statement in the extra space of a utility's billing statement, or a response in a newspaper's editorial page, this is compelled speech. *See Hurley*, 515 U.S. at 569-81, 115 S. Ct. 2338; *Pacific Gas*, 475 U.S. at 12-16, 106 S. Ct. 903; *Miami Herald*, 418 U.S. at 255-58, 94 S. Ct. 2831. And by putting demands on the law schools' employees and resources,[21] the schools are compelled to subsidize the military's recruiting message. Like mandatory assessments to support advertisements or political funds, this is compelled speech. *See United Foods*, 533 U.S. at 411-17, 121 S. Ct. 2334; *Abood*, 431 U.S. at 235, 97 S. Ct. 1782.

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[21] While we recognize that the relative cost of providing these services to one particular employer is marginal, the Supreme Court has never required that compelled subsidies be substantial to present a constitutional concern. *See, e.g.*, *United Foods*, 533 U.S. at 408, 121 S. Ct. 2334 (mushroom assessment at issue was one cent per pound and only some of it was going toward the objectionable advertising).

(d) *The Solomon Amendment prohibits disclaimers and, even if it did not, risk of misattribution is not an element of a compelled speech violation.*

The District Court suggested that assisting military recruiters is not "obvious endorsement" by the law schools of the military's point of view because "law schools can effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters." *FAIR*, 291 F. Supp. 2d at 308, 310. But the Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message. Its express terms require them to provide treatment to the military recruiters "equal in quality and scope" to that provided to other employers. As the law schools do not disclaim the messages of those employers, similarly they may not disclaim the message of the military. Furthermore, it was in apparent response to the law schools' ameliorative measures-their efforts to "distance themselves" (in the District Court's words) from the military's position-that the DOD and eventually Congress insisted on equal treatment for military recruiters.

But even if the Solomon Amendment allowed for disclaimers, the Supreme Court has never held that compelled speech concerns evaporate if a speaker can ameliorate the risk of misattribution by disclaiming the message it is being compelled to propagate. To the contrary, "the presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure . . . to respond to [compelled] speech." *Pacific Gas*, 475 U.S. at 15 n. 11, 106 S. Ct. 903 (plurality opinion). While a disclaimer reduces the risk that readers will misattribute the message, it "does nothing to reduce the risk that [the compelled speaker] will be forced to respond

when there is strong disagreement with the substance of [the] message." *Id.* Thus, in *Pacific Gas*, the Supreme Court invalidated as compelled speech a requirement that a utility share the extra space in its billing statements with an organization that opposed its viewpoint. The utility's ability to include a disclaimer did not change the analysis. In fact, a "forced reply" may add to the injury of compelled speech, not its cure. *Id.* at 15-16, 106 S. Ct. 903 (noting that the "pressure to respond" to compelled speech is "antithetical to the free discussion that the First Amendment seeks to foster").

In *Miami Herald*, the Supreme Court also invalidated a state law compelling newspapers to provide editorial page space to any political candidates that the newspaper assailed in an editorial. 418 U.S. at 255-58, 94 S. Ct. 2831. It did not suggest that a newspaper could alleviate compelled speech by running a disclaimer above the candidate's message.[22]

Similarly, in *Wooley* the Court held that the state motto on the Maynards' license plate was compelled speech even though the state supreme court had expressly found in another case that "nothing in the state law . . . precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates." 430

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[22] While the newspapers could avoid triggering the penalty of having to provide editorial page space to assailed candidates by not criticizing any candidates at all, the Court noted that this self-censorship was a form of speech suppression, itself a First Amendment injury. 418 U.S. at 257, 94 S. Ct. 2831. Our case presents this self-censorship concern as well, as the law schools could avoid triggering-or at least minimize-the quality and scope of active assistance they must provide to military recruiters by limiting the quality and scope of their assistance to other recruiters.

U.S. at 722, 97 S. Ct. 1428 (Rehnquist, J., dissenting) (citing *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972)).[23] On the facts of *Wooley*, there was virtually no

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[23] The Supreme Court has expressed concerns about misattribution and ability to disclaim in several of its compelled speech cases. *See Hurley*, 515 U.S. at 576-77, 115 S. Ct. 2338 (noting that parade organizers do not customarily "disavow 'any identity of viewpoint' between themselves and the selected participants" and that "such disclaimers would be quite curious in a moving parade"); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994) ("TBS") (noting that regulations requiring cable operators to carry broadcast signals posed little risk of misattribution because broadcasters are required by federal regulation to identify themselves at least once every hour); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980) (suggesting that there was no risk that the message of students distributing political pamphlets and conducting a petition drive at a shopping mall would be attributed incorrectly to the mall owner and noting that the mall owner could disavow any connection with the message by posting signs near the petition table).

But in none of these cases did the Court hold that the risk of misattribution and the speaker's ability to disclaim the message were dispositive elements of the compelled speech doctrine. In *Hurley*, the Court noted that it was not "deciding on the precise significance of the likelihood of misattribution" and did not rest its holding on the parade organizer's presumed difficulty in disclaiming the gay marchers' message. 515 U.S. at 517, 115 S. Ct. 2310. And in both *PruneYard* and *TBS* the absence of a risk of misattribution was only one of a number of factors distinguishing them from prior cases in which compelled speech had been found. *PruneYard*, 447 U.S. at 87, 100 S. Ct. 2035; *TBS*, 512 U.S. at 654-55, 114 S. Ct. 2445. The Court also considered the content-neutral nature of the law causing the challenged "compelled" speech, the nonexistent risk of self-censorship, and the unique characteristics of the forum (the Court later described the shopping mall in *PruneYard* as a "peculiarly public" forum, *see Pacific Gas*, 475 U.S. at 13 n. 8, 106 S. Ct. 903; the *TBS* Court noted cable's monopoly status and exclusive control over the "essential pathway" for

risk that the compelled speech would be attributed to anyone other than the state.

In sum, law schools are expressly precluded from disclaiming or retorting the military's recruiting message by the Solomon Amendment's new requirement that their treatment of military recruiters be "equal in quality and scope" to the treatment of other recruiters. And while the Court has mentioned the danger of misattribution and the speaker's ability to disclaim in several of its compelled speech cases, it has not held to date that the presence of either factor eliminated compelled speech concerns. Therefore, the District Court was wrong to reject FAIR's compelled speech claims on the basis of its conclusion that the Solomon Amendment's requirements posed little risk of misattribution to the law schools who in any event could effectively disclaim the military's message.

(e) *The Solomon Amendment would not likely survive strict scrutiny.*

Although the Solomon Amendment impairs the law schools' First Amendment rights by compelling them to propagate, accommodate, and subsidize the military's recruiting message against their will, the statute "could still be valid if it were a narrowly tailored means of

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disseminating a particular type of communication). *TBS*, 512 U.S. at 654-56, 114 S. Ct. 2445; *PruneYard*, 447 U.S. at 87-88, 100 S. Ct. 2035. And while *PruneYard* comes closest to holding that a speaker's ability to disclaim a message may be relevant to the compelled speech analysis, it is notable that *PruneYard* predated *Pacific Gas*, the most express rejection of the ability to disclaim as an antidote for compelled speech. *Pacific Gas*, 475 U.S. at 15 n. 11, 106 S. Ct. 903 (plurality opinion) ("The presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure on the appellant to respond to [the unwanted] speech. . . .").

serving a compelling state interest"-*i.e.*, if it passed strict First Amendment scrutiny. *Pacific Gas*, 475 U.S. at 19, 106 S. Ct. 903; *see also Riley*, 487 U.S. at 798, 108 S. Ct. 2667 (regulation impairing speakers' First Amendment rights under the compelled speech doctrine was subject to "exacting First Amendment scrutiny" that it did not survive). We thus inquire (1) whether the Government's interest in recruiting military lawyers is compelling, and (2) whether the Solomon Amendment is narrowly tailored to advance that goal. But as discussed above in the context of FAIR's expressive association claim, *see supra* Part III.B.1(c), the Solomon Amendment does not survive strict scrutiny because the Government has not demonstrated (or even argued) that it cannot recruit effectively by less speech-restrictive means. Therefore, the balance of interests likely tips in the law schools' favor.

* * * * * *

To summarize, the Solomon Amendment conditions funding on the law schools' propagation, accommodation, and subsidy of the military's recruiting, which is expression. The Government has not shown that the assistance from law schools that the Solomon Amendment requires is narrowly tailored to advance its interest in recruiting. FAIR has thus established a reasonable likelihood of establishing that the Solomon Amendment unconstitutionally conditions funding on a basis that infringes law schools' constitutionally protected interests under the First Amendment doctrine of compelled speech.

3. Consideration of *O'Brien*

We turn finally to an argument that is ancillary to our holding. Although the Solomon Amendment fits within the categories of First Amendment cases described in the previous sections, the District Court placed it instead into a mold it does not fit: the doctrine of expressive conduct. In so doing, it applied the intermediate scrutiny test set out by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), discussed at length below, for review of governmental regulations with only an incidental effect on expression. For the sake of completeness, we close by considering whether the law schools' resistance to the military's recruitment policy, motivated by their ideological opposition to exclusion based on sexual orientation, is expressive conduct protected by the First Amendment.[24]

(a) O'Brien *is inapplicable when First Amendment activity is protected on other grounds.*

Before exploring the contours of the *O'Brien* test, we explain briefly why expressive conduct fails as a descriptive model of the First Amendment issues at

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[24] While the expressive content of the law schools' message is relevant also to the law schools' expressive association claim under *Dale*, the analysis is different in that context. Under the rubric of expressive association, we consider whether the Solomon Amendment interferes with the law schools' extant message of nondiscrimination, and thus impinges their associational freedom, by compelling them to assist in the military's recruitment efforts. But with expressive conduct we ask whether resistance to the statute, *i.e.*, exclusion of the recruiters in contravention of the statute (or its flip side, "the conduct of law schools in permitting or assisting a recruiting activity," *FAIR*, 291 F. Supp. 2d at 309), is *itself* expressive conduct warranting First Amendment protection.

stake in this case. Activity simultaneously may give rise to an expressive conduct claim and to claims based on alternative theories. The premise of the category "expressive conduct" is that some activity, though it is not speech proper and is not protected under other First Amendment grounds, is crucial to public debate and warrants protection. *See Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989) (explaining that the Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word" and that conduct may be "sufficiently imbued with elements of communication" to merit First Amendment protection) (citations omitted). Expressive conduct is, loosely stated, an overflow category; it is broad.[25] It is therefore unsurprising that much expression that falls squarely within the doctrines discussed in the first sections may also be cast as expressive conduct. In those cases, application of the *O'Brien* test is inappropriate.

We need only look at the seminal expressive association and compelled speech cases to see that this is so. In *Dale*, for example, the Supreme Court expressly declined to rely on *O'Brien*, explaining: "New Jersey's

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[25] As noted in *Johnson*, *id.*, the Supreme Court has recognized the expressive nature of students' wearing of black armbands to protest the war in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969); of a sit-in by black citizens in a segregated area, *Brown v. Louisiana*, 383 U.S. 131, 141-142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555, 26 L.Ed.2d 44 (1970); and of picketing in support of a wide variety of causes, *see, e.g.*, *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314, 88 S. Ct. 1601, 20 L.Ed.2d 603 (1968).

public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable." 530 U.S. at 659, 120 S. Ct. 2446. Likewise in *Wooley v. Maynard*, the Supreme Court elected not to consider *O'Brien* because it considered compelled speech to be a "more appropriate First Amendment ground[ ]." 430 U.S. at 713, 97 S. Ct. 1428. In short, the Court has not applied *O'Brien* where alternative First Amendment grounds were available.

Taking our cue from the Supreme Court, because the Solomon Amendment is subject to strict scrutiny under the doctrines of expressive association and compelled speech, we need not engage in an *O'Brien* analysis. Because *O'Brien* scrutiny is intermediate rather than strict, demonstrating a constitutional violation under a theory of expressive conduct is significantly more burdensome than under the models we have discussed. And the law schools need establish only one constitutional infirmity to justify an injunction. *See, e.g.*, *Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1144 (3d Cir. 1977).

(b) *Even under* O'Brien, *the Solomon Amendment is likely to impair expressive conduct unconstitutionally.*

Even if *O'Brien* applied, we would reverse the District Court's decision because we disagree with its application of intermediate scrutiny. Notwithstanding that the District Court's opinion featured a consistent theme-that the Solomon Amendment "targets conduct, not speech"-the Court acknowledged a communicative or expressive element in the law schools' policies against offering the schools' resources, support, or endorsement to any employer who does not conform to

their antidiscrimination policies. *FAIR*, 291 F. Supp. 2d at 311. Thus, to the extent we focus on the law schools' conduct, it is nonetheless expressive.

The First Amendment protects the right to engage in expressive conduct. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982) (recognizing the right of boycotters to "band[ ] together and collectively express[ ] their dissatisfaction with a social structure that had denied them rights to equal treatment and respect"); *Spence v. Washington*, 418 U.S. 405, 411, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974) (acknowledging First Amendment protection for conduct that "convey[s] a particularized message" that is understood as expression in the context of surrounding circumstances). A government regulation impairing expressive conduct is only justified "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673.

We take no issue with the District Court's conclusion that the Solomon Amendment is within the constitutional power of the Government, as the Constitution authorizes Congress to raise and support a military. *FAIR*, 291 F. Supp. 2d at 312 (citing U.S. Const. art. 1 § 8). We assume *arguendo* that the District Court was correct in determining that the Solomon Amendment is unrelated to the suppression of ideas. *Id.* at 314. And we of course presume that the United States has a vital interest in having a system for acquiring talented mili-

tary lawyers. But as we noted above, the Government has chosen to submit no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting. Instead, the Government argues that "the impact of the wholesale exclusion of military recruiters [from law school campuses] is self-evident, and the government is not obligated" during preliminary injunction proceedings "to assemble and present a factual record that merely confirms the dictates of common sense." The Government fails to offer even an affidavit indicating that enforcement of the Solomon Amendment has enhanced military recruiting efforts. It suggests simply that the scope of the remedy sought by the plaintiffs relieves the Government of its obligation, pursuant to the First Amendment, to justify its curtailment of expression. How this is so we cannot conjure. We are unaware of any case so holding.[26] And while the Government emphasizes that the Nation's military is at stake, invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting. *See Rostker v. Goldberg*, 453 U.S. 57, 89, 101 S. Ct. 2646, 69 L.Ed.2d 478 (1981) ("'[T]he phrase "war power" cannot be invoked as a talismanic incantation to . . . remove constitutional limitations safeguarding essential liberties.'"

[26] The Government quotes *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000), for the proposition that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." But this is not a case where the Government has presented less evidence than might otherwise be required; here the Government has presented no evidence.

(quoting *United States v. Robel*, 389 U.S. 258, 263-64, 88 S. Ct. 419, 19 L.Ed.2d 508 (1967))).[27]

It may be the case, as the Government argues, that on-campus recruitment is an employer's principal tool for attracting talented students. But it does not thereby follow that recruiting by means of the Solomon Amendment is effective. On the contrary, it seems to us equally plausible that the Solomon Amendment has in fact hampered recruitment by subjecting the military's exclusionary policy to public scrutiny. The record is replete with references to student protests and public condemnation. In this context, it is hardly "common sense," as the military alleges, that its presence on campus amidst such commotion and opposition has aided its recruitment efforts.

In closing, we emphasize again that we need not enter the thicket of *O'Brien* analysis in this case. We rely on the doctrines of expressive association and compelled speech to conclude that FAIR has made the requisite showing of a likelihood of success on the merits in support of its motion for a preliminary injunction. And even under the intermediate scrutiny test of *O'Brien* the Solomon Amendment falters thus far, for the Government has chosen not to produce any evidence that it is no more than necessary to further the Government's interest. Perhaps this explains why the DOD initially objected to the Amendment as "un-

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[27] We note that this is not a case involving military discretion to determine whether internal policies are necessary and appropriate. *Cf. Parker v. Levy*, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society" (citation omitted)). On the contrary, this case involves the military's compelled presence on the campuses of civilian institutions.

necessary" and "duplicative." 140 Cong. Rec. H3864 (daily ed. May 23, 1994).

C. Other preliminary injunction factors

By establishing a likelihood of success on the merits of its unconstitutional condition claim based on a First Amendment violation, FAIR has necessarily satisfied the second element: irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999) ("[T]he irreparable injury issue and the likelihood of success issue overlap almost entirely" in the First Amendment context). On the third element, we conclude that the balance of interest tips in FAIR's favor. Without an injunction, the law schools' First Amendment rights under the expressive association doctrine and the compelled speech doctrine will be impaired during on-campus recruiting seasons. The Government, on the other hand, does not lose the opportunity, in a proceeding on the merits, to "shoulder its full constitutional burden of proof" of showing that a less restrictive alternative would not be as effective. *Ashcroft v. ACLU*, —- U.S. ——, 124 S. Ct. 2783, 2794, 159 L.Ed.2d 690 (2004). As for the final element, we believe the public is best served by enjoining a statute that unconstitutionally impairs First Amendment rights.

IV. Conclusion

The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom. While no

doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment. Even were the test less rigorous than a compelling governmental riposte to the schools' rights under the First Amendment, failure nonetheless is foreordained at this stage, for the military fails to provide any evidence that its restrictions on speech are no more than required to further its interest in attracting good legal counsel.

In this context, the Solomon Amendment cannot condition federal funding on law schools' compliance with it. *FAIR* has a reasonable likelihood of success on the merits and satisfies the other injunctive elements as well. We reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment.

ALDISERT, Circuit Judge, Dissenting.

I would affirm the judgment of the district court. Although I have myriad problems with the fundamental contentions presented by the Appellants and the host of supporting amicus curiae briefs, essentially my disagreement is with the all-pervasive approach that this is a case of First Amendment protection in the nude. It is not.

Rather, the issues before us are threefold. First, we must inquire whether Appellants have met the high burden of overcoming the presumption of constitutionality of a congressional statute that is not only bottomed on the Spending Clause, but on a number of other specific provisions in the Constitution that deal with Congress' obligation to support the military. This

is especially relevant because, in the entire history of the United States, no court heretofore has ever declared unconstitutional on First Amendment grounds any congressional statute specifically designed to support the military.

Second, we must determine, using canons of logic, whether a permissible factual inference-let alone a compellable one-may be properly drawn that the law schools' anti-discrimination policies are violated from the sole evidentiary datum that a military recruiter appears on campus for a short time.

Third, only if a proper inference may be drawn do we meet First Amendment considerations. The First Amendment is implicated if and only if, after applying the "balance-of-interests" test originally articulated by Justice Brennan in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984), it can be concluded that the operation of the First Amendment trumps the several clauses of Articles I and II relating to the spending power and support of the military.

Upon analysis, the argument of the Appellants and many of the amici curiae, including but not limited to the Association of American Law Schools, is rather complex. Its point of beginning takes the following tripartite form: (1) most, but not all, accredited American law schools have adopted policies that indicate they will not discriminate based on age, race, color, national origin, disability, religion, gender or sexual orientation; (2) the law schools have committed themselves to "admit students, grant scholarships, grade exams, recruit and promote faculty, and hire staff in light of these principles" (J.A. at 509); (3) in conjunction with their own commitment not to discriminate, the law

schools have adopted policies stating that they will not assist employers who discriminate.

Their intermediate statement is that the United States military excludes service members based on evidence of homosexual conduct or orientation. *See* 10 U.S.C. § 654 (2004). From this, the law schools conclude that permitting the military to recruit on campus for military lawyers and military judges creates a compellable inference that the law schools are violating their own policies prohibiting discrimination on the basis of sexual orientation.

They then move to the Solomon Amendment which provides that certain federal grants will not be made to "an institution of higher education . . . if the Secretary of Defense determines that that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents—(1) the Secretary of a military department or [the Department of Homeland Security] from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting . . . ."[28] 10 U.S.C. § 983.

This year, Congress amended the Solomon Amendment to require military recruiting access "in a manner that is at least equal in quality and scope to the [degree

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[28] Congress has clarified that the funding restriction does not apply to the following: (1) federal grants of funds "to be available solely for student financial assistance or related administrative costs," Pub. L. No. 106-79, § 8120, 113 Stat. 1260 (Oct. 25, 1999); (2) an institution that ceased its prior policy or practice of prohibiting or effectively preventing entry to campus or access to students on campus for military recruiting, 10 U.S.C. § 983(c)(1); and (3) an institution that "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2).

of] access to campuses and to students that is provided to any other employer." National Defense Authorization Bill for Fiscal Year 2005, Pub.L. No. 108-287 (2004).

From the foregoing premises Appellants' Second Amended Complaint alleges that the Solomon Amendment and regulations promulgated thereunder violate the First Amendment as applied to law schools by: (1) imposing unconstitutional conditions on the receipt of federal funding; (2) effecting viewpoint discrimination; (3) forcing the plaintiffs to endorse messages repugnant to them and suppressing their expression of dissent; and (4) imposing vague and overbroad restrictions on speech.

I would hold that Congress' use of the spending power and fulfillment of the requirements to maintain the military under Articles I and II do not unreasonably burden speech and, therefore, do not offend the First Amendment. I apply the balance-of-interests test and decide that the interest of protecting the national security of the United States outweighs the indirect and attenuated interest in the law schools' speech, expressive association and academic freedom rights. The Solomon Amendment survives the constitutional attack because its provisions, the 2004 amendments thereto and related regulations, govern conduct while only incidentally affecting speech. In serving its compelling interest in recruiting military lawyers, the statute does not require the government to engage in unconstitutional conduct. Accordingly, with respect, I dissent. I agree with the thoughtful statement of reasons of the district court and would affirm its judgment.

I.

The starting point for analysis must be fealty to the precept that congressional statutes are presumed to be constitutional. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) ("'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L.Ed. 297 (1895)); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 99 S. Ct. 1313, 59 L.Ed.2d 533 (1979) ("[A]n act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). Thus in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), the Court teaches:

> The principle enunciated in *Hooper v. California*, *supra* and subsequent cases, is a categorical one: As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which would save the Act. *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (opinion of Holmes, J.). This principle is based at least in part on the fact that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Ibid.* Following *Hooper*, *supra*, cases such as *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909), and *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916), developed the corollary doctrine that

> "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307, 44 S.Ct. 336, 68 L.Ed. 696 (1924). It is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S. Ct. 620, 77 L.Ed. 1265 (1933).

Id. at 190-191, 111 S. Ct. 1759.

It is noted that although the Supreme Court considers this principle "a categorical one," it is not included in the majority's analysis.

II.

A second disagreement with the approach of my distinguished brothers of the majority is that they have not identified by name or discussed the several important provisions of the Constitution that provide for the support of the military and that antedate the promulgation of the amendments contained in the Bill of Rights.

Among the powers granted to Congress is the spending power: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." U.S. Const. art. I, § 8, cl. 1. Furthermore, Congress is specifically given several powers related to the military: (1) "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land

and Water," *id.* cl. 11; (2) "[t]o raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years," *id.* cl. 12; (3) "[t]o provide and maintain a Navy," *id.* cl. 13; and (4) "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14.

The Constitution also authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* cl. 18. The Constitution further states: "[t]he President shall be Commander in Chief of the Army and Navy of the United States. . . ." Const. art. II, § 2, cl. 1. The President also "shall take Care that the Laws be faithfully executed. . . ." *Id.* § 3, cl. 1.

Indeed, the only oblique reference to these countervailing provisions of the Constitution appears in the majority's discussion of the unconstitutional conditions doctrine, citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (public university could not condition funds for student publications on their secular perspective); *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (FCC could not condition federal funds to radio stations on editorial content); and *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972) (relating to nonrenewal of a contract and citing cases relating to denials of tax exemptions and welfare payments, but emphasizing that "most often, we have applied the principle to denials of public employment").

Significantly, my research has not discovered any reported case where an act of Congress exclusively predicated on supporting the military has been declared unconstitutional by application of the seminal doctrine that "[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Speiser v. Randall*, 357 U.S. 513, 526-529, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958); *see also Perry*, 408 U.S. at 597, 92 S. Ct. 2694. By reversing the district court's judgment, the majority has created new law, totally unsupported by binding precedent. In doing so the majority selects analogues to cases where state public accommodation statutes were involved and not a single case where an act of Congress was not only authorized by various Clauses in Articles I and II, but commanded by them.

In the posture of this case, Appellants do not urge that the Solomon Amendment is facially unconstitutional, but only that it is unconstitutional as applied to the law schools because it offends their stated policies of anti-discrimination. To succeed in their burden of overcoming the presumption of constitutionality of the Solomon Amendment, they must first demonstrate that the mere presence of recruiting officers on campus constitutes a compellable inference that the law schools will be objectively and reasonably viewed as violating their anti-discrimination policies. If they succeed at that stage, then they must demonstrate that the bite of the First Amendment under the facts of this case is so strong as to outweigh Congress' interests to "provide for the common Defense . . . ," U.S. Const. art. I, § 8, cl. 1; "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on

Land and Water," *id.* cl. 11; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; and for the President to "be Commander in Chief of the Army and Navy of the United States . . . ," U.S. Const. art. II, § 2, cl. 1; and to "take Care that Laws be faithfully executed . . . ," *id.* § 3, cl. 1.

Before proceeding into this analysis, it bears note that the military's policy against homosexual activity, codified at 10 U.S.C. § 654, previously has been adjudged by a number of our sister courts of appeals not to violate the Constitution. *See, e.g.*, *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).").

Moreover, in *United States v. City of Phil.*, 798 F.2d 81 (3d Cir. 1986) this court has discussed the very subject of this appeal. In that case, the Temple School of Law's placement office invited the Judge Advocate General Corps of the Army, Navy and Marine Corps to participate in a job recruiting program on its campus. The Philadelphia Commission on Human Relations issued an order restraining the law school from doing so on the ground that the military services did not accept homosexuals. We affirmed a district court order prohibiting the Commission from taking any adverse action. After reviewing Congressional legislation implementing what we described as "the long standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters," we stated:

> We believe that only one reasonable conclusion can be drawn from this legislation: Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance. In other words, we think that Congress views such access an integral part of the military's effort to conduct "intensive recruiting campaigns to obtain enlistments." This conclusion is buttressed by the legislative history of these provisions. For example, a committee report accompanying the DDA Act of 1973 states, in pertinent part, that "the Committee believes that [the] national interest is best served by colleges and universities which provide for the full spectrum of opportunity for various career fields, including the military field through the Reserve Officers Training Corps program, and by the opportunity for students to talk to all recruiting sources, including military recruiters." H.R. Rep No. 92-1149, 92d Cong., 2d Sess. 79 (1972). . . .

We conclude, therefore, that the Order conflicts with a clearly discernible Congressional policy concerning military recruitment on the campuses of this nation's colleges and universities.

Id. at 86, 88. We do not write on a clean slate regarding the importance Congress places in access to college and university facilities by the military. We already have decided that issue contrary to the argument pressed by the Appellants. And we made this determination almost twenty years ago.

III.

Before we address the application of First Amendment precepts, I am unwilling to accept that there is a

permissible inference, let alone a compellable one, that a military presence on campus to recruit, in and of itself, conjures up an immediate impression of a discriminatory institution. Throughout our history, especially in times of war, like the present conflicts in Afghanistan and Iraq, and the military campaign against the Al Qaeda, a completely different impression is evoked. The men and women in uniform are almost universally considered as heroes, sacrificing not only their lives and well-being, but living separate from all the comforts of stateside living. Again in the current era, almost every day, a candidate for President emphasized his four months as a swift boat commander in the Vietnam conflict. As masters of public opinion, the political apparatus on both sides of the aisle certainly would not put a premium on military service if the inference of the discrimination advanced by Appellants here was attached thereto. Indeed, the respect to the man and woman in uniform is so profound that in the same Presidential campaign, the other candidate was criticized for serving at home in a National Guard unit during the Vietnam conflict instead of going overseas.

This view of service in the armed forces is at the farthest polar extreme from the Appellants' position that the mere presence of military recruiters conjures up the image of an institution that discriminates. That the military does so in fact, does not, in and of itself, generate the direct and universal feeling of loathing and abomination to the extent that their presence on campus a few days a year deprives law school institutions of rights inferred from the First Amendment.

What is involved here in the first instance is not operation of legal principles but precepts of logic that

determine what can be properly inferred from stated circumstances. An inference is a process in which one proposition (a factual conclusion) is arrived at and affirmed on the basis of one or more other propositions, which were accepted as the starting point of the process. Professor Stebbing observes that an inference "may be defined as a mental process in which a thinker passes from the apprehension of something given, the datum, to something, the conclusion, related in a certain way to the datum, and accepted only because the datum has been accepted." L.S. Stebbing, *A Modern Introduction to Logic* 211-212 (1948).

Inference is a process where the thinker passes from one proposition to another that is connected with the former in some way. But for the passage to be valid, it must be made according to the laws of logic that permit a reasonable movement from one proposition to another. Inference, then is "any passing from knowledge to new knowledge." Joseph Gerard Brennan, *A Handbook of Logic* 1 (1957). The passage cannot be mere speculation, intuition or guessing. The key to a logical inference is the reasonable probability that the conclusion flows from the evidentiary datum because of past experiences in human affairs. A moment is necessary to discuss the difference between *inference* and *implication.* These terms are obverse sides of the same coin. We *infer* a conclusion from the data; the data *imply* a conclusion. Professor Cooley explains:

> [w]hen a series of statements is an instance of a valid form of inference, the conclusion will be said to *follow* from the premises, and the premises to *imply* the conclusion. If a set of premises implies a conclusion, then, whenever the premises are accepted

> as true, the conclusion must be accepted as true also. . . .

John C. Cooley, *A Primer of Formal Logic* 13 (1942).

As Professor Brennan put it: "In ordinary discourse, [implication] may mean 'to give a hint,' and [inference], 'to take a hint.'" Brennan, *A Handbook of Logic* at 2-3. Drawing a proper inference is critical in this case, and this court has heretofore suggested some broad guidelines:

> The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Tose v. First. Pa. Bank, N.A., 648 F.2d 879, 895 (3d Cir. 1981) (quoting *Galloway v. United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 87 L.Ed. 1458 (1943)).

From these basic precepts of logic we cannot conclude that the mere presence of a uniformed military recruiter permits or compels the inference that a law school's anti-discrimination policy is violated. It bears repetition that the passage from datum to conclusion cannot be mere speculation, intuition, or guessing, or by

"judicial idiosyncracies." The subjective idiosyncratic impressions of *some* law students, *some* professors, or *some* anti-war protesters are not the test. What we know as men and women we cannot forget as judges. And this we know from elementary canons of logical processes-the validity *vel non* of a logical inference is the *reasonable* probability that the conclusion flows from the evidentiary datum because of past experiences in human affairs.

A participant in a military operation cannot be *ipso facto* denigrated as a member of a discriminatory institution. And conjuring up such an image is the cornerstone of Appellant's First Amendment argument.

In my view it is not necessary to meet any First Amendment argument because given the evidentiary datum of a military recruiter on campus for a few days, a proper inference may not be drawn that this, in and of itself, supports a factual conclusion that the law school is violating its anti-discrimination policy. I think that this alone is sufficient to affirm the judgment of the district court.

Nevertheless, I go further and assume that Appellants' suggested inference may properly be drawn as a fact, and now turn to a discussion of whether First Amendment concerns trump the demands placed on Congress and the President under Articles I and II to support the military.

IV.

Our beginning point in approaching a First Amendment analysis is the balancing-of-interests test set forth in Justice Brennan's important opinion in *Roberts*:

> Determining the limits of state authorities over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's *objective* characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . We need not mark the potentially significant points on this terrain with any precision.

468 U.S. at 620, 104 S. Ct. 3244 (emphasis added). Moreover, important for our immediate purposes is the recognition that "[t]he right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623, 104 S. Ct. 3244.

Although dealing with distinctions between abortions and other procedures, Justice Blackmun emphasized that in constitutional matters we do not deal with absolutes. "The constitutionality of such distinction will depend on its degree and the justification for it." *Bellotti v. Baird*, 428 U.S. 132, 149-150, 96 S. Ct. 2857, 49 L.Ed.2d 844 (1976). For other cases discussing the necessity to weigh or balance conflicting interests, *see also New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L.Ed.2d 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987); *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 758, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985) ("We have long recognized that not all speech is of equal First Amendment importance.*"); Ohralik v. Ohio State*

Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *Maher v. Roe*, 432 U.S. 464, 473, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977); *Whalen v. Roe*, 429 U.S. 589, 599, 600 and nn. 24 and 26, 97 S. Ct. 869, 51 L.Ed.2d 64 (1977); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed.2d 965 (1977) (emphasizing that a line has to be drawn between media reports that are protected and those that are not).

A.

I now turn to identify and then weigh competing interests involved in this case. I have written elsewhere that "[a]n interest is a social fact, factor or phenomenon reflected by a claim or demand or desire which human beings, either individually or as groups or associations or relations, seek to satisfy and which has been recognized as socially valid by authoritative decision makers in society." Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* 489 (2d ed. 1996) (citing authorities). Two important interests conflict here. Using the formulation of Dean Roscoe Pound, they are: (1) "an interest in general safety, long recognized in the legal order in the maxim that the safety of the people is the highest law"; and (2) the social interest in political progress and individual mental self-assertion, taking form in "the [p]olicy in favor of free speech and free belief and opinion[.]" Roscoe Pound, "A Survey of Social Interests," 57 *Harv. L. Rev.* 1, 17, 34 (1943).

The interest in public safety is expressed in the clauses of Articles I and II of the Constitution relating to support of the military; the interest in free speech is found in the First Amendment.

I now proceed to weigh these interests.

B.

What is perceived to be the flash point of controversy here is whether the general interest in public safety has been trumped by the interests embodied in the First Amendment. Supporting the government's position are the line of cases emphasizing the Supreme Court's deference to Congress' support of the military. Arrayed against this is Appellant's insistence that the national defense interest is trumped by the teachings of *Boy Scouts of Amer. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

The Court has consistently deferred to congressional decisions relating to the military. "The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57, 64-65, 101 S. Ct. 2646, 69 L.Ed.2d 478 (1981); *see also Weiss v. United States*, 510 U.S. 163, 177, 114 S. Ct. 752, 127 L.Ed.2d 1 (1994) ("Judicial deference . . . 'is at its apogee' when reviewing congressional decision making . . ." in the realm of military affairs). As the Supreme Court has explained, "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker*, 453 U.S. at 65, 101 S. Ct. 2646; *see also Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L.Ed.2d 407 (1973) (stating "it is difficult to conceive of an area of governmental activity in which the courts have less competence . . .").

For example, in *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L.Ed.2d 478 (1986), the Court

rejected a Free Exercise challenge to a military dress regulation notwithstanding the plaintiff's claim that the military's assessment of the need for the regulation "is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony. . . ." *Id.* at 509, 106 S. Ct. 1310. As the Court explained, "whether or not expert witnesses may feel that religious exceptions . . . are desirable is quite beside the point[;] [t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.*

Appellants suggest that even if the military requires physical access to campuses, there is no need for military recruiters to be given the same degree of access provided to other employers. It must be emphasized that even bare physical access is more than the Appellants are willing to tolerate; they are asserting a constitutional right to exclude the military from campuses altogether. Second, it is hardly credible for the Appellants to suggest that physical access alone is sufficient for effective military recruiting, particularly when other employers are being granted far more extensive and meaningful access. It is fair to assume that all of the facilities and services provided to prospective employers by law schools are intended to facilitate the hiring process. If military recruiters are denied the ability to reach students on the same terms as other employers, damage to military recruiting is not simply probable but inevitable. The Solomon Amendment reflects Congress' judgment about the requirements of military recruiting, and "[t]he validity of such regulations does not turn on a judge's agreement with

the responsible decision maker concerning the most appropriate method for promoting significant government interests." *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985).

What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice. They make it perfectly clear that they are not opposed to military institutions as such; they only want to curtail recruitment of military lawyers and judges. It is important for private employers to appear on campus to recruit law school graduates for positions with law school-sponsored "On Campus Recruiting Days" or "On Campus Interviewing" replete with interviews, followed by dinners and parties, but somehow the military will recruit its lawyers without appearing on campus. Somehow, Appellants urge, better *law* graduates will be attracted to the military legal branches with its lower pay and fewer benefits by some other recruiting method, for example, from the ranks of *undergraduate* ROTC programs.[29] Much of Appellants' brief takes the form of conclusory statements that the military is able

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[29] The following colloquy took place at the oral argument:

> THE COURT: What else could the government do as a less restrictive alternative?
>
> MR. ROSENKRANTZ: [A]ny number of things. Number one, ROTC, the single most effective recruiting device the military has, by their own admission.

(Tr. at 25.)

to attract top of the line or high quality students without stepping foot on campus. There is no explanation, however, why the law schools consider it important to have private national law firms come to campus and boast about first year associates' salaries and signing bonuses and emphasize that if the students want to clerk for a federal judge for a year, the firm will add another bonus. This is not only OK for the private sector, but also it's good for the law school. But we don't want military recruiters to pollute our students. No, say the law schools, what's sauce for the private sector goose is not sauce for the military gander. No, say the law schools, we don't need a level playing field; let the military shift for themselves.

In its demand for total exclusion of military recruiters from their campuses, "fair play" is not a phrase in the law schools' lexicon. They obviously do not desire that our men and women in the armed services, all members of a closed society, obtain optimum justice in military courts with the best-trained lawyers and judges. It scarcely can be an exaggeration to suggest that in many respects the need for specially competent lawyers and exceptionally qualified judges may be more important in a settled environment dominated by the strictures of discipline than in the open society of civilian life.

V.

I turn now to Appellants' compelled speech argument. They argue that the Solomon Amendment trenches on their freedom of speech by compelling them to convey a message other than their own. In making this argument, the Appellants place principal reliance on the teachings of *Hurley v. Irish-American Gay*,

Lesbian & Bisexual Group of Boston. The district court recognized, however, that nothing in *Hurley* suggests that the Solomon Amendment crosses the line into unconstitutionality. I agree completely and accept the government's analysis of this issue.

A.

In *Hurley*, the Court held that a state public accommodation law could not constitutionally be applied to compel organizers of a St. Patrick's Day parade to allow a group of gay, lesbian, and bisexual individuals to march in the parade for the purpose of conveying a public message about homosexual pride and solidarity. 515 U.S. at 572-581, 115 S. Ct. 2338. The organizers did not object to the participation of the group's members in the parade; the only question was whether the group could participate in the parade "as its own parade unit carrying its own banner." *Id.* at 572, 115 S. Ct. 2338. The Court concluded that the law's "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own," and that in so doing, the law "violates the fundamental rule of protection under the First Amendment [ ] that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 578, 115 S. Ct. 2338.

Hurley involved an effort by the government to dictate the content of a quintessential form of expressive activity-a public parade. The Court emphasized that parades "are . . . a form of expression, not just motion," and "the inherent expressiveness of marching to make a point," *id.* at 568, 115 S. Ct. 2338, formed the predicate for its opinion. In contrast, there is nothing remotely so expressive about the activity of recruiting.

The military engages in recruiting on college campuses for precisely the same reason as do other employers: to hire employees. Recruiting is undertaken solely for instrumental reasons, not expressive ones.

To be sure, recruiting involves speaking, but the recruiter speaks purely as part of an economic transaction, and the expression is entirely subordinate to the transaction itself. It bears no resemblance to the activities of the would-be marchers in *Hurley*, who formed their group "for the very purpose of marching" in the parade, and who sought to march "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day parade." *Id.* at 560, 570, 115 S. Ct. 2338. In *Hurley*, unlike here, expression was not a subsidiary part of an instrumental activity; expression *was* the activity.

The role of the parade organizers in *Hurley* consisted of choosing the messages that would comprise the parade, and the vice of the challenged statute was that the homosexual group's protest message would be attributed to the organizers themselves. The Court reasoned that the group's participation in the parade "would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575, 115 S. Ct. 2338.

Here, in contrast, the likelihood that members of a law school community will perceive a military recruiter's on-campus activities as reflecting the school's

"customary determination" that the recruiter's message is "worthy of presentation and quite possibly of support" is vanishingly small. Unlike bystanders watching a passing parade, law school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any "message" that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take-and have taken-ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting.

There is nothing to prevent the law school communities from making speeches discouraging military recruiting, posting signs and erecting huge billboards on campus or public approaches announcing their opposition and stating their reasons. That this is an important consideration has been emphasized by the Supreme Court in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980):

> [f]inally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Id. at 87, 100 S. Ct. 2035.

Clearly, the interests expressed in *Hurley* lack the power to dilute the judiciary's traditional deference to Congress in the interest of national defense.

In addition to arguing that the Solomon Amendment trenches on freedom of speech *simpliciter*, the Appellants also contend that the statute infringes on the law schools' interests in expressive association. Although the First Amendment provides a measure of protection to expressive association, "the Supreme Court has required a close relationship between the [government] action and the affected expressive activity to find a constitutional violation." *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000). In the case at bar, the impact of the Solomon Amendment on the law schools' interests in expressive association is far too remote to violate the First Amendment. In applying the balancing-of-interests test of *Roberts*, I am persuaded that the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—"where that relationship's objective characteristics locate it . . . [near] the most attenuated of personal attachments." 468 U.S. at 620, 104 S. Ct. 3244. It is important to say again that "[t]he right to associate for expressive purposes is not, however, absolute." *Id.* at 623, 104 S. Ct. 3244.

First Amendment claims based on expressive association are subject to a three-step constitutional inquiry. *See Pi Lambda Phi*, 229 F.3d at 442. The first question is "whether the group making the claim [is] engaged in expressive association." *Id.* If so, the next question is whether the government action at issue "significantly affect[s] the group's ability to advocate its viewpoints." *Id.* If it does, the final question is

whether the governmental interests served by the law outweigh the burden imposed on the group's associational interests. *Id.*; *see also The Circle School v. Pappert*, 381 F.3d 172, 178 (3d Cir. 2004). In the case at bar the district court found as a threshold matter that law schools are engaged in expressive association, but went on to determine that the Solomon Amendment does not place a significant burden on their associational interests and that, in any event, the governmental interests served by the Solomon Amendment outweigh whatever associational burden the law may impose. (J.A. at 54-75.)

C.

The majority invokes cases like *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-470, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001), and *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), for the proposition that the Solomon Amendment impermissibly obligates them to "subsidize" military recruiting. In all these cases the challenged statutes obligated individuals to make direct payments of money to finance private speech with which they disagreed. Here, in contrast, the recruiting activities of military recruiters are paid for exclusively with federal tax revenues; the Solomon Amendment does not obligate educational institutions to pay one red cent to the government or to a private organization. Although Appellants complain of having to provide "scarce interview space" and "make appointments," (Appellant br. at 31), this kind of physical accommodation simply does not present the constitutional concern underlying cases like *Abood*, *Glickman*, *United Foods* and *Cochran*—the concern that compelling an

individual to pay for someone else's speech impinges on his right to "believe as he will" and to have his beliefs "shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 235, 97 S. Ct. 1782.

Unlike *Abood*, this case does not involve the right to make or not make "contributions for political purposes." 431 U.S. at 234, 97 S. Ct. 1782. Unlike *Glickman*, there was no mandatory assessments similar to those to be paid by growers of nectarines, plums and peaches under regulations 7 C.F.R. sections 916.31(c), 917.35(f) promulgated under the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* Unlike *United Foods*, there were no mandatory assessments similar to those imposed on mushroom producers for the purpose of funding generic mushroom advertisements under the Mushroom Act, 7 U.S.C. § 6101. Unlike *Cochran*, there were no mandatory assessments similar to those imposed on milk producers under the Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* The teachings of *United Foods* and *Cochran* are not applicable because, unlike the compelled advertising scheme in those cases, the principal object of the Solomon Amendment is not communication of expression but rather a furtherance of the government's compelling interest in raising and maintaining a military force as mandated by the Constitution. Unlike a regulatory scheme requiring subsidization of generic advertising for fruit, mushrooms or milk, the Solomon Amendment "impose[s] no restraint on the freedom of any [law school] to communicate any message to any audience, . . . do[es] not compel any person to engage in any actual or symbolic speech . . . [and] do[es] not compel the [law schools] to endorse or to finance any political or

ideological views." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-470, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997).

Moreover, even if law schools *were* being required to provide direct financial payments to the government to support military recruiting, which they manifestly are not, the First Amendment provides far more latitude for compelled financial support of governmental speech than it does for compelled support of private speech. *See Abood*, 431 U.S. at 259 n. 13, 97 S. Ct. 1782 (Powell, J., concurring in the judgment) ("Compelled [financial] support of a private association is fundamentally different from compelled support of government"); *United States v. Frame*, 885 F.2d 1119, 1130-1133 (3rd Cir. 1989).

Finally, what we said in *Frame* is relevant here:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial protects or expressive activities, the nexus between the message and the individual is attenuated.

885 F.2d at 1132.

It becomes necessary to say again that our task in this case is to identify and weigh competing interests and to emphasize again that in applying the balancing-of-interests test of *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—"where that relation-

ship's objective characteristics locate it . . . [near] the most attenuated of personal attachments." 468 U.S. at 620, 104 S. Ct. 3244.

The attempt to analogize the First Amendment considerations in compelling an individual to pay for someone else's speech with a program of military recruiting fails completely because the extreme *differences* in the compared factual scenarios totally dominate over any purported *resemblances*. What we explained in *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002), is appropriate here:

> To draw an analogy between two entities is to indicate one or more respects in which they are similar and thus argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of the similarities in the two sets. Because a successful analogy is drawn by demonstrating the resemblances or similarities in the facts, the degree of similarity is always the crucial element. You cannot conclude that only a partial resemblance between two entities is equal to a substantial or exact correspondence.

Id. at 147.

VI.

In challenging the district court's reasoning, Appellants also seek to analogize this case to the teachings of *Dale*. As the district court recognized, (J.A. 68-70), a comparison of this case to *Dale* shows not why the Appellants should prevail in this case, as urged by the majority, but why they must lose, *see id.* at 648-650, 120 S. Ct. 2446.

In *Dale*, the Court was presented with a New Jersey public accommodations law that compelled the Boy Scouts of America ("BSA") to admit "an avowed homosexual and gay rights activist," *id.* at 644, 120 S. Ct. 2446, as an adult member and scoutmaster. The declared mission of the BSA was to "instill values in young people," *id.* at 649, 120 S. Ct. 2446, and disapproval of homosexual conduct was one of BSA's values. BSA relied on its scoutmasters to "inculcate [Boy Scouts] with the Boy Scouts' values-both expressly and by example." *Id.* at 650, 120 S. Ct. 2446. The Court reasoned that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648, 120 S. Ct. 2446. The Court found that "the presence of Dale as an assistant scoutmaster would surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept[ ] homosexual conduct as a legitimate form of behavior." *Id.* at 653-654, 120 S. Ct. 2446.

Let me now count the two ways the Solomon Amendment differs from the state statute in *Dale*, both of which are critical to the law's impact *vel non* on associational interests. First, the Solomon Amendment simply does not impinge on the right of educational institutions to determine their membership. *See* 10 U.S.C. § 983. It does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators. It merely requires them to allow the transient presence of recruiters, who are not a part of

the law school and do not become members through their mere presence. In contrast to the scoutmaster in *Dale*, recruiters do not purport to speak "for"-and cannot reasonably be understood to be speaking "for"-the law schools that they are visiting. This case thus does not involve "[t]he forced inclusion of an unwanted person in a group." *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. It cannot be denied that this was the genesis of the constitutional injury in *Dale*.

Second, as noted in my discussion of *Hurley*, recruiting is an economic activity whose expressive content is strictly secondary to its instrumental goals. In contrast, the fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is "[t]o instill values in young people," a goal that is pursued "by example" as well as by word. *Id.* at 649, 650, 120 S. Ct. 2446. As a result, compelling the BSA to appoint an adult leader who was committed to "advocacy of homosexual teenagers' need for gay role models," *id.* at 645, 120 S. Ct. 2446, struck at the heart of the organization's goals.

Military recruiting is not intended to "instill values" in anyone, nor is it meant to convey any message beyond the military's interest in enlisting qualified men and women to serve as military lawyers and judges. As a result, the burden on the law schools' associational interests is vastly less significant than the burden imposed on the BSA by the statute in *Dale*.

These profound distinctions demonstrate that the teachings of *Dale* lack the power to dilute the judiciary's traditional deference to Congress in the interest of national defense.

VII.

I now turn to the proper measure by which to evaluate the weighing of competing interests implicated in this case. There should be no question that the teachings of *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), control. In that case, the Court considered whether a 1965 amendment to the Universal Military Training and Service Act, which prohibited the knowing destruction or mutilation of a Selective Service Registration Certificate, was unconstitutional as applied to a man who burned his certificate as a symbolic expression of his antiwar beliefs. *Id.* at 369-370, 88 S. Ct. 1673. The Court stated:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in *O'Brien*'s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. at 376, 88 S. Ct. 1673.

In this case, the law schools portray their efforts to keep military recruiters off their campuses as "quintessential expression." (Appellant br. at 20.) But when an institution excludes military recruiters from its

campuses or otherwise restricts their access to students, it is engaging in something different from "quintessential expression." It is engaging in a course of conduct which contains both nonspeech and speech elements. The acts which the law schools claim they are compelled to do by virtue of the military's post-2001 "unwritten policy"—disseminating and posting military recruitment literature, making appointments for military recruiters to meet with students and providing military recruiters a place to meet with students—also contain both nonspeech and speech elements.

The constitutional framework for evaluating such laws is provided by *O'Brien*. Regulation of conduct that imposes incidental burdens on expression is constitutional if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S. Ct. 1673. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 689, 105 S. Ct. 2897. Regulations of conduct that place incidental burdens on expression are *not* subject to a least-restrictive-alternative requirement "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive

alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989).

The Solomon Amendment readily passes constitutional muster under these constitutional standards. The Appellants themselves do not dispute that the government has a substantial interest-indeed, a compelling one-in recruiting talented men and women for the nation's armed forces. As the Court recognized in *O'Brien*, "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency. . . ." 391 U.S. at 381, 88 S. Ct. 1673. Effective military recruiting is the linchpin of that system. *See City of Phil.*, 798 F.2d at 86 ("Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance.")

The government's interest in military recruiting, as embodied in the Solomon Amendment, is manifestly "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673. The Solomon Amendment makes no effort to condition federal funding on the absence of campus criticism of military policies; a law school and its faculty and students are free to denounce military recruiting policies without jeopardizing federal funding in the slightest. The only thing that matters under the Solomon Amendment is whether the institution is denying access to military recruiters. And if the institution is denying access, it is irrelevant under the Solomon Amendment whether its reasons for doing so are communicative (to convey a message about its own principles or those of the military) or non-communicative (for example, to avoid participation in a recruiting process that it regards as unfair). What matters under the Solomon Amendment

is "only the independent noncommunicative impact of [the] conduct," *id.* at 382, 88 S. Ct. 1673—its impact on the ability of the military to reach students.

The Appellants argue that because the Solomon Amendment is intended to facilitate military recruiting, and because recruiters speak to students, the governmental interest underlying the Solomon Amendment "is not unrelated to expression." (Appellant br. at 26.) But the question posed by *O'Brien* is not whether the governmental interest is "unrelated to expression," but instead whether the interest "is unrelated to the *suppression* of free expression." 391 U.S. at 377, 88 S. Ct. 1673 (emphasis added). The Appellants' argument deliberately omits the touchstone of suppression from the constitutional test. Once it is recognized that suppression of expression is the focus of *O'Brien*, the Appellants' argument falls apart, for the governmental interests served by the Solomon Amendment are manifestly unrelated to the *suppression* of anyone's expression.

It bears constant emphasis that the First Amendment test involves a balancing-of-interests as repeatedly emphasized above. The *O'Brien* measure is quintessentially correct because this case involves a weighing of the government's interest in national defense and Appellants' interest in First Amendment protections. In this posture it is difficult to conjure a case that is a more perfect fit for the exposition in *O'Brien*.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., A NEW JERSEY MEMBERSHIP CORPORATION, SOCIETY OF AMERICAN LAW TEACHERS, INC., A NEW YORK CORPORATION, ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

Nov. 5, 2003

OPINION

LIFLAND, District Judge.

Plaintiffs Forum for Academic and Institutional Rights, Inc. ("FAIR"), Society of American Law Teachers, Inc. ("SALT"), The Coalition for Equality ("CFE"), Rutgers Gay and Lesbian Caucus ("RGLC"), law professors Erwin Chemerinsky and Sylvia Law (collectively, "Law Professors"), and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild (collectively, "Law Students") seek a

preliminary injunction enjoining enforcement of the so-called Solomon Amendment—a statute conferring authority on the United States Secretary of Defense to deny federal funding to institutions of higher education that prohibit or effectively prevent on-campus military recruiting. Plaintiffs contend that the Solomon Amendment is unconstitutional because it (1) conditions a benefit—federal funding—on the surrendering of law schools' First Amendment rights of academic freedom, free speech, and freedom of expressive association; (2) discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because they find the military's policy against homosexual conduct morally objectionable; and (3) violates the void-for-vagueness doctrine for lack of clear guidelines and for conferring unbridled discretion on military bureaucrats to decide which institutions to target and what acts or omissions amount to non-compliance with the statute. Defendants (collectively, "the Government") move to strike or, in the alternative, to dismiss Plaintiffs' Second Amended Complaint for lack of standing, and otherwise oppose the Motion for a Preliminary Injunction on the basis that the Solomon Amendment is a valid exercise of the Spending Clause that conditions federal funding on conduct unrelated to speech.

As discussed more fully herein, the Government's Motion to Strike will be denied because Plaintiffs obtained express leave of Court to file a Second Amended Complaint. The Government's Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Standing will be denied on the basis that the

factual allegations are sufficient to confer standing on all associational and individual plaintiffs.

Finally, Plaintiffs' Motion for a Preliminary Injunction will be denied on the basis that Plaintiffs have not established a likelihood of success on the merits of their constitutional challenges to the Solomon Amendment. As with all constitutional challenges to legislation, the question is not whether the Court believes that the legislation is wise or unwise, or even fair or unfair. Those are value judgments which can and do vary from time to time, from person to person, and from issue to issue. The question is whether Congress, a co-equal branch of our government, has overstepped the boundaries prescribed, albeit in general terms, by our Constitution. Those boundaries have been made clearer by centuries of experience with case-by-case development of constitutional doctrines. Application of those doctrines, as explained in the cases cited, to the facts of this case, has led the Court to the conclusion that the compulsion exerted by the Solomon Amendment, as an exercise of Congress' spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment rights of free speech, expressive association, and academic freedom where that compulsion operates primarily to compel or limit conduct, not speech or expression, and where, to the extent speech or expression is diluted, it can be readily and freely reconstituted, thus preserving the message for propagation by all who wish to express it and to all who may hear it.

PARTIES

Plaintiff FAIR, an association of law schools and law faculties, is a membership corporation organized under

the laws of the State of New Jersey. Membership is open to law schools, other academic institutions, and faculties that vote by a majority to join. FAIR's stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." (Second Amended Complaint ¶ 7(a) [hereinafter "Am. Compl."]). With few exceptions, FAIR membership is kept secret. (Am. Compl. ¶ 7(d)).

Plaintiff SALT is a New York corporation with nearly 900 law faculty members committed "to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities." (Am. Compl. ¶ 8). Plaintiff Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School ("USC Law"), and Plaintiff Sylvia Law is the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University Law School ("NYU Law"). Plaintiffs CFE, of Boston College Law School, and RGLC, of Rutgers University School of Law, (collectively, "Law Student Associations") are student organizations committed "to furthering the rights and interests of all groups including gays and lesbians." (Am. Compl. ¶ 9). Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild are students at Rutgers University School of Law.

Defendant Donald Rumsfeld heads the Department of Defense ("DOD") in his capacity as the United States Secretary of Defense. The DOD is charged with implementing the Solomon Amendment and making the ultimate determination as to whether an institution is in compliance therewith. Defendant Rod Paige heads the

Department of Education in his capacity as the United States Secretary of Education. Defendant Elaine Chao heads the Department of Labor in her capacity as the United States Secretary of Labor. Defendant Tommy Thompson heads the Department of Health and Human Services in his capacity as the United States Secretary of Health and Human Services. Defendant Norman Mineta heads the Department of Transportation in his capacity as the United States Secretary of Transportation. Defendant Tom Ridge heads the Department of Homeland Security as the United States Secretary of Homeland Security. The Departments collectively make available billions of dollars in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

PROCEDURAL HISTORY

On Friday, September 19, 2003, Plaintiffs sought a temporary restraining order ("TRO") and preliminary injunction enjoining enforcement of the Solomon Amendment. The Court denied Plaintiffs' request for a TRO at a hearing held the same day. At the hearing, the Assistant United States Attorney informed the Court of a Government shut down in the District of Columbia due to Hurricane Isabel. Given the Government's inability to respond to Plaintiffs' voluminous submissions—including an over-length brief and a three-inch thick bound volume of eighteen declarations —the Court set a briefing schedule.

The Government timely submitted a Motion to Dismiss for Lack of Standing and Opposition to Plaintiffs' Motion for a Preliminary Injunction on Friday, September 26, 2003. Plaintiffs submitted a reply brief on Monday, September 29, 2003. During a

telephone conference held later that day, the Court granted Plaintiffs' request to respond more fully to the Government's Motion to Dismiss and ordered both parties to further brief the impact on standing, if any, of FAIR's secret membership list.

The Court heard oral argument on Friday, October 10, 2003. At argument, counsel for Plaintiffs advised the Court that a First Amended Complaint had been filed earlier that morning. Counsel also indicated that he was prepared to file a Second Amended Complaint based on new information that a law school member of FAIR was willing to be publicly identified. The Court indicated that it would accept and direct the Clerk to file the Second Amended Complaint, subject to its verification. On October 15, 2003, Plaintiffs filed a Second Amended Complaint identifying two members of FAIR—Golden Gate University School of Law and the Faculty of Whittier Law School. (Am. Compl. ¶ 7(d)). By letters dated October 15 and 17, 2003, Plaintiffs informed the Court that NYU Law and the Faculty of Chicago-Kent University School of Law had also agreed to be publicly identified as members of FAIR.

On October 22, 2003, the Government moved to strike or, in the alternative, to dismiss Plaintiffs' Second Amended Complaint for lack of standing. Plaintiffs submitted a responsive brief the following day.

BACKGROUND AND FACTS

The facts are drawn largely from Plaintiffs' Second Amended Complaint and declarations submitted in connection with Plaintiffs' Motion for a Preliminary Injunction. At this juncture, the Government has not

challenged or substantially supplemented Plaintiffs' factual assertions.

Solomon Amendment

The Solomon Amendment, in pertinent part, reads as follows:

> **(b) Denial of funds for preventing military recruiting on campus.**—No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—
>
> > (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or
> >
> > (2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).

10 U.S.C. § 983(b) (2003). Subsection (d)(2) identifies funds made available for the Departments of Defense and Transportation, as well as those in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act. *Id.* § 983(d)(2). The Solomon Amendment also applies to funds from the Department of Homeland Security.

Pub.L. No. 107-296, Title XVII, §§ 1704(b)(1),(g), 116 Stat. 2314, 2316 (2002).

A subelement of an institution is defined as "a discrete (although not necessarily autonomous) organizational entity that may establish policies or practices affecting military recruiting and related actions." 32 C.F.R. § 216.3(d). A law school is an example of a subelement. *Id.* Current DOD regulations provide that limitations on DOD funding apply to an offending subelement as well as its parent institution, whereas limitations on other federal funding apply only to the offending subelement. 32 C.F.R. § 216.3(b)(1) (stating that "limitations on the use of funds . . . shall apply only to the subelement and not to the parent institution as a whole"); 65 Fed. Reg. 2056 (Jan. 13, 2000) (prohibiting DOD from providing funds to institution of higher education and any subelement of same upon a determination that institution or any subelement prohibits or in effect prevents military recruiting on campus). Schools deemed ineligible for federal funding pursuant to the Solomon Amendment are identified in the Federal Register at least once every six months. 32 C.F.R. § 216.5(a)(4).

Not every school that denies the military recruiters access to its campus or to its students risks losing federal funding. The Solomon Amendment and the DOD regulations promulgated thereunder carve out various exceptions. The statute exempts schools that (1) have ceased an offending policy or practice or (2) have a longstanding, religious-based policy of pacifism. 10 U.S.C. § 983(c). The DOD regulations exempt schools that bar all employers from on-campus recruiting, and those able to demonstrate that "the degree of access by military recruiters is at least equal in quality

and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3). Also exempted are schools at which student interest does not justify accommodating military recruiters. *Id.* § 216.4(c)(6)(ii). There are also exemptions pertaining to the requirement in Section 983(b)(2) that schools provide the military with student recruiting information. 32 C.F.R. § 216.4(c)(4)-(5).[1]

History of the Solomon Amendment

A policy of discouraging barriers to on-campus military recruitment pre-dates the 1994 passage of the Solomon Amendment by nearly thirty years. *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). Congress enacted legislation in the 1960s and 1970s that, much like the Solomon Amendment, authorized the withholding of defense funds from schools that maintained a policy barring military recruiters or otherwise eliminated the Reserve Officers Training Corps program. *Id.* (citing Department of Defense Authorization Act of 1973, Pub.L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972) [hereinafter "the DDA of 1973"]; Department of Defense Authorization Act of 1971, Pub.L. No. 91-441, § 510, 84 Stat. 905 (1970); National Aeronautics and Space Administration Authorization Act of 1969, Pub.L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968); 118 Cong. Rec. 22,346 (1972)). Section 606(a) of the DDA of 1973, for example, provided that

> [n]o part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of

[1] Plaintiffs have not directly challenged 10 U.S.C. § 983(b)(2).

> Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution. . . .

DDA of 1973, Pub.L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972).

The apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting.[2] The original version of the statute denied

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[2] Legislative history indicates that the Solomon Amendment sought to "not give taxpayer dollars to institutions . . . interfering with the Federal Government's constitutionally mandated function of raising a military" and to encourage recruitment of "the most highly qualified candidates from around the country." 141 Cong. Rec. E13-01 (Jan. 4, 1995). Representative Solomon introduced the law as an effort 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 rights. But do not expect Federal Dollars to support your interference with our military recruiters.

140 Cong. Rec. H3861 (1994). Representative Pombo, a co-sponsor, similarly noted "[a] growing, and misguided, sense of moral superiority . . . creeping into the policies of colleges and universities in this country." *Id.* at H3863. He urged that those institutions

> 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. He ended by encouraging his "colleagues to support the Solomon Amendment, and send a message over the wall of the ivory tower of higher education." *Id.*

federal funding "to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students." National Defense Authorization Act of 1995, Pub.L. No. 103-337, § 558, 108 Stat. 2663 (1994). Targeted funds included only those administered by the DOD and only those flowing to the particular school, or subelement, that declined to allow the military to recruit on campus. *Id.*; 61 Fed. Reg. 7739 (Feb. 29, 1996). Thus, for example, a law school that did not permit on-campus military recruiting risked only DOD funds allocated for the law school itself, and not funds flowing to its parent university.

As of 1997, the Solomon Amendment more broadly provided that any "covered education entity" that prevented access by military recruiters to campuses, students, or student information risked not only DOD funding, but all funds available from the Departments of Labor, Health and Human Services, Education, and any related agency. Targeted funding also included "any grant of funds to be available for student aid." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996) (formerly 10 U.S.C. § 503), repealed by Pub. L. No. 106-65, 113 Stat. 512 (1999). The DOD continued to inter-

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Legislative history also indicates that the DOD did not support passage of the Solomon Amendment. *See* 140 Cong. Rec. H3860-03 (1994) (Reps. Underwood, Harman, Schroeder). To the contrary, the DOD opposed it as "unnecessary, duplicative, and potentially harmful to defense research initiatives." *Id.* at H3863 (Rep. Underwood).

pret the statute to mean that only a school's subelement that violated the Solomon Amendment risked losing federal funding. 63 Fed. Reg. 56,819 (stating that non-compliance of "only a subelement of a parent institution" implicated funding "only to the subelement and not to the parent institution as a whole").

In January 1998, the Department of Education ("DOE") clarified the effect of the Solomon Amendment on programs of student financial assistance under Title IV of the Higher Education Act of 1965, as amended. 63 Fed. Reg. 56,821 (Oct. 23, 1998). The DOE explained that the Solomon Amendment applied only to "campus based" student aid programs for which the educational institutions (not the students) applied and were awarded funding. Such programs included the Federal Perkins Loan, the Federal Work-Study, and the Federal Supplemental Education Opportunity Grant programs. *Id.* Direct student aid programs—funds made directly available to students (*e.g.*, Federal Pell Grant, the Federal Family Education Loan, and the Federal Direct Loan programs)—remained outside the scope of the statute. In 1999, the Frank-Campbell Amendment expressly removed from the scope of the Solomon Amendment "any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-79, 113 Stat. 1260 (1999).

In 2000, the DOD amended its regulations to eliminate the subelement limitation as to DOD funds. 65 Fed. Reg. 2056 (Jan. 13, 2000). The subelement limitation remained in effect as to funds from other federal agencies. *See* 32 C.F.R. § 216. Thus, a non-compliant law school risked DOD funds flowing to both the law

school and its parent university, as well as other federal funding flowing to the law school (but not to the parent institution).

Law School Non-Discrimination Policies

Law schools have determined that diversity among their faculty and students is essential to their core mission of "train[ing] the next generation of leaders to pursue justice, respect the rule of law, and stand by principle." (Am. Compl. ¶¶ 19-21) ("[L]aw schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect."). Nearly every accredited American law school has adopted policies against discrimination on the basis of categories such as national origin, religion, gender, race, ethnicity, marital status, parental status, veteran status, physical disability, age, and sexual orientation. (Am. Compl. ¶¶ 21-22). Law schools admit students, award scholarships, hire and promote faculty, and hire staff consistent with their non-discrimination policies. (Am. Compl. ¶ 23). A typical law school non-discrimination policy states:

> [The Law School] is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.

(Am. Compl. ¶ 22). The trend of including sexual orientation as a protected category in non-discrimination policies began in the late 1970s. NYU Law was the first school to do so, and others followed its lead. (Rosenkranz Decl. ¶ 10).

As corollaries to their non-discrimination policies, law schools adhere to recruiting policies whereby they refuse to offer school resources, support, or endorsement to any employer that discriminates based on protected categories. (Am. Compl. ¶ 23). The recruitment policies are applied even-handedly to all employers. (Am. Compl. ¶ 26). The policies, in the law schools' judgment, 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. (Am. Compl. ¶ ¶ 24-25). The policies neither prevent discriminating employers from contacting students, nor steer students away from such employers. While students remain free to seek jobs with employers that discriminate, including the military, they must do so without school support or resources. (Am. Compl. ¶ 26).

The AALS Position

The Association of American Law Schools ("AALS") is a non-profit association of law schools committed to improving the legal profession through legal education. It functions "as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies." American Association of Law Schools, *What is the AALS*? at http://www.aals.org/about.html. In 1990, the AALS voted to include sexual orientation as a protected category in law school non-discrimination policies. (Rosenkranz Decl. ¶ 10). Accordingly, all of the more than 160 member law schools of the AALS extended their non-discrimination policies to cover sexual orientation. (*Id.*).

Section 6-4 of the By-Laws of the AALS requires member schools to, among other things, provide "students and graduates with equal opportunity to obtain employment, without discrimination or segregation" on the basis of sexual orientation and other protected categories. (Rosenkranz Decl. ¶ 10, Ex. 1). Schools must communicate to employers their "firm expectation" that the employers will observe the principle of equal opportunity. (*Id.*). Employers seeking to utilize member law school career services must provide written assurance that they will not discriminate on the basis of protected categories; the schools refuse to assist any employer that declines to so certify. (Rosenkranz Decl. ¶ 7).

The AALS has recognized the tension between its By-Laws requiring non-discrimination and the Solomon Amendment: "[T]he Amendment . . . places most law schools in the difficult position of either foregoing financial aid funds that are critical to their students or receiving the financial aid funds but failing to provide an environment that adequately protects its students from the experience of discrimination." (Rosenkranz Decl. ¶ 10, Ex. 3). In apparent resolution of that tension, the AALS has suggested "ameliorative" measures to be taken by law schools that choose to permit on-campus military recruiting so that those schools may be deemed compliant with the By-Laws:

> [E]ach school should assure that all its students, as well as others in the law school community, are informed each year that the military discriminates on a basis not permitted by the school's nondiscrimination rules and the AALS bylaws and that the military is being permitted to interview only because of the loss of funds that would otherwise be

> imposed under the Solomon Amendment (or, in appropriate cases, because of higher university directives that compel the law school to permit access). Other ameliorative acts that schools might consider include forums or panels for the discussion of the military policy or for the discussion of discrimination based on sexual orientation. Although no specific type of amelioration is required, the Executive Committee will examine the actions schools take in the context of the totality of the school's efforts to support [a] hospitable environment for its students. In assessing that environment, the Association will consider, among other things, the presence of an active lesbian and gay student organization and the presence of openly lesbian and gay faculty and staff.

(*Id.*).

Law School Compliance with the Solomon Amendment

Law schools are loathe to endorse or assist recruiting efforts of the United States military because of its policy against homosexual activity.[3] Law school ad-

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[3] The military's prohibition against homosexual conduct is codified at 10 U.S.C. § 654. The policy provides for the separation of a member of the armed forces upon a finding:

> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
>
> > (A) such conduct is a departure from the member's usual and customary behavior;

ministration, faculty, and students have openly expressed their disapproval with the military's policy in a variety of ways. Some law schools, for example, have posted ameliorative statements throughout the school advising that the military does not comply with the school's non-discrimination policies. (Appleton Decl. ¶ 18, Ex. 9; Law Decl. ¶ 22). Law faculty and student bar resolutions also have condemned the military's policy and, correspondingly, expressed support of non-discrimination policies. (Appleton Decl. ¶¶ 14, 16; Law Decl. ¶¶ 22-23). In addition, students and faculty have held demonstrations protesting on-campus military recruiting. (Appleton Decl. ¶ 19; Gerken Decl. ¶¶ 24-28; Law Decl. ¶ 35, Smolik Decl. ¶ 2; Sweeney Decl. ¶ 11).

B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654.

Law schools have attempted to comply with the Solomon Amendment, notwithstanding the military's discriminatory policy. While some law schools denied military access to campus, others developed ways to adhere to their respective non-discrimination policies and still permit the military access to interested students. (Am. Compl. ¶¶ 7(j),(k)). Some law schools permitted the military to recruit on campus, but refused to schedule student interviews. (*Id.* ¶ 7(k)). Other law schools allowed military recruiters to use university facilities, but not law school facilities. (*Id.*). Many refused to let military recruiters participate in school-sponsored job fairs. (*Id.*). Still other schools refused to match students with recruiters or post military literature. (*Id.* ¶ 34). One law school, for example, allowed military recruiters on campus, but kept military recruiting literature separate from its career services office and arranged interviews through the dean's office. (Rosenkranz Decl. ¶ 19).

On occasion, the military has expressed satisfaction with the law schools' efforts to accommodate military recruiters. For instance, a 1998 letter from the Department of the Army thanked USC Law's career services office "for providing . . . military recruiters a degree of access to students that is equal in quality and scope to that afforded other employers, consistent with the regulations. . . ." (Chemerinsky Decl. ¶ 19). Another 1998 letter from the Department of the Army thanked NYU Law for its efforts in notifying students about a military recruiter's scheduled trip to the New York area. (Law Decl. ¶ 16; Ex. 6). That same letter signaled an abundance of recruits, stating that "[c]ompetition has become very keen in the past few years for . . . JAG attorney positions" and that, as a

result, "some very qualified applicants will not be selected for a position." (*Id.*).

However, in or about 2001, the military began to express dissatisfaction with the law schools. The DOD and officers of various branches of the military notified various schools that they were not in compliance with the Solomon Amendment. Plaintiffs have submitted detailed declarations recounting Solomon Amendment stories from at least nine different law schools. In general, Plaintiffs allege that the DOD threatened law schools with the loss of not only DOD funding, but all federal funding, if the schools did not afford the military full access to career services, the students, and the law schools. (Am. Compl. ¶ 36; Chemerinsky Decl. ¶ 21; Gerken Decl. ¶ 16). Plaintiffs further allege that, despite written requests from various law schools, the DOD failed to offer specific guidance as to what the military requires of the law schools in order to be deemed compliant with the Solomon Amendment (Am. Compl. ¶ 37; Rosenkranz Decl. ¶ 22; Eskridge Decl. ¶¶ 39-55), and replied simply by way of notification that the schools remained in default (Am. Compl. ¶¶ 7(m), 37).

Solomon Amendment stories from Yale Law School and USC Law[4] are illustrative of the DOD's current stance. Yale Law School consistently permitted military recruiters on campus to meet students in response to expressed student interest, and provided military recruiters access to student directory information. (Eskridge Decl. ¶¶ 37, 40). But the school-sponsored off-campus interview programs were only open to

[4] Yale Law School and USC Law are mentioned for illustrative purposes only. Neither institution is a party to this action.

employers that complied with the school's non-discrimination policy. (Eskridge Decl. ¶ 40). By letter dated May 29, 2002, United States Army Colonel Tate notified Yale that the Law School was non-compliant with the Solomon Amendment insofar as it (1) maintained a policy that limited military recruiting; (2) did not provide the military access to law school-sponsored interviewing programs; and (3) did not permit the military to recruit on campus unless invited on by a law student or law student organization. (Eskridge Decl. ¶ 41, Ex. 10). The letter threatened funding denial unless, by July 1, 2002, the Army received information that the law school had modified its policies to conform to federal requirements. (*Id.*). By letter dated May 29, 2003, Acting Deputy Under Secretary of Defense William Carr notified Yale that allowing military recruiters to use law school facilities, but not the career development office, violated the Solomon Amendment because the DOD had interpreted the statute "to require universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters." (Eskridge Decl. ¶ 55; Ex. 18). According to Mr. Carr, not allowing the military access to the law school's career development services would "impose substantial burdens and restrictions . . . to schedule interviews with students through e-mail or other means, rather than through the standard processes provided . . . to other employers." (*Id.*).

USC Law encountered a similar situation. By letter dated December 17, 2001, United States Air Force Colonel Daniel B. Fincher wrote to the President of USC requesting clarification of the Law School's policies concerning military recruitment. USC's General Counsel responded by explaining the school's policy

exception for military recruiters. (Eskridge Decl. ¶ 20; Ex. 6). Under the policy exception, the law school (1) provided military recruiters with standard employer information and materials; (2) referred the military recruiter to on-campus ROTC offices for scheduling of interview space; (3) posted a notice in the school's weekly career services newsletter indicating the scheduled recruiter visit; (4) provided students with information about how to apply for an interview with the military; and (5) made available military recruitment materials to all students. On May 30, 2002, Colonel Fincher notified USC that the Law School's policy did not conform to the Solomon Amendment and to do so USC must "allow[ ] the military full access to the services of the Career Services Office, the students, and the law school." (Chemerinsky Decl. ¶¶ 20- 21).

Recruitment Seasons

Most law schools host employers in the fall and spring. (Am. Compl. ¶ 41). At the close of fall recruiting season, law school career services personnel begin collecting and disseminating literature, making arrangements, and organizing appointments for employers who will be arriving in the spring. (*Id.*). The same is true for spring recruitment season. Thus, preparation for upcoming recruitment seasons occurs year round. (*Id.*). As of the fall 2003 recruiting season, every law school in the nation that receives federal funds has suspended permanently their non-discrimination policies as applied to military recruiters. (Am. Compl. ¶ 40).

THE GOVERNMENT'S MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT

The Government moves to strike Plaintiffs' Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a), which states that a party may amend a pleading once as a matter of right and thereafter "only by leave of court or by written consent of the adverse party." The Government contends that Plaintiffs failed to obtain express leave of court or written consent to file the Second Amended Complaint. To the contrary, the Court granted Plaintiffs leave to file the Second Amended Complaint at oral argument. (Tr. at 68:5-8) ("I will accept and direct the clerk to file your [Second] amended complaint. . . ."). The Motion to Strike Plaintiffs' Second Amended Complaint will be denied.

THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT FOR LACK OF STANDING [5]

I. Standard of Review

A party may challenge the court's jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), either by attacking the allegations on the face of the complaint, or the facts supporting the allegations. *Carpet Group Int'l v. Oriental Rug Imp. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000); *Mortensen v. First Fed. Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where, as here, a party challenges the court's subject matter jurisdiction on the pleadings, the court "must

[5] The brief in support of the Government's Motion to Dismiss Plaintiffs' Second Amended Complaint For Lack of Standing incorporates by reference the arguments made in the Government's original Motion to Dismiss. The Court will address the arguments advanced in both submissions.

assume that the allegations contained in the complaint are true." *Cardio-Med. Assocs. Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983). The court's evaluation is thus similar to the analysis used in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Mortensen*, 549 F.2d at 891; *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 428 (D.N.J. 1999).

II. Analysis

Article III, § 2 of the United States Constitution "extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). Standing is "an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). To satisfy the "case or controversy" requirement for standing a plaintiff must demonstrate that it has suffered (1) an injury-in-fact (2) caused by the conduct complained of, and (3) that such injury is likely to be redressed by a favorable judicial decision. *Id.*; *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002). An injury-in-fact is defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural and hypothetical.'" *Lujan*, 504 U.S. at 560, 112 S. Ct. 2130 (citations and internal quotations omitted). The causal connection required is that the injury be "fairly traceable" to the challenged conduct. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917, 48 L.Ed.2d 450 (1976)).

Standing is also subject to certain prudential limitations that reflect the need for judicial restraint. One such limitation is that a plaintiff typically must assert his own legal rights and cannot rest his claim on third-party interests. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975). However, an exception to that rule is that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id.* at 511, 95 S. Ct. 2197. Whether an association has standing to sue on behalf of some or all of its members depends on whether

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977).

Standing, be it individual or associational, goes to whether a litigant is entitled to have a court decide a particular case. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518, 95 S. Ct. 2197. That inquiry is "especially rigorous" where, as here, "reaching the merits of a dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 138 L.Ed.2d 849 (1997).

A. FAIR

The Government argues that any threat of injury from enforcement of the Solomon Amendment would be to law schools, whose involvement as unidentified members of FAIR is insufficient to satisfy the associational standing requirement that one or more members has standing in their own right. The Government further argues that merely naming law school members of FAIR is insufficient to demonstrate standing where (1) none of the factual allegations demonstrate that the law schools, as part of larger parent universities, are entitled to bring suit on their own behalf and potentially against the wishes of the parent institution; (2) the parent institutions, not the law schools, have standing in their own right insofar as they make the ultimate decision to comply with the Solomon Amendment and stand to suffer a denial of funding pursuant thereto; and (3) law schools violate the prudential rule against third-party standing by resting their claims on the legal rights of their parent universities that are not involved in this suit. Lastly, the Government contends that FAIR does not satisfy the requirements for associational standing insofar as the as-applied challenge to the Solomon Amendment demands participation of individual members in the lawsuit.

The Court will first analyze whether FAIR members have standing in their own right. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. FAIR members include law schools and law faculties that collectively voted to join FAIR.[6] (Am. Compl. ¶ 7). The Second Amended Complaint

[6] To assist the Court in evaluating FAIR's standing, Plaintiffs submitted the FAIR membership list for in camera review.

describes the alleged harm to FAIR members as follows:

> Every member of FAIR has autonomy to develop policies directed at enhancing its academic atmosphere and safeguarding its ability to recruit and retain diverse students. Every member of FAIR exercised that autonomy to adopt a policy that prohibits discrimination on the basis of, among other categories, sexual orientation. Every member of FAIR requires those employers who seek to use the law schools' career placement offices, facilities and resources to abide by these non-discrimination policies. Every member of FAIR applies these non-discrimination policies to all employers, and has declined to make an exception for military recruiters. As a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment, every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters, including any symbolic gestures to signal its adherence to non-discrimination. Every member of FAIR believes that the suspension of its non-discrimination policy has compromised the message of non-discrimination that FAIR members previously sent to their communities and has undermined its efforts to provide its students and faculty with an atmosphere conducive to the free exchange of ideas.

(Am. Compl. ¶ 7(d)).

Taking Plaintiffs' allegations to be true, as the Court must, FAIR has satisfied its burden to demonstrate that it has law school members who have abandoned

their non-discrimination policies due to threatened enforcement of the Solomon Amendment. The Solomon Amendment plainly affects law schools; the Government concedes that any threatened injury from the statute would be to law schools. (Gov't Opp'n Prelim. Inj. at 11). FAIR alleges that its law school members' First Amendment rights have been violated by virtue of having to compromise their message of non-discrimination due to the Solomon Amendment. Thus, FAIR members have alleged a concrete injury fairly traceable to the Solomon Amendment that is likely to be redressed were enforcement of the statute enjoined. *See Warth*, 422 U.S. at 501-02, 95 S. Ct. 2197; *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130.

It is true that FAIR members have not as of yet suffered an actual loss of funding pursuant to enforcement of the Solomon Amendment. But law school members of FAIR have a sufficient stake in this controversy insofar as the allegations demonstrate that the schools have capitulated to government threats of losing federal funding due to non-compliance with the Solomon Amendment. The relevant injury for standing purposes is the government-induced abandonment of the schools' non-discrimination policies and not, as the Government urges, an actual loss of funding.

Nor does the secrecy of FAIR's membership list defeat standing. FAIR membership is kept secret to allay members' fears of retaliatory efforts on behalf of the government and private actors if the law schools were to participate as named plaintiffs in a legal challenge. (Am. Compl. ¶ 7(b); Greenfield Decl. ¶¶ 5-6). The fear is that

> Members of Congress will cancel appropriations to their sister institutions behind closed doors and that Government bureaucrats will reject contracts or grants or will decline to renew them—all without any explanation, but as punishment for what they view as an affront to the military. They also fear that they and their sister institutions will be singled out for virulent and unfair attacks by politicians and in the press, attacks that have already materialized in such mainstream media outlets as the Wall Street Journal, The Legal Times, and Fox News. Such attacks, unfairly mischaracterizing the lawsuit and the interests of FAIR's members in the lawsuit, expose FAIR's members and their sister institutions to the loss of students, the anger of alumni, and the loss of donations.

(Am. Compl. ¶ 7(b)). While the Court cannot evaluate such fears, it agrees with Plaintiffs, for the reasons that follow, that FAIR need not reveal its membership list at the pleading stage in order to bring suit on its members' behalf.

In *Doe v. Stincer*, 175 F.3d 879, 881 (11th Cir. 1999), an Advocacy Center brought a claim on behalf of mentally ill patients alleging that the Americans with Disabilities Act preempted a Florida statute that blocked patient access to certain medical records. The Attorney General of the State of Florida argued that the Advocacy Center lacked standing to sue on behalf of its members because "it has not brought suit on behalf of a specific individual who" had suffered harm traceable to the statute at issue. *Id.* at 884. The Eleventh Circuit Court of Appeals disagreed, concluding that the association was not required to "name the members on whose behalf suit is brought." *Id.* at

882 ("[U]nder Article III's established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought and we decline to create such a requirement. . . ."). The court went on to explain that "it is enough for the representational entity to allege that one of its members or constituents has suffered an injury that would allow it to bring suit in its own right." *Id.* at 885. The court ultimately dismissed the complaint because the Advocacy Center failed to allege "that one of its constituents otherwise had standing to sue to support the district court's grant of summary judgment and injunctive relief." *Id.* at 886.

FAIR has done what the Advocacy Center in *Doe* failed to do—allege facts establishing that one or more of its members have suffered an injury sufficient to confer standing in their own right. The Court declines the Government's invitation to require that FAIR take the next step and publicly name all of its members.

Authorities cited by the Government do not suggest a different result. *See United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003); *Kessler Inst. for Rehabilitation v. Mayor & Council of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995). In *United States v. AVX Corp.*, the First Circuit Court of Appeals held that an environmental organization's assertions of environmental injury were not specific enough to sustain a claim of associational standing because it had asserted "only the most nebulous allegations regarding its members' identities and their

connection to the relevant geographic area." 962 F.2d at 117. The court described the deficiency as follows:

> The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. In short, the asserted injury is not anchored in any relevant particulars. . . . A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested.

Id.

Likewise, in *American Immigration Lawyers Ass'n v. Reno*, the District Court for the District of Columbia held that immigrant associations lacked associational standing because the organizational plaintiffs failed to demonstrate that their members possessed standing. 18 F. Supp. 2d at 52. That case involved challenges to a summary removal process pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. There, the plaintiff organizations failed to demonstrate that their membership included immigrants who suffered an injury-in-fact and thus would have standing in their own right. Plaintiffs' complaint stated that "[m]embers of some of the Plaintiff organizations have sought and will continue to seek asylum in the United States." *Id.* at 51. The complaint generally alleged harm to members of all organizations, and identified vague groups of members that might suffer harm. *Id.* The court noted that the obligation to allege facts sufficient to establish injury to its members "extends to identifying the member or members" of the organization, and went on to explain that "[n]owhere in their

pleadings do the plaintiffs identify one injured person by name, allege that the injured person is a member of one of the plaintiff organizations (naming the specific organization), or allege facts sufficient to establish the harm to that member." *Id.* The complaint even conceded that it would be "impossible" to identify individual refugees before they suffered harm. *Id.* Based on those allegations, the court concluded that the plaintiff associations had failed to allege facts sufficient to establish that its members had standing in their own right. *Id.* at 52.

While the factual allegations in *AVX Corp.* and *American Immigration Lawyers Ass'n* suffered from a common deficiency—no showing that association members had suffered an injury-in-fact—the necessary particulars were case-specific. Geographic location was critical to establishing members' injury-in-fact in the environmental context, *AVX Corp.*, 962 F.2d at 117, whereas exposure to expedited removal proceedings was critical to establishing members' injury-in-fact in the immigration context. *American Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 51. Here, the necessary particulars are that FAIR has members who have suffered an injury-in-fact traceable to the Solomon Amendment. Plaintiffs have alleged that FAIR has law school members and that those members maintain nondiscrimination policies to which they cannot adhere due to restrictions imposed by the Solomon Amendment. There are no remaining uncertainties as to the effect of the Solomon Amendment on FAIR law school members. Thus, the factual allegations are sufficient to confer associational standing on FAIR.

Similarly unavailing is *Kessler Inst. for Rehabilitation v. Mayor & Council of Essex Fells*, in which a non-

profit organization dedicated to advocacy and support for handicapped persons in New Jersey failed to establish associational standing to bring suit on behalf of its members. 876 F.Supp. at 656. The sole allegation about the advocacy group was that it was

> a non-profit corporation in the state of New Jersey, having offices at Passaic County Administration Building, 317 Pennsylvania Avenue, Paterson, New Jersey, which has as its principal purpose the provision of services, including advocacy, information, referral and support for handicapped persons in Passaic County and the State of New Jersey.

Id. The complaint did not even allege that the advocacy group had members, let alone that its members had suffered injury as a result of the challenged governmental action. Given the plaintiff association's failure "to identify a single member" of the association, the Court could not ascertain whether "any of [the association's] members has suffered an injury sufficient to confer standing." *Id.*; *see also Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 335 (D.N.J. 2003) (holding organization dedicated to enforcement of Americans with Disabilities Act lacked standing to bring suit on behalf of its members for denial of handicapped access to restaurants given failure "to identify which members visited which restaurants on which dates and when such members plan to return") (citing *Kessler*, 876 F. Supp. at 656). Clearly, the district court in *Kessler* was grappling with whether the plaintiff association had any members who had standing in their own right. That is not the case here. Plaintiffs' allegations and sworn declarations are sufficient to demonstrate that FAIR's members have suffered harm sufficient to confer standing in their own right. The Government's

argument places undue emphasis on language requiring plaintiff associations to "identify" or "name" members. Such language in the cited authorities goes not to a blanket rule that associations seeking to bring suit on behalf of their members must identify their membership, but rather to whether the factual allegations in a given context sufficiently demonstrate that an association indeed has members that have suffered an injury-in-fact.

Even if FAIR were obligated to identify a member to establish associational standing, it has done so. Plaintiffs' Second Amended Complaint names two members of FAIR—Golden Gate University School of Law ("Golden Gate Law") and the Faculty of Whittier Law School ("Whittier Law"). (Am. Compl. ¶ 7(d)). The Complaint alleges that Golden Gate Law maintains a policy against use of its career services office and facilities by discriminatory employers; that it was threatened by the DOD with a complete cutoff of federal funds if found out of compliance with the Solomon Amendment; and that, due to that threat, it suspended its policy with respect to the military. (*Id.*) Similarly, the Complaint alleges that Whittier Law faculty adopted a non-discrimination policy; that, pursuant to the school's policy, the director of career services disinvited military Judge Advocate General representatives and removed all recruiting materials from the career offices shelves; that it was threatened by the DOD with a complete cutoff of federal funds if found out of compliance with the Solomon Amendment; and that, because of the DOD's threat, it capitulated to the military's demands. (Am. Compl. ¶¶ 7(f)-(g)). The allegations concerning Golden Gate University School of Law and Whittier Law faculty are sufficient to

establish that FAIR members have standing in their own right to bring this action.

The Court also rejects the Government's argument that the named FAIR members do not have standing in their own right because there is no allegation that, as mere components of a larger parent university, the schools are "entitled" to bring suit on their own behalf, "potentially against the wishes of the parent institution." In support of that proposition the Government cites only to the *Hunt* requirement that members have standing in their own right. That requirement goes to whether members satisfy the injury, causation, and redressability factors for Article III standing, and not to whether members have either the capacity to bring suit or the blessings of their respective parent institutions to do so. *See Felson v. Miller*, 674 F. Supp. 975, 977-78 (E.D.N.Y. 1987) (explaining difference between standing and capacity to sue). The Court declines to impose the capacity requirement requested by the Government for purposes of standing.

The Government further argues that FAIR members lack standing because the decision to comply with the Solomon Amendment was not made by the law schools, alone, but by their parent institutions. The Court disagrees. Plaintiffs' Second Amended Complaint specifically alleges that "[a]s a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment, every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters." (Am. Compl. ¶ 7(h)). The decision to suspend the non-discrimination policies, even if at the direction of a parent university, was made in direct response to the Solomon Amendment. In any event, the vast majority of law

schools that suspended their policies did so by vote of the law school faculty. (Rosenkranz Decl. Opp'n Gov't 2nd Mot. to Dismiss ¶ 6).

Finally, the Court rejects the Government's argument that the law schools do not satisfy the prudential requirement of standing that a party cannot rest its claim on the legal rights or interests of third parties. *See Warth*, 422 U.S. at 499, 95 S. Ct. 2197. As Plaintiffs correctly point out, the Government's argument confuses penalty with injury. The alleged injury in this case is that of the law schools being forced to abandon policies of non-discrimination. As such, the law schools are asserting their own rights and not the rights of their parent institutions. That a law school might choose to abandon its policy, in part, because it does not want its parent institution to suffer a loss of funding, does not alter the nature of the injury suffered by the law school. Nor does it follow that theoretical standing on the part of parent universities somehow forecloses standing of law schools in their own right.

The Court concludes that the factual allegations concerning FAIR and its membership are sufficient to establish that FAIR members have standing in their own right, and FAIR need not identify the remainder of its membership at this juncture.[7] Accordingly, prong one of the test for associational standing is satisfied. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434.

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[7] The Court does not reach the issue of whether First Amendment rights of association will protect FAIR from revealing its membership list later in this litigation. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 103 S. Ct. 416, 74 L.Ed.2d 250 (1982); *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L.Ed.2d 1488 (1958).

The Government does not dispute that FAIR has satisfied the germaneness prong of associational standing, and the Court so concludes. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. FAIR's stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." (Am. Compl. ¶ 7(a)). Its members "recognize and agree that the non-discrimination policies of each of its members is central to their missions." (*Id.*). The interests FAIR seeks to protect in this suit—the right of law schools to adhere to their non-discrimination policies—are on all fours with FAIR's stated purpose. The Court accordingly finds the germaneness prong satisfied.

FAIR also satisfies the third requirement of associational standing, that members' individual participation is not necessary. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. The Third Circuit has held that there is no need for individual member participation where, as here, only injunctive and declaratory relief is sought. *Roe v. Operation Rescue*, 919 F.2d 857, 865-66 (3d Cir. 1990); *see also Hospital Council of Western Pa. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (noting that the Supreme Court has consistently held that requests by associations for declaratory and injunctive relief do not require participation by individual association members). Yet, the Government argues that Plaintiffs' as-applied challenge to the Solomon Amendment requires individualized participation to the extent that Plaintiffs assert that "the military has demanded that law schools actively disseminate the military's literature and make arrangements for military recruiters," that recruiters have "threaten[ed] harsh sanctions for conduct that is not at all apparent on the statute's face,"

and that the military has failed to "offer[ ] any guidance or consistency as to what will be permitted." Those claims, the Government contends, necessarily require participation of the particular schools in question and an evaluation of the specific factual circumstances alleged to have occurred. The Court disagrees.

The Government misconstrues the nature of Plaintiffs' as-applied challenge. Plaintiffs' as-applied challenge is not that there is something unconstitutional about the manner in which the Government is applying the Solomon Amendment to a particular institution. It is that the Government is applying a statute and its implementing regulations to almost every law school in the nation in a way that violates the law schools' First Amendment rights. So viewed, Plaintiffs as-applied challenge does not require individualized determinations. The Court is satisfied that resolution of the claims asserted herein and the relief requested do not require participation of individual FAIR members.

B. SALT, LAW PROFESSORS, LAW STUDENT ASSOCIATIONS, & LAW STUDENTS

The Government challenges the standing of the law professors and law students for failure to satisfy the injury-in-fact and causation requirements. Specifically, the Government argues that the Solomon Amendment affects only funds flowing to institutions, not to professors or students, and does not prevent any individual from expressing disagreement with the statute or the military's policy regarding homosexual conduct. The Government further argues that the alleged injury to law professors and students amounts to stigmatic or dignitary injury, without personal harm, that is insufficient to confer standing. Finally, the Govern-

ment argues that the harm to students and law professors is not directly traceable to the Solomon Amendment insofar as it resulted from the schools' independent choice to suspend their non-discrimination policies.

Plaintiffs respond that law professors and students do not claim to be silenced by the Solomon Amendment, nor do they claim to be harmed due to a generalized objection to the Government's message. The law professors and law students are suing because "the Government is interfering with a learning environment that law schools constructed for [their] benefit." (Plaintiffs' Reply Br. at 4). Plaintiffs further argue that the alleged harm to students and law professors is directly traceable to the Government's conduct because, but for the Solomon Amendment, the law schools would not have suspended their respective non-discrimination policies.

Like FAIR, SALT and the Law Student Associations must demonstrate that (a) their members would otherwise have standing to sue in their own right; (b) the interests they seeks to protect are germane to their purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. The parties have not briefed associational standing of SALT and the Law Student Associations. As noted, the Government challenges standing of those organizations only insofar as it argues that the professors and students lack standing in their own right. Because it is incumbent on this Court to determine that standing exists, the Court will analyze each of the factors for associational standing of SALT and the Law Student Associations. *Chong v. District Dir., Immigra-*

tion & Naturalization Serv., 264 F.3d 378, 383 (3d Cir. 2001) ("[C]ourts must decide Article III standing issues, even when not raised by the parties, before turning to the merits.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998)).

1. SALT

SALT is an organization of law professors from various law schools throughout the nation. (Am. Compl. ¶ 8). The law schools where SALT members teach have implemented non-discrimination policies that allow law professors to "pursue scholarly goals and prepare their students for the practice of law in an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance within their communities." (Am. Compl. ¶¶ 8(a),(b)). Plaintiffs allege that SALT members are "both beneficiaries and recipients of the messages of non-discrimination sent by the policies and they are harmed by their respective law schools' suspension of" those policies. (Am. Compl. ¶ 8(e)). The alleged injury to SALT members is that, due to the Solomon Amendment, they are unable to benefit from the enriched pedagogical environment created by non-discrimination policies. (Am. Compl. ¶¶ 8(c)-(e)). SALT members who were instrumental in the development and implementation of non-discrimination policies at their respective law schools claim an additional injury of no longer being able to send their schools' message free from interference due to the Solomon Amendment. (Am. Compl. ¶ 8(f)). In short, SALT members claim that they are being denied "the fulfillment of [their] educational mission and the meaningful exercise of [their] own rights of academic freedom." (Johnson Reply Decl. ¶ 7).

Whether SALT members have standing in their own right turns on whether they have alleged an injury-in-fact fairly traceable to the Solomon Amendment that is likely to be redressed by a favorable judicial decision. *See Warth*, 422 U.S. at 501-02, 95 S. Ct. 2197; *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130. It is well settled that the Constitution protects the exchange of information, both as to the speaker and the intended recipient. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."); *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 867, 102 S. Ct. 2799, 73 L.Ed.2d 435 (1982) ("[T]he Constitution protects the right to receive information and ideas."); *Lamont v. Postmaster General*, 381 U.S. 301, 305-06, 85 S. Ct. 1493, 14 L.Ed.2d 398 (1965) (recognizing right to receive publications free from government interception); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972) (recognizing right to "receive information and ideas" as being "nowhere more vital than in our schools and universities"). SALT members allege an intrusion on their right to receive, benefit from, and, in some cases, send information—the law schools' message of non-discrimination. That injury is unlike the vague and generalized concerns held insufficient to support standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) (psychological consequence of disagreeing with governmental conduct) and *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616, 109 S. Ct. 2037, 104 L.Ed.2d 696 (1989) (teachers association members' "special interest in the quality of education").

The Court concludes that SALT members have alleged a sufficiently concrete and particularized harm to their right to receive, benefit from, and, in some cases, send the message of non-discrimination.

Next, it must be determined whether the alleged harm to SALT members is fairly traceable to the Solomon Amendment or, as the Government argues, is due to an independent decision on the part of the law schools that breaks the chain of causation. Particularly on point is *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000). There a student newspaper sued the Attorney General of the State of Pennsylvania to enjoin enforcement of a state statute that imposed criminal penalties on businesses that advertised alcoholic beverages in materials "published by, for or in behalf of any education institution." *Id.* at 357. The Attorney General challenged the student newspaper's standing on the ground that its alleged injury—reduction in advertising revenues—was caused by the advertisers' independent decision not to purchase advertising for fear of criminal prosecution, not the statute itself. *Id.* at 360-61. The Third Circuit disagreed, reasoning that the newspaper's injury was traceable to the statute because the advertisers would not have ceased purchasing advertisements in the student newspaper but for the challenged statute. *Id.* Likewise, the chain of causation is not broken here because the law schools would not have suspended their non-discrimination policies as to military recruiting but for the Solomon Amendment. The Court concludes that the alleged harm to SALT members is fairly traceable to the Solomon Amendment.

SALT members also meet the redressability requirement for standing. The alleged harm to SALT

members—governmental intrusion on their right to receive, benefit from, and, in some cases, send the message of non-discrimination—would be redressed were enforcement of the Solomon Amendment to be enjoined and the schools reinstated their respective non-discrimination policies as to the military. The Court accordingly finds that SALT has alleged facts sufficient to establish that its member law professors have standing in their own right.

The Government does not dispute that SALT satisfies the germaneness and individual participation prongs of associational standing, and the Court finds that those factors are met. According to the Declaration of SALT's co-president, Michael Rooke-Ley, SALT is dedicated to "enhanc[ing] the quality of legal education, and extend[ing] the power of law to underserved individuals and communities." (Rooke-Ley Decl. ¶ 3). Consistent with that mission, members of SALT have been instrumental in requiring law schools to adhere to non-discrimination policies as a way to combat discrimination in the legal profession. (*Id.* ¶ 4). SALT members consider the non-discrimination policies, and the values expressed by those policies, to be central to their mission and their role as law professors. (*Id.* ¶ 6). The germaneness prong is satisfied because SALT's mission is sufficiently broad to encompass the interests championed in this suit.

Finally, this litigation does not demand or depend on the individual participation of SALT members. No case-by-case determination need be made as to individual professors. And, as previously noted, the Third Circuit has held that there is no need for individual member participation where, as here, only injunctive and

declaratory relief is sought. *Roe*, 919 F.2d at 865-66; *Hospital Council of Western Pa.*, 949 F.2d at 90.

2. Law Professors

Just as SALT members have standing to bring this action, so too do the Law Professors. Erwin Chemerinsky and Sylvia Law, as faculty members of USC Law and NYU Law, respectively, are beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools' non-discrimination policies. (Am. Compl. ¶ 11). The Law Professors allege that they can no longer send or receive the messages of non-discrimination due to the Solomon Amendment. (*Id.*). For reasons discussed *supra*, the alleged harm to professors is sufficient to confer standing to bring this action.

3. Law Student Associations

The Government challenges the standing of the Law Student Associations primarily on the basis that students do not have standing in their own right. Specifically, the Government argues that students are not directly affected by the Solomon Amendment, they have not otherwise alleged a legally cognizable injury, and that any harm to the students is the result of the law schools' independent choice to comply with the Solomon Amendment, not the statute itself. Plaintiffs respond that students, as beneficiaries of law school policies directed at increasing diversity, inculcating values, and fostering an environment of open and respectful debate, are harmed to the extent that they can no longer receive the educational messages sent by their law schools.

Plaintiffs CFE and RGLC are student associations at Boston College Law School and Rutgers University

School of Law, respectively. (Am. Compl. ¶ 9). CFE was formed in direct response to Boston College Law School's capitulation to military threats of a funding cut-off; specifically, the faculty's September 2002 decision to suspend the school's non-discrimination policy as it applied to sexual orientation and to permit the military to recruit on campus with the assistance of the school's career services office. (Smolik Decl. ¶ 1). CFE has distributed symbolic ribbons, circulated petitions urging the faculty to reinstate the non-discrimination policy, held discussion groups, sought to educate others about the Solomon Amendment, and held rallies during on-campus military recruitment visits. (Smolik Decl. ¶ 2). The record discloses no comparable particulars about the genesis of RGLC, revealing only that both organizations "are committed to furthering the rights and interests of all groups including gays and lesbians." (Am. Compl. ¶ 9).

The Court will first consider whether Student Association members have standing in their own right to bring this action. Members of the Law Student Associations are student beneficiaries of law school non-discrimination policies who allege that the Solomon Amendment interferes with their right to receive educational messages sent by their respective law schools. (*Id.*). Instructive on that point is *N.J.-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Ed.*, 654 F.2d 868, 878 (3d Cir. 1981), where the Third Circuit recognized a right of students to acquire knowledge. In that case students alleged infringement of their First Amendment right "in education to express, transmit and receive ideas" by virtue of the licensing requirements imposed on institutions of higher education by

New Jersey law. *Id.* at 871. The Third Circuit recognized students' rights as listeners:

> The Supreme Court has held that the "opportunities of pupils to acquire knowledge," is a first amendment right distinct from the right to impart knowledge. *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). Moreover, the Court has recently emphasized that the distinct "first amendment right 'to receive information and ideas' . . . . is nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972). . . . Supreme Court precedent clearly indicates that the students have distinct rights which may be enforced. . . .

Id. at 878. Clearly, students have a legally cognizable right to receive information and messages sent by their schools. The Court concludes that law student members have alleged a legally cognizable injury sufficient to satisfy the injury-in-fact requirement of standing.

Next, it must be determined whether the alleged harm to student members' rights is "fairly traceable" to the Solomon Amendment. *Lujan*, 504 U.S. at 560, 112 S. Ct. 2130. For reasons discussed *supra*, the alleged harm to law students is fairly traceable to the Solomon Amendment. *See Pitt News*, 215 F.3d 354. There is little doubt that, but for the Solomon Amendment, law school non-discrimination policies would have remained in effect. Nor is there any doubt that the harm to students would be redressed if enforcement of the Solomon Amendment were enjoined. With the injury-in-fact, causation, and redressability requirements established, the Court finds that student members of

CFE and RGLC have standing in their own right to bring this action.

Next, it must be determined whether the Law Student Associations satisfy the germaneness and individual participation prongs of associational standing. The stated purpose of the Law Student Associations—to further the interests and rights of all groups, including gays and lesbians—is concededly broad. However, that purpose does encompass vindication of student rights to benefit from the pedagogical environment created by non-discrimination policies. *See Hospital Council of Western Pa.*, 949 F.2d at 88 (rejecting argument that association cannot satisfy germaneness requirement unless its purpose is narrow or specific). The record demonstrates that CFE was created in direct response to suspension of the law school's non-discrimination policy as to the military. Thus, the Court is satisfied that its purpose is germane to the interests championed herein. Likewise, RGLC's commitment to furthering the interests of gays and lesbians necessarily encompasses the objections raised herein—i.e., conflict between law school non-discrimination policies and military's discriminatory practices concerning homosexual conduct. The Court is satisfied that there is a sufficient theoretical identity of interest between law student members and both Law Student Associations to satisfy the germaneness prong of associational standing.

Lastly, the Court finds that the Law Student Associations satisfy the individual participation prong. This case does not demand any fact-sensitive determinations concerning individual members of the Law Student Associations. The Law Student Associations can fully represent their members' interests. More-

over, as already noted, the injunctive and declaratory relief requested does not require individual member participation. *Roe*, 919 F.2d at 865-66; *Hospital Council of Western Pa.*, 949 F.2d at 90.

The Court accordingly concludes that the Law Student Associations have standing to bring suit on behalf of their student members.

4. Law Students

Plaintiff Law Students, as "beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds," allege harm to their right to receive educational messages sent by their law school due to the Solomon Amendment. (Am. Compl. ¶ 10). For reasons discussed *supra*, the Court concludes that alleged governmental interference with a message sent by academic institutions to their students amounts to an invasion of the students' legally protected interests that is fairly traceable to the Solomon Amendment. The Court also finds a likelihood of redress to the Law Students were enforcement of the statute enjoined. The Court accordingly concludes that the Law Students have standing to bring this action.

III. Conclusion

For the foregoing reasons, the Government's Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Standing will be denied as to all plaintiffs.

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

To obtain preliminary injunctive relief Plaintiffs must establish four well-settled conditions: (1) a "reasonable

likelihood" of success on the merits; (2) a likelihood of "irreparable harm" absent the relief sought; (3) the harm to plaintiffs by denying preliminary injunctive relief outweighs the harm to the government by granting such relief; and (4) preliminary injunctive relief would serve the public interest. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002), cert. denied, *Borough of Tenafly v. Tenafly Eruv Ass'n, Inc.*, 539 U.S. 942, 123 S. Ct. 2609, 156 L. Ed.2d 628 (2003). The inquiry as to likelihood of success on the merits of Plaintiffs' constitutional claims, to which the Court now turns, is a separate inquiry from the threshold determination of Article III standing. That is, "[a] party may demonstrate standing to litigate a claim even if they fail to make out a constitutional violation on the merits." *Pitt News*, 215 F.3d at 360, 361 n. 4. It follows that the Court's conclusion as to standing is not determinative of whether Plaintiffs have established a likelihood of success on the merits of their constitutional claims. The parties have not separately addressed the First Amendment claims of the law students and law professors in connection with the preliminary injunction request, though their standing arguments are extensive, and the Court will not do so in the analysis that follows. In any event, the students and law professors are entitled to no greater protection than the law schools whose interests are most directly implicated by the Solomon Amendment.

The ultimate question presented is whether the Solomon Amendment is likely to withstand constitutional scrutiny. Plaintiffs contend that the Solomon Amendment is constitutionally infirm because it conflicts with law school recruiting policies, which are "saturated with First Amendment value" and lie at the

intersection of three distinct First Amendment rights (academic freedom, freedom of expressive association, and free speech). Plaintiffs' position is that application of three distinct constitutional doctrines (the doctrine of unconstitutional conditions, the prohibition against viewpoint discrimination, and the void-for-vagueness doctrine) compels a finding of unconstitutionality. The Government disagrees and relies heavily on Congress' broad power under the Spending Clause and its constitutional mandate to raise and support armies.

This case raises multiple issues of constitutional law, so for clarity the Court will briefly set forth the structure of its analysis. First, the Court will address whether the Solomon Amendment creates an unconstitutional condition by forcing law schools to abandon their First Amendment rights on pain of losing federal funding, and thereby impinges on the First Amendment rights of the law schools and other plaintiffs. Typically, Congress has wide latitude in imposing conditions on the receipt of federal funding. This wide latitude, though, is not without bounds, and traditional Spending Clause analysis will not suffice in situations where, as here, there is tension between the spending power and the First Amendment. Where the exercise of the spending power implicates First Amendment interests, the doctrine of unconstitutional conditions becomes applicable and holds that the government cannot condition a benefit on the relinquishment of a constitutional right. Thus, the Court will examine the substance of the conditions imposed by the Solomon Amendment and their impact on First Amendment rights. The Court notes, however, that the Solomon Amendment does not directly restrict speech, making

this case factually different from prior cases applying the doctrine of unconstitutional conditions.

Second, the Court will address Plaintiffs' contention that the Solomon Amendment discriminates on the basis of viewpoint by promoting a pro-military recruiting message and punishing only those schools that exclude the military because of their belief that the military's recruiting policy is a moral wrong.

Finally, the Court will examine the Solomon Amendment and its implementing regulations to determine if they are unconstitutionally vague.

I. The Unconstitutional Conditions Claim

A. Facial v. As-Applied Challenges

The Court begins its analysis by considering Plaintiffs' argument that the Solomon Amendment is unconstitutional, both facially and as applied. Plaintiffs argue that this case includes a facial challenge because Congress cannot command law schools even to admit the military to campus to "disseminate its recruiting message so long as that message is anathema to their mission and undermines their expressive goals." As framed by Plaintiffs, the as-applied challenge to the Solomon Amendment focuses on the manner in which the military has been interpreting the statute, *i.e.*, requiring law schools to provide affirmative assistance to military recruiters. It is clear that the alleged interference with Plaintiffs' First Amendment interests is comparatively greater in the as-applied situation because the potential entanglement with the military is greater when law schools are required to provide affirmative assistance to military recruiters than it is when they are only required to allow military recruiters

on campus. However, the Court need not linger on the difference between the facial and as-applied challenges because it rejects Plaintiffs' contention that the Solomon Amendment is unconstitutional as applied. To the extent the Solomon Amendment may require law schools to offer affirmative assistance to military recruiters, the alleged intrusion on Plaintiffs' First Amendment interests still falls short of a constitutional violation. And if the Solomon Amendment survives the as-applied challenge, it follows that it survives the facial challenge as well since the alleged infringement on Plaintiffs' First Amendment interests resulting from the mere presence of military recruiters on campuses is even less. Put another way, if the Solomon Amendment can be applied constitutionally, Plaintiffs' facial challenge must fail. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that a facial challenge to constitutionality of a statute will only succeed if a plaintiff can "establish that no set of circumstances exists under which the Act would be valid"). With this distinction in mind, the Court will analyze Plaintiffs' as-applied challenge.[8]

[8] For purposes of Plaintiffs' as-applied First Amendment challenge, the Court accepts the DOD's proposed interpretation of the Solomon Amendment, *i.e.*, requiring the affirmative assistance of the law schools. However, as a matter of statutory construction, the Court has serious reservations as to the DOD's interpretation. See discussion *infra* in Section III.

B. The Spending Clause

As this matter concerns a congressional attempt to attach certain conditions to the receipt of federal funds, and not a regulatory restriction, the Spending Clause is the appropriate starting point for assessing the constitutionality of the Solomon Amendment. The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L.Ed.2d 171 (1987) (internal citations and quotation marks omitted). The Supreme Court has repeatedly emphasized that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 2303, 156 L.Ed.2d 221 (2003) (citing *Dole*, 483 U.S. at 206, 107 S. Ct. 2793); *see also Rust v. Sullivan*, 500 U.S. 173, 197-98, 111 S. Ct. 1759, 114 L. Ed.2d 233 (1991). Of particular import here, the constitutional limitations on Congress when it exercises its spending power "are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 209, 107 S. Ct. 2793. There is, therefore, a basic difference between a federal spending program and a federal regulatory program. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 551, 121 S. Ct. 1043, 149 L. Ed.2d 63 (2001) (Scalia, J., dissenting) (citing *Maher v.*

Roe, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977)).

In addition, it is evident that the Solomon Amendment furthers important policy objectives. The Constitution empowers Congress to "raise and support Armies," U.S. Const. art. I, § 8, cl. 12, and "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). The salient issue, then, is whether Congress has rightly exercised its broad power under the Spending Clause to achieve the policy objective of maintaining an effective military through on-campus recruiting efforts. Proper resolution of this issue, however, compels an inquiry that goes beyond traditional Spending Clause analysis.

C. Intersection Between Spending Clause and First Amendment

Notwithstanding the wide latitude afforded to Congress to set spending priorities, the congressional spending power is not unlimited; other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Dole*, 483 U.S. at 208, 107 S. Ct. 2793. Plaintiffs are thus correct in pointing out that the Spending Clause cannot categorically trump the Bill of Rights. *See Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958) (veteran's tax benefit cannot be conditioned on loyalty oath); *FCC v. League of Women Voters*, 468 U.S. 364, 370-71, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (grant of federal funds to broadcasting stations cannot require that stations refrain from editorializing); *see also Finley*, 524 U.S. at 571, 118 S. Ct. 2168 (noting that

First Amendment has application in subsidy context). Traditional Spending Clause analysis does not apply in situations where the spending power clashes with First Amendment rights. In those circumstances, the doctrine of unconstitutional conditions, which holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, circumscribes the otherwise broad reach of the spending power. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972).

Plaintiffs argue that the Solomon Amendment violates the doctrine of unconstitutional conditions because it forces law schools to abandon their constitutionally-protected academic freedom and their speech and associational rights to avoid a cut-off of federal funding. Defendants respond that the Solomon Amendment does not impose an unconstitutional condition on any institution's protected First Amendment rights because it is not conditioned on, or related to, speech; or alternatively, if the Solomon Amendment does affect speech, the effect is incidental. Defendants therefore argue that the Solomon Amendment is a valid exercise of the Spending Clause.

Prior cases discussing the doctrine of unconstitutional conditions fail to provide a controlling framework for assessing the Solomon Amendment's constitutionality. A review of those cases reveals that the Supreme Court was guided by two overarching principles, neither of which bear directly on this case, as the Solomon Amendment does not directly target speech or, as will be seen, discriminate on the basis of viewpoint.

First, when the Government appropriates public funds to establish a program it is entitled to define the

limits of that program. *Rust*, 500 U.S. 173, 111 S. Ct. 1759; *American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297. In *Rust*, the Supreme Court rejected a First Amendment free-speech challenge to a federal funding scheme for family planning services which denied such funds to any program providing abortion counseling. 500 U.S. at 192, 111 S. Ct. 1759. The Court noted that the Government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way." *Id.* at 193, 111 S. Ct. 1759. Similarly, in *American Library Ass'n*, the Supreme Court held that the Children's Internet Protection Act ("CIPA") did not impose an unconstitutional condition on public libraries. 539 U.S. at ——, 123 S. Ct. at 2307. CIPA denied public libraries federal funding to provide Internet access unless they installed software to block obscene or pornographic images. In rejecting the unconstitutional conditions claim brought by the recipients of these funds, the Court stated that "'the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized.'" 539 U.S. at ——, 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 196, 111 S. Ct. 1759). Because the Government spending program was limited in both *Rust* and *American Library Ass'n*, the Government could constitutionally "make a value judgment . . . and . . . implement that judgment by the allocation of public funds." *Rust*, 500 U.S. at 192-93, 111 S. Ct. 1759 (citations omitted). Put differently, the Government may make viewpoint-based funding decisions in instances in which the Government itself is the speaker. *Velazquez*, 531 U.S. at 541, 121 S. Ct. 1043.

Although both *Rust* and *American Library Ass'n* stand for the proposition (advanced by the Government) that the Government has wide latitude in conditioning the receipt of federal funds even in circumstances implicating First Amendment rights, they addressed narrow spending programs. Here, there is no Government spending "program" as in *Rust* or *American Library Ass'n*. The funds at issue under the Solomon Amendment are those flowing from certain parts of the Government to any higher education institution for various purposes. While that distinction distances this case from *Rust* and *American Library Ass'n*, it does not compel the conclusion (advanced by Plaintiffs) that the Solomon Amendment transgresses the wide latitude granted Congress in both those cases. Both cases are factually distinct in another way. Within the scope of the spending programs in those cases, the governmental interference with a well-defined constitutional right was direct and categorical. Indeed, particular viewpoints which were contrary to the Government's value judgments were entirely suppressed. The Solomon Amendment, by contrast, does not directly or entirely exclude a point of view. For reasons discussed in more detail below, the Solomon Amendment's interference with speech and other protected rights is incidental. As such, the Court concludes that the principles established in *Rust* and *American Library Ass'n*, although instructive, cannot be squarely applied to the Solomon Amendment.

Second, the government cannot use its funds in a way that is "aimed at the suppression of ideas thought to be inimical to the Government's own interest." *Velazquez*, 531 U.S. at 549, 121 S. Ct. 1043 (prohibiting legal services funding to any organization that represented

clients in effort to amend or otherwise challenge existing welfare law); *Speiser*, 357 U.S. 513, 78 S. Ct. 1332 (denial of tax exemption for engaging in proscribed speech); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed.2d 129 (1983). Where the Government itself does not speak or subsidize transmittal of a message it favors, viewpoint-based distinctions are improper. *Velazquez*, 531 U.S. at 548-49, 121 S. Ct. 1043; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (university created limited public forum by subsidizing student fund, from which it impermissibly excluded religious publications); *see also American Library Ass'n*, 539 U.S. at —— n. 7, 123 S. Ct. at 2309 n. 7. These cases involved the direct suppression of ideas, through the withholding of funding, tax benefits or subsidies from those who would express those ideas. Whether these cases are controlling depends on whether the Solomon Amendment suppresses speech or substantially inhibits the exercise of other protected rights.

The Court believes that the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment. Law school recruiting policies have First Amendment value and the Solomon Amendment has an effect on Plaintiffs' First Amendment interests. However, at the intersection between the Spending Clause and the First Amendment, the mere presence of a constitutionally protected interest does not render the Solomon Amendment unconstitutional.

A finding of an unconstitutional condition presupposes that there is a relinquishment of a constitutional right. *See Perry*, 408 U.S. at 597, 92 S. Ct. 2694 (noting that if government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited). In other words, the Solomon Amendment, as an exercise of the congressional spending power, will not create an unconstitutional condition unless the alleged infringement on Plaintiffs' First Amendment interests rises to the level of a constitutional violation. This determination, given the fact that First Amendment jurisprudence resists generalities and usually requires delicate balancing, requires the Court to carefully examine the First Amendment rights at issue here and the Solomon Amendment's impact thereon. For the reasons explained herein, the Solomon Amendment does not transgress constitutional boundaries.

D. First Amendment Interests

1. Academic Freedom

Plaintiffs aver that a law school's policy of nondiscrimination—and its application of that policy to employer recruiting—has pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures and by helping to nurture an environment conducive to free and open discourse. They argue that if academic freedom means anything, it means that the decision as to what to teach is the law schools' to make, without governmental interference. But as Justice O'Connor opined in a different First Amendment context, "reliance on categorical platitudes is unavailing." *Rosenberger*, 515 U.S. at 847, 115 S. Ct. 2510 (O'Connor, J., concurring). Like most freedoms,

the right to academic freedom is not absolute. *See Barenblatt v. U.S.*, 360 U.S. 109, 112, 79 S. Ct. 1081, 3 L.Ed.2d 1115 (1959).

The constitutional importance of academic freedom has long been recognized. *See Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2339, 156 L.Ed.2d 304 (2003); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L.Ed.2d 629 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L.Ed.2d 1311 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195, 73 S. Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring); *see also Board of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 237 n. 3, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000) (Souter, J., concurring). It is true that the Court must give "a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at ——, 123 S. Ct. at 2339 (holding that student body diversity is a compelling state interest that can justify use of race in university admissions). However, a university is not impervious to competing societal interests. *Barenblatt*, 360 U.S. at 112, 79 S. Ct. 1081 (noting that an "educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls"). That such institutions occupy a "special niche in our constitutional tradition" implies that they remain part of, and not sovereign to, that constitutional tradition. *Grutter*, 539 U.S. at ——, 123 S. Ct. at 2339. An educational institution should not be able to erect an insurmountable or impenetrable wall

against opposing public interests. Rather, the interests of educational institutions to shape their own pedagogical environments must be considered in proper context and not in disregard of any controlling facts or competing interests. *See id.* at 2338 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960) ("admonishing that 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts' ")).

The difficulty in evaluating the constitutional significance of Plaintiffs' claim to academic freedom is that the precise contours of this First Amendment interest are somewhat unclear. The concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive organization or entity. To be sure, cases involving academic freedom have almost exclusively dealt with direct and serious infringements on individual teachers' speech or associational rights. *Southworth*, 529 U.S. at 237 n. 3, 120 S. Ct. 1346; *see also Wieman*, 344 U.S. 183, 73 S. Ct. 215 (state statute requiring state employees to take loyalty oath that they are not affiliated with subversive organizations); *Sweezy*, 354 U.S. 234, 77 S. Ct. 1203 (investigation by state attorney general into professor's political ideology and content of classroom lectures); *Shelton*; 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (state statute requiring teachers to file affidavits giving names and address of all organization to which they had belonged); *Keyishian*, 385 U.S. 589, 87 S. Ct. 675 (state statute requiring removal of teachers based

on treasonable or seditious words). The Solomon Amendment, unlike the statutes at issue in those cases, cannot be said to "cast a pall of orthodoxy over the classroom," because professors remain free to speak and teach as they please. *Keyishian*, 385 U.S. at 603, 87 S. Ct. 675. The Solomon Amendment, on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view. While the Solomon Amendment undoubtedly interferes with law school recruiting policies, the effect on speech and associational rights is more attenuated than in the cases just cited. Thus, notwithstanding the broad acknowledgment of the constitutional importance of academic freedom, those cases fail to provide the Court with an independent path to review an alleged infringement on the right to academic freedom; which is to say, without reference to the related and attendant rights of free expression.

For purposes of the Court's analysis in this case, the right to academic freedom is not cognizable without a foundational free speech or associational right. If the Solomon Amendment violates Plaintiffs' right to academic freedom, it is because it also intrudes on their rights to free speech and expressive association. Accordingly, the Court will turn its attention to those First Amendment rights.

2. Free Speech and Associational Rights

Plaintiffs argue that the law schools' rights are not different from the First Amendment rights of free speech and expressive association that attach to any organization with an expressive purpose. In *Boy Scouts of America v. Dale*, the Supreme Court held that a state law requiring the Boy Scouts to accept an

avowed homosexual and gay rights activist as an assistant scoutmaster violated the Boy Scouts' First Amendment right of expressive association. In so holding, the Court articulated a three-step process to analyze a group's expressive association claim. 530 U.S. 640, 648, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000). First, the Court considered whether the group making the claim engaged in expressive association. *Id.* Second, the Court analyzed whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints. *Id.* at 653, 120 S. Ct. 2446. Lastly, the Court weighed the governmental interest implicated in the action against the burden imposed on the associational expression to determine if the governmental interest justified the burden. *Id.* at 656, 120 S. Ct. 2446 (noting that freedom of expressive association is not absolute); *see also Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (applying three-step process to expressive association claim of university fraternity chapter). To succeed on an expressive association claim, a group must satisfy all three prongs. *See Dale*, 530 U.S. at 656, 120 S. Ct. 2446.

(a) Expressive Association

As the Third Circuit has recognized, "[t]he Supreme Court has cast a fairly wide net in its definition of what comprises expressive activity." *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 443. The First Amendment's protection of expressive association extends beyond pure advocacy groups. A group must merely engage in some form of expression, whether it be public or private, that could be impaired in order to be entitled to protection. *Dale*, 530 U.S. at 655, 120 S. Ct. 2446. "The expansive notions of expressive association used

in . . . *Dale* demonstrate that there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity." *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 443. It is nevertheless incorrect to say there is no threshold for expressive activity claims; rather, there is a de minimis threshold for a finding that a group engages in expressive association. *See id.* at 444 (holding fraternity chapter did not engage in constitutionally protected expressive association). Under this liberal interpretation of expressive association, there appears to be no doubt that the law schools qualify as expressive associations entitled to constitutional protection.

In *Dale*, the Court opined that it "seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." 530 U.S. at 650, 120 S. Ct. 2446. The Boy Scouts claimed that its goal was to "instill values in young people." *Id.* at 649-50, 120 S. Ct. 2446. The record reveals that the law schools, too, seek to inculcate a certain set of values and principles in their students. Plaintiffs assert that the law schools believe that invidious discrimination on the basis of sexual orientation is a moral wrong, and that "judgments about people bearing no relation to merit harm and inhibits students, faculty, and eventually society at large." Plaintiffs further assert that their non-discrimination policies help inculcate those values. And whereas the Boy Scouts Oath and Law did not expressly mention the particular value that it claimed the government was undermining—homosexual conduct as an unacceptable form of behavior—the law schools' non-discrimination policies explicitly include sexual orientation.

Furthermore, although it could be argued that the law schools do not exist for the sole purpose of disseminating one particular viewpoint, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Id.* at 655, 120 S. Ct. 2446. It is also not fatal to the law schools' claim of expressive association that certain members of the law school community conceivably disagree with the law schools' conception of tolerance or other related moral norms. The First Amendment does not require that every member of a group agree on every issue. *Id.* The law schools have adopted official policies with respect to sexual orientation, and this is sufficient for First Amendment purposes. As such, the law schools qualify as expressive associations.

(b) Degree of Interference

Given that the law schools engage in expressive association, the inquiry turns to whether the forced inclusion on their campuses of an unwanted periodic visitor would significantly affect the law schools' ability to express their particular message or viewpoint. The Court believes it does not.

The right to freedom of speech protected by the First Amendment against state intrusion includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (Murphy, J., concurring). "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (citing *Barnette*, 319 U.S. at 637, 63

S. Ct. 1178). Just as the First Amendment may prohibit the government from suppressing or infringing on speech, it may also prevent the government from compelling individuals to express certain views. *See id.* Within First Amendment jurisprudence, therefore, there exist two analytically independent constitutional violations: message suppression and compelled speech. Plaintiffs argue that the Solomon Amendment combines both violations. On the one hand, Plaintiffs contend that the Solomon Amendment muddles (*i.e.*, suppresses) the law schools' messages since they cannot credibly proclaim "we do not abet acts of discrimination" when they do. On the other hand, Plaintiffs also claim that the Solomon Amendment, as applied by the military, compels law schools to endorse, or even subsidize, the military's expressive effort in recruiting by assisting military recruiters.

Just as the Court must give deference to the law schools' assertions regarding the nature of their expression, the Court must also give deference to the law schools' view of what would impair that expression. *Dale*, 530 U.S. at 653, 120 S. Ct. 2446. Even so, the law schools cannot "erect a shield" against opposing public interests simply by asserting that the mere presence of an unwanted visitor would impair its message. *See id.* This degree of deference, therefore, does not preclude the Court from conducting an independent inquiry into whether the Solomon Amendment significantly intrudes on the law schools' expressive and associational interests.

(i) Message Dilution

Plaintiffs claim that the Solomon Amendment presents the same constitutional violation found in

Dale—muddling of a speaker's message. In *Dale*, the Boy Scouts asserted that homosexual conduct was inconsistent with the values embodied in the Scout Oath and Law, and that the organization did not want to promote homosexual conduct as an acceptable form of social behavior. *Dale*, an assistant scoutmaster, was co-president of a gay and lesbian organization and a vocal gay rights activist. His continued presence in the Boy Scouts, not merely as a member but as a leader, would surely force the organization to send a message, both to youth members and the world, that the Boy Scouts accepted homosexual conduct as an acceptable form of behavior. The Court thus found a "severe intrusion" on the Boy Scouts' right to freedom of expressive association. *Id.* at 660, 120 S. Ct. 2446.

Dale is distinguishable from this case. The communicative and associational effect of periodic visits of a military recruiter to a university campus or job fair is vastly different from the presence of a gay scoutmaster in the Boy Scouts, a private membership organization. The application of the state anti-discrimination law required the Boy Scouts to accept a gay rights activist not merely as a member but as an assistant scoutmaster. The significant intrusion on the Boy Scouts' associational rights did not result from the fact that they were forced to accept as a member a person with whom they disagreed. As the Supreme Court noted, "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts policy." *Dale*, 530 U.S. at 655-56, 120 S. Ct. 2446. There is no question that the forced inclusion of an openly gay assistant scoutmaster

would significantly undermine the Boy Scouts' ability to express its viewpoint and thereby inculcate its values in younger members. Here, the Solomon Amendment does not compel the law schools to accept the military recruiters as members of their organizations, not to mention bestow upon them any semblance of authority. Indeed, the military recruiters are actually present on campuses only a few times per year. The military recruiter, by definition, is not a member of the law school community. He or she is a visitor, and, in fact, a periodic visitor among many competing visitors. At best, the military recruiter is like the heterosexual assistant scoutmaster who disagrees with the Boy Scouts' policy; he or she does little to compromise the free speech and expressive association rights of the law schools.

The law schools are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters. While there is tension between the Solomon Amendment and law school recruiting policies, there are ways of relieving that tension by taking ameliorative measures to distance the law schools from the military's discriminatory policy. And notwithstanding the Solomon Amendment's effect on those policies, which are a means of inculcating the law schools' value system, there is no realistic danger, given the AALS' recommended ameliorative measures, that it will significantly compromise the law schools' ability to disseminate their messages. The law schools' anecdotal examples in evidence are said to support the argument that "[t]he message is not getting through." (Pls.' Br. Supp. Prelim. Inj. at 16-17). On the contrary, the

message of non-discrimination is at the heart of the annual controversy, and is therefore re-played and re-endorsed every time there is a controversy on any law school campus. The fact that one NYU Law student (Sweeney Decl. ¶ 15) and some other law students profess to no longer believe the message of non-discrimination does not change the fact that the message is being disseminated, loudly and clearly, as suggested by the AALS. It follows that the Court is unpersuaded that the degree of intrusion on the law schools' right to expressive association is comparable to the governmental intrusion found in *Dale*.

(ii) Compelled Speech

The Solomon Amendment merely conditions federal funds on campus and student access for military recruiting, and therefore, it is not an outright compulsion of speech. There is nothing in the record to indicate that the Solomon Amendment requires law schools to speak, in the linguistic or verbal sense, on behalf of the military recruiters or the military's alleged recruiting message. Rather, Plaintiffs argue that the Solomon Amendment compels law schools to endorse, or even subsidize, the military's expressive effort in recruiting by admitting military recruiters to campus and assisting their recruiting efforts.

Plaintiffs rely heavily on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L.Ed.2d 487 (1995), in arguing that the Solomon Amendment compels the schools to endorse the military's recruiting 'message.' In *Hurley*, the Supreme Court applied traditional First Amendment analysis in holding that a local anti-discrimination ordinance could not constitutionally be applied to com-

pel the organizers of Boston's St. Patrick's Day parade to include a gay, lesbian, and bisexual contingent ("GLIB") marching under its own banner. *Id.* at 581, 115 S. Ct. 2338. An important point in *Hurley* was that the parade organizers wanted to exclude GLIB members not because of their sexual orientation (they were free to march in the parade) but because they wanted to march behind the GLIB banner. Indeed, GLIB was formed for the very purpose of marching in the parade in order to express as a message its members' pride as openly gay, lesbian, and bisexual individuals of Irish heritage. The Supreme Court found that a parade is an inherently expressive activity, and perhaps more importantly, that GLIB's participation as a unit in the parade was "equally expressive." *Id.* at 571, 115 S. Ct. 2338. It therefore violated the First Amendment to force the parade organizers to include messages they found inimical. *Id.* at 569-70, 115 S. Ct. 2338.

The Court further noted that the anti-discrimination ordinance did not, "on its face, target speech or discriminate on the basis of its content." *Id.* at 572, 115 S. Ct. 2338. The Court stated that such laws "do not, as a general matter, violate the First and Fourteenth Amendments." *Id.* Nevertheless, given the expressive character of both the parade and the marching GLIB contingent, the Court found that the statute had been applied in a manner such as to require the parade organizers to alter the expressive content of their parade. *Id.* at 573, 115 S. Ct. 2338.

Hurley is also distinguishable from this case. To begin with, GLIB was formed to express a message. The military recruiters are not seeking access to campuses and students with the primary purpose of expressing the message that disapproval of openly gay

conduct within the armed forces is morally correct or justifiable. That some see the military only for its discriminatory policy does not support the conclusion that the military is similar to GLIB in its expressive purpose. The Solomon Amendment, on its face, reveals that the reason the military seeks access to these campuses is to recruit, *i.e.*, interview applicants and offer jobs. A recruiting function or job fair is fundamentally different from a parade in its communicative content. At the very least, a recruiting event on campus or a job fair off campus is substantially less expressive than a parade. *Compare Hurley*, 515 U.S. at 569, 115 S. Ct. 2338 (noting that "parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration") (citations omitted). The purpose of an expressive parade is to celebrate a particular ideological viewpoint. That is the obvious reason why groups having opposing viewpoints tend to have their own separate parades. As every parade also tends to have a common theme, so every contingent marching behind a banner in a parade is understood to contribute something to that theme. The content of the overall message of the parade in *Hurley* would therefore be dramatically affected by the forced inclusion of GLIB. Both the parade organizers and GLIB sought to expressly convey messages through the medium of an inherently expressive activity. The same cannot be said about the military's presence at a recruiting function.

This case resembles *Hurley* only if recruiting were held to be essentially expressive activity proclaiming the discriminatory message of the military. Plaintiffs argue that recruiting is at least as communicative as

soliciting contributions and proselytizing. However, this argument does not withstand careful inspection. As the Supreme Court has noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example walking down the street or meeting one's friends at the shopping mall—but such a kernel is not sufficient to bring the activity within the protections of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989) (finding insufficient the expressive content of dance-hall gatherings); *see also United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech'. . . ."). Although the Court is unwilling to conclude that recruiting has no expressive content, any such expressive content is ancillary to the practical and overriding purpose of recruiting—the hiring of future employees.

For this reason, recruiting differs dramatically from soliciting contributions and proselytizing. Soliciting contributions implicates a variety of free speech interests—"communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). Because charitable solicitations are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," the flow of such information would likely cease without solicitation. *Id.* at 632, 100 S. Ct. 826. Where the component parts of a

single expressive activity are inextricably intertwined, as in the case of soliciting contributions, both the speech and non-speech parts receive full constitutional protection. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988). Soliciting contributions is simply impossible without the concomitant advocacy of a particular cause or viewpoint. The financial component of soliciting contributions is a mere means to achieving the intended result, to wit, the propagation of ideological points of view. And there can be no more robust First Amendment interest than the dissemination of ideas or the advocacy of causes. Recruiting does not implicate the same free speech interests. The dissemination or propagation of views and ideas forms, if at all, only a fraction of the recruiting process. Recruiting has an economic or functional motive; the advocacy of causes, which lies at the very heart of solicitation, is virtually absent. The Court therefore refuses to confer upon this "kernel of expression" the constitutional equivalence of soliciting contributions. *See Village of Schaumburg*, 444 U.S. at 631, 100 S. Ct. 826 (noting that "charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services").

Proselytizing is even less similar to recruiting than soliciting contributions. To proselytize is to "convert from one religion, belief, opinion, or party to another." *Webster's Third New International Dictionary* 1821 (1993). The Court fails to see how the recruiting of potential employees is as communicative or expressive as proselytizing to change one's beliefs or opinions. Recruiting and proselytizing are not equivalents in the

constitutional sense. And because recruiting has a dominant functional purpose, it lacks the requisite communicative content necessary to make this case analogous to *Hurley*.

Furthermore, as each contingent marching in a parade is necessarily understood to contribute something to a common theme, there is no customary means for private sponsors to disavow any identity of viewpoint between themselves and the selected participants. *Hurley*, 515 U.S. at 576, 115 S. Ct. 2338. Thus, the use of disclaimers "would be quite curious in a moving parade." *Id.* (comparing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speaker . . . stands")). "[A] parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577, 115 S. Ct. 2338. In contrast, law schools can effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters. Unlike a parade, a recruiting function does not proclaim an overall message which could be destroyed by the presence of an individual recruiter, especially where disclaimers can expressly disavow any ideological connection to that recruiter.

In short, if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose. Because recruiting activities on a campus or at a job fair, although not entirely without communicative content, are far less expressive than a parade and other such highly expressive activities like

soliciting contributions and proselytizing, and because the presence of military recruiters is far less expressive than a contingent marching behind a banner, the effect on First Amendment interests in requiring law schools to open themselves up to military recruiters is far more attenuated. Plaintiffs' reliance on *Hurley* is therefore unavailing.

Apart from *Hurley*, Plaintiffs argue that the military's application of the Solomon Amendment compels them to endorse a message which they abhor. The compelled endorsement to which Plaintiffs object does not involve words, which convey a clear ideological message. Instead, the alleged compulsion is indirect and less precise: it involves the conduct of law schools in permitting or assisting a recruiting activity. A threshold issue, then, is whether this conduct is expressive. *See Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1091 (3d Cir. 1995), *cert. denied*, 516 U.S. 1047, 116 S. Ct. 708, 133 L.Ed.2d 663 (1996).

Conduct must be "sufficiently imbued with elements of communication" to implicate the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974); *Troster*, 65 F.3d at 1090 (rejecting corrections officer's claim that regulation requiring wearing of an American flag patch violated First Amendment by compelling him to engage in expressive conduct); *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 161 (finding that residents failed to establish that affixing of *lechis* to utility poles to create *eruv* was expressive conduct entitled to First Amendment protection). The test, as articulated by the Third Circuit, is "whether, considering the 'nature of [the] activity, combined with the factual context and environment in which it was undertaken,'" . . . "the activity

[is] sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Tenafly Eruv Ass'n*, 309 F.3d at 159 (citations omitted); *Troster*, 65 F.3d at 1090. This is a fact-sensitive, context-dependent inquiry. *Tenafly Eruv Ass'n*, 309 F.3d at 159; *Troster*, 65 F.3d at 1090.

The relevant activity at issue for purposes of a compelled speech analysis is that of the law schools in assisting the military recruiters. The essence of Plaintiffs' claim is that law schools are being required to endorse the military's recruiting 'message.' The Court believes that the law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment. The Solomon Amendment does not compel law schools to say anything. While allowing or even assisting military recruiters on campus could be viewed as a dilution of the law schools' message of non-discrimination, it is far different from endorsing the military's policy towards sexual orientation, particularly where, as here, there is no restriction on speech or conduct disclaiming any such endorsement. This case does not present the scenario of directly requiring a private speaker to participate in the dissemination of a particular message, as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943) (forcing a conscientious objector to say the pledge of allegiance); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (forcing a citizen to display state's motto); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (plurality) (forcing utility company to distribute potentially adverse propaganda with billing statements); *Miami*

Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974) (forcing a newspaper to provide space to political candidates it opposes). Such cases involved an outright regulation on speech and a patent attempt by the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642, 63 S. Ct. 1178. Conditioning receipt of federal funds upon an educational institution's willingness to assist the military's recruiting efforts involves a less serious infringement upon First Amendment liberties than compelling the affirmative act of a flag salute or even the passive act of carrying the state motto on one's license plate. Facilitating interviews and even disseminating recruiting literature on behalf of military recruiters, when a law school does all these things for every other potential employer in the context of a large recruiting function, are not obvious endorsements of a particular ideological point of view. The Court therefore rejects Plaintiffs' contention that the Solomon Amendment requires law schools to endorse the military's recruiting 'message.'

To sum up, the presence of the military on campus does not significantly intrude upon the law schools' ability to express their views, thus presenting a very different situation than those considered in *Dale* or *Hurley*. The Court believes that this difference is constitutionally significant. As the presence of military recruiters on campuses or job fairs does not significantly affect the law schools' ability to espouse or advocate their own viewpoints, Plaintiffs' claim of expressive association fails the second prong of the framework established in *Dale*. Therefore, there is no

unconstitutional infringement on the law schools' free expression rights.

Having determined that the inclusion of a periodic visitor in the context of a large recruiting function does not significantly affect the law schools' ability to express their message, the Court need not reach the third step of the *Dale* analytical framework. Yet, even if Plaintiffs survived the second step of the *Dale* analysis by demonstrating that the Solomon Amendment significantly affects law schools' free speech and associational interests, Plaintiffs' claim that these rights have been violated still fails, as such rights can be overridden by competing governmental interests. *Dale*, 530 U.S. at 648, 120 S. Ct. 2446.

(c) Balancing of Interests

The final step in the *Dale* analysis involves balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries. Plaintiffs argue that because the Solomon Amendment burdens academic freedom, along with speech and associational rights, it cannot withstand constitutional scrutiny unless it passes a heightened scrutiny test, *i.e.*, that it was "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms." *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. Plaintiffs maintain that the Solomon Amendment fails both prongs of this test. However, without deciding whether the Solomon Amendment would survive this heightened level of scrutiny, the Court believes that this test does not apply here.

It is true that in *Dale* the Supreme Court adopted a heightened scrutiny test because the state action directly affected the groups' associational activities. But as the Third Circuit noted in *Pi Lambda Phi Fraternity, Inc.*, there are three different levels of scrutiny to state actions affecting expression, "depending on the character of the relationship between the state action and the protected expression." 229 F.3d at 445. The most rigorous standard of review is triggered when the state action directly burdens expressive rights. *Dale* involved this kind of direct effect, as the state statute in question required the Boy Scouts to accept an unwanted member in a leadership position. *Id.* at 445-46. A less stringent, intermediate scrutiny test is appropriate in circumstances where the state action has only an incidental effect on the right to free expression. *Id.* at 446 (citing *O'Brien*, 391 U.S. 367, 88 S. Ct. 1673). And since almost every governmental action can be characterized as having some indirect effect on First Amendment interests, "indirect and attenuated effects on expression do not rise to the level of a constitutional violation." *Id.* at 439. Thus, in circumstances where there is neither direct regulation of protected expression nor an incidental effect on such expression, the state action in question does not merit even the intermediate scrutiny test. *Id.* at 447 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704-05, 106 S. Ct. 3172, 92 L.Ed.2d 568 (1986)).

As an initial matter, the Solomon Amendment differs from the anti-discrimination statute at issue in *Dale* in two important respects. First, the Solomon Amendment does not require law schools to accept unwanted persons as leaders of their expressive organizations. Second, the Solomon Amendment is not a regulatory

restriction; it is an exercise of the congressional spending power. Thus, the Solomon Amendment affects associational rights in an indirect and less immediate fashion. *Compare Dale*, 530 U.S. at 659, 120 S. Ct. 2446 (holding that public accommodations law directly and immediately affected associational rights). As such, the most rigorous standard of review employed by the Supreme Court in *Dale* is not applicable here.

The Solomon Amendment literally conditions campus-based funding on the allowance of the military on campus for recruiting purposes. Because there is little that is inherently expressive about the act of permitting military recruiters access to campus (or providing assistance to recruiters), the statute targets conduct, not speech. *See, e.g.*, *Hurley*, 515 U.S. at 572, 115 S. Ct. 2338 (noting that public accommodations statute did not, on its face, target speech since it focuses on the act of discriminating); *Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (holding that discrimination statutes are aimed at conduct, *i.e.*, discrimination, not speech); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S. Ct. 2194, 124 L.Ed.2d 436 (1993) (noting that Title VII is a permissible content-neutral regulation of conduct). But as an expressive element can be subsumed within otherwise non-communicative conduct, the mere fact that the Solomon Amendment might target conduct, and not speech, does not insulate it from constitutional scrutiny. Here, the law schools have adopted policies against discrimination on the basis of sexual orientation. As corollaries to these non-discrimination policies, law schools also maintain policies against offering their resources, support, or endorsement to any employer that discriminates. By

conditioning federal funding on campus access for military recruiters, the Solomon Amendment has an undeniable but incidental effect on these policies. A communicative or expressive element therefore exists in the conduct targeted by the Solomon Amendment. As such, the applicable standard of review is found in *United States v. O'Brien*, 391 U.S. 367, 388, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) (applying medium scrutiny test to state action having an incidental effect on right to free expression).[9]

It is well established that the government may constitutionally regulate conduct even if such regulation entails an incidental limitation on speech. *O'Brien*, 391 U.S. at 375, 88 S. Ct. 1673. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376, 88 S. Ct. 1673. A government regulation is sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673. Given that the Solomon Amendment targets conduct but nevertheless entails an incidental limitation on First Amendment freedoms, it must survive this

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[9] The Court notes that if the Solomon Amendment's effect on law school recruiting policies were independently evaluated under a traditional free speech analysis, and not within the *Dale* analytical framework, the *O'Brien* test would still apply, as the effect on these policies is incidental.

intermediate level of scrutiny to pass constitutional muster under the third step of the *Dale* analysis.

The Constitution empowers Congress to raise and support a military. *See* U.S. Const. art. I, § 8 (providing that "Congress shall have the Power . . . To raise and support Armies"). "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *Id.* (citing *Lichter v. United States*, 334 U.S. 742, 755-58, 68 S. Ct. 1294, 92 L.Ed. 1694 (1948); *Selective Draft Law Cases*, 245 U.S. 366, 38 S. Ct. 159, 62 L.Ed. 349 (1918)). If Congress possesses the power to conscript manpower for military service and the concomitant power to enact legislation in furtherance thereof, it also possesses the lesser power to recruit manpower for military service and enact the necessary enabling legislation. *See id.* (citing *Lichter*, 334 U.S. at 756, 68 S. Ct. 1294; *Selective Draft Law Cases*, 245 U.S. 366, 38 S. Ct. 159, 62 L.Ed. 349 (noting that power of Congress to classify and conscript manpower is beyond dispute)). Hence, the Solomon Amendment is within the constitutional power of Congress.

It is also evident that the Solomon Amendment furthers an important governmental interest. Pursuant to its constitutional grant of authority, Congress has imposed on the military an affirmative obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the Armed Forces. 10 U.S.C. § 503(a). And as the Third Circuit has recognized, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d at 86. Indeed, in *O'Brien*, the Supreme Court stated that it is "apparent that the

Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." 391 U.S. at 381, 88 S. Ct. 1673. Access to law schools and their students is an integral part of the military's effort to conduct "intensive recruiting campaigns to obtain enlistments." 10 U.S.C. § 503(a). Clearly, then, the Solomon Amendment furthers a substantial and important interest in gaining access to law schools for purposes of military recruiting and thereby assuring the effectiveness of raising a volunteer military. And whereas in *Dale* the state interests embodied in a public accommodations law did not justify "such a severe intrusion" on the Boy Scouts' right to expressive association, here the relatively modest intrusion is outweighed by the compelling governmental interest in on-campus military recruiting. 530 U.S. at 660, 120 S. Ct. 2446.

Even so, to avoid constitutional difficulty, the Solomon Amendment's incidental restriction on First Amendment freedoms must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673. Plaintiffs, relying on a heightened standard of review, argue that any interest the Government has in recruiting students could be achieved by less burdensome means as there are other ways in which the military can recruit students without the assistance of law school personnel. Even assuming, without deciding, that the governmental interest presented in the Solomon Amendment could be achieved through less burdensome means, the *O'Brien* test does not demand such precision. Later Supreme Court cases have stated that to satisfy the *O'Brien* standard, "a regulation need not be the least speech-restrictive

means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994). "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *U.S. v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985). "Narrow tailoring in this context requires, in other words, that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc.*, 512 U.S. at 662, 114 S. Ct. 2445 (citations omitted). Such regulations are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S. Ct. 2897.

The Solomon Amendment passes constitutional review under this standard. Law schools universally provide assistance to employers who do not discriminate (Rosenkranz Decl. ¶ 7). As a preliminary matter, then, military recruiters are placed at a disadvantage as compared to other competing employers without the assistance of the law schools. Although it may be true, as Plaintiffs argue, that military recruiters can still contact students and interview students either off-campus or at some on-campus location, this ignores the fact that a law school recruiting function is the chief mechanism of connecting current law students with future employers. Without access to such mechanisms, the substantial governmental interest in gaining access to campuses for the purpose of military recruiting will be achieved less effectively.

Moreover, as previously stated, the Solomon Amendment is not a regulatory restriction; educational institutions remain free to reject military recruiters. But if educational institutions desire the assistance of federal funding, they must allow the military to fulfill its congressional directive "to conduct intensive recruiting campaigns to obtain enlistments." 10 U.S.C. § 503(a). Most importantly, these institutions remain free to voice objections to the military and its internal policies and to take ameliorative actions to distance themselves from the military's discriminatory policy. And for the reasons already set forth, the Court believes that the actual effect of the Solomon Amendment on the speech and associational rights of law schools is relatively minor. The Solomon Amendment therefore does not suppress "substantially more speech than . . . necessary" to ensure the effectiveness of on-campus military recruiting. *Turner Broad. Sys., Inc.*, 512 U.S. at 668, 114 S. Ct. 2445 (citations omitted).[10]

Finally, the Solomon Amendment is also unrelated to the suppression of ideas. A law school or institution of higher learning that prohibits or in effect prevents military recruiters from gaining entry to campus or access to students will be disentitled to those funds regardless of the viewpoint that prompted the decision

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[10] Plaintiffs' facial challenge to the Solomon Amendment alleges that the restriction of law schools' associational freedoms results from the mere presence of military recruiters on campuses. But if Plaintiffs define the restriction as the presence of military recruiters on campuses, it is obvious that any means less restrictive of law schools' associational rights would entirely frustrate the governmental objective, which is to gain access to campuses for the purpose of military recruiting. That is, it is wrong to claim that the Government could achieve its objective in a less burdensome manner by abandoning that very objective.

to deny assistance to such recruiters or prohibit them from campuses. *See* discussion *infra*. Additionally, as already stated, law schools are free to take ameliorative actions to disclaim any endorsement of the military's recruiting policy; in fact, law schools can outright denounce the military without running afoul of the Solomon Amendment's prohibitions. For the non-communicative impact of their conduct, and for nothing else, will law schools transgress the Solomon Amendment. *See O'Brien*, 391 U.S. at 383, 88 S. Ct. 1673.

Plaintiffs nonetheless allege that the purpose behind the Solomon Amendment was entirely related to the suppression of ideas. In support of this contention, Plaintiffs point to certain statements in the legislative history. But as the Supreme Court stated in *O'Brien*, "inquiries into congressional motives or purposes are a hazardous matter." 391 U.S. at 383, 88 S. Ct. 1673. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.*; *see also Turner Broad. Sys., Inc.*, 512 U.S. at 652, 114 S. Ct. 2445. This Court, likewise, refuses to strike down a congressional statute "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 391 U.S. at 384, 88 S. Ct. 1673. Here, the overriding congressional purpose is unrelated to the suppression of speech.

Accordingly, the Solomon Amendment passes constitutional muster under the *O'Brien* framework for governmental actions having an incidental effect on speech.

E. Conclusion

For the foregoing reasons, the Solomon Amendment does not unconstitutionally infringe Plaintiffs' free speech and associational rights. Even when considered against the background of academic freedom, the alleged intrusion on Plaintiffs' speech and associational rights falls short of a constitutional violation. Accordingly, there is no unconstitutional condition.

II. Viewpoint Discrimination Claim

Plaintiffs argue that the text of the Solomon Amendment, as well as the military's implementation of that text, discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because of a belief that the military's recruiting policy is immoral. This contention is unavailing. The Solomon Amendment does not "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Turner Broad. Sys., Inc.*, 512 U.S. at 640, 114 S. Ct. 2445 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991)). Even if the Solomon Amendment affects speech, the impact on speech is incidental, and there is virtually no risk of excising specific ideas or viewpoints from the public discourse. A law school that prevents military recruiters from gaining access to campus or students will forfeit federal funding regardless of the viewpoint that prompted the decision to deny access to such recruiters. More importantly, an institution that decides to accept federal funding and not prevent military recruiters from gaining access to campus or

students remains free to voice objections and take ameliorative actions to disassociate itself from the military recruiters. This decision may impact expression by affecting a recruiting policy, but an indirect effect on speech, without more, cannot sustain a claim for invidious viewpoint discrimination. *See Turner Broad. Sys., Inc.*, 512 U.S. at 643, 114 S. Ct. 2445. The Court thus rejects the premise that the Solomon Amendment draws a distinction based on the viewpoint expressed.

It is, of course, axiomatic that the government may not regulate speech based on its substantive content or the viewpoint it conveys. *Rosenberger*, 515 U.S. at 828, 115 S. Ct. 2510; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."). Plaintiffs contend that the Solomon Amendment discriminates on the basis of viewpoint because it does not apply to every academic institution, but only to those institutions that target the military in protest. The first flaw in this argument is that anti-military sentiment can and does thrive in situations where law schools decide to comply with the Solomon Amendment. The record demonstrates that law school administrators, faculty, and students have all openly expressed their disapproval of the military's discriminatory policy through various channels of communication. Some law schools have posted ameliorative statements throughout the school; law faculty and student bar resolutions have openly condemned the military's policy; and faculty and students have held demonstrations protesting the military's presence on campus. This is simply not a case where the Govern-

ment is trying to "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc.*, 512 U.S. at 642, 114 S. Ct. 2445.

The second flaw is that the Solomon Amendment is not a direct restriction on expression; the impact on law school recruiting policies is indirect. *Compare Rosenberger*, 515 U.S. 819, 115 S. Ct. 2510; *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L.Ed.2d 263 (1980) (invalidating as impermissible content discrimination a law that prohibited all picketing in a residential neighborhood, except labor picketing); *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988) (prohibiting display of signs bringing foreign government into disrepute within 500 feet of the embassy was content-based restriction on political speech). By its terms, the Solomon Amendment does not attempt to silence a particular viewpoint thought to be inimical to the Government's interests. The statute is not concerned with the underlying motivation that may prompt an institution to deny access to military recruiters. Today, the motivation arises from a disagreement with the military's policy towards sexual orientation; tomorrow, the motivation might stem from some other disagreement with the military. The point is that the Solomon Amendment continues to target the same conduct, to wit, denial of access to campus and students for military recruiting, even if the underlying viewpoint that might prompt an institution to deny such access is subject to change.[11]

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[11] The Court does not share Plaintiffs' view that the DOD's current posture is predominantly an effort to suppress the law schools' messages of non-discrimination. Plaintiffs' arguments to the contrary are not convincing since they are unsupported by

Nor does the fact that the Solomon Amendment expressly excludes certain educational institutions support Plaintiffs' contention that the statute is viewpoint-based. That the statute does not apply to an institution that "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2), merely comports with the long-standing principle, codified by statute, that a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" is not required to engage in military service. 50 U.S.C. App. § 456(j). It would serve no common-sense purpose to invoke the Solomon Amendment against pacifist schools where military recruiting efforts would be futile. Likewise, the statute does not apply to educational institutions where there is a lack of student interest, 32 C.F.R. § 216.4(c)(6)(ii), since military recruiting would also be futile in the absence of any such interest. And that it does not apply to institutions where "all employers are similarly excluded from recruiting on the premises of the covered school," 32 C.F.R. § 216.4(c)(3), merely reflects the DOD's reasonable view that it should not give the military employer an unfair advantage by invoking the Solomon Amendment against an institution which prohibits all employers from recruiting on campus. Thus, the exceptions carved out by the Solomon Amendment are based on pragmatic considerations, unrelated to speech, and in no way support Plaintiffs' argument that the statute discriminates on the basis of viewpoint.

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factual evidence which goes directly to any improper motivation. The evidence supplied suggests that the DOD is attempting to enforce the law as they currently construe it.

Finally, Plaintiffs argue that the Solomon Amendment is viewpoint-based because it promotes one viewpoint: the Government's pro-military viewpoint. For the reasons discussed *supra*, the Court rejects the notion that recruiting is sufficiently communicative to make this case similar to *Barnette*, *Wooley*, and the other compelled speech cases relied on by Plaintiffs. Any expressive component to recruiting is incidental, and any threat of government compulsion to adopt a particular viewpoint is far too tenuous and insubstantial to trigger constitutional alarm. Furthermore, to the extent recruiting is expressive, "it [is] inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Southworth*, 529 U.S. at 229, 120 S. Ct. 1346 (citing *Rust*, 500 U.S. 173, 111 S. Ct. 1759; *Regan*, 461 U.S. at 548-49, 103 S. Ct. 1997). Presumably, a government 'viewpoint' is subsumed within all federal spending programs, for the spending power permits the government to promote broad policy objectives through the conditioned-receipt of federal funds. Public funds spent on recruiting for the military are no different. But a federal subsidy program does not discriminate based on viewpoint simply because it has incidental effects on First Amendment interests. *See Finley*, 524 U.S. at 587-88, 118 S. Ct. 2168 (noting that government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake); *Regan*, 461 U.S. at 550, 103 S. Ct. 1997 ("Where governmental provision of subsidies is not aimed at the suppression of dangerous ideas, its power to encourage actions deemed in the public interest is necessarily far broader.") (internal citations omitted).

The Solomon Amendment is not a direct regulation of speech, notwithstanding the incidental effect on First Amendment freedoms. And because it does not target speech, it draws no distinction based on the viewpoint expressed. Accordingly, Plaintiffs' have not demonstrated a likelihood of success on the merits of their viewpoint discrimination claim.

III. Void-for-Vagueness Claim

Plaintiffs argue that the Solomon Amendment and its implementing regulations are unconstitutionally vague for failing to offer clear guidance on what actions or inactions will result in a determination that law schools have "either prohibit[ed], or in effect prevent[ed]" the military from gaining "entry to campuses, or access to students," 10 U.S.C. § 983(b)(1), or have satisfied the exemption for affording the military a "degree of access . . . [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4. It follows, according to Plaintiffs, that military recruiters have unbridled discretion to decide what acts or omissions do not comply with the statute and which institutions are to be targeted for non-compliance. Plaintiffs further argue that it is unclear whether and to what extent an offending subelement risks funding to the entire university.

The Government responds that the conditional funding requirements imposed by the Solomon Amendment need only be set forth with a reasonable degree of certainty and, judged by that standard, the statute survives constitutional scrutiny. The Government maintains that the statute's conditional funding limitations are clear, the implementing regulations sufficiently define the scope of the statute, and that uni-

formity of application is ensured by a centralized decisionmaker—the United States Secretary of Defense.

There are two general standards for evaluating whether a law is unconstitutionally vague. First, a law must not "forbid[ ] or require[ ] the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed. 322 (1926). Second, the law "must provide explicit standards for those who apply" it so as to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). But those criteria are not to be "mechanically applied." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.*

Whether a law "threatens to inhibit the exercise of constitutionally protected rights" is critical in determining the level of clarity demanded by the Constitution. *Id.* at 499, 102 S. Ct. 1186. "Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Finley*, 524 U.S. at 588, 118 S. Ct. 2168. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted). The underlying rationale is that an unclear law regulating speech might deter persons from

engaging in protected speech or activity, and the very threat of sanctions could have as strong a deterrent effect on the exercise of fundamental rights as the actual application of sanctions. *Id.* at 433, 83 S. Ct. 328. Thus, vagueness inquiries as to laws regulating fundamental constitutional rights such as the freedoms of speech, assembly, or association, are particularly rigorous.

The corollary to that rule is that some laws are subject to a slightly less rigorous vagueness standard. Terms that are unconstitutionally vague for purposes of criminal or regulatory statutes might pass constitutional muster in other contexts. *See, e.g.*, *Finley*, 524 U.S. at 588-89, 118 S. Ct. 2168 (holding "undeniably opaque" terms capable of raising significant vagueness concerns in certain contexts not unconstitutionally vague in selective subsidies context). Economic regulation, for example, is subject to a "less strict vagueness test" because it often deals with narrowly defined circumstances and because "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates*, 455 U.S. at 498, 102 S. Ct. 1186.

The Solomon Amendment is not a penal statute, nor is it a direct regulation on speech. The statute conditions the receipt of federal funds on conduct—a school permitting a periodic visitor (military recruiter) who has no enduring association with the school to engage in on-campus recruiting. So viewed, the Solomon Amendment does not readily trigger a heightened vagueness standard. *Cf. Finley*, 524 U.S. at 599, 118 S. Ct. 2168 (Scalia, J., concurring) ("[W]hat is true of the First Amendment is also true of the constitutional

rule against vague legislation: it has no application to funding. Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government regulation of expressive conduct, not government grant programs.") (internal citations omitted). On the other hand, the Solomon Amendment is not altogether devoid of First Amendment implications. The Court acknowledges that, as a practical matter, law schools needed to adjust their existing recruitment policies in order to comply with the Solomon Amendment. But, as explained *supra*, the statute has only an incidental effect on the law schools' First Amendment rights. The Court accordingly concludes that a slightly less rigorous vagueness standard is appropriate.

The Solomon Amendment conditions funding on a school not having "a policy or practice . . . that either prohibits, or in effect prevents," military recruiters from "gaining entry to campuses" or gaining "access" to students for recruiting purposes. 10 U.S.C. § 983. Plaintiffs point to three possible interpretations of that language: (1) the schools need do no more than refrain from closing its doors to the military in order to secure funding; (2) the schools must provide some level of assistance to the military in its recruiting efforts; or (3) the schools must treat the military the same as any other employer. Plaintiffs rightly point out that the DOD regulations do not define the operative terms. See 32 C.F.R. § 216.3. But the mere absence of definitions does not necessarily render the statute vague, particularly where, as here, the terms are subject to interpretation according to their commonly understood meaning. *See Horn v. Burns & Roe*, 536 F.2d 251, 255 (8th Cir. 1976) (noting that requirement of

reasonable certainty "does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding"); *see also Village of Hoffman Estates*, 455 U.S. at 501, n. 18, 102 S. Ct. 1186 (relying in part on dictionary definition for purposes of vagueness analysis); *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 123 (5th Cir. 1991) (same); *House v. United States, I.R.S.*, 593 F. Supp. 139, 142 (W.D. Mich. 1984) (same).

The operative terms of the Solomon Amendment are not complex or difficult to understand such that one of ordinary intelligence must "necessarily guess" at their meaning. *See Connally*, 269 U.S. at 391, 46 S. Ct. 126. The military "gaining entry" to campuses plainly contemplates entering the campus gates. To enter something is "to go or come into" it. *Webster's Third New International Dictionary* 756 (2003). Access is defined as "permission, liberty, or ability to enter, approach, communicate with." *Id.* at 11. Thus, to comply with the Solomon Amendment, a school must allow the military to come onto campus and to communicate with interested students for purposes of recruiting. Schools that do not allow the military on campus, and thereby prohibit on-campus recruitment, do not comply with the statutory requirements. The statute is abundantly clear in that respect.

Schools that allow the military on campus, yet "in effect prevent" military recruiting efforts also do not comply with the Solomon Amendment. The phrase in effect means "virtually" or "in substance," *id.* at 724, and the term prevents means "to keep from happening," *id.* at 1798. "In effect prevents" therefore contemplates virtually keeping the military from recruiting students or posing obstacles that would normally lead

to abandonment of the recruiting effort. Importantly, Congress chose not to use language connoting anything less than a total or effective prohibition on the military's recruitment efforts, such as "interfere," "hinder," "impede," or "adversely affect." It follows that anything short of preventing or totally thwarting the military's recruitment efforts does not trigger funding denial pursuant to the statute. Although it is conceivable that assistance provided to other employers (which thereby facilitates those employers' recruiting efforts) could, under certain circumstances, rise to the level of "in effect prevent[ing]" military recruitment efforts, the fact "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous" to pass constitutional muster. *U.S. v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 91 L.Ed. 1877 (1947).

Nor is the exemption for schools that provide a "degree of access by military recruiters [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4, void for vagueness. Plaintiffs challenge that exemption as "supremely subjective." The Court disagrees. The exemption is necessarily applicable to a variety of circumstances because the degree of access provided to employers will vary across schools. The benchmark for satisfying the exemption is what degree of access a given school provides to other employers and the regulation then requires a comparison with the degree of access given to the military recruiters. Such a comparison is not imbued with either vagueness or undue subjectivity. The Court is unwilling to conclude that the exemption's flexibility and broad applicability renders it imper-

missibly vague. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 339-41, 72 S. Ct. 329, 96 L.Ed. 367 (1951) ("[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.").

Lastly, the Court concludes that the consequences of non-compliance with the Solomon Amendment are sufficiently clear to pass constitutional muster. The statute denies federal funding to "an institution of higher education (including any subelement of such institution) if . . . that institution (or any subelement of that institution) has a policy or practice" prohibiting military recruitment efforts. 10 U.S.C. § 983(b). Plaintiffs point out that, over time, the military has adopted three different interpretations of that language: (1) funding restrictions are limited to the offending subelement, *see* 61 Fed. Reg. 7739; 32 C.F.R. § 216.3(b)(1) (prior to January 3, 2003) ("In the event of a determination . . . affecting only a subelement of a parent institution . . . , the limitation on the use of funds . . . shall apply only to the subelement and not to the parent institution as a whole."); (2) the extent of funding restrictions varies depending on the source of funds, 48 C.F.R. § 209.470.1; (3) or, as allegedly threatened by some military functionaries, all federal funds from all sources are cut off due to a subelement's non-compliance with the statute, (Chemerinsky Decl. ¶ 21; Gerken Decl. ¶ 15). Plaintiffs acknowledge, though, that current DOD regulations provide that an offending subelement risks DOD funds flowing to both

the subelement and its parent university, as well as other federal funds flowing to the subelement. (Pls.' Mem. Supp. Prelim. Inj. at 10 (citing 65 Fed. Reg. 2056 (Jan. 13, 2000) and 32 C.F.R. § 216.3)). Current regulations thus define the consequences of violating the Solomon Amendment: An offending subelement, or law school, risks DOD funding earmarked for the law school and its parent institution, as well as other federal funding flowing to the law school itself (but not to the parent). In other words, the subelement limitation does not apply to DOD funds.

Plaintiffs do not allege that the DOD has made a final determination denying funding in a manner unauthorized by the statute, and there is nothing in the record to suggest that such action has been taken. The crux of Plaintiffs' claim as to the consequence of non-compliance is that military functionaries have threatened schools with a university-wide cut-off of funding that is unsupported by existing DOD regulations. In that regard, Plaintiffs contend that the military recruiters are akin to local governmental officials who exercise unbridled discretion on licensing decisions concerning demonstrations, parades, solicitation, and like activities. *See, e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (ordinance giving discretion to mayor in issuing permits for newsbox placement on city sidewalks); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L.Ed.2d 162 (1969) (ordinance requiring permit for parade); *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949 (1938) (city ordinance prohibiting distribution of leaflets or advertising without city manager's permission).

The nature of Plaintiffs' claim—that a threatened cut-off of university funding runs afoul of the implementing regulations—belies the assertion that there is no clear guidance as to funding consequences. The guidance that exists is sufficiently clear, though unwelcome. That guidance ensures against arbitrary enforcement of the statute. Furthermore, military recruiters have no express or implied authority to make final funding determinations. Only the Secretary of Defense has statutorily conferred authority to make those decisions. The concern as to arbitrary enforcement is minimal given a centralized decisionmaker and, as previously discussed, the Court believes that the terms of the Solomon Amendment are sufficiently clear so as not to confer unfettered discretion in targeting institutions or making final funding determinations. Plaintiffs of course remain free to challenge a final funding determination as inconsistent with the Solomon Amendment or its implementing regulations.

The Court concludes that Plaintiffs have not established a likelihood of success on the merits on their vagueness challenge to the Solomon Amendment and its implementing regulations. That is not to say that the Court agrees with the DOD's proposed interpretation that the statute requires law schools to "provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers." (Eskridge Decl. ¶ 55, Ex. 18). The Court's conclusion is in no way an endorsement of the DOD's position. The DOD's interpretation, in effect, turns the exemption in 32 C.F.R. § 216.4 into a statutory requirement, and the Court has grave reservations as to whether such an interpretation is sustainable as a matter of statutory construction.

It is axiomatic that the DOD is not at liberty to adopt an interpretation contrary to the plain wording of the Solomon Amendment. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, n. 9, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). By letter dated May 29, 2003, Acting Deputy Under-Secretary of Defense William Carr stated that the DOD interpreted 10 U.S.C. § 983(b)(1) to require that there not "be a substantial disparity in the treatment of military recruiters as compared to other potential employers" and that the statute "should, and will, be construed to require equal access for military recruiters—the construction that better permits the military to fulfill congressional intent." That interpretation of the Solomon Amendment is problematic for several reasons. Insisting on "equal access" and demanding that there be no "substantial disparity" are not the same thing. No substantial disparity allows for something less than equal access. More importantly, the statute could easily have provided that military recruiters are to be treated the same as other employers. The statute does not so provide. While it is conceivable (in presently unknown circumstances) that a substantial disparity between treatment of the military and other employers could rise to the level of "in effect prevent[ing]" military recruitment efforts, the Court simply fails to see how the statute requires absolute parity when all that it requires is that a school not "prohibit" or "in effect prevent" military recruiting efforts. Finally, reading the "equal in quality and

scope" aspect into the substantive statutory requirements swallows the exemption for schools allowing a "degree of access by military recruiters [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4. That exemption applies to schools that do not comply with the requirements of the statute.

The Court concludes that Plaintiffs have not established a likelihood of success on their void-for-vagueness claim, notwithstanding the DOD's seemingly unwarranted interpretation that the Solomon Amendment requires law schools to treat the military the same as other employers.

IV. Remaining Factors for Preliminary Injunction

Having concluded that Plaintiffs have not established a likelihood of success on the merits of their constitutional challenges to the Solomon Amendment and its implementing regulations, the Court need not decide whether Plaintiffs have satisfied the remaining requirements for preliminary injunctive relief. That is because "'a failure to show a likelihood of success . . . must necessarily result in the denial of a preliminary injunction.'" *Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (quoting *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982)). For the sake of completeness, though, the Court will address the three remaining factors for preliminary injunctive relief—irreparable harm, balance of hardships, and public interest. *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 157. As will be seen, evaluation of those factors is interrelated with the Court's evaluation of the likelihood-of-success factor.

The loss of First Amendment freedoms constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). "[T]he irreparable injury issue and likelihood of success issue overlap almost entirely" where First Amendment violations are concerned. *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999). Given this Court's conclusion that Plaintiffs have not established a likelihood of success on the merits of their First Amendment claims, there is no risk of irreparable harm absent a preliminary injunction.

The balance-of-hardships and the public interest factors also weigh in favor of the Government. That an Act of Congress is presumptively constitutional is "an equity to be considered in favor of applicants in balancing hardships." *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324, 105 S. Ct. 11, 82 L.Ed.2d 908 (1984) (Rehnquist, Circuit Justice) (granting request for stay of injunction enjoining enforcement of statute on constitutional grounds). The Solomon Amendment is presumptively constitutional. Given this Court's conclusion that Plaintiffs have not established a likelihood of success on the merits of their constitutional claims, the harm to the Government in being precluded from enforcing the Solomon Amendment and engaging in on-campus recruiting outweighs the harm that would result to Plaintiffs by denying them preliminary injunctive relief. Moreover, Congress has imposed on the military an obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the branches of the armed forces. 10 U.S.C. § 503(a). And "Congress considers access to [institutions of higher education] by military recruiters to be a matter of paramount importance" and an "integral part" of military recruiting efforts. *United States v. City of*

Philadelphia, 798 F.2d at 86. The Solomon Amendment furthers those interests. Enforcing the First Amendment is indisputably a matter of great public interest, but where, as here, the Court has not found a likelihood of success on the First Amendment claims, the public interest factor weighs in favor of the Government.

V. Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction enjoining enforcement of the Solomon Amendment as unconstitutional will be denied.

APPENDIX C

10 U.S.C. 983, as amended by Pub. L. No. 108-375, Div. A, Tit. V, § 552(a) to (d), 118 Stat. 1911.

Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies

(a) DENIAL OF FUNDS FOR PREVENTING ROTC ACCESS TO CAMPUS.—No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) DENIAL OF FUNDS FOR PREVENTING MILITARY RECRUITING ON CAMPUS.—No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of

Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) 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; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) EXCEPTIONS.—The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that—

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) COVERED FUNDS.—(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(C) Any funds made available for the Department of Homeland Security.

(D) Any funds made available for the National Nuclear Security Administration of the Department of Energy.

(E) Any funds made available for the Department of Transportation.

(F) Any funds made available for the Central Intelligence Agency.

(2) Any Federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

(e) NOTICE OF DETERMINATIONS.—Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary—

(1) shall transmit a notice of the determination to the Secretary of Education, to the head of each other department and agency the funds of which are subject to the determination, and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) SEMIANNUAL NOTICE IN FEDERAL REGISTER.—The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).