No. 04-1152

IN THE
Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, ET AL.,

Respondents.

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

BRIEF AMICI CURIAE OF ROBERT A. BURT, ET AL. ON BEHALF OF RESPONDENTS

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INTEREST OF AMICI

Amici comprise a majority of the faculty of the Yale Law School ("Faculty Members").[1] Twenty-seven years ago, the Faculty collectively adopted a Nondiscrimination Policy, which committed the Yale Law School to stand against discrimination based upon sexual orientation. That policy grew out of Faculty Members' deep conviction that neither the Law School's educational mission nor their own individual consciences would tolerate teachers assisting deliberate discrimination against their own students.

For nearly three decades, the Faculty applied this Nondiscrimination Policy to give access, but not active assistance, to any employers who insisted upon discriminating against Yale Law students in their hiring practices based on sexual orientation. The Faculty Members believed that the Yale Law School should not exclude any speaker from speaking or prevent any point of view from being aired within the School. Accordingly, the Faculty Members have never interfered with willing employers and willing job applicants who want to meet on the Law School campus. But the Yale Law School does not aid and abet discrimination or assist outside employers who seek to hire some Yale students, but not others, based on their race, gender, religion, or sexual orientation.

In 2002, the Department of Defense ("DOD") invoked the Solomon Amendment (codified at 10 U.S.C. § 983) and threatened to cut off more than $300 million in Yale's federal funding if the Faculty Members did not change their long-standing policy. Rather than abandon their Nondiscrimination Policy under such coercion, Faculty

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[1] A list of amici appears in an appendix hereto. This brief has not been authored in whole or in part by counsel for a party and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Written consents to the filing of briefs by amici curiae have been filed in the Office of the Clerk of the Supreme Court by all parties to the proceeding.

Members filed the case of *Robert A. Burt et al. v. Donald H. Rumsfeld* in the United States District Court for the District of Connecticut, challenging the legality of the Defense Department's interpretation of the Solomon Amendment. Following extensive fact-finding, the Hon. Janet C. Hall: (1) entered final judgment on behalf of the Faculty plaintiffs; (2) declared the DOD's threats to deprive Yale University of some $300,000,000 in federal funding an unconstitutional application of the Solomon Amendment in violation of the Faculty Members' rights under the First Amendment to the United States Constitution; and (3) enjoined the DOD from making any further financial threats against Yale University.[2] Judge Hall's judgment confirmed that the DOD had: (1) unlawfully invaded the Faculty Members' constitutionally protected freedom of association; (2) unconstitutionally suppressed the Faculty Members' right to disassociate themselves from the DOD's discriminatory recruitment practices; and (3) failed to introduce any evidence of harm to its recruiting efforts resulting from the Faculty Members' Nondiscrimination Policy.

In *Rumsfeld v. Forum for Academic and Institutional Rights* ("FAIR"), the Government now denies that it has invaded academic freedom or coerced faculty, and claims that the Faculty Members' efforts to protect their own gay, lesbian, and bisexual students against discrimination have undermined military recruitment efforts in a time of national emergency. Amici submit this brief to show that these claims are false.

First, the DOD's actions have trampled upon the Faculty Members' academic freedom. The DOD's effort to conscript the Yale Law School faculty in its policy of open and deliberate discrimination offends the fundamental values of the Yale Law School, and any law school. The Faculty

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[2] The decision of Judge Hall is reported at 354 F. Supp. 2d 156 (D. Conn. 2005) and is reproduced at p. A1 of the Appendix to the Faculty Members' Petition for Writ of Certiorari ("App.") which is currently pending before this Court. (No. 04-1434).

Members object not to the mere presence of military recruiters, but to being forced to assist the military in telling some Yale Law students that they are not fit to serve in our country's armed forces because of their sexual orientation. The Faculty Members deeply respect those who serve in our nation's armed forces. They find both demeaning and stigmatizing Petitioners' insistence upon excluding Yale's gay, lesbian, and bisexual students from those forces. The DOD's demand that Faculty Members not just tolerate, but actively aid and abet, their discriminatory recruitment practices undermines the Faculty Members' commitment to maintain a tolerant and inclusive educational environment for all Yale law students. For the Faculty now to surrender to the Government's coercion—even to protect the University's finances—would inevitably erode all students' faith in the Faculty Members' commitment to treat them with equal respect and dignity.

Second, by threatening Yale and other law schools with massive defunding, Petitioners seek to prevent any law professors from disassociating themselves from the military's campaign of open discrimination against gays, lesbians and bisexuals. But in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and its progeny, this Court has repeatedly affirmed that private associations have a First Amendment right to disassociate themselves from, and thereby to protest against, the conduct of other private or public organizations. Had the NAACP received government funds, no one would argue that the Government could use that financial lever to coerce the NAACP to abandon its core mission through forced association with Claiborne Hardware's racially discriminatory practices. In the same way, the Government should not now be allowed to use its money to coerce Yale Law Faculty Members into associating with its discriminatory hiring practices against some Yale law students.

Third and finally, the facts found by Judge Hall in the *Burt* case prove that the DOD has, at all times, had ample access to Yale Law School students for its legitimate recruitment purposes. In *Burt,* the only Solomon

Amendment case to date to reach final judgment, the trial court found that Petitioners had introduced no evidence to show that the Law School's Nondiscrimination Policy of giving access but not assistance had adversely affected the DOD's recruiting at the Law School. The *FAIR* Petitioners offer no reason why subjecting Yale and other law schools to financial blackmail is either helpful or necessary to the military's efforts to recruit a sufficient number of lawyers into the uniformed services.[3]

The Yale Law School is an equal opportunity employer and fully supports any employer who offers equal opportunity. But when the Government tries to force law teachers who believe in equal opportunity to endorse discrimination, those teachers can and should resist. Neither the Solomon Amendment, nor the Constitution, authorizes our military to recruit lawyers by invading the academic freedom of teachers or forcing them to associate with practices that are inconsistent with their core values, particularly when such coercion serves no legitimate military need.

STATEMENT OF FACTS

I. THE YALE LAW SCHOOL'S NONDISCRIMINATION POLICY PROTECTS GAYS, LESBIANS, AND BISEXUALS FROM ALL FORMS OF DISCRIMINATION.

As Judge Hall found, the Yale Law School faculty adopted a Nondiscrimination Policy in 1972, barring discrimination on the basis of religion, race, sex or national origin. (App. A15). In 1978, the Yale Law School faculty

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[3] Indeed, the United States Army General Counsel recently proposed that the number of active-duty, uniformed lawyers working in the Judge Advocate General Corps be slashed from 1500 to 500. *See* Jill Schachner Chanen, *JAG Edge: Proposed Changes for Military Lawyers Have Critics at Attention*, 89-Nov. A.B.A. J. 26 (2003).

extended the protection of that policy to gays, lesbians, and bisexuals. *Id.*

The Nondiscrimination Policy provides:

> "Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of 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, sexual orientation, or the prejudice of clients. Accordingly, all employers utilizing its placement services are required to abide by this policy. Employers who violate this policy will face sanctions." (Petition for Writ of Certiorari, *Burt v. Rumsfeld*, No. 04-1434 ("*Burt* Pet.") at 10).

The Nondiscrimination Policy governs all aspects of the Law School's activities, including appointments, admissions, housing, scholarships—and recruitment. (App. A15). The Nondiscrimination Policy requires all employers seeking to use the services of the Law School's Career Development Office ("CDO") to sign a pledge affirming their adherence to the Law School's Nondiscrimination Policy. *Id.*

It is the official policy of the DOD to discriminate against gays, lesbians, and bisexuals. *See* 10 U.S.C. § 654(b)(1-3). DOD representatives have refused to sign the pledge since 1978 and cannot use the services of the CDO. (App. A20).

The Yale Law School faculty members guide their students toward appropriate careers in the legal profession and attempt to ensure that all of their students have access to the broadest range of professional opportunities possible, free from discrimination. The Faculty Members have delegated the performance of some of their duties to the CDO. The CDO manages interview programs through which employers can interview Yale Law School students. The CDO maintains information provided by employers for review by

students, provides a means for students to transmit resumes to employers and schedules interviews, which are held at a nearby private hotel to avoid disruption of the Law School's activities. (*Burt* Pet. at 9).

Because of their continuing discrimination against gays, lesbians, and bisexuals, military recruiters did not use the services of the CDO from 1978 to 2001. But pursuant to the Law School's policy of providing access but not assistance to employers who refuse not to discriminate, throughout those years military recruiters have been provided with access to students and information sufficient for recruitment needs. Under the arrangements between the Law School and the DOD, the Law School provides military recruiters with information concerning the students' identity, addresses and education, as well as contact information which enables military recruiters to communicate with all students by mail, phone and the internet. (App. A20-21). Using that information, the DOD can communicate directly with Yale law students by email, advertising their openings and receiving applications by email. Military recruiters are free to schedule interviews with interested students at the private hotel at the same time that other employers are interviewing Yale law students. *Id.* They are also free to initiate contact with student organizations and meet with any interested students at the organization's invitation at any available space on the Yale campus. *Id.*

The DOD accepted these arrangements and conducted interviews at the Law School without protest for over 20 years, from 1978 to 2001. *Id.* In 2001, the DOD abruptly discarded those earlier arrangements and insisted that the Faculty Members exempt military recruiters from their Nondiscrimination Policy. *Id.*

II. THE DOD HAS SUPPRESSED THE LAW SCHOOL COMMUNITY'S NATIONWIDE PROTEST OF THE MILITARY'S DISCRIMINATION AGAINST GAYS, LESBIANS, AND BISEXUALS.

Yale's policy led increasing numbers of American law schools to adopt similar nondiscrimination policies protecting gays, lesbians, and bisexuals. After these practices became widespread, the American Association of Law Schools adopted a resolution in 1990 requiring all of its 166 members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate against law students on the basis of race, religion, ethnicity, gender or sexual orientation. (Brief on the Merits submitted on behalf of the Department of Defense in *Rumsfeld v. FAIR,* No. 04-1152 ("DOD Brief") at 7.)

In response to the law schools' growing protest against the military's continuing discrimination against gays, lesbians, and bisexuals, Congress enacted the Solomon Amendment in 1994. In its current form, the Solomon Amendment empowers the DOD to withhold a broad range of federal funding from "institutions of higher education" if the "institution" or any "subelement of that institution" has a "policy or practice . . . that either prohibits, or in effect prevents" military recruiters from gaining access to campuses, to students on campuses, or to certain information deemed necessary for recruiting. (App. E1-2).

The legislative history of the Solomon Amendment makes it clear that the law was enacted in response to the limitations placed on military recruiters by the nation's law schools. During passage of the Amendment in 1994, Senator Nickles noted that "140 institutions of higher education . . . have denied military recruiters access to their campus[es]". 140 Cong. Rec. 15,500 (1994) (statement of Sen. Nickles).[4]

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[4] Although the legislative history does not specifically reference the law schools' stand against military discrimination, Senator Nickles' reference to "140 institutions" must refer to application of the nation's

Representative Pombo, a cosponsor of the Solomon Amendment, stated the sponsors' intention to "send a message over the wall of the ivory tower", and to tell universities that "their starry eyed idealism comes with a price". 140 Cong. Rec. 11,441 (1994) (statement of Rep. Pombo). Representative Solomon stated that Congress intended 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. 11,439 (1994) (statement of Rep. Solomon).

Despite the passage of the Solomon Amendment in 1994, the DOD continued for seven more years the *modus vivendi* for recruiting which had been worked out with the Yale Law School over the years since 1978. The DOD did, however, successfully seek amendments to the Solomon Amendment, expanding the scope of funds subject to the Amendment in 1997 (Pub. L. No. 104-208, § 514, 110 Stat. 3009-271 (1996) (codified at 10 U.S.C. § 983(d)(1))), and extending the defunding to the entire "institution of higher learning" if "any subelement of such institution" (*i.e.*, law school) denied recruiting services to the DOD in 1999. Pub. L. No. 106-65, § 549 (1999) (codified at 10 U.S.C. § 983(b)). In adopting these amendments, Congress never considered any empirical information showing that the law schools' nondiscrimination policies were actually impeding the DOD's recruitment efforts at the nation's law schools.

In 2001, in an abrupt reversal of policy, the DOD began insisting that Yale provide military recruiters not only with the access necessary for recruitment, but also with the active assistance given to other employers that adhered to the Law

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law schools' nondiscrimination policies because there was no other significant relevant activity during that period at the nation's universities.

School's Nondiscrimination Policy. (*Burt* Pet. at 12). The DOD insisted that military recruiters be afforded access in a manner that is "at least equal in quality and scope" to that offered to employers that subscribed to the Nondiscrimination Policy. *Id.* The DOD's actions left no doubt that it was threatening to withdraw $300 million of federal funding in an effort to suppress the perceived message sent by Yale's policy.[5] As the DOD itself concedes, the DOD's threats against Yale were part of its nationwide campaign to suppress the law schools' application of nondiscrimination policies to military recruiters. (DOD Brief at 8).

The DOD succeeded. By 2003, virtually every law school in the nation had been forced to exempt military recruiters from their nondiscrimination policies. *Id.* To avoid depriving their colleagues of some $300,000,000 in annual funding, a majority of the Yale Law School faculty voted to suspend application of the Nondiscrimination Policy to military recruiters until they could vindicate their constitutional rights in court. (App. A22).

In 2003, the United States District Court for the District of New Jersey suggested that the DOD's insistence that military recruiters be treated in a manner equal in quality and scope to nondiscriminating employers exceeded the authority conferred on the DOD by the Solomon Amendment. *Forum for Academic & Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 321 (D.N.J. 2003). In order to increase pressure on the nation's law school community, the DOD

[5] After protracted correspondence, Acting Deputy Undersecretary for Military Personnel Policy, William J. Carr, sent a letter, dated May 29, 2003, to Yale University President Richard Levin that flatly declared that "Yale's policy is in violation of federal law". (App. A23). The Carr letter complained that the Faculty Members' *application of the Nondiscrimination Policy to military recruiters "sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment [elsewhere]."* *Id.* (emphasis added). The letter made it clear that the DOD would deprive Yale University of $300,000,000 in federal funding unless the Faculty Members stopped applying the Nondiscrimination Policy to military recruiters. *See id.*

returned to Congress and secured legislation overturning Judge Lifland's decision (as the DOD concedes, DOD Brief at 5-6; App. A20 n.16). Without holding hearings or issuing any factual findings, the Congress amended the Solomon Amendment by adding equality in quality and scope language to the statute. Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004) (codified at 10 U.S.C. § 983(b)(1)).

As a result of the DOD's coercive threats, the faculty of the Yale Law School, under duress, allowed military recruiters to use the services of the CDO from the fall of 2002 until the spring of 2005. (App. A22). Yet during that time—in which it received both access and assistance from Yale's CDO—the DOD did not succeed in hiring a single Yale law student contacted through the CDO. *Id.* At the same time, the Army General Counsel announced a proposal to dramatically reduce his recruitment of military lawyers. *See supra* note 3, (reporting U.S. Army General Counsel Steven Morello's announcement that "he planned to cut the number of active-duty uniformed Judge Advocate General Corps personnel to 500 from 1500".)

The Faculty Members filed their action, *Burt v. Rumsfeld*, in the United States District Court on October 16, 2003. On January 31, 2005, Judge Hall entered final judgment declaring the DOD's actions in applying the Solomon Amendment to Yale University unconstitutional and enjoining the DOD from making financial threats for the purpose of coercing the Yale Law School faculty to abandon application of their Nondiscrimination Policy to military recruiters.

ARGUMENT

I. THE DOD HAS VIOLATED THE FACULTY MEMBERS' RIGHT TO ACADEMIC FREEDOM

The Faculty Members are dedicated to the teaching of the law and the values central to the law. Among these values is the principle that all persons are to be treated with equal respect and dignity, irrespective of their race, ethnicity, religion, gender or sexual orientation.

The Faculty Members believe that a tolerant and inclusive environment is essential for all students to achieve their potential as members of the bar, bench and academy. They believe that protecting their students from all forms of discrimination occurring under law school auspices is necessary to maintain this environment and to encourage all students to participate fully and freely in the discussions which form the core of their education, without exposure to any discrimination which may inhibit or marginalize them.

The Faculty Members believe that protection against discrimination must be extended to all activities occurring under law school auspices—including recruitment. Since the DOD openly and deliberately discriminates against gays, lesbians, and bisexuals, the Faculty Members believe that the DOD's recruitment and hiring practices offend the core values of the Yale Law School. The Faculty Members object in the strongest possible terms to the DOD's effort to conscript the Faculty Members and the CDO, acting under faculty supervision, to aid the military in implementing their discriminatory practices under Law School auspices. The Faculty Members object, not to the mere presence of military recruiters, but to being forced to assist the military in acts that tell some of their students that they are not fit to serve in our country's armed forces because of their sexual orientation.

The Faculty Members support and respect all persons who serve in the armed forces, but believe that the opportunity to serve must be open to all persons irrespective of race, ethnicity, religion, gender or sexual orientation. The military's exclusion of Yale's gay, lesbian, and bisexual students burdens these students with a demeaning and stigmatizing judgment.

For the Faculty Members to assist or associate with the military's discrimination against their gay, lesbian or bisexual students—particularly for financial reasons—will inevitably erode the students' trust in the Faculty Members' commitment to treat them with equal respect and dignity. It will necessarily damage the Faculty Members' attempt to create an inclusive and tolerant atmosphere in which students

can express their views freely and fully without fear of marginalization, whether they are African-American, or women, or Jewish, or Muslim, or gay, or lesbian, or bisexual.

This Court has consistently held that the First Amendment rights of free speech and association endow academic freedom with heightened constitutional protection. As the Court explained in *Sweezy v. New Hampshire*:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation." 354 U.S. 234, 250 (1957).

The Supreme Court has consistently reaffirmed the principle that academic freedom has long been viewed as "a special concern of the First Amendment". *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). Only two years ago, this Court again reemphasized "our tradition of giving a degree of deference to a university's academic decisions". *Grutter v. Bollinger,* 539 U.S. 306, 328 (2003).

This deference extends not only to what and how the faculty teaches, but more broadly to the faculty's freedom to govern its university's affairs. As the Court held in *Regents of the Univ. of Mich. v. Ewing*:

> "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decision making by the academy itself". 474 U.S. 214, 226 n. 12 (1985) (citations omitted).

See also Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 232 (2000) (upholding a mandatory fee supporting extracurricular student activity and deferring to the university's judgment about what speech "is or is not

germane to the ideas to be pursued in an institution of higher learning").

The principle of academic freedom enshrined in the First Amendment clearly protects the Nondiscrimination Policy that the Yale Law School faculty members have followed since 1978. The Faculty Members adopted that policy to protect all of their students from any form of discrimination, reasoning that such protection is necessary to preserve a tolerant and inclusive academic environment. The coercive intrusion of the DOD's discriminatory practices into the Law School community tramples upon the Faculty Members' academic freedom.

II. THE DOD HAS SUPPRESSED THE FACULTY MEMBERS' FREEDOM OF ASSOCIATION

The Faculty Members refuse to assist or to associate with the DOD's discrimination against their gay, lesbian, and bisexual students in hopes that one day, all of their students can pursue military service based on merit and free from discrimination. In applying their Nondiscrimination Policy to military recruiters, the Faculty Members are exercising a constitutionally protected right to disassociate from and to protest the military's discrimination.

This Court has long recognized that "freedom of association ... plainly presupposes a freedom not to associate". *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). In *Claiborne*, this Court held that the freedom not to associate provided constitutional protection for the actions of the NAACP in organizing a boycott of merchants in Port Gibson, Mississippi who discriminated against African-Americans. The Court held:

> "In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association and petition, though not identical, are inseparable.... This Court has recognized that expression on public issues has always rested on the highest rung

> of the hierarchy of First Amendment values." 458 U.S. at 911, 913 (quotation marks and citations omitted).[6]

The Court's decision in *Claiborne* makes it clear that the First Amendment fully protects the Faculty Members' refusal to cooperate with or assist, to disassociate from, and thereby to protest against, the military's discrimination against their gay, lesbian, and bisexual students. Yet the Government's brief in *FAIR* nowhere mentions this Court's decision in *Claiborne*, which clearly holds that acts of disassociation such as those before the Court are in and of themselves acts protected by the First Amendment. Nor does the DOD make any attempt to deal with this Court's cases extending First Amendment protections to academic freedom and according deference to "autonomous decision making by the academy". *Ewing,* 474 U.S. at 226 n.12. Nor, finally, does the DOD even mention that the cases before this Court arise out of the DOD's suppression of a nationwide protest against the military's continuing discrimination against gays, lesbians, and bisexuals.

In short, the DOD ignores what this case is really about. The Faculty Members' actions in disassociating themselves from the military's discrimination form an integral part of the nation's law schools' efforts to rid the legal profession of base discrimination against gays, lesbians, and bisexuals. That act of disassociation is part of a broader national effort to ensure that gays, lesbians and bisexuals are treated with equal dignity and respect throughout our society.

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[6] *See Thornhill v. Alabama*, 310 U.S. 88 (1940) (striking down as unconstitutional an Alabama statute which prohibited picketing designed to encourage workers to withhold their labor from an employer); *Missouri v. National Organization for Women ("NOW")*, 620 F.2d 1301 (8th Cir. 1980) (voiding the application of state tort law to penalize NOW's boycott of Missouri related to the Equal Rights Amendment); *see also Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *Mechasky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Kirkland v. Wallace*, 403 F.2d 413 (5th Cir. 1968).

The military, the Boy Scouts and some religious institutions continue to openly and deliberately discriminate against gays, lesbians, and bisexuals. But the nation's law schools, virtually all of the nation's law firms, and many employers and religious institutions have taken actions designed to eliminate such discrimination from their institutions and from our society. In this case, the Faculty Members do not ask this Court to accept their view that gays, lesbians, and bisexuals should be accorded the same dignity and respect as all other citizens. They ask only that, as in other cases, this Court protect their freedom to express those views through a constitutionally protected right of disassociation. *Cf. Dale*, 530 U.S. 640 (protecting the right of disassociation when exercised to discriminate against gays, lesbians, and bisexuals); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (same).

If, as the Faculty Members believe, their decision to disassociate themselves from the military's discrimination is itself an act protected by the First Amendment, most of the DOD's arguments become irrelevant. First, the fact that the Faculty Members could express their opposition to the military's discrimination against gays and lesbians by some other means is irrelevant. In *Claiborne*, the NAACP could equally have taken out an advertisement in the Port Gibson newspaper deploring racial discrimination by local merchants, but that fact in no sense suggests that the NAACP lacked a protected right to boycott those merchants—and hence to disassociate themselves from their racist activities. Of course, the Faculty Members retain their freedom to speak, but that is no justification for depriving them of their constitutionally protected freedom of association.

Nor does it make any difference *whose* speech is involved when a military recruiter tells a Yale law student that her sexual orientation renders her unfit to serve in the armed forces. The Faculty Members' right to disassociate themselves from the military's discriminatory recruitment and employment practices is in no way dependent on anything that any particular interviewer might say in any

particular interview. If the DOD's coercive threats violate the Faculty Members' right of disassociation, it does not matter if those threats are deemed in some sense to be "government speech" under the recent expansion of that doctrine in *Johanns v. Livestock Mktg. Ass'n*, __U.S.__, 125 S. Ct. 2055 (2005).

Nor does it matter that students and others will not likely attribute the DOD's discrimination to the Yale Law School. The point of *Claiborne* is that the act of disassociation is, itself, a powerful tool of expression and protest deserving of constitutional protection. The Faculty Members have a constitutional right to disassociate themselves from governmental practices they deem immoral, whether those practices are attributed to them or not.

Similarly, the DOD seeks to brush aside this Court's holdings in *Dale* and *Hurley*, which recognize the First Amendment protection afforded to private associations that express themselves by exercising their rights to disassociate.[7] The DOD would limit *Dale* to: (1) cases involving membership in an association; and (2) cases where the presence of an unwanted member may result in an attribution of that member's views to the association. (DOD Brief at 18-25). But as *Claiborne* makes clear, neither limitation applies

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[7] The Faculty Members believe that the *Dale* case was wrongly decided because it upheld the Boy Scouts' ability to discriminate against Mr. Dale based on his mere presence and sexual orientation, as opposed to his conduct. The Faculty Members look forward to the day when the law's protections of our citizens' rights to equal respect and dignity will be accorded to gays, lesbians, and bisexuals as they have been to other historically disfavored minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities" "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and hence legislation that affects such minorities "may call for a correspondingly more searching judicial inquiry"). But if *Dale* and *Hurley* articulate the Court's current views concerning the relationship between an institution's freedom of association and its right to disassociate from activities which conflict with its values, those views must be as fully applicable to law schools as they are to the Boy Scouts.

when a group exercises its right to disassociate itself from another institution whose practices it finds offensive to the association's values. The merchants who were boycotted by the NAACP and its supporters were obviously not members of the NAACP. Nor did the NAACP's right to boycott those merchants rest on the potential attribution of the merchants' racial views to the NAACP. *See Claiborne*, 458 U.S. 886.

In any event, Mr. Dale's mere presence did not intrude more deeply on the Boy Scouts' core values than has the DOD's coercive conscription of Yale's assistance in discriminatory recruitment. As Justice Stevens pointed out in *Dale*, no one claimed that Mr. Dale was proselytizing or advertising his sexual orientation when serving as a Boy Scout leader. 530 U.S. at 689-91 (Stevens, J., dissenting). Nevertheless, Mr. Dale's mere presence was deemed sufficient to trigger the Boy Scout's right to exclude him. By contrast, in the *Burt* case, the Faculty Members are attempting to prevent the actual commission under Law School auspices of discriminatory acts that demean their gay, lesbian, and bisexual students—acts explicitly condemned by the Yale Law School's Nondiscrimination Policy. Coercing the Faculty Members' cooperation in such discriminatory conduct damages the Yale Law School's values far more than Mr. Dale's mere presence damaged the Boy Scouts.

In *Dale*, this Court said: "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression". 530 U.S. at 653. This Court should similarly defer to Yale's Nondiscrimination Policy, which leaves no room for doubt as the Faculty Members' views:

> "Yale Law School reaffirms its policy against discriminatory employment practices. The Law School does not countenance any form of discrimination . . . ". (*Burt* Pet. at 10).

There is no basis for this Court to apply a narrower concept of a law faculty's right to disassociate from discriminators

than it has applied to those who choose to discriminate against gay, lesbian, and bisexual persons.

Finally, this Court's decisions in *Sweezy*, *Bakke*, *Ewing* and *Grutter*, *supra*, all recognize that academic freedom is a matter of special concern of the First Amendment and that deference should be accorded to the autonomous decision-making by the academy. These decisions clearly mandate judicial deference to the Faculty Members' judgment that they must disassociate themselves from the military's discriminatory recruitment practices to protect the core values of the Yale Law School.

III. THE DOD FAILED TO INTRODUCE ANY EVIDENCE THAT ITS RECENT COERCIVE CONDUCT IS NECESSARY TO ACHIEVE ANY GOVERNMENTAL PURPOSE.

In *Burt v. Rumsfeld*, Judge Hall found that the DOD had failed to introduce any evidence that its recent coercive conscription of CDO services was necessary to achieve any governmental purposes. She held:

> "Here, DOD has offered no proof that the Solomon Amendment is the least restrictive means by which the Congress can successfully raise and maintain an effective military . . . . Despite the fact that any information on military recruiting successes and failures is uniquely within the control of the military, DOD has offered no evidence that either (1) the number of recruits it obtained prior to the suspension [of the Yale Law School's Nondiscrimination Policy ("NDP")] was insufficient, or (2) that implementation of the Solomon Amendment, in the form of the suspension of the NDP, has increased, or is even likely to increase the number of those recruits. In fact, the only reference made to any success or failure of recruiting in this litigation is the military's admission that in the more than two years the NDP has been suspended, it has obtained

> only one recruit and that this recruit did not come to the military via the CDO program." (App. A44, A46).

The DOD introduced no evidence in either the *Burt* case or the *FAIR* case that its recent coercive conduct has furthered any legitimate interest in recruiting lawyers. For more than twenty years—including seven years after the Solomon Amendment was passed—the DOD recruited law students at the Yale Law School and law schools throughout the country under arrangements which permitted access and information sufficient for legitimate recruiting needs. (App. A15-24). During that time, the DOD did not coerce law schools to abandon the evenhanded application of their nondiscrimination policies to all employers. At no time during the enactment or subsequent modification of the Amendment were any findings made by Congress that could establish that the DOD's suppression of the law schools' protest against military discrimination was either (1) necessary to attain a compelling government interest (as required by *Dale*, 530 U.S. at 659); or (2) the minimum restriction of First Amendment freedoms necessary to further a governmental interest (as required by *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

In the cases now before this Court, the DOD introduced no evidence that its recruiting of lawyers was either inadequate before its recent coercive conduct, or improved because of it. To the contrary, as Judge Hall found, the only evidence in the *Burt* case proved that the DOD's coercion resulted in no benefit to the Government's recruiting efforts. (App. A45-46).

The DOD's failure of proof means that its recent coercive conduct cannot be justified, whether one applies the strict scrutiny test applied by *Dale*—that the conduct constitutes the least restrictive means of achieving a compelling government interest—or the test applied by *O'Brien*—that the restriction of First Amendment freedoms be "no greater than essential to the furtherance of the governmental interest". 391 U.S. at 377.

Judge Hall correctly decided that the DOD's conduct in these cases is subject to strict scrutiny. (App. A41-46, A54-55). The DOD offers no principled distinction between these cases and *Dale*, in which this Court held that "the intermediate standard of review set forth *United States v. O'Brien* . . . is inapplicable". 530 U.S. at 659. The DOD's actions in forcing the Faculty Members to exempt the military from its Nondiscrimination Policy affects their associational rights in a manner at least as direct and immediate as the impact of Mr. Dale's mere presence in the Boy Scouts. Nor can the DOD escape strict scrutiny by drawing a line between "speech" and "conduct", because the conduct in these cases—the Faculty Members' disassociation from and protest against military discrimination—is itself an activity protected by the First Amendment. *See, e.g., Claiborne*, 458 U.S. 886; *Thornhill*, 310 U.S. 88; *Missouri v. NOW*, 620 F.2d 1301.

In its Brief, the DOD relies on three arguments to justify its recent coercion. First, relying solely on Justice O'Connor's opinion in *United States v. Albertini*, 472 U.S. 675 (1985) (a case involving access to military bases), the DOD asserts that all it need prove is that recruiting was more effectively achieved by its conscription of law school recruiting services than by the less intrusive methods previously followed. (DOD Brief at 35-36). But as Justice O'Connor has elsewhere written, citing *Albertini*, when the Government acts to suppress First Amendment values "the availability of less intrusive approaches to a problem serves as a benchmark for assessing reasonableness of the fit between Congress' articulated goals and the means chosen to pursue them". *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 253 (1997) (O'Connor, J., dissenting) (quoting *Albertini*, 472 U.S. at 689).[8]

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[8] *Albertini* arose from Mr. Albertini's prosecution for violating an order he had received barring him from entering the Hickam Air Force Base because he had vandalized military property during an earlier visit. *See* 472 U.S. 675. Nothing in the Court's decision upholding that

Second, the DOD asserts that its recent conduct is justified by Congress's judgment that "the military's recent success in recruiting talented high school and college candidates was 'in large part due to recruiting on school campuses'". (DOD Brief at 35-36) (quoting 140 Cong. Rec. 11,438 (1994)). But on its face, this statement refers to the recruiting of high school graduates and college students, not lawyers. Although the statement was made in 1994—sixteen years after the Yale Law School began denying military recruiters assistance through its recruiting services—it makes no claim that such practices harmed military recruiting of JAG lawyers. Most important, the statement clearly cannot support any claim that the DOD's recent coercive conduct at the Yale Law School is "no greater than essential to the furtherance of the [DOD's] interest". *O'Brien*, 391 U.S. at 377.

Third, the DOD asserts that "the Solomon Amendment relies on the educational institutions' own assessments of what is required for effective recruiting . . . ". (DOD Brief at 40). But the Yale Law School directs employer recruiting to a hotel off campus not to optimize employers' effective recruiting, but to limit employers' disruption of the Law School's educational mission. As described above, from 1978 to 2001, the Yale Law School and DOD followed a *modus vivendi* whereby DOD successfully recruited Yale students by having access, but not active assistance, from the Law School's Career Development Office. The DOD has made no factual showing why this *modus vivendi* did not serve, or could not be made to serve, all of the DOD's legitimate recruiting aims.

In sum, the DOD's recent suppression of the law schools' disassociation from military discrimination against gay, lesbian, and bisexual students is far more restrictive than necessary for achieving governmental objectives. Whether

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prosecution suggests that the DOD is not obligated to ensure that actions impinging on First Amendment values be no greater than essential to furtherance of the governmental interest.

under the test in *O'Brien* or under the more searching standard of *Dale*, the DOD has utterly failed to show that it has taken all available steps to minimize its intrusion into Faculty Members' constitutional rights.

CONCLUSION

Neither the Solomon Amendment nor the First Amendment authorizes our military to invade academic freedom, to force law schools to associate with the military's discriminatory practices, or to use coercive tactics that are unnecessary for effective military recruiting. For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit in *FAIR v. Rumsfeld* should be affirmed.

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Respectfully submitted,

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Counsel for Amici Curiae

Appendix A

List of Amici

Amici, each of whom is a member of the faculty of the Yale Law School, are as follows:

Robert A. Burt
Owen M. Fiss
Harold Hongju Koh
Kenji Yoshino
Bruce Ackerman
Anne L. Alstott
Ian Ayres
Jack M. Balkin
Yochai Benkler
Richard R.W. Brooks
Amy L. Chua
Morris L. Cohen
Dennis E. Curtis
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Alvin K. Klevorick
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