

No. 04-1152

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IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE  
October Term, 2005

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DONALD H. RUMSFELD, SECRETARY OF DEFENSE, et al.,  
*Petitioners,*

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, et al.,  
*Respondents.*

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

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**BRIEF FOR PETITIONERS**

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## **QUESTIONS PRESENTED**

1. Does the Solomon Amendment violate the compelled speech doctrine when it requires universities, as recipients of federal funds, to provide military recruiters equal access to campus recruiting activities?
2. Can law schools invoke the First Amendment right of expressive association to violate a federal law preventing barriers to military recruitment?

## **PARTIES TO THE PROCEEDINGS**

### **Petitioners:**

Donald H. Rumsfeld, Secretary of Defense;  
Margaret Spellings, Secretary of Education;  
Elaine Chao, Secretary of Labor;  
Michael O. Leavitt, Secretary of Health and Human Services;  
Norman Y. Mineta, Secretary of Transportation;  
Michael Chertoff, Secretary of Homeland Security.

### **Respondents:**

Forum for Academic and Institutional Rights;  
Society of American Law Teachers, Inc.;  
Coalition for Equality;  
Rutgers Gay and Lesbian Caucus;  
Pam Nickisher;  
Leslie Fischer;  
Michael Blauschild;  
Erwin Chemerinsky.

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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The opinion of the divided panel of the United States Court of Appeals for the Third Circuit is reported at *FAIR II*, 390 F.3d 219 (3d Cir. 2004). The opinion of the district court denying the motion for a preliminary injunction is reported at *FAIR I*, 291 F.Supp.2d 269 (D.N.J. 2003).

## **JURISDICTION**

The Court of Appeals entered its judgment on November 29, 2004. The petition for a writ of certiorari was filed on February 28, 2005 and was granted on May 2, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## **STATEMENT OF FACTS**

### **I. CONGRESS'S EFFORTS TO REMOVE BARRIERS TO MILITARY RECRUITING**

Over thirty years ago, amid the Vietnam War, the United States Congress recognized both the difficulty and the necessity of on-campus military recruiting. Finding 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,” Congress sought to reduce barriers to recruiting, H.R. Rep. No. 92-1149, at 54 (1972). It authorized the withholding of certain defense funds from schools that barred military recruiters from campus or otherwise eliminated ROTC programs. Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972); Department of Defense Authorization Act of 1971, Pub. L. No. 91-144, § 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).

By the 1990s, the Vietnam-era policy had become insufficient. Many educational institutions, though they did not technically bar recruiters from campus, continued to prevent the military from effective on-campus recruiting. Faced with the military’s continued need to attract top talent, Representative Gerald Solomon sponsored an amendment to the annual defense appropriation bill withholding defense funds from any institution with “a policy of denying, or which effectively prevents [recruiters from obtaining] (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, 2776 (1994).

The House passed the amendment by a wide majority, 140 Cong. Rec. H3861, at H3865 (daily ed. May 23, 1994), and the Senate quickly approved it as well.

Since 1995, Congress has amended the legislation several times. It now covers funds administered by the Departments of Labor, Health and Human Services, Education, and Homeland Security,<sup>1</sup> and includes DOD funds to parent institutions as well as sub-elements. 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); Ronald Reagan National Defense Authorization Act of 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). Congress has also codified the requirement that schools provide access “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.” *Id.*; 10 U.S.C. § 983(b)(1).

This legislation was necessary to ensure “military preparedness,” because “recruiting is the key to an all-volunteer military.” 140 Cong. Rec. H3861 (daily ed. May 23, 1994). By ensuring equal access to qualified candidates alongside other employers, the “Solomon Amendment,” as it is known, facilitates the recruitment of “the most highly qualified candidates from around the country.” *Id.*

## **II. ENFORCING THE SOLOMON AMENDMENT**

Throughout the long history of this policy, universities have often found particular military policies objectionable. For example, in the late 1960s, many colleges sought to exclude ROTC from campus out of opposition to the Vietnam War. *See e.g.*, Carla D. Williams, *A Campus in Revolt: the ROTC at Harvard during the 1960s*, Harv. Crimson, Apr. 23, 1983. Most

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<sup>1</sup> The Department of Homeland Security funds replaced Department of Transportation funds in 2002. Pub. L. No. 107-296, § 1704(b)(1), 116 Stat. 2314 (2002).

recently, some law schools have sought to exclude military recruiters from their recruiting programs because of their disagreement Congress' policy on military personnel, 10 U.S.C. § 654.

Popularly known as “Don’t ask, Don’t Tell,” this policy was enacted in 1993 with the support of the Clinton Administration. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (1993). While objectionable to some, the policy has withstood every challenge to its constitutionality. *See e.g., Able v. United States*, 155 F.3d 628 (2d Cir. 1998) (holding that 10 U.S.C. § 654 does not violate the Equal Protection Clause); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996) (holding that the policy does not violate the First Amendment).

Upon the introduction of the equal access policy, some law schools refused to comply with the Congressional mandate by denying military recruiters access to campus. *See e.g., J.A.* at 35, 44, 59. Other law schools permitted recruiters onto campus when invited by interested students but refused to allow military recruiters to participate in the school-sponsored interview programs. *See e.g., J.A.* at 128-33. In general, Respondent law schools sought to avoid treating military recruiters the same as they treated law firms and other private-sector employers. In 2001, the military informed non-compliant schools of their status and reminded the schools of the consequences of continued non-compliance. *See e.g., J.A.* at 133. Since that time, DOD officials have continually sought to help all law schools achieve compliance. *See J.A.* at 112, 116, 121-23.

After prolonged delays, the law schools have all decided in favor of compliance. In order to do so, each school chose to suspend its non-discrimination policy as applied to the military. *See, e.g., J.A.* at 86; *see also FAIR I*, 291 F.Supp.2d at 284. Because all Respondent law schools

are in compliance with the terms of the Solomon Amendment, neither Congress nor the DOD has taken any action to withhold funds from any law school or parent university.

Compliance with the Solomon Amendment has resulted in more effective military recruitment. Recruiters who participated in the ordinary recruiting programs were better equipped to reach interested students, build rapport, and compete with other employers for top candidates. As a result, recruiters have been much more successful in hiring qualified candidates. *See, e.g.*, J.A. at 60 (citing increase in students hired by the military at University of Southern California Law School after 2001 compliance).

Meanwhile, compliance has had no significant effect on the ability of the law schools and their community members to voice disagreement with the “Don’t Ask, Don’t Tell” policy. Each law school has taken a series of steps to ensure that its view is clearly understood. Faculty and students have participated in protests and lectures, hung posters, distributed flyers and emails, and worn pins to express their objections to the Congressional policy. *See* J.A. at 244. The government has never interfered with this conduct. *See* J.A. at 159; J.A. at 173.

### **III. THE OPINIONS BELOW**

In September 2003, Respondents sued the Department of Defense and the other federal departments to which the Solomon Amendment applies. Respondents’ request for a preliminary injunction was denied. The District Court found that any effect on First Amendment interests is “incidental” and that the Solomon Amendment does not condition funding on the exercise of First Amendment freedoms. *See FAIR I*, 291 F. Supp. 2d at 299. The District Court also denied the defendants’ motion to dismiss for lack of standing. *Id.* at 296. The Third Circuit reversed over the dissent of Judge Aldisert, who stated that his “disagreement is with the all-pervasive

approach that this is a case of First Amendment protection in the nude. It is not.” *Id.* at 246-47.  
This appeal followed.

### **SUMMARY OF ARGUMENT**

A law school cannot claim a free speech or free association right to evade the requirements of the Solomon Amendment. Breaking the law does not become acceptable simply because a lawbreaker acts for expressive reasons.

The Solomon Amendment is a constitutional exercise of Congress’s spending power. This Court affords Congress “wide latitude” to pursue policy objectives when it appropriates funds, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), including objectives it could not constitutionally pursue under its other enumerated powers. *American Library*, 539 U.S. at 203. Congress thus regularly imposes conditions on federal spending. Like the Solomon Amendment’s equal access requirement, these conditions are frequently enacted long after the spending provisions they affect, and they tend to affect diverse sources of federal funding. In the context of education,, Congress regularly applies spending conditions to the entire university.

The Solomon Amendment is not barred by the doctrine of unconstitutional conditions, because it regulate anything that Congress “could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). In particular, it does not ask Respondents to relinquish First Amendment rights: It neither compels speech nor violates the freedom of expressive association.

A requirement that law schools grant military recruiters equal access alongside private-sector employers at recruiting events does not constitute compelled speech. The Solomon Amendment regulates conduct, not speech, and it has not affected Respondents’ ability to express their opposition to the Congressional “Don’t Ask, Don’t Tell” policy. Recruiting is not expressive behavior, but even if it were, the message of a lone military recruiter could not be

attributed to the law schools. Most critically, the compelled speech doctrine is not relevant where, as here, a law primarily serves a nonspeech interest. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Nor does the equal access requirement violate the Respondents' freedom of expressive association. The relationship between a recruiter and a law school would not install the recruiter in a critical leadership role, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), or even a membership role. Moreover, that relationship is not expressive in character; it is economic. Providing equal access does not impair the ability of law schools, as expressive associations, to express whatever message they choose.

Although the Solomon Amendment can withstand even the highest level of scrutiny, the Court should apply only rational-basis scrutiny in its analysis. Applying intermediate scrutiny, as in *United States v. O'Brien*, 391 U.S. 367 (1968), would be inappropriate here because the choice to violate the law is not sufficiently expressive under the objective standard this Court has established. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

The First Amendment does not bar the application of this critically important law to Respondent law schools. Unless one approaches this case "as an academic exercise . . . or a moot court topic, with no thought of [its] effect" on the nation's military, *FAIR II*, 390 F.3d at 255 (Aldisert, J. dissenting), no other conclusion is sound.

## **ARGUMENT**

### **I. THE SOLOMON AMENDMENT IS A VALID EXERCISE OF THE SPENDING CLAUSE.**

Congress's power to enact the Solomon Amendment derives not only from the Army and Navy Clauses, U.S. Const., art. 1, § 8, cl. 12-14, and the Necessary and Proper Clause, *id.* § 8, cl.



18, but also from the Spending Clause, which empowers Congress to “provide for the common Defence and general Welfare of the United States.” *Id.* § 8, cl 1. Congress possesses “wide latitude” under the Spending Clause to pursue policy goals by selectively or conditionally disbursing funds to private and public parties. *United States v. American Library Ass’n*, 539 U.S. 194, 203 (2003). The Solomon Amendment easily falls within Congress’s spending power.

**A. Congress has broad constitutional authority to pursue policy objectives by selective spending.**

Congress has “wide latitude” to pursue policy goals under the Spending Clause. *Dole*, 483 U.S. at 206; *American Library*, 539 U.S. at 203. “[T]he constitutional limitations on Congress when it exercises its spending power are less exacting than those on its authority to regulate directly.” *Dole*, 383 U.S. at 209. Congress may choose among policy alternatives in funding and may even decide “not to subsidize the exercise of a fundamental right.” *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983). Congress may insist “that public funds be spent for the purposes for which they were authorized.” *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). For example, Congress may choose to subsidize family planning services but not abortion counseling; and it may forbid recipients of family-planning funding to engage in abortion counseling. *See Rust*, 500 U.S. at 173.

Congress may also “attach conditions to the receipt of federal assistance in order to further its policy objectives,” even if it could not constitutionally fulfill those objectives by direct legislation. *American Library*, 539 U.S. at 203. In *American Library*, Congress provided funding to local libraries to provide internet access, but it conditioned that funding on the libraries’ installment of software to block access to pornographic websites. The Court upheld the condition, reasoning that, even if libraries had First Amendment rights to offer access to pornographic websites, funding conditioned on nonexercise of that right would still be

acceptable. *See id.* at 211-12 (“[E]ven assuming that [the libraries] may assert an ‘unconstitutional conditions’ claim, this claim would fail on the merits.”).

This Court has upheld spending conditions even when they impose significant disincentives to engage in protected expressive behavior. *See, e.g., Lyng v. UAW*, 485 U.S. 360 (1988) (upholding a statute that withheld food stamps from striking workers). As long as the funding withheld was not initially allocated to “facilitate private speech” or create a forum, Congress may even use funding conditions to pursue its own expressive goals. *See American Library*, 539 U.S. at 213 n.7; *Rust*, 500 U.S. at 173; *Compare Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

When Congress acts without an expressive purpose but imposes a condition that incidentally affects one’s subjective, idiosyncratic expression, the condition is fully constitutional. For example, Title IX, codified at 20 U.S.C. § 1681(a), prohibits sex discrimination in education programs which receive federal funding. In implementing the statute, the Department of Education requires each school to sign an Assurance of Compliance, stating that it does not discriminate on the basis of sex. In *Grove City College v. Bell*, 465 U.S. 555 (1984), a small private college wished to refrain from making such a statement. The college did not intend to discriminate, but it objected to signing a government-mandated statement due to its “deeply held beliefs regarding the proper role of the individual, government and private education.” 687 F.2d 684, 701 n.29. When the school sought First Amendment protection, the Court found that its claim warranted “only brief consideration”:

Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. . . . Grove City may terminate its participation in the [federal financial aid] program and thus avoid the requirements of [Title IX]. . . . Requiring Grove City to [sign the declaration as a condition of] participat[ing] in the [federal grant] program infringes no First Amendment rights of the College or its students.

*Id.* at 575-76. Likewise, in this case, the universities are free to terminate their participation in federally-funded programs, thereby avoiding the requirements of the Solomon Amendment.

That these universities have grown accustomed to the receipt of federal funds does not alter this conclusion. Just as Congress need not fund student aid to attend a college that refuses to sign a nondiscrimination pledge, likewise, Congress need not fund research, aid, or anything else at a university that refuses equal access to military recruiters.

In short, “there is no assumption . . . that [universities] must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.” *American Library*, 539 U.S. at 213.

**B. Conditions on spending programs may relate broadly to the purposes of those programs, and the Solomon Amendment serves interests sufficiently related to educational funding.**

A spending condition must serve a governmental interest related to the affected spending program. The Solomon Amendment easily meets this “relatedness” burden.

In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court relied on Congress’s spending power to uphold a law directing the Secretary of Transportation to withhold federal highway funds from states failing to adopt a minimum age of twenty-one years for the purchase or public possession of alcoholic beverages. The *Dole* Court discussed the required degree of “relatedness” between a spending condition and the objectives of the conditioned funds. *Id.* at 209. The Court evaluated the relationship between the drinking-age condition and the highway funding program. Since one objective of federal highway funding was to encourage “safe interstate travel” and the government believed that the objective had been “frustrated” by the ability of young people to drink and drive, the Court reasoned, the condition imposed by the new law was sufficiently “related” to the grant of federal highway funding. *Dole*, 483 U.S. at 208-09.

Lest the degree of relation acceptable to the *Dole* Court be overstated: The Court held that because the government funds highway construction, it can require a ban on underage drinking.

The degree of relatedness between the Solomon Amendment and federal education funding is at least as great as that between the drinking age and highway funding. One goal of federal educational funding is to ensure that “colleges and universities . . . provide for the full spectrum of opportunity for various career fields, including the military field.” H.R. Rep. No. 92-1149, at 79 (1972). This goal is frustrated if students are not exposed to military opportunities alongside private sector jobs. The Solomon Amendment’s equal access provision directly advances such exposure. Indeed, “[s]uccessful recruiting requires that Department of Defense recruiters have reasonable access to students on the campuses of colleges and universities, and at the same time have effective relationships with the officials and student bodies of those institutions.” J.A. at 104.

Moreover, the funding conditions in federal antidiscrimination laws demonstrate another form of relatedness. “Title VI [of the Civil Rights Act of 1964] was enacted on the proposition that it was contrary . . . to the ‘moral sense of the Nation’ to expend federal funds in a racially discriminatory manner.” *Cannon v. University of Chicago*, 441 U.S. 677, 720 (1979) (White, J., dissenting). *See also* 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting President Kennedy’s message of June 19, 1963) (“Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”). The Solomon Amendment, likewise, represents a Congressional judgment that the decision to “spend monies at colleges and universities which . . . bar military recruiters” would be amoral or irresponsible and that justice requires that “defense monies for educational and research programs should not be spent at these institutions.” H.R.

Rep. No. 92-1149, at 79-80 (1972). In short, requiring universities to accommodate DOD recruiting efforts is sufficiently related to the goals of educational funding.

**C. Congress may limit its spending without creating a spending program.**

There is no merit in the Court of Appeals' conclusion that the Solomon Amendment cannot qualify as valid selective spending merely because it "does not create a spending program," *FAIR II*, at 229 n.9. A condition on spending need not be enacted at the same time as the related spending program, and it need not affect a single source of funds. Like the Solomon Amendment, the condition on highway funding in *Dole* threatened to affect a large category of federal grants. The condition was enacted in a separate bill, years after the establishment of the funding programs affected. Pub. L. No. 98-363, § 6(a), 98 Stat. 437 (1984). And it applied to funding from a number of related spending programs. *See* 23 U.S.C. § 158(a)(1) (listing the sections of Title 23 affected by the condition). The Court found these conditions acceptable as selective spending. *See also Harris v. McRae*, 448 U.S. 297 (1980) (upholding conditions on Medicaid spending enacted eleven years after general Medicaid legislation).

Likewise, Title IX, the landmark legislation barring sex discrimination in higher education, was passed long after the funding it effects, Pub. L. 92-318, Title IX, June 23, 1972, 86 Stat. 374, and those funds come from a variety of sources, 20 U.S.C. § 1682 (2005) (applying to every "grant, loan, or contract" from "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity"). By the Court of Appeals' faulty logic, Title IX would impose unconstitutional conditions because of the time lapse. Of course it does not: Title IX is a valid exercise of Congressional discretion under the Spending Clause. *Cannon v. University of Chicago*, 441 U.S. 677, 708-09 ("[I]t is the

expenditure of federal funds that provides the justification for this particular statutory prohibition.”)

**D. Conditions on spending may properly apply to the entire university.**

The Court of Appeals also erroneously concluded that the selective spending doctrine would permit a law affecting a “particular spending program” but not one that might cause “loss of general funds,” *FAIR II*, 390 F.3d at 229 n.9. That conclusion is without legal basis:

Conditions on spending may, and often do, apply to entire universities that accept federal grants.

For example, in the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), Congress provided that its antidiscrimination conditions would apply to funds distributed to an entire institution. *See* 20 U.S.C. § 1687(2)(A) (defining “program or activity” as an entire “college, university, or other postsecondary institution, or a public system of higher education” for purposes of sex and blindness discrimination spending condition). Federal courts employing this provision have applied it broadly without hesitation about the constitutional implications. *See, e.g., Leake v. Long Island Jewish Medical Center*, 695 F.Supp. 1414, 1416 (E.D.N.Y. 1988); *King v. Board of Control of Eastern Michigan University*, 221 F.Supp.2d 783 (E.D. Mich. 2002); *Cook v. Colgate University*, 802 F.Supp. 737 (N.D.N.Y. 1992); *Communities for Equity v. Michigan High School Athletic Ass’n*, 80 F.Supp.2d 729 (W.D. Mich. 2000).

These cases reached the correct outcome. A university is the proper unit of coverage for the Solomon Amendment because each university exercises controlling authority over all of its subparts, including its law school. As might be expected, university administrators played crucial roles in negotiating with the DOD and, eventually, ensuring compliance. *See, e.g., J.A.* at 81-93 (describing Yale University President Richard Levin’s role). And the universities, by and large, receive the bulk of federal funds. “[T]he recipient’s acceptance of the funds triggers

coverage under the nondiscrimination provision.” *U.S. Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 605 (1986). See *Grove City*, 465 U.S. at 563-70 (concluding that the college was a proper defendant under Title IX because it had obvious control over financial aid program receiving federal grants); *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 272 (6th Cir. 1994) (holding that athletic association was properly sued under Title IX where it controlled athletic programs that received federal financial assistance). See generally *Communities for Equity v. Michigan High School Athletic Ass’n*, 80 F.Supp.2d 729, 734 (W.D. Mich. 2000) (describing the “controlling authority” theory of acceptable breadth of spending conditions).

**E. The Solomon Amendment does not impose unconstitutional conditions on Respondents.**

The spending power is limited by 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,” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), or “produce a result which [it] could not command directly,” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). See also *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). As Sections II and III demonstrate, requiring equal access for military recruiters would not infringe Respondents’ “constitutionally protected interests,” *Perry*, 408 U.S. at 597, because such a policy does not violate Respondents’ freedom of speech or expressive association. The Solomon Amendment is thus well within Congress’s power to “command directly.”<sup>2</sup>

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<sup>2</sup> Oddly, the Court of Appeals characterized the selective spending doctrine as an “exception to the unconstitutional conditions doctrine.” *FAIR I*, 291 F. Supp. 2d at 229 n.9. Whether that was ever a correct characterization, the reverse is closer to reality today. The selective spending doctrine has come to reflect the Court’s recognition that, in the modern regulatory state, federal laws frequently encourage or discourage the exercise of certain rights. See Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U. L. Rev. 593, 593-94, 596-97 (1990); see also *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting) (The doctrine of unconstitutional conditions “has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.”). As the selective spending cases in Sections

## **II. THE SOLOMON AMENDMENT DOES NOT COMPEL RESPONDENTS TO EXPRESS OR ENDORSE A GOVERNMENT MESSAGE.**

As the following Section demonstrates, the Solomon Amendment does not violate this Court's compelled speech doctrine. It imposes no expressive requirement on Respondents. Moreover, since its purpose is not to compel agreement or endorsement of any government policy, this case is distinguishable from the Court's major compelled speech cases.

### **A. Respondents are not required by the Solomon Amendment to express, or refrain from expressing, any message.**

#### **1. The terms of the Solomon Amendment require access and not speech.**

The terms of the Solomon Amendment impose only conduct requirements, not speech requirements. The law ensures that military recruiters are granted "access to campuses, or access to students . . . equal in quality and scope to [that] provided to any other employer" as well as access to student information. 10 U.S.C. § 983(b) (2003). It does not mention any speech concerns whatsoever; institutions accepting federal aid, including the law school Respondents, remain free to express their views on any matter of public policy, including the Congressional policy on military hiring.

The primary interest served by the Solomon Amendment is a nonspeech interest: The military must staff its Judge Advocate General ("JAG") program at a time when the nation is at war. As Representative Solomon asserted, the Amendment ensures that the armed forces can locate and attract "the most highly qualified candidates from around the country." 141 Cong. Rec. E13-01 (Jan. 4, 1995). "Recruiting," he explained, "is the key to an all-volunteer military." 140 Cong. Rec. H3861 (daily ed. May 23, 1994). Recruiting is particularly crucial for highly

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I.A-I.E demonstrate, even if the Solomon Amendment raises marginal First Amendment questions, it is still a valid exercise of Congress's spending power.



qualified lawyers, for whom the military must compete with deep-pocketed law firms eager to hire top students.

Nor does the Amendment's chosen means—a requirement of equal treatment alongside law firms and other employers—evinced some hidden expressive purpose. *Compare Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (describing as unconstitutional a regulation with the “plain purpose of penalizing” First Amendment activities). The equal treatment requirement represents Congress's recognition that “what's good for the goose is good for the gander.” Legal employers have established, over years of trial and error, a sophisticated system for attracting talented lawyers. Congress has simply required that the military follow these time-tested practices in recruiting personnel. *See* J.A. at 104.

If an institution were to violate the terms of the Solomon Amendment, that institution would risk loss of funds *regardless of whether its behavior were expressive*. There are a variety of reasons a university or law school might choose to limit military recruiters' access, many of which are entirely nonexpressive. *Cf. O'Brien*, 391 U.S. at 385 (ban on draft card destruction will prohibit both expressive and non-expressive acts). For example, a law school might attempt to save money and space by excluding employers whose presence is not cost-justified—or even by excluding employers by lot. If the military were excluded for those nonexpressive reasons, the university would still lose its federal funds, even though the law school's motivation was purely economic. Any effects of the Solomon Amendment on expressive behavior are merely incidental. *Id.* at 376. In sum, the Solomon Amendment has no expressive agenda and imposes no expressive requirement. It is not a law about speech.

## **2. Law schools continue freely to express their opposition to the Congressional policy on military hiring.**

The DOD has not imposed any speech requirement on any of Respondents. Although the record in this case provides detailed accounts of the interactions between the law schools and the military, there is no evidence that the DOD attempted to suppress or compel any expression.

Since long before the passage of the Solomon Amendment, Respondents have continually voiced their disagreement with Don't Ask, Don't Tell. The equal treatment requirement has posed no barrier to this expression. Rather, each Respondent law school has taken what they regard as ameliorative steps. Such steps include educational programs, "teach-ins," faculty and student demonstrations. *See generally* J.A. at 224; *cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) ("[Appellants] could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.") At NYU, for instance,

[e]ach time the military recruiters came to campus, the [Office of Career Counseling and Placement] posted "ameliorative" statements advising students that the military recruiters had not signed the non-discrimination policy usually required by the Law Faculty. Other ameliorative measures include letters from the Dean and the faculty to the community, distribution of educational materials, protest resolutions by the Student Bar Association, educational programs, festooning the Law School with rainbow bunting, and faculty and staff distribution of rainbow ribbons to students.

J.A. at 157-58. *See also*, J.A. at 39-42, 159, 244 (describing similar behavior at other Respondent law schools). If anything, these protests have continued with increased vigor.

No law school has faced sanctions or even an unfriendly governmental response as a result of this speech. Quite the contrary. Military officials know protests are likely to occur but express no judgment on them. The exchanges between the DOD and the law schools demonstrate that the government is both tolerant and accommodating of the law schools'

expressive demonstrations. *See, e.g.*, J.A. at 173 (Letter from Craig Merutka to Irene Dorzback) (“I was appreciative of the welcome I received from your office, particularly under the circumstances. Despite the protests, I feel the trip was a success.”).

Thus, the Solomon Amendment does not in any way “impermissibly prohibit[] the Plaintiffs . . . from expressing dissent” or penalize schools “that express their protest of and objection to the military’s discriminatory hiring and personnel policies.” J.A. at 27 (Second Amended Complaint). Nor does it force the law schools “to express and subsidize a message of support for the military . . . .” *Id.* Political dissent continues to thrive in our Nation’s schools.

### **3. Law schools’ recruiting activities are not First Amendment expression.**

Although the Solomon Amendment affects the conduct of law schools, it does not affect symbolic or expressive conduct. Recruiting activity and its preparation are economic activity, not protected speech. Thus, the compelled presence of military recruiters at career fairs and interview programs could not implicate this Court’s compelled speech doctrine.

Although it involves communication between students and potential employers, recruiting activity is a form of commercial transaction in which firms, nonprofits, and the government attempt to sell themselves to potential employees. At the same time, students showcase themselves to would-be employers. This type of transaction is subject to state and federal regulation, and that regulation receives only rational-basis review in this Court: “[G]overnmental regulation of the *commercial recruitment* of new members, stockholders, customers, or *employees* is valid if rationally related to the government’s ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635 (1984) (O’Connor, J., concurring) (emphasis added). “A lawyer’s procurement of remunerative employment” is communication “only marginally affected with First Amendment concerns.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 459 (1978). It

therefore “falls within the State’s proper sphere of economic and professional regulation.” *Id.*<sup>3</sup> See also *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting a commercial law firm’s claim to First Amendment protection for hiring and promotion practices).<sup>4</sup>

Of course, a conversation between a student and a recruiter might wander toward traditionally protected topics—reaching, for example, a discussion of the student’s political views or the employer’s advocacy for a particular cause. But, as the District Court correctly noted, “any such expressive content is ancillary to the practical and overriding purpose of recruiting—the hiring of future employees.” *FAIR I*, 291 F. Supp. 2d at 307.

Nor does a law school’s season of recruiting activities, viewed as a whole, “proclaim an overall message which could be destroyed by the presence of an individual recruiter.” *FAIR I*, 291 F. Supp. 2d at 308. Unlike the organizers of a parade, career development staff are not “making some sort of collective point” by assembling a group of employers. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995). There is no “overall message” inherent in an employment placement program; each employer does not “contribute something to a common theme.” *Id.* at 577. Unlike a parade, Respondents cannot seriously contend that “each unit’s expression is perceived by spectators as part of the whole.” *Id.* at 577. As every participant knows, each recruiter speaks solely on behalf of his or her employer. The District Court thus correctly found that “recruiting activities on a campus or at a job fair . . . are

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<sup>3</sup> Although the First Amendment affords some protection to commercial speech, see, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (affording some First Amendment protection for commercial advertising), communication in the course of an economic transaction, such as in the recruiting context, is not affected by that doctrine.

<sup>4</sup> The government does not abridge freedom of speech by regulating conduct merely because that conduct was “in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). As the Court pointed out in *Ohralik*, “[n]umerous examples could be cited of communications that are regulated without offending the First Amendment . . .” 436 U.S. at 456. Examples include the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968); corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and employers’ threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). These examples illustrate that “the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” *Ohralik*, 436 U.S. at 456.

far less expressive than a parade and other such highly expressive activities,” and “the presence of military recruiters is far less expressive than a contingent marching behind a banner.” *FAIR I*, 291 F. Supp. 2d at 308-09.

Respondents may act, at times, in ways that are expressive. For example, in their classrooms and throughout their extracurricular programs, they impart both knowledge and values to their students. But “[n]o association is likely ever to be *exclusively* engaged in expressive activities,” and “even the most expressive of associations is likely to touch, in some way or other, matters of commerce.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635 (1984) (O’Connor, J., concurring) (emphasis added). When the law schools host career fairs and arrange for placement interviews, they are doing just that. As such, “the effect on First Amendment interests in requiring law schools to open themselves up to military recruiters is . . . attenuated.” *FAIR I*, 291 F. Supp. 2d at 309. No special scrutiny is appropriate.

#### **4. No government expression is attributable to the law school.**

No governmental message can be attributed to any of the Respondents in this case. Such attribution would be counterintuitive. As the Court emphasized in *PruneYard*, when one person expresses his own views on another person’s privately owned and maintained property, “[t]he views expressed . . . will not likely be identified with those of the owner” so long as that property is open to the use of many parties. 447 U.S. at 86. In that case, the Court upheld a provision of California’s state constitution protecting speech and petitioning in large, privately-owned shopping centers. The Court reasoned that

as far as appears here [the owners] 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. Respondents have posted signs just like those the Court described in *PruneYard*. And they have gone further, distributing pins, holding rallies, protests, and teach-ins, and circulating emails “disclaim[ing] any sponsorship of the message.” *Id.*

Thus, a reasonable observer stumbling upon the military table at a law school career fair would be well aware that the recruiters are “communicating their own messages by virtue of [federal] law.” *Id.* at 87. *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997) (concluding that generic advertising by regulated fruit farmers was not attributable to the individual farmers); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655-56 (1994) (There is “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator” since “broadcasters . . . identify themselves at least once every hour . . . and . . . disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility”). No one seeing a law school ablaze with demonstrations and protest pins—or a law school “festoon[ed] with rainbow bunting”—could possibility attribute any government expression to that law school. J.A. at 158.<sup>5</sup>

The reasonable observer would be even more unlikely to conclude that a host law school somehow *endorses* the military hiring policy merely because it permits JAG recruiters to participate in a career fair or interview program. When a law school admits a traditional law firm onto campus to interview candidates for employment, the host law school does not thereby endorse the firm’s policy on, say, lockstep compensation or representing tobacco interests.

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<sup>5</sup> The speech of military recruiters is no more attributable to their hosts than the content of a Christian magazine is attributable to a university that funds student publications in a viewpoint-neutral way, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 841-42 (The “concern that Wide Awake’s religious orientation would be attributed to the University is not a plausible fear” and “there is no real likelihood that the speech in question is being either endorsed . . . by the State”), or the evangelical film shown in a classroom at night is attributable to a school district that makes its buildings available for civic and recreational uses, *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395(1993) (“[T]here would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed.”). *See also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (an open forum does not confer “imprimatur” of university approval on a group eligible to use its facilities).

Exercising the common sense of the observer in *PruneYard*, no one could possibly believe that a law school endorses the policies of the employers it hosts.

Neither the expression of a governmental message nor the endorsement of its policies can be attributed to law schools hosting military recruiters. As the Court concluded in *PruneYard*, the compelled doctrine “is inapposite.” 447 U.S. at 87. No speech is compelled and the First Amendment is not violated.

**B. The Solomon Amendment serves a governmental interest unrelated to expression.**

**1. The compelled speech doctrine prohibits only laws with an expressive purpose.**

Under its compelled speech doctrine, this Court has only struck down those laws whose primary purpose is to coerce expression of a particular message. In its foundational compelled speech case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court struck down the state’s requirement that schoolchildren salute the flag and recite the Pledge of Allegiance. A compulsory flag salute offends First Amendment principles, the Court explained, because it “requires affirmation of a belief and an attitude of mind.” *Id.* at 632-33. It allows the government to “prescribe what shall be orthodox in . . . matters of opinion” and to require “citizens to confess by word or act their faith therein.” *Id.* at 642. Indeed, compelling belief and expression about national loyalty is the only interest served by a flag salute statute.

The same has been true in every major compelled speech case since *Barnette*. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court struck down a New Hampshire law requiring the display of the state’s “Live Free or Die” motto on all license plates. The main purpose of that statute was to compel affirmation of a belief—in the form of “mobile billboard[s] for the State’s ideological message.” *Id.* at 715 (internal quotations omitted). Indeed, the Court stressed that

“the State’s *interest* is to disseminate an ideology.” *Id.* at 705 (emphasis added). In *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986), the Court disallowed a state regulation requiring a public utility to distribute a ratepayer-group’s message in the extra space of the utility’s billing statements. The regulation sought to compel the dissemination of a particular message. In *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974), the Court ruled that a state may not force a newspaper to provide equal editorial-page space to candidates it opposes. The law in question impermissibly compelled the publication of political opinion. And in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court struck down a regulatory scheme compelling mushroom handlers to contribute to a generic mushroom advertising campaign. Forcing participation in a communicative scheme was the explicit agenda of that requirement. *See id.* at 415 (stressing that advertising was “[t]he only program” served by the contributions).<sup>6</sup>

The Court’s cases in the regulated-markets context confirm that the key factor in compelled speech cases is *whether compelling speech is the main purpose of the law in question*. In striking down the compulsory advertising scheme in *United Foods*, the Court made clear that the scheme offended the First Amendment because it was “a program where the principal object is speech itself.” *Id.* at 415. By contrast, a compelled subsidy for speech is “permissible when it is ancillary, or ‘germane,’ to a valid cooperative endeavor.” *Id.* at 418 (Stevens J., concurring).

The *United Foods* Court distinguished *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), which upheld compelled contributions from nectarine, plum, and peach farmers that were used to support generic fruit advertisements. The *Glickman* majority stressed that the fruit farmers were already organized in a complex cooperative distribution scheme and that

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<sup>6</sup> In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court explained: “When the law is applied to expressive activity in the way it was done here, *its 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. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker’s autonomy forbids.” *Id.* at 578 (emphasis added).



compelled participation in the advertising program was “germane” to a broader, nonspeech goal. *Id.* at 473; *see also United Foods*, 533 U.S. at 415. Although the Court admitted that some parties were compelled to participate in a form of speech, some compulsion was acceptable so long as the primary purpose of the compulsion was not forced expression of a message. *See id.* at 473.

## **2. The Solomon Amendment primarily serves interests unrelated to expression.**

In contrast to every law overturned on compelled speech grounds, the Solomon Amendment does not aim to compel expression. It is thus distinguishable from the laws in *Barnette* and its progeny. The government neither conveys a message nor conscripts anyone else into doing so. The chief governmental interest served by the Amendment is not speech-related at all: it is the military’s need to recruit talented lawyers. *See supra* Section II.A.1.<sup>7</sup>

That the government’s interest is not expressive is plain from both the law’s requirements and the law schools’ behavior. The Amendment does not require law schools to express a particular view—or any view at all—on the Congressional policy on military hiring. It penalizes the failure to provide equal access *regardless* of the reason for that failure. And law schools remain free to express whatever message they choose. Virtually all have continued to express their opposition to the Don’t Ask, Don’t Tell policy. *See supra* Section II.A.1.

If the Solomon Amendment compels any expressive activity at all, eliciting that expression is certainly not the law’s chief goal. To whatever *de minimis* extent the law schools are forced to express a message by allowing recruiters onto their campuses, that expression is

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<sup>7</sup> While Respondents point to statements of individual congressmen indicating a different purpose, this Court has emphatically rejected “[i]nquiries into congressional motives or purposes [as] hazardous matter[s].” *See United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”)

merely “ancillary,” *United Foods*, 533 U.S. at 418 (Stevens, J., concurring), and “germane,” *Glickman* 521 U.S. at 473, to the fully permissible congressional goal of ensuring the military access to a critical talent pool. It thus would not trigger any form of heightened scrutiny.

### **III. THE SOLOMON AMENDMENT DOES NOT INTERFERE WITH RESPONDENTS’ FREEDOM OF EXPRESSIVE ASSOCIATION**

This Court’s expressive association doctrine does not extend to the relationship between military recruiters and Respondents. That relationship is not an expressive one, and it does not exhibit the characteristic traits of First Amendment association. Moreover, granting military recruiters access to a campus does not interfere with a law school’s expression of political dissent.

#### **A. The Solomon Amendment does not compel association or infringe the freedom to choose associates.**

When a military recruiter comes to campus to recruit, the recruiter and the law school do not form an association within the meaning of the First Amendment. As this Section demonstrates, the Court should not simply defer to Respondents’ claim that the Solomon Amendment compels a First Amendment association. It does not.

##### **1. The Solomon Amendment seeks equal access, not any kind of association.**

Nowhere in the text of the Solomon Amendment can one find a mandate for “association” of any kind. The statute merely requires that the law schools give “access . . . equal in quality and scope” to that given to other recruiters. 10 U.S.C. § 983(b)(1). Granting access does not require association: law schools must grant access to the police force and fire brigade, but such access does not constitute association.

Furthermore, law schools themselves determine the conditions under which they will host recruiters; the Solomon Amendment requires no more and no less than they choose to provide.

If a law school's job placement activity were limited to distributing law firm pamphlets or forwarding law firm emails, the Solomon Amendment would require no more.

**2. The Solomon Amendment does not require Respondents to admit any new members into their association.**

The Solomon Amendment does not infringe any associational freedom because it has no effect at all on membership in the law school communities. The government neither compels law schools to accept new members nor interferes with institutional decisions akin to membership admission or qualification.

The touchstone of the freedom to associate is the freedom to choose those *with whom* to associate. As a result, a party claiming a violation of that freedom must demonstrate the loss of control over the association's membership. *See e.g., Democratic Party of United States v. Wis.*, 450 U.S. 107, 122 (1981) (quoting Larry Tribe, *American Constitutional Law* 791 (1978)) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."). *See also NAACP v. Patterson*, 357 U.S. 449, 462-63 (1958) (describing infringement on association's ability to attract members);

The Government does not ask that Respondents accept military recruiters as members of their association.<sup>8</sup> Recruiters are on campus "only a few times per year." *FAIR I*, 291 F. Supp. 2d at 305. They do not partake in day-to-day life at the law school in the same way as students, faculty, and staff. *See e.g., J.A.* at 74. Most critically, military recruiters do not engage in any part of a law school's decision-making—even in those decisions about how to plan for a successful recruiting season. Yet the Court has stated in similar contexts that participation and influence in collective decision-making is a critical sign of membership. *See Democratic Party*

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<sup>8</sup> Webster's Dictionary defines "member" as "each of the persons composing a society, party, community or other body." *Webster's Encyclopedic Unabridged Dictionary* 894 (1989).

*v. LaFollette*, 450 U.S. 107, 122 (1981) (permitting government to dictate open primary selection of party membership “would seriously distort its collective decisions thus impairing the party’s essential functions.”); *see also Tashjian v. Republican Party*, 479 U.S. 208 (1986) (holding unconstitutional state restrictions on who could vote in party primary).

Only faculty members are voting members of the Respondent law schools, *see, e.g., J.A.* at 152 (describing NYU Law school faculty voting). Of course, students may have a membership-like relationship to the law school; they compose its everyday community, they typically elect student representatives, and they lead many extracurricular activities. But stretching the concept of “membership” to include military recruiters would distort both the concept of membership and the doctrine of expressive association.

Indeed, if the role of a military recruiter could properly be regarded as membership, then the military would already qualify as a member of many Respondent law schools whether or not they chose to provide equal access. Members of the military visit campuses frequently as speakers and alumni, *see J.A.* at 78 (Letter from Dean Barabara I. Safriet to Colonel Moore March 31, 1998); and military recruiters would still be permitted to meet with students, even on the law school’s premises, *see id.* (“If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus.”); *cf. Roberts*, 468 U.S. at 627 (noting that “the Jaycees already invites women to share the group’s views and philosophy and to participate in much of its training and community activities.”) If the concept of membership stretches this far, then the equal access requirement has hardly any affect on these membership decisions.

The doctrine of associational freedom simply does not extend this far. In fact, as the District Court underscored, “[t]he 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.” *FAIR I*, 291 F. Supp. 2d at 305.

**3. Military recruiters do not play a leadership or advocacy role in a law school association.**

Since the military recruiters are not even *members* of the law schools, it would be absurd to consider them *leaders* of the law schools. For that reason, *Dale* is not applicable here. In *Dale*, the Court affirmed that the freedom to choose its own leadership was central to associational freedom, for the leadership controls the association’s message. *Dale*, 530 U.S. at 653 (As a scoutmaster, Dale’s “presence in the Boy Scouts would, at the very least, force the organization to send a[n unwelcome] message. . .”).<sup>9</sup> The Solomon Amendment does not affect the ability of Respondent law schools to choose their own leaders. It does not, for example, mandate the hiring of military or pro-military faculty. Thus, unlike the forced inclusion of an “avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform,” the participation of military recruiters in law school recruiting activities would not “send a message, both to [its] members and the world, that the [school] accepts [the military policy] as a legitimate form of behavior.” *Dale*, 530 U.S. at 653.

**B. The relationship between a law school and a military recruiter is not an expressive relationship.**

The protections the First Amendment affords expressive associations do not extend to economic relationships. Recruiting relationships are economic and not expressive, irrespective of whether an expressive association, like a law school, is involved.

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<sup>9</sup> In this sense, *Dale* is best understood as the latest in a line of cases involving an expressive association’s ability to select its leadership. See e.g., *Democratic Party v. LaFollette*, 450 U.S. 107 (1981); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); see also *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“By regulating the identity of the parties’ leaders, the challenged statutes may also color the parties’ message and interfere with the parties’ decisions as to the best means to promote that message.”).

**1. The Court should not defer to Respondents but must decide for itself whether a given relationship is expressive.**

The Respondents' bare assertion that recruiting activities are protected as expressive association is insufficient to trigger further analysis of the Solomon Amendment. In determining whether a particular activity is protected by expressive association rights, the Court must examine "the extent to which [an] aspect of the constitutionally protected liberty is at stake in a given case," and analyze the nature of the relationship between the associated parties. *Roberts v. Jaycees*, 468 U.S. 609, 618 (1984) (O'Connor, J., concurring).<sup>10</sup> It must perform "a careful inquiry into the objective characteristics of the particular relationships at issue." *Duarte*, 481 U.S. at 547 n.6. The mere fact that a relationship involves "oral and written communication," *FAIR II*, 390 F.3d at 236, is insufficient to classify it as "expressive." *Cf. Ohralik*, 436 U.S. at 456 ("Numerous examples could be cited of communications that are regulated without offending the First Amendment . . .").

In short, this Court has refused to grant constitutional protection to every "selective process of inclusion and exclusion." *N.Y. State Club Ass'n*, 487 U.S. at 13. Even when an institution is an expressive association for certain purposes—as a law school is, *see FAIR II*, 390 F.3d at 231 ("A group that engages in some form of public or private expression above a de minimis threshold is an 'expressive association.'")—not every relationship it forms is protected. Certain relationships, such as those formed in "support of a political candidate," clearly fall "within the scope of the right of political association." *Sowards v. Loudon County, Tenn.* 203 F.3d 426, 432 (6th Cir. 2000) (Moore, J.) (citations omitted). But other relationships are not protected. *See e.g., Dallas v. Stanglin*, 490 U.S. 19 (1989) (gatherings of dance hall patrons).

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<sup>10</sup> Respondents have not claimed a violation of their rights of intimate association. It is clear that the law schools and Respondent organizations would not meet the Court's requirements for such claims. *See Duarte*, 481 U.S. at 537 (1987) (outlining criteria for intimate association).

Schools do not receive First Amendment protections for selective school admissions, much less for recruiting relationships. *See Runyon v. McCrary*, 427 U.S. 160 (1976).

Thus, the Court must examine the nature of the relationships formed between law schools and military recruiters “to see whether they are of a character which the principles of the First Amendment . . . protect.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (*quoting Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

## **2. A recruiting relationship is economic, not expressive.**

Far from the characteristics of expressive association, recruiting fairs and interview programs exemplify the paradigmatic features of functioning markets. *See Black’s Law Dictionary* 970 (6th Ed. 1990) (A market is a “place of commercial activity in which goods, commodities, securities, services, etc. are bought and sold.”); Adam Smith, *Wealth of Nations* 30-48 (4th ed. 1869) (describing the markets for the conversion of labor into wealth). Just as stocks and bonds are bought and sold on the floor of the New York Stock Exchange, jobs are offered and accepted at career fairs hosted by Respondent law schools. J.A. at 74-75 (describing the Fall Interview Program sponsored by Yale Law School at which “some 250 legal employers from all over the country and abroad register to interview students for summer and permanent positions.”) *See also Abood v. Detroit Bd. of Education*, 431 U.S. 209, 226 (1977) (concluding that collective bargaining relationship is not First Amendment association).

Like “large business enterprise[s],” recruiting events and interviews “seem[] remote from the concerns giving rise to [the free association] protection.” *Roberts*, 468 U.S. at 620 (explaining that First Amendment protections are strongest for forms of intimate association and weakest for commercial activity). Granting expressive association protection to employment fairs would not vindicate First Amendment interests but would “raise[] the possibility that certain

commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination.” *Roberts*, 468 U.S. at 63. (O’Connor, J., concurring); *see also N.Y. State Club Ass’n*, 487 U.S. at 20.

For the same reason, the Court has held that the First Amendment poses no barrier to the regulation of commercial association. “The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.” *Roberts*, 468 U.S. at 634 (O’Connor, J., concurring); *see also Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94 (1945) (holding that there is no constitutional right of association for an organization “which holds itself out to represent the general business needs of employees” to discriminate on the basis of race). *See also Dale Carpenter, Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515 (2001) (distinguishing between expressive and economic relationships in the Court’s associational freedom cases); David Bernstein, *Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale*, 9 Wm. & Mary Bill of Rts. J. 619, 626 (2001) (distinguishing *Dale* from *Runyon v. McCrary* on the basis that *Runyon* involved a “for-profit, commercially operated school” with weaker First Amendment protections).

Relationships forged in pursuit of legal employment have consistently been recognized as economic, not expressive. “A lawyer’s procurement of remunerative employment is a subject only marginally affected with First Amendment concerns.” *Ohralik*, 436 U.S. at 459. *See also Hishon v. King & Spalding*, 467 U.S. 69 (1983) (holding that a law firm may not claim an “expressive association” right to violate Title VII); *Roberts*, 468 U.S. at 637 (O’Connor, J.,



concurring) (The “result [in *Hishon*] would not have been altered by a showing that the firm engaged even in a substantial amount of activity entitled to First Amendment protection.”).

Some expression, of course, occurs during the recruiting process. Nevertheless, that “kernel of expression” is “not sufficient to bring the [relationship] within the protection of the First Amendment.” *Stanglin*, 490 U.S. at 25. Unlike proselytizing and soliciting, contexts in which relationships are formed chiefly for the advocacy of political and social causes, *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 631 (1980), recruiting relationships are formed chiefly for the purpose of matching employers with employees so that each can profit. And unlike parades and rallies, in which participants join together to make “some sort of collective point, not just to each other but to bystanders along the way.” *Hurley*, at 568, recruiters compete against each other for attractive candidates, and students likewise vie for attractive positions. In short, there is no merit to the conclusion of the Court of Appeals, that recruiting is an “obvious form[] of expressive activity.” *FAIR II*, 390 F.3d at 237.

**C. The Solomon Amendment does not disrupt the expressive message of Respondent associations.**

The Solomon Amendment does not infringe the rights of expressive associations to promulgate their chosen message or espouse controversial viewpoints. The infringement, if any, is indirect and insignificant.

**1. The Court should not defer to Respondents but must decide for itself to what extent an association’s expressive interests are infringed.**

In order to prevail on their expressive association claim, Respondents must demonstrate, not merely assert, that the Solomon Amendment impairs their ability to express their chosen message. This Court does not defer to a claim that an association’s message is infringed. To the contrary, in similar cases, this Court has undertaken an independent analysis of the level of

infringement, and that analysis has often been dispositive. *See, e.g., Roberts*, 468 U.S. at 627 (“There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”); *accord N.Y. State Club Ass’n*, 487 U.S. at 13-14; *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

This Court’s decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) is not to the contrary. Although the Court deferred to the Boy Scouts’ assertion of *in what way* its expression might be impaired, *see id.* at 653 (granting “deference to an association’s view of what would impair its expression”),<sup>11</sup> the Court independently analyzed the significance of the impairment. *See Dale*, 530 U.S. at 653-56 (analyzing the level of impairment before concluding that “the forced inclusion of Dale would significantly affect [BSA’s] expression”); *id.* at 653 (“That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”); *but see Democratic Party of United States v. Wis.*, 450 U.S. 107, 123-24 (1981) (refusing to “mediate the merits” of a dispute between the state and a political party over the infringement of party’s associational interests).

## **2. Respondents’ ability to espouse their chosen message is not impaired.**

“To be cognizable, an interference with associational rights must be ‘direct and substantial’ or ‘significant.’” *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (opinion by Newman, C.J.) (quoting *Lyng*, 485 U.S. at 366, 367 & n.5). While “inhibiting conduct might make it more difficult for individuals to exercise their freedom of association, this consequence does not, without more, result in a violation of the First Amendment.” *Id.* Where a

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<sup>11</sup> This much deference was necessary for consistency with the deference given to an organization’s definition of its own message, *id.* at 653.

law does “not affect ‘in any significant way’ the ability of individuals to form associations that will advocate public or private viewpoints,” no First Amendment harm is cognizable. *N.Y. State Club Ass’n*, 487 U.S. at 13 (quoting *Rotary*, 481 U.S. at 548). The purported infringement here is no more “significant” than the infringement at issue in the *Roberts* trilogy of cases, which the Court unanimously held to be insignificant. *See e.g., Duarte*, 481 U.S. at 549 (describing infringement as, at most, “slight”). No law school has been forced to change the content or dilute the conviction of any message it wishes to express. To the contrary, since the passage of the Solomon Amendment, Respondents have continually voiced their disagreement with the Congressional policy on military hiring. As discussed in Section II.A.2., every Respondent has continued to express its opposition unimpeded.

If any infringement could be imagined here, it is certainly “indirect.” Unlike “[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform,” *Dale* at 655-56, which would “directly and immediately affect[] associational rights,” *id.* at 659, the military recruiters do not seek the imprimatur of the law school or any of the other marks of acceptance. As discussed Section III.A.2. *supra*, no such forced membership exists here. *See also Lyng*, 485 U.S. at 360 (holding that denial of food stamps for striking workers does not “directly and substantially interfere” with their rights of association). Therefore, the level of infringement is minimal and does not rise to the level in *Dale*.

**D. The right of expressive association does not include unlawful conduct or civil disobedience.**

Respondents’ conduct is a basic form of civil disobedience. Refusal to comply with the law, “like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [is] entitled to no constitutional protection.” *Roberts*, 468 U.S. at 628; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) (“[V]iolent

conduct is beyond the pale of constitutional protection.”). Similarly, civil disobedience carries with it the consequences of violating the law; although noble, it garners no protection from the First Amendment. *See generally* Martin Luther King, jr., *Letter from a Birmingham Jail*, Apr. 16, 1963. When the students and faculty of the law school protest and petition the government to alter its military recruitment policy, those activities are clearly within the scope of the First Amendment’s guarantees. Refusal to comply with a statute passed by Congress is not.

“People constantly want to violate laws for expressive reasons.” For instance, “[d]iscrimination is profoundly expressive.” Jed Rubenfeld, *The First Amendment’s Purpose*, 767, 769 (2001). Respondent’s logic would permit any employer to avoid the mandates of Title VII by claiming First Amendment protection for its discrimination. Permitting Respondents’ claims of expressive association to excuse non-compliance with the Solomon Amendment would usher in a new era in First Amendment jurisprudence. It would employ one of the key tools of the Civil Rights Movement—expressive association doctrine—in a way that would dismantle the Movement’s key achievements.

#### **IV. HEIGHTENED SCRUTINY IS INAPPROPRIATE BECAUSE NO FIRST AMENDMENT ACTIVITIES ARE INFRINGED.**

Although both the District Court and the Court of Appeals applied intermediate scrutiny under this Court’s *O’Brien* test,<sup>12</sup> no special scrutiny is appropriate here. The Court should review the Solomon Amendment under its ordinary rational-basis standard.

##### **A. Recruiting is not expressive conduct, only rational basis scrutiny applies.**

The *O’Brien* Court held that First Amendment protects the burning of a draft card in protest, against the enforcement of a federal law criminalizing the destruction of such draft cards. The Court held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course

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<sup>12</sup> The Court of Appeals considered the application of the *O’Brien* test purely “for the sake of completeness,” *FAIR II*, 390 F.3d at 243, although it held that the Solomon Amendment was unconstitutional on other grounds.

of conduct,” a law regulating that conduct must satisfy a heightened standard of scrutiny. The state must demonstrate (via a four-prong test) that “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

*O'Brien* sometimes provides protection where a law incidentally burdens expressive behavior. But the *O'Brien* Court did not define what behavior counts as expressive and thus triggers that heightened scrutiny. The Court assumed without deciding that *O'Brien's* conduct contained a “communicative element . . . sufficient to bring into play the First Amendment.” *Id.* But it indicated that such an assumption is not always be appropriate. “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.” *O'Brien*, 391 U.S. at 376. After all, if *any* conduct could be labeled speech, then anyone breaking the law could simply claim his conduct was expressive, and the application of every law would thus be subjected to heightened scrutiny. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002).

Thus, a party claiming First Amendment protection for conduct must demonstrate that its conduct is sufficiently expressive. Under current doctrine, conduct must fall into the category of “inherently expressive” behavior. *Hurley*, 515 U.S. at 568.<sup>13</sup> The inherent expressiveness

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<sup>13</sup> Before 1995, the governing inquiry was the *Spence-Johnson* test, which asked “whether ‘[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.’” See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). More recently, the Court has substituted an “inherent expressiveness” requirement for the “particularized message” requirement. See *Hurley*, 515 U.S. at 568 (holding that a parade is sufficiently expressive because parades have no purpose but expression, and noting that “*the inherent expressiveness of marching to make a point* explains our cases involving protest marches” (emphasis added)). This move was necessary because if constitutional protection were “confined to expressions conveying a ‘particularized message,’ [they] would never reach the unquestionably shielded painting of Jackson Pollak, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U.S. at 569. Since parades, marches, music, and art all have “inherent expressiveness,” they all continue to enjoy First Amendment protection. Moreover, as

analysis is not a test of the specific context or factual issues of any purported expression, but of whether the type of purportedly expressive act, as a category of conduct, has traditionally been recognized as symbolic speech. *See Dale*, 530 U.S. at 694 (noting that “parade organizers are *usually understood* to [choose their participants],” but that a cable operators are “*usually considered* to be merely a conduit for the speech produced by others”) (internal quotations omitted) (emphasis added). *See also* Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 Colum. L. Rev. 1844, 1864 (1997) (surveying caselaw and locating “inherent expressiveness” within the traditional social meaning of such activity).

This test excludes activity expressive only in the eyes of the participant. For example, “the simple act of joining the [Boy Scouts]—unlike joining a parade—is not inherently expressive.” *Dale*, 530 U.S. at 695 n.22. Likewise, recruiting activity and job interviews are not inherently expressive. The traditional social meaning of these activities is not related to expression, protest, or public statement. *See* Section II.A.3, *supra* (arguing that recruiting is not expressive); III.B.2, *supra* (concluding that the relationships between recruiters and law schools are not an expressive associations). Thus, the government may regulate this practice irrespective of the law schools’ subjective expressive intent. *See FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 427-28 (1990).

**B. Nevertheless, the Solomon Amendment survives any level of scrutiny.**

Even if some form of heightened scrutiny were appropriate, the Solomon Amendment passes every level of scrutiny.

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commentators have pointed out, the particularized message test is overinclusive. *See e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 772 (2001) (describing how a tax protestor, for instance, expresses a particularized message).

## 1. The Solomon Amendment survives the highest level of review.

The Government may regulate constitutionally protected speech “in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Solomon Amendment passes both these conditions.

As every court to review the constitutionality of the Solomon Amendment has determined, the government’s interest in staffing its armed forces is “compelling.” *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 187 (D. Conn. 2005); *FAIR II*, 390 F.3d at 234; *FAIR I*, 291 F. Supp. 2d at 312. This conclusion is unquestionably correct. “[T]he Nation has a vital interest in having a system for raising armies that functions with maximum efficiency . . . .” *O’Brien*, 391 U.S. at 381. *Accord Blameuser v. Andrews*, 630 F.2d 538, 543 (7th Cir. 1980) (“The interest of our government in recruiting qualified candidates to be officers in the armed services is a compelling one . . . .”)

The Solomon Amendment also passes the “least restrictive means” prong of strict scrutiny, which requires the government show that its interests “cannot be achieved through means significantly less restrictive of associational freedoms.” *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).<sup>14</sup> No significantly less restrictive means avails itself. Respondents argue that inferior access and the provision of information would suffice. But Congress and the DOD have tried this less restrictive policy; before 2000, the Solomon Amendment required access and information but not equality. This experiment proved ineffective; indeed, the

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<sup>14</sup> The least restrictive means analysis requires that the government show that its interests “cannot be achieved through means significantly less restrictive of associational freedoms.” *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623) *not* that government demonstrate “that it cannot recruit effectively by less speech-restrictive means.” *FAIR II*, 390 F.3d at 242. The Court of Appeals mischaracterized the standard in an important way: the Third Circuit’s formulation suggests that any means less restrictive—even by a minimal amount—would be preferable. The proper inquiry is whether there is any means *significantly* less restrictive that would permit government to achieve its interest.

Congressional codification of the DOD's equal access policy in 2004 acknowledged that the old policies were insufficient.

The Court of Appeals is incorrect to suggest that “the Government has not demonstrated . . . that it cannot recruit effectively by less speech-restrictive means.” *FAIR II*, 390 F.3d at 242.

The record supports the opposite conclusion: Only the enforcement of the equal access provision has proven effective in attracting recruits. *See* J.A. at 60. (citing increase in students hired by the military at University of Southern California after the addition of the equal access provision).

## **2. Enforcement of the Solomon Amendment survives intermediate scrutiny.**

Although as demonstrated in Section IV.A, *supra*, not even intermediate scrutiny is appropriate, nevertheless if the Court were to apply such scrutiny the Solomon Amendment would easily pass. Under the four-part *O'Brien* test, a government regulation impairing expressive conduct is 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

The Solomon Amendment easily satisfies all four of these conditions.

First, as demonstrated in Section I *supra*, Congress's power to raise an army is a specific grant of constitutional authority. That grant is a “broad and sweeping” one, *O'Brien*, 391 U.S. at 377, including not only the power to draft but also the power to legislate in support of the volunteer armed forces. Second, the government interest in military recruiting is more than “important or substantial;” it is a compelling state interest. *See* section IV.B.1, *supra*; *accord FAIR II*, 390 F.3d at 245; *FAIR I*, 291 F. Supp. 2d at 312. Third, as discussed in both Section



II.A.3 and Section III.A.2, *supra*, the government interest in military recruiting is entirely unrelated to the suppression of free expression.

The final prong, which requires that speech restrictions be “no greater than is essential,” is easily satisfied. As established in Section IV.B.1, *supra*, the Solomon Amendment passes even the “least restrictive means test.” The “no greater than essential” test is far less exacting; it requires only a showing that “a substantial governmental interest . . . would be achieved less effectively absent the regulations.” *United States v. Albertini*, 472 U.S. 675, 689 (1985). The record reflects that the recruiting interest was being achieved less effectively before the equal access provision was enforced. *See* J.A. at 60 (recruiting statistics); Section IV.B.1, *supra*.

**3. On rational basis review, the Solomon Amendment is constitutional.**

The enforcement of the Solomon Amendment clearly survives this most deferential form of review. In this case, Congress unquestionably has a legitimate interest in reducing barriers to military recruitment. Requiring equal access alongside private sector recruiters is rationally related to that end.

**CONCLUSION**

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Brandon Fail

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Jaynie Randall

*Counsel for Petitioner*  
December 1, 2005

## **APPENDIX: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### Constitutional Provisions

Article I, Section 8, Clause 1 of the United States Constitution provides in relevant part:

“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 . . . .”

Article I, Section 8, Clauses 12-14 of the United States Constitution provide in relevant part:

“[The Congress shall have Power to] To raise and support Armies; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces.”

The First Amendment to the Constitution of the United States provides in relevant part:

“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

### Statutory Provisions

The Solomon Amendment, 10 U.S.C. § 983(b)(1) (2005), provides in part:

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--on or subelement that has a policy or practice that either prohibits, or in effect prevents--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.