No. 04-637

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

December Term, 2005

DONALD H RUMSFELD, Secretary of Defense,

Petitioner,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC.,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Solomon Amendment, 10 U.S.C. § 983(b)(1), as amended by the Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911, violates the First Amendment right to associate?

2. Whether the Solomon Amendment violates the compelled speech doctrine of the First Amendment?

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, Inc., a New Jersey membership corporation;
Society of American Law Teachers, a New York corporation;
Coalition for Equality, a Massachusetts association;
Rutgers Gay and Lesbian Caucus, a New Jersey association;
Pam Nickisher, a New Jersey resident;
Leslie Fischer, a Pennsylvania resident;
Michael Blauschild, a New Jersey resident;
Eriwn Chemerinsky, a California resident;
Sylvia Law, a New York resident

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OPINIONS BELOW

The opinion of the panel of the United States Court of Appeals for the Third Circuit reversing the lower court opinion and remanding for the District Court to enter a preliminary injunction is reported at 390 F.3d 219 (3d Cir. 2004) [hereinafter *FAIR II*]. The opinion of the United States District Court for the District of New Jersey denying the motion for a preliminary injunction is reported at 291 F. Supp.2d 269 (D.N.J. 2003) [hereinafter *FAIR I*].

JURISDICTION

The Court of Appeals entered its judgment on Nov. 29, 2004. Thereafter, a petition for a writ of certiorari was filed with this Court on February 28, 2005, and certiorari was granted on May 2, 2005. 125 S. Ct. 1977 (2005). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (2005).

STATEMENT OF FACTS

I. Law Schools Non-Discrimination Policies

Law schools have long maintained formal policies of nondiscrimination that restrict access to Career Service Office ("CSO") resources from employers who discriminate in hiring based on race, gender, and religion. Beginning in the 1970s, law schools expanded these policies to prohibit discrimination based upon sexual orientation. *See, e.g.*, J.A. at 151-52. In 1990, the American Association of Law Schools ("AALS") voted unanimously to include sexual orientation as a protected category and require that employers who seek to use a law school's CSO provide written assurance that they will not discriminate against student applicants based upon sexual orientation. *See* J.A. at 34.

II. Congress Enacts the Solomon Amendment

In 1994, unsolicited by the Department of Defense ("DOD"), Representative Gerald Solomon offered an amendment to the annual defense appropriation bill that proposed to withhold any DOD funding from any educational institution with a policy of denying or effectively preventing the military recruiters access to the campus. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994). During debate in the House of Representatives, Representative Solomon urged the passage of the bill "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military." 140 Cong. Rec. H3861 (daily ed. May 23, 1994). Representative Richard Pombo of California, a co-sponsor of the bill urged his colleagues to "send a message over the wall of the

ivory tower of higher education" that colleges' and universities' "starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves[,] then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America." *Id.* at H3863. Another Representative expressed concern about the Amendment. "We should not . . . chill or abridge privacy, speech, or conscience by threatening a college with a Federal funds termination because it chose for whatever reason to deny access to military recruiters. . . . We should not browbeat them . . . into becoming involuntary agents of Federal policy." *Id.* at H3862 (statement of Rep. Dellums).

III. Subsequent Amendments and Regulatory Interpretations

In 1997 Congress amended the Solomon Amendment by expanding its penalties to include, in addition to DOD funds, funds administered by other federal agencies, including the Departments of Transportation, Health and Human Services, and Education. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996). While an offending "subelement" of a college or university (e.g. a law school) risked losing funds from all of the above agencies, DOD regulations clarified that the parent institution was only at risk for losing DOD funds. 32 C.F.R. § 216.3(b)(1). In 1999, Congress passed another amendment that codified exceptions to the Solomon Amendment's penalties for schools that 1) had ceased an offending policy or practice, or 2) had a longstanding religious-based policy of pacifism. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999).

IV. Law Schools Attempt to Comply with the Solomon Amendment

Throughout this time, law schools made an effort to comply with the Solomon Amendment while continuing to distinguish its treatment of military recruiters due to the

military's exclusion of homosexual servicemembers. At Harvard Law School, for example, the Harvard Law School Veterans Association, a recognized student organization, invited military recruiters to campus and facilitated their recruitment efforts, independent of the CSO. *See* J.A. at 137-38. New York University School of Law made available in the CSO information about military positions and contact information for recent graduates who pursued military careers while reserving on-campus recruiting facilities solely for non-discriminating employers. *See* J.A. at 154-55. Multiple law schools made other facilities available for military recruiters while reserving CSO facilities for non-discriminating employers. *See, e.g.*, J.A. at 59-60 (explaining that the University of Southern California School of Law made ROTC offices on the main USC campus available to military recruiters).

In some cases, law schools arranged for alternate interview locations to facilitate recruiting by allowing students interested in interviewing to bypass other students protesting the military's discriminatory hiring policy. For example, Touro College Law Center moved its military interviews to a non-profit office near the Law Center in order encourage students to interview who were otherwise reluctant to confront the protesters. *See* J.A. at 180. Military recruiters were satisfied with mere access to campuses even though they were being denied the same affirmative assistance that CSOs were providing other non-discriminating employers. *See FAIR II*, 390 F.3d at 227.

V. Recent Changes in How the Solomon Amendment Is Applied

Starting in 2001, the DOD began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters. *See* J.A. at 83. Law schools were informed that they were at risk for losing millions of dollars in federal funding unless they provided military recruiters not only access to campus, but also services commensurate with those provided other employers. *See FAIR II*, 390 F.3d at 227. Law schools struggled with the

decision to suspend their non-discrimination policies in order to meet these demands. *See, e.g.*, J.A. at 201. In light of the federal funds at stake, by the 2003 recruiting season, every law school that received federal funds had suspended its nondiscrimination policy as applied to military recruiters. *See FAIR II*, 390 F.3d at 228. Last year, Congress codified the new DOD interpretation in the Ronald W. Reagan National Defense Authorization act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). The latest amendment penalizes subelements and their parent institutions for preventing military recruiters from gaining entry to campuses "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to the students that is provided to any other employer." 10 U.S.C. § 983(b).

VI. Current Litigation

In September 2003, FAIR sued the DOD and the other federal departments whose funds are restricted under the Solomon Amendment, seeking on constitutional grounds a preliminary injunction enjoining enforcement of the statute and the then-existing (now codified) informal policy. The Government defendants moved to dismiss for lack of standing. The District Court denied both the motion to dismiss and FAIR's motion for preliminary injunction. *FAIR I*, 291 F. Supp.2d 269 (D.N.J. 2003). On appeal, a panel of the Third Circuit Court of Appeals reversed the District Court's ruling and remanded the case for the District Court to enter a preliminary injunction. *FAIR II*, 390 F.3d at 246. This appeal followed.

SUMMARY OF ARGUMENT

As applied, the Solomon Amendment violates FAIR's right to expressive association by forcing FAIR to contradict and undermine its message of non-discrimination. Under *Dale*, an expressive association can gain protection from a law that significantly burdens its expression when the state interest does not justify the burden placed on the group's expression. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 650-60 (2000). FAIR is an expressive association that

seeks to inculcate its students with its message of non-discrimination. FAIR's members have expressed this message by speaking out against discrimination, by enforcing non-discrimination policies, and by denying employers who discriminate the right to participate in many law school recruiting events. By denying full access to employers who discriminate, FAIR has lent clear expressive content to its decision to admit or exclude an employer.

The Solomon Amendment significantly burdens FAIR's message of non-discrimination. It forces the members of FAIR to provide precisely the same access and assistance to the military that it provides to employers who do not discriminate against homosexuals. It also often forces FAIR members to suspend longstanding non-discrimination policies. This burdens the ability of FAIR members to model non-discriminatory behavior for their students by making them hypocritical and requiring FAIR members to send a message that the military does not engage in illegitimate discrimination. The Court has noted that forcing a group to include a party with whom the group disagrees can impermissibly alter that group's message. *See Dale,* 530 U.S. at 654, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 572-75 (1995). Such a burden is present here because the military openly discriminates against homosexuals and forcing FAIR to equate them with other employers would alter and undermine FAIR's message.

The Solomon Amendment is not justified by the state interest at stake. Because it directly and immediately affects FAIR's expression, it is subject to strict scrutiny. *See Dale*, 530 U.S. at 659. The Solomon Amendment fails strict scrutiny because alternative recruiting methods that are less restrictive of FAIR's speech are at least as effective at attracting qualified military lawyers. These alternatives ensure the military access to students through such means as recruiting at campus ROTC offices and avoid compromising FAIR's message because they do

not force law schools to equate the military with non-discriminating employers. Alternative methods are also less likely to draw disruptive student protests precisely because of their different symbolism and may thereby actually increase recruiting. The Solomon Amendment would also fail intermediate scrutiny because of the effectiveness of these alternative methods

The Solomon Amendment also violates FAIR's First Amendment rights by compelling law schools to implicitly endorse the military's discriminatory hiring policy. Prior to the Solomon Amendment, law schools distinguished employers with discriminatory hiring practices by restricting their access to Career Service Office ("CSO") facilities. By distinguishing the treatment for discriminatory employers, FAIR members expressed their antipathy for such practices and encouraged these employers to change their hiring practices.

The statutory history of the Solomon Amendment and history of its application demonstrate that the purpose of the Solomon Amendment is to compel FAIR members to endorse military hiring practices. Amendments to the original Solomon Amendment have increased the penalties for noncompliance, making it even more difficult for FAIR members to express their views. Furthermore, the military's rejection of alternative arrangements that allow the military to conduct interviews while preserving FAIR members' rights indicates that the military is more concerned with silencing criticism than improving recruitment.

Because the Solomon Amendment targets the expression of FAIR members, its constitutionality should be evaluated under the strict scrutiny standard, which it does not meet. While it may appear content-neutral, the intention of Congress and the DOD to regulate speech is evident and the Government must therefore show there is a compelling state interest to regulate FAIR members' expression. Because viable alternatives exist to provide for recruitment without

infringing on speech, the Solomon Amendment is unconstitutional. This holds true even if the Court applies an intermediate scrutiny standard.

Finally, the Solomon Act violates the Spending Clause because it conditions the receipt of federal funds on activities that violate the First Amendment, the conditions are not part of a broader federal program, and the overwhelming penalties are coercive.

ARGUMENT

This case presents a challenge to the heart of the First Amendment. At its core, the First Amendment protects private individuals from being compelled by the State to express something with which they disagree. Here, the Federal Government coerces educational institutions by threatening the loss of hundreds of millions of dollars to drop long-held policies against discrimination and instead to implicitly endorse the military's discriminatory hiring policies. The effects have been devastating for law school communities.

I. THE SOLOMON AMENDMENT VIOLATES FAIR'S RIGHT TO EXPRESSIVE ASSOCIATION BY FORCING FAIR TO CONTRADICT AND UNDERMINE ITS MESSAGE OF NON-DISCRIMINATION

The Solomon Amendment violates FAIR's right to expressive association because it forces FAIR to contradict and to undermine its message of non-discrimination by allowing military recruiters onto campus and by assisting them in recruiting students despite the fact that the military openly discriminates against homosexuals. The right of expressive association is protected under the First Amendment because "[e]ffective advocacy of both public and private points of view is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The Solomon Amendment is unconstitutional under the test set forth in *Dale*. Under *Dale* a group is protected if (1) it "engages in 'expressive association'"; (2) the state action

"significantly affect[s]" the group's ability to express its views, and (3) the state interest does not justify the burden placed on the group's expression. *See Dale*, 530 U.S. at 648, 650, 656-60; *see also Bd. of Dirs. of Rotary Club Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987).

A. FAIR is An Expressive Association

FAIR is an expressive association because it seeks to disseminate its message of non-discrimination to law students and the wider world. To be protected as an expressive association, a group must "engage in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648. The group need not be a political advocacy organization. *Id.* at 648-49 (holding that the Boy Scouts is an expressive association); *see also Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) (holding that a high school is an expressive association under *Dale*).

FAIR is an expressive association because it seeks to imbue its students with the ethic of non-discrimination. The members of FAIR include law schools and law professors who seek to shape student's characters as well as provide technical training in the law. *See, e.g.*, J.A. at 17. FAIR expresses the message that discrimination on the basis of sexual orientation is illegitimate. FAIR communicates this message through public non-discrimination policies, *see* J.A. at 32, through student handbooks, *see* J.A. at 52, and by example through members of the faculty, *see* J.A. at 151. Members of FAIR also express this message in their recruiting programs by excluding employers that discriminate. *See, e.g.*, J.A. at 77 (noting that Yale Law School has excluded employers that discriminate); J.A. at 154 (noting that New York University School of Law ("NYU Law") has excluded employers that discriminate). Members of FAIR have a long history of expressing their message of non-discrimination. Some have had policies banning discrimination against homosexuals since the late 1970s. *See* J.A. at 68, 151.

This evidence qualifies FAIR as an expressive association under *Dale*. FAIR's expression is of an analogous type to that protected in *Dale*. Both FAIR and the Boy Scouts seek to communicate an ethical message to their members. *Cf. Dale* 530 U.S. at 649-50 (holding that the Boy Scouts are an expressive association because they inculcate values in their members). The subject matter of FAIR's expression is distinguishable from groups that have not been deemed expressive associations. *See City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (holding the right of expressive association does not protect chance encounters in a dance hall). Moreover, FAIR's evidence of its engagement in protected expression is at least as extensive as that deemed sufficient in *Dale*. *See Dale*, 530 U.S. at 649-50 (using evidence from the Boy Scout's mission statement to conclude that the Boy Scouts were an expressive association). Accordingly, FAIR is an expressive association.

B. The Solomon Amendment Significantly Impairs FAIR's Ability to Express Its Message

The Solomon Amendment significantly impairs FAIR's ability to express its message by forcing FAIR to contradict and undermine its message of non-discrimination and to associate with the military for the purpose of recruiting. Under *Dale*, the Court must first define the message that is potentially burdened and then analyze whether that message has been significantly burdened. *See Dale* 530 U.S. at 650-53. At both stages, the Court must defer to an expressive association's own definition of what is the content is its message and what would constitute a significant burden on the expression of that message. *See id.* at 653. ("[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.") (citations omitted).

1. FAIR's Message is That Discrimination On The Basis of Sexual Orientation is Immoral and Illegitimate

As noted in Section I.A, FAIR's message is that discrimination on the basis of sexual orientation is illegitimate. FAIR's evidence defining the content of its message is stronger than that found sufficient in *Dale*. The *Dale* Court indicated that it was willing to "accept the Boy Scout's assertion" regarding the nature of its expression and that "[the Court] need not inquire further to determine the nature of the Boy Scout's expression…." *Dale*, 530 U.S. at 651. The Court, however, went on to discuss three public position statements promulgated by the Boy Scout's leadership and another lawsuit in which the Boy Scouts had asserted that it opposed homosexuality. *Id.* at 652-53. The *Dale* court accepted the Boy Scouts assertions regarding its beliefs despite the fact that the Boy Scouts never explicitly communicated their message to their scouts but merely taught by example. *Id.* FAIR's evidence of the nature and sincerity of its expression is, if anything, stronger than that put forward by the Boy Scouts. As noted in Section I.A., members of FAIR have expressed their belief that discrimination on the basis of sexual orientation is illegitimate in a variety of public, verifiable ways over an extended period of time. See J.A. at 52, 68, 77, 151, 154. Under the *Dale* standard, this evidence clearly establishes that FAIR's message is that discrimination on the basis of homosexuality is illegitimate.

2. The Solomon Amendment Significantly Burdens FAIR's Non-Discriminatory Message

The Solomon Amendment significantly burdens FAIR's ability to express its message of non-discrimination by forcing FAIR to violate its non-discrimination policies and to send a message that discrimination is legitimate by assisting the military in recruiting. To receive First Amendment protection, a group must show that its expression is "significantly burden[ed]" by a law. *Dale*, 530 U.S. at 654. The Court must "give deference to an association's view of what

would impair its expression." 530 U.S. at 653 (citing *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981)). The admission of a party whose beliefs or actions contradict the association's beliefs can constitute a significant burden. *See Dale*, 530 U.S. at 653 (finding a significant burden because "Dale's presence in the Boy Scouts would … force the organization to send a message … that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."); *see also New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).

The Solomon Amendment's requirements are extensive and demanding. It requires FAIR to grant access that "is at least *equal in quality and scope* to the access to campuses and to students that is provided to any other employer…." 10 U.S.C. § 983 (b)(1) (emphasis added). To grant the military an equal "quality and scope" of access, FAIR would have to admit the military to campus recruiting programs and assist military recruiters to the same extent that FAIR members assist other employers. In a typical campus recruiting program, this assistance would include distributing recruiters' literature, scheduling student interviews, and advertising the military's presence. *See* J.A. at 241. Because the military discriminates against homosexuals, law faculties at many FAIR members must authorize the suspension of their non-discrimination policies in order to provide the required assistance. *See, e.g.*, J.A. at 87, 222.

These requirements significantly burden FAIR's ability to express its message in at least three ways. First, it affects FAIR's ability to inculcate its value of non-discrimination in its members by example. The history of law school recruiting has lent expressive content to FAIR's choice to admit or to exclude an employer. FAIR has traditionally excluded employers that engaged in discrimination that FAIR felt was illegitimate, including discrimination against homosexuals. *See, e.g.*, J.A. at 87, 222. This decision to exclude expressed FAIR's belief that

the employer engaged in a form of conduct that FAIR believed was illegitimate. By inference, therefore, inclusion, while it may not have signaled active approval of all of an employer's activities, did indicate that that employer was not engaged in illegitimate discrimination. Including and excluding employers on this basis helped FAIR members to inculcate their value of non-discrimination by serving as a model for their students. *Cf. Dale*, 530 U.S. at 655 (noting that the Boy Scout's right to teach by example was protected). Prohibiting this act of exclusion significantly burdens their expressive rights.

Second, forcing FAIR to include the military requires FAIR to send the message that the military's discrimination against homosexuals is legitimate. The Court has recognized that when an organization has control over whom it includes in its membership or activities, forcing the organization to include a party can require them to alter or contradict their message. For example, in *Dale*, the Court found that forcing the Boy Scouts to admit Dale would burden the Boy Scouts message. The court reasoned that because Dale was openly gay, "Dale's *presence* in the Boy Scouts would … force the organization to send a message … that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Dale*, 530 U.S. at 645 (emphasis added).

Including the military in recruiting programs sends a discriminatory message because law students associate the military with its discriminatory practices. The "don't ask don't tell" policy is well known and well documented. It has been the subject of substantial public discussion and is mandated by law. *See* 10 U.S.C. § 654(b) (codifying the "Don't Ask Don't Tell" policy); *News in Brief*, Durham Herald-Sun, Dec. 24, 1999, at A3 (noting that the Pentagon has "drawn fire recently for its "don't ask, don't tell policy."). Accordingly, just as the Boy Scouts message was burdened partly because Mr. Dale was an openly gay man and his presence accordingly sent

a message, FAIRs message will be burdened because the military is open about its discriminatory policies and those policies are widely known.

This burden is created even though FAIR is not required to admit the military as a member of its association. The Court has emphasized that merely requiring a group to allow a party to participate in an event can constitute an unconstitutional burden when that group has exercised control over participation in the past. For example, the Court found in *Hurley* that an association organizing a parade could not be forced to include a gay and lesbian group in its parade because that group's mere inclusion would force them to alter their message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 572-75 (1995). The *Hurley* Court reasoned that mere inclusion would force this alteration because the parade organizers traditionally exercised control over who marched and the choice to include implied a degree of endorsement. *Id.* at 575.[1] Indeed, *Dale* found a burden in Dale's mere "presence." *Dale*, 530 U.S. at 645. As noted above, FAIR members have exercised control over who they admit to the recruiting event and have done so for plainly ideological and expressive reasons. Forcing them to include a group they disagree with accordingly forces them to send a message they disagree with.

It is unpersuasive to argue that the Solomon Amendment does not impair FAIR's expression because recruiting is an economic rather than an expressive activity. For one, recruiting is highly expressive, involving the distribution of literature and discourse about the merits of particular employers. Though recruiting undoubtedly has an economic component, this does not exclude it from First Amendment protection. An association's choice about what kinds of economic activity to engage in can be protected under the right to expressive association if

[1] Though *Hurley* refers mostly to compelled speech, *Dale* applied *Hurley*'s analysis in the expressive association context. *See Dale*, 530 U.S. at 650-58.

that choice is motivated by protected First Amendment interests. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 866, 913 (1982) (holding that a boycott designed to secure governmental action was protected under the right of association)

Third, the Solomon Amendment would burden FAIR's expression by forcing FAIR to become hypocritical through assisting in the act of discrimination that FAIR abhors and associating with the military for this purpose.[2] As noted above, the Solomon Amendment requires that FAIR actively assist the military, distributing recruiting literature, advertising the presence of military recruiters and scheduling appointments for students. Faculty must often be personally involved by voting to suspend their non-discrimination policies to allow the military to recruit. *See, e.g.*, J.A. at 87, 222. This assistance would directly enable the military to discriminate. During recruiting trips, military recruiters refuse to hire students who admit they are homosexual. *See* J.A. at 40. In effect, the Solomon amendment would force FAIR to become hypocritical-- saying one thing to its students but providing intimate assistance in an act they abhor. Needless to say, hypocrites are less effective advocates.

The resulting burden on FAIR's expression has been substantial, as demonstrated by student reaction to the decision by many law schools to admit military in the face of the Solomon Amendment. Students frequently doubted the law schools' commitment to non-discrimination. For example, after the University of Washington School of Law decided to admit recruiters, the student bar association president said at a protest that many students believed that the school wasn't truly committed to non-discrimination. J.A. at 41. The head of the school's organization for gay and lesbian students stated that the decision to admit recruiters conveyed a message of "'school sanctioned prejudice.'" J.A. at 38. At Boston College Law School, one student "explained that the only message they could derive from abandonment of the Non-discrimination

[2] The First Amendment also protects the right to not associate. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Policy was that the Law School was not really as serious about its commitments as promised." J.A. at 212. At NYU Law, a student asked a professor "[w]hat's the price tag on my equal rights? Why should I believe you when you talk about principle?" J.A. at 232.

FAIR's evidence of the burden on its speech is at least as great as that found sufficient in *Dale*. The targets of FAIR's message, the students, understand the link between the presence of the military and discrimination, while in *Dale* "there [was] no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation…." *Dale* 530 U.S. at 696 (Stevens, J., dissenting). FAIR has documented that its message is impaired, while the Boy Scouts presented no specific evidence that their message was being conveyed less effectively. *See Id.* at 654-55. Also, the impact on FAIR's expression in the instant case is more pervasive than in *Dale*. Because the decision to admit military recruiters often requires a faculty vote, *see, e.g.*, J.A. at 87, 222., it often forces the faculty to participate in admitting recruiters, thus creating a general burden on their expression. By contrast, even if the regulation in *Dale* had been upheld, the vast majority of assistant scoutmasters would not have been homosexuals and accordingly the Boy Scouts' expression to the students in those units would have been largely unaltered. Accordingly, the Solomon Amendment significantly burdens FAIR's expression.

C. The Solomon Amendment is Subject to Strict Scrutiny

The Solomon Amendment is subject to strict scrutiny because it directly burdens FAIR's right to expressive association. Under *Dale*, a law that "directly and immediately affects associational rights" is subject to strict scrutiny rather than intermediate scrutiny. *See Dale*, 530 U.S. at 659; *see also Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 446 (3d Cir. 2000) (noting that *Dale* requires strict scrutiny when a law "directly and immediately"

affects associational rights). The *Dale* Court held that the New Jersey Public Accommodations law, which forced the Boy Scouts to include Dale as a member, created such a direct and immediate effect. *Dale*, 530 U.S. at 659. Moreover, Dale applied strict scrutiny even though the law in question did not target speech on its face. *Id*.

Under this standard, the Solomon Amendment is also subject to strict scrutiny. It forces FAIR to include the military in its school recruiting programs. It therefore burdens FAIR's expressive associational rights in just as direct a way as that at issue in *Dale* because, like the law in *Dale*, the Solomon Amendment straightforwardly intrudes into the internal workings of the association. Indeed, the Court's recent cases have consistently applied strict scrutiny to cases where laws force the inclusion of a third party in an association. *See Roberts v. Jaycees*, 468 U.S. 609, 623-25 (1984) (applying strict scrutiny to the Minnesota Civil Rights Act, which forced the Jaycees to include women as full voting members); *Rotary*, 481 U.S. at 549 (holding that even if the Unruh Act imposed a "slight infringement" on Rotary's associational interests by forcing Rotary to admit female members, the act was still valid because of California's "compelling interest in eliminating discrimination against women."). Moreover, because of the severe burden placed on FAIR's associational rights, it is untenable to argue that intermediate scrutiny should apply because the Solomon Amendment merely imposes a slight burden.[3] As noted at Section I.B, the Solomon Amendment imposes a burden that is at least as great as that which merited strict scrutiny in *Dale*.

[3] The Court has followed a different formulation in electoral law cases, requiring strict scrutiny when the burden on the association was "severe." *See Clingman v. Beaver*, 125 S.Ct. 2029, 2039 (2005). The Court in *Clingman* explained that the severe burden test serves the purpose of ensuring that the court will not have to rewrite state electoral codes. *Id.* The severe burden test had been articulated prior to *Dale*, but was not applied in *Dale*. *See Timmons v. Twin Cities Area New Party*, 530 U.S. 351 (1997). Even if the *Timmons* formulation were adopted in this case, the burden on FAIR would be sufficiently severe to qualify for strict scrutiny because it exceeds that meriting strict scrutiny in *Dale*.

It is also inappropriate to apply intermediate scrutiny to the Solomon Amendment on the grounds that it merely imposes an incidental burden on FAIR's expression The incidental burdens doctrine applies when "'speech' and 'nonspeech'" elements are inseparable and laws regulating the non-speech element are subject to intermediate scrutiny. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). As noted in Section I.B., FAIR already sends a message of non-discrimination through means that are separate from excluding the military, including its non-discrimination policies and the example of faculty. Including the military in recruiting programs would send a message that contradicts this message of non-discrimination and would undermine the ability of FAIR's members to send that message by forcing them to hypocritically assist in the act they abhor. *See* Section I.B. Laws that force a group to jeopardize or contradict an existing message by including those it wishes to exclude are subject to strict scrutiny. *See Dale*, 530 U.S. at 653-54, 658. Accordingly, the Solomon Amendment is subject to strict scrutiny.

D. The Solomon Amendment Fails Strict Scrutiny

The Solomon Amendment fails strict scrutiny because the government cannot show that it is the least speech-restrictive method for securing its interest in recruiting military lawyers. Indeed, the government cannot even show that the Solomon Amendment even increases the number of JAG recruits. To pass strict scrutiny, a law must further a compelling state interest and be "the least restrictive means to further the articulated interest." *Sable Communications of California Inc. v. FCC*, 492 U.S 115, 126 (1989). The burden of proof is on the government. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

1. The Government Cannot Show That The Solomon Amendment Increases the Number of JAG Recruits. Indeed, it May Actually Harm Recruiting By Causing Protests

The government has presented no evidence that the Solomon Amendment increases the number of JAG recruits. Indeed, the available evidence suggests that it has no effect or even a negative effect on recruiting. Because the members of FAIR have applied the Solomon Amendment for the past two years, we have a test case of the Solomon Amendment's effects. *See* J.A. at 63, 158, 219 (indicating that FAIR members complied with the Solomon Amendment to avoid losing funds). The results do not indicate that the Solomon Amendment furthered recruiting. At the Yale Law School, the military was admitted to the standard interview program but only recruited a single summer intern. *Burt v. Rumsfeld*, 354 F.Supp.2d 156, 169 (D. Conn. 2005). At NYU Law, the military was admitted to the on campus recruiting program but only recruited a single student through that program in two years. J.A. at 165. At Whittier Law School, the military was admitted to the normal recruiting program but only made a single offer to a student. J.A. at 9. This does not reflect a significant increase in recruiting as a result of the Solomon Amendment.

Indeed, there is substantial evidence that the Solomon Amendment may actually decrease recruiting by attracting student protests. Protests against military recruiting occurred at many campuses. *See, e.g.*, J.A. at 41, 142-43, 157, 160. Some of these protests were particularly disruptive. At NYU Law "student protesters pushed into the interview area and physically tried to keep interviewees from gaining entry…." J.A. at 160. Posters appeared bearing the pictures of students who had interviewed with the military. J.A. at 158. Protests such as these discourage students from interviewing with the JAG corps because they indicate strong disapproval from other students. Without the Solomon Amendment, these protests probably would not occur and recruiting might increase.

2. Less Speech-Restrictive Recruiting Methods Have Demonstrated Their Effectiveness in Recruiting JAG Officers

The military can utilize less speech-restrictive methods to effectively recruit JAG officers. FAIR members have historically been willing to provide effective alternatives. As the Dean of Harvard Law School wrote "I am convinced that military service is honorable and essential …. I am also very proud of each and every graduate who has gone into military service, and I hope the number increases." J.A. at 140. Members of FAIR merely wish to preserve their message of opposition to the military's discriminatory hiring practices by maintaining a symbolic distinction between the kind of access that non-discriminatory employers receive and that which the military receives.

The military can recruit effectively even if it does not have exactly the same kind of recruiting access. For example, at Yale Law School, the interview program occurs at an off-campus hotel. The military can book its own room, right next door to other employers, publicize its own presence and schedule its own meetings. *See* J.A. at 79-80. This would undoubtedly be effective in securing recruits and, because the law school would not have to provide identical assistance to the military and other employers, it would preserve Yale's message.

Similarly effective opportunities were present at other law schools prior to the Solomon Amendment. For example, at Harvard Law School, student organizations may invite JAG officers onto campus. J.A. at 147. This method was employed prior to the Solomon Amendment and succeeded in recruiting one to three students per year. J.A. at 138. At USC Law School, the law school would post JAG recruiting information, but have interviews scheduled by the campus ROTC office. This minimized student protests and increased student recruiting. J.A. at 60-61. Accordingly, it is clear that there are less speech restrictive methods that can effectively secure

recruits for the military.[4] The Solomon Amendment therefore fails strict scrutiny. *See Sable* 492 U.S. at 130-31 (finding that an FCC regulation failed strict scrutiny because there was a less speech-restrictive means to achieve the government's interest in preventing children from accessing indecent telephone messages).

3. Deference to the Congressional Judgment in National Defense Applies With Less Force to the Instant Case Because Outsiders Can Judge the Numerical Effectiveness of a Recruiting Program

Though deference to military judgments regarding national security is often appropriate, such deference does not change the result in this case. As the Court noted in *Robel* "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power…." *United States v. Robel,* 389 U.S. 258, 263-64 (1967). The leading cases on deference to Congressional judgment in national security concern questions of the military's internal requirements. For example, in *Goldman*, the court deferred to the military regarding what dress regulations were necessary to maintain military morale. *See Goldman v. Weinburger*, 475 U.S. 503, 504-09 (1986). In *Rostker,* the Court deferred primarily to Congress's judgment regarding what type of soldiers would be necessary in an upcoming draft. As Congress had determined that combat troops were needed and that women could not be combat troops, it was permissible to not register women for the draft. *See Rotsker v. Goldberg*, 453 U.S. 57, 70-77 (1981). In *Weiss* the Court deferred to Congress's judgment regarding the structure of military courts. *See Weiss v. Hernandez*, 510 U.S. 163 (1994). In all of these cases, the primary subject of deference was an internal military requirement that required special expertise to judge. But the instant case does not require special judgment about internal military affairs, it merely requires a comparison of pre-Solomon Amendment recruiting with post-Solomon Amendment

[4] Moreover, the military is free to use its substantial resources to engage in an advertising campaign or to provide scholarships and loan repayment assistance if it wishes to further increase recruiting

recruiting.[5] Because of this, the degree of deference necessary is smaller and does not alter the result in this case. The Solomon Amendment therefore fails strict scrutiny because alternative methods can be just as effective and because the military cannot show that the Solomon Amendment increases the number of JAG recruits.

E. Even if the Court Finds That the Solomon Amendment Only Incidentally Affects Speech, the Solomon Amendment Fails Intermediate Scrutiny

As applied, the Solomon Amendment fails to meet the intermediate standard laid out in *United States v. O'Brien*, 391 U.S. 367 (1968). The Court in *O'Brien* offered a four-part intermediate standard test for expressive conduct. A regulation passes the test if it 1) is within the Constitutional power of the Government; 2) furthers an important or substantial governmental interest; 3) the Government's 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. 391 U.S. at 377; *see also Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (finding that a regulation fails the intermediate standard test if it "broadly stifle[s] fundamental personal liberties when the end can be more narrowly achieved").

No one questions that the government has a substantial interest in recruiting JAG lawyers to fulfill its staffing needs. As discussed in Section I.D, however, the Solomon Amendment is applied so broadly as to stifle speech unnecessarily without furthering the Government's interest. *O'Brien* dictates that any restriction is "no greater than essential." 391 U.S. at 377. As the Court noted in another First Amendment case, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 512 (1969). FAIR members have provided alternative means

[5] Nor is the quality of recruits a matter of concern. After recruiting at NYU under the law school's substitute program for the military, a JAG recruiter wrote that competition was so fierce that "very qualified applicants will not be selected for a position." J.A. at 156.

for DOD recruiting that allow military recruiters to meet their recruiting goals and in some cases even improve their recruiting prospects while preserving their First Amendment right to distinguish their treatment of DOD recruiters from non-discriminating employers. The Government's interest need not interfere with FAIR member's expressing their dissatisfaction with the military's discriminatory hiring practice.

II. THE SOLOMON AMENDMENT VIOLATES FAIR'S FIRST AMENDMENT RIGHT BECAUSE IT COMPELS FAIR MEMBERS TO ENDORSE THE MILITARY'S HIRING PRACTICES AND DOES NOT REFLECT A COMPELLING STATE INTEREST

This Court has long understood the danger posed by the Government compelling the speech of private citizens. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broad.Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 641 (1994). The Solomon Amendment is unconstitutional because it aims to compel FAIR members' to legitimate military hiring policies and fails to provide a compelling state interest for doing so.

A. The Solomon Amendment Compels FAIR to Endorse the Military's Discriminatory Hiring Practices by Removing Any Distinguishing Treatment for Military Recruiters

1. Prior to Enactment of the Solomon Amendment, FAIR Members Expressed Their Dissatisfaction With the Military's Discriminatory Hiring Policy By Restricting the Military's Access to CSO Facilities

FAIR members intend to convey a clear message: They condemn employers who utilize discriminatory hiring practices that discriminate on the basis of, among other things, sexual orientation. To express their displeasure with such hiring practices, law schools distinguished between employers who utilized discriminatory hiring practices from those who did not. For example, they denied discriminating employers access to CSO facilities or declined to pass out recruiting paraphernalia on behalf of discriminating employers. By creating such a distinction

and electing to fully serve only those employers who did not discriminate, FAIR explicitly and symbolically criticized employers who selected students in violation of the schools' non-discrimination policies. *Cf. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (noting that "like a composer," a parade organizer selects participants who "comport[] with what merits celebration on that day").

FAIR expressed its criticism of discriminating employers primarily through the policies articulated by the CSOs. The law schools were able to express this view, in part, because they maintained complete control over who had access to CSO services and these services were not available to the public. *Cf. Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 22-23 (1986) (Marshall, J., concurring) (noting an organization's right to refuse compelled speech because it had never opened its facilities to public use). Criticism of discriminating employers predated the Solomon Amendment as the Association of American Law Schools, in 1990, required its members to insist that employers who seek to use the law schools' CSO facilities provide written assurance that they would not discriminate against student applicants based upon sexual orientation or any other protected category. *See* J.A. at 34. Through their CSOs, members of FAIR unequivocally stated to any prospective employer that they would not have equal access to CSO facilities if they discriminated on the basis of sexual orientation. *See, e.g., id.* (Washington University School of Law); J.A. at 57 (University of Southern California); J.A. at 76-77 (Yale Law School); J.A. at 136-37 (Harvard Law School); J.A. at 196 (New York University School of Law); J.A. at 211, 214 (Boston College Law School).

The law schools' efforts to distinguish discriminating employers was not limited to the military but was applied to any employer who failed to meet the non-discrimination

requirements. For example, Yale Law School, in the 1990s, denied the Christian Legal Society access to its CSO facilities as the employer admittedly selected students based on religious affiliation and sexual orientation. *See* J.A. at 77-78. In addition, New York University School of Law ("NYU Law"), in 1981, denied access to the Federal Bureau of Investigation to CSO facilities since it selected students based on sexual orientation. *See* J.A. at 152. NYU Law also banned a Chicago-based law firm from CSO facilities in 1990-1991 because of a discriminatory question asked to a student during interviews. *Id*.

The military acknowledged that the actions taken by FAIR expressed a specific message criticizing the hiring policies of the military. In a letter written to the President of Yale University, the Acting Deputy Under Secretary for Military Personnel Policy wrote that "by singling out military recruiters, Yale sends the message that employment in the Armed Service of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." J.A. at 132. While the military misperceived the law school's message, *see* J.A. at 113 (Letter from Richard C. Levin, President of Yale University expressing the University and Law School's respect for military service), the military nevertheless identified the law school's actions as a form of expression.

2. The Statutory History of the Solomon Amendment and its History of Application Demonstrate That it Has Been Applied to Compel Law Schools to Endorse Military Hiring Practices

The statutory history of the Solomon Amendment and its application by the military illustrate that the purpose of the Solomon Amendment is to compel law schools to endorse military hiring practices rather than focus on the efficacy of military recruiting. Furthermore, the DOD's rejection of law schools' efforts to offer alternative interview venues indicates the purpose of the Solomon Amendment is to regulate expression.

i. The Statutory History of the Solomon Amendment Reveals it Was Enacted to Curtail the Criticism Leveled by Law Schools at the Military's Hiring Policies

The statutory history of the Solomon Amendment illustrates that the drafting of and subsequent amendments to the Solomon Amendment were in response to criticisms voiced by law schools regarding the military's "Don't Ask, Don't Tell" policy. To derive Congress's intent and subsequently the Act's constitutionality, this Court has found an exploration of legislative and statutory history to be relevant. *See Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981) (finding that the statutory and legislative history regarding the consideration of requiring women to register for the draft was "highly relevant in assessing the constitutional validity of the exemption.").

Since the 1980s, law schools began to restrict access to military recruiters based on the military's exclusion of homosexual servicemembers. *See FAIR II*, 390 F.3d at 225. This practice gained considerably more attention following the promulgation of the "Don't Ask, Don't Tell" policy in 1993. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (1993) (codified as amended at 10 U.S.C. § 654). In 1994, without any request made by the DOD or any hearings held regarding the efficacy of military recruiting, Representative Gerald Solomon sponsored an amendment to withhold DOD funding from any educational institution with a policy of denying or effectively preventing the military access to campuses for purposes of recruiting. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994). During the debate in the House of Representatives, the Amendment's co-sponsor, Representative Richard Pombo of California, revealed the true intention of the Amendment: to punish schools that criticize military hiring policies. He urged his colleagues to "send a message over the wall of the ivory tower of higher education" that colleges' and universities' "starry-eyed idealism

comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves[,] then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America." 140 Cong. Rec. H3863 (daily ed. May 23, 1994). Another Representative noted the harmful effect the Amendment had on First Amendment rights. "We should not . . . chill or abridge privacy, speech, or conscience by threatening a college with a Federal funds termination because it chose for whatever reason to deny access to military recruiters. . . . We should not browbeat them . . . into becoming involuntary agents of Federal policy." *Id.* at H 3862 (statement of Rep. Dellums).

Over the years, further amendments to the original Act have dramatically increased the penalties for not complying with the Solomon Amendment. Following the amendment passed in 1999, National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999), law schools were able to comply with the Solomon Amendment by merely allowing military recruiters to gain access to campuses while not providing them affirmative assistance in the manner provided to other recruiters. *See FAIR II*, 390 F.3d at 227. Starting in 2001, however, the DOD's policy changed as it began applying "an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters." *Id.* Congress codified this policy in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). The latest amendment penalizes law schools and their parent institutions for preventing military recruiters from gaining entry to campuses "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to the students that is provided to any other employer." 10 U.S.C. § 983(b). The actions taken by Congress and more recently the military have never reflected a finding regarding the efficacy of military recruiting based on distinguishing treatment

by law schools. Rather, the actions result from an increasing frustration with the criticisms leveled by law schools at the discriminatory "Don't Ask, Don't Tell" policy.

ii. The DOD's Rejection of Alternative Interview Venues Provided by Law Schools Indicates the Purpose of the Amendment is to Compel Endorsement

The military's rejection of alternative recruiting venues provided by law schools offers further evidence that the true purpose of the Solomon Amendment is not to facilitate recruitment but rather to silence criticism through compelled endorsement. Throughout the past decade, FAIR members made a good faith effort to accommodate military recruiting needs while simultaneously maintaining a distinction in how they treated military recruiters in order to express their disfavor for the military's discriminatory hiring policy. While such accommodations were initially approved by the military, the military recently took a new approach where any distinctive treatment was not tolerated regardless of what accommodating measures were offered by the law school. For example, prior to the enactment of the Solomon Amendment, law schools provided the military with multiple avenues to recruit their students. At Harvard Law School, for example, the Harvard Law School Veterans Association, a recognized student organization, invited military recruiters to campus and facilitated their recruitment efforts. *See* J.A. at 137-38. NYU Law made available in the CSO information about military positions and contact information for recent graduates who pursued military careers. *See* J.A. at 154-55. Multiple law schools made alternative facilities available for military recruiters while reserving CSO facilities for non-discriminating employers. *See, e.g.,* J.A. at 59-60 (explaining that the University of Southern California School of Law made ROTC offices on the main USC campus available to military recruiters).

In some instances, the alternative venues provided by law schools proved more effective at recruiting than the CSO facilities. Following the passage of the first Solomon Amendment,

many campuses experienced boisterous protests at locations where the military conducted interviews from students opposed to the discriminatory hiring practices of the military. For this reason, Touro College Law Center moved its military interviews to a nearby office in order to encourage students to interview who were otherwise reluctant to confront the protesters. *See* J.A. at 180. Because of student protestors at NYU Law in 2002, military recruiters offered to interview students off campus so they did not have to cross the protest line, s*ee* J.A. at 160-61, and later praised the results. *See* J.A. at 173-74 (Letter from Major Craig E. Merutka). Despite these efforts by law schools, the military remained unsatisfied. *See* J.A. at 161 (Decl. of Sylvia A. Law explaining that in spite of the successful recruiting off-campus, the military later demanded access to on-campus facilities). The current application of the Solomon Amendment requires that no distinction be made for military recruiters regardless of whether alternative facilities would be mutually beneficial. Rather than focus on numerical outcomes of recruiting efforts, the military is more concerned about suppressing the criticisms directed at it by FAIR members through their distinguishing treatment.

B. The Solomon Amendment Must Reflect a Compelling State Interest to Be Found Constitutional Since It Regulates the Speech of FAIR Members and It Fails to Meet This Strict Standard

Since the Solomon Amendment has been applied to compel FAIR members to endorse military hiring procedures, this Court must evaluate the Solomon Amendment's constitutionality under a strict scrutiny standard requiring the Government to demonstrate a compelling state interest. The application of strict scrutiny should apply to all forms of speech compelled by the DOD of FAIR members, including both explicit and implicit forms of speech.

1. Because the Solomon Amendment Aims to Compel Speech Rather Than Regulate Conduct, the Court Should Evaluate its Constitutionality Under a Strict Scrutiny Standard

As demonstrated in Section II.A, the primary purpose of the Solomon Amendment is to suppress criticism of the military's hiring policy by compelling the endorsement of FAIR members. Whether one characterizes the government's interference as compelling endorsement or silencing criticism does not affect whether strict scrutiny should be applied. *See Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." (citation omitted)).

To determine whether to apply strict scrutiny, the Court must first determine whether the regulation in question relates to expression or conduct. *See id.* (noting the need to determine whether the regulation is related to content since "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"); *see also Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (deciding not to apply First Amendment scrutiny, in part, because the compelled action "cannot be said to engender any crisis of conscience").

The actions compelled of FAIR members by the DOD are not content-neutral and therefore fall within the purview of strict scrutiny. In order for government regulation to face the less-restrictive burden laid out in *O'Brien*, the regulation must be "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (citing *O'Brien* for the same proposition). While the Solomon Amendment may appear to be content-neutral on its face, this Court has explicitly held that "a regulation neutral on its face maybe content-based if its manifest purpose

is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc.*, 512 U.S. at 645; *see also Acara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring, joined by Stevens, J.) ("If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate the First Amendment and require analysis under the appropriate First Amendment standard of review.").

The exception identified in *Turner Broadcasting* and by Justice O'Connor in *Acara* is precisely the exception to apply in the instant case. The statutory history and pattern of application of the Solomon Amendment demonstrate that its manifest purpose is to regulate expression. In a number of other speech-related cases, the Court has evaluated Congress's intent in determining whether the regulation was content based. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court disallowed restrictions on campaign expenditures since "the interest in regulating the alleged 'conduct' of giving or spending money arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* at 17 (quotation omitted).; *see also United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression." (quotations omitted)). Given the motivation of Congress and the DOD illustrated in Section II.A to compel the law schools to legitimate the military's hiring practice, the Amendment must face strict scrutiny analysis.[6]

2. The Court Should Apply Strict Scrutiny Analysis to All Compelled Speech, Including Both Explicit and Implicit Forms of Speech

In applying the strict scrutiny standard to the Solomon Amendment, the Court should consider every form of speech affected by the Solomon Amendment. The Court identified

[6] As discussed above in Subsection I.D.3, there is no need for the Court use a standard other than strict scrutiny because the case involves the military. *See Rostker v. Goldberg*, 453 U.S. 57, 69-70 (1981).

potential forms of compelled speech in *Wileman Brothers* where it held that the regulation in question did not violate the First Amendment since it

> does not require respondents to repeat an objectional message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent' . . . or require them to be publicly identified or associated with another's message.

521 U.S. at 471 (citations omitted). In categorizing these distinct forms of speech more broadly, the Court may consider instances where the Solomon Amendment compels members of FAIR to explicitly convey a message and instances where FAIR members are compelled to implicitly convey a message.

i. The Solomon Amendment Compels Explicit Forms of Speech

The Solomon Amendment requires FAIR members to explicitly convey messages that legitimate the military's hiring practices. The classic case involving explicitly compelled speech is *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where the Court struck down a law compelling students to salute the American flag. As *Barnette* demonstrates, the compelled speech need not be verbal speech but can include nonverbal forms of expression. *See also Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression.").

As currently applied, the Solomon Amendment requires CSOs to explicitly convey information on behalf of military recruiters since CSOs are disallowed from distinguishing how they treat military recruiters from non-discriminating employers. CSO employees may be required to maintain contact information for military recruiters and distribute it to students. CSO employees may also be required to maintain statistics regarding how many students accept

summer and permanent positions with DOD branches and subsequently distribute the information to students. During campus interviews, the CSO may be required to post which military branches are coming to interview on public displays along with the names of other employers. In addition, if CSO employees agree to hand out paraphernalia marketing employment opportunities of certain employers, they would also be required to hand out paraphernalia advertising military employment opportunities to students.

Should CSOs of FAIR members elect to curtail their participation in interview programs to avoid conveying messages on behalf of the DOD, a First Amendment violation would still exist since the Solomon Amendment would have effectively suppressed the schools' speech. Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a state law that compelled newspapers to print responses of political candidates who had been assailed by the paper. *Id.* at 243. The Court noted that given the penalties faced by newspapers under the statute, "editors may well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* at 257.

ii. The Solomon Amendment Compels Implicit Forms of Speech

More common than a government requirement to repeat an objectionable phrase is a government requirement to accommodate or subsidize the objectionable speech of a third party. A number of cases decided by this Court make clear that this implicit form of compelled speech is equally violative of the First Amendment. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (finding unconstitutional a federal law that compelled mushroom growers to subsidize advertising campaign to which some objected); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (finding unconstitutional a state law compelling the utility

company to insert a newsletter written by a third party in its monthly bill to customers); *Wooley v. Maynard*, 430 U.S. 705 (1977) (finding unconstitutional a New Hampshire state law requiring citizens to display the state motto, "Live Free or Die" on their license plates).

The Solomon Amendment requires FAIR members to accommodate and subsidize numerous messages delivered by the DOD. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that the California State Constitution allowed third parties to exercise their free speech rights on the private party of an objecting party, a shopping center. This case is easily distinguished from *Pruneyard.* In *Pruneyard*, the Court noted that

> [m]ost important[ly], the shopping center by choice of the owner is not limited to the personal use of [the owners]. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.

Id. at 87. The members of FAIR do not share this trait. Rather than making their interview programs open to the public, CSOs explicitly limit the program to non-discriminating employers who must sign forms declaring they do not violate the non-discrimination policies of the school. *See* Subsection II.A.1. Students, faculty members, and other staff of law schools recognize that law schools and their CSOs have a choice of whom to admit to the interview programs and will hold the law school responsible for those decisions.

The fact that FAIR members may disavow any message it expresses on behalf of the military does not cure the First Amendment violation. The Court in *Pruneyard* suggested that the shopping center owners could "disavow any connections with the message by simply posting signs in the area where the speakers . . . 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." 447 U.S. at 87. Later opinions by this Court, however, did not

rely on this argument and, in fact, held the opposite. In *Pacific Gas & Electric Co.*, the Court struck down a requirement that the utility company include a newsletter from a third party in its monthly bill even though the third party was "required to state that its messages are not those of [PG&E]." 475 U.S. at 7 (plurality opinion). Such ameliorative measures, which FAIR members are required to take by AALS in response to the equal access required by the Solomon Amendment, *see* J.A. at 244-50, violate the FAIR members First Amendment right to stay silent. *See Pac. Gas & Elec. Co.*, 475 U.S. at 11 (plurality opinion) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid"); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (First Amendment "necessarily compris[es] the decision of both what to say and what *not* to say"). Any ameliorative measures taken by FAIR members to distance themselves from compelled speech only exacerbates the First Amendment violations.

3. The Solomon Amendment Does Not Reflect a Compelling State Interest

For the same reasons articulated in Section I.E, the Solomon Amendment fails the strict scrutiny test as there is no compelling state interest in the Amendment as applied. Furthermore, for the reasons outlined in Section I.F, even if the Court finds that the Solomon Amendment regulates expressive conduct and therefore is subject only to intermediate scrutiny, the Amendment fails this test as well.

III. The Solomon Amendment Violates the Spending Clause by Placing Unconstitutional Conditions on the Receipt of Federal Funds

While this Court has emphasized that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives," *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003), such latitude is not unlimited. The Solomon Amendment violates the Spending Clause for three reasons. First, as demonstrated above, the Solomon Amendment conditions the receipt of money on activities that violate the First

Amendment. Second, the conditions placed on federal funds by the Solomon Amendment are unrelated to any specific federal program. Third, the overwhelming potential loss of federal funding is coercive.

A. The Solomon Amendment Violates the Spending Clause By Conditioning Federal Funds on Activities That Violate the First Amendment

The Solomon Amendment's infringement on First Amendment rights precludes its use as a condition for receiving federal funds. Congress may not condition the receipt of federal funds on activities that require the recipient to forego constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (finding unconstitutional a condition that denied legal services funding to any organization that represented clients in efforts to amend or otherwise challenge existing welfare law). As demonstrated in Parts I and II above, the Solomon Amendment requires activity that violates the First Amendment rights of FAIR. Therefore conditioning any federal funds on such activities violates the Spending Clause.

B. The Solomon Amendment Violates the Spending Clause by Not Conditioning the Receipt of Federal Funds as Part of a Broader Federal Program

The Solomon Amendment violates the Spending Clause by conditioning the receipt of federal money on activities unrelated to particular federal projects or programs. This Court has held that "federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects of programs.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion).

In cases where the Court has upheld conditions on the receipt of federal funds, the funds are directly tied to a broader federal program. *See Rust v. Sullivan*, 500 U.S. 173, 192-92 (1991) (restricting funding to family planning services that eschew abortion counseling). In *Dole*, the

Court held that the Government's interest in safe interstate travel was sufficient to condition receipt of transportation funds on the states having a minimum drinking age of twenty-one. 483 U.S. at 208-09. *But see id.* at 218 (O'Connor, J., dissenting) ("[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction."). The condition in the instant case is even more attenuated than the condition in *Dole*, and is arguably non-existent. FAIR members risk losing all federal funding from the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, Energy, Transportation, and the Central Intelligence Agency, *see* 10 U.S.C. § 983(d), merely because they do treat military recruiters in exactly the same manner they treat non-discriminating employers. The actions required by the Solomon Amendment are not directly tied to any other federal program and certainly fall outside the scope of anything unrelated to the hiring of military personal. Therefore, the Solomon Amendment violates the Spending Clause.

C. The Solomon Amendment Violates the Spending Clause By Threatening the Loss of an Overwhelming Amount of Federal Funding and Therefore Being Coercive

This Court has noted that "in some circumstances the financial inducement offered by Congress may be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211. Given the overwhelming loss of federal funds facing FAIR members who choose not to comply with the Solomon Amendment as applied, one is hard pressed to contemplate a clearer example of financial compulsion. *Cf. Dole*, 483 U.S. at 211 ("When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course . . . is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact."). The loss faced by FAIR members is not merely rhetorical but devastating. Law schools have been coerced into complying with a

Governmental policy with which they disagree and for this reason the Solomon Amendment must be found to be in violation of the Spending Clause.

CONCLUSION

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

Respectfully submitted,

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APPENDIX 1: STATUTORY PROVISIONS INVOLVED

The Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994), provides in part:

> (a) DENIAL OF FUNDS.--(1) No funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes--
>
> (A) entry to campuses or access to students on campuses; or
>
> (B) access to directory information pertaining to students.

The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996), provides in part:

> (b) Denial of Funds for Preventing Federal Military Recruiting on Campus.-- None of the funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for any fiscal year may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered educational entity if the Secretary of Defense determines that the covered educational entity has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--
>
> (1) entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of Federal military recruiting; or

The National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999), provides in part:

> (a) RECODIFICATION AND CONSOLIDATION FOR LIMITATIONS ON FEDERAL GRANTS AND CONTRACTS.--(1) Section 983 of title 10, United States Code, is amended to read as follows:
>
> "§ 983. Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies
>
> "(b) DENIAL OF FUNDS FOR PREVENTING MILITARY RECRUITING ON CAMPUS.--No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

"(1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

"(d) COVERED FUNDS.--(1) The limitation established in subsection (a) applies to the following:

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

"(B) Any funds made available in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

"(2) The limitation established in subsection (b) applies to the following:

"(A) Funds described in paragraph (1).

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

The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004), provides in part:

(a) EQUAL TREATMENT OF MILITARY RECRUITERS WITH OTHER RECRUITERS.--Subsection (b)(1) of section 983 of title 10, United States Code, is amended--

(1) by striking "entry to campuses" and inserting "access to campuses"; and

(2) by inserting before the semicolon at the end the following: "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".

(b) PROHIBITION OF FUNDING FOR POST-SECONDARY SCHOOLS THAT PREVENT ROTC ACCESS OR MILITARY RECRUITING.--(1) Subsection (d) of such section is amended--

(A) in paragraph (1)--

(i) by striking "limitation established in subsection (a) applies" and inserting "limitations established in subsections (a) and (b) apply";

(ii) in subparagraph (B), by inserting "for any department or agency for which regular appropriations are made" after "made available"; and

(iii) by adding at the end the following new subparagraphs:

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

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

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

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

The Solomon Amendment, 10 U.S.C. § 983 (2004), provides in part:

(b) Denial of funds for preventing military recruiting on campus.--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

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

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

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

(d) Covered funds.--(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:

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

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

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

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

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

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

The Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654, provides in part:

(a) Findings.--Congress makes the following findings:

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act…

APPENDIX 2: REGULATORY PROVISIONS INVOLVED

The DOD regulation clarifying that the 1999 version of the Solomon Amendment only denied funds to the subelement of a university that denied recruiters access, 32 CFR § 216.3, provides in part:

(b) Covered school. An institution of higher education, or a subelement of an institution of higher education, subject to the following clarifications:

(1) In the event of a determination (§ 216.5) affecting only a subelement of a parent institution (see § 216.3(d)), the limitations on the use of funds (§ 216.4(a) and (b)) shall apply only to the subelement and not to the parent institution as a whole.