No. 04-1152

# In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

*v.*

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

**PARTIES TO THE PROCEEDINGS BELOW**

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chartoff. Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

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## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Donald H. Rumsfeld, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 390 F.3d 219. The opinion of the district court (Pet. App. 82a- 184a) is reported at 291 F. Supp. 2d 269.

### JURISDICTION

The judgment of the court of appeals was entered on November 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Solomon Amendment, 10 U.S.C. 983[1], is set forth in the appendix to this petition (Pet. App. 185a-188a). The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

## STATEMENT

1. Article I of the Constitution vests Congress with the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12. Enlisting qualified men and women in the military is essential in fulfilling that task. Except when military exigency has required resort to conscription, Congress traditionally has relied on voluntary enlistment as the most effective means of meeting its staffing needs. As a result, the defense of the United States depends on the ability of the armed forces to attract men and women of the highest possible caliber.

To meet that challenge, Congress has long required the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1) (codifying Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 2, 59 Stat. 538). As the demands of military service have grown more complex, the military has placed increasing emphasis on recruiting students from colleges and universities. However, some institutions of higher education have sought to restrict campus recruiting by the military.

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[1] The Solomon Amendment was amended by Congress on October 28, 2004. All references to the Solomon Amendment in this petition are to the statute as currently amened.

In 1994, Congress enacted legislation that directed the Department of Defense to withhold funds from institutions of higher education that denied military recruiters access to campuses and students. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, § 558, 108 Stat. 2776. Two years later, Congress amended the legislation to extend the funding condition to funds provided by several other federal agencies. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271. That funding condition is popularly known as the Solomon Amendment, after the Member of Congress who originally introduced it, and it is codified as amended in 10 U.S.C. 983.

Under the Solomon Amendment, specified public funds are not provided to an "institution of higher education," or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. 983(b)(1). The Solomon Amendment does not demand a fixed level or degree of access; it simply asks the institution to provide military recruiters with equal access relative to what the institution provides to other employers. Even so, the Solomon Amendment does not mandate equal access, but it does condition federal funds on equal access, such that the institution cannot deny equal access and simultaneously receive the specified federal funds.

The Solomon Amendment applies to all institutions of higher education except ones with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. 983(c)(2). The Act governs all funds made

available through the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, the Central Intelligence Agency, and other enumerated agencies. 10 U.S.C. 983(d)(1). The Act does not apply to funds provided to educational institutions or individuals "solely for student financial assistance, related administrative costs, or costs associated with attendance." 10 U.S.C. 983(d)(2).

The Solomon Amendment rests on two related legislative judgments. The first is that restrictions on military recruiting at colleges and universities interfere with "the Federal Government's constitutionally mandated function of raising a military." 141 Cong. Rec. 595 (1995) (Rep. Solomon). As Representative Solomon explained during a floor debate:

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996); *id.* at 12,712 (Rep. Goodlatte) ("Campus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military.").

The second legislative judgment is that *equal* access is critical to effective military recruiting. As originally enacted, the text of the Solomon Amendment did not

expressly refer to equal access. The Department of Defense interpreted the Act to condition federal funding on equal access, however, and Congress amended the law in 2004 to ratify that administrative interpretation. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811. The House Committee report accompanying the 2004 amendment explained the importance of equal access:

> [A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment[, in turn,] relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers.

H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004). In implementing that judgment, Congress once again did not impose a direct requirement on all colleges and universities, but instead provided that affording equal access in recruiting shall be a condition on the receipt of federal funds by those colleges and universities that choose to accept them.

2. Since 1990, the American Association of Law Schools (AALS) has required its members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate on the basis of sexual orientation or other specified criteria. C.A.

App. 349, 353 (AALS Bylaws §§ 6-4(b), 6.19). The AALS takes the view that the military runs afoul of that policy as a result of the Act of Congress concerning homosexuality in the armed forces. See 10 U.S.C. 654. Nonetheless, following enactment of the Solomon Amendment, the AALS excused members from complying with that policy if they took steps to "ameliorate" the perceived impact of military recruiting on the student body. See AALS Memorandum 97-46 (Aug. 13, 1997) <http://www.aals.org/97-46.html>. In response, most law schools allowed military recruiters to enter their campuses, but many law schools refused to provide military recruiters with the same access that they offered to other employers. Pet. App. 99a. The Department of Defense subsequently clarified that the Solomon Amendment conditions federal funding on *equal* access, and notified law schools that the failure to provide equal access could jeopardize their federal funds. *Id.* at 101a.

3. In September 2003, the Forum for Academic and Institutional Rights—an association of certain law schools and law school faculties—and others (respondents) brought this suit against Secretary of Defense Donald R. Rumsfeld and others (petitioners) in the United States District Court for the District of New Jersey. Pet. App. 10a. Respondents alleged, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *Id.* at 12a. Respondents immediately moved for a temporary restraining order and a preliminary injunction. *Id.* at 86a. The district court denied the request for a temporary restraining order, but required petitioners to respond to the preliminary injunction motion within seven days. *Ibid.* The district court subsequently denied respon-

dents' request for a preliminary injunction. *Id.* at 82a-184a.[2]

Applying the First Amendment standard for laws that affect expressive conduct, see *United States* v. *O'Brien*, 391 U.S. 367 (1968), the district court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court reasoned that the Solomon Amendment furthers the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort will be less effective if military recruiters are denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment

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[2] In the same decision in which it denied a preliminary injunction, the district court also denied the government's motion to dismiss the complaint for lack of standing. The district court held, on the basis of the allegations in the complaint, that a broad range of plaintiffs in addition to FAIR, including individual students and faculty members, student organizations at two law schools, and a national association of law professors, had standing to challenge the constitutionality of the Solomon Amendment. Pet. App. 84a-86a, 103a-128a.

The court of appeals affirmed the district court's holding that respondent FAIR has standing, and therefore did not find it necessary to determine whether any of the other respondents have standing. Pet. App. 10a-11a n.7; see *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986). FAIR's list of member law schools and faculties is secret, and at the time the motion to dismiss was filed, none of its members (nor, consequently, their alleged injuries) had been specifically identified. *Id.* at 108a. The district court held that the secrecy of the membership did not defeat standing. *Id.* at 108a-114a. The court also noted that in its second amended complaint, FAIR identified two of its members, Golden State University School of Law and the faculty of Whittier Law School. *Id.* at 14a. As we did below, we concede that respondent FAIR has standing, at a minimum, to represent identified law schools. See *id.* at 10a n.7.

does not seek to suppress ideas. *Id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. *Id.* at 166a.

4. A divided panel of the Third Circuit reversed. Pet. App. 1a-81a. The panel majority held that respondents are likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and it directed the district court to issue a preliminary injunction against its enforcement on that basis. *Id.* at 11a-48a.

Initially, the court of appeals viewed the Solomon Amendment's funding condition as the equivalent of a direct regulatory requirement that institutions afford military recruiters equal access to their campuses and students. Pet. App. 11a-12a n.9. The court then held that the Solomon Amendment is subject to strict scrutiny under the First Amendment on two grounds. *Id.* at 13a-15a.

First, the court concluded that the Solomon Amendment directly burdens the right of educational institutions to engage in expressive association. Pet. App. 15a-22a. The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 18a. Second, the court concluded that the Solomon Amendment implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message with which they disagree. *Id.* at 25a-39a. In the court's view, the Solomon Amendment requires law schools to convey the message that all employers are equal, and to facilitate the military's statements that homosexual applicants may not serve. *Id.* at 32a.

Applying strict scrutiny, the court concluded that the government had failed to establish that there are no alternative means for effective recruitment of military personnel that would be less restrictive than the Solomon Amendment. Pet. App. 22a-24a. The court suggested loan repayment programs and television and radio advertisements as two such alternatives. *Id.* at 23a.

The court of appeals also concluded that respondents would be entitled to a preliminary injunction if the *O'Brien* standard rather than strict scrutiny were applicable. Pet. App. 43a-47a. The court held that a denial of equal access to military recruiters involves expressive conduct. *Id.* at 43a-44a. And it found that the government was required to supply evidence to the district court that the Solomon Amendment enhances the military's recruitment effort in order to sustain the Amendment under *O'Brien*. *Id.* at 45a.

Judge Aldisert dissented. Pet. App. 48a-81a. Applying the *O'Brien* framework, he concluded that the Solomon Amendment is constitutional. *Id.* at 78a-81a.

5. The government filed a motion in the court of appeals to stay the mandate pending the filing of this certiorari petition. By order dated January 20, 2005, the court of appeals granted a stay. By order dated February 2, 2005, the court denied respondents' motion to reconsider the stay.

## REASONS FOR GRANTING REVIEW

Effective recruitment is essential to sustain an all-volunteer military, particularly in a time of war. The Solomon Amendment reflects Congress's judgment that a crucial component of an effective military recruitment program is equal access to college and university campuses.

Based on its conclusion that the Solomon Amendment likely violates the First Amendment, the court of appeals in this case has directed the district court to enjoin enforcement of the Solomon Amendment. That injunction would undermine military recruitment during a time of war.

The court of appeals' constitutional analysis is seriously flawed. The court held that the Solomon Amendment interferes with expressive association and compels speech, but it does neither. The equal access condition applies only if institutions voluntarily choose to receive the specified federal funding. If institutions do not wish to associate with military recruiters or their speech, they may decline to associate with the federal funding. Neither the association, nor the receipt of federal funs, nor the equal access policy is compelled. Furthermore, the Solomon Amendment does not even force institutions that choose to accept federal funds to give military recruiters some predetermined level of access. It simply requires the institutions to give the military the same access to their facilities and students as they choose to give other outside employers. The Solomon Amendment does not seek to affect federally funded institutions' selection of their own internal membership. Nor does it ask the institutions to adopt the statements made by military recruiters as their own. To the contrary, institutions that voluntarily accept federal funding remain free to protest the military's policies and to make clear that they do not agree with them.

Because the court of appeals' decision calls into question the constitutionality of an important Act of Congress and directs entry of a preliminary injunction barring its enforcement, because that decision is based on a flawed constitutional analysis, and because the

decision undermines military recruiting during time of war, review by this Court is warranted.

## I. THE COURT OF APPEALS ERRED IN ITS CONSTITUTIONAL ANALYSIS

A. The court of appeals held that the Solomon Amendment interferes with expressive association and compels speech, triggering the application of strict scrutiny under the First Amendment. That holding is incorrect. The Solomon Amendment does not interfere with expressive association or involve compelled speech.

1. Relying on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), the court of appeals held that the Solomon Amendment impairs a law school's right to expressive association. Pet. App. 15a-22a. The court's reliance on *Dale* is misplaced.

In *Dale*, the Court invalidated a state law that required the Boy Scouts to accept gay men as leaders of their organization. The Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. Applying that standard, the Court found that "Dale's presence as an assistant scoutmaster would * * * surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653-654.

Under the *Dale* analysis, the Solomon Amendment does not burden a law school's right to expressive association. Unlike the state law at issue in *Dale*, the

Solomon Amendment is not concerned with an institution's method of determining its own internal composition and organization: it does not establish criteria for the selection of administrators, faculty, or students. Recruiters are not a part of the institution itself and do not become members through their recruiting activities. To the contrary, the role of recruiters is to attract students to seek employment *outside* the school. Such employment is an integral part of the economic activity of the Nation, and it has long been subject to governmental regulation through anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*), as well as numerous other laws. Educational institutions do not have any unique constitutional immunity to the application of laws that secure equal access to employment opportunities for their students or otherwise regulate employment and associated activities, such as recruiting. A school could not, for example, assert a "*Dale* right" to exclude minority-owned enterprises from the recruiting process. Indeed, most employment laws apply fully to a university's relationship with its own employees, who are engaged in its internal affairs. See, *e.g.*, *University of Pa.* v. *EEOC*, 493 U.S. 182 (1990). And of course, the Solomon Amendment takes as a given the recruiting program that the university itself has chosen to establish and requires only that military recruiters be afforded equal access to it. The Amendment thereby in turn ensures that the university's students will have equal access to military recruiters.

Furthermore, unlike the state law at issue in *Dale*, the Solomon Amendment does not force an institution to take an implicit position on an issue that is inconsistent with its beliefs. Because a scout leader purports

to speak for the Boy Scouts, there was a serious risk that the presence of a homosexual scout leader would send a message to its youth members and the world that the Boy Scouts approve of homosexual conduct. In contrast, recruiters speak for the employers they represent and do not purport to speak for the educational institutions they visit. There accordingly is no serious risk that the personnel rules and other laws and policies governing the armed forces would be regarded by the school's students or faculty, or by the outside world, as reflecting the views of the school.

That is particularly true because the Solomon Amendment simply seeks to put military recruiters in the same position as other employers, and those other employers also do not speak for the institution. No one would suppose, for example, that a law school endorses the "message" that is embedded in the work of each of the many prospective employers who might visit the campus to recruit, from corporate law firms, public interest groups across the ideological spectrum, and federal, state, and local governments. To the extent that a law school nonetheless wants to ensure that its faculty and students or the outside world will not erroneously perceive that it endorses the perspectives or policies of the United States military or other prospective employers that recruit on campus, the law school is free to make appropriate disclaimers or to express its disagreement with any policy or any recruiting organization.[3]

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[3] Members of a law school community are not similarly situated to impressionable "youth members" of the Boy Scouts. They participate in a vibrant academic atmosphere in which ideas and legal principles are vigorously attacked and defended and a respect for diverse views is normally encouraged. There is no reason to be-

2. The Solomon Amendment also does not implicate the compelled speech doctrine. That doctrine is triggered when the government compels a speaker to convey an antagonistic message, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997), and the Solomon Amendment does not *compel* anything, see pp. 15-16, *infra*, let alone require law schools to convey any antagonistic message. The court of appeals stated that law schools "object to conveying the message that all employers are equal," Pet. App. 32a, but a law school that affords military recruiters equal access in response to the Solomon Amendment conveys no such message. Indeed, there is no reason to suppose that the recruiting program on a law school campus that excluded military recruiters would convey a message that all prospective employers are equal. As a general matter, such a program might well convey only the message that the law school *treats* those prospective employers equally, presumably in an effort to make a broad range of options available to a diverse student body whose members are planning to enter the world of work after they leave school.

With military recruiters included, the program may convey the message that the school is more committed to receiving federal money than it is to a particular application of its non-discrimination policy. But that is a choice the school itself has made, and any message that choice might convey to its students or faculty or to the public at large therefore is the *school's* message. In any event, if the law school believes that the presence of military recruiters among prospective employers might actually lead to a misperception about a message

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lieve that the presence of military recruiters on campus threatens such an environment.

conveyed by the law school itself, the school is free to correct that misperception.

The court of appeals also stated that law schools object to statements made by military recruiters that openly homosexual students are ineligible for military service. Pet. App. 32a. But such a statement, to the extent the subject even came up in a particular interview, would simply report an objective fact about the qualifications for military service; it would not convey a particular message. Furthermore, such a statement would be made by the *recruiter*, not by the law school. In the context of a program in which the law school gives a wide array of employers access to its campus for recruitment purposes, there is no realistic danger that the statements of military recruiters will be uniquely attributed to the school, and the school is free to make its own views clear. See *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (where property is not reserved for personal use, where views of speakers will not likely be attributed to property owner, and where property owner can effectively correct any such misimpression through speech of his own, compelled speech doctrine does not apply).

3. There is a further, fundamental flaw in the court of appeals' reliance on the notion of "compelled" speech and on the proposition that the Solomon Amendment impermissibly intrudes into an educational institution's freedom of association. An educational institution covered by the Solomon Amendment has not been *compelled* to do anything. It has voluntarily chosen to enter into grant agreements or contracts *with* the United States and to accept funds under them, subject to a series of conditions, such as that it not discriminate on the basis of race or disability and that it give equal access in recruiting *to* the United States. That is an

entirely permissible quid pro quo in a bilateral relationship, and one that *any entity* that contracted with or made donations to a college or university could reasonably insist upon.

Furthermore, by receiving funding from the United States, an educational institution has voluntarily chosen to *associate* with the United States. Its resulting undertaking—to accord equal access in recruiting to the United States—is an integral feature of that association. The institution's right as an autonomous entity to expressive association in its own internal relationships among its students, faculty, and administration does not confer on it a constitutional right to dictate the terms of its association with autonomous outside entities such as the United States. The educational institution cannot find the United States to be an acceptable partner in financial arrangements promoting the education of its students, and then insist upon a constitutional right to deem the United States unacceptable when it comes to having military representatives on campus, on equal terms with other prospective employers, to recruit those students.

B. The court of appeals held that even if the right of expressive association and compelled speech were not implicated, the Solomon Amendment would be subject to review under the standard for the regulation of expressive conduct set forth in *O'Brien*. Pet. App. 43a-47a. The court of appeals further held that, on the existing record, the Solomon Amendment does not satisfy *O'Brien*'s standard of scrutiny. *Ibid.* That analysis is quite mistaken as well.

The Solomon Amendment is addressed to conduct: an educational institution's denial of equal access to military recruiters. There is nothing inherently communicative about that conduct, and it is not trans-

formed into expression simply because the institution may have announced in advance its *reason* for engaging in the conduct. If such a prior announcement of one's motive were sufficient to trigger First Amendment scrutiny of the government's regulation of the conduct itself, then a broad range of governmental regulation could be affected. The refusal to pay taxes (some portion of which funds the armed forces) or arson of a government building would trigger an analysis under *O'Brien* as long as the actor announced his reasons in advance. Conduct directed at private persons or property would likewise fall under such a rule, such as defacing a building by an animal rights activist who explained his conduct by the fact that the building houses a laboratory conducting animal research.

The Court made clear in *O'Brien* itself, however, that it has "not accept[ed] the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376. And the court of appeals was wrong to do so here. See *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel of expression is not sufficient to bring the activity within the protecton of the First Amendment.").

Even if the act of restricting campus access were sufficiently expressive to come within the scope of the First Amendment, Congress retains the power to deal with the non-expressive harm to military recruiting that arises from that conduct. Under *O'Brien*, a regulation of conduct that imposes an incidental burden on expression is constitutional as long as it furthers a

substantial governmental interest that is "unrelated to the suppression of free expression," 391 U.S. at 377, and that "would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). Here, the government's interest in recruiting the most qualified men and women for military service is compelling and entirely unrelated to the suppression of expression. Moreover, that recruiting mission would be achieved less effectively if military recruiters have less effective access to campuses and students than other prospective employers.

The court of appeals held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. Pet. App. 45a. In employing a rule of equal access, however, the Solomon Amendment relies on the *educational institutions*' own assessments of what is required for effective recruiting on their campuses. When a university allows recruiters to conduct on-campus interviews, provides recruiters with conveniently located interview facilities, makes recruiting literature available through the university's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when the university denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the university itself views as integral to effective recruiting. An educational institution's own expert judgment therefore furnishes a firm factual basis for applying the Solomon Amendment to that institution.

Furthermore, this Court has recognized that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments" depends on "the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Here, there is nothing novel or implausible about the proposition that access to students and campuses enhances recruitment. If on-campus recruitment were not effective, law schools and other departments of colleges and universities would not invite employers on campus, and employers would not incur the considerable costs necessary to take advantage of the offer. A similar operating premise underlies anti-discrimination laws generally, which require equal treatment within the framework of the employment or other policies that the affected entity has adopted to govern its own affairs. It has never been thought that some evidentiary showing in court is required under those laws to prove that equal treatment is in fact necessary or justified.

The court of appeals' insistence upon more proof was particularly misconceived here, because to the extent anything more than common sense is required to support the principle of equal access for military recruiters, Congress's judgment in enacting the funding condition furnishes that support. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986) (holding that government is not required, in response to Free Exercise Clause claim, to offer evidentiary support to establish need for challenged military dress regulations). Article I assigns the power "[t]o raise and support Armies" to Congress, and Congress has made the judgment that equal access is necessary to "raise and support" military forces of the highest caliber. That judgment is entitled to substantial deference. See, *e.g.*, *Rostker* v.

*Goldberg*, 453 U.S. 57, 64-65 (1981); *Goldman*, 475 U.S. at 509 (1986).

There is no need in this case, however, to determine as a general matter what showing a person challenging an Act of Congress under *O'Brien* may demand by way of justification from the government. In the context of the Solomon Amendment, when an educational institution has elected to accept federal funding with full awareness of the equal access condition, nothing in *O'Brien* suggests that the First Amendment confers on the institution a right to insist at a later date upon any more of a justification for that condition than Congress's judgment that equal access is appropriate. If the institution did not believe, when it was deciding whether to enter into the various funding agreements, that there was a sufficient empirical justification for the government to insist upon that condition instead of some alternative method of recruiting, it was free to decline to enter into the agreements. That is the same option anyone has to decline to accept a contract offer that he believes is not justified or sufficiently backed up by information furnished by the other party.

C. For the reasons given in Points A and B, *supra*, the court of appeals erred in directing the entry of a preliminary injunction on the ground that the Solomon Amendment infringes upon a law school's freedom of expressive association, triggers the compelled speech doctrine, and has not been justified under *O'Brien*. Even under those First Amendment principles applicable to direct governmental regulation of private conduct, the court's analysis was seriously flawed. But the Solomon Amendment does not constitute a direct regulation of colleges and universities. It is not a mandate of equal access imposed on all institutions. It is a condition imposed on those institutions that

voluntarily associate with the government that they not turn around and deny the government equal access in recruiting.

The Solomon Amendment, therefore, rests on more than Congress's substantive powers under Article I of the Constitution to raise and support armies and otherwise to support the Nation's military. It also rests on the Spending Clause, which confers on Congress the power to "provide for the common Defence and general Welfare of the United States," Art. I, § 8, Cl. 1, as well as Congress's power to enact all laws that are necessary and proper to effectuate its spending power, Art. I, § 18. Specifically, the Solomon Amendment is a condition on an educational institution's receipt of federal funds that are appropriated by Congress for defense and other purposes. Thus, an educational institution that does not wish to associate with the United States' military recruiters may simply decline to seek funding from the United States.

The court of appeals recognized that the Solomon Amendment is a condition on the receipt of federal funds, enacted in the exercise of Congress's spending power, but it rejected the proposition that this feature of the Amendment has any bearing on the constitutional analysis. In the court's view, if the Solomon Amendment would be invalid under the First Amendment as a requirement imposed directly on law schools by Congress, it is equally invalid as a condition on the receipt of federal funds. See Pet. App. 11a-13a & n.9. That conclusion, too, is wrong.

Because the Solomon Amendment is a condition on federal funding, and not a direct regulatory requirement, it implicates Congress's "wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States* v.

*American Library Ass'n*, 539 U.S. 194, 203 (2003). Under the Spending Clause, Congress may establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998). The First Amendment is not inapplicable to Spending Clause conditions. In general, however, Congress exceeds First Amendment limits under the Spending Clause only when it "aim[s] at the suppression of dangerous ideas." *Id.* at 587 (quoting *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550 (1983)); see *Leatherers* v. *Medlock*, 499 U.S. 439, 447 (1991); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958). Otherwise the recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance.

Under these principles, the Solomon Amendment is valid Spending Clause legislation. The Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters. The Solomon Amendment is entirely indifferent to an institution's reason for denying equal access.

Nor is the Solomon Amendment aimed at the suppression of ideas in any other respect. Educational institutions that receive federal funds are free to criticize the military on whatever ground they wish without risking the loss of federal funds. They may adopt formal resolutions condemning military policies, hold rallies and marches, conduct open forums, and distribute leaflets and posters. Indeed, the record reflects that law schools, their faculties, and their students have engaged in precisely such activities. See, *e.g.*, C.A. App. 103 (law school forum); *id.* at 106-107, 206-207, 255, 302, 382-383 (student and faculty protests); *id.* at 112-113, 114, 232, 261-262 (memoranda

and faculty resolutions); *id.* at 231-232 (ameliorative statements); *id.* at 115 (student bar association resolution); *id.* at 118-121 (protest posters). No educational institution has been denied federal funds for that vigorous and open criticism. To the extent that educational institutions want to distance themselves from military policies more completely and send a less ambiguous message, they may simply decline assistance from the federal government, which advances the policies to which they object.

2. The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), illustrates the scope of Congress's authority under the Spending Clause. In that case, Grove City College argued that compliance with Title IX's prohibition against gender discrimination in federally funded educational programs would interfere with the First Amendment associational rights of the college and its students. The Court unanimously rejected that contention. 465 U.S. at 575-576. The Court held that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," and that the college could avoid Title IX's equal opportunity condition by "terminat[ing] its participation in the [educational grant] program." *Id.* at 575.

Like Title IX, the Solomon Amendment seeks to encourage educational institutions to provide equal access; it does not seek to suppress ideas; and it permits institutions to avoid the federal condition by declining federal assistance. Indeed, while Title IX governs the internal relationship between an institution and its students, the Solomon Amendment addresses only one narrow aspect of the relationship between an institution and the federal government itself, and it does so

only with respect to recruiting for prospective employment *outside* the school. Thus, like Title IX, the Solomon Amendment is a constitutional exercise of Congress's authority under the Spending Clause.

## II. THERE IS A PRESSING NEED FOR IMMEDIATE REVIEW

A. Invalidating an Act of Congress on constitutional grounds is "the gravest and most delicate duty that [a court] is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The inherent gravity of that act, and the injury that arises "any time [the government] is enjoined by a court from effectuating statutes enacted by representatives of its people," *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in Chambers), are themselves sufficient to warrant review by this Court. Indeed, the Court routinely grants certiorari when the government seeks review of a lower court decision granting a preliminary injunction on constitutional grounds. See, *e.g.*, *Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2790 (2004); *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 540 (2001); *Miller* v. *French*, 530 U.S. 327, 335 (2000); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992); *Walters* v. *National Ass'n of Radiation Survivors*, *supra*; see also *Saenz* v. *Roe*, 526 U.S. 489, 497-498 (1999) (interlocutory review of constitutionality of state statute).

The need for immediate review in this case is particularly pressing. The court of appeals has directed the district court to enter a preliminary injunction against enforcement of the Solomon Amendment. Pet. App. 48a. Any such injunction would cause serious harm to military recruiting. Moreover, military lawyers play a

vital role in the ongoing combat missions of the armed forces, and the military services depend significantly on campus access to recruit the lawyers they need to carry out their missions. If law schools are nevertheless allowed to deny equal access to military recruiters, and even bar them from campus altogether, without facing the loss of funding, the services' recruiting capabilities, and ultimately their broader capabilities, will be seriously compromised. A decision threatening those results should be given plenary review by this Court.

B. The case is in a posture that is suitable for the Court's review because it presents important legal questions that do not depend for their resolution on further factual development. The court of appeals has held as a matter of law that (1) the Solomon Amendment is subject to strict scrutiny because it infringes on law schools' freedom of expressive association and compels speech, (2) the Amendment in any event triggers heightened scrutiny under *O'Brien* because it interferes with the schools' expressive conduct, (3) Congress's determination that the Amendment is necessary for military recruitment and the recipient schools' own judgment about what is necessary for effective recruiting by other employers is not sufficient to justify similar access by the military, and (4) the Amendment's status as Spending Clause legislation does not affect the constitutional analysis. Those legal holdings are central to the court of appeals' decision concerning the Solomon Amendment's constitutionality, and further factual development is not necessary to review them.

If the Court agrees with the government on the appropriate constitutional analysis, the Solomon Amendment will be sustained, and no further evidentiary proceedings will be necessary. Even if the Court were

to conclude that the constitutionality of the Solomon Amendment required some form of factual inquiry, the Court's decision would significantly advance the course of the litigation by clarifying the nature and scope of that inquiry. For that reason, and because entry of a preliminary injunction would cause serious harm to the United States, the court of appeals' decision warrants immediate review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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