No. 04-1434

In the Supreme Court of the United States

ROBERT A. BURT, ET AL., PETITIONERS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Solomon Amendment as amended by Pub. L. No. 108-375, § 552(a), 118 Stat. 1911 (to be codified at 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 Solomon Amendment, as applied to the Yale Law School, violates the First Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the district court (Pet. App. A1-A59) is reported at 354 F. Supp. 2d 156.

JURISDICTION

The judgment of the district court was entered on January 31, 2005. A notice of appeal was filed by respondent on April 5, 2005. The petition for a writ of certiorari before judgment was filed on April 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners in this case ask the Court to issue a writ of certiorari before judgment to review a district court decision in their favor regarding the constitution-

ality of the Solomon Amendment, Act of Oct. 28, 2004, Pub. L. No. 108-375, § 552(s), 118 Stat. 1191 (to be codified at 10 U.S.C. 983(b)(1)), as applied to Yale Law School. The constitutionality of the Solomon Amendment is already before the Court in *Rumsfeld* v. *Forum for Academic and Institutional Rights*, cert. granted, No. 04-1152 (May 2, 2005) (*FAIR*).

1. The Solomon Amendment provides that specified public funds shall not be 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(a) and (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. The Solomon Amendment does not mandate equal access, but instead conditions federal funds on equal access, so 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 was enacted in furtherance of Congress's authority under Article I of the Constitution to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12. The Solomon Amendment is also an exercise of Congress's authority, under the Spending Clause, to "provide for the common Defence and general Welfare of the United States." *Id.* Art. I, § 8, Cl. 1. The Solomon Amendment reflects Congress's judgment 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); 142 Cong. Rec. 16,860 (1996) (Rep. Solomon); *id.* at 12,712 (Rep. Goodlatte). It also reflects Congress's judgment that *equal* access is critical to effective military recruiting. See H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004) ("Successful recruitment relies heavily on 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.").

2. Since 1990, the Association of American 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. AALS Bylaws §§ 6-4(b), 6.19 (1971). 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. 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.

3. In September 2003, organizations representing more than two dozen law schools or law school faculties, and 900 faculty members (the *FAIR* plaintiffs) brought suit in the United States District Court for the District of New Jersey to challenge the constitutionality of the Solomon Amendment. The *FAIR* plaintiffs claimed, *inter alia*, that the Solomon Amendment violates the First Amendment and Fifth Amendment, both on its face and as applied.

The district court denied the *FAIR* plaintiffs' motion for a preliminary injunction, holding that they were unlikely to prevail on any of their constitutional claims. *Forum for Academic and Institutional Rights, Inc.* v. *Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003). On appeal, a divided panel of the Third Circuit reversed. *Forum for Academic and Institutional Rights, Inc.* v. *Rumsfeld*, 390 F.3d 219 (2004). The panel majority held that the *FAIR* plaintiffs are likely to prevail on their claim that the Solomon Amendment violates the First Amendment. Based on that holding, the panel directed the district court to enter a preliminary injunction against enforcement of the Solomon Amendment. *Id.* at 246.

The government petitioned this Court for a writ of certiorari to review the court of appeals' decision regarding the constitutionality of the Solomon Amendment. The Court granted the government's petition on

May 2, 2005 (No. 04-1152), and the government's opening brief is due on July 18, 2005.

4. This case involves a challenge to the constitutionality of the Solomon Amendment as applied to Yale Law School. Until 2002, Yale Law School maintained a policy of denying the services of its Career Development Office to employers that take account of sexual orientation in hiring decisions. Pet. App. A15-A16, A20-A21. In 2002, the law school's faculty voted to suspend the application of the non-discrimination policy to military recruiters in order to avoid possible loss of federal funding under the Solomon Amendment. *Id.* at A22.

In October 2003, members of the faculty of Yale Law School (petitioners) filed suit in the United States District Court for the District of Connecticut against Donald H. Rumsfeld, the Secretary of Defense. They alleged that the application of the Solomon Amendment to the law school and its parent institution, Yale University, violates the First Amendment. Petitioners sought an injunction prohibiting the application of the Solomon Amendment to the law school and university on the basis of the law school's suspended recruiting policy.

The government moved to dismiss the complaint under Rule 12(b)(1) for lack of standing and lack of ripeness, and also moved to dismiss petitioners' constitutional claims under Rule 12(b)(6) for failure to state a claim. In June 2004, the district court denied the motion to dismiss on standing and ripeness grounds and reserved the government's Rule 12(b)(6) motion. Pet. App. C1-C20.

Petitioners thereafter moved for summary judgment under Rule 56. At the time of the motion, the government had not yet had the opportunity to engage in any discovery on petitioners' factual allegations. Acting pur-

suant to Rule 56(f), the government therefore asked to be allowed to conduct discovery before the district court acted on petitioners' motion. The government also opposed the motion on its merits.

On January 31, 2005, the district court issued a memorandum order granting petitioners' motion for summary judgment on First Amendment grounds. Pet. App. A1-A59. The district court declared the Solomon Amendment unconstitutional as applied, and enjoined the government from enforcing it against Yale University based on Yale Law School's denial of equal access to military recruiters. *Id.* at A59.

As a threshold matter, the court rejected the government's request for discovery under Rule 56(f). The court acknowledged that "the grant of summary judgment prior to discovery is not to be undertaken lightly," but nevertheless denied the government the opportunity to conduct discovery. Pet. App. A7; *id.* at A6-A15.

On the merits, the district court held that the Solomon Amendment interferes with petitioners' freedom of speech by compelling the law school to disseminate a recruiting message with which it disagrees and by interfering with the law school's ability to convey its own message. Pet. App. A33-A41. The court further held that the Solomon Amendment intrudes on petitioners' First Amendment right of freedom of association. *Id.* at A46-A55. Applying strict scrutiny, the court held that the government had not shown that the application of the Solomon Amendment to Yale Law School materially advances the government's military recruiting goals or that the Amendment is the least restrictive means of achieving those goals. *Id.* at A44-A46, A54-A55.

ARGUMENT

Petitioners seek certiorari before judgment on the question whether the Solomon Amendment violates the First Amendment. Rule 11 of this Court provides that a petition for a writ of certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Because the present petition does not satisfy that standard, the petition for a writ of certiorari before judgment should be denied.

1. The constitutionality of the Solomon Amendment under the First Amendment is already before this Court in *FAIR*. That case presents the crucial legal questions that will determine the constitutionality of the Solomon Amendment. In particular, that case presents the questions whether (1) the Solomon Amendment infringes on a law school's freedom of expressive association, (2) the Solomon Amendment unconstitutionally compels the recipient schools themselves to speak, (3) the Solomon Amendment triggers heightened scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968), because it interferes with expressive conduct, (4) a specific evidentiary showing of the effectiveness of on-campus recruiting is necessary to satisfy the *O'Brien* standard, and (5) the Solomon Amendment's status as Spending Clause legislation affects the constitutional analysis. If the Court agrees with the government's position in *FAIR*, the Solomon Amendment will be sustained. Because *FAIR* already presents the crucial legal issues that will determine the constitutionality of the Solomon Amendment, there is no reason for the Court to grant review in another case involving the constitutionality of the Solomon

Amendment, much less take the extraordinary step of granting review in a case that has not been resolved by the court of appeals.

Granting review before judgment is particularly unwarranted in this case because petitioners *prevailed* on their First Amendment claim in the district court and obtained an injunction preventing the government from enforcing the Solomon Amendment against Yale University. While the Court has granted a petition for review before judgment by a prevailing party in extraordinary circumstances, see *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 686-687 nn.1-2 (1974), petitioner has not identified any remotely comparable extraordinary circumstance here.

2. Petitioners contend that the record in this case is more complete than the record in *FAIR* and therefore provides a more suitable vehicle for review of the constitutional issues. Pet. 4, 21-22. That contention is incorrect. The record in this case is confined to a single school, and the district court held that the Solomon Amendment is unconstitutional only as applied to that school. In contrast, the *FAIR* plaintiffs submitted evidence regarding school recruiting practices and the putative operation of the Solomon Amendment with respect to a number of schools. On the other side of the evidentiary scale, the government's evidentiary presentation in this case is no different from its presentation in *FAIR*. There is therefore no basis for petitioners' contention that this case provides a better vehicle for resolving the constitutionality of the Solomon Amendment than *FAIR*.

Petitioners contend that evidence below on the effectiveness of military recruiting at Yale Law School is vital to determining whether the Solomon Amendment

survives strict scrutiny, because it reflects the military's experience at Yale both before and after Yale afforded equal access to military recruiters. Pet. 21-22. The government's principal submission, however, is that the Solomon Amendment is not subject to strict scrutiny. Even if the Solomon Amendment were subject to strict scrutiny, however, the outcome of that scrutiny does not turn on the effect of the Solomon Amendment on recruiting at a single educational institution. The Solomon Amendment is intended to advance the government's compelling interest in military recruiting at all of the Nation's educational institutions that receive federal financial assistance. Evidence of its impact at a single law school cannot establish that it fails to further that goal.

Petitioners argue that this case is better suited for review than *FAIR* because *FAIR* is at the preliminary injunction stage, while this case contains a "closed" factual record. Pet. 20. But as noted above, the district court in this case entered summary judgment in favor of petitioners without giving the government the opportunity to conduct discovery, and did so over the government's objections. The district court's refusal to permit discovery remains subject to review in the court of appeals, and if the court of appeals concludes that discovery should have been allowed, the record that petitioners characterize as "closed" will be reopened for further development.

Moreover, nothing about the interlocutory posture of *FAIR* renders it unsuitable as a vehicle for addressing the constitutionality of the Solomon Amendment. As noted in the government's petition in *FAIR*, this Court routinely reviews the constitutionality of Acts of Congress in the context of preliminary injunction proceed-

ings. See 04-1152 Pet. at 24 (citing cases). And, as discussed above, *FAIR* presents the crucial legal questions that will determine the constitutionality of the Solomon Amendment. This Court evidently agrees that *FAIR* is a suitable vehicle for it has granted the government's certiorari petition in that case.

There are two additional reasons why the Court should not grant the petition for review before judgment in this case. First, because the Court has already granted certiorari in *FAIR*, the briefing process for that case will be nearly complete before the Court considers the petition in this case in the ordinary course. Second, unlike in *FAIR*, the Court would not have the benefit of the views of the court of appeals in this case.

3. Petitioners suggest that this case presents constitutional claims that are not presented in *FAIR*. Pet. 4-5. In particular, petitioners point to their claims that the Solomon Amendment violates "their constitutionally protected rights of academic freedom" and "the constitutionally protected right of private associations to disassociate themselves from" persons with whose conduct and views they disagree. *Id.* at 5. Contrary to petitioners' assumption, the *FAIR* plaintiffs raised those claims or similar claims in the district court and court of appeals. See 04-1152 Pet. App. at 15a-25a (court of appeals) (freedom of association); *id.* at 21a-22a n.13 (court of appeals) (academic freedom); *id.* at 139a-142a (district court opinion) (academic freedom). Whether or not this Court in *FAIR* addresses all the issues petitioners here might wish to raise, there is no reason to prematurely take this case out of the hands of the Second Circuit. To the contrary, the Court should defer review until the Second Circuit has had an opportunity to address all of the issues petitioners have raised, with the

benefit of this Court's decision in *FAIR* if it is rendered before the Second Circuit rules.

4. Petitioners also contend that "considerations of standing [and] ripeness are less likely to prevent this Court from reaching" the merits in this case than they are in *FAIR*. Pet. 4. But ripeness has never been at issue in *FAIR*, and the government is no longer contesting standing in *FAIR* either. See 04-1152 Pet. at 7 n.2. In this case, in contrast, it remains open to the government to renew its standing and ripeness arguments in the court of appeals, and if the present petition is granted, this Court may be called on to address those issues as well. Thus, there is no basis for petitioners' claim that this case presents fewer potential jurisdictional obstacles than does *FAIR*.

5. Finally, petitioners argue that the constitutional interests of the Nation's law schools demand that this Court resolve the constitutionality of the Solomon Amendment. Pet. 22-24. The Court, however, has already taken the steps needed to accomplish that goal by granting the petition for certiorari in *FAIR*. If petitioners wish to be heard on the constitutionality of the Solomon Amendment, they are free to participate in *FAIR* as amici curiae and present the Court with whatever constitutional arguments they think appropriate. There is no reason for the Court to take the additional step of granting petitioners' extraordinary request for review before judgment.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

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