

No. 04-1152

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In The  
**Supreme Court of the United States**

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DONALD RUMSFELD, ET AL.,  
*Petitioners,*

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS,  
ET AL.,  
*Respondents.*

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

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**BRIEF AMICUS CURIAE OF  
SERVICEMEMBERS LEGAL DEFENSE NETWORK  
IN SUPPORT OF RESPONDENTS**

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SHARRA E. GREER  
KATHI S. WESTCOTT  
SERVICEMEMBERS LEGAL  
DEFENSE NETWORK  
P.O. Box 65301  
Washington, DC 20035  
(202) 328-3244

LINDA T. COBERLY  
*Counsel of Record*  
WINSTON & STRAWN LLP  
35 West Wacker Drive  
Chicago, IL 60601  
(312) 558-5600

GENE C. SCHAERR  
WINSTON & STRAWN LLP  
1700 Washington Street, NW  
Washington, DC 20006-3817  
(202) 282-5000  
SEPTEMBER 2005

TYLER M. PAETKAU  
JENNIFER GARBER  
WINSTON & STRAWN LLP  
101 California Street  
San Francisco, CA 94111  
(415) 491-1000

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## QUESTIONS PRESENTED

Did the Third Circuit correctly conclude that the Solomon Amendment imposes an unconstitutional condition on federal funding by requiring colleges and universities, as a condition on their receipt of federal funds, to provide military recruiters with the same support and access provided to any other recruiter, despite the schools' longstanding policy of refusing to abet employers engaged in discrimination?

More specifically, did the Third Circuit correctly refuse to accept the Government's bare assertion that the Solomon Amendment's intrusion on the rights of civilian institutions is necessary and its argument that this Court's cases on military deference preclude further judicial scrutiny?

**RULE 29.6 DISCLOSURE STATEMENT**

The Servicemembers Legal Defense Network is a non-profit legal services and policy organization. It has no corporate parents or affiliates.

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**BRIEF AMICUS CURIAE OF  
SERVICEMEMBERS LEGAL DEFENSE NETWORK**

Pursuant to Supreme Court Rule 37.3,<sup>1</sup> Amicus Curiae Servicemembers Legal Defense Network ("SLDN") submits this brief in support of Respondents. This brief addresses the question whether the Third Circuit correctly refused to accept the Government's bare assertion that the Solomon Amendment, 10 U.S.C. § 983, is necessary to serve a compelling military need and its argument that this Court's cases concerning deference to the military and to Congress in military affairs preclude further judicial scrutiny of the justifications offered for the statute.

**INTERESTS OF AMICUS CURIAE**

SLDN is a national, not-for-profit legal services and policy organization dedicated to protecting the rights of military personnel affected by the military's "Don't Ask, Don't Tell" policy. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (Nov. 30, 1993) [hereinafter "Don't Ask, Don't Tell"]. SLDN's honorary board is comprised of retired senior military officers and senior enlisted members, and many of the organization's governing board members and staff members are military veterans.

SLDN works to ensure that all Americans have the freedom to serve. Its mission is to end discrimination against and harassment of military personnel affected by

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<sup>1</sup> Counsel for Petitioners and counsel for Respondents have consented to the filing of this brief; letters evidencing such consent are on file with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than SLDN and its members and counsel has made a monetary contribution to the preparation or submission of this brief.

"Don't Ask, Don't Tell" and related forms of intolerance. For more than a decade, SLDN has worked to end the military's discriminatory policy and has provided free legal services to those harmed by "Don't Ask, Don't Tell." SLDN has responded to more than 6,900 requests for assistance and has effected almost three dozen different changes to military policy and practice.

SLDN's work also encompasses the impact of the Solomon Amendment, which effectively requires colleges and universities to assist in the military's practice of discrimination in recruiting as a condition on the receipt of federal funding. In addition, each year, representatives of SLDN speak at colleges and universities across the nation, educating on the discriminatory impact of the "Don't Ask, Don't Tell" policy. Given its familiarity with the military and its many years of work in connection with the policy of "Don't Ask, Don't Tell"—as well as with the Solomon Amendment itself—SLDN not only has a great interest in the outcome of this case but is uniquely well-positioned to assist the Court in its consideration of these important issues.

#### STATEMENT OF THE CASE

For many years, law schools have followed a policy of refusing to provide recruiting assistance to employers that engage in various forms of discrimination. In the 1970s, law schools began to extend this policy to bar access to employers that discriminate on the basis of sexual orientation, and in 1990, the Association of American Law Schools voted unanimously to include sexual orientation in the list of protected categories in law school non-discrimination policies.

The military has an explicit policy of discriminating on the basis of sexual orientation—a policy known as "Don't

Ask, Don't Tell." As a result, law schools have typically refused to offer the military's recruiters affirmative assistance. Most law schools did not completely bar military recruiters from their campuses, however, instead providing accommodations that would enable military recruiters to reach students without offending the institutions' non-discrimination policies. Those accommodations included, but were not limited to, allowing military recruiters to recruit at alternate locations.

In 1994, Congress passed the Solomon Amendment, which effectively required law schools to exempt the military from their non-discrimination policies. In 2004, after the pendency of this lawsuit (and partly in response to it), Congress amended the statute to expressly require that schools give the military access and assistance that is at least equal in quality and scope to the access provided to any other employer. Ronald W. Reagan Nat'l Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004) [hereinafter "2004 Provision"]. If any part of a college or university fails to comply with the terms of the Solomon Amendment, the entire institution will be denied federal funding, including not only grants and contracts from the Department of Defense, but also virtually any federal grants or contracts available to the academic institutions (other than student aid).

This lawsuit was brought by a coalition of law schools and law faculty who contended that the Solomon Amendment is an unconstitutional condition on federal funding, requiring that law schools speak for, associate with, and host military recruiters and disseminate the military's recruitment message. Although the district court denied the plaintiffs' motion for a preliminary injunction, the Third Circuit reversed, holding that the plaintiffs had established a likelihood of success on the merits of their First Amendment claims. *See Forum for Academic & Institutional*

*Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) [hereinafter *FAIR*]. In the course of its ruling, the Third Circuit noted that “the Government ha[d] chosen to submit no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting.” *Id.* at 245. The Third Circuit rejected the Government’s bare assertion of military need, and it refused to accept the Government’s argument that this Court’s cases concerning deference in military affairs relieved it of further obligation to demonstrate military need. *Id.* This Court granted certiorari on May 2, 2005. 125 S.Ct. 1977 (2005).

#### SUMMARY OF ARGUMENT

One of the most important ideals of our system of government is that even in times of military conflict, the rights recognized by the Founders and conferred by the Constitution cannot be arbitrarily impinged. Thus, as this Court recognized more than seventy years ago, “even the war power does not remove constitutional limitations safeguarding essential liberties.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

To be sure, this Court has held that the military is, “by necessity, a specialized society separate from civilian society,” and thus “Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed.” *Parker v. Levy*, 417 U.S. 733, 743, 756 (1974). Accordingly, in several cases, this Court has deferred to empirical judgments by Congress and the armed forces with regard to certain “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Even in cases where deference is appropriate, however, this Court has recognized that it must not “abdicate” its “ultimate responsibility to decide the

constitutional question.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

In this case, the Government and its amici seek to expand the notion of military deference far beyond what this Court has previously recognized. They contend that even if the Solomon Amendment infringes on the First Amendment rights of civilians and civilian institutions, this Court should uphold it without any meaningful review at all, simply because it has an articulable connection to military affairs. Moreover, they ask this Court to *presume* that Congress must have found a real military need for the infringement, despite the legislative history that shows that the law was motivated by a desire to punish schools, not by any empirical judgment that the access the military already had to law school and university students was insufficient to meet its needs.

The Government’s reliance on military deference in this case must be rejected for several reasons. First, the concept of judicial deference in military affairs has no application where—as here—Congress is regulating the conduct of non-military personnel in non-military space. Second, deference is not warranted here because the Solomon Amendment concerns recruiting on law school and university campuses—a matter with regard to which the military has no unique expertise and about which the judiciary is perfectly well equipped to make judgments. And third, in enacting the Solomon Amendment, Congress conducted no factual investigation and made no studied choice between alternatives, and thus there is no empirical judgment to which the judiciary can defer.

Moreover, regardless of whether concepts of deference apply in this context, this Court cannot ignore the fact that there has *never* been a credible showing—either before Congress or in this litigation—that the Solomon Amendment and its 2004 “equal access” provision were no

broader than necessary for the military to meet its recruiting needs. When the Solomon Amendment was originally enacted, there was no reason to believe that law school policies of restricting access to employers who discriminate had actually impaired the military's ability to fill its needs for new lawyers. Indeed, as discussed below, the Department of Defense actually objected to the Solomon Amendment in 1994, on the ground that it was *not* necessary. See *infra* at 19-20. Neither the Government nor its amici have pointed to any evidence that the military is unable to recruit a sufficient number of qualified applicants through the many other means of access it has to students at colleges and law schools. And no one has even suggested that the military was unable to meet its recruiting needs for lawyers because of any inadequacy in the accommodations that were in place before 2001, when the military began to demand "equal access." Under these circumstances, to uphold the Solomon Amendment based on the Government's bare assertion of military need would indeed be an "abdication" of this Court's responsibility to decide constitutional questions.

## ARGUMENT

The modern concept of military deference is based on two ideas: Congress's power to raise and regulate armies and navies, U.S. CONST. art. I, § 8, cl. 12-14, and the judiciary's presumed lack of competence in certain matters of military strategy and operations. This Court has recognized both of these rationales in granting "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

The second of these ideas—the courts' presumed lack of competence in military affairs—is critical to the concept of

military deference. *See id.* at 65. Military deference cannot be justified purely by reference to the fact that Article I of the Constitution gives Congress the power to raise and regulate armies. After all, Congress *always* acts in furtherance of powers granted by Article I, and yet this Court does not always defer to its judgments.<sup>2</sup>

Significantly, “deference does not mean abdication.” *Rostker*, 453 U.S. at 70. Congress is not “free to disregard the Constitution when it acts in the area of military affairs,” *id.*, and thus this Court has made clear that its deference in military affairs does not insulate congressional or military judgments from meaningful judicial review. *Id.* at 70 (“[s]imply labeling the legislative decision ‘military’ . . . does not automatically guide a court to the correct constitutional result”); *see also United States v. Robel*, 389 U.S. 258, 263-64 (1967) (“the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit”). This Court will defer—not to rhetoric or constitutional arguments—but to specific “professional judgment[s] of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). And even where the doctrine of military deference applies, it does not excuse the Government from showing the extent to which its restriction on constitutional rights is actually tailored to serve important governmental interests.

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<sup>2</sup> As then-Judge Clarence Thomas observed in a non-military context: “We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature’s judgment that the facts exist. If a legislature could make a statute constitutional simply by ‘finding’ that black is white or freedom, slavery, judicial review would be an elaborate farce.” *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

Indeed, only last Term, this Court undertook careful constitutional review of the Government's detention of an American citizen as an enemy combatant, despite the fact that the Government had invoked the principle of deference to the Executive Branch in military judgments. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2651-52 (2004) (plurality op.). As the Court explained:

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

*Id.* at 2649-50; *see also id.* at 2655 (Souter, J., concurring) (judiciary is charged with "deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war"). Thus even when deference is appropriate, the judiciary still bears the responsibility of deciding whether the statute or military regulation infringes on the liberties guaranteed in the Constitution.

In this case, the Government contends that this Court should defer to the bare assertion by the statute's sponsors that it is necessary to compel civilian institutions to associate with and speak on behalf of the military.<sup>3</sup> As discussed

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<sup>3</sup> The Government contends that if the Solomon Amendment comes within the scope of the First Amendment, this Court's analysis under the intermediate standard for expressive conduct in *United States v. O'Brien*, 391 U.S. 367 (1968), should be conducted with due deference to Congress's military judgments about the need for and breadth of the statute. Brief for the Petitioners at 35-39 [hereinafter "Gov't Br."]. The

below, this position represents a dramatic and unjustified expansion of military deference, both with regard to the scope of the doctrine and with regard to the nature of the deference Congress enjoys when the doctrine applies.

**I. This Court's military deference cases have no application here because of the nature of the congressional action under review.**

By its nature, the congressional action at issue here is entitled to no special quantum of deference. This Court should reject the Government's and its amici's reliance on concepts of military deference for three different reasons. First, the notion of military deference does not apply in the context of a law that burdens the rights of civilians and civilian institutions in civilian space. Second, neither the military nor Congress has unique expertise beyond that of the judiciary with regard to the effectiveness of various methods of recruiting university and law school students, and the courts are fully capable of considering such matters themselves. And finally, the legislative history makes clear that Congress did not make any empirical judgments about whether the Solomon Amendment and its 2004 "equal access" provision are necessary—and no broader than necessary—for the military to meet its recruiting needs.

**A. Principles of deference in military affairs do not apply to laws that direct the conduct of civilian institutions in civilian space.**

The most obvious flaw in the Government's position on deference is that it seeks to apply the doctrine to a law that burdens the First Amendment rights of civilians in civilian space. This Court's deference cases do not go nearly this far.

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Government does not argue that military deference could save the Solomon Amendment if it is subject to strict scrutiny.

