

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, 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; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN Y. MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDGE, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLEES

PETER D. KEISLER
Assistant Attorney General

CHRISTOPHER J. CHRISTIE
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Appellate Staff
Civil Division, Room 9554
601 D Street N.W.
Washington, D.C. 20530
202-514-4052

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
I. Statutory Background	4
II. The Present Litigation	9
STATEMENT OF RELATED CASES AND PROCEEDINGS	14
STANDARD OF REVIEW	14
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE SOLOMON AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT	16
A. The Solomon Amendment Does Not Deprive Law Schools of their Freedom of Speech	16
B. The Solomon Amendment Does Not Violate Law Schools' Rights of Expressive Association	37
C. The Solomon Amendment Does Not Violate Academic Freedom	40
D. The Solomon Amendment Does Not Place Unconstitutional Conditions on Federal Funding	43

II. THE SOLOMON AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE 45

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION REGARDING THE REMAINING PRELIMINARY INJUNCTION FACTORS 54

CONCLUSION

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Able v. United States, 155 F.3d 628 (2d Cir.1998)	9
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	33, 34
Barenblatt v. United States, 360 U.S. 109 (1959)	42
Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000)	42
Bowsher v. Synar, 478 U.S. 714 (1986)	13
Boy Scouts of America v. Dale, 530 U.S. 640 (2000)	15, 38, 39, 40
Burbank v. Rumsfeld, Civil Action No. 03-5497 (E.D. Pa.)	14
Burt v. Rumsfeld, Civil Action No. 3:03CV01777 (D. Conn.)	14
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)	50
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	49
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)	50
Gilligan v. Morgan, 413 U.S. 1 (1973)	28
Goldman v. Weinberger, 475 U.S. 503 (1986)	28
Good Samaritan Hospital v. Shalala, 508 U.S. 402 (1993)	49
Grutter v. Bollinger, 123 S. Ct. 2325 (2003)	41
Holmes v. California Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999)	9

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)	15, 30, 31, 32
Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985)	17, 18, 22
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	41
Kolender v. Lawson, 461 U.S. 352 (1983)	45
Lovell v. Griffin, 303 U.S. 444 (1938)	50
Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987)	53
Nash v. United States, 229 U.S. 373 (1913)	47
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)	48
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)	27
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)	34
Perry v. Sindermann, 408 U.S. 593 (1972)	44
Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997)	9
Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435 (3d Cir. 2000)	37
Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985)	41
Richenberg v. Perry, 97 F.3d 256 (8th Cir.1996), cert. denied, 522 U.S. 807 (1997)	9
Rostker v. Goldberg, 453 U.S. 57 (1981)	27, 28
Rust v. Sullivan, 500 U.S. 173 (1991)	49

Shelton v. Tucker, 364 U.S. 479 (1960)	41
South Dakota v. Dole, 483 U.S. 203 (1987)	44
Steffan v. Perry, 41 F.3d 677 (D.C.Cir.1994)	9
Student Members of SAME v. Rumsfeld, Civil Action No. 3:03CV01867 (D. Conn.)	14
Sweezy v. New Hampshire, 354 U.S. 234 (1957)	42
Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003)	14
Thomasson v. Perry, 80 F.3d 915 (4th Cir.), cert. denied, 519 U.S. 948 (1996)	9
United States v. Albertini, 472 U.S. 675 (1985)	22, 26, 29
United States v. American Library Ass'n v., 123 S. Ct. 2297 (2003)	44
United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986)	23
United States v. Frame, 885 F.2d 1119 (3rd Cir. 1989), cert. denied, 493 U.S. 1094 (1990)	34
United States v. Gregg, 226 F.3d 253 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001)	22
United States v. O'Brien, 391 U.S. 367 (1968)	15, 22, 23, 24, 25
United States v. Perillo, 321 U.S. 1 (1947)	47
United States v. United Foods, Inc., 533 U.S. 405 (2001)	33
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	48

Ward v. Rock Against Racism, 491 U.S. 791 (1989)	23, 26
Weiss v. United States, 510 U.S. 163 (1994)	27
Wieman v. Updegraff, 344 U.S. 183 (1952)	41

Constitution, Statutes, and Regulations

U.S. Const. art. I, § 8, cl. 1	2
U.S. Const. art. I, § 8, cls. 12 & 13	2
U.S. Const. art. I, § 8, cl. 18	2
U.S. Const. amend. 1	passim
U.S. Const. amend 5	
Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1260 (1999)	8
Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970)	5
Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972)	5
National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968)	5
National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A., Title V, § 558, 108 Stat. 2776 (1994)	5
National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Title V, § 549(a)(1), 113 Stat. 609 (1999)	7
Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996)	7

Pub. L. No. 107-296, Title XVII, §§ 1704(b)(1), (g), 116 Stat. 2314, 2316 (2002)	7
10 U.S.C. § 503(a)	4
10 U.S.C. § 654	9
10 U.S.C. § 983	7
10 U.S.C. § 983(b)	passim
10 U.S.C. 983(c)(1)	51
10 U.S.C. § 983(c)(2)	36
10 U.S.C. § 983(d)	7
28 U.S.C. § 1292(a)(1)	1
28 U.S.C. § 1331	1
50 U.S.C. App. § 456(j)	37
32 C.F.R. Part 216	8
32 C.F.R. § 216.4(c)(3)	8, 11
32 C.F.R. § 216.4(c)(6)	9
32 C.F.R. § 216.5(a)	50
32 C.F.R. § 216.5(a)(2)	51

Legislative History and other Materials

H. Conf. Rep. 104-863, 142 Cong. Rec. H11644-01 (Sept. 28, 1996)	7
H.R. Rep. No. 92-1149 (1972)	5
S. Rep. 104-112 (1995)	5
140 Cong. Rec. H3861 (May 23, 1994)	23
141 Cong. Rec. E13-01(Jan. 4, 1995)	4, 6, 17
142 Cong. Rec. H5715 (May 30, 1996)	6, 17, 24
142 Cong. Rec. H5716 (May 30, 1996)	24
142 Cong. Rec. H7335 (July 11, 1996)	6, 24
63 Fed. Reg. 56819, 56821 (Oct. 23, 1998)	8
65 Fed. Reg. 2056 (Jan. 13, 2000)	8
DOD Directive 5124.8 ¶ 1.2 (July 16, 2003)	50

STATEMENT OF JURISDICTION

This is an action for declaratory and injunctive relief based on claims arising under the First and Fifth Amendments to the Constitution. The jurisdiction of the district court over the subject matter of the action was asserted under 28 U.S.C. § 1331. The district court issued an order denying the plaintiffs' motion for a preliminary injunction on November 5, 2003. The plaintiffs filed a notice of appeal on November 12, 2003, within the time provided by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. The appeal is within this Court's jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

The Solomon Amendment, 10 U.S.C. § 983(b), disallows the awarding of specified federal funds to institutions of higher education that prohibit or effectively prevent military representatives from gaining entry to campuses or access to students for purposes of recruiting. The questions presented are:

1. Whether the Solomon Amendment violates the Free Speech Clause of the First Amendment.
2. Whether the Solomon Amendment violates the Due Process Clause of the Fifth Amendment.¹

¹ These two issues were raised by the plaintiffs' motion for a preliminary injunction (see JA 405-407) and were ruled upon in the order and opinion denying the motion (see *id.* at 1-90).

STATEMENT OF THE CASE

For nearly a decade, Congress has restricted the provision of federal funds to institutions of higher education that prohibit or effectively prevent representatives of the nation's military services from gaining entry to campuses or access to students for purposes of military recruiting. Congress enacted this funding limitation, popularly known as the Solomon Amendment, pursuant to three broad grants of constitutional authority: the Spending Clause, which authorizes Congress to spend money to "provide for the common defense and general welfare of the United States" (art. I, § 8, cl. 1); the Army and Navy Clauses, which empower Congress to "raise and support" the nation's armed forces (*id.* cl. 12 & 13); and the Necessary and Proper Clause, which authorizes "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States" (*id.* cl. 18), including the powers vested in the President as Commander-in-Chief under Article II. The Solomon Amendment reflects Congress's determination that the security of the United States depends on the caliber of its military personnel and that the exclusion of military recruiting from university campuses undermines the ability of the armed forces to enlist skilled men and women in the nation's defense.

This suit was brought by law schools, law professors, and law students who are opposed to current federal laws and policies regarding military service by homosexuals. In response to those laws, the plaintiffs want to exclude military recruiters from their campuses. The law schools do not, however, wish to give up the public funds that they receive from Congress. Instead, they assert a constitutional prerogative to take the government's money while turning away the government's recruiters. They argue that the First Amendment leaves Congress constitutionally powerless either to conduct military recruiting at colleges that object to it or to confine federal grants to colleges that permit it.

The federal government has a different view regarding the relationship between the Solomon Amendment and the First Amendment. The military policies of the United States, including its policies regarding military service by homosexuals, are legitimate subjects of public debate, and a law that sought to prohibit anyone from expressing contrary views on those policies would unquestionably run afoul of the First Amendment. The Solomon Amendment, however, is not such a law. It conditions federal funding not on what an educational institution says, but rather on what it does. Universities, their faculties, and their students may express whatever views they wish about military policies, and may do so without jeopardizing federal funding in any way. What matters under the Solomon Amendment is not whether an

institution criticizes military policies, but simply whether it obstructs military recruiting. The former activity is protected by the First Amendment; the latter is not.

The plaintiffs brought suit to enjoin the Department of Defense and other federal agencies from carrying out the funding mandate of the Solomon Amendment. The district court denied the plaintiffs' motion for a preliminary injunction, concluding that the Solomon Amendment does not prevent the plaintiffs from speaking out against the military policies which they oppose and does not otherwise violate the rights of free speech, expressive association, and academic freedom invoked by the plaintiffs. This appeal followed.

STATEMENT OF FACTS

I. Statutory Background

Article I of the Constitution authorizes Congress "[t]o raise and support armies" and "provide and maintain a navy." Const. art. I, § 8, cl. 12 & 13. Congress has long recognized the importance of military recruiting to the capability and readiness of the nation's armed forces. See, *e.g.*, 10 U.S.C. § 503(a) (directing respective branches of the military to "conduct intensive recruiting campaigns to obtain enlistments"). The need for vigorous recruiting efforts has been increased by periodic reductions in military spending, which have made recruitment of "the most highly qualified candidates from around the country * * * even more important." 141

Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995); see also S. Rep. 104-112, p. 296 (1995) ("Across the nation, military recruiters are facing an increasingly difficult time attracting quality individuals to military service").

At various times over the past several decades, however, Congress has confronted resistance to military recruiting at institutions of higher education. See generally H.R. Rep. No. 1149, 92d Cong., 2d Sess. 79 (1972). To encourage educational institutions to open their campuses to military recruiters, Congress has included provisions in various appropriations acts that prohibit the distribution of specified federal funds to institutions of higher learning that bar military recruiters from their campuses. See, *e.g.*, Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (restricting distribution of Department of Defense funds); Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970) (same); National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968) (restricting distribution of NASA funds).

In 1995, Congress placed restrictions on the distribution of Department of Defense funds to educational institutions that denied access to military recruiters. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A., Title V, § 558, 108 Stat. 2776 (1994). The following year, in response to the

continued refusal of many institutions to allow the military to recruit on their campuses, Representative Solomon introduced a bill that expanded the restriction to include funding from other agencies as well. See 141 Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995). The stated purpose of the proposed legislation was to further encourage educational institutions to open their campuses to military recruitmen, thereby advancing "the Federal Government's constitutionally mandated function of raising a military." Ibid. As Representative Solomon explained in a subsequent 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. H7335 (July 11, 1996); id. at H5715 (May 30, 1996) (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").

Congress enacted Representative Solomon's proposal in 1996 as an amendment to the Omnibus Consolidated Appropriations Act of 1997. See Pub. L. No. 104-208,

§ 514(b), 110 Stat. 3009-270 (1996); H. Conf. Rep. 104-863, 142 Cong. Rec. H11644-01, H11937 (Sept. 28, 1996) (discussing amendment); see also National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Title V, § 549(a)(1), 113 Stat. 609 (1999). The Solomon Amendment is now codified, as amended, in 10 U.S.C. § 983.

The funding restrictions imposed by the Solomon Amendment apply to all funds appropriated for the Departments of Defense, Health and Human Services, Labor, Education, and Homeland Security, and related agencies. 10 U.S.C. § 983(d); see Pub. L. No. 107-296, Title XVII, §§ 1704(b)(1), (g), 116 Stat. 2314, 2316 (2002) (substituting Department of Homeland Security for Department of Transportation). These departments and agencies may not provide funds "by contract or by grant" to "an institution of higher education (including any subelement of that institution)" if the Secretary of Defense determines that the institution or any subelement "has a policy or practice * * * that either prohibits, or in effect prevents," any military department or the Department of Homeland Security "from gaining entry to campuses, or access to students * * * on campuses, for purposes of military recruiting." 10 U.S.C. § 983(b)(1).² This funding restriction applies to all institutions

² The Solomon Amendment also restricts funding for educational institutions that withhold specified information about their students, such as name and address and academic majors, from military recruiters. See *id.* § 983(b)(2). This aspect of the

of higher education except those that are found by the Secretary of Defense to "ha[ve] a longstanding policy of pacifism based on historical religious affiliation * * * ." Id. § 983(c)(2). The restriction does not apply to "any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1260 (1999).

The Department of Defense has promulgated regulations implementing the Solomon Amendment and related legislation. See 63 Fed. Reg. 56819, 56821 (Oct. 23, 1998); 65 Fed. Reg. 2056 (Jan. 13, 2000). Those regulations are set forth at 32 C.F.R. Part 216. Among other things, the regulations provide that the funding limitation does not apply if an educational institution that has denied requested access to military recruiting "certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." Id. § 216.4(c)(3). The regulations further provide that the funding limitation does not apply if an institution "[p]ermits employers to recruit on the premises of the covered school only in response to an expression of student interest," and the institution either "[p]rovides the Military Services with the same

Solomon Amendment has not been challenged in this case. See JA 9 n.1.

opportunities to inform the students of military recruiting activities as are available to other employers" or "[c]ertifies that too few students have expressed an interest to warrant accommodating military recruiters, applying the same criteria that are applicable to other employers." Id. § 216.4(c)(6).

II. The Present Litigation

Although many educational institutions that receive federal funds complied with the funding conditions of the Solomon Amendment, others did not. The principal occasion for non-compliance was the reaction of institutions to the federal policy that disallows military service by homosexuals. See generally 10 U.S.C. § 654.

The constitutionality of this policy has been consistently upheld by the courts. See Able v. United States, 155 F.3d 628 (2d Cir.1998); Holmes v. California Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir.1996), cert. denied, 522 U.S. 807 (1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); Steffan v. Perry, 41 F.3d 677 (D.C.Cir.1994) (en banc). Nevertheless, many educational institutions regard the policy as unfairly discriminatory and inconsistent with their own principles. In particular, the American Association of Law Schools and almost all law schools have

adopted policies against discrimination on the basis of sexual orientation. JA 12, 101. As a corollary to those policies, law schools generally refuse to make their recruiting programs available to employers who discriminate on the basis of sexual orientation or other specified categories. *Id.* at 13, 101 (policy of Washington University School of Law) ("The Career Services facilities of this school shall not be available" to employers who discriminate on the basis of specified characteristics, including sexual orientation).

As the plaintiffs themselves acknowledge (FAIR Br. 10), some law schools that receive federal funds denied military recruiters the access to students provided to other prospective employers, while other law schools excluded military recruiters from their campuses altogether. See, *e.g.*, JA 229 (As of 1998, NYU School of Law "did not permit the military to use the Law School's [career placement] facilities or services or to come onto the Law School campus to recruit"). In response, the Department of Defense has made a concerted effort to identify instances in which institutions are not complying with the funding requirements of the Solomon Amendment and to insist that those requirements be met as a condition for federal funding. In so doing, the Department of Defense reiterated its understanding, as reflected in its regulations, that the Solomon Amendment requires universities to afford "[a] degree of access [to] military recruiters is at least equal in quality and

scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3); see JA 195 (letter from William J. Carr, Acting Deputy Under Secretary (Military Personnel Policy), Department of Defense, to Richard C. Levin, President, Yale University).

In their brief, the plaintiffs suggest that the enforcement of the Solomon Amendment by the Department of Defense has been motivated by "suppressive instincts" (FAIR Br. 12) – meaning, evidently, a desire to suppress criticism of the military's recruiting policies. We will return to this suggestion below, but it should be noted here that the plaintiffs seriously mischaracterize the record in this regard. For example, the plaintiffs state that a DoD recruiting officer "warned a law dean that even efforts to protest the military's discriminatory policies * * * could trigger a university-wide funding cut" (FAIR Br. 12). As the record shows, what the officer actually told the dean was very different: "if the law school allows military recruiters to interview at the law school, your institution will be in compliance with federal law * * * ." JA 260 (emphasis added). The letter added that "ameliorative actions" by the school would be contrary to the requirements of the Solomon Amendment if, but only if, they "intimidate interested students and, in effect, prevent military recruiting on campus * * * ." Ibid.

In September 2003, the plaintiffs commenced this action in an effort to compel the Executive Branch to distribute federal funds to educational institutions that

exclude military recruiting. The plaintiffs are an association of law schools and law faculties (FAIR), an association of law school faculty members (SALT), two law school student associations, and several individual law professors and law students. JA 4-5. The plaintiffs have sued the Secretary of Defense and the Secretaries of the other departments whose funds are subject to the Solomon Amendment. Id. at 495-96. The plaintiffs claim that requiring access to campuses by military recruiters as a condition for the receipt of federal funds violates the First and Fifth Amendments. Id. at 518. The complaint therefore seeks "equitable relief enjoining the Defendants from enforcing the Solomon Amendment" in any fashion. Id. at 518-19.

After the district court denied the plaintiffs' motion for a temporary restraining order, the plaintiffs moved for a preliminary injunction, and the government moved to dismiss the complaint for lack of standing. JA 405-410. The government's motion was predicated, in part, on the failure of the complaint to identify any law school that belonged to FAIR. In response, the plaintiffs filed a second amended complaint that specifically identified two member law schools. Id. at 499.

On November 5, 2003, the district court issued an order and opinion denying the plaintiffs' motion for a preliminary injunction and the government's motion to

dismiss. 291 F. Supp. 2d 269 (D.N.J.).³ In an unusually thorough and closely reasoned opinion, the district court concluded that the Solomon Amendment does not impermissibly burden any of the three First Amendment interests asserted by the plaintiffs – freedom of speech, freedom of expressive association, or academic freedom. JA 43-90. The court determined that the Solomon Amendment does not place unconstitutional conditions on federal funding, does not discriminate on the basis of viewpoint, and is not unconstitutionally vague. Id. at 45-88. The district court therefore found that the plaintiffs had not established a reasonable likelihood of success on the merits. The court found that the remaining preliminary injunction considerations – the risk of irreparable harm to the plaintiffs, the countervailing harm to the government, and the public interest – were "interrelated with the Court's evaluation of the likelihood-of-success factor" (id. at 89) and therefore likewise weighed against the granting of a preliminary injunction. This appeal followed.

³ Because the plaintiffs ultimately identified two law schools who belong to FAIR, and because FAIR otherwise appears to satisfy the requirements of associational standing, we do not contest the district court's determination that FAIR has standing. Given the nature of the claims pursued and the relief sought in this case, the presence of one plaintiff with standing makes it unnecessary for this Court to address the standing of the other plaintiffs. See Bowsher v. Synar, 478 U.S. 714, 721 (1986). Nevertheless, we continue to believe that the plaintiffs other than FAIR lack standing for the reasons urged below.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this court previously. Suits presenting similar challenges to the constitutionality of the Solomon Amendment are now pending in the Eastern District of Pennsylvania and the District of Connecticut. Burbank v. Rumsfeld, Civil Action No. 03-5497 (E.D. Pa.); Burt v. Rumsfeld, Civil Action No. 3:03CV01777 (D. Conn.); Student Members of SAME v. Rumsfeld, Civil Action No. 3:03CV01867 (D. Conn.).

STANDARD OF REVIEW

An order denying a preliminary injunction is subject to review for abuse of discretion. Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 156 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003). The district court's conclusions of law and its application of law to the facts are subject to plenary review. Ibid. The district court's findings of fact regarding claims arising under the First Amendment are subject to independent examination on appeal. Id. at 156-57.

SUMMARY OF ARGUMENT

The district court correctly concluded that the Solomon Amendment does not violate the First Amendment. The Solomon Amendment leaves educational institutions, their faculties, and their students free to express whatever views they may have regarding any military policy. The Solomon Amendment is directed not at what

law schools or other educational institutions wish to say, but instead at what they wish to do – namely, to deny military recruiters entry to campuses and access to students. Although the plaintiffs assert that law schools wish to pursue this course of action as a means of expressing their views about military policies, the First Amendment does not disable Congress from responding to actions that obstruct military recruiting simply because they are undertaken for expressive purposes. Instead, under United States v. O'Brien, 391 U.S. 367 (1968), Congress is free to regulate expressive conduct as long as it is pursuing substantial governmental interests that are unrelated to the suppression of speech and the resulting burden on expression is not substantially broader than necessary. As the district court correctly recognized, the Solomon Amendment readily passes constitutional muster under this standard.

The Solomon Amendment does not compel law schools to adopt or convey a message other than their own, as did the law at issue in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995). It does not burden their rights of expressive association by dictating their membership, as did the law in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). It does not discriminate among institutions on the basis of viewpoint; to the contrary, it applies even if an institution's exclusion of military recruiters is not intended to express any viewpoint at all. It does

not place an impermissible burden on academic freedom, for it leaves undisturbed the institution's right to decide who will teach, what they teach, and what will be taught. Finally, it does not run afoul of the void-for-vagueness doctrine, for it provides meaningful legal criteria for determining whether an institution is in compliance with the law's funding preconditions, and it minimizes the risk of arbitrary decisionmaking by centralizing the decisionmaking process in a single official. In short, none of the plaintiffs' objections to the district court's constitutional conclusions has merit.

ARGUMENT

I. THE SOLOMON AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Solomon Amendment Does Not Deprive Law Schools of their Freedom of Speech

1. The Solomon Amendment is an exercise of one of Congress's most profound constitutional responsibilities – its responsibility under Article I to "provide for the common defense" of the United States and its people. The capacity of the United States to defend itself ultimately depends on the quality of the men and women who volunteer to serve their country, and recruiting is critical to attracting qualified young people to military service. As the legislative history of the Solomon Amendment indicates, the success of the volunteer armed services has depended on the ability of military recruiters to reach students at college and university campuses around the

country. 142 Cong. Rec. H7335 (July 11, 1996). When educational institutions close their doors to military recruiting, they directly "interfer[e] with the Federal Government's constitutionally mandated function of raising a military" (141 Cong. Rec. E13-01 (Jan. 4, 1995) (Rep. Solomon)) and thereby compromise the defense of the nation.

The plaintiffs object that the enforcement of the Solomon Amendment "is compelling law schools across the country to violate their consciences" (FAIR Br. 18). We do not question either the sincerity or the dictates of the plaintiffs' consciences. But this much, at least, is clear at the outset: nothing in the First Amendment gives conscience primacy over federal law. This Court has considered and rejected "[the] First Amendment argument * * * that a member of society can be absolved of the responsibility for obeying a given law of the community * * * if he can prove a sincere, abiding, and good faith objection to the direct or indirect object of that law." Kahn v. United States, 753 F.2d 1208, 1215 (3d Cir. 1985) (quoting United States v. Malinowski, 472 F.2d 850, 857 (3d Cir.), cert. denied, 411 U.S. 970 (1973)). As the Court explained in Kahn, an individual may choose to follow the demands of conscience when they conflict with the demands of the law, but the First Amendment does not excuse the individual from bearing the consequences of that choice. Id. at 1215-16. Like the defendant in Kahn, who openly refused to comply

with federal tax laws "as a form of protest against taxation for military spending," FAIR's law school members "want[] to rely on the privilege or the moral honor of civil disobedience without paying the price or penalty such disobedience necessarily incurs." Id. at 1215. The First Amendment simply does not guarantee that choice. Id. at 1216-17.

The First Amendment does protect the right of educational institutions, as well as their faculties and students, to express their disagreement with the policies of the federal government, including the Congressional policies regarding military service that underlie the present litigation. But what is missing from this case is any effort by the government to deprive anyone of that right.

FAIR's member law schools, their faculties, and their students are free to criticize the Department of Defense and the nation's armed forces on whatever grounds they wish. They may adopt resolutions condemning the military's policies, hold rallies and marches, conduct open forums, and distribute leaflets and posters. Not only may they do these things, but they have done them. The record in this case is replete with examples of impassioned and articulate public criticism of the government's military service policies and the Solomon Amendment itself by law schools, administrators, faculty members, and students. See, e.g., JA 103 (law school forum); id. at 106-107, 206-207, 255, 302, 382-83 (student and faculty protests); id.

at 112-13, 114, 232, 261-62 (memoranda and faculty resolutions); id. at 231-32 (ameliorative statements); id. at 115 (student bar association resolution); id. at 118-21 (protest posters).

No educational institution has been denied federal funds, or sanctioned in any other way, for this open and vigorous criticism. Publicly criticizing and condemning the military has no bearing on the eligibility of FAIR's member institutions for federal funds, either under the Solomon Amendment or under any other federal law. It is a matter of absolute indifference under the Solomon Amendment whether or why an educational institution chooses to criticize the military.

The plaintiffs argue that the Solomon Amendment has nevertheless "muddled" the law schools' message of non-discrimination (FAIR Br. 13-14). That argument is fundamentally misconceived. What the record shows, and what the plaintiffs complain of, is that law students have faulted schools that accommodate military recruiting for failing to live up to their professed principles of non-discrimination. See, e.g., Br. 13-14; JA 273 (student criticizes "what he perceived as NYLS'[s] failure to adhere to principle"). The law schools find themselves accused of not practicing what they preach – in a word, of hypocrisy.

That is, understandably, a serious accusation to face. But one who is accused of hypocrisy cannot complain, as the plaintiffs do, that "the message is not getting

through" (FAIR Br. 13). The charge of hypocrisy comes about precisely because the message is getting through – and the speaker's conduct has been found, fairly or unfairly, not to measure up to his words. What is "muddled" is not the message itself, which "is being disseminated, loudly and clearly" (JA 60) (district court opinion), but instead the institution's willingness to conform its own actions to its message. That "chasm between word and deed" (FAIR Br. 33) is not a First Amendment concern.

The plaintiffs complain that if a law school is compelled to permit military recruiters to engage in campus recruiting, the school cannot "credibly" claim (FAIR Br. 24) that it prohibits them from doing so. But the statement that an institution does not permit military recruiting is a statement of fact, and if a law school does permit military recruiting, the statement is simply false. Compliance with any law prevents an individual from "credibly" claiming that he is not complying, but it is preposterous to suggest that the First Amendment therefore entitles him to disregard the law in order to preserve his credibility. If a racist educational institution stated publicly that "we do not admit racial minorities," it could hardly invoke the First Amendment as a shield against the enforcement of federal anti-discrimination laws by complaining that admitting minorities would harm the "credibility" of its factual representations about its admission practices. The First Amendment does not obligate the

government to rearrange its own policies to turn a private party's false statements of fact into true ones.

2. Unable to show that the Solomon Amendment penalizes FAIR's member institutions for what they say, the plaintiffs claim that the exclusion of military recruiters is itself a form of expression (FAIR Br. 20-21). They argue that law schools wish to exclude military recruiters not only because they do not want to participate in a recruiting process that they regard as unfair, but also to convey a message to their students, by their actions as well as their words, about principles of non-discrimination.

We have no quarrel with the general proposition that "[w]hen a law school declares it will not abet a discriminatory employer * * * , it is engaged in quintessential expression" (FAIR Br. 20). But when an institution excludes military recruiters from its campus or otherwise restricts their access to students, it is engaging in something different from "quintessential expression." It is engaging in a course of conduct, one with adverse consequences for military recruiting that are entirely separate from whatever message the institution may wish to convey.

As the district court recognized, private conduct that is otherwise subject to the government's regulatory authority does not acquire constitutional immunity when it is undertaken for expressive purposes. Even assuming arguendo that the act of

restricting access by military recruiters has sufficient communicative elements to bring it within the scope of the First Amendment as expressive conduct, the government retains the power to regulate conduct in order to deal with its non-communicative effects, regardless of whether it is being undertaken for expressive purposes. United States v. O'Brien, 391 U.S. 367 (1968); United States v. Gregg, 226 F.3d 253, 267-68 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001); Kahn, 753 F.2d at 1216-17.

The constitutional framework for evaluating such laws is provided by United States v. O'Brien, 391 U.S. 367 (1968). Under O'Brien, a regulation of conduct that imposes incidental burdens on expression is constitutional if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and 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. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985). Regulations of conduct that place incidental burdens on expression are not subject to a least-restrictive-alternative requirement; "[s]o long as the means chosen are not

substantially broader than necessary to achieve the government's interest, * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward v. Rock Against Racism, 491 U.S. 791, 800 (1989).

The Solomon Amendment readily passes constitutional muster under these constitutional standards. The plaintiffs themselves do not dispute that the government has a substantial interest – indeed, a compelling one – in recruiting talented men and women for the nation's armed forces. As the Supreme Court recognized in O'Brien, "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency * * * ." 391 U.S. at 381. Effective military recruiting is the linchpin of that system. See United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986) ("Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance").

The plaintiffs nevertheless suggest that the Solomon Amendment's purpose "was not to enhance military recruiting" (FAIR Br. 8). Even a casual review of the legislative history is enough to dispose of that suggestion. The law's sponsor and other members of Congress argued repeatedly that campus recruiting is critical to military preparedness and that the law was needed to enhance recruiting. See, e.g., 140 Cong. Rec. H3861 (May 23, 1994) (Rep. Solomon) ("[R]ecruiting is where

readiness begins. Recruiting is the key to an all-volunteer military. * * * The readiness of our Armed Forces is on the wane today * * * [and] [w]e must reverse this slide before it snowballs"); 142 Cong. Rec. H5715 (May 30, 1996) (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"). id. at H5716 (May 30, 1996) (Rep. Solomon) ("because it is an all-voluntary military, our military does need access to be able to offer these honorable careers to these young men and women"); id. at H7335 (July 11, 1996) (Rep. Solomon) ("Recruiters have been able to enlist * * * 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," and "[t]hat is why we need this amendment").

The government's interest in military recruiting, as embodied in the Solomon Amendment, is manifestly "unrelated to the suppression of free expression." O'Brien, 391 U.S. at 377. As explained above, the Solomon Amendment makes no effort to condition federal funding on the absence of campus criticism of military policies; a law school and its faculty and students are free to denounce military recruiting policies without jeopardizing federal funding in the slightest. The only thing that

matters under the Solomon Amendment is whether the institution is denying access to military recruiters. And if the institution is denying access, it is irrelevant under the Solomon Amendment whether its reasons for doing so are communicative (to convey a message about its own principles or those of the military) or non-communicative (for example, to avoid participation in a recruiting process that it regards as unfair). What matters under the Solomon Amendment is "only the independent noncommunicative impact of [the] conduct" (O'Brien, 391 U.S. at 382) – its impact on the ability of the military to reach students.

The plaintiffs argue that because the Solomon Amendment is intended to facilitate military recruiting, and because recruiters speak to students, the governmental interest underlying the Solomon Amendment "is not unrelated to expression" (FAIR Br. 26). But the question posed by O'Brien is not whether the governmental interest is "unrelated to expression," but instead whether the interest "is unrelated to the suppression of free expression." 391 U.S. at 377 (emphasis added). The plaintiffs' argument deliberately omits the touchstone of suppression from the constitutional test. Once it is recognized that suppression of expression is the focus of O'Brien, the plaintiffs' argument falls apart, for the governmental interests served by the Solomon Amendment are manifestly unrelated to the suppression of anyone's expression.

Finally, whatever incidental burden may be placed on an educational institution's expression by the Solomon Amendment "is not substantially broader than necessary," Ward, 491 U.S. at 800, because the government's interests necessarily "would be achieved less effectively absent the regulation." Albertini, 472 U.S. at 689. In the absence of the Solomon Amendment, every institution of higher education in the United States would be free to exclude military recruiters from their campuses or otherwise make their placement facilities unavailable to military recruiters. The economic incentives provided by the Solomon Amendment thus are critical to the continuing ability of the armed forces to recruit on the nation's campuses.

The plaintiffs complain (FAIR Br. 39-41) that the government has failed to tender evidence proving that the Solomon Amendment actually furthers Congress's goal of recruiting qualified men and women to serve in the armed forces. In considering this argument, it is worth recalling the relief that the plaintiffs are seeking: an injunction that would permit every law school in the United States (and, by implication, every college and university) to "prohibit[], or in effect prevent[]," military recruiters from "gaining entry to campuses" and "access to students * * * on campuses." 10 U.S.C. § 983(b)(1). The impact of the wholesale exclusion of military recruiters is self-evident, and the government is not obligated – particularly in the

context of a highly expedited preliminary injunction proceeding – to assemble and present a factual record that merely confirms the dictates of common sense. As the Supreme Court has made clear, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391 (2000). Here, there is nothing remotely novel or implausible about the proposition that the excluding military recruiters from the nation's campuses, or denying them the use of university placement facilities, would impair the ability of the armed forces to recruit qualified men and women. What is implausible is the plaintiffs' contrary proposition – the proposition that even if every law school in the United States excludes military recruiters from their campuses, military recruiting will not suffer.

The plaintiffs' insistence on evidentiary support for Congress's judgment is particularly ill-conceived "in the context of Congress's authority over national defense and military affairs," for "perhaps in no other area has the [Supreme] Court accorded Congress greater deference." Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); Weiss v. United States, 510 U.S. 163, 177 (1994) ("Judicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking" in the realm of military affairs). As the Supreme Court has explained, "[n]ot only is the scope of Congress'

constitutional power in this area broad, but the lack of competence on the part of the courts is marked." Rostker, 453 U.S. at 65; Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"). For that reason, predictive judgments by the political branches in this area need not be buttressed with courtroom evidence, even when constitutional claims are involved.

Thus, for example, in Goldman v. Weinberger, 475 U.S. 503 (1986), the Supreme Court rejected a Free Exercise challenge to a military dress regulation despite the plaintiff's claim that the military's assessment of the need for the regulation "is mere ipse dixit, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony * * * ." 475 U.S. at 509. As the Court explained, "whether or not expert witnesses may feel that religious exceptions * * * are desirable is quite beside the point[;] [t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." Ibid. So too here: decisions about what is necessary to "raise and support armies" and "provide for the common defense" are assigned by the Constitution to Congress, and Congress's considered judgment in the exercise of that

authority does not require supporting affidavits, particularly when the judgment is reasonable on its face.

The plaintiffs suggest that even if the military requires physical access to campuses, there is no need for military recruiters to be given the same degree of access provided to other employers. First, it must be emphasized that even bare physical access is more than the plaintiffs are willing to tolerate; they are asserting a constitutional right to exclude the military from campuses altogether. Second, it is hardly credible for the plaintiffs to suggest that physical access alone is sufficient for effective military recruiting, particularly when other employers are being granted far more extensive and meaningful access. It is fair to assume that all of the facilities and services provided to prospective employers by law schools are intended to facilitate the hiring process. If military recruiters are denied the ability to reach students on the same terms as other employers, damage to military recruiting is not simply probable but inevitable. The Solomon Amendment reflects Congress's judgment about the requirements of military recruiting, and "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." Albertini, 472 U.S. at 689.

3. The plaintiffs also argue that the Solomon Amendment trenches on their freedom of speech by compelling them to convey a message other than their own. In making this argument, the plaintiffs place principal reliance on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995). As the district court recognized, however, nothing in Hurley suggests that the Solomon Amendment crosses – or even approaches – the constitutional line.

In Hurley, the Supreme Court held that a state public accommodation law could not constitutionally be applied to compel organizers of a St. Patrick's Day parade to allow a group of gay, lesbian, and bisexual individuals to march in the parade for the purpose of conveying a public message about homosexual pride and solidarity. 515 U.S. at 572-81. The organizers did not object to the participation of the group's members in the parade; the only question was whether the group could participate in the parade "as its own parade unit carrying its own banner." Id. at 572. The Supreme Court concluded that the law's "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own," and that in so doing, the law "violates the fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message." Id. at 573, 578.

Hurley involved an effort by the government to dictate the content of a quintessential form of expressive activity – a public parade. The Supreme Court emphasized that parades "are * * * a form of expression, not just motion," and "the inherent expressiveness of marching to make a point" (515 U.S. at 568) forms the predicate for the Court's opinion. In contrast, there is nothing remotely so expressive about the activity of recruiting. The military engages in recruiting on college campuses for precisely the same reason as do other employers: to hire employees. Recruiting is undertaken solely for instrumental reasons, not expressive ones.

To be sure, recruiting involves speaking, but the recruiter speaks purely as part of an economic transaction, and the expression is entirely subordinate to the transaction itself. It bears no resemblance to the activities of the would-be marchers in Hurley, who formed their group "for the very purpose of marching" in the parade, and who sought to march "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day parade." 515 U.S. at 560, 570. In Hurley, unlike here, expression was not a subsidiary part of an instrumental activity; expression was the activity.

The role of the parade organizers in Hurley consisted of choosing the messages that would comprise the parade, and the vice of the challenged statute was that the homosexual group's protest message would be attributed to the organizers themselves. The Supreme Court reasoned that the group's participation in the parade "would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." 515 U.S. at 575.

Here, in contrast, the likelihood that members of a law school community will perceive a military recruiter's on-campus activities as reflecting the school's "customary determination" that the recruiter's message is "worthy of presentation and quite possibly of support" is vanishingly small. Unlike bystanders watching a passing parade, law school students (to say nothing of their professors) are an extraordinarily sophisticated and well-informed group, and they understand perfectly well that their schools admit military recruiters not because they endorse any "message" that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take – and have taken – ameliorative

steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting.

In a related vein, the plaintiffs invoke cases like Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and United States v. United Foods, Inc., 533 U.S. 405 (2001), for the proposition that the Solomon Amendment impermissibly obligates them to "subsidize" military recruiting. In Abood and United Foods, the challenged statutes obligated individuals to make direct payments of money to finance private speech with which they disagreed. Here, in contrast, the recruiting activities of military recruiters are paid for exclusively with federal tax revenues; the Solomon Amendment does not obligate educational institutions to pay a penny to the government. While the plaintiffs complain of having to provide "scarce interview space" and "make appointments" (FAIR Br. 31), this kind of physical accommodation simply does not present the constitutional concern underlying cases like Abood and United Food – the concern that compelling an individual to pay for someone else's speech impinges on his right to "believe as he will" and to have his beliefs "shaped by his mind and his conscience rather than coerced by the State." Abood, 431 U.S. at 235. Moreover, even if law schools were being required to provide direct financial payments to the government to support military recruiting, which they manifestly are not, the First Amendment provides far more latitude for compelled financial support

of governmental speech than it does for compelled support of private speech. See Abood, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("Compelled [financial] support of a private association is fundamentally different from compelled support of government"); United States v. Frame, 885 F.2d 1119, 1130-33 (3rd Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

4. Finally, the plaintiffs argue that the Solomon Amendment is subject to strict scrutiny, rather than the intermediate level of scrutiny called for by O'Brien, because the law is allegedly "viewpoint-specific" (FAIR Br. 27). It is well settled that "viewpoint discrimination implicates core First Amendment values." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 66 (1983). But nothing about the Solomon Amendment, either on its face or as applied, reflects an attempt to discriminate on the basis of viewpoint.

The plaintiffs insist that the Solomon Amendment promotes "the government's pro-military viewpoint" (FAIR Br. 28) because the government is insisting only on access for its own recruiters, not access for other employers. What the plaintiffs lose sight of is that the Solomon Amendment does not demand preferential access for military recruiting. As explained above, under the regulations promulgated by the Department of Defense, an educational institution discharges its obligations under the Solomon Amendment if "all employers are similarly excluded from recruiting on the

premises of the covered school, or * * * the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3). Thus, the Solomon Amendment demands nothing more than "equal[ity] in quality and scope" of access between military and non-military recruiters. That kind of parity is precisely the opposite of viewpoint discrimination.

Alternatively, the plaintiffs assert that the Solomon Amendment penalizes "[o]nly those schools that target the military *in protest*." FAIR Br. 29 (emphasis added). They reason that the exceptions to the funding limitation – for institutions that place the same limits on access by military and non-military employers, institutions that allow employers to recruit on campus only in response to expressions of student interest, and institutions with a longstanding policy of pacifism based on historical religious affiliation – effectively excuse all possible grounds other than protest for denying military access.

The shortest answer to this argument is that the exceptions to the Solomon Amendment demonstrably do not exempt all institutions other than those that are excluding the military as an act of protest. To take the most obvious counter-example, an institution's administrators might well choose to exclude military recruiters not because they want to "make a statement" about military policies, but simply because – as was common during the Vietnam era – they wish to avoid

making themselves and their institution the target of student anger over the military policies of the day. The fact that the institution does not intend its action to be an expression of protest does not excuse it in any way from the requirements of the Solomon Amendment. It thus is simply false that the Solomon Amendment exempts "every conceivable non-protest reason to exclude the military" (FAIR Br. 29).

Moreover, each of the provisions embodied in the Solomon Amendment and its implementing regulations serves interests that are unrelated to viewpoint discrimination. The provision permitting institutions to place equivalent limits on military and non-military recruiters (32 C.F.R. § 216.4(c)(3)) reflects the practical recognition that discriminatory restrictions on access are more damaging to military recruiting than non-discriminatory ones: the use of alternative means of recruiting, such as off-campus recruiting events, is more likely to be effective if other employers do not enjoy more direct and immediate access to students. The exception for institutions that exclude on-campus recruiters except in response to expressed student interest (*id.* § 216.4(c)(6)) is likewise predicated on equivalent treatment of military and non-military recruiters, and also reflects the reality that military recruiting is less likely to be productive where student interest is absent. See JA 78 (district court opinion). Finally, the exception for institutions with longstanding policies of pacifism based on historical religious affiliation (10 U.S.C. § 983(c)(2)) merely

comports with the longstanding and wholly constitutional policy of excusing military service by persons with religious scruples against war (see 50 U.S.C. App. § 456(j)), as well as the practical recognition that "military recruiting efforts would be futile" at schools with a historical tradition of religious pacifism. JA 78 (district court opinion). Whether viewed separately or collectively, these provisions are not the product of legislative or administrative viewpoint discrimination.

B. The Solomon Amendment Does Not Violate Law Schools' Rights of Expressive Association

In addition to arguing that the Solomon Amendment trenches on freedom of speech simpliciter, the plaintiffs also contend that the statute infringes on law schools' rights of expressive association. While the First Amendment provides a measure of protection to expressive association, "the Supreme Court has required a close relationship between the [government] action and the affected expressive activity to find a constitutional violation." Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435, 438 (3d Cir. 2000). In this case, the impact of the Solomon Amendment on law schools' interests in expressive association is far too remote to violate the First Amendment.

First Amendment claims based on expressive association are subject to a three-step constitutional inquiry. Pi Lambda Phi, 229 F.3d at 442. The first question

is "whether the group making the claim [is] engaged in expressive association." Ibid. If so, the next question is whether the government action at issue "significantly affect[s] the group's ability to advocate its viewpoints." Ibid. If it does, the final question is whether the governmental interests served by the law outweigh the burden imposed on the group's associational interests. Ibid. Here, the district court found as a threshold matter that law schools are engaged in expressive association, but went on to determine that the Solomon Amendment does not place a significant burden on their associational interests and that, in any event, the governmental interests served by the Solomon Amendment outweigh whatever associational burden the law may impose. JA 54-75.

In challenging the district court's reasoning, the plaintiffs seek to analogize this case to Boy Scouts of America v. Dale, 530 U.S. 640 (2000). But as the district court recognized (JA 68-70), a comparison of this case to Dale shows not why the plaintiffs should prevail, but why they must lose.

In Dale, the Supreme Court was presented with a state public accommodations law that compelled the Boy Scouts of America (BSA) to admit "an avowed homosexual and gay rights activist" (530 U.S. at 644) as an adult member and scoutmaster. The declared mission of the BSA was to "instill values in young people" (id. at 649), and disapproval of homosexual conduct was one of BSA's values (id. at

649-51). BSA relied on its scoutmasters to "inculcate [Boy Scouts] with the Boy Scouts' values – both expressly and by example." Id. at 650. The Supreme Court reasoned 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." Id. at 648. The Court found that "the presence of Dale 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 accept[] homosexual conduct as a legitimate form of behavior." Id. at 653-54.

The Solomon Amendment differs from the statute at issue in Dale in at least two basic respects, both of which are critical to the law's impact vel non on associational interests. The first is that the Solomon Amendment simply does not impinge on the right of educational institutions to determine their membership. It does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators. It merely requires them to allow the transient presence of recruiters, who are not a part of the institution and do not become members through their mere presence. In contrast to the scoutmaster in Dale, recruiters do not purport to speak "for" – and cannot reasonably be understood to be

speaking "for" – the institution that they are visiting. This case thus does not involve "[t]he forced inclusion of an unwanted person in a group" (530 U.S. at 648) – the genesis of the constitutional injury in Dale.

Second, as noted above in connection with our discussion of Hurley, recruiting is an economic activity whose expressive content is strictly secondary to its instrumental goals. In contrast, the fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is "[t]o instill values in young people," a goal that is pursued "by example" as well as by word. 530 U.S. at 649, 650. As a result, compelling the Boy Scouts to appoint an adult leader who was committed to "advocacy of homosexual teenagers' need for gay role models" (id. at 645) struck at the heart of the organization's goals. Military recruiting is not intended to "instill values" in anyone, nor is it meant to convey any message beyond the military's interest in enlisting qualified men and women. As a result, the burden on the university's associational interests is vastly less significant than the burden imposed on the Boy Scouts by the statute in Dale.

C. The Solomon Amendment Does Not Violate Academic Freedom

The plaintiffs argue that the Solomon Amendment deprives law schools not only of their freedom of speech and expressive association, but also their academic freedom. As the district court recognized, the plaintiffs' appeal to academic freedom

adds nothing to their other First Amendment claims – not because the First Amendment does not protect academic freedom, but because the Solomon Amendment simply makes no attempt to trench on that freedom. See JA 52-54.

As the district court noted, cases in which government activities have been held to infringe on constitutional principles of academic freedom have involved attempts to dictate who will teach, what will be taught, or who will be taught. See, e.g., Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225-26 & n.12 (1985) (limiting judicial review of academic grounds for university's dismissal of student); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (invalidating state law prohibiting employment of teachers who make "treasonable or seditious" statements); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (invalidating state law requiring college professors to disclose all associations to which they belong or which they support); Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring) (loyalty oath statute); see also Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003). The Solomon Amendment bears no resemblance whatsoever to these invasions of academic freedom. It does not purport to tell institutions of higher education what they can teach, who may teach, or who may be taught. To the contrary, it scrupulously honors the principle that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian, 385 U.S. at 603.

The plaintiffs complain that while the Solomon Amendment does not dictate *what* law schools can teach, it places a limitation on *how* they can teach: they cannot close their doors to military recruiters as a means of teaching principles of nondiscrimination. The plaintiffs point to Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234 (1957), which suggested that academic freedom includes the right to determine not only "what may be taught," but also "how it shall be taught." Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring in judgment). However, Justice Frankfurter's broad formulation in Sweezy was not adopted by the Court. See Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217, 238 (2000) (Souter, J., concurring in judgment). We know of no case – and the plaintiffs cite none – in which the Supreme Court or this Court has invalidated a law like the Solomon Amendment that is not directed at the content of a university's curriculum simply because it places an incidental burden on how pedagogical views are conveyed.

The First Amendment has never been thought to turn an educational institution into "a constitutional sanctuary" (Barenblatt v. United States, 360 U.S. 109, 112 (1959)), exempt from the obligation to comply with laws that regulate the institution's actions rather than its views. When a university's actions have harmful consequences far beyond the university's walls, as does the wholesale exclusion of military

recruiting, and when those consequences flow not from any pedagogical motive or message behind the actions, but rather from the impact of the actions themselves, academic freedom provides no shelter from legislative authority.

The plaintiffs' position is particularly weak because the Solomon Amendment leaves conventional avenues of academic discourse completely undisturbed. As explained above, educational institutions, their administrators, their faculties, and their students are free to advocate principles of non-discrimination and condemn military hiring practices through lectures, speeches, resolutions, publications, marches, and protests. That is not to gainsay that, from a particular institution's perspective, actually barring the campus gates to military recruiters may give added force to the message. But at the very least, the unimpaired availability of traditional modes of academic discussion and debate significantly mitigates whatever burden the law might otherwise be thought to place on academic freedom.

D. The Solomon Amendment Does Not Place Unconstitutional Conditions on Federal Funding

As noted at the outset of this brief, the Solomon Amendment is an exercise of Congress's power over the expenditure of federal revenues under the Spending Clause. The reach of Congress's spending power is broad, and the constitutional limitations on Congress's authority under the Spending Clause "are less exacting than

those on its authority to regulate directly." South Dakota v. Dole, 483 U.S. 203, 209 (1987). In particular, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives." United States v. American Library Ass'n v. 123 S. Ct. 2297, 2303 (2003).

To be sure, the scope of Congress's authority under the Spending Clause is not without limits, and one of the limits is the unconstitutional-conditions doctrine. Under this doctrine, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected * * * freedom of speech even if he has no entitlement to that benefit." American Library Ass'n, 123 S. Ct. at 2307 (internal quotation marks omitted); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

As the district court pointed out, however, "[a] finding of an unconstitutional condition presupposes that there is a relinquishment of a constitutional right." JA 51 (emphasis added). The unconstitutional-conditions doctrine thus is not an independent basis for seeking relief under the First Amendment; it simply prevents the government from requiring acceptance of an otherwise unconstitutional burden on expression as the price of federal funding. In order to prevail on an unconstitutional-conditions claim, the plaintiff must demonstrate that the burden imposed on his First Amendment interests is itself unconstitutional.

For the reasons given above, requiring educational institutions to provide access to military recruiting does not place an unconstitutional burden on freedom of speech, freedom of expressive association, or academic freedom. Thus, nothing in the unconstitutional-conditions doctrine constrains Congress from requiring educational institutions to provide the access prescribed by the Solomon Amendment as a condition for the receipt of federal funds.

II. THE SOLOMON AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

The Due Process Clause requires legislatures to frame their enactments "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Here, the Solomon Amendment disallows the provision of specified federal funds to an educational institution that "prohibits, or in effect prevents," the military departments and the Department of Homeland Security "from gaining entry to campuses, or access to students * * * on campuses, for purposes of military recruiting." As explained above, the Department of Defense interprets this language to require institutions to provide military recruiters with a degree of access to students that is "at least equal in quality and

scope" to the access provided to other potential employers. See 32 C.F.R. § 216.4(c)(3).

The plaintiffs cannot seriously argue that this interpretation of the Solomon Amendment renders it unconstitutionally vague. Requiring that military recruiters be given a degree of access "at least equal in quality and scope" to the access given to non-military recruiters provides a readily administrable rule, both for university administrators and for the Department of Defense itself.⁴ The plaintiffs may well disagree with the Department of Defense (and, indeed, do) regarding the meaning of the Solomon Amendment. But they cannot plausibly contend that the government's reading of the statute and its implementing regulations (see 32 C.F.R. § 216.4(c)(3), (6)) fails to provide an intelligible rule of decision to guide universities and the government. Nor can (or do) they suggest that their own preferred reading of the

⁴ The plaintiffs construe a letter by William J. Carr, the Acting Deputy Under Secretary for Military Personnel Policy, as indicating that the Department of Defense is actually willing to accept access that is not "equal in quality and scope" as long as it does not involve "substantial disparity" in treatment. The plaintiffs misunderstand the import of the letter. The letter's reference to "substantial disparity" (see JA 195) was intended simply as a shorthand for restrictions that deny military recruiters "a degree of access that is equal in quality and scope." Whenever military recruiters are denied access that is equal in quality and scope, the resulting disparity in treatment is "substantial" and unacceptable. The Carr letter thus does not introduce a new and inchoate legal criterion for determining whether an institution is complying with the funding requirements of the Solomon Amendment.

Solomon Amendment, which would entitle military recruiters to nothing more than physical entry to the campus (see JA 518), is itself unconstitutionally vague.⁵

To be sure, there may be instances in which the applicability of the Solomon Amendment to a particular institution's placement policies is unclear. But as the Supreme Court has made clear, the fact "[t]hat there may be marginal cases in which it is difficult to determine the side on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense." United States v. Perillo, 321 U.S. 1, 7 (1947); Nash v. United States, 229 U.S. 373, 377 (1913) (rejecting criminal defendant's vagueness challenge to Sherman Act's "rule of reason" liability standard) ("the law is full of instances where a man's fate depends on his estimating rightly * * * some matter of degree"). A fortiori, the

⁵ The Harvard faculty amici argue at length that the Department of Defense's interpretation of the Solomon Amendment is incorrect as a statutory matter. Although the plaintiffs included a statutory claim in their complaint, their motion for a preliminary injunction was predicated exclusively – and deliberately – on their constitutional claims. See JA 405-407; see also id. at 461 (plaintiffs' counsel) ("We would not be satisfied" with a decision adopting a narrower reading of the statute "because there are law schools out there * * * that would prefer to bar military recruiters entirely from their campus"). Neither the plaintiffs nor the defendants briefed the statutory claim below, and the plaintiffs have not asked this Court to reverse the district court on the basis of that claim – nor could they, since they did not urge the claim on the district court as a basis for the relief they sought. Because the plaintiffs did not seek injunctive relief below on the basis of their statutory claim and have not pursued that claim in this appeal, the government need not address it here. The statutory issue remains before the district court and will be taken up in due course there.

existence of close cases does not render a non-criminal statute unconstitutionally vague, particularly a statute like the Solomon Amendment that does nothing more than regulate federal spending. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) ("[t]he Court has * * * expressed greater tolerance of enactments with civil rather than criminal penalties"); National Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998) (rejecting vagueness challenge to federal statute that conditions funding on "artistic excellence," "artistic merit," and "general standards of decency and respect for the diverse beliefs and values of the American people") ("In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity"). Vagueness concerns are further diminished where the regulated party "may have the ability to clarify the meaning of a regulation by its own inquiry, or by resort to an administrative process." Hoffman Estates, 455 U.S. at 498. Here, the record shows that law schools have been able to avail themselves of this process and are continuing to do so. See, e.g., JA 194-98.

The plaintiffs contend (FAIR Br. 41-42) that the Department of Defense has changed its views over time regarding both the substantive scope of the Solomon Amendment and the extent to which federal funding must be curtailed in the event of noncompliance. But there is nothing impermissible, much less unconstitutional,

about an agency's reconsideration and revision of its own views regarding the meaning of a statute. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157 (2000) ("an agency's initial interpretation of a statute that it is charged with administering is not carved in stone") (internal quotation marks omitted); Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993) ("an administrative agency is not disqualified from changing its mind" regarding the meaning of a statute); Rust v. Sullivan, 500 U.S. 173, 186 (1991). The critical question is simply whether the statute as currently construed by the agency is unconstitutionally vague – and as explained above, nothing about the Department of Defense's current reading of the law crosses that line. As the district court noted, "[t]he [administrative] guidance that exists is sufficiently clear," however "unwelcome" it may be. JA 86.

In a related vein, the plaintiffs complain that "military bureaucrats" have "the power to adopt their own idiosyncratic interpretations of the Solomon Amendment and apply them inconsistently to different parties" (FAIR Br. 43-44). That complaint fails to come to terms with the actual operation of the statute. The Solomon Amendment gives the Secretary of Defense the authority to determine that an educational institution is not in compliance with the Solomon Amendment. See 10 U.S.C. 983(b) ("No funds * * * may be provided * * * if the Secretary of Defense determines" that entry to campus or access to students is being prohibited or

effectively prevented). By regulation and directive, the Secretary's power to make this determination has been assigned to the Principal Deputy Under Secretary of Defense for Personnel and Readiness ("Principal Deputy"). See 32 C.F.R. § 216.5(a) (empowering Assistant Secretary of Defense for Force Management Policy to make a "final determination" under the Solomon Amendment); DOD Directive 5124.8 ¶ 1.2 (July 16, 2003) <<http://www.dtic.mil/whs/directives/corres/pdf2/d51248p.pdf>> (assigning Principal Deputy the functions previously assigned to Assistant Secretary of Defense for Force Management Policy). Thus, only a single decisionmaker in the Department of Defense – not, as the plaintiffs suggest, "diverse military recruiters" (FAIR Br. 17) – can disqualify an institution from receiving federal funds under the Solomon Amendment.

As a result, the licensing cases cited by the plaintiffs (FAIR Br. 44) are simply irrelevant to the vagueness issue here. In each of those cases, the official authorized to make the licensing decision had unbridled discretion to grant or withhold the license, creating an intolerable risk that the discretion would be exercised to suppress protected expression. See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Lovell v. Griffin, 303 U.S. 444 (1938). Here, the military recruiters and other subordinate officials who allegedly have taken inconsistent views regarding the

meaning of the Solomon Amendment lack the authority to grant or withhold funds. That authority rests solely with one decisionmaker – and his exercise of that authority, far from being subject to unbridled discretion, is subject to the clear requirements of the Solomon Amendment and its implementing regulations. See JA 86 (district court opinion) ("[t]he concern as to arbitrary enforcement is minimal[,] given a centralized decisionmaker" and a "sufficiently clear" statute that does "not * * * confer unfettered discretion in targeting institutions or making final funding determinations").

Finally, if the Principal Deputy does make a final determination that an institution is withholding the requisite access, the institution can regain its funding simply by complying with the statute. See 10 U.S.C. 983(c)(1) (funding limitation "shall not apply to an institution of higher education * * * if the Secretary of Defense determines that the institution * * * has ceased the [proscribed] policy or practice"); 32 C.F.R. § 216.5(a)(2) (not later than 45 days after receipt of school's request to restore eligibility, Principal Deputy shall determine whether school's funding status should be changed). As a result, schools are not forced to act at their peril in the way that an individual must act at his peril when confronted with a vague criminal statute: while the individual cannot avoid punishment simply by changing his course of conduct once its legality has been determined, the school can avoid the loss of fund-

ing by promptly providing the access found to be required by the Principal Deputy. Concerns about fair notice and the chilling of expression are far less urgent where, as here, the consequences of unintentionally crossing the statutory line are readily reversible.

The plaintiffs respond that "one need not incur the penalty first in order to assert a constitutional challenge" (FAIR Br. 46). That response misses the point. An educational institution is free (subject to the limitations imposed by ripeness principles) to pursue a vagueness challenge to the Solomon Amendment without waiting for a final determination by the Principal Deputy regarding the institution's legal status under the statute. When the institution does so, however, the facts that authority under the Solomon Amendment is centralized in one decisionmaker and that the school can protect itself from the fallout of his decision through post-decision compliance have a direct bearing on the merits of the vagueness claim. The claim fails, in other words, not because it is premature, but because it is wrong.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION REGARDING THE REMAINING PRELIMINARY INJUNCTION FACTORS

As the foregoing discussion shows, the district court was correct in concluding that the plaintiffs have not shown a likelihood of success on the merits of their constitutional claims. That conclusion was sufficient to dispose of the plaintiffs'

motion, for "a failure to show a likelihood of success * * * must necessarily result in the denial of a preliminary injunction." Morton v. Beyer, 822 F.2d 364, 371 (3d Cir. 1987) (internal quotation marks omitted). The district court nevertheless considered each of the remaining preliminary injunction factors – the risk of irreparable injury to the plaintiffs, the countervailing harm to the government, and the public interest – and found that they too weighed in favor of denying the preliminary injunction. JA 88-90.

Although the plaintiffs take issue with the district court's assessment of the remaining factors, they do so solely on the basis of their position on the merits. See FAIR Br. 18-19. They concede that the weight of the remaining factors is heavily dependent on their position that the Solomon Amendment violates their First Amendment rights, and hence that the inquiry "boils down" to whether they are likely to prevail on the merits. Id. at 18. Thus, if this Court shares the district court's view of the merits, it need proceed no further.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

PETER . KEISLER
Assistant Attorney General

CHRISTOPHER J. CHRISTIE
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Appellate Staff
Civil Division, Room 9554
601 D Street N.W.
Washington, D.C. 20530
202-514-4052

February 17, 2004

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure. The brief contains 12,155 words, as determined by Corel WordPerfect 9.

Scott R. McIntosh

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2004, I filed and served the foregoing BRIEF FOR THE APPELLEES by causing the required number of copies of the brief to be filed with the Office of the Clerk and served on the following counsel by first-class mail:

E. Joshua Rosenkranz
Timothy P. Wei
Sharon E. Frase
Heller Ehrman White & McAuliffe LLP
120 West 45th Street
New York, NY 10036
212-832-8300

Warrington S. Parker, III
Aaron M. Armstrong
Heller Ehrman White & McAuliffe LLP
333 Bush Street
San Francisco, CA 94104-2878
415-772-6000

Paul M. Smith
William M. Hohengarten
Daniel Mach
Jenner & Block LLP
601 13th Street NW
Suite 1200 South
Washington DC 20005
202-939-6000

Walter Dellinger
Pamela Harris
Toby Heytens
O'Melveny & Myers LLP
1625 Eye Street NW
Washington DC 20006-4001
202-383-5300

Lawrence S. Lustberg
Philip G. Gallagher
Jonathan L. Hafetz
Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.
One Pennsylvania Plaza, 37th Floor
New York NY 10119-3701
212-649-4700

Jonathan Kentner
Bingham McCutchen LLP
399 Park Avenue
New York NY 10022
212-705-7000

Sam Heldman
Hilary E. Ball
Gardner, Middlebrooks, Gibbons, Kittrell & Olsen
2805 31st Street NW
Washington DC 20008
202-965-8884

John L. Moore, Jr.
Louis J. Rouleau
Piper Rudnick LLP
1200 Nineteenth Street NW
Washington DC 20036
202-861-3900

Scott R. McIntosh