

POINT II

ALL CLAIMS ARE RIPE FOR ADJUDICATION

In a further attempt to avoid litigating the merits of this dispute, defendant argues that plaintiffs' constitutional and statutory claims are not ripe for adjudication. Def. Br. at 20-26. Defendant is incorrect.

Abbott Labs v. Gardner, 387 U.S. 136 (1967), upon which defendant principally relies, provides the guidelines for deciding whether an agency decision is ripe for review. Specifically, the Court should consider (1) whether delayed review will cause hardship to plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action and (3) whether courts would benefit from further factual development of issues presented. Id. at 149. Plaintiffs easily satisfy each of these factors.

First, as discussed above, the members of SAME and OutLaws suffer ongoing injury as a result of defendants' misguided application of the Solomon Amendment. See Able v. United States, 88 F.3d 1280, 1289-90 (2d Cir. 1996) (plaintiffs' challenge to "Don't Ask, Don't Tell" ripe for adjudication). The Yale Law School has been forced – under the threat of loss of hundreds of millions of dollars to Yale University – to suspend its 25-year-old nondiscrimination policy by allowing JAG to participate in official recruiting programs. Cplt. ¶ 31. Students have thus been deprived of their right to receive the law school's message of nondiscrimination and to participate in an expressive association defined by the association, and not the government. While defendant may disagree that this constitutes legally cognizable

injury, the question is indisputably ripe for decision and so can – and must – be decided now.

Second, immediate adjudication of plaintiffs’ constitutional and nonconstitutional claims will not cause any interference with agency action. In Califano v. Sanders, 430 U.S. 99, 109 (1977), the Supreme Court made clear that constitutional claims are not suited for administrative adjudication in the first place, and as a result, judicial review is the appropriate means of dealing with such claims. Defendant’s assertion that he has not “staked out any position with regard to the application of the Solomon Amendment at Yale,” see Def. Br. at 20-21 (emphasis added), is belied by defendant’s unequivocal statements that Yale University is violating the Solomon Amendment and so is subject to forfeiture of federal funding. See letter from Carr to Levin, dated May 29, 2003 (Ex. B) (“By not providing the military’s requested access and in effect preventing the military from gaining access to students, Yale’s policy is in violation of federal law.”).¹⁰

Defendant argues that because his interpretation of the Solomon Amendment has been explained in letters, as opposed to a directive from the “Principal Deputy,” it should be shrouded from judicial review. Def. Br. at 20-21. It is, however, well settled that “an agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position on a general question of statutory

¹⁰ See also letter from Miller to Levin, dated Jan. 6, 2003 (Ex. C) (“As you are aware, federal statutes provide for the denial of major federal funding to institutions of higher learning that have a policy or practice of denying military recruiting personnel entry to campuses, access to students on campuses, or access to student recruiting information. [These funds will include] funding through grants or contracts from appropriations of the Departments of Defense, Transportation, Labor, Heath and Human Services, Education and related agencies We will consider any response other than an affirmative one to be a negative response.”).

interpretation.” CIBA-Geigy Corp. v. United States Env'tl. Prot. Agency, 801 F.2d 430, 438 n.9 (D.D.C. 1986) (upholding the reviewability of the EPA’s position communicated in a letter response to CIBA-Geigy’s inquiry). Courts have thus not required plaintiffs to obtain a document framed as a “formal order” before permitting them to challenge an agency’s interpretation of a statute. To the contrary, agency communications as informal as emails have been held to be “final agency actions.” See De la Mota v. Dep’t of Educ., No. 02 Civ. 4276 (LAP), 2003 WL 21919774 (S.D.N.Y. Aug. 12, 2003) (agency email to plaintiff stating his ineligibility for Perkins Loan cancellation constituted “final agency action”). See also W. Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659 (7th Cir. 1998) (upholding reviewability as “final agency action” of letter sent by subordinate of Department of Labor director and suggesting possibility of department enforcement action).

Here, the DOD has unequivocally stated its belief that “Yale’s policy is in violation of federal law.” See letter from Carr to Levin, dated May 29, 2003 (Ex. B). Indeed, defendant has taken the position expressed in these letters for more than a year, i.e., ample time to “apply its expertise and correct its mistakes.” Def. Br. at 23 (citing Air Espana v. Brien, 165 F.3d 148, 152 (2d Cir. 1999)). There can be no credible argument that defendant or the “Principal Deputy” disagree with the position taken in these official letters. Notably, defendant nowhere states in his motion papers that the determination may be revised. Indeed, the record makes clear that the only additional action being contemplated by defendant is taking an even more onerous stance on the application of the Solomon Amendment. See letter from Carr to Levin, dated May 29, 2003 (Ex. B) (“Although Yale has on two occasions . . . waived its policy, Yale has refused to state

whether it will apply the policy to the military for future interviewing seasons

Therefore, it is my duty under law to recommend to the Principal Deputy Under Secretary . . . that Yale University be determined ineligible for Department of Defense funding.”). Plaintiffs are not required to wait until defendant has inflicted the maximum possible injury upon them; defendant’s argument that “the Court’s intervention at this juncture would be premature and would ‘disrupt[] the agency’s processes’” is therefore a red herring. See Def. Br. at 23 (citation omitted).

Finally, the third factor of the Abbott test is satisfied because plaintiffs’ claims are purely legal in nature and do not require the further development of a factual record. SAME and OutLaws intend to move for summary judgment shortly because the undisputed facts require judgment in their favor as a matter of law.

* * *

In addition, plaintiffs’ statutory claims are ripe for adjudication because defendant has violated the plain language of the Solomon Amendment by (i) enacting regulations eliminating the subelement limitation, see Cplt. ¶ 38, and (ii) demanding access equal to that afforded to non-discriminating employers. Cplt. ¶ 37.¹¹ Agency rulemaking represents a “final agency action” for purposes of the ripeness review. See

¹¹ This Court clearly has federal question jurisdiction under 28 U.S.C. § 1331 to determine whether the defendant has exceeded its statutory authority by (i) erroneously demanding access equal to that afforded to nondiscriminating employers, and (ii) wrongly repealing the subelement limitation on defunding. See Califano, 430 U.S. at 105 (“federal question jurisdiction ‘confers jurisdiction on federal courts to review agency action’”) (citations omitted). Indeed, Congress relies on the courts to ensure that the executive obeys its statutory commands, and for that reason “judicial review is favored when an agency is charged with acting beyond its authority.” Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988). The need for judicial review is especially apparent when, as here, an agency is charged with misinterpreting Congress’ statutory mandates. See Verizon Md., Inc. v. Public Serv. Comm’n of Md., 535 U.S. 635 (2002) (where nothing in the statute interpreted by the agency “displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies”).

Natural Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n, 539 F.2d 824, 836 (2d Cir. 1976) (no distinction exists for review purposes between agency adjudications and other pronouncements, such as rulemaking).

In addition, the imminent harm threatened by non-compliance with the DOD's demands, which has caused Yale Law School to suspend its nondiscrimination policy, subjects plaintiffs to ongoing injury. Legal consequences have already flowed from the DOD's misguided revocation of the subelement limitation, satisfying the ripeness requirement that the parties feel concrete effects from the agency's action. See Bennett, 520 U.S. at 177-78.

Significantly, defendant does not, because he cannot, offer any defense on the merits of his reading of the statute and has not moved to dismiss the statutory claim under Rule 12(b)(6). Defendant's elimination of the subelement limitation and his demand to be treated equally to nondiscriminating employers flatly contradicts the plain language of the statute. Cplt. ¶¶ 36-38; FAIR, 291 F. Supp. 2d at 321 (“[T]he statute could easily have provided that military recruiters are to be treated the same as other employers. The statute does not so provide.”).

POINT III

THE PLAINTIFFS STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) is proper “only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Warner v. Asplundh Tree Expert Co., No. Civ. A 303CV1267JCH, 2003 WL 22937718, at *1 (D. Conn. Dec. 10, 2003) (Hall, J.) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957))

(internal quotation marks omitted). When ruling on a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiffs, accepting as true all factual allegations in the complaint. Levitt v. Bear Stearns & Co., 340 F.3d 94, 96, 101 (2d Cir. 2003) (citing Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984)).

A. The Solomon Amendment Presents Yale Law School With An Unconstitutional Condition – “Your Money Or Your Rights”

A long line of Supreme Court precedent rejects the type of legislative strong-arming undertaken by the Solomon Amendment. More than 45 years ago, the Supreme Court struck down a statute requiring an applicant for a property-tax exemption to sign a loyalty oath. Speiser v. Randall, 357 U.S. 513, 516-17, 529 (1958). The Court reasoned:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech [D]enial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the prescribed speech.

Id. at 518-19.

Subsequent decisions apply that principle to an expanded set of circumstances. In Perry v. Sinderman, the Court held that a junior college professor had presented a legitimate constitutional claim alleging that his contract was not renewed because he advocated a policy at odds with the college’s governing body. 408 U.S. 593 (1972). The Court held that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.” Id. at 597. This doctrine also prohibits Congress from conditioning grants for public broadcasting upon the requirement that the recipient station refrain from

expressing editorial opinions, even when it uses private funds to do so. See FCC v. League of Women Voters, 468 U.S. 364, 371, 400-01 (1984). Likewise, a public university with a general fund for student publications cannot withhold money from a student group on the condition that its publications refrain from presenting a religious perspective. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995).

As explained above, see supra Point I.A., the Solomon Amendment violates students' First Amendment rights to receive the message of nondiscrimination and to expressive association. While defendant states the unobjectionable proposition that Congress has "wide latitude" in the context of federal funding, see Def. Br. at 27, Congress's spending power "cannot categorically trump the Bill of Rights." FAIR, 291 F. Supp. 2d at 299. Moreover, the cases relied on by defendant involved congressional limits on specific federal funding programs, not punitive measures wholly unrelated to any funding received by the plaintiff, as is the case here. Cf. Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 588 (1998) (arts program); United States v. Am. Library Ass'n, ___ U.S. ___, 123 S.Ct. 2297, 2307-08 (2003) (library internet access programs).

The Solomon Amendment, by contrast, is not part of a federal spending program limiting the use of federal funds within the program: defendant is not seeking to define the uses by the Yale Law School of DOD funds; the Law School receives no such

funds. Cplt. ¶ 42.¹² The subject matter of the Solomon Amendment – military recruiting at the law school – is completely unrelated to the federal funds flowing generally to Yale University, which defendant threatens to revoke because of his displeasure with the law school’s expressive conduct. See Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001) (limitation on speech of legal services lawyers impermissible because “lawyer is not the government’s speaker”).

Defendant also argues that the Solomon Amendment somehow passes constitutional muster because it has “nothing to do with protected speech,” and so is subject to the less rigorous standard in United States v. O’Brien, 391 U.S. 367 (1968). Def. Br. at 28. First, the Dale Court held that O’Brien is “inapplicable” in adjudicating laws “directly and immediately affect[ing] associational rights.” Dale, 530 U.S. at 649. See also Texas v. Johnson, 491 U.S. 397, 404, 411 (1989) (O’Brien inapplicable when an “intent to convey a particularized message was present, and ... the likelihood was great that the message would be understood by those who viewed it”). Here, of course the law school’s policy sends a very clear message about the inappropriateness of discrimination. Cplt. ¶ 34 (Tate letter asserting that exclusion of the military from the law school’s interview programs “sends [a] message” with which defendant disagrees). Given the First Amendment interests at stake, defendant’s conduct can be upheld on if it serves “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” Dale, 530 U.S. at

¹² Grove City College v. Bell, 465 U.S. 555 (1984), cited by defendant, see Def. Brief at 27, does not help defendant. Grove City College, involved restrictions on a specific college financial aid program and implicated the government’s compelling interest in eradicating discrimination. 465 U.S. at 575-76.

648; Roberts, 468 U.S. at 623.¹³ While defendant might believe it may be able to satisfy this high standard, on this motion it certainly cannot demonstrate, consistent with the allegations in the Complaint, that its burden has been met.

Indeed, even if one accepts defendant's position that conduct, not speech, is at issue here, see Def. Br. at 31-32, regulation of conduct having an incidental effect on First Amendment rights is justified only if (1) the government has the power to regulate; (2) the regulation furthers an important governmental interest; (3) the interest furthered is not related to the suppression of speech; and (4) the incidental restriction on First Amendment rights is "no greater than essential to the furtherance of that interest." O'Brien, at 377.

Accepting the allegations in the Complaint as true, defendant cannot meet even this lower test to justify its imposition on students' First Amendment rights. There is no legitimate justification for the defendant's misapplication of the Solomon Amendment, see Cplt. ¶ 44; indeed, the DOD originally opposed enactment of the statute itself. 140 Cong. Rec. H3860-63 (Reps. Underwood, Harman, Schroeder).

¹³ Analysis of the right to receive information has frequently turned on the type of speech or regulation at issue. See, e.g. Kleindienst, 408 U.S. at 765-66 (immigration); Va. State Bd. of Pharmacy, 425 U.S. at 758 (commercial speech); Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 390 (1969) (cable regulation); Stanley v. Georgia, 394 U.S. 557, 558 (1969) (privacy rights). Because the right to hear "follows ineluctably from the sender's First Amendment right to send them," restrictions of the right to receive information should be scrutinized along the same lines as restrictions on the right to speak. In the case at bar, there is additional constitutional protection under the doctrine of academic freedom. Shelton, 364 U.S. at 487 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). See also Plaintiffs' Burt v. Rumsfeld Br. at III.A.2. Consequently, the burdens on students' First Amendment rights should be subject to the same heightened scrutiny that was applied in Dale, not only because of the serious First Amendment issues regarding students' right to receive the law school's message, but also because Dale controls the analysis for measuring the burdens on students' right to expressive association.

Moreover, for years, the military had contacted interested students through lists of names and numbers provided by Yale Law School’s Career Development Office, or at the invitation of particular students. Cplt. ¶ 27. It was only in December 2001 that the military demanded that it be treated the same as employers who did not discriminate. Cplt. ¶ 29. Where, as here, the military can just as easily pursue its interest in recruiting through the means it had used in the past, and where this interest can be achieved without interfering with plaintiffs’ right to receive the law schools message and without causing Yale Law School students to sacrifice their right to expressive association, it must chose the avenue that is least restrictive of the students’ rights. O’Brien, 391 U.S. at 377; see also Searcy v. Crim, 642 F. Supp. 313, 317 (N.D. Ga. 1986) (“there has been no showing that the military lacks alternative means of contacting high school students; the mere convenience of contacting them at high schools is not a compelling state interest”), aff’d in part, vacated in part, 815 F.2d 1389 (11th Cir. 1987).¹⁴

B. The Solomon Amendment Constitutes Impermissible Viewpoint Discrimination

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” Turner Broad. Sys., Inc. v. Fed. Communications Comm’n, 512 U.S. 622, 641 (1994). Because the Supreme Court recognizes that “[o]ur political system and cultural life rests upon this ideal,” id., its precedents are clear that “[d]iscrimination against speech because of its message is presumed to be

¹⁴ United States v. Weslin, relied upon by defendant, is not to the contrary. 156 F.3d 292, 298 (2d Cir. 1998). In Weslin, the right at stake was allowing women access to pregnancy-related services, id. at 297, not speech, as is the case here. See supra III.A. Furthermore, the statute in Weslin prohibited only conduct—violent or obstructive—that would actually prevent a person from being able to enter a clinic.

unconstitutional.” Rosenberger, 515 U.S. at 828 (citing Turner, 512 U.S. at 641-43). Because of the prohibition on content-based restrictions on speech, the government cannot force schoolchildren to salute the flag, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), prohibit speech critical of a foreign government in the vicinity of a foreign embassy, Boos v. Barry, 485 U.S. 312, 329 (1988), or impose additional criminal penalties for hate speech motivated by certain types of bias (but not others), R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391-92 (1992). Neither can it prohibit plaintiffs from expressing a viewpoint other than the pro-military recruitment message favored by defendant. The choices of whether to speak and on which topics must be left to the speaker, without interference in the form of financial carrots or sticks from the governing body controlling the purse strings

Moreover, it is irrelevant that the government’s coercion takes the form of financial disincentives rather than outright prohibition. In Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991), the Supreme Court struck down a statute requiring an accused or convicted criminal’s income from artistic works portraying his or her crimes to be deposited in an escrow account for possible disbursement to the criminal’s victims and other creditors. The Court determined that “[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” Id. at 115. See also Rosenberger, 515 U.S. at 837 (declaring unconstitutional refusal to fund Christian student newspaper even though university did not prohibit publication of the newspaper).

Courts are especially wary of strings attached to a benefit when those strings are “aimed at the suppression of dangerous ideas.” Speiser, 357 U.S. at 519

(quoting Am. Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 402 (1950)). Here, of course, it was precisely the content of the law school's speech – disagreement with military recruiting in light of “Don't Ask, Don't Tell” – that prompted the enactment of the Solomon Amendment. With the Solomon Amendment, Congress took aim at “[a] growing, and misguided, sense of moral superiority . . . creeping into the policies of colleges and universities in this country.” 140 Cong. Rec. H3860-03 (May 23, 1994) (statement of Rep. Pombo). The “moral superiority” that offended Congress did not extend however to institutions that exclude the military because of “a longstanding policy of pacifism based on historical religious affiliation.” 10 U.S.C. § 983. This distinguishing among viewpoints cannot survive a First Amendment challenge unless the government demonstrates that it is necessary to serve a compelling interest and that it serves that interest by the least restrictive means available. See Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 616 & n.4 (4th Cir. 2002). As alleged in the Complaint, it does not. Cplt. ¶ 47.

Defendant points out that the district court in FAIR, 291 F. Supp. 2d at 316, rejected the claim that the Solomon Amendment constituted viewpoint discrimination. Def. Br. at 35-36. As a threshold matter, Judge Lifland was expressing his views in the context of the analysis applicable to a motion for injunctive relief; he did not dismiss the claim on the merits. FAIR, 291 F. Supp. 2d at 274. And the court's conclusion rested on its erroneous view that the Solomon Amendment had only an incidental burden on speech. Id. at 311. Here, the Solomon Amendment's exclusion of pacifist schools precludes the defendant from silencing or altering any message those schools might convey concerning the appropriateness of employment by the military. By

contrast, defendant has used the Solomon Amendment to impair the Yale Law School message that discrimination based on sexual orientation is wrong. Cplt. ¶ 7. This is classic impermissible viewpoint discrimination. See FAIR, 291 F. Supp. 2d at 314-15 (improper viewpoint discrimination “rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”) (citing Turner Broadcasting, 512 U.S. at 640). It is no answer to say, as Judge Lifland did, that “[i]t would serve no common-sense purpose to invoke the Solomon Amendment against pacifist schools where military recruiting efforts would be futile.” FAIR, 291 F. Supp. 2d at 274. On this motion to dismiss, there is nothing in the record to support an inference that all students at institutions with policies “of pacifism based on historical religious affiliation” are also pacifists uninterested in military service.

C. The Solomon Amendment Is Unconstitutional Because It Violates Students’ Fifth Amendment Rights

Since 2001, defendant has made clear that prior arrangements reached with Yale Law School are no longer acceptable, and that Yale Law School is out of compliance with the Solomon Amendment unless it abandons its 25-year-long nondiscrimination policy as it applies to gay men and lesbians. See letter from Carr to Levin, dated May 29, 2003 (Ex. B) (law school’s “certification requirement is inconsistent with federal law”). See also letter from Tate to Levin, dated May 29, 2002 (Ex. A) (stating Yale Law School’s “institutionalized policy that limits military recruiting” renders it out of compliance with the statute). This interpretation of the statute is not only unnecessary, unwarranted and extreme, but also runs afoul of the equal protection guarantees protected under the Fifth Amendment to the Constitution. Yick

Wo v. Hopkins, 118 U.S. 356 (1886).¹⁵ Defendant, by meting out the Solomon Amendment's dictates "with an evil eye and an unequal hand," Yick Wo, 118 U.S. at 373-74, has established "an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that . . . [they] amount to a practical denial . . . [of the] equal protection of the laws." Id. at 373.

Defendant's actions revive concerns about virulent anti-gay sentiment expressed by members of Congress during passage of the Solomon Amendment. The Solomon Amendment grew out of a legislative session evidencing numerous connections between the gay rights movement, university campuses and military recruiting. Representative Philip Crane railed against "allowing homosexuals to service [sic] in the military" as a sign of "the same degradation and lack of respect displayed little more than a decade ago." 139 Cong. Rec. E1758-01 (daily ed. July 14, 1993) (statement of Rep. Crane). Representative Richard Pombo, a co-sponsor of the amendment, supported efforts to teach schools that "starry-eyed idealism comes with a price." 140 Cong. Rec. H3863 (May 23, 1994) (statement of Rep. Pombo). Representative Solomon added in a warning that universities that "do not like the Armed Forces . . . [should] not expect Federal dollars to support your interference with our military recruiters." Id. at H3861.

Defendant argues that plaintiffs cannot assert a valid Fifth Amendment argument because it is "immaterial whether access to campus is restricted in response to the Congress' policy on homosexuality in the armed forces, or because of a disagreement with a particular military engagement, or for no reason at all." Def. Br. at 36-37. But

¹⁵ "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." Washington v. Davis, 426 U.S. 229, 239 (1976); see also Bolling v. Sharpe, 347 U.S. 497 (1954).

defendant has wielded the statute as a weapon against Yale Law School's long-held commitment to gay and lesbian equality, and in that context, enforcement is material. Yick Wo; 118 U.S. at 373-74.¹⁶ As a result of defendant's conduct, gay men and lesbians have become the only group deprived of the protection of the law school's nondiscrimination policy. Cplt. ¶¶ 32, 49.

The fact that defendant's animus involves sexual orientation, as opposed to race or gender, by no means diminishes plaintiffs' claims. As the Supreme Court has made abundantly clear – precisely in the context of gay rights – the Constitution “neither knows nor tolerates classes among citizens.” Romer, 517 U.S. at 623 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) (striking down state constitutional amendment prohibiting local anti-discrimination measures protecting gays and lesbians under rational basis review). See also Lawrence, 123 S. Ct. at 2484 (striking down anti-sodomy statute under rational basis review because it “demean[s] the[] existence [and] control[s] the[] destiny” of gays and lesbians). Defendant's arbitrary actions undermine Yale Law School's nondiscrimination policy as it applies to gay and lesbian students who are, as a class, deprived of the protections they are entitled to receive. This form of injustice has always been unconstitutional, Yick Wo, 118 U.S. at 373-74, and continues to be today. Romer, 517 U.S. at 635; Lawrence, 123 S. Ct. at 2484. Consequently, the statute violates the equal protection component of the Due Process Clause of the Fifth Amendment.

¹⁶ The professors of Yale Law School also raise viable Fifth Amendment claims based on their fundamental right to educate their students according to their preferred educational mission. See Burt Br. at III.B.

CONCLUSION

For the foregoing reasons, defendant's Motion to Dismiss should be denied.

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