

**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 CHERMERINSKY, 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; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; 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.

No. 03-4433

APPELLEES' MOTION TO STAY THE MANDATE

On November 29, 2004, a divided panel of this Court issued an opinion holding that the appellants are entitled to a preliminary injunction on their claim that the Solomon Amendment, 10 U.S.C. § 983(b)(1), violates the First Amendment rights of law schools that wish to limit or forbid on-campus military recruiting because it is inconsistent with their opposition to Congress's policy

regarding military service by homosexuals. The Acting Solicitor General of the United States has now decided to petition the Supreme Court for a writ of certiorari to review that decision. The Acting Solicitor General's decision to seek Supreme Court review reflects the gravity of this Court's invalidation of an Act of Congress on constitutional grounds. It also reflects the harm that will accrue to the Nation's military readiness and the public interest if the Department of Defense is deprived, in whole or in part, of the recruiting capabilities that it enjoys under the Solomon Amendment.

In connection with the Acting Solicitor General's decision to seek Supreme Court review, the Secretaries of Defense, Education, Labor, Health and Human Services, Transportation, and Homeland Security (hereafter collectively "the government") hereby move to stay the issuance of this Court's mandate pending the filing and disposition of the forthcoming petition for certiorari. The government is entitled to a stay of the mandate if "the certiorari petition would present a substantial question" and "there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). That showing is readily met here.

The Supreme Court is highly likely to review this Court's constitutional decision, and there is, at the very least, a serious possibility that the Supreme Court will not share this Court's view that the First Amendment compels the federal government to provide funding to educational institutions that deliberately impede or prohibit campus access by the government's own recruiters. At the same time, there is compelling cause for staying the mandate in order to maintain the status quo pending Supreme Court review. The Solomon Amendment has been in effect for a number of years, and on-campus recruiting in conformity with it has been an established practice. The statute and practice

under it should not be abruptly halted at this point until the Supreme Court has considered the issue presented.

As explained below, and as discussed in detail in the declarations that accompany this motion, the lawyers who serve in the Judge Advocate General (JAG) Corps play a vital role in all phases of their services' military missions, including direct front-line support for current military operations in Iraq, Afghanistan, and other fronts in the global war on terror. The military services depend heavily on unimpeded access to law school campuses to recruit the hundreds of highly qualified lawyers who must be hired each year to carry out these critical tasks. If the mandate issues and the district court enters a preliminary injunction against the enforcement of the Solomon Amendment on the Nation's law school campuses, the military's ability to recruit the best and brightest young lawyers for military service will be seriously compromised. The mandate should be stayed to ensure that military readiness is not impaired in this fashion until the Supreme Court has had the same opportunity as this Court to address the significant constitutional issues in this case.

I. The Government's Petition for Certiorari Will Present Substantial Questions Regarding the Constitutionality of the Solomon Amendment

As a threshold matter, it is highly likely that at least four Justices will vote to issue a writ of certiorari to review this Court's decision. Invalidating an Act of Congress on constitutional grounds is "the gravest and most delicate duty that [a court] is called upon to perform." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.). Because of the inherent gravity of that act, and because the government suffers irreparable injury "any time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people," New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351

(1977) (Rehnquist, J., in Chambers), the Supreme Court almost invariably grants review when a lower court holds an Act of Congress to be unconstitutional, even at the preliminary injunction stage. See Stern, Gressman, Shapiro & Geller, Supreme Court Practice § 4.12, at 244 (8th ed. 2002) ("Where the decision below holds a federal statute unconstitutional * * *, certiorari is usually granted because of the obvious importance of the case"); Ashcroft v. ACLU, 532 U.S. 1037 (2001) (granting certiorari to review preliminary injunction against enforcement of Child Online Protection Act); United States v. Bajakajian, 524 U.S. 321, 327 (1998); United States v. Edge Broadcasting Co., 509 U.S. 418, 425 (1993). In this case, the entry of a preliminary injunction will divest the Department of Defense of a legislatively crafted safeguard for military recruiting and will compel the Executive Branch to spend large amounts of federal funds in derogation of explicit spending limitations imposed by an Act of Congress. There is no realistic prospect that the Supreme Court will allow these results to stand without consideration of the constitutionality of the Solomon Amendment by the Supreme Court itself.

If certiorari is granted, there is a significant prospect that the Supreme Court will sustain the constitutionality of the Solomon Amendment. In saying this, we fully recognize that two of the three members of the panel who heard this appeal have already concluded that the Solomon Amendment runs afoul of the First Amendment. At the same time, however, the remaining member of the panel and the district judge reached the opposite conclusion. The fact that the constitutional claims in this case have evenly divided the four federal judges who thus far have considered them suggests that, at the very least, the arguments in defense of the constitutionality of the Solomon Amendment are substantial ones. Moreover, a review of the panel majority's opinion suggests several important respects in which the Supreme Court may disagree with this Court's reasoning.

A. This Court's analysis of the plaintiffs' expressive association claim equates the state law at issue in Boy Scouts of America v. Dale, 530 U.S. 640 (2000), which obligated the Boy Scouts to accept gay men as members and leaders of their organization, with the Solomon Amendment, which simply requires law schools and other educational institutions to accord military recruiters the same opportunities that the schools extend to other employers. See Op. 24-31. However, the differences between the two statutes are vastly more significant than their supposed similarities.

In Dale, 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." 530 U.S. 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. Here, the Solomon Amendment does not impose any comparable burden on the right of educational institutions to determine their membership. It merely requires them to allow campus access by military recruiters on an equal basis with other recruiters. The recruiters are not a part of the institution itself and do not become members through their recruiting activities. To the contrary, recruiters play a role concerning economic activity – prospective employment – of students outside the school. In contrast to the scoutmaster in Dale, recruiters do not purport to speak for the institution that they are visiting, and the bare fact that the Solomon Amendment deters law schools from discriminating against military recruiting activities creates no risk that the recruiter's views will be mistaken for those of the law school itself. Cf. Rosenberger v. Rector and Visitors of University

of Virginia, 515 U.S. 819, 841-42 (1995) (where a university provides funding for student publications on a non-discriminatory basis and "take[s] pains to disassociate itself" from a particular publication's views, the concern that those views "would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being * * * endorsed" by the university).

B. With respect to the Court's analysis of the plaintiffs' compelled speech claim, the simple fact is that the Solomon Amendment does not compel law schools to say anything. To be sure, if a law school chooses to assist private employers in disseminating their recruiting information to students, the Solomon Amendment conditions federal funding on the law school's willingness to provide the same kind of assistance to military recruiters. But because all of the recruiting information disseminated by law school placement offices is attributable to employers, rather than to the law school itself, this is not a case in which the government is "requir[ing] speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). When a military recruiter speaks to a potential recruit, or information about a forthcoming military recruiting visit is made available through a placement office, the risk that the military's message will be attributed to the law school is non-existent, particularly when (as is often the case with respect to the Solomon Amendment) the institution has publicly condemned the recruiter and his mission.

C. The Court's opinion holds that if the Solomon Amendment is subject to intermediate scrutiny under United States v. O'Brien, 391 U.S. 367 (1968), rather than strict scrutiny, the plaintiffs are entitled to prevail because the government has not presented evidence to demonstrate that the

Solomon Amendment materially advances the government's compelling interest in military recruiting or that alternative means of recruiting would be less effectual. This demand for particularized evidentiary proof of the necessity and efficacy of the Solomon Amendment is fundamentally misguided.

By adopting a rule of equal access, the Solomon Amendment accepts and relies on educational institutions' own assessments of what is required for effective recruiting. When a law school allows recruiters to conduct on-campus interviews, provides recruiters with conveniently located interview facilities, makes recruiting literature available through the university's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when the university denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the university itself obviously views as integral to effective recruiting and thereby puts the military at a competitive disadvantage. The schools' own policies therefore furnish a firm and sufficient factual basis for the Solomon Amendment, if one were needed. Law schools cannot complain about the factual predicate of a law that, in the end, rests on the law schools' own factual judgments.

Moreover, the Supreme Court has recognized that "[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). While the Supreme Court has yet to decide "what may be necessary as a minimum" (ibid.), the premise on which the Solomon Amendment rests – that access to campuses and students significantly assists recruiting and that discriminatory restrictions on campus access

correspondingly harms recruiting – is the kind of self-evident proposition that does not demand further evidentiary justification in court. And the Supreme Court has been particularly reluctant to demand evidentiary support where, as here, the constitutional issue involves a challenge to military decisions. See, e.g., Goldman v. Weinberger, 475 U.S. 503, 509 (1986) (holding that government is not required, in response to Free Exercise claim, to offer evidentiary support to establish need for challenged military dress regulations).

D. At a more general level, the Court's inclination to second-guess Congress's judgment about the need for on-campus military recruiting reflects a highly suspect approach to the Constitution's allocation of authority over military affairs. Article I assigns the power and responsibility "[t]o raise and support armies" to Congress. It is therefore for Congress, not the judiciary, to make judgments about what measures are needed to "raise and support" the Nation's military establishment. The First Amendment does not shift that constitutional authority from Congress to the courts. To the contrary, the Supreme Court has made clear that First Amendment claims provide no basis for judicial second-guessing of empirical judgments about military readiness made by the political branches and the military. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); Goldman v. Weinberger, 475 U.S. 503, 509 (1986); Weiss v. United States, 510 U.S. 163, 177 (1994).

E. At the most general level, the question in this case is whether a school's disagreement with the government's military recruiting policies gives the school a constitutional privilege to flout the requirements of the Solomon Amendment without suffering any legal consequences. Ordinarily, the fact that an individual chooses to flout a statutory command for reasons of conscience, as the law schools in this case claim to be doing, does not subject the statute to any constitutional scrutiny at

all, much less to strict scrutiny. This Court itself has previously recognized that an individual is not "absolved of the responsibility for obeying a given law of the community" simply because he has "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) (internal quotation marks omitted). The decision in this case, in contrast, effectively turns civil disobedience into a cost-free constitutional privilege, one that can be invoked by anyone who claims to be disobeying the law in order to "send a message." The idea that there is a constitutional right to engage in civil disobedience without paying the statutory price for disobeying the law is one that is likely to be viewed with skepticism, at the very least, by the Supreme Court.

F. Finally, we note that the Solomon Amendment is one of many federal statutes that make federal funding of educational institutions contingent on the institutions' willingness to abide by a rule of equal access. See, e.g., 20 U.S.C. § 1681 (Title IX) (prohibiting gender discrimination under "any educational program or activity receiving Federal financial assistance"); 20 U.S.C. § 4071 (Equal Access Act) (mandating equal student access to "limited open forums" of federally funded secondary schools). This Court's decision dismisses the spending framework of the Solomon Amendment as without consequence for the constitutionality of the statute. See Op. 19-20 & n.9. But far from being inconsequential, the fact that the Solomon Amendment is a spending statute that ties federal funding to equal access is likely to be viewed by the Supreme Court as highly significant.

For example, in Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court summarily and unanimously rejected a claim that Title IX's prohibition against gender discrimination in federally funded educational programs violated the First Amendment associational rights of Grove City College and its students. See 465 U.S. at 575-76. The Court held that "Congress is free to

attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," and found it constitutionally sufficient that the college could avoid Title IX's equal opportunity mandate by "terminat[ing] its participation in the [educational grant] program." *Id.* at 575. Grove City suggests that when Congress makes educational funding contingent on an institution's compliance with equal access rules, and the institution may avoid the equal access obligation by giving up the federal funding, the equal access requirement is not subject to strict scrutiny – and, indeed, is not subject to heightened scrutiny of any kind. See also Westside Community Board of Educ. v. Mergens, 496 U.S. 226 (1990) (sustaining Equal Access Act against First Amendment challenge under Establishment Clause). And in several major respects, this case is even easier than Grove City: the funding condition here addresses only the relationship between the funded institution and the provider of the funds (the federal government), not the internal relationship between the educational institution and its members (as in Grove City), and it does so with respect to recruiting for a prospective employment relationship outside the school.

For present purposes, the question is not whether this Court agrees with the government regarding the constitutionality of the Solomon Amendment. Instead, the question is simply whether there is a "fair prospect" that a majority of the Supreme Court will take a view of the constitutional issues that differs from the views of this Court. Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in Chambers). That "fair prospect" is manifestly present in this case.

II. There Is Compelling Cause For Staying the Mandate

If this Court's mandate is not stayed while the Acting Solicitor General seeks review of the Court's decision, the mandate will issue on January 20, 2005. See Fed. R. App. P. 41(b). If that happens, the case will be remanded to the district court for entry of a preliminary injunction

consistent with this Court's decision. Although the scope and terms of the preliminary injunction have yet to be addressed by the district court, the government expects the plaintiffs to ask for an injunction that prohibits the Department of Defense from enforcing the Solomon Amendment with respect to any law school that is a member, or whose faculty or students are members, of the organizational plaintiffs in this case. The government does not concede that an injunction of that scope would be in order, but if such an injunction nevertheless were issued, it appears that it would extend to the great majority of law schools in the United States.¹

As already noted above, the government suffers irreparable injury whenever it is enjoined from carrying out duly enacted laws. In this case, however, the interests at stake are not confined to the general (and compelling) public interest in the enforcement of federal laws. Instead, an injunction would have concrete and serious adverse consequences for military preparedness.

The impact of a preliminary injunction on military preparedness is addressed in the declarations that accompany this motion. The declarants are the Under Secretary of Defense for Personnel and Readiness, Dr. David S.C. Chu; the Judge Advocate General of the Army, Major General Thomas J. Romig; the Deputy Judge Advocate General of the Air Force, Major General Jack L. Rives; the Commander of the Navy Recruiting Command, Rear Admiral Jeffrey L. Fowler; and the Commanding General of the Marine Corps Recruiting Command, Brigadier General Walter E. Gaskin. We strongly encourage the Court to review these declarations in detail. The declarations demonstrate the following points:

¹ The plaintiffs have withheld the identities of most of the members of FAIR and SALT. However, the plaintiffs' amended complaint alleges that SALT includes faculty members from 159 law schools. JA 503. The American Association of Law Schools has 166 member schools, along with 22 non-member "fee paid" schools. See <<http://www.aals.org/members.html>>.

A. The members of the JAG Corps are vital to the performance of the Department of Defense's military mission. Although the Solomon Amendment applies to all categories of military recruiting on college and university campuses generally, this litigation focuses specifically on the recruiting of lawyers to serve in the JAG Corps. The public might not perceive military lawyers as playing a role in the front-line military mission of the armed services. As the declarations explain, the reality is dramatically different.

One of the most important tasks of judge advocates is to provide support for commanders and troops who are actively engaged in combat activities. See Chu Dec. ¶ 9; Romig Dec. ¶¶ 5-8; Rives Dec. ¶¶ 3, 6, 7; Fowler Dec. ¶ 1; Gaskin Dec. ¶ 1. In the words of the Army's Judge Advocate General, "[j]udge advocates go wherever the Army goes * * * ." Romig Dec. ¶ 5. During combat operations in Iraq and Afghanistan, judge advocates have been called on by Army commanders for direct assistance regarding "the use of force, rules of engagement, capitulation, parole and local cease fire agreements, civilians on the battlefield, war crimes investigations, negotiations with armed groups, the wearing of nonstandard uniforms, and child soldiers on the battlefield." Romig Dec. ¶ 7. Judge advocates in those theaters are also engaged in judicial reconstruction, anti-corruption and de-Baathification efforts, special prosecutions, and counter-smuggling operations, among other activities. Ibid. Air Force, Navy, and Marine Corps judge advocates are likewise deployed to provide "mission-ready support to fighters both at home stations and in an expeditionary capacity." Rives Dec. ¶ 7 (JAGs deployed in sixteen locations in southwest and central Asia in direct support of 14,000 airmen); Fowler Dec. ¶ 1 (JAGs are serving in Iraq and Afghanistan and are attached to SEAL teams, Amphibious Ready Groups, and Expeditionary Strike Groups, inter alia); Gaskin Dec.

¶ 2 Thus, as Under Secretary Chu explains, "recruiting the most talented lawyers that we can attract is not simply a luxury – it is a necessity for our military mission." Chu Dec. ¶ 9.

B. The JAG Corps need to attract hundreds of highly qualified new attorneys every year. The mission of the JAG Corps requires the work of thousands of talented attorneys. Romig Dec. ¶¶ 4, 9; Rives Dec. ¶ 3; Fowler Dec. ¶ 1; Gaskin Dec. ¶ 1. Like any large law firm or other large legal employer, the JAG Corps must recruit a large number of new attorneys each year to make up for attrition and to deal with expanding demands for legal services. During a typical year, the Army accesses 150 active-duty judge advocates and 120 reserve judge advocates. Romig Dec. ¶ 9. The Air Force JAG Corps needs approximately 120 new judge advocates each year, while the Navy and Marine Corps JAG Corps together make 100 more new annual accessions. Rives Dec. ¶ 8; Fowler Dec. ¶ 2; Gaskin Dec. ¶ 2. The already-high annual demand for new judge advocates is now increasing significantly, because the Army JAG Corps needs to increase its total number of judge advocates by almost 200 attorneys by 2007 to meet the increased requirements for judge advocates in combat units. Romig Dec. ¶ 9.

C. Campus recruiting is vital to the ability of the JAG Corps to attract new attorneys. The JAG Corps rely heavily on access to law school campuses, including the cooperation of law school career services offices, to reach potentially interested law students. Romig Dec. ¶¶ 14-17; Rives Dec. ¶¶ 13-19; Fowler Dec. ¶ 4; Gaskin Dec. ¶ 4. For example, the Deputy Judge Advocate General of the Air Force describes the on-campus interview program as "the centerpiece of AF JAG Corps recruiting." Rives Dec. ¶ 13. The goal of the Air Force JAG Corps is to conduct informational interviews at every ABA-accredited law school in the United States during both the fall and the spring recruiting seasons. *Id.* ¶ 14. Army JAG recruiters conducted over 800 interviews

last fall, the majority of which were conducted on-campus, and received subsequently approximately 450 applications from interviewees. Romig Dec. ¶ 16.

On-campus interviews play an important role in attracting the interest of law students, including those who may not previously have considered a career in the JAG Corps. Romig Dec. ¶ 14; Rives Dec. ¶ 17; Fowler Dec. ¶ 7. JAG recruiters are able to meet directly with law students, in a setting that is familiar and convenient for the students, to provide them with information and answer their questions about a military career. Fowler Dec. ¶ 5. This form of contact is particularly valuable because JAG recruiters are often young attorneys themselves, who "can relate to the applicant and speak to them sincerely from their recent experiences." *Id.* ¶ 7. The resulting value of campus recruiting is illustrated by the results of anonymous questionnaires completed by newly accessed Air Force judge advocates. Over the period from 2000 through 2004, more than 43 percent of new Air Force judge advocates stated in their questionnaires that their face-to-face on-campus interviews were critical in their decision to apply to the JAG Corps. Rives Dec. ¶ 19.

D. The ability of the JAG Corps to attract highly qualified attorneys will be seriously impaired, particularly in the near term, if JAG recruiters are denied equal access to law school campuses and students. Because campus recruiting plays such a large role in the ability of the JAG Corps to attract talented young attorneys, efforts by law schools to deny military recruiters equal access – the kind of efforts that this litigation was brought to facilitate – will necessarily have a serious impact on JAG recruiting. Chu Dec. ¶ 5; Romig Dec. ¶¶ 18-21; Rives Dec. ¶ 31; Fowler Dec. ¶¶ 5-6. Direct campus access to law students and career services offices are the key to effective JAG Corps recruiting. Denials of access will impede the kind of face-to-face exchanges that are so important to the recruiting process. Rives Dec. ¶ 31. This is true not only in the case of outright

denials of access, but also in cases where military recruiters are denied the same kind of access that is provided to other employers. Romig Dec. ¶ 21. The market of legal employers who are seeking highly qualified young lawyers is an extremely competitive one, and unequal access places the JAG Corps at a competitive disadvantage in reaching and attracting qualified students. Ibid.; Fowler Dec. ¶¶ 5-6.

Even if the pool of JAG applicants remains larger than the number of open positions, a reduction in the size of the applicant pool will inevitably affect the overall caliber of new accessions. Romig Dec. ¶ 19. It is important to realize that the ability of the military services, including the JAG Corps, to perform their mission depends not only on the quantity of their personnel, but also on their quality. Chu Dec. ¶ 4. Accordingly, as Under Secretary Chu explains, "[e]ven if impairments in our ability to conduct military recruiting do not lead to a reduction in the absolute number of accessions, they can produce a damaging reduction in the collective skills and capabilities of the persons whom we recruit – and on whom other service members depend." Ibid.

The declarations also make clear that while alternative recruiting methods may serve as a complement for campus recruiting, they cannot serve as a replacement. Romig Dec. ¶¶ 22-23; Rives Dec. ¶ 32; Fowler Dec. ¶¶ 4, 7. For example, the Air Force JAG Corps already engages in extensive use of other recruiting methods (Rives Dec. ¶¶ 20-30), but experience has shown that "on-campus access provides a form of direct visibility to the AF JAG Corps that off-campus alternatives cannot match." Rives Dec. ¶ 32. Expanding alternative recruiting methods would necessarily require diverting manpower and resources from other, equally pressing military needs. Chu Dec. ¶ 7. Moreover, even if alternative methods of recruiting could make up for the adverse impact of campus recruiting restrictions in the long run, they cannot do so in the near term. Chu Dec. ¶ 8; Rives Dec.

¶ 32. Developing and deploying alternative methods of recruiting takes time, but the recruiting needs of the JAG Corps are immediate. Ibid. Thus, if the mandate issues and a preliminary injunction is entered while the government is pursuing Supreme Court review, the adverse impact of the ensuing campus recruiting restrictions will necessarily take a toll before alternative recruiting options can have any significant ameliorative impact.

Finally, as Under Secretary Chu explains,

Our recruiting needs are particularly critical now, when we are engaged in an ongoing global war against terrorism. At the same time, the heightened demands that are faced by members of the military during wartime make it more challenging to recruit the personnel on whom we must rely for our defense. In short, our need to recruit qualified personnel is increasing while our capacity to do so is facing growing challenges.

Chu Dec. ¶ 3.

This is, in short, a particularly perilous time for a court to dismantle the statutory scheme that Congress has devised to safeguard military recruiting on the Nation's campuses. Whatever injury may be claimed to accrue to law schools from having to continue to provide equal access to military recruiters during the pendency of the Supreme Court process, the compelling public interest in military readiness during time of war weighs decisively in favor of staying the mandate.

CONCLUSION

For the foregoing reasons, the government requests that the Court stay the issuance of the mandate pending the filing and final disposition of a petition for a writ of certiorari. If the mandate issues before the Court has acted on this motion, the government requests that the Court recall the mandate.

Respectfully submitted,

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January 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2005, I filed and served the foregoing APPELLEES' MOTION TO STAY THE MANDATE by causing an original and four copies to be filed with the Office of the Clerk by hand, and by causing copies to be served on the following counsel in the manner specified below:

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