

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC.,
SOCIETY OF AMERICAN LAW
TEACHERS, et al.,

Plaintiffs,

v.

DONALD H. RUMSFELD, in his capacity
as U.S. Secretary of Defense, et al.,

Defendants.

03 Civ. 4433 (JCL)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

To be argued on _____.

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Abbreviations

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Memorandum of Law in Support of Defendants' Motions to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction	Opp.
Declaration of Susan Appleton and Karen Tokarz, signed September 18, 2003	Appleton & Tokarz
Declaration of Erwin Chemerinsky, signed September 19, 2003	Chemerinsky
Declaration of William N. Eskridge, Jr., signed September 18, 2003	Eskridge
Declaration of Heather Gerken, signed September 17, 2003	Gerken
Declaration of Harold K. Greenfield, signed September 18, 2003	Greenfield
Declaration of Paula C. Johnson, signed September 18, 2003	Johnson
Declaration of Sylvia A. Law, signed September 18, 2003	Law
Declaration of Thomas Maligno, signed September 18, 2003	Maligno
Declaration of Richard Matasar, signed September 18, 2003	Matasar
Declaration of Gerald V. May, III, signed September 18, 2003	May
Declaration of Alan Minuskin, signed September 18, 2003	Minuskin
Declaration of Burt Neuborne, signed September 18, 2003	Neuborne
Declaration of James S. Rogers, signed September 18, 2003	Rogers
Declaration of Michael Rooke-Ley, signed September 18, 2003	Rooke-Ley
Declaration of E. Joshua Rosenkranz, signed September 19, 2003	Rosenkranz
Declaration of Louis Michael Seidman, signed September 19, 2003	Seidman
Declaration of Sara Smolik, signed September 18, 2003	Smolik

Document

Abbreviation

Declaration of Robert Sweeney, signed September 18, 2003

Sweeney

Reply Declaration of Harold K. Greenfield, signed September 28, 2003

Greenfield Reply

Reply Declaration of Paula C. Johnson, signed September 29, 2003

Johnson Reply

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INTRODUCTION

Pervading the Government's brief is a refusal to face up to how the military has applied the Solomon Amendment. The Government blames Plaintiffs for not suing ten years ago, *see* Opp. at 1, 36, without acknowledging that the statute itself has gotten harsher over the years, *see* Pl. Br. at 9-10, and, more importantly, that the military dramatically changed its interpretation and enforcement of the statute only recently, *see id.* at 11-15, 35. The Government can insist that some parties lack standing, because the Solomon Amendment does not regulate them, *see* Opp. at 11, only by ignoring how the military's actions have undermined the pedagogical and scholarly environment, *see* Pl. Br. at 17-18. The Government insists that the Solomon Amendment requires nothing but access to campus, *see* Opp. at 17, 21, 24, without a hint that the military has demanded that law schools actively disseminate the military's literature and make arrangements for military recruiters, *see* Pl. Br. at 12-15. The Government protests that the language of the statute is clear, *see* Opp. at 33, but never explains why DOD can authorize recruiters to threaten harsh sanctions for conduct that is not at all apparent on the statute's face, and without offering any guidance or consistency as to what will be permitted, *see* Pl. Br. at 12, 15.

Perhaps the Government justifies its flight from the facts because it mistakenly believes that Plaintiffs are presenting only a facial challenge. Opp. at 21 & n.8. To be sure, this case *includes* a facial challenge – Plaintiffs assert that Congress cannot command them even to admit the military to campus *to disseminate its recruiting message* so long as that message is anathema to their mission and undermines their expressive goals – but the main thrust of Plaintiffs' complaint is about the manner in which the military has, only recently, been interpreting the Solomon Amendment.

Should the Government definitively concede (consistent with the statute's plain language) that the Solomon Amendment requires a school to do nothing but allow military

recruiters to walk on campus to disseminate a recruiting message, Plaintiffs would withdraw the *as-applied* facet of their challenge – and limit this litigation to the facial challenge. But if the Government wishes to protect the military’s prerogative to continue its current suppressive practices, then those are the practices the Government must defend.

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE SOLOMON AMENDMENT.

A. FAIR, An Association Of Law Schools, Has Standing To Assert Any Right Its Members Can Assert.

The biggest flaw in the Government’s attack on Plaintiffs’ standing is that the Government has conceded the point. The Government asserts that “any threatened injury from the Solomon Amendment . . . would be to the law schools themselves, rather than to the members of the plaintiff organizations,” Opp. at 11; *see also id.* at 1. The Government has evidently forgotten that, under the doctrine of associational standing, there *are* law schools in this case – represented here as “members of [one of] the plaintiff organizations.” As the Supreme Court recognized a generation ago, an association, like FAIR, stands in the shoes of its members to assert their rights so long as: (1) its members have standing to sue in their own right; (2) the interests that the organization asserts are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the organization’s individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

FAIR satisfies not only the element that the Government concedes, *see* Greenfield ¶ 9 (“The Solomon Amendment subverts the ability of FAIR’s membership to implement their nondiscrimination policies and impairs their ability to express the values embodied in those policies.”); Greenfield Reply ¶¶ 3-8, but the other two as well. As to germaneness, FAIR’s “mission is to promote academic freedom, support educational institutions in opposing discrimination, and vindicate the rights of institutions of higher education.” Greenfield ¶ 2; *see*

also id. ¶¶ 9-10. And the Third Circuit has held that there is no need for individual members to appear where the relief requested is only injunctive and declaratory. *See Roe v. Operation Rescue*, 919 F.2d 857, 865-66 (3d Cir. 1990); *Hosp. Council v. Pittsburgh*, 949 F.2d 83, 90 (3d Cir. 1991).

The Government seems to think that FAIR's insistence on maintaining membership confidentiality – a practice common among associations whose members bear much less risk of retribution – somehow defeats FAIR's standing to press claims on their behalf. *See Opp.* at 11-13. In fact, associations with secret membership lists frequently litigate law suits on behalf of their members with no standing issues arising from the fact that their membership is secret. *See, e.g., Hastings v. North East Ind. School Dist.*, 615 F.2d 628 (5th Cir. 1980).

The key to associational standing, then, is not whether the association exposes its members, but whether it sufficiently alleges – as FAIR has – facts demonstrating that its members have suffered injury-in-fact. That is what was lacking in the one case the Government cites to try to prove that FAIR cannot sue on behalf of its members if it does not reveal its membership list. *See United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992) (environmental group lacks standing to sue factories for polluting Massachusetts waters, not because its membership list was secret, but because the association neglected to allege even the minimal fact that any member lived near or ever even used the waters in question).

In contrast, in this case, the verified complaint and sworn statements of Professor Greenfield do satisfy standing requirements, even if they do not satisfy the Government's curiosity. Should the Court wish to verify for itself which law schools are effectively in this case, FAIR will make its membership list available to the Court for *in camera* review. What it will not do is reveal the lists to the Government and expose its members to cloaked retribution

that could lose them millions of federal dollars.

B. Law Professors And Law Students Have Standing To Challenge Government Action That Interferes With A Pedagogical Environment Created For Their Benefit.

The Government's challenge to the standing of law professor and law student Plaintiffs is based on a misunderstanding of the injury they allege. These Plaintiffs are not complaining that the Solomon Amendment stops them from speaking. Opp. at 13-14, 24. Nor are they suing because "they find the government's message 'repugnant,'" or because of any "stigmatic or dignitary injury," or "psychological consequence[s]." *Id.* at 14 (citations and internal quotes omitted). Rather, the crux of their complaint is that the Government is interfering with a learning environment that law schools constructed for the benefit of law professors and law students. *See Johnson Reply* ¶¶ 7-11. *Compare Alliance of Lesbian, Gay, Bisexual, Transgendered and Straight Students v. Cohen*, No. 99-CV-34, slip op. (D. Vt. Nov. 10, 1999) (magistrate finds students lack standing to challenge the Solomon Amendment where the students asserted only that the military stigmatizes them).

Numerous cases teach that not only are these Plaintiffs permitted to seek to remedy the injury to themselves, but that the injury is a distinct infringement of their own First Amendment rights. *See Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (scholars sue to protest the viewpoint-based exclusion of an invited speaker from the country). Especially on point is a Third Circuit opinion holding that "the opportunities of pupils to acquire knowledge, is a first amendment right distinct from the right to impart knowledge." *N.J.-Philadelphia Presbytery of the Bible Presbyterian Church v. N.J. State Bd. of Higher Ed.*, 654 F.2d 868, 878 (3d Cir. 1981) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)). The students there alleged that their First Amendment right "in education to express, transmit and receive ideas" was being infringed by the licensing requirements imposed on institutions of higher education by New Jersey state

law. *Id.* at 871. The Third Circuit held that the students' First Amendment rights as listeners are "distinct rights which may be enforced in a separate action." *Id.* at 878. *See also Bd. of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 867 (1982) ("Constitution protects the right to receive information and ideas.").

The Government is equally wrong when it argues that the harm to students and law professors is not traceable to the Government's conduct despite proof that the only reason law schools suspended their non-discrimination policies was because of government threats. *See Opp.* at 16-17; *see also id.* at 23 (incorrectly asserting that "[t]he unconstitutional conditions doctrine does not apply to non-recipients . . . upon whom no conditions have been imposed"). The Third Circuit rejected exactly this argument in *Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3d Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001). So too did the Supreme Court, when it sustained a challenge to a funding condition imposed on the legal services *employers*, even though not a single legal services employer was in the case, only employees, clients, and donors. *See Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001), *cert. denied*, 532 U.S. 903 (2001).

II. PLAINTIFFS WILL PREVAIL ON THE MERITS BECAUSE THE SOLOMON AMENDMENT VIOLATES THE FIRST AMENDMENT.

A. The Solomon Amendment Affects Law School Expression And Promotes A Government Message.

On the merits, whether focused on the unconstitutional conditions claim, the viewpoint discrimination claim, or the vagueness claim, the Government's central position is that the Solomon Amendment has "nothing to do with speech." *Opp.* at 2; *see id.* ("speech is not at issue in the statute"); *id.* ("it does not target speech"); *id.* at 22 ("the Solomon Amendment . . . is not conditioned on, or related to, speech"); *id.* at 26, 29. This position ignores both the language of the statute and the way in which the military has applied it, especially recently.

If the Solomon Amendment prohibited a school only from discriminating against people

with military commissions, or if it prohibited a school from blocking at the gates anyone dressed in a military uniform, the Government might have a point that the Solomon Amendment merely “conditions the receipt of federal funds on conduct.” *Id.* at 2. But the statute goes further. It punishes a school for blocking access by military recruiters “for purposes of military recruiting.” No matter how often the Government insists that there is no speech in this case, it cannot deny that recruiting is communicative, at least as communicative as soliciting contributions and proselytizing, which the Supreme Court has consistently held to be expressive in nature. *See, e.g., Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992); *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 789 (1988); *Vill. of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, 632 (1980).

More importantly, the Government has not even begun to grapple with the free speech implications of the military’s current stance, requiring a school to disseminate the military’s recruiting literature or to facilitate the recruiting interviews, all against its will. Nor does it address a mountain of declarations proving that the non-discrimination policy by which law schools administer their job fairs is communicative in nature, and that forcing a law school to abet the military’s message by admitting the military to a school-sponsored job fair undermines its own message of non-discrimination and interferes with a pedagogical environment that it strives to maintain. *See* Pl. Br. at 16-18. Asserting that “a job fair is not an inherently expressive activity,” *Opp.* at 15-26, does nothing to override this evidence. In fact, the Government’s litigation stance is directly at odds with the position its client, DOD, has taken about the messages it reads into law school non-discrimination policies. Thus, for example, in rejecting Yale’s symbolic gesture to treat the military differently simply by having Yale College personnel make the appointments, the Undersecretary of Defense explained that to “singl[e] out military

recruiters . . . sends the message that employment in the Armed Forces . . . is less honorable or desirable than employment with . . . other organizations.” Eskridge Ex. 18. While DOD misinterpreted the message, it can hardly now claim that these non-discrimination policies are devoid of all communication.

The best the Government can muster is the argument that “[t]he Solomon Amendment does not bar any plaintiff from expressing their disagreement . . . [with] Congress’ [discriminatory] policy.” Opp. at 13. Putting aside for the moment the reality that this is factually untrue – the military actually has threatened to cut off funds from law schools for nothing but criticizing the military, *see* Maligno Ex. 3 – the Government’s position disregards fundamental axioms of First Amendment law. First, the First Amendment encompasses a right not just to express a view, but to express it in the manner of the speaker’s choosing; suppression of a particular message or mode of communication is not justified on the ground that the speaker can communicate in a different way. *Cohen v. California*, 403 U.S. 15, 25 (1971); *see also Kleindienst*, 408 U.S. at 765 (recognizing right of listener to receive message in preferred way). Second, the harm of compelled speech is never justified on the ground that the speaker can simply distance himself from the position. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575-76 (1995); *Pac. Gas and Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (plurality); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 255-58 (1974).

B. The Solomon Amendment Violates The Doctrine Of Unconstitutional Conditions.

There is no question that Congress has broad power, under the Spending Clause, to advance its interests. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). But the Spending Clause does not trump the Bill of Rights. To the contrary, the leading Spending Clause case

emphasizes that its analysis does not apply in situations where strings attached to federal funds clash with First Amendment rights. *Id.* at 207-08. In those circumstances, the controlling body of law is the doctrine of unconstitutional conditions, which strictly limits the government's power to use strings tied to funds either to suppress speech, *see, e.g., Velazquez*, 531 U.S. at 547 (government may not fund lawyers but prohibit them from challenging welfare laws); or to compel speech, *see, e.g., Speiser v. Randall*, 357 U.S. 513 (1958) (a veteran's tax benefit cannot be conditioned on a loyalty oath).

In applying that doctrine, the Supreme Court has declared that especially offensive under the First Amendment are "situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original).

Thus, when the Supreme Court upholds strings attached to federal funds, it consistently takes care to emphasize that the strings are attached only to the specific program funded. Thus, for example, the Supreme Court upheld a rule prohibiting doctors in a federally funded family planning clinic from counseling about abortions, but went out of its way to point out that the restriction was limited to the activities of the specific program funded and not to activities in the rest of the hospital. *Rust*, 500 U.S. at 196-98. Similarly, the Supreme Court upheld a rule that libraries must block pornography from their computers when they benefit from a government program to pay for library computers, but the rule did not in any way affect what books or programs the library maintained outside the program. *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2307-08 (2003). And the Court sustained a federal subsidy for 501(c)(3) corporations, so long as they do not engage in lobbying, but went out of its way to point out how easy it is for

the same group to set up a sister corporation, a 501(c)(4), to engage in lobbying. *Regan v. Taxation with Representation*, 461 U.S. 540, 544-45 (1983).

Under these cases, if Congress wanted to authorize a stream of funds directed at enhancing the capacity of law schools to help the military recruit students, it could, of course, insist that the funds flow only to those schools that are prepared to allow the military to recruit its students. But the First Amendment does not permit the Government to threaten to cut off every grant to a school – much less to the entire university – because the school refuses to support the Government’s message or to submit to Government pressure not to communicate its own message in a particular way. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (condition on federal funding violated unconstitutional conditions doctrine because the condition effectively covered the speaker and not just the program); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (public employee may not be forced to relinquish First Amendment rights as condition of public employment). Put another way, the Supreme Court precedent does not allow the Government to define the *entire institution* as the “federally assisted program,” *Opp.* at 27, as the Government has tried to do. *See also Opp.* at 23, 24.

Equally incorrect is the Government’s assertion that the Solomon Amendment “is no different than numerous other provisions of federal law that prohibit [federal monies] to institutions or organizations that discriminate on the basis of race.” *Opp.* at 24-25 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)). Those cases are entirely different for many reasons, the most important of which is that the Supreme Court has concluded, based upon extensive prior precedent, that any First Amendment interests of an academic institution in invidious discrimination is outweighed by the government’s compelling interest in resisting support for racial discrimination. *See, e.g., Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984).

In contrast, the Government has not even tried to prove, as it must, that Congress was justified in concluding that the need to recruit on campus is so compelling as to override an institution's expressive interest in excluding the recruiting messages of discriminatory employers. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (the Government must prove that Congress's finding of a compelling interest was justified). Nor has the Government so much as suggested that it can prove that the military's interest in co-opting law school personnel and resources to advance its recruiting message – an interest that finds no support in the statutory language or even in DOD's regulations – is so compelling as to outweigh the law school's right to resist propagating a message it finds offensive.

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM TO THEIR FIRST AMENDMENT RIGHTS HERE AND NOW, EVEN THOUGH THEY DID NOT SUE EARLIER WHEN THE HARM WAS LESS SEVERE AND THE THREAT OF PUNISHMENT LESS REAL.

The Government does not dispute that every day of a First Amendment violation is a fresh and irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). And the Government appears to agree that in a First Amendment case, “the irreparable injury issue and likelihood of success issue overlap almost entirely.” *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999); *see also* Opp. at 35-36 (citing *Beal*).

Instead, the Government's argument over irreparable injury focuses entirely on the assertion that Plaintiffs did not sue until “nearly ten years after enactment of the Solomon Amendment.” Opp. at 3. However, only by ignoring the history of the Solomon Amendment can the Government assert that the delay proves the absence of harm. Early versions of the Solomon Amendment did not have nearly the same penalties associated with them, applying at first only to DOD funds and only to funds earmarked for the subdivision that violated the

Solomon Amendment.

More importantly, it was not until December of 2001, that the military for the first time even signaled that it *might be* interpreting the Solomon Amendment – in violation of both the statutory language and its own regulations – to require absolute parity with any employer. *See* Pl. Br. at 11-17; Chemerinsky ¶ 23 & Ex. 6; *see also* Minuskin ¶ 32. But that spate of letters was only a hint. It took schools a good 18 months of cajoling and negotiating to confirm (a) that the military appeared to be taking the position that absolute parity was required (though even that remains unclear); and (b) that the military would not bend to persuasive arguments that it was misreading the statute and its own regulations. The “delay” of a few months to bring suit after these efforts finally failed does not defeat irreparable harm. *See Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1417-18 (D. Haw. 1997) (finding delay of nine months in bringing action to vindicate First Amendment rights did not undermine plaintiffs’ claim of urgency and irreparable harm).

Plaintiffs could have taken the extraordinary step of suing the Government at the first hint. But to deny them relief now for an irreparable First Amendment violation would be to punish them for not having bothered the courts with a controversy while they were still trying to work out a suitable solution. That would be especially unfair, since the Government has not even suggested that the compressed timeline disadvantages them in a litigation that – by gratuitously filing a motion to dismiss within a week – the Government confirms is purely legal in nature.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction prohibiting enforcement of the Solomon Amendment pending the outcome of a trial on the merits.

Dated: September 29, 2003

Respectfully submitted,



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