

No. 03-4433

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, et al.,

Appellants,

vs.

SECRETARY OF DEFENSE, et al.,

Appellees.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF OF LAW SCHOOL CAREER SERVICES PROFESSIONALS
AS AMICI CURIAE SUPPORTING APPELLANTS AND SUPPORTING
REVERSAL, SUBMITTED WITH CONSENT OF ALL PARTIES

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Amici Karen Comstock, Thomas Maligno, Margaret E. Reuter, Gicine Brignola, Janet Mosseri and Lisa M. Dickinson respectfully submit this brief supporting Appellants, FAIR and others, and supporting reversal.

Interest of Amici

Amici are law school career services professionals, who bring to this Court years of experience and insight into the process by which employers recruit students. Karen Comstock is a law school career services professional in Ithaca, New York. Thomas Maligno is the Director of Career Development at Touro College's Jacob D. Fuchsberg Law Center. Margaret E. Reuter is Assistant Dean for Career Planning at New York Law School. Gicine Brignola is Assistant Dean for Career Services at a U.S. law school. Janet Mosseri is Director of Career Development at Nova Southeastern University Shepard Broad Law Center. Lisa M. Dickinson is Director of Career Services at University of San Francisco School of Law. (Each appears on his or her own behalf, not necessarily representing the views of an institution.) Amici have an interest in ensuring that this Court is fully informed as to what their jobs, and the jobs of their counterparts at other schools, entail; and they have an interest in retaining the freedom to perform those jobs in accordance with the values that are central to the schools they serve.

This brief is submitted with the consent of all parties' counsel.

Summary of the Argument

To avoid duplication of other briefs, Amici address the following points:

(1) The work of law school career services offices consists of speech: speaking, and facilitating speech communication between employers and students. In particular, on-campus recruitment by prospective employers is richly expressive communication with students, by which employers explain and advocate their vision of the nature and purpose of the legal employment that they offer. Moreover, law school staff are integrally involved in this communication; they disseminate, arrange for, facilitate, and provide a forum within the school's bosom for, expressive speech by employers. The District Court erred in describing recruiting as only "incidentally" involving expression.

(2) Once one recognizes that law school recruiting is expressive speech and not mere "conduct", the impairment of constitutional rights by the Solomon Amendment and by the government's interpretation of it becomes clear. This case falls squarely within the line of precedent protecting against "compelled speech"; compelled speech infringes constitutional rights even if the speech has an economic aspect (as the District Court concluded that recruiting does) and even if the objector could take steps to reduce the appearance that it endorses the speech. Moreover, the right of an expressive association, such as a law school, to express

its own message and values is significantly impaired by requiring the association to assist communication by a speaker that rejects its values.

Argument

1. Recruiting is speech; law school career services offices actively facilitate, and provide a forum for, that speech.

The District Court's reasoning, in denying the motion for preliminary injunction, depended in large part on the court's conclusion that recruiting should be viewed more as "conduct" than as "speech." The Court viewed the governmental mandate here as being merely "the forced inclusion on their campuses of an unwanted periodic visitor," i.e., military recruiters. (Opinion at 56). The government's position, it must be noted, is that much more is required of law schools than merely permitting the "visitor" to enter: that law schools are required to provide services to the military on the same basis as to other prospective employers. Even leaving that aside, the "visitor" comes not to admire the foliage, or to hear lectures: the visitor comes to *recruit*. So, it becomes necessary to determine whether recruiting, and the school-provided services to which the military claims entitlement, involve "speech" in the relevant sense.

The District Court's answer was that recruiting is more conduct than speech. At pages 61-66 of its opinion, the District Court minimized the expressive content

of recruiting, and minimized the expressive content of a law school's capitulation to the government's demands. At page 68 the court held, "the statute targets conduct, not speech," because "there is little that is inherently expressive about ... providing assistance to recruiters." While recognizing that there is an expressive element in schools' resistance of military access to their recruiting programs (*id.* at 69), the Court deemed this as merely "incidental" to the statute's putative focus on conduct. (*Id.* at 69-70). The District Court stated its view plainly at 78: "Any expressive component to recruiting is incidental" and 64: "if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose."

But Amici, who know the recruiting process intimately, submit that the at-school aspects of recruiting are nearly 100% expression and speech. Moreover, law schools actively facilitate, and provide a forum for, the speech of recruiters who participate in the schools' career services programs. While employers' off-campus recruiting efforts may contain a large element of conduct that is not speech – for instance, employers' demonstrations of their working conditions, their perks and their collegiality during "call-back" interviews or "summer associate" programs – the on-campus aspects of recruiting are carried out almost entirely through verbal communication, facilitated and assisted by law school staff.

Among the on-campus aspects of recruiting that consist of verbal

communication from employers are: the posting or other distribution of written communications (announcing the employer's desire for applicants, or inviting students to social events); the maintenance, for students' perusal, of large volumes of written materials (on paper or computer) in which employers describe themselves and the jobs they offer; the hosting of job-fairs, roundtables, and the like, all of which events are the occasion for verbal communication between employers and students; and interviews, which of course consist of nothing other than verbal communication or "speech." In all of these aspects of "speech" by recruiters, the staff of law schools' career services offices are integrally and actively involved in either disseminating the employers' speech, or creating the opportunity and forum for the speech to occur; the staff post or distribute written materials, compile volumes of employers' self-descriptions, arrange for events, and help to schedule one-on-one interviews. All of these activities are, quite literally, speech.

The "speech" of recruiters, which law school staff work so hard to facilitate and disseminate, varies substantially in content from employer to employer. Each recruiter is encouraged to speak in its own unique voice about the unique aspects of the employment that it offers. Thus, for instance, the National Association for Law Placement – the umbrella group for law school career services professionals and those who interact with them – provides forms as a service to employers, with

the explicit purpose of “aid[ing] communication among job seekers, employers, and law schools.”¹ Employers are encouraged to fill out an “NALP form” that (as the NALP puts it) “offers employers a thorough yet succinct way *to tell their story* to candidates.”² Those forms expressly instruct recruiters to use the “Narrative” section of the form to “discuss special characteristics of your” firm, company, government entity or public interest organization,³ again instructing the recruiter to “Tell your story to students ...”⁴

As this reflects, recruiting entails creative and substantive communication – speech, expression – that is unique to each recruiting employer. Moreover, prospective employer’s verbal communications with students tell much about the beliefs and values of the employers. Therefore, even if one defined “speech” for this purpose as including only those communications that touch upon matters of social or public concern, the expression that takes place in recruiting would meet

¹ <<http://www.nalp.org/forms>> (Note: this and all other web pages cited herein were last viewed between January 1 and January 7, 2004).

² *Id.* (emphasis supplied).

³ <<http://www.nalp.org/forms/firmdir.pdf>> (for law firms); <<http://www.nalp.org/forms/corpdire.pdf>> (corporate legal departments); <<http://www.nalp.org/forms/govtdire.pdf>> (governmental entities); <<http://www.nalp.org/forms/pubdire.pdf>> (public interest groups) (all PDF files).

⁴ *Id.*

that test. Examples, drawn from various recruiters' "narratives" on the NALP form, include:

- * Some recruiters, particularly public interest organizations, dramatically explain their advocacy on issues of public concern.⁵
- * Some law firms, while emphasizing service to clients, also richly express their commitment to pro bono work and particular values.⁶
- * Other firms' self-descriptions are notable for what seems (in comparison to other recruiters' touting of other aspects of worklife or philosophy) to be an unadorned and straightforward focus on the pursuit of the goals of their clients in the world of business and finance. This, too, speaks volumes.⁷

In all of these aspects of recruiters' expression, and more, recruiters are speaking

⁵ *E.g.*, narrative statement of ACLU Reproductive Freedom Project, <<http://www.nalpdirectory.com/employerdetails.asp?fscid=P0718&id=1&yr=2003>>.

⁶ *E.g.*, narrative statement of Denver office of Arnold & Porter: "The firm has a long tradition of pro bono service, which extends back to the firm's defense of leading academics and government workers during the McCarthy era. We encourage all attorneys to devote up to fifteen percent of their time to pro bono matters." <<http://www.nalpdirectory.com/employerdetails.asp?fscid=F3761&id=1&yr=2003>>.

⁷ *E.g.*, narrative statement of New York office of Coudert Brothers, LLP, <<http://www.nalpdirectory.com/employerdetails.asp?fscid=F1320&id=1&yr=2003>>.

to matters that are of important public concern as well as being important to law students considering employment: employers are offering their vision of the part they think their lawyers should play in the economic and political life of the nation and in our system of justice. It takes no imagination to understand that military recruiters would likewise richly express the values that military lawyers are expected to further, and the reasons why they believe these values are important to the life of the nation. This, too, is speech and expression in the fullest sense of those words.

As noted above, the recruitment process requires the work of law school career services staff in order to be effective. That is, of course, a large part of the reason why law schools incur the expense of *having* career services offices: without the assistance of law school staff in disseminating, providing a forum for, and arranging for this very expressive behavior by recruiters, the opportunities for effective communication between recruiters and students would be far fewer and far more difficult.

Law school staff facilitate, and provide the forum for, expressive speech by recruiters in a variety of ways. The Office of Career Counseling and Placement of NYU School of Law, for instance, tells employers, "If you ... wish to enhance your on-campus recruiting strategy, we encourage you to get in touch with us. ... We are always pleased to speak with you about 'Effective Recruiting' practices at NYU

School of Law and how you can maximize your efforts on campus.”⁸ Among the services that NYU offers to employers are scheduling thousands of on-campus interviews per year;⁹ coordinating employer-sponsored social receptions;¹⁰ hosting or participating in large-scale job fairs for recruiting by public interest employers or employers seeking students of color;¹¹ creating a network of alumni in public interest fields to enable communication between alumni and interested students;¹² posting notices of available positions,¹³ and more.

Likewise, Harvard Law School tells employers: “[W]e are aware of your needs and are *ready to assist you* with your recruitment efforts at Harvard. ... We are always happy to sit down with you and discuss ways in which you can *get your message out* to students in an effective manner.”¹⁴ Among the ways that Harvard helps a recruiter “get [its] message out” to students are coordinating interviews,

⁸ <<http://www.law.nyu.edu/depts/careerservices/employer/index.html>>.

⁹ <<http://www.law.nyu.edu/depts/careerservices/recruiting/index.html>>.

¹⁰ <<http://www.law.nyu.edu/depts/careerservices/contacts.html>>.

¹¹ <<http://www.law.nyu.edu/depts/careerservices/recruiting/consortium.html>>

¹² <<http://www.law.nyu.edu/depts/publicinterest/career/network/index.html>>.

¹³ <<http://www.law.nyu.edu/depts/careerservices/employer/index.html>>.

¹⁴ <http://www.law.harvard.edu/ocs/employers/What_We_Do_Recruiting.htm> (emphasis supplied).

counseling employers on effective recruiting, and posting job opportunities for perusal by students and alumni;¹⁵ assisting employers in arranging to have student mailboxes stuffed with an employer's written recruiting materials;¹⁶ coordinating the scheduling of employers' social receptions for students, printing employers' announcements in its newsletter;¹⁷ and more.

In addition, these and other law schools take still more actions to facilitate, disseminate, and provide a forum for recruiters' unique expression. Some schools provide teleconferencing or videoconferencing services to facilitate long-distance interviewing;¹⁸ this literally offers a platform for the recruiter's speech at some expense to the school. Some schools use a sort of editorial judgment in providing certain facilities for recruiters' speech, by creating programs or opportunities designed for specific categories of employers – not only the public interest employers that have already been mentioned, but also categories defined by

¹⁵ *Id.*

¹⁶ <http://www.law.harvard.edu/ocs/employers/Frequently_Asked_Questions.htm>.

¹⁷ <http://www.law.harvard.edu/ocs/employers/Contacting_HLS_Students.htm>.

¹⁸ *E.g.*, <<http://www.utexas.edu/law/depts/career/employers.html#video>>.

location¹⁹ and/or firm size,²⁰ and practice area.²¹

Even having said all of the above, we emphasize that it is only a portion of the ways in which law school career services officers engage in expressive speech and facilitate the expressive speech of recruiting employers. For a taste of yet another aspect of this expression-intensive activity, one should peruse the series of “Specialty Guides” prepared by Harvard Law School’s Office of Public Interest Advising, offering interested law students information about a variety of types of cause-advocacy employment. These guides – including a range of perspectives such as the “Guide to Conservative/Libertarian Public Interest Law”²² – transmit the richly expressive views of alumni working for organizations in these fields, and

¹⁹ *E.g.*, University of Texas’s “Texas Small and Mid-Size Firm Directory,” *see* <<http://www.utexas.edu/law/depts/career/employers.html#smsf>>, compiling firms’ self-descriptions on topics such as “What sets you apart? What does everyone cheer about?” <http://www.utexas.edu/law/depts/career/forms/smsf_directory.html>

²⁰ *E.g.*, Lewis & Clark University’s “Small Firm Career Fair,” offering small firms an event at which they can tell students “what makes your firm unique.” <<http://www.lclark.edu/dept/lscs/employersmall.html>>; George Washington University’s “small firm interviewing” offer, <<http://www.law.gwu.edu/cdo/employer.asp#small>>

²¹ *E.g.*, Loyola University Chicago’s “Patent Law Interview Program,” <<http://www.luc.edu/law/career/index.shtml>>.

²² <<http://www.law.harvard.edu/students/opia/docs/guide-conservative.pdf>> (pdf file).

offer information for contacting relevant organizations in order to communicate with them about their causes and employment opportunities.

Even when a law school seeks to minimize its involvement in facilitating military recruitment, still on-campus military recruiting places demands on the school's career services resources. Think, for instance, of a school that allows military recruiters to host an information session on campus. This will entail, at the very least, the provision of physical space and utilities, and the involvement of staff to arrange for, and oversee, the military's use of the facilities. And, if the government's interpretation of the Solomon Amendment is correct – though we believe it is not – law schools are required (on pain of a devastating loss of funding) to do much more than that; they are required to engage in active efforts to assist military recruiters in getting their message to students. As Appellants have shown, however, it is quite unclear just *how much* active assistance is required of schools, under the government's view.

All of the above, we submit, demonstrates that recruiting *is* speech of a very expressive sort, and that law school career services offices are active in facilitating, disseminating, and providing a forum for the expressive speech of recruiters who have access to the schools' career services programs. Amici apologize if this has seemed a long-winded way of stating the obvious, but were concerned that without

this explanation this Court might adopt the District Court’s puzzling conclusion that the Solomon Amendment targets conduct rather than speech, and that recruiting is, at best, only “incidentally” expressive. We ask the Court to recognize that the Solomon Amendment, and the government’s current interpretation of it, seek to harness the resources of law schools to facilitate and disseminate the expressive speech of military recruiters.

2. The District Court’s failure to appreciate that recruiting is expressive speech, and that such speech is actively facilitated by law school staff, led the District Court to underestimate the strength of Appellants’ claims.

The District Court’s failure to appreciate the expressive nature of recruiting, and the ways in which law schools facilitate that expression, led the District Court to underestimate the strength of Appellants’ constitutional claims.

Perhaps the best way to begin analysis of the legal issues is to propose a hypothetical. Imagine a law – putatively justified by a legislative “finding” that lawyers were overabundant – declaring “No law school shall permit any access to its campus or its facilities by any prospective employer for the purpose of recruiting students for employment,” or “While law schools may allow recruiters physical access to their campuses, no law school may do anything to facilitate the recruiting process.”

We take it as bedrock that those laws would raise serious First Amendment

concerns: they expressly forbid an activity that is (at least, almost entirely) speech, and expressly forbid the voluntary association between schools and prospective employers. Even if one called recruiting “commercial speech” – though one should not, given the ideological undertones (and explicit ideological content) in many recruiters’ ways of “telling their story” – it is still speech and therefore entitled to significant constitutional protection. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (discussing constitutional protection of commercial speech, and striking down federal statute that prohibited advertising of compounded drugs). We find it hard to imagine that a court would uphold those laws. Some sorts of speech and association can certainly be forbidden (“You want to get together to traffic in heroin?”) but only on a showing of some real level of necessity.

Once one realizes that *prohibiting* law schools from permitting recruiters on campus would call for searching constitutional scrutiny, it follows that the *requirement* of the same thing raises serious constitutional concerns as well. *U.S. v. United Foods*, 533 U.S. 405, 410 (2001) (reaffirming that the *requirement* of speech raises First Amendment concerns, just as the *prohibition* of speech does).²³

²³ Amici recognize that this case does not involve a literal *requirement*, but instead the threat of devastating loss of funding to a school that declines to do what the government asks. This brief does not focus on the “unconstitutional

(continued...)

The District Court agreed that compelling speech raises constitutional concerns just as prohibiting speech does (Opinion at 56); we therefore take this principle as undisputed.

With this background, let us turn to the specifics of the “compelled speech” doctrine and to the District Court’s rationale in rejecting that aspect of the case. To put it most simply, the District Court erred not only in failing to recognize the expressive nature of recruiting, but also in treating “compelled speech” merely as a way of making out one element of an “expressive association” claim. (Opinion at 59-67). In applying “expressive association” doctrine to “compelled speech”, the District Court applied the wrong legal standard.

In this, we believe it useful to focus on *U.S. v. United Foods*, 533 U.S. 405 (2001). There the Court struck down, under the First Amendment, a federal statute “mandat[ing] assessments on handlers of fresh mushrooms to fund advertising for

²³(...continued)

conditions” aspect of this case; we leave to Appellants the discussion of the possible legal ramifications of the distinction between this case and a literal requirement. (See Appellants’ Opening Brief, pp. 34-38). We also leave to Appellants the discussion of the governmental-interest side of the constitutional analysis (see Appellants’ Brief, pp. 38-41); we do note, however, our agreement with Appellants that the Solomon Amendment, and the government’s current interpretation of it, have been designed more as a message than as a reasoned policy response to an actual public need.

the product.” *Id.* at 408. The assessed funds were to be used for “generic advertising to promote mushroom sales.” *Id.* (Imagine “Got Mushrooms?”). United Foods was a handler that objected to having to support that sort of generic campaign; United Foods prevailed, based on the principle that one cannot ordinarily be compelled to support speech to which he objects. *Id.* at 410, 413. We focus on *United Foods* because it refutes nearly every point that the District Court made in rejecting the “compelled speech” claim. (Opinion, pp. 59-66).

Take, first, the District Court’s indication that the Solomon Amendment does not require law schools to “speak, in the linguistic or verbal sense, on behalf of the military recruiters ...” (Opinion at 59). The District Court’s premise is, unfortunately, not rock-solid; we fear that, under the government’s position that the Solomon Amendment requires schools to do everything for military recruiters that they do for any other recruiter, some actual speech on behalf of the military might be required. But even if the District Court’s premise is accepted, *United Foods* demonstrates that the premise is irrelevant; for in *United Foods*, it was clear that “the program does not compel an objecting party ... itself to express views it disfavors,” but instead unlawfully compelled it to provide support for the expression of such views by others. *United Foods*, 533 U.S. at 411. The same is true here: even if law school staff said nothing on behalf of military recruiters, still a

school would (in order to avoid devastating economic loss) have to support the military's speech through the provision of its facilities (physical space, computer space, etc.) and the paid work of its staff (posting notices, distributing information electronically and/or physically, arranging interview schedules, and the like). This support is just as material as a direct monetary assessment.

The District Court next, in distinguishing this case from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), made several assertions: that military recruiters do not come “with the primary purpose of expressing the message that disapproval of openly gay conduct within the armed forces is morally correct or justifiable,” (Opinion at 60); that they do not seek to “expressly convey messages through the medium of an inherently expressive activity” (at 61); that any expressive content of recruiting is “ancillary to the practical and overriding purpose of recruiting – the hiring of future employees” (at 62); that “[r]ecruiting has an economic or functional motive; the advocacy of causes ... is virtually absent” (at 63); and that law schools can “effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters” (at 63-64).

Again, we disagree with some of the District Court's premises; as discussed above, recruiting is a highly *expressive* activity, and is often imbued in subtle and

unsubtle ways with the advocacy of causes. But even if one accepted the premises – that recruiting is just a humdrum proposal of an economic transaction, and that law schools can distance themselves from the military’s beliefs – still *United Foods* shows that this is no answer to the constitutional claim. What verbal behavior could possibly be more humdrum and more purely economic than “Buy more mushrooms”? And that message was no more directly and avowedly in conflict with the objector’s beliefs, than the message of a military recruiter who (as the District Court stated) may not come for the specific purpose of disagreeing with the law school on matters of gay rights. After all, the mushroom ads were not going to explicitly disagree with, nor were they motivated by the purpose of disagreeing with, United Foods’ belief that its mushrooms were the best of all. And nothing was stopping United Foods from running its own ads saying “We disavow any possible implication that all mushrooms are fungible!” All of the points that the District Court made in distinguishing *Hurley*, in other words, were equally true in *United Foods*; and they did not save the law compelling United Foods to support speech that it preferred not to support.

The remainder of the District Court’s reasoning in rejecting the “compelled speech” claim (Opinion, pp. 64-66) also cannot withstand scrutiny under *United Foods*. The District Court opined that the threshold question was whether

“permitting or assisting a recruiting activity ... is expressive.” (*Id.* at 64). The Court focused on the school’s activities rather than the recruiters’, asking whether the *school’s* activities were expressive. (*Id.* at 65). The Court held that law schools’ activities in this regard were “insufficiently imbued with elements of communication to require the protection of the First Amendment” (*id.*). But *United Foods* demonstrates that the District Court asked the wrong question. The question, for a “compelled speech” analysis, is not whether the objector is being forced to *do something expressive*. *United Foods* was not being required to express a thing in its own voice; it was only being required to give economic support to expression by others that it preferred not to support. All that *United Foods* was being required to do was to write a check, which it could have done under cover of darkness to ensure that there was no hint of any expressiveness whatsoever. Nonetheless, *United Foods* prevailed, because the question is not whether the objector is being required to express something, but rather whether the objector is being required to support expression by others that it prefers not to support.

United Foods, finally, refutes the District Court’s last point in rejecting Appellants’ “compelled speech” claim. The District Court asserted that allowing and assisting military recruiters does not amount to endorsement of their views,

particularly in light of a school's ability to disclaim any such endorsement. (*Id.* at 65). This is the way that the District Court distinguished compelled-speech cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977): by asserting that, unlike the compelled acts at issue in those cases, the things required of law schools here “are not obvious endorsements of a particular ideological point of view.”

Again, *United Foods* demonstrates that the District Court asked the wrong question. It is not whether the objector is being compelled to “endorse” a view, and especially not whether such endorsement is “obvious” or incapable of being disclaimed. *See United Foods*, 533 U.S. at 411 (noting, without disagreement, government’s assertion that the program “imposes no restraint on the freedom of an objecting party to communicate its own message” and “does not compel the objecting party ... itself to express views it disfavors”). While loyalty oaths and other explicit demonstrations of doctrinal agreement are one prohibited kind of “compelled speech,” they are not the only kind.

The question instead, as demonstrated by *United Foods*, is whether the objector is being forced to support a message that he would prefer not to support – and “support” here is defined not in terms of overt expressions of agreement or “endorsement” (for no such thing was required in *United Foods*) but in terms of providing some of the wherewithal for the dissemination of the other’s message.

The thing being unconstitutionally required of United Foods was merely the payment of money. Similarly, the thing being unconstitutionally required in *Pacific Gas & Electric v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) was not an endorsement of others' messages (nothing of the sort was required) but merely the provision of the means for their dissemination. Similarly, under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a public employee seeking to avoid certain union assessments does not have to show that he is being compelled to *endorse* the union's views (he's not); he only must say that he prefers not to provide money to aid the union's expression.

Once one asks the correct question under *United Foods* – i.e., does this case involve an impairment of law schools' right not to provide the means for the dissemination of speech that they would prefer not to support – the answer is apparent. This case does involve a substantial impairment of that right. It is, if anything, substantially greater than the impairment at in *United Foods*, because (as explained above) (a) the involvement that is putatively required of schools is much greater than merely writing a check, and (b) the speech involved in recruiting is not the mere commercial speech of mushroom-selling but is often imbued with political, economic and ideological content that is closer to the core of the First Amendment.

Let us turn, next, away from the “compelled speech” issue and towards the

issue of “expressive association” and “message dilution” as embodied in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The District Court recognized that law schools are exercising the right of “expressive association” in the same sense as the Boy Scouts. (Opinion, pp. 54-56). This recognition was clearly correct. In constituting themselves as communities dedicated to (among other things) the value of non-discrimination, law schools are exercising the right at issue in *Dale* and similar cases. And, it bears noting, conflict over military recruiting is not the first instance in which law schools have barred certain employers who violated the schools’ anti-discrimination principles.²⁴ This confirms both that law schools are expressive associations, and that their career services programs are one of the venues in which they express their values.

The District Court concluded, however, that the Solomon Amendment does not intrude upon the right of expressive association to the same degree that the Scouts’ right was intruded upon by the requirement that they employ an openly gay assistant scoutmaster. (*Id.*, pp. 57-59). In this, the District Court both misread

²⁴ See, e.g., Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 Am.U.L.Rev. 669, 704 n.144 (1997) (discussing several schools’ barring of Baker & McKenzie from their career services programs, in 1989, based on a firm partner’s racially discriminatory actions in a student interview).

Dale and underestimated the effect of enforced access to a law school's career services programs.

The relevant test under *Dale* is whether the governmental requirement “significantly affects” or (synonymously, it seems) “significantly burdens” the institution’s expression. *Dale*, 530 U.S. at 653 (asking whether “Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”); *id.* at 656 (concluding that “the Boy Scouts is an expressive association and that the forced inclusion of Dale significantly affects its expression”). It is, of course, not necessary to show that the effect on expression here is every bit as great as in *Dale*; nothing in *Dale* suggests that the effect there was at the bottom end of what counts as “significant.” Still, the effect on expression here *is* every bit as “significant” as it was in *Dale*.

In attempting to assess what counts as “significant”, the District Court misread the opinion in *Dale*. The Supreme Court noted in *Dale* that “[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.” 530 U.S. at 655-56. The District Court interpreted this to mean

that the hypothetical heterosexual would have a lesser effect on the Scouts' expression, and so the court said, "At best, the military recruiter is like the heterosexual assistant scoutmaster who disagrees with the Boy Scouts' policy; he or she does little to compromise the free speech and expressive association rights of the law schools." (Opinion at 58).

But the Supreme Court did *not* say that a law requiring the Scouts to hire an assistant scoutmaster who disagreed with scouting dogma would be constitutional. The Court's mention of the hypothetical heterosexual was not in furtherance of any such point. Instead, the Court was responding to Dale's argument that the Scouts allowed such people to serve; the Court said that this was irrelevant, because the presence of the heterosexual would send a message "distinctly different" from the one sent by the presence of *Dale*: not less significant, not more obscure, but merely "distinctly different". *Dale*, 530 U.S. at 656. The Scouts "can choose to send one message but not the other," said the Court. *Id.* The Supreme Court's discussion of the hypothetical heterosexual suggests, if anything, that the Scouts also have a right to refuse to send the "distinctly different" message that his presence would send. In any event, the Court was not holding that the definition of "significant" effect can be calibrated by the difference between Dale and a gay-rights-supporting heterosexual.

How, then, can one define “significant” for this purpose? The best answer is to look at the *ways* in which Dale’s compelled presence might have “affected” the Scouts’ expression. The compelled presence of military recruiters “affects” law schools’ anti-discrimination expression in precisely those same ways.

How would the governmentally-compelled presence of Dale have “affected” the Scouts’ desire not to “promote homosexuality as ... legitimate”? *Dale*, 530 U.S. at 653. It is, said the Court, that his presence would “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Id.* In all of the opinion, that – along with an analogy to *Hurley, supra* – is as close as we get to an explanation of how Dale’s presence would significantly affect the Scouts’ expression.

It was thus irrelevant to the Supreme Court that the Scouts could have vociferously disclaimed any implication that the organization thought Dale’s sexual preference acceptable. The Scouts could have proclaimed, “Don’t infer anything from the fact that we allow Dale to be a scoutmaster; we’re just complying with a legal command, nothing more.” But this was, to the Court, irrelevant or at least insufficient to make the effect on the Scouts’ expression insignificant. By the same token, it is no answer that law schools can proclaim that they allow military

recruiters only because of the Solomon Amendment; this does not, under *Dale*, detract from the significance of the effect on expression.

Moreover, the Scouts could have redoubled their efforts to teach that homosexuality is wrong, but that too did not make the effect on the Scouts' expression insignificant. By the same token, one cannot rely on law schools' ability to redouble their values-teaching efforts, as a reason to conclude that the effect on expression is insignificant. It was also, it seems, irrelevant to the Court that the Scouts could have instructed Dale to keep quiet about his opinions about gay rights while on duty, and that there was no proof that Dale intended to speak about such issues while on duty; nothing in the majority opinion suggests that any of this made any difference. By the same token, then, one cannot rely (as the District Court did) on the assertion that military recruiters do not come to campus for the express purpose of disseminating their views on the propriety of anti-gay discrimination; as in *Dale*, the compelled *presence* of the unwelcome person burdens the expressive association's rights, even if the unwelcome person does not intend to bring up on his own the issue on which he and the association disagree.

There are, then, two ways of understanding *Dale*'s implementation of the "significantly affects" test. One is to take the Court's statement at face value: to actually believe that the compelled presence of Dale as a scoutmaster would "force

the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior” despite possible efforts by the Scouts to explain that this was not its message at all. *Dale*, 530 U.S. at 653. The statement, at face value, means that all amelioration and disclaimers were for naught. From Dale’s presence in the Scouts, one could infer (says the Court) not only that the Scouts believed in obeying state law, and not only that the Scouts believed that employment discrimination against gay people was inappropriate. One could infer that the Scouts believed that gay sex was acceptable.

And if we take that at face value, then by the very same token it must be taken at face value that the presence of an invidiously-discriminating employer at school-sponsored interview season or a job fair, assisted in various ways by law school staff, sends the message that the law school accepts discrimination as a legitimate form of behavior. The recruiter’s presence, under the Supreme Court’s reasoning, does not just send the message that the school believes in obeying the Solomon Amendment. It does not, even beyond that, just send the message that the school might believe that one should be more accepting of the military’s bad behavior than of other employers’, in light of some countervailing virtues of the military. It means – just as surely as the message was to be understood in *Dale* –

that the law school agrees that the military's conduct, i.e., discriminating against gay people, is acceptable.

Is there some reason why one would infer acceptance of gay sex from the compelled presence of Dale, yet not infer acceptance of discrimination from the compelled presence of an invidiously-discriminating recruiter? We cannot imagine any such reason; nor does the Court's opinion offer the seeds for any such reason. Could a court find, as a matter of fact about human psychology, that the presence of one gay assistant scoutmaster among thousands, somewhere in New Jersey, having no contact with the vast majority of scouting's millions of constituents, who would certainly have never even heard of his existence but for the Supreme Court litigation – that this one scoutmaster is more likely to cause misimpressions about the organization's message and principles, than is the presence on a small law school campus of agents of the world's strongest military, whose views and actions regarding sexual orientation are known to everyone on campus? Such a finding would be fanciful at best. (And recall: the existence and possible success of efforts to dispel the misimpression cannot be taken into account in this analysis as reducing the likelihood of the misimpression, because the Supreme Court did not take them into account in *Dale* even though they would have been easy to accomplish there.)

If it is hard to take the Supreme Court's statement at face value, then there is another way of understanding the way in which the compelled presence of Dale "significantly affect[ed]" the Scouts' expression. That is this: that in order to counteract the possible mis-inference that they approved of gay sex, the Scouts would have had to do and say things that they would have otherwise not have needed to say. That is a significant effect on expression: requiring further expression to dispel misimpressions. And that is equally true, of course, as to law schools; many schools have felt the need to go to great lengths to try to dispel the inference that they approve of the military's discrimination. If this is the test for "significantly affects," the test is easily met here.

Amici, as law school career services professionals, are intimately familiar with the substantial additional "expression" or "speech" that law schools have undertaken, in their attempts to combat the possible inference that they approve of the military's discrimination. Such "ameliorative" speech begins with direct announcements, to students and other interested parties, that the school permits military recruiting only because of the Solomon Amendment, and that the school continues to deplore discrimination. Consider the example of Lewis & Clark Law School. The school's "non-discrimination policy," prominently featured in a link

from the home page of the school's Career Services Office,²⁵ explains in strong language that the military is allowed to recruit on campus only in response to the "threat" to withdraw federal financial aid and other funding.²⁶

But this sort of announcement is not all that schools do, to counteract the message that might be sent by their concession to the Solomon Amendment. Beyond this, schools engage in further expressive activities. The Association of American Law Schools – the century-old organization made up of over 150 of the nation's finest law schools²⁷ – has even offered guidance to its member schools as to the sorts of predominantly-expressive activities that can serve to counteract the inference that schools condone the military's discrimination. In compliance with AALS guidelines, member schools engage in such expressive activities as: letters from deans to members of the school community; student forums about the Solomon Amendment; sexual-preference diversity training programs for faculty, staff, and students; and conferences or symposia on gay and lesbian issues.²⁸ The AALS has determined, in fact, that some combination of these or similar activities

²⁵ <<http://law.lclark.edu/dept/lscs/>>

²⁶ <<http://www.lclark.edu/dept/lscs/nondiscrimpolicy.html>>

²⁷ <<http://www.aals.org/about.html>>.

²⁸ <<http://www.aals.org/02-03.html>>.

are *necessary* in order to reasonably counteract the discrimination-condoning message that would otherwise be conveyed by a school's cooperation with military recruiters pursuant to the Solomon Amendment.²⁹ These activities entail the devotion of a significant amount of resources of the law schools, including their career services offices. And even after the creation of these programs, in the experience of Amici, many students are not persuaded that their school truly believes in its professed anti-discrimination principle; career services professionals spend significant one-on-one time discussing these issues with students who are troubled by their school's response. Thus, again, if the reason the Scouts' speech would have been "significantly affect[ed]" by Dale's presence was that the Scouts would have had to engage in further speech to restrengthen their own preferred message, then the same is true here.

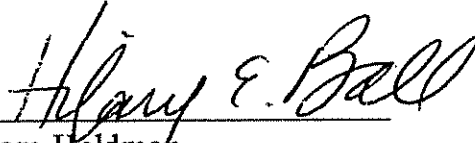
The compelled presence of Dale could have "significantly affect[ed]" the Scouts' expression in another way, too: by showing that there were limits to what the Scouts would do in furtherance of their beliefs. If the Scouts reinstated Dale pursuant to a legal command, rather than defy the law, one could understand that the Scouts' adherence to their belief about homosexuality was not without limit;

²⁹ *Id.*; see also <<http://www.aals.org/97-46.html>>.

and that is something that the Scouts preferred not to express. The same is true here, of course: the Solomon Amendment forces law schools to test, and then to demonstrate, the lengths to which they are willing to go in adherence to their anti-discrimination principles. This affects the expression of those principles, just as surely as in *Dale*.

So, for precisely the same reasons that the Boy Scouts had a strong constitutional interest in excluding Dale, so a law school has a strong constitutional interest in excluding an employer who practices discrimination. Thus in the “expressive association” aspect of the case, as well as in the “compelled speech” aspect, the District Court underestimated the strength of Appellants’ constitutional interests; and this undervaluing of Appellants’ interests led to the District Court’s error in denying the motion for preliminary injunction.

Respectfully submitted,



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Certificate of Bar Admission

Amici certify that one of their counsel, Hilary E. Ball, is a member of the Bar of this Court. She is listed in this Court's records under a former name, Hilary E. Ball-Walker; a change of name and address form has been sent to the Clerk.

Hilary E. Ball

Certificate of Compliance

I certify that the foregoing brief was prepared in Times New Roman 14 point font, and that it contains 6981 words, according to the word-processing application that was used to prepare it. This number of words complies with the limitation on amicus briefs in F.R.A.P. 29(d) that such a brief can be half as long as a party's principal brief, and thus complies with the relevant limitations in F.R.A.P. 32(a)(5) and 32(a)(7)(B).

Hilary E. Ball

Certificate of Service

I certify that two copies of the foregoing have been served by U.S. Mail on each of the following this 12th day of January, 2004, and that on this same day, 10 copies were sent by First Class U.S. Mail to the Clerk for filing.

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