

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FORUM FOR ACADEMIC AND	:	
INSTITUTIONAL RIGHTS, INC.,	:	
SOCIETY OF AMERICAN LAW	:	
TEACHERS, et al.,	:	03 Civ. 4433 (JCL)
	:	
Plaintiffs,	:	
v.	:	
	:	
DONALD H. RUMSFELD, in his capacity	:	
as U.S. Secretary of Defense, et al.,	:	
	:	
Defendants.	:	

x

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

The Government agrees that law schools have standing to challenge the Solomon Amendment, and does not dispute that Plaintiffs have *alleged* and presented sworn statements that Plaintiff FAIR includes law schools as members. That has been enough to establish standing in hundreds of cases in which associations sue on behalf of their members. Nevertheless, the Government argues that FAIR lacks standing unless it reveals its membership list publicly—in its complaint. In other words, in this particular motion to dismiss, the Government is claiming that the allegations are not to be taken at face value, a proposition that flies in the face of the ordinary rules of pleading.

The Government's insistence that FAIR reveal its membership list in order to vindicate its right to petition the government is also inconsistent with decades of precedent governing the First Amendment rights of associations to protect their membership lists—even when, indeed, especially when, they are approaching the courts for relief of constitutional violations and especially when the very nature of the suit is a challenge to the Government. The Government has offered no compelling reason, as these cases require, why it needs to review the membership lists itself, at any point in this case, much less to establish standing. Nor has it explained why an *in camera* review of the membership lists would not suffice, even if revealing the names was necessary to establish standing.

Finally, regardless of the resolution of FAIR's standing, this case can proceed because other plaintiffs in this case have standing in their own right. Specifically, faculty and students have standing because they are the explicitly intended beneficiaries of the very policies the Solomon Amendment has forced law schools to revoke.

STATEMENT OF FACTS

FAIR

FAIR is a membership corporation organized under the laws of the State of New Jersey, and its mission is to promote academic freedom, support educational institutions in opposing discrimination, and vindicate the rights of institutions of higher education. Greenfield ¶ 2. Law schools have joined FAIR in two ways: some FAIR members are law schools themselves, and others are the policy-making bodies that run them, faculties that choose by majority vote to join as a group. *Id.* A university or college may join. *Id.* And, so, too, may a subdivision of a larger university. *Id.* Members of FAIR currently include law schools and the faculties of law schools. *Id.* The very first act FAIR took to fulfill its mission was to file this lawsuit on behalf of its members seeking to challenge the Solomon Amendment, 10 U.S.C. § 983, a statute that withholds federal funds from FAIR's members and other educational institutions if they limit military recruiting activities on campus. FAIR was able to file this action, and indeed to exist at all, only because it promised its members that its membership list would be kept confidential. Greenfield ¶¶ 7-8.

Prior to the formation of FAIR, law deans, law professors, and university officials were frustrated with the restrictions imposed on them by the Solomon Amendment, the arbitrary way in which the military enforced it, and their inability to truly ameliorate the detrimental impact that the military's presence at on-campus recruiting events has on the message of nondiscrimination that the law schools try to express. *Id.* ¶¶ 5-6. Yet, they also feared that should their law schools appear as named plaintiffs in a legal challenge to the Solomon Amendment, the law schools, and the larger universities of which the law schools are a part, would be targeted for retaliation by governmental actors, including the military, or by private organizations. *Id.* ¶ 6. They feared the public vilification that would be heaped upon those non-

compliant schools whose names are published in the Federal Register as mandated by the Solomon Amendment. *Id.* And they feared the prospect of losing millions of dollars in earmarked federal appropriations or contracts administered by federal bureaucrats, without ever having a chance to discuss the blackball. *Id.* The law schools also feared reprisals from the private sector, such as alumni, donors and grant makers, that could have devastating economic consequences for the school. These fears kept law deans, law schools, and universities from vindicating the rights of their institutions by filing a legal challenge to the Solomon Amendment. *Id.*

FAIR was born out of these fears, and one of the foundational promises that FAIR makes to members and prospective members is that its membership list will be kept secret. *Id.* ¶ 7. The privacy and security thus afforded members under FAIR's auspices allows FAIR's members to work in concert to promote their common interests, including this challenge to the Solomon Amendment, an unpopular cause in some quarters, without the fear that individual members will be singled out for harassment or retaliation. *Id.* If FAIR cannot keep this critical promise of secrecy, most of its current members would likely resign and prospective members would shy away. *Id.* ¶ 8. The rights of its members that FAIR seeks to protect would never receive effective vindication. *Id.* Likewise the right of FAIR itself to promote its members' interests would be harmed.

In addition to the fears expressed by law deans, the founders of FAIR have other ample evidence to conclude that the public identification of its member law schools would adversely impact its ability to pursue its efforts to promote its members' interests by challenging the Solomon Amendment. From day one, the sponsors of the Solomon Amendment trumpeted its chilling effect, as Representative Pombo proclaimed: "Some institutions of higher education in

this country need to be put on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed—either by this House or by the American people.”

140 Cong. Rec. 11,441 (1994) (Rep. Pombo).

The chilling effect of the Solomon Amendment of which Representative Pombo bragged at its inception in Congress lived up to its billing. For example, New York Law School could not withstand the adverse pressures that would have been generated by publication of its name in the Federal Register as a non-compliant school. *See Matasar* ¶ 21. In the post-September 11 era, its resolve to defy the Solomon Amendment was crushed by the threatened stigma of non-compliance. *See id.* Similarly, USC Law School gave in to the military's demands after it was warned not to “play games” with the military and that there was no opportunity to “cure” an alleged violation of the Solomon Amendment once the military had recommended a funding cut-off to the Department of Defense. *Chemerinsky Ex. 6.* In fact, the Air Force warned Touro Law Center that even the ameliorative actions Touro took to distance itself from the message of discrimination sent by the military's presence on campus “would be contrary to requirements” of the Solomon Amendment. *Maligno Ex. 3.* These threats, all backed up by the prospect of disastrous and instantaneous cut off of federal funds, effectively kept law schools from filing a legal challenge to the Solomon Amendment. *Greenfield* ¶¶ 5-6. They prevented action, that is, until FAIR with its promise of confidentiality was able to bring together its membership to file this lawsuit.

SALT

SALT is an organization of law faculty, *Compl.* ¶ 8, that is bringing the claims in this lawsuit on behalf of its members, *Johnson Reply* ¶ 3. Those members are “on the faculties of law schools across the nation,” *id.*, and as such they are members of the bodies that set the

pedagogy and policy of their respective institutions, *id.* ¶ 5. Thus, they “are ultimately responsible for the stewardship of the law school[s], and especially for advancing [the law schools’] mission to nurture future leaders and foster an environment conducive to respectful, open dialogue on fundamental issues of law and justice.” Compl. ¶ 8; *see also id.* ¶ 21 (“The message of diversity and tolerance is communicated by law schools through their faculty, their curriculum, and their policies.”).

SALT’s members choose to teach and pursue scholarship at institutions that commit to provide to the members of their communities a particular kind of pedagogical environment. Johnson Reply ¶ 5. While the nature of this environment may vary at each law school, “the vast majority of them have non-discrimination values at their core.” *Id.* In their capacity as legal educators, SALT members “have a responsibility to [their] students, colleagues, institutions, and society at large, to ensure that law schools’ principles and policies of inclusion and nondiscrimination are upheld and constitutionally validated.” Johnson ¶ 5. The administrations and the faculties at law schools where SALT members teach have thus implemented non-discrimination policies that prohibit discrimination on the basis of, among other categories, sexual orientation, disability and age. Johnson Reply ¶¶ 3, 8,9.

The non-discrimination policies have “substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures, values that law faculty hope students will internalize.” Compl. ¶ 23. The policies “reify those values, modeling behavior that [a law faculty] hopes its students will follow in their law practices and lives as community leaders.” *Id.* They allow SALT members to “pursue [their] scholarly goals and prepare [their] students for the practice of law in an atmosphere that encourages debate,

celebrates diversity and promotes the ideals of respect and tolerance within our communities.”
Johnson Reply ¶ 6.

In the past SALT members’ law schools applied their non-discrimination policies to the branches of the U.S. military that sought to recruit at the law schools. Johnson Reply ¶ 3. However, these institutions no longer apply their non-discrimination policies to military recruiters because the military has threatened them and their parent institutions with the loss of federal funds under the Solomon Amendment. SALT members’ law schools would return to applying their non-discrimination policies to military recruiters if the Solomon Amendment were enjoined. *Id.* ¶ 4.

At some law schools where SALT members teach, the law school or university administration developed and implemented the non-discrimination policies. *Id.* ¶ 8. At others, the law faculties themselves, including SALT members, developed, approved and implemented the policies. *Id.* ¶ 9. At those schools where the law school or administration is responsible for development and implementation of the non-discrimination policies, SALT members are harmed by the suspension of those policies as applied to the military because they “cannot hear the law schools’ message of non-discrimination free from the static caused by the Solomon Amendment.” *Id.* ¶ 8.

Whatever the source of the non-discrimination policy, SALT members are among the beneficiaries of the policies. Because of the Solomon Amendment’s enforcement, they have not only lost their ability to “enforce, express and live the values embodied” in those policies.” Johnson ¶ 7, they have also been deprived of the ability to engage in the free and open discourse that flows naturally in an environment where all participants feel equally free to exchange ideas. Neuborne ¶ 5; Eskridge ¶ 6. In effect, they are denied “the fulfillment of [their] educational

mission and the meaningful exercise of [their] own rights of academic freedom.” Johnson Reply ¶ 7.

STUDENTS

Plaintiff Coalition for Equality is an association of students at Boston College Law School, Compl. ¶ 8, plaintiff Rutgers Gay and Lesbian Caucus is an association of students at Rutgers University School of Law (“Rutgers Law”), *id.*, and plaintiffs Pam Nickisher, Leslie Fischer and Michael Blauschild are students at Rutgers Law (collectively the “Student Plaintiffs”).

The Student Plaintiffs are the direct beneficiaries of the pedagogical goals and mission of their law schools. Not least, they are the “beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds.” *Id.* The Solomon Amendment interferes with the learning environment to which the Student Plaintiffs would otherwise be entitled. *See* Johnson Reply ¶¶ 7-11.

The Solomon Amendment, by forcing law schools to abandon their policies as to a certain group of its students, interferes with the Student Plaintiffs’ right to “an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance.” *Id.* ¶ 10. Thus, although the law schools of the Student Plaintiffs have determined that “diversity in their faculty and students is an essential precondition” to their missions, “because the society these future lawyers will enter, and hopefully lead, is not monochromatic, and because discourse is richer in communities full of varied backgrounds, perspectives, and experiences,” *id.* ¶ 19, Student Plaintiffs no longer receive that benefit. Similarly, although law schools’ stated purpose is to nurture environments in which students are welcome to present their views, their ideas, and their beliefs, *id.* ¶ 20, the Student Plaintiffs’ entitlement to that environment has been curtailed.

In short, the Student Plaintiffs benefited from law school policies that “promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect,” and they benefited from law schools’ “uncompromising adherence to the principle that all who engage in discourse with the law school community are fully equal.” *Id.* Yet, the Solomon Amendment curtails and undercuts Student Plaintiffs’ receipt of these benefits.

ARGUMENT

THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE AN ASSOCIATION OF LAW SCHOOLS HAS STANDING TO PRESS THE FIRST AMENDMENT RIGHTS OF ITS MEMBERS AND BECAUSE LAW PROFESSORS AND LAW STUDENTS HAVE STANDING IN THEIR OWN RIGHT.

A. FAIR, An Association of Law Schools, Has Standing To Sue On Behalf Of Its Members, Even If It Refuses to Expose Its Membership List To The Government.

1. The First Amendment Protects FAIR’s Right to Keep Its Membership Lists Secret, Even When It Brings A Lawsuit Protesting A Government Policy.

This Court has inquired why Plaintiffs waited until now to bring this lawsuit. Plaintiffs have good explanations, rooted largely in the manner in which Congress, and the military, progressively turned up the heat, reaching the boiling point only recently; many law schools across the country were still negotiating with the military through this past summer, hoping that the military would accept conciliatory efforts to cling to their expressive messages even while giving the military full access to students. *See* Rosenkranz Reply. But Plaintiffs would be less than fully candid if they did not confess that one factor was fear. No doubt, law schools saw the Solomon Amendment for what it was when it was first passed—an egregious violation of the doctrine of unconstitutional conditions. Since the stakes were lower, it may not have been worth it for them to fight. But as the stakes were raised, law schools still were reluctant to fight, not because they were complacent, not because they were oblivious to the effect of the Solomon Amendment on their message to students and their academic environment, and not (as the

Government alleges) because there was no harm, but because they could ill afford the retribution they knew would be forthcoming.

It was not until FAIR emerged as a viable option—in early September of this year—that law schools were prepared to take the extraordinary step of suing the Government over a highly controversial law that has already sparked angry reactions.

It takes no great prescience to predict what would happen if FAIR published its membership list: overnight, the membership list would become a blacklist. Every law school on that list would be targeted for retribution—swiftly and vigorously. Politicians, whether driven by a deep sense of patriotism or a cynical sense of opportunism, would vilify every school on the list, just as Representative Pombo vilified California State University at Sacramento for phasing out its ROTC program when he was presenting the Solomon Amendment to the House. 140 Cong. Rec. 11,441. Those who once vowed to exact a “price” from nameless “colleges and universities” that exhibited “starry-eyed idealism,” 140 Cong. Rec. 11,440 (1994), or to punish the “misguided[] sense of moral superiority . . . creeping into the policies of [unidentified] colleges and universities,” *id.*, would be able to target the academic enemy more specifically. Military officials who were already prone to threaten sanctions against schools that were too persuasive in their criticisms of the military, *see* *Maligno Ex. 3*, would spare little time devising ways to punish the institutions that dared to sue them. Discretionary appropriations would be killed in cloakrooms. Grants would be denied in the warrens of government bureaucracies. No one would explain. Hundreds of millions of dollars would dry up, all because law schools dared to band together to stand up to what they considered repressive and unconstitutional government action. Rather than assume that risk, FAIR’s members would evaporate, and FAIR would be unable to advocate the very interests that it was formed to promote.

It is precisely for situations like this that the courts have steadfastly maintained that “[m]embership lists of groups engaged in political expression clearly deserve . . . First Amendment protection.” *Black Panther Party v. Smith*, 661 F.2d 1243, 1265 (D.C. Cir. 1981), *vacated without opinion on other grounds*, 458 U.S. 1118 (1982). As the Supreme Court observed 45 years ago in the First Amendment landmark, *NAACP v. Alabama ex rel. Patterson*, “compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association.” 357 U.S. 449, 462 (1958). In protecting the NAACP’s right to keep its membership list secret from the government’s prying eyes, the Supreme Court declared that “[i]nviolability of privacy in group association . . . [is] indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.* Just two years later, the Court extended its ruling to prohibit a state from requiring teachers to disclose their group memberships. *Shelton v. Tucker*, 364 U.S. 479 (1960). In a ruling that applied as much to those who join the Rotary Club as it did to those who joined the Communist Party, the Court explained that to “compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association. . . . Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny could be constant and heavy.” *Id.* at 485-86.

In words that could have been tailor-made for this case, courts since have embellished, even deepened, the proposition. “[P]rivacy is [especially] important,” they have opined, when “the government itself is being criticized” and “has a special incentive to suppress opposition.” *Black Panther*, 661 F.2d at 1265. The First Amendment privilege “is designed [not only] to protect members of groups from harassment and intimidation, . . . [but also] to prevent the chilling effect that disclosure may have on the willingness of individuals to associate with the

group.” *International Society for Krishna Consciousness, Inc. v. Walter Lee*, 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) (“ISKCON”) (citations and internal quotation marks omitted). Thus, compelled disclosure of membership raises First Amendment concerns in that it undermines members’ ability to pursue its collective expressive efforts whether by either inducing it to withdraw from the organization or dissuading others from joining it. *See Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87, 97 (1982) (compelled disclosure of identity of recipients of disbursements from political party deters individuals from entering even purely commercial transaction with political party, “cripp[ing] . . . party’s ability to operate effectively and thereby reduc[ing] ‘the free circulation of ideas both within and without the political arena’”); *Hastings v. North East Independent School Dist.*, 615 F.2d 628, 632 (5th Cir. 1980) (“To direct disclosure of the membership list would subject the . . . members to the very retaliatory measures they seek to avoid.”); *Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045, at *3 (N.D. Ill. May 10, 2001).

The courts are so solicitous of associational rights that they will accord the First Amendment privilege to keep membership secret even to groups that, unlike FAIR, cannot make “a concrete showing of infringement.” *Anderson*, 2001 WL 503045, at *3. Those seeking protection from compelled disclosure “need only show that ‘there is some probability that disclosure will lead to reprisal or harassment.’” *Id.* (quoting *Black Panther*); *see Brown*, 459 U.S. at 93 (parties asserting First Amendment privilege must show only a “reasonable probability that the compelled disclosure of [its membership list] will subject [its members] to threats, harassment, or reprisals from either Government officials or private parties”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

FAIR did not shed its members' First Amendment protection by filing a lawsuit. That much is plain from a long line of cases dating back almost as far as the privilege itself. *See Black Panther*, 661 F.2d at 1266-67; *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Right to Work Legal Defense and Educational Fund*, 590 F.2d 1139, 1153 (D.C. Cir. 1979); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974). The Fifth Circuit was so passionate about applying the privilege to a plaintiff association that it declared that to hold otherwise "would be an abdication by the federal court of not only its federal stature, but its judicial robes as well." *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976).

The most discursive explanation of the principle was provided by the D.C. Circuit over 20 years ago in *Black Panther*, which is still regarded as authoritative. *See, e.g., Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002). The Black Panther Party, like FAIR, brought its lawsuit "because it believes the government has infringed its First Amendment rights of expression and association." *Black Panther*, 661 F.2d at 1266. There, as here, the Government argued that by exercising its right to petition for redress, the association waived its other First Amendment rights. *Id.* The D.C. Circuit dismissed any such notion, because it "would make any judicial protection meaningless." *Id.*

That is not to say that the First Amendment right to keep a membership list secret is utterly inviolable. An organization's First Amendment privilege can be pierced, but only where there is a "compelling" interest in the disclosure, *Patterson*, 357 U.S. at 1172; *see also Black Panther*, 661 F.2d at 1266 (citing *Patterson*); *Local 1814 Int'l Longshoremen's Assoc. v. Waterfront Comm'n of New York Harbor*, 512 F. Supp. 781, 785 (S.D.N.Y.), *aff'd*, 667 F.3d 267 (2d Cir. 1981), "and then only if there is a 'substantial relation between the information sought

and [an] overriding and compelling state interest,” *Brown*, 459 U.S. at 92; *Local 1814*, 512 F. Supp. at 786-87.

When it comes to efforts to overcome the claim of privilege in the context of litigation, the courts have conducted the classic balancing test that applies to all other manner of First Amendment rights: weighing the strength of the need for confidentiality against the litigation need for the information sought. “The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases.” *Black Panther*, 661 F.2d at 1268. Where, as here, the organization’s beliefs are “controversial and subject to occasionally overt hostility . . . it cannot be doubted that the potential in defendants’ discovery program for chilling the associational and free exercise rights of the plaintiffs is sufficiently evident to compel close scrutiny of the necessity for the requested discovery.” *ISKCON*, 1985 WL 315, at *9. In other words, if the Government insists on exposing FAIR’s members to the extreme public vilification that is sure to come, it must demonstrate an exceedingly compelling need.

At any step in this litigation it will not be enough for the Government to say that the law schools’ identities are relevant; it must show that “the information sought is so relevant that it goes to the ‘heart of the matter’; that is, the information is crucial to the party’s case.” *Anderson*, 2001 WL 503045, at *4 (quoting *Black Panther*). And the Government “must exhaust all reasonable alternative sources of information by which [it] could obtain the information in a less chilling manner.” *Id.* (citing *Zerilli*, 656 F.2d at 714-15).

It is through this lens that the Court must assess the Government’s claim that FAIR must expose its members in order even to take the first step—the filing of a complaint—toward vindicating their First Amendment rights. In this regard, it is notable that the relevant case law

has developed almost entirely not at the threshold of the case, but deep into discovery. That in itself is telling, for if member identity were always—or even sometimes—a prerequisite for establishing an association’s standing, one would expect to see among the hundreds of cases brought by associations on behalf of their members¹ a significant number in which courts were called upon to lift the veil of confidentiality from the plaintiff association.

2. FAIR Has Already Established Associational Standing Without Revealing Its Members’ Identities.

As explained in the Reply Brief Plaintiffs filed in connection with their preliminary injunction motion, Pl. Reply at 2-4, Plaintiffs have alleged sufficient facts to establish the three elements of associational standing: (1) an organizational plaintiffs’ members must have standing to sue in their own right; (2) the interests that the organization asserts must be 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. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); *see Roe v. Operation Rescue*, 91 F.2d 857, 865-66 (3d Cir. 1990) (requests for injunctive and declaratory relief do not require participation by organization’s members); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn*

¹ *See, e.g., Engine Manufacturers Ass’n v. South Coast Air Quality Management Dist.*, 123 S. Ct. 2274 (June 9, 2003) (granting certiorari to trade association representing interests of its members); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-81 (2000); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998); *NAACP v. Alabama*, 357 U.S. 449 (1958) (civil rights organization); *Pennsylvania Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir.), *cert. denied*, 537 U.S. 881 (2002) (nonprofit corporation representing psychiatrists); *Hospital Council of W. Pa. v. Pittsburgh*, 949 F.2d 83 (3d Cir. 1991) (nonprofit membership corporation representing member hospitals’ interests); *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990) (abortion rights organization representing individual members’ interests).

Terminals, Inc., 913 F.2d 64, 70 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (“*PIRG*”) *NRDC v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 504-05 (3d Cir. 1993); Pl. Reply at 2-4. Under this standard, the Government is mistaken when it asserts that an association cannot vindicate the First Amendment rights of its members without establishing that those members are unable to protect their own interests, Gov’t Opp. at 20, for associational standing is one of the four classic, and longstanding, exceptions to the prudential rule against third-party standing. *See* Erwin Chemerinsky, *Constitutional Law* 87-89 (2d Ed. 2002).

The Government has contested only the first prong, and even that prong only obliquely. After all, the Government *concedes* that law schools that face the choice between federal funding and adhering to their non-discrimination policies have standing to challenge the Solomon Amendment, *see* Gov’t Opp. at 1, 11, and the Government cannot contest that Plaintiffs have *alleged* that FAIR has law school members. *See* Complaint ¶ 7; *see also* Greenfield Reply ¶ 3. Plaintiffs have, indeed, embellished well beyond that baseline allegation, submitting sworn statements that:

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. * * * FAIR’s law school and law faculty members, therefore, face imminent and irreparable harm as a result of the military’s enforcement of the Solomon Amendment and FAIR seeks redress for this harm in this action.

Greenfield ¶¶ 9-10. Plaintiffs have also submitted uncontroverted sworn statements that establish that FAIR brings this lawsuit on behalf of its members; every member of FAIR is a law school or law faculty that (1) has had a nondiscrimination policy, (2) applied that policy to bar the military from on-campus recruiting and from the resources of that member’s placement office because of the military’s discriminatory hiring practices; and (3) as a result of the

Solomon Amendment has suspended the application of the nondiscrimination policy to the military. Greenfield Reply ¶¶ 3-6.

In considering the Government’s motion to dismiss for lack of standing, this Court is obliged to take all of these facts as true and to construe the complaint in FAIR’s favor. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975); accord *Pennell v. City of San Jose*, 485 US 1, 7 (1988); see *Lujan*, 504 U.S. at 561 (“On a motion to dismiss, a court should “presum[e] that general allegations embrace those specific facts that are necessary to support a claim.”); *Pennsylvania Psychiatric Society*, 280 F.3d at 283 (when faced with a challenge to standing, courts “must accept as true all material allegations of the complaint and draw all reasonable inferences in a light most favorable to plaintiff”); *Hosp. Council*, 949 F.2d at 88 (heightened “level of specificity is [not] necessary to avoid dismissal of a complaint for lack of standing”; “clear allegations of past and threatened [injury] are sufficient”).

The Government reaffirms this long-standing axiom, quoting the rule that “[i]t is the responsibility of the complainant clearly to *allege* facts demonstrating” standing. Gov’t Opp. at 8 (emphasis added; citation and internal quotes omitted). So, by the Government’s own admission, far from offering a compelling reason to overcome FAIR’s First Amendment privilege, it has actually offered proof that there is *no* reason to.

Nevertheless, the Government concludes that FAIR cannot establish its standing unless its “members are revealed.” Gov’t Opp. at 12. Apart from declaring that “[t]his is insufficient,” and labeling the allegations “[g]auzy generalities . . . , unsubstantiated by any sort of factual foundation,” Gov’t Opp. at 12 (citing *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992)), the Government offers no explanation as to why the ordinary rules about accepting factual allegations as true should not apply to this particular motion to dismiss.

Certainly, the single case the Government cites for its “gauzy” imagery does nothing to undermine Plaintiffs’ standing. There the party in question was an association that entered a lawsuit against businesses alleged to have polluted Massachusetts waters. *See* 962 F.2d at 110. The First Circuit concluded that the plaintiff association had not sufficiently established its standing. *Id.* at 117. The problem there, however, was not that the plaintiff association had failed to *name* any of its members; it was that the association neglected even to offer the minimal allegation that any of its members so much as “use[d] of the affected resources.” *Id.* (emphasis supplied). In other words, the association in that case failed to do what FAIR did here, allege that it had members with an individual stake in the case.

Much more on point is *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), where the plaintiff, Advocacy Center, was a federally authorized protection and advocacy organization bringing a novel statutory claim on behalf of mentally ill patients. *Id.* at 881. The government there, like its counterpart here, argued that the Center lacked standing to sue on behalf of its members because “it has not brought suit on behalf of a specific individual who” had been specifically harmed under the statute. *Id.* at 884. Rejecting the argument, the court declared in no uncertain terms, that the association *is not required to “name the members on whose behalf suit is brought.”* *Id.* at 882 (emphasis added). “[U]nder Article III’s established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought and we decline to create such a requirement . . .” The Eleventh Circuit nevertheless dismissed the complaint, because the plaintiff failed to do what FAIR did. It failed to allege “that one of its constituents otherwise had standing to sue to support the district court’s grant of summary judgment and injunctive relief.” *Id.* at 886 (citing *Lujan*). Instead, it cagily referred to what “many Floridians” had experienced,

but neglected “to state that any of these persons were clients of the Advocacy Center.” *Id.* at 887.

The Government has suggested that it has uncovered numerous cases—including some from within the Third Circuit – that have reached the opposite conclusion. We were unable to find a single case. The only case even in the ballpark is *Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of the Borough of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995), in which a non-profit corporation “dedicated to advocacy and support for Handicapped Persons” joined a lawsuit challenging a state condemnation the land under a health care facility. *Id.* at 647-48.

The *sole* allegation in the complaint about the advocacy group was that it was:

a non-profit corporation in the state of New Jersey, having offices at Passaic County Administration Building, 317 Pennsylvania Avenue, Patterson, New Jersey, which has as its principal purpose the provision of services, including advocacy, information, referral and support for handicapped persons in Passaic County and the State of New Jersey.

Id. at 656. Not only did this complaint fail to allege that it had members who were affected by the government actions, but it conspicuously omitted any allegation that it had members at all.

Id. Like most advocacy organizations, the plaintiff was quite evidently not a membership organization. *Id.* That is why the court was correct to have dismissed that plaintiff. *Id.* And that must be what the court meant when it noted, albeit perhaps imprecisely, that “Plaintiffs have failed to identify a single member of [the association].” *Id.* In the absence of any further discussion about the constitutionally required balance between associational freedom and the need to prove standing, this case hardly stands for the proposition that an association that *has members with standing* must be dismissed for refusal to name its members publicly.

In insisting on a heightened pleading requirement, perhaps the Government is mistaking the level of proof necessary to survive a motion to dismiss with the level necessary to prevail ultimately on the merits. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 US 26, 38-39

(1976) (an inquiry into standing “focuses on the party seeking to get his complaint before a federal court, and not on the issues he wishes to have adjudicated.”); *Flast v. Cohen*, 392 US 83, 99 (1968); *Hospital Council*, 949 F.2d at 90 (even if participation of plaintiff organization’s members to provide evidence in discovery and trial is necessary, associational standing still exists). Perhaps the Government believes that DOD’s conduct vis-à-vis each law school must be examined before declaring it void as to any. But even that argument is off base, whether because this case includes a facial challenge; or because the allegations in this case are that DOD developed a pervasive policy (albeit one that it long kept secret and still applies inconsistently); or because in a First Amendment case, unlike in any other arena, the fact scenario as to any particular plaintiff is unimportant: “[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 393 (1988).

There are only two other possible—albeit cynical and unpalatable—explanations for the Government’s insistence that FAIR must plead more than, say, the American Library Association, the Chamber of Commerce, or the National Association of Manufacturers would in comparable circumstances—or, for that matter, the Society of American Law Teachers whose capacity to sue on behalf of its members is not challenged by the Government. The first, which we dismiss out of hand, is that the standing argument is a subterfuge to undermine the lawsuit by forcing FAIR to dissolve or withdraw. The second is that the Government is too polite to say that it suspects that the allegations about FAIR—presented in a verified complaint and multiple sworn declarations, all prepared by a top-ranked law firm, and overseen by a FAIR board that

includes some of the nation's most prominent legal scholars—are false, that FAIR has not a single member that is a law school.

3. This Court Can Verify FAIR's Standing And The Government May Test The Allegations Through Means Other Than Exposing FAIR's Members To Retribution.

If for whatever reason, at this motion-to-dismiss phase of the case, or any other, further proof as to FAIR's standing is necessary, there are any number of vehicles by which that proof can be supplied, short of publicly revealing the membership list. First, Plaintiffs reiterate the offer to present the list to the Court *in camera*. See, e.g., *Doe v. City of Clawson*, 915 F.2d 244, 245 n.1 (6th Cir. 1990) (noting that John Doe was identified *in camera* in an affidavit filed under seal with the district court to establish his standing and to verify the court's jurisdiction); *International Union*, 590 F.2d at 1153 & n.19 (if identities of contributors must be revealed, court must take steps to minimize the effect of disclosure of defendant's members' first amendment rights; *in camera* review may be helpful); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 792 (9th Cir. 1999) (noting that district court, questioning existence of standing after case was pending for six years, held *in camera* hearing to determine whether anonymous child plaintiff was still a student in defendant's school district); *Doe v. U.S. Civil Service Commission*, 483 F. Supp. 539, 546 n.1 (S.D.N.Y. 1980) (anonymous plaintiff bringing statutory and constitutional claims for declaratory, injunctive and monetary relief from government's allegedly unauthorized investigation of her submitted documents with her real name to the court *in camera*). That should suffice to establish standing. After all, the Government concedes that the presence of *any* law school in this lawsuit would establish standing, and this Court does not need the assistance of Government lawyers to ascertain whether the list includes the name of a law school. Second, whenever appropriate (though this truly is a matter for trial), the Government is free to subject FAIR's leadership to cross-examination in open court. Without eliciting the

names of members, the Government can freely test the veracity of these witnesses the way litigants routinely test veracity on other matters on which proof of absolute truth is elusive. That is what the Government does on all sorts of matters—such as emotional harm or pain, or, in the First Amendment context, the desire or intention to engage in certain activities in the future—which, in other contexts, could be necessary to establish standing.

B. Faculty and Student Plaintiffs Have Standing to Challenge The Government’s Interference With Their Schools’ Pedagogical Message And Chosen Atmosphere.

1. Faculty and Students Have Injury-In-Fact, Arising Out of the Government’s Interference With Policies Whose Overriding Purpose Is To Create A Pedagogical and Scholarly Environment For The Benefit Of Faculty And Students.

As Plaintiffs observe in their earlier reply brief, the Government has incorrectly characterized the basis of the injury alleged for the Faculty and Student Plaintiffs, and that is the only way that the Government is able to challenge standing. To review, the Faculty and Student Plaintiffs are not complaining that the Solomon Amendment stops them from speaking. Gov’t Opp. at 13-14, 24. Nor are they suing because “they find the government’s message ‘repugnant’” (though they do), or because of any “stigmatic or dignitary injury,” or “psychological consequence[s].” *Id.* at 14 (citations and internal quotes omitted). Rather, their complaint is that the Government is actively interfering with a learning environment that law schools constructed for the benefit of law professors and law students. *See* Johnson Reply ¶¶ 7-11.

In other words, the students and faculty suffer direct and palpable injury from the Government-induced suspension of the non-discrimination policies. Whereas the school wishes to provide them with an environment in which the institution sends, by word and deed, a message of equality and merit, the Government has intervened to subject them to an environment

in which their institutions can no longer stand by that message or articulate it clearly. Whereas the school wishes to create an atmosphere—perhaps rarified—in which all students and faculty feel safe in the knowledge that they will be judged only on merit, the Government, co-opting the school’s resources and personnel, has intruded on that environment with the opposite stance. *Compare Alliance of Lesbian, Gay, Bisexual, Transgendered and Straight Students v. Cohen*, No. 99-CV-34, slip op. (Nov. 10, 1999) (magistrate concludes students lack standing to challenge the Solomon Amendment, but students do not allege the injury alleged here, only the stigma associated with being discriminated against).

There is nothing at all novel about this brand of standing. The courts have routinely upheld the rights of the intended audience of a message to hear that message. *See, e.g., 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 classic example of listener standing is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1996), where the passive recipients of advertising sued to invalidate a restriction on advertisers. The Supreme Court found they had standing, reasoning as follows:

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information. Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.

Id. at 756; *see also Lamont v. Postmaster General*, 381 U.S. 301 (1965) (passive recipients of publications sent from abroad have a First Amendment right to receive that literature, free from government interception); *see also Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (observing that First Amendment protects the right to “receive information and ideas,” and that freedom of speech “necessarily protects the right to receive”); *Procunier v. Martinez*, 416 U.S.

396, 408-409 (1974) (Court declines to address whether censorship of prison inmates' mail violated the inmates' First Amendment rights, because the censorship surely infringed the rights of the non-inmates addressees). In words that are apt here, the *Virginia State Board* Court concluded, "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [listener plaintiffs]." 425 U.S. at 757. So, too, here: if there is a right to teach a lesson, there is a reciprocal right to receive that lesson, and it may be asserted by students and faculty.

That right, the Supreme Court has opined, is long established and "is nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972).² In fact, the case that applies these precedents to facts that are most analogous to this case is from the Third Circuit, which held that "the opportunities of pupils to acquire knowledge, is a first amendment right distinct from the right to impart knowledge." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Ed.*, 654 F.2d 868, 878 (3d Cir. 1981) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)). In *Presbytery*, the plaintiffs alleged that the state was infringing their First Amendment right "in education to express, transmit and receive ideas" by the licensing requirements imposed on institutions of higher education by New Jersey state law. 654 F.2d at 871. The Third Circuit rejected a request

² The Government's contention that the Solomon Amendment does not inhibit any of the Plaintiffs from voicing protest or making ameliorative statements, Gov't Opp. at 13, does nothing to defeat Plaintiffs' standing. First, the military's own admissions demonstrate the ameliorative actions taken by law schools do purportedly violate the Solomon Amendment. See Maligno Ex. 3 (letter from military stating "Ameliorative actions that intimidate interested students and, in effect, prevent military recruiting on campus would be contrary to requirements of the law."). Second, the Government's point goes to the merits of the lawsuit, not to standing. And third, as demonstrated above, the Student and Faculty Plaintiffs are not claiming that their own voices of dissent have been silenced but that their right to hear their law schools' pedagogical message of nondiscrimination has been disrupted.

to abstain on the ground that the schools themselves had filed a separate law suit. The students' suit should proceed, the court held, because the students had "distinct rights," as listeners, "which may be enforced in a separate action." 654 F.2d at 878. If that right was sufficiently strong to persuade a federal appellate court to proceed in the face of an identical action in state court, it is certainly strong enough to give students, and comparably situated faculty, the standing to proceed in this case.

The injury alleged here is nothing like the nebulous and generalized injury that was rejected in the cases the Government cites. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), is a good example. There, the plaintiffs complained of Pennsylvania's decision to transfer property in Chester County to a private religious organization, allegedly in violation of the First Amendment. The plaintiffs were not even residents of Pennsylvania; and they learned of the transfer through a news release. *Id.* at 486-87. On these facts, the Supreme Court held that the plaintiffs had no standing because they did not have "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487. The only injury they could claim, the Court held, was "the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485.

The consequences of the Solomon Amendment for the Student and Faculty Plaintiffs are in some sense "psychological," but only in the same sense that any First Amendment violation is ultimately a matter of conscience and psychology. But that is where the similarity ends. The Student and Faculty Plaintiffs here are anything but roving vigilantes bent on righting governmental wrongs in foreign states. The military came to them, marched onto their campuses, and suspended policies intended to benefit them.

For the same reasons, the Government’s reliance on various other cases is also misplaced. In each case, the problem with the plaintiffs was that there was nothing about the Government’s action that affected those particular plaintiffs more than the average member of the interested public. *See Allen v. Wright*, 468 U.S. 737, 754-56 (1984) (mere assertions of a “right to have the Government act in accordance with law,” or “stigmatic injury” to one’s entire race, held insufficient to confer standing); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 613-16 (1989) (taxpayers and citizens lack standing “to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens”), *Humane Soc’y v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) (rejecting standing based on “general emotional ‘harm’” resulting from housing of elephant plaintiff did not own); *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 243 (7th Cir. 1986) (a “general interest in insisting that government officials comply with statutory and constitutional obligations” does not confer standing).

2. The Injury Suffered By Students And Faculty Is Directly Traceable The Solomon Amendment.

The Government is equally wrong when it argues that the harm to students and law professors is not traceable to the Government’s conduct. *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”). To read the Government’s brief, one would think that students and faculty have no basis on which to conclude that they would have the environment they were promised—an environment protected by non-discrimination policies—if Congress had never passed the Solomon Amendment and the military had never enforced it as it has recently. But the complaint alleges the direct link, *see Complaint* ¶¶ 3-4, and virtually every declaration filed confirms that the *only* reason any law school suspended its non-

discrimination policy was because of a direct threat by the military based upon the Solomon Amendment.

Under similar circumstances, the Third Circuit rejected exactly the independent-decision argument the Government is advancing. In *Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3d Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001). There a student newspaper sued the Pennsylvania attorney general to enjoin enforcement of a state statute that imposed criminal penalties on businesses that advertised alcoholic beverages in materials “published by, for or in behalf of any educational institution.” 215 F.3d at 357. The state challenged the newspaper’s standing arguing that its alleged injury, reduction in advertising revenues, was caused by the advertisers’ independent decision not to purchase advertising for fear of criminal prosecution, not the defendants’ actions. *Id.* at 360-61. The Third Circuit rejected this argument, analogizing the traceability factor to but-for causation in tort law. *Id.* Because the advertisers would not have ceased purchasing advertising in the student newspaper but for the enactment of the statute at issue, the Third Circuit held that the newspaper’s injury was traceable to the statute. That is exactly what plaintiffs have alleged—and proven—here.

The Supreme Court, too, recently sustained a First Amendment challenge in an even more analogous case. See *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001), *cert. denied*, 532 U.S. 903 (2001). There, as here, the plaintiffs were challenging a federal law that imposed a condition on funding, in that context it was a condition on funding of legal services offices. There, as here, no entity that was a direct recipient of government funds joined the lawsuit (although here, at least, direct recipients in the lawsuit by virtue of FAIR), and the reason was presumably the same, fear of government retribution. Specifically, *Velazquez* involved not a single legal services employer; the plaintiffs were all legal services lawyers, legal services

clients, and donors. Legal services lawyers, like law professors, are just employees. Legal services clients, like law students, are just beneficiaries of the policies set by institutions designed to serve them. But the Supreme Court did not think twice about allowing the lawsuit to proceed—and handing a victory to the employees and beneficiaries—even though every legal services program faced the same decision law schools face, whether to accept the Government’s conditions or forego the federal funds.

In each of the cases on which Government relies, the connection between the Government’s action and the claimed harm was much more tenuous. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993) (Detroit challenges to the federal government’s census methods, alleging that it dilutes voting power of Detroit citizens, but court rejects that particular injury as not traceable to census data. because the Michigan legislature had no obligation to use census data in legislative redistricting, but only to use the “best population data available”); *Lee v. Bd. of Govs. of the Fed. Res. Sys.*, 118 F.3d 905 (2d Cir. 1997) (petitioners complain about a merger because they were concerned that the merged bank was unlikely to adhere to a precatory standard expressed in a federal statute governing the provision of banking services to the communities in which the banks were located; standing rejected because the statutory standard was so “amorphous” that it was impossible to trace the bank’s adherence to the practice directly to the statute); *DeBolt v. Espy*, 47 F.3d 777, 782 (6th Cir. 1995) (plaintiff challenged a federal housing development policy that she contended discriminated against large families by encouraging developers to build small apartments unsuited for large families; court finds that the inability to obtain suitable housing could “just as easily be a consequence of . . . factors, such as economic concerns regarding . . . [a] particular housing market”). *See also Trafficant v. Metropolitan Life Ins. Co.*, 409 U.S. 205, (1972) (two residents of an apartment

complex have standing to challenge owner's discrimination against African-American applicants, because their injury—deprivation of the right to live in a racially integrated community—is traceable to the owner's conduct).

In sum, only by abandoning the allegations in the Complaint, the evidence in numerous sworn statements, and the very notion of practical reality can the Government assert that “academic institutions are free to choose whether to permit the military on their campuses,” Gov't Opp. at 16-17, or that these decisions “break[] the chain of causation,” *id.* at 18.

CONCLUSION

For the reasons set forth above, FAIR respectfully requests that this Court deny the Government's motion to dismiss.

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Respectfully submitted,



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