

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, INC., a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAN NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN Y. MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDGE, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

No. 03-4433

OPPOSITION TO APPELLEES' MOTION TO STAY THE MANDATE

INTRODUCTION AND SUMMARY OF ARGUMENT

Setting aside briefly the government's eleventh-hour production of evidence and its failure to provide to this Court or Plaintiffs the evidence underlying its factual assertions, the government has not shown that the Solomon Amendment's demand of "equal access"—by which the government means "affirmative assistance"—is necessary to its recruiting efforts. The government says that it needs access to campus. But the government makes no attempt to prove, by any fact or figure, that either access equal to that granted other recruiters or affirmative assistance by law school career services offices is essential to their recruiting efforts.

Indeed the record establishes that affirmative assistance is not required. Even when schools were not providing the affirmative assistance the government insists is required by the Solomon Amendment, the military was thanking schools for the access they voluntarily provided, and was interviewing more highly qualified candidates than it could hire. Thus, the striking of a law that demands "equal access" cannot create an irreparable injury. It creates no injury at all.

The last-minute declarations submitted by the government also fail to demonstrate that even access is necessary. The government makes much of its claim that "more than 43 percent of new Air Force judge advocates stated in their questionnaires that their face-to-face on-campus interviews were critical in their decision to apply." Appellees' Mot. to Stay the Mandate (hereinafter "Mot.") at 14 (quoting Rives Decl. ¶ 19). However, at most this fact establishes that a face-to-face meeting is critical; it does not prove that the interview must occur *on campus*. Not troubled by the lack of empirical data, the government suggests that fewer students would express an interest in JAG if the military were not allowed to recruit on campus because students might not learn of the military or because an

off-campus interview is less convenient. But these assertions are not evidence that students will not apply. The military does not provide any empirical data or so much as a passing anecdote of a single student who learned of the military and applied to become a JAG officer only because recruiters conducted interviews on campus. There is no evidence, or story, about a single soul who applied for JAG but would have refused to walk 100 yards off campus for an interview.

Moreover, the government presupposes that the military would not be allowed on law school campuses at all absent a stay. The government posits that all law schools will exclude them entirely. Yet, there is no basis for such a conclusion. Law schools did not exclude the military before the military's demand of affirmative assistance. And, furthermore, there is nothing to indicate that universities would not make their campuses available, even were law schools to exclude recruiters from their grounds.

In any case, Plaintiffs offered the government access to campuses after this Court's decision. Plaintiffs offered to discuss an interim accommodation so as to avoid troubling this Court with a squabble over the mandate. Yet, the government flatly declined any interim measure short of full implementation of the Solomon Amendment. Any provable harm is therefore self-inflicted and cannot justify a stay.

Finally, as for the evidence, the weight it should be afforded must be tempered by the eleventh-hour production of declarations that the government has shielded from any meaningful scrutiny. The government had the opportunity to produce evidence before the district court. Had it done so, Plaintiffs would have obtained discovery, they would have cross-examined the declarants at the preliminary injunction hearing, and this Court would have had a full record before it. Now, the government asks this Court to accept without question its assertions. It has not provided this Court with any of the background data that supports the

assertions made. And, when Plaintiffs requested the background data for the purposes of this opposition, the government provided only a blank questionnaire and a promise that it would “think about” providing additional materials, which still have not been provided.

Given this, a stay is not appropriate. The government has not met its burden of showing irreparable injury. Nor has the government established the other factors justifying a stay—that there is a “reasonable probability” that the Supreme Court will grant certiorari, and that there is a “fair prospect” that the Supreme Court will reverse the decision of this Court.

The government has now decided to defend the Solomon Amendment based on legal, as well as factual grounds. The factual record, as is noted below, is far from developed. Other challenges to the Solomon Amendment brought by separate sets of plaintiffs are currently pending in district courts in this Circuit and the Second Circuit. The Supreme Court may deny certiorari to let these issues percolate.

And, this case rests on solid Supreme Court authority. The Supreme Court has recognized that forced inclusion of a person who embodies values contrary to an organization’s values violates that organization’s right of expressive association. In addition, the Supreme Court has recognized that organizations cannot be forced to propagate, accommodate, or subsidize the Government’s message. The Supreme Court is unlikely to overturn this Court’s careful application of fact to these well-established doctrines.

In sum, what issuance of the mandate *will* do is protect against the only harm proven—the harm to Plaintiffs. The military will retain its ability to recruit, just not in a fashion that trammels the rights of others. No stay is warranted.

ARGUMENT

A. The Government Has Not Shown a Likelihood of Irreparable Injury

Each of the government's declarations touts the advantage of allowing recruiters to walk on campus. They disclaim any other recruiting tools because the military asserts that on-campus recruiting increases student interest, is most convenient and attractive for students, and allows military recruiters the same competitive advantage as other employers. The key difference between on-campus recruiting and any other form of recruiting, according to the military, is the face-to-face interactions on-campus recruiting allows.

According to the Army, face-to-face interactions are necessary because they "spark the interest of law students," which would not occur in the absence of campus access because "Army JAG Corps will receive applications only from those already familiar with the military." Romig Decl. ¶¶ 19-20; *see also id.* ¶¶ 18-23 (explaining that lack of face-to-face meetings that allow recruiters to meet with law students places recruiters at competitive disadvantage). The Air Force says that a survey has revealed that "43% of recent JAGs stat[e] that . . . face-to-face on-campus interviews were critical to their decision to apply" to the JAG. Rives Decl. ¶ 31; *see also id.* ¶¶ 31-32 (explaining that lack of face-to-face meeting places recruiters at competitive disadvantage). In similarly worded declarations, the Marine Corps and Navy say that they will be deprived of viable applicants because there "is no adequate substitute for a personal dialogue between a current Judge Advocate and an interested candidate." Fowler Decl. ¶ 7; *see also id.* ¶¶ 5-7 (explaining that on-campus interviews are convenient for law students and that lack of face-to-face interviews would place recruiters at disadvantage); Gaskin Decl. ¶ 8 ("There is no adequate substitute for a personal dialogue between [a recruiter] and an interested candidate."); *id.* ¶¶ 6-7 (explaining that on-campus

interviews are convenient to law students and that lack of face-to-face interviews would place recruiters at disadvantage) .

Yet, to the extent the government claims that the Solomon Amendment's demand of affirmative assistance is required to avoid irreparable injury, the declarations fall short. The military actually recruited at levels exceeding their requirements when affirmative assistance was not provided. And there is no evidence that all law schools will exclude the military altogether. Indeed, law schools approached the government following this Court's decision to arrive at an interim agreement that would protect the military's access to campus. The government rejected the offer out of hand.

In addition, while the government claims that the complete denial of access will work an irreparable harm, the military affords this Court with no basis for so concluding. The government cannot deny that the face-to-face meetings that are considered so important will still occur if an injunction issues. And, there is no actual evidence that the number of recruits will fall. For example, the government does not identify the number of students who became aware of the military and signed up for JAG only because the military came onto campus. There is no evidence of the number of students who would refuse to walk off campus for a face-to-face interview. At most, the government has established that face-to-face meetings are important. Yet, nothing about the injunction prevents the military from conducting those interviews.

1. The declarations fail to demonstrate harm if the command to provide affirmative assistance is enjoined

The record demonstrates that compelled affirmative assistance is *not* required for successful recruiting. Prior to 2001, before the military began to demand absolute parity of treatment, the vast majority of law schools believed that they could remain faithful to their even-handed policies of denying affirmative

assistance to employers that discriminate while still allowing the military access to students. Harvard Law School, for example, allowed military recruiters on campus to recruit at the offices of the Harvard Law School Veterans Association, but would not volunteer its career placement personnel to arrange the interviews. JA-202 (Gerken); *see also* JA-128-29 (Chemerinsky). Boston College Law School allowed military recruiters on campus to interview law students, but kept literature from military recruiters in the library rather than in the career services office. JA-298 (Minuskin); *see also* JA-380 (Seidman), JA-229 (Law).

Military recruiters frequently thanked law schools for these sorts of accommodations, even when they were treated to fewer services than employers that did not discriminate. *See* JA-17 (Op.). One recruiter expressed typical sentiments in a 1998 letter to a law school: “Thank you for providing our military recruiters a degree of access to students that is equal in quality and scope to that afforded other employers, consistent with the regulations” JA-130 (Chemerinsky). Competition for legal jobs in the military remained so intense that another Army recruiter enthused in a 1998 letter that even “very qualified applicants will not be selected for a position.” JA-17 (Op.) (quoting JA-229-30 (Law), JA-241 (Levin letter)); *see* JA-202 (Gerken), JA-129 (Chemerinsky).

In contrast to these facts, the government offers nothing but bald assertions that military recruiting will decrease if “equal access” is not allowed. Nothing is offered to support these conclusory statements. No fact is pointed to, no document is cited, and no numbers are provided. To overcome the historical record of recruiting success, the government must do better than *say* that recruiting will be impaired.¹ The government must, at least, explain why it cannot replicate its pre-

¹ The government suggests that it need not produce any evidence of irreparable injury. Mot. at 3-4. It notes that then-Justice Rehnquist once

(Footnote continued)

2001 success, and show why it cannot distribute literature, send emails, make students aware of job openings, collect resumes, and arrange interviews, without compelling the assistance of the law schools. But the government has not done this.

Nor has the government shown why the military is unable to utilize the many channels it has to communicate with students. The government's own declarations list regional and national job fairs, brochures mailed upon request, a toll-free recruiting hotline, Internet job postings, tens of thousands of "direct mail" solicitations, an interactive website, ads in legal publications, conferences hosted at military bases, word of mouth, television, and radio, as among the means *already* used by the military to spread its recruiting message. Rives Decl. ¶¶ 20-30; Fowler Decl. ¶ 4. Yet, the military provides no basis for assessing just how much more or less successful these avenues are when affirmative assistance is provided.

commented that it "seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people," it suffers "a form" of injury. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). This comment does not satisfy the government's burden. Moreover, Justice Rehnquist's comment was merely an addendum to a list of *factually demonstrated* harms to the "State." *See id.* Furthermore, a *per se* rule of harm would contradict the countless stay decisions of various Justices, which have universally required a showing of actual harm, including in cases where a legislative act was enjoined. *See, e.g., Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (denying stay of injunction of portions of federal statute because government had not demonstrated irreparable injury); *Bellotti v. Latino Political Action Comm.*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers) (denying stay of injunction of electoral districting plan adopted by Boston City Council because state had not demonstrated irreparable injury). Contrary to the government's suggestion, irreparable harm must be shown, not inferred or assumed.

Moreover, in seeking to minimize the importance of these channels, the government fails to mention that even absent affirmative assistance the military would still be provided student names and addresses, so it could contact students directly. Having ignored this fact, the government fails to explain why such access to student information does not vitiate their assertion of irreparable injury.

Ultimately, the lack of affirmative assistance that the military demanded under the Solomon Amendment will not work an irreparable harm on the military. It has not in the past and it will not going forward.

2. The declarations fail to demonstrate harm if the command to provide “access” is enjoined

Nor has the government proven that it needs access to campuses in order to achieve its recruiting goals. Again, the government *asserts* a harm, but it provides no evidence or data quantifying the harm, and it certainly provides no means for this Court to determine whether the harm will be so severe as to warrant a stay.

For example, to the extent the military has established that face-to-face meetings are essential, it has not proven that these will not occur absent mandatory campus access. Without a stay, the vast majority of law schools would not force the military off campus. For those few that would, the military could simply hold its meetings off campus or on university or college grounds. This would not spell an end to face-to-face interactions, and the military does not deny this. So, even if the mandate were to issue, candidates could have the “personal dialogue” and the face-to-face interactions that 43% of the Air Force JAGs found so important.

Moreover, the declarations provide no way to assess what harm the military would suffer if it could not compel campus access. The declarations discuss the hundreds of JAGs that the military recruits, but they do not identify the number of JAG lawyers that were recruited as a result of on-campus visits. The government claims that alternative means of recruiting will not be as successful because

students will be unaware of JAG opportunities or because it will be less convenient for them. Yet, again, there is no evidence that allows this Court to quantify what that means. The military does not supply the number of students who have interviewed but would not have applied if it were not for the on-campus appearances. The military does not tell this Court how many students indicated that they would have been unable or unwilling to meet with recruiters at a nearby off-campus site rather than in a university office. This type of showing, however, is essential to proving irreparable harm.

More importantly, it is information the government has. For example, the Air Force asked students “What recruiting efforts influenced you most to join our Department?”. Declaration of E. Joshua Rosenkranz (“Rosenkranz Decl.”), Exh. D. But the government refuses to disclose the responses to that question to this Court or to Plaintiffs. *See infra*.

Nor is it enough for the military to suggest that recruiting on campus is more efficient or effective. To the extent there is empirical data, it reflects that in fact the military does not come on campus merely because it is efficient in terms of monetary expenditure or effective in terms of drumming up student interest. For example, the military expended money to travel to Yale Law School and set up a recruiting table despite their knowledge that no students had signed up for interviews. And, no data suggest that as a result, subsequent trips have resulted in more applicants. JA-157 (Eskridge).

Finally, the government’s arguments and declarations ignore the fact that the military is not like other employers. *See, e.g.*, Romig Decl. ¶ 10 (“The Army is not a traditional law firm . . .”). The Defense Department, with an annual budget

exceeding \$400 billion,² has recruiting means unlike those of any private legal employer. Each of the four services sends representatives to most or all accredited law schools in the United States—a feat that no evidence suggests is attempted by even the largest private law firms in the country. *See, e.g.*, Rives Decl. ¶ 13. They even send recruiters to campuses where no students have expressed interest. And, the military competes in ways that no other employer could. *See, e.g.*, Fowler Decl. ¶ 6 (listing “public service, significant responsibility early on, adventure, travel opportunities, and the prestige associated with military service”).

In sum, the government has not proven irreparable harm.

3. To the extent harm is shown, it is self-inflicted

Even assuming *arguendo* that the government has shown some harm, it had the means to avoid it. Plaintiffs placed on the table an interim proposal that could have guaranteed military recruiters continued access to campuses and to law students, without compelled affirmative assistance. Rosenkranz Decl., Exh. A. The letter offered the following: “A preliminary injunction that would bar military recruiters from demanding affirmative support or services from law schools or their career services offices, but that would continue to ensure recruiters’ ability to enter campuses to recruit and their access to students and student contact information.” *Id.*

This overture was made because most law schools have not historically resisted allowing military recruiters on campus to recruit. They have only resisted the command to abet military recruiting with expressive assistance. *E.g.*, JA-331 (Rosenkranz); JA-202 (Gerken); CR-5 (Matasar Decl., exh. 6).

² See Press Release No. 061-04, United States Dep’t of Defense, *Fiscal 2005 Department of Defense Budget Release* (Feb. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040202-0301.html>.

Yet, the government rejected the offer out of hand. And not because there was some particular sticking point in the details. The discussion did not get that far. In response to Plaintiffs' offer to discuss an accommodation of military recruiters, the government telephoned and said that such a conversation was of no interest whatsoever. Rosenkranz Decl. ¶ 3.

The bottom line is that to the extent the government has proven a harm, it is a harm that could have been avoided. A stay cannot be warranted.

B. The Government's Evidence Must Be Rejected—It Is Too Little Too Late and the Government Refuses to Allow Plaintiffs or this Court to Assess the Information Underlying Its Assertions

Although up to this point Plaintiffs have argued the merits of the government's submission, their evidence should in fact not be considered at all. The government elected not to produce this evidence in the district court. Had it done so, Plaintiffs would have had the right to review the documents that underlie the military's claims, and would have sought modest discovery to test those assertions. Plaintiffs would have called the declarants to the stand at the preliminary injunction hearing in order to cross-examine them. A record would have been developed reflecting the actual facts underlying the government's assertions. This Court would have the benefit of a hearing testing the conclusory allegations the government now offers, and there would be a means of quantifying the actual harm the government will face if an injunction issues.

Having produced these materials only at the last moment, the military refuses to allow anything approaching critical scrutiny. Immediately after the government filed its stay motion, Plaintiffs requested the information on which the declarations were based. Rosenkranz Decl., Exh. B. The government declined. The government provided Plaintiffs only the blank questionnaire that the Air Force JAGs filled out and based on which the government asserts that 43% of its JAG

applicants found the face-to-face on-campus interview important.³ Rosenkranz Decl., Exh. C. However, this blank questionnaire certainly does not provide the basis for the assertion, nor what other answers predominated. As for the remaining information, the government said that it would think about providing it. *Id.* ¶ 6 & Exh. C. No information has been forthcoming. *Id.* ¶ 7.

There is no excuse for this. The military clearly has, and has had, information relating to its own recruiting. The military has been insisting on affirmative assistance since 2001, and schools have acquiesced. The military and the government, therefore, have available to them data that reflect recruiting efforts both before and after the military's insistence on affirmative assistance. In fact, as discussed above, the Air Force uses at least one questionnaire to evaluate its recruiting techniques. Yet neither the Plaintiffs nor this Court (or the district court, for that matter) were apprised of this information until the government filed its stay motion. And, even now, the bits of information that the government has disclosed are fashioned in a way that best suits its own interest. For example, the government does not disclose the number of students the military recruited on campuses as opposed to through other avenues. The government does not disclose the number of students who expressed an interest in the military only because the military was able to recruit on campus. The government does not even tell this

³ The government says that the 43-percent figure was derived from Question III (“How did you learn about The Judge Advocate General’s Department? (*please check all that apply*)”) and either Question IV (“Why did you choose to become a *Judge Advocate*?”) or Question VI (“What recruiting efforts influenced you most to join our Department (*please specify*)?”). Rosenkranz Decl., Exh. D. (The letter is ambiguous on this.) But the government does not disclose the answers to the individual questions, or provide enough information to meaningfully parse its singular data point.

Court or Plaintiffs whether the military's recruiting has increased or decreased since 2001.

Having lost its appeal on the merits, the government cannot now come to this Court and produce evidence it has had in its hands since the beginning. It should not be allowed to prove a harm based on little more than its assertions that recruiting will suffer. It particularly should not be allowed to do so when it refuses to allow either Plaintiffs or this Court to engage in any measure of scrutiny of the claims it has made. *Cf. Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994) (rule against raising issues for first time on appeal "applies with added force where the timely raising of the issue would have permitted the parties to develop a factual record" (internal quotation marks omitted)). The numbers don't hold up and neither do the government's tactics.

C. There Is No Question that Plaintiffs Will Suffer Irreparable Harm

In contrast to the government, Plaintiffs have supplied ample evidence that the Solomon Amendment's forcible inclusion of, and assistance to, military recruiters undermines their efforts to disseminate their chosen message of nondiscrimination. *See Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 233-34 (3d Cir. 2004) (hereinafter "*FAIR*"). Moreover, this Court has found that the Solomon Amendment violates Plaintiffs' First Amendment rights of expressive association, *id.* at 234-35, and their First Amendment right not to be compelled to propagate, accommodate, or subsidize the military's expressive message, *id.* at 240. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Abu-Jamal v. Price*, 154 F.3d 128, 136 (3d Cir. 1998). Thus, any balancing of equities must weigh heavily in favor of Plaintiffs.

D. Given the Posture of This and Other Solomon Amendment Litigation, There Is No Guarantee that the Supreme Court Will Grant Certiorari

The likelihood of certiorari is also diminished by the preliminary posture of this case. The government's declarations are proof that the government intends to defend the Solomon Amendment on factual, as well as legal grounds. As is set forth above, the factual record is far from developed. The Supreme Court may decline to hear this case before the factual record is fully developed.

Also, this Court's opinion is the first from a Court of Appeals considering the Solomon Amendment. Other challenges are currently pending in the district courts of this Circuit and the Second Circuit. *See Burt v. Rumsfeld*, No. 03 CV 1777 (D. Conn. filed Oct. 16, 2003); *Student Members of SAME v. U.S. Sec'y of Defense*, No. 03 CV 1867 (D. Conn. filed Oct. 30, 2003); *Burbank v. Rumsfeld*, No. 03 CV 5497 (E.D. Pa. filed Oct. 1, 2003).

The Supreme Court may deny certiorari to let these issues percolate. *See Miroyan v. United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, J., in chambers) (denying motion to stay pending certiorari, finding that certiorari is unlikely given that case does not present or resolve any square conflict among the Courts of Appeals); *see also* Sup. Ct. R. 10 (setting forth considerations governing review on certiorari).

The likelihood of certiorari is also diminished by the preliminary posture of this case. This Court has held only that Plaintiffs are *likely* to prevail on the merits. This qualifier makes the case less suitable for Supreme Court review. So does the fact that, on the eve of this Court issuing its mandate, the government is only beginning to reveal the critical facts. The Supreme Court may well decline to hear this case until the factual record is fully developed, especially when other cases are wending their way up with fuller records.

Finally, as explained further below, a grant of certiorari is less likely because this Court's decision was based on bedrock principles of First Amendment law and a careful application of these principles to the facts of this case. This Court's decision falls squarely within the well-established doctrines of expressive association and free speech.

E. There Is Not a Fair Prospect that the Government Will Ultimately Prevail on the Merits

The government offers little regarding the merits that it has not already argued and lost before this Court. Principally, the government attempts again to distinguish *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and the “expressive association” doctrine under which Plaintiffs prevailed. *Compare* Mot. at 5-6, *with* Gov't Br. at 30-40. The government also argues again that the Solomon Amendment should have been examined under the less strict “expressive conduct” test of *United States v. O'Brien*, 391 U.S. 367 (1968), as informed by the special deference regarding military matters the government claims is taught by *Rostker v. Goldberg*, 453 U.S. 57 (1981). *Compare* Mot. at 6-9, *with* Gov't Br. at 21-29. The only new point raised by the government's motion relates to the doctrine of unconstitutional conditions as applied to federal education funds. *See* Mot. at 9. However, this Court's determination that a threat to cut off all federal funds to an educational institution is the same as a government command is clearly correct, *see FAIR*, 390 F.3d at 229, and the government is hardly in a position to argue otherwise, having failed to raise the issue before this Court.

There is thus nothing in the government's brief to cast doubt on this Court's opinion. This Court held in favor of Plaintiffs under four independent and well-established First Amendment doctrines, and a careful application of facts to those

rules. This Court found that the Solomon Amendment must be evaluated under strict scrutiny, because:

(1) it is a restriction on expressive association, *see Boy Scouts of Am.*, 530 U.S. at 644 (state cannot require Boy Scouts to accept gay scoutmaster);

(2) it forces schools to *propagate* the military's message, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state cannot enforce compulsory flag salute statute); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot require drivers to display state motto on license plates);

(3) it forces schools to *accommodate* the military's message, *see Hurley*, 515 U.S. at 559 (state cannot require parade organizers to include unwanted marching contingent); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (state cannot require public utility to distribute message in billing statements); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (state cannot force newspaper to provide editorial-page space); and

(4) it forces the schools to *subsidize* the military's message, *see United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (Congress cannot force mushroom growers to pay assessments to fund advertisements); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (state cannot compel non-union employees to pay union dues to promote union causes).

The government has not taken issue with these cases. Rather, it challenges the first principle underlying this Court's decision to apply their holdings to the Solomon Amendment—whether the First Amendment rights of Plaintiffs are at issue at all. *See* Mot. at 5; Gov't Br. at 39-40. However, this Court properly determined that forced inclusion of a gay scoutmaster is analogous to forced inclusion of a military recruiter. *FAIR*, 390 F.3d at 232. This Court properly determined that recruiting is a form of expression. *Id.* at 236-37 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). Recruiting

is just as communicative as soliciting, proselytizing, and leafleting, all of which the Supreme Court has consistently held to be expressive in nature. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992); *Vill. of Schaumburg*, 444 U.S. at 632; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).⁴

Finally, even if the government succeeds in convincing the Supreme Court that this Court has misinterpreted the record and misconstrued conduct as expression, the government should still lose. The Solomon Amendment not only fails strict scrutiny, but also (as this Court determined), would fail the lower standard that the government has urged. *See FAIR*, 390 F.3d at 243-44 (considering *United States v. O'Brien*, 391 U.S. 367 (1968)). As discussed in the merits briefs, the Congressional record demonstrates that the government's interest in enacting the Solomon Amendment was precisely the stifling of free expression. Moreover, the government has failed to submit *any evidence* that would "support the necessity of requiring law schools to provide the military with a forum for, and

⁴ If there was any question about this at all, the declarations establish this beyond dispute. The Army acknowledges that on-campus interviews are intended to "conduct[] informational seminars about the JAG Corps and provide[] a human face to the Army." Romig Decl. ¶ 12. The Air Force notes the number of different informational devices provided, *see, e.g.,* Rives Decl. ¶ 17, and then states that the purpose of the on-campus interviews is to "allow a law student to interact with someone close to their peer group who was, relatively recently, 'in their shoes' in law school. This type of exchange is invaluable in conveying what joint the JAG Corps really means, on both personal and professional levels" *Id.* ¶ 19. More directly, the Navy and the Marine Corps state that "Navy Judge Advocates need a direct forum in which to communicate the many advantages of military service, such as public service, significant responsibility early on, adventure, travel opportunities, and the prestige associated with military service." Fowler Decl. ¶ 6; *see also id.* ¶ 7 (citing importance of "the ability to proudly walk onto a law school campus"); Gaskin Decl. ¶ 6.

assistance in, recruiting.” *Id.* at 245. Presented with the same factual record, the Supreme Court would be bound to come to the same conclusion.

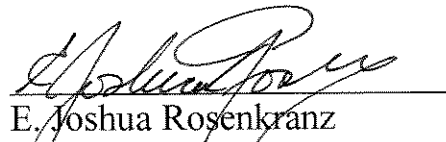
Because the Supreme Court is unlikely to hear or overturn this Court’s careful application of the facts to well-established First Amendment doctrine, there is no reason to delay relief to Plaintiffs.

CONCLUSION

For the foregoing reasons, the government’s motion for stay of the mandate should be denied.

DATED: January 27, 2004

Respectfully submitted,



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AFFIRMATION OF SERVICE

Jean-David Barnea, an attorney duly admitted to practice before the courts of the State of New York, affirms the truth of the following allegations under penalty of perjury:

I am an attorney with the firm of Heller Ehrman White & McAuliffe LLP, whose address is 120 West 45th Street, New York, NY 10036. On January 27, 2005, I caused to be served by Federal Express a true and correct copy of the foregoing Plaintiffs-Appellants' Opposition to Appellee's Motion to Stay the Mandate, dated January 27, 2005, upon the following:

Appellees:

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