

PETER D. KEISLER  
Assistant Attorney General  
CHRISTOPHER J. CHRISTIE  
United States Attorney  
VINCENT M. GARVEY  
Deputy Branch Director  
MICHAEL A. CHAGARES (MC5483)  
Chief, Civil Division  
Assistant United States Attorney  
MARK T. QUINLIVAN (MQ9087)  
Senior Trial Counsel  
U.S. Department of Justice

Attorneys for Defendants

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

-----  
FORUM FOR ACADEMIC AND )  
INSTITUTIONAL RIGHTS, INC., ) No. 03 CV 4433 (JCL)  
a New Jersey membership corporation, )  
et al., )  
)  
Plaintiffs, )  
v. )  
)  
DONALD H. RUMSFELD, in his capacity )  
as U.S. Secretary of Defense, et al. )  
)  
Defendants. )  
-----

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS AND OPPOSITION  
TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

BACKGROUND ..... 4

    A. Military Recruiting and the Solomon Amendment ..... 4

    B. Proceedings ..... 7

ARGUMENT ..... 7

I. STANDARDS ..... 7

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY  
    LIKELIHOOD OF SUCCESS ON THE MERITS ..... 8

    A. Plaintiffs Lack Standing to Maintain this Action ..... 8

        1. Plaintiffs Have Failed To Allege A Cognizable  
           "Injury In Fact ..... 10

        2. Plaintiffs Have Failed To Establish Causation ..... 16

        3. Plaintiffs May Not Assert the Rights  
           of Absent Law Schools ..... 19

    B. The Solomon Amendment Does Not Infringe Upon  
        First Amendment Rights ..... 21

        1. The Solomon Amendment Does Not Transgress the  
           Doctrine of Unconstitutional Conditions ..... 22

        2. The Solomon Amendment Does Not  
           Discriminate on the Basis of Viewpoint, Nor  
           Does it Regulate Speech in any Form. .... 29

3.	The Solomon Amendment Is Not Unconstitutionally Vague .....	31
III.	THE REMAINING EQUITABLE FACTORS WEIGH AGAINST ENTRY OF A PRELIMINARY INJUNCTION .....	35
A.	Irreparable Injury .....	35
B.	Balance of Hardships .....	37
C.	Public Interest .....	37
	CONCLUSION .....	40

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Allegheny Energy, Inc. v. DQE, Inc.</u> , 171 F.3 153 (3d Cir. 1999) .....	7
<u>Allen v. Wright</u> , 468 U.S. 737 (1984) .....	14
<u>Alliance of Lesbian, Gay, Bisexual, Transgendered &amp; Straight Students v. Cohen</u> , No. 1:99-CV-34 (D. Vt. Nov. 10, 1999) .....	15-16
<u>American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.</u> , 84 F.3d 1471 (3d Cir.1996) .....	7
<u>Asarco, Inc. v. Kadish</u> , 490 U.S. 605 (1989) .....	14
<u>Beal v. Stern</u> , 184 F.3d 117 (2d Cir. 1999) .....	35-36
<u>Bender v. Williamsport Area School Dist.</u> , 475 U.S. 534 (1986) .....	8
<u>Blodgett v. Holden</u> , 275 U.S. 142 (1927) .....	9
<u>Board of County Comm'rs v. Umbehr</u> , 518 U.S. 668 (1996) .....	23
<u>Bob Jones Univ. v. United States</u> , 461 U.S. 574 (1983) .....	25

<u>Bowen v. Kendrick</u> , 483 U.S. 1304 (1987) .....	37
<u>Boy Scouts of America v. Dale</u> , 530 U.S. 640 (2000) .....	26 n.9
<u>Boyce Motor Lines v. United States</u> , 342 U.S. 337 (1952) .....	32, 34
<u>Bradley v. Pittsburgh Bd. of Educ.</u> , 910 F.2d 1172 (3d Cir. 1990) .....	8, 35
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973) .....	21 n.8
<u>Citibank, N.A. v. Citytrust</u> , 756 F.2d 273 (2d Cir. 1985) .....	36
<u>City of Detroit v. Franklin</u> , 4 F.3d 1367 (6th Cir. 1993), <i>cert. denied</i> , 510 U.S. 1176 (1994) .....	18
<u>City of Los Angeles v. Lyons</u> , 461 U.S. 95 (1983) .....	10
<u>Colautti v. Franklin</u> , 439 U.S. 379 (1979) .....	32
<u>Costello v. McEnery</u> , 767 F. Supp. 72 (S.D.N.Y.), <i>aff'd</i> , 948 F.2d 1278 (2d Cir. 1991), <i>cert. denied</i> , 504 U.S. 980 (1992) .....	36
<u>DeBolt v. Espy</u> , 47 F.3d 777 (6th Cir. 1995) .....	18
<u>FW/PBS, Inc. v. Dallas</u> , 493 U.S. 215 (1990) .....	21 n.8

Foster v. Center Township of LaPorte County,  
798 F.2d 237 (7th Cir. 1986)) ..... 15

Gillette v. United States,  
401 U.S. 437 (1971) ..... 30

Harris v. McRae,  
448 U.S. 297 (1980) ..... 28

Heart of Atlanta Motel, Inc. v. United States,  
85 S. Ct. 1 (1964) ..... 37

Hohe v. Casey,  
868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) ..... 8, 35

Humane Soc'y of the United States v. Babbitt,  
46 F.3d 93 (D.C. Cir. 1995) ..... 14

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,  
515 U.S. 557 (1995) ..... 25-26

In Re Arthur Treacher's Franchisee Litig.,  
689 F.2d 1137 (3d Cir.1982) ..... 35

Kolender v. Lawson,  
461 U.S. 352 (1983) ..... 32, 33

Lee v. Board of Governors of the Fed. Reserve Sys.,  
118 F.3d 905 (2d Cir. 1997) ..... 18

Legal Services Corp. v. Velazquez,  
531 U.S. 533 (2001) ..... 28, 29

Lujan v. Defenders of Wildlife,  
504 U.S. 555 (1992) ..... 8, 10, 16, 18

<u>Morton v. Beyer</u> , 822 F.2d 364 (3d Cir.1987) .....	35
<u>Nat'l Endowment for the Arts v. Finley</u> , 524 U.S. 569 (1998) .....	21 n.8
<u>O'Brien v. Massachusetts Bay Transp. Auth.</u> , 162 F.3d 40 (1st Cir. 1998) .....	17
<u>O'Shea v. Littleton</u> , 414 U.S. 488 (1974) .....	10
<u>Papachristou v. City of Jacksonville</u> , 405 U.S. 156 (1972) .....	32
<u>Perry v. Sinderman</u> , 408 U.S. 593 (1972) .....	23
<u>Powers v. Ohio</u> , 499 U.S. 400 (1991) .....	20
<u>Raines v. Byrd</u> , 521 U.S. 811 (1997) .....	9, 10
<u>Regan v. Taxation Without Representation</u> , 461 U.S. 540 (1983) .....	28
<u>Renne v. Geary</u> , 501 U.S. 312 (1991) .....	10
<u>Rust v. Sullivan</u> , 500 U.S. 173 (1991) .....	23, 24, 27, 28
<u>Simon v. Eastern Ky. Welfare Rights Org.</u> , 426 U.S. 26 (1976) .....	16

<u>Singleton v. Wulff</u> , 428 U.S. 106 (1976) .....	19
<u>South Dakota v. Dole</u> , 483 U.S. 203 (1987) .....	27
<u>Steel Co. v. Citizens for a Better Environment</u> , 523 U.S. 83 (1998) .....	8, 9
<u>Steward Machine Co. v. Davis</u> , 301 U.S. 548 (1937) .....	28
<u>Tough Traveler, Ltd. v. Outbound Products</u> , 60 F.3d 964 (2d Cir. 1995) .....	36
<u>Turner Broadcasting Sys. v. FCC</u> , 507 U.S. 1301 (1993) .....	37
<u>US Ecology, Inc. v. U.S. Dept. of Interior</u> , 231 F.3d 20 (D.C. Cir. 2000) .....	9
<u>United States v. AVX Corp.</u> , 962 F.2d 108 (1st Cir. 1992) .....	12
<u>United States v. American Library Ass'n</u> , 123 S. Ct. 2297 (2003) .....	27, 28, 29
<u>United States v. Butler</u> , 297 U.S. 1 (1936) .....	27
<u>United States v. City of Philadelphia</u> , 798 F.2d 81 (3d Cir. 1986) .....	38
<u>United States v. Clinical Leasing Service, Inc.</u> , 925 F.2d 120 (5th Cir.), <i>cert. denied</i> , 502 U.S. 864 (1991) .....	34

<u>United States v. Oakland Cannabis Buyers' Cooperative</u> , 532 U.S. 483 (2001) .....	39
<u>United States v. Petrillo</u> , 332 U.S. 1 (1947) .....	32
<u>United States v. Salerno</u> , 81 U.S. 739 (1987) .....	21 n.8
<u>Valley Forge Christian College v. Americans United for Separation of Church &amp; State, Inc.</u> , 454 U.S. 464 (1982) .....	14, 16
<u>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</u> , 455 U.S. 489 (1982) .....	32, 33
<u>Virginian Ry. Co. v. System Federation No. 40</u> , 300 U.S. 515 (1937) .....	38, 39
<u>Voigt v. Savell</u> , 70 F.3d 1552 (9th Cir. 1995) .....	20
<u>Walters v. National Ass'n of Radiation Survivors</u> , 468 U.S. 1323 (1984) .....	37
<u>Warth v. Seldin</u> , 422 U.S. 490 (1975) .....	10, 19
<u>Whitmore v. Arkansas</u> , 495 U.S. 149 (1990) .....	9

## **CONSTITUTIONAL PROVISIONS**

U.S. Const. art. I, § 8 .....	<i>passim</i>
U.S. Const. art. III, § 2 .....	8
U.S. Const. amend 1 .....	<i>passim</i>

**STATUTES**

10 U.S.C. § 503(a) ..... 4, 38  
10 U.S.C. § 983(b) ..... *passim*  
10 U.S.C. § 983(c)(2) ..... 30  
50 U.S.C. App. § 456(j) ..... 30

Armed Forces Appropriation Authorization Act of 1973,  
Pub. L. No. 92-436, § 606, 86 Stat. 734 (1972) .....

National Aeronautics and Space Administration Authorization  
Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280 (1968) .....

**CONGRESSIONAL MATERIALS**

S. Rep. 104-112, 104th Cong., 1st Sess. 1995 (1995) ..... 4  
H.R. Rep. No. 1149, 92d Cong., 2d Sess. 79 (1972) ..... 4  
141 Cong. Rec. E13-01 (Jan. 4, 1995) ..... 4, 5  
141 Cong. Rec. H59367, 5962-H5965 (June 15, 1995) ..... 5

**REGULATIONS AND REGULATORY MATERIALS**

32 C.F.R. § 216.4(b)-(c) ..... *passim*  
63 Fed. Reg. 56,821 (Oct. 23, 1998) ..... 5-6, 11

## PRELIMINARY STATEMENT

Nearly one decade after Congress passed what is commonly known as the Solomon Amendment, 10 U.S.C. § 983(b), which prohibits certain federal agencies from providing federal funds to institutions of higher education that prevent, or effectively prevent, the military from recruiting on their campuses, plaintiffs seek a preliminary injunction to enjoin operation of the statute. Plaintiffs, who consist of an organization that allegedly consists of academic institutions or the faculties of academic institutions, an association of law school faculty members, two law student organizations, and three individual law students, contend that the Solomon Amendment violates the First Amendment rights of law schools because it imposes unconstitutional conditions upon those schools, because it is a viewpoint-based restriction upon speech, and because it is unconstitutionally vague.

Plaintiffs' complaint should be dismissed, and their motion for a preliminary injunction denied. *None* of the plaintiffs have standing to maintain this action. The Solomon Amendment does not apply to organizations, associations, law school faculties, or law school students; it applies to law *schools* and other institutions of higher education, none of whom are parties to this action. Plaintiffs therefore have failed to establish that they have suffered a constitutionally meaningful injury-in-fact, or that the harms of which they complain are fairly traceable to the statute. Nor, as a prudential matter, may plaintiffs bring suit on behalf of absent, non-party law schools.

Even were the Court to entertain the merits of plaintiffs' suit, their request for a preliminary injunction should be denied. Plaintiffs have failed to establish any likelihood of success on the merits of their claim that the Solomon Amendment infringes upon constitutionally protected First Amendment freedoms. *First*, the doctrine of unconstitutional conditions has no possible application here because the Solomon Amendment imposes conditions only upon law *schools* (and other academic institutions), not upon law school organizations, associations, or students, such as plaintiffs. The Solomon Amendment is a valid exercise of Congress' Spending Clause authority, and those conditions have nothing to do with speech. They are merely a prohibition on discrimination against the military in student recruiting activities, and the statute in no way prohibits plaintiffs (or law schools, law faculty, law school organizations, or law students generally) from speaking out against and even vigorously protesting Congress' policy choices regarding service in the Armed Forces. Plaintiffs' attempt to pigeonhole this dispute into the unconstitutional conditions case law simply misses the point that speech is not at issue in the statute.

*Second*, as a consequence, plaintiffs' contentions that the Solomon Amendment constitutes a viewpoint-based restriction, and is unconstitutionally vague, also are devoid of merit. Because it does not target speech, it does not target speech of particular viewpoint. It merely conditions the receipt of federal funds upon conduct;

namely, the allowance of military recruiters on campuses by institutions of higher learning. Nor is there any merit to plaintiffs' contention that the Solomon Amendment is unconstitutionally vague; the statute more than provides sufficient notice of what conduct is prohibited for persons of ordinary intelligence to know what the law commands, and this conclusion is bolstered by the fact that officials of the Department of Defense ("DoD") and military recruiters have expressly informed schools when their conduct might run afoul of the statute's requirements.

Nor can plaintiffs establish that the balance of harms favors them in this case. Indeed, the fact that they have waited nearly ten years after enactment of the Solomon Amendment to bring this suit itself undermines any putative claim of irreparable injury that plaintiffs may claim. In any event, the government's interest in effective military recruiting -- especially during times, as these, where our military is engaged on numerous fronts in the war on terrorism -- easily outweighs any such claim.

Accordingly, because plaintiffs have failed to establish that they have standing to bring this lawsuit, because they have failed to establish any likelihood of success on the merits, and because the remaining equitable factors weigh strongly against entry of the requested injunction, plaintiffs' complaint should be dismissed and their motion for a preliminary injunction should be denied.

## BACKGROUND

### A. Military Recruiting and the Solomon Amendment

The Constitution authorizes Congress "[t]o raise and support armies \* \* \*." U.S. Const. art. I, § 8. Congress has long recognized the importance of the military's ability to recruit in order to maintain the United States' Armed Forces. See, e.g., 10 U.S.C. § 503(a) (directing respective branches of the military to "conduct intensive recruiting campaigns to obtain enlistments"). Since the Vietnam War, however, Congress has confronted "disaffection" with regard to the military among some students and faculty at institutions of higher learning that impairs the ability of the military to recruit. See generally H.R. Rep. No. 1149, 92d Cong., 2d Sess. 79 (1972). Periodic reductions in military spending have compounded this problem, making the recruitment of "the most highly qualified candidates from around the country \* \* \* even more important." 141 Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995); see also S. Rep. 104-112, 104th Cong., 1st Sess. 1995 (1995) ("Across the nation, military recruiters are facing an increasingly difficult time attracting quality individuals to military service.").

On January 4, 1995, in response to the continued refusal of many institutions to allow the military to recruit on their campuses, Congressman Gerald B.H. Solomon introduced the Military Recruiter Campus Access Act, which sought to prohibit certain

federal agencies from providing federal funds to institutions of higher education that prevent, or effectively prevent, the military from recruiting on their campuses. See 141 Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995). The stated purpose of the proposed legislation was to further discourage educational institutions from closing their campuses to military recruitment and thereby "interfering with the Federal Government's constitutionally mandated function of raising a military." Id.

Congress considered Congressman Solomon's proposed legislation and, after vigorous debate, passed it as an amendment to the Omnibus Consolidated Appropriations Act of 1997. See 141 Cong. Rec. H5937, H5962-H5965 (June 15, 1995). The statute currently provides, in relevant part:

**(b) Denial of funds for preventing military recruiting on campus.–**

No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents–

(1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

10 U.S.C. § 983(b).<sup>1</sup>

In January 1998, the Department of Education issued a "Dear Colleague Letter" clarifying the effect of the Solomon Amendment on programs of student financial assistance under Title IV of the Higher Education Act of 1965, as amended. See 63 Fed. Reg. 56,821 (Oct. 23, 1998). The Department of Education explained that the Solomon Amendment applied only to so-called "campus based" student aid programs by which the educational institution, rather than the student, applies for and is awarded federal funds. The three such programs that are affected by the Solomon Amendment are the Federal Perkins Loan program, the Federal Work-Study program and the Federal Supplemental Educational Opportunity Grant program. Id. In contrast, direct student aid programs (by which funds are made directly to students with the educational institution acting as the disbursing agent) are not affected by the Solomon Amendment. Id. Examples of such direct student aid programs are the Federal Pell Grant program, the Federal Family Education Loan program and the Federal Direct

---

<sup>1</sup> On October 23, 1998, the Department of Defense promulgated regulations implementing the Solomon Amendment (among other Acts). See 32 C.F.R. 216.4.

Student Loan program. Id.

**B. Proceedings**

Plaintiffs filed this suit on September 19, 2003, seeking a temporary restraining order and preliminary and permanent injunctive relief to enjoin operation of the Solomon Amendment. This Court denied plaintiffs' request for a temporary restraining order on the same date.

**ARGUMENT**

**I. STANDARDS**

A district court's decision whether to issue a preliminary injunction is governed by four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. See, e.g., Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999); American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir.1996) (en banc ). A district court should endeavor to "balance[] these factors to determine if an injunction should issue." American Civil Liberties Union of New Jersey, 84 F.3d at 1477 n.2. Nonetheless, at an irreducible minimum, a movant "must show both a likelihood of success on the

merits and a probability of irreparable harm" to be entitled to preliminary injunctive relief. Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1175 (3d Cir. 1990) (citing Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989)).

## **II.. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON THE MERITS**

### **A. Plaintiffs Lack Standing to Maintain this Action**

Article III, § 2, of the Constitution "extends the 'judicial power' of the United States only to 'Cases' and 'Controversies.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998). The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), and "the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co., 523 U.S. at 104. At the pleadings stage, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Renne v. Geary, 501 U.S. 312, 315 (1991) (quoting Bender v. Williamsport Area School Dist., 475 U.S. 534, 546 n.8 (1986)). The Supreme Court also has emphasized that the "standing inquiry has been especially rigorous when reaching the merits of a dispute would force us to decide whether an action taken by a one of the other two branches of the Federal Government was

unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-820 (1997). This is because adjudicating the constitutionality of an Act of Congress is, in Justice Holmes' famous words, "the gravest and most delicate duty that this Court is called upon to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

Three requirements must be met to satisfy the "irreducible constitutional minimum of standing." Steel Co., 523 U.S. at 102. "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' -- a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" Id. at 103 (quoting in part Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). "Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. \* \* \* And third, there must be redressability -- a likelihood that the requested relief will redress the alleged injury." Id. "This triad \* \* \* constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence," id. at 103-04, and "a deficiency on any one of the three prongs suffices to defeat standing." US Ecology, Inc. v. U.S. Dept. of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000).

The standing doctrine also contains certain prudential requirements. One of these is the requirement that "the plaintiff generally must assert his own legal rights and

interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975).

As we now demonstrate, plaintiffs cannot sustain their burden of establishing either the constitutional or prudential elements of standing.

1. Plaintiffs Have Failed To Allege A Cognizable "Injury In Fact"

To qualify as an injury in fact, an "alleged injury must be legally and judicially cognizable." Raines, 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is \* \* \* concrete and particularized.'" Id. at 818 (quoting Lujan, 504 U.S. at 560). The injury or threat must be "both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted).

Plaintiffs' alleged "injuries" fail to satisfy these requirements. Plaintiffs allege that, by virtue of enforcement of the Solomon Amendment, their "constitutional rights to express dissent and to be free from compelled endorsement of messages repugnant to them \* \* \* have been, and continue to be, irreparably harmed." Complaint ¶ 50. But the Solomon Amendment has never been applied to any of the plaintiff organizations or individuals, and plaintiffs do not allege that they or any of their members have been denied any federal aid as a result of the Solomon Amendment.

Indeed, the Solomon Amendment, by its plain terms, does not apply to organizations, law faculties, or law students; it applies only to "institution[s] of higher learning." 10 U.S.C. § 983(b).

Thus, for example, the Solomon Amendment does not affect financial assistance that the Department of Education distributes to individual students, such as the Pell Grant program and the Family Education Loan program. Rather, the Solomon Amendment concerns only those "campus based" grants that are distributed to the institutions themselves; namely, the Perkins Loan program, the Work-Study program and the Supplemental Educational Opportunity Grant program. See 63 Fed. Reg. 56,821 (Oct. 23, 1998). Hence, any threatened injury from the Solomon Amendment -- assuming *arguendo* that such an injury would suffice for standing -- would be to the law schools themselves rather than to the members of the plaintiff organizations or the individual plaintiffs.

To be sure, plaintiff Forum for Academic & Institutional Rights, Inc. ("FAIR"), which only was incorporated in August 2003, purports to reserve membership to "academic institutions or the faculties of academic institutions if they choose by majority vote to join as a group," and the members of FAIR allegedly include "law schools and the faculties of certain law schools that have joined as a group." Declaration of Harold K. Greenfield ¶¶ 1-3. But the identities of none of these alleged

members are revealed. To the contrary, plaintiff FAIR straightforwardly asserts that it will *not* reveal the identities of its members, alleging that "one of the foundational promises that FAIR makes to members and prospective members is that its membership list will be kept secret." Id. ¶ 7.

This is insufficient to establish associational standing. The law is clear that "[g]auzy generalities of this sort, unsubstantiated by any sort of factual foundation, cannot survive a motion to dismiss." United States v. AVX Corp., 962 F.2d 108, 117 (1st Cir. 1992). In that case, the First Circuit held that an environmental organization's assertions of environmental injury were insufficiently specific to sustain a claim of associational standing because the organization had asserted "only the most nebulous allegations regarding its members' identities and their connection to the relevant geographic area." Id. In particular, the First Circuit reasoned that the organization's averment of environmental harm:

[H]as no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. In short, the asserted injury is not anchored in any relevant particulars. The intervenor's papers do not contain an averment, much less a particularized showing, of the type of "concrete injury" that we have said is needed to confer standing in an environmental suit. A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested.

Id. (internal citation omitted). The First Circuit's analysis in AVX Corp applies with

equal force in this case, given FAIR's abject refusal to identify any of its "members."

Plaintiffs' allegation (Complaint ¶ 50) that their "constitutional rights to express dissent and to be free from compelled endorsement of messages repugnant to them," fares no better. The Solomon Amendment does not bar any plaintiff from expressing their disagreement and, indeed, even contempt for that statute and Congress' policy regarding homosexual conduct in the Armed Forces. Far from a compelled endorsement of a particular viewpoint, the Solomon Amendment involves no endorsement at all. This is evidenced by the very declarations submitted by the plaintiffs, which are replete with examples in which members of the various law school communities have been free to express their disapproval of Congress' policy, whether through formal "ameliorative" actions,<sup>2</sup> protests,<sup>3</sup> faculty resolutions voicing

---

<sup>2</sup> Declaration of Susan Appleton and Karen Tokarz (Washington University School of Law) ¶ 18 & Exhibit 9; Declaration of Sylvia A. Law (New York University School of Law) ¶ 22

<sup>3</sup> See Appleton and Tokarz Decl. ¶¶ 19-23, 25 & Exhibit 10; Declaration of Heather Gerken (Harvard Law School) ¶¶ 24-28 & Exhibits 5-7; Law Decl. ¶¶ 20, 35; Declaration of Thomas Maligno (Touro College of Law) ¶ 5 & Exhibit 4; Declaration of Alan D. Minuskin (Boston College Law School) ¶ 40; Declaration of Louis Michael Seidman (Georgetown University Law Center) ¶¶ 21-23.

disapproval,<sup>4</sup> and/or student bar association resolutions voicing disapproval.<sup>5</sup> The Solomon Amendment does not inhibit the exercise of any of these First Amendment rights.

Nor does plaintiffs' allegation that they find the government's message "repugnant" serve to establish a cognizable injury-in-fact. The Supreme Court has flatly rejected the argument that a stigmatic or dignitary injury allegedly caused by government action can, without some concrete personal harm, constitute an injury sufficient to confer standing. See, e.g., Allen v. Wright, 468 U.S. 737, 753-56 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). As the Court explained in Valley Forge, "psychological consequence presumably produced by observation of [government] conduct with which one disagrees" is not a personal injury for purposes of standing. 454 U.S. at 471. Both the Supreme Court and lower federal courts have adhered to this principle. See, e.g., Asarco, Inc. v. Kadish, 490 U.S. 605, 616 (1989) (teachers association members' "special interest in the quality of education" alone cannot confer standing); Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 98 (D.C. Cir.

---

<sup>4</sup> Appleton and Tokarz Decl ¶ 14 & Exhibit 6; Law Decl. ¶ 23 & Exhibit 9; Maligno Decl. Exhibit 4; Minuskin Decl. ¶ 22; Seidman Decl. ¶ 12 & Exhibit 5.

<sup>5</sup> Appleton and Tokarz Decl. ¶ 16 & Exhibit 8; Law Decl. ¶ 22.

1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes."); Foster v. Center Township of LaPorte County, 798 F.2d 237, 244 (7th Cir. 1986) ("To be made indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit." (internal quotation omitted)).

Indeed, the only court to have considered a similar challenge to the Solomon Amendment recommended dismissal of that action for lack of standing. In Alliance of Lesbian, Gay, Bisexual, Transgendered & Straight Students v. Cohen, No. 1:99-CV-34 (D. Vt. Nov. 10, 1999) (attached hereto as Exhibit 1), three student groups from the Vermont Law School brought suit against the Secretary of Defense, DoD, and the United States, alleging (as plaintiffs do in this case) that defendants had "coerced" Vermont Law School into allowing military recruiters on campus through enforcement of the Solomon Amendment. United States Magistrate Judge Jerome J. Niedermeier recommended that that case be dismissed, finding that none of the plaintiffs had identified "any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." Id. slip op. at 9 (quoting Valley Forge, 454 U.S. at 485). Magistrate Judge Niedermeier therefore ruled that the plaintiffs' allegation of stigmatic injury could not support Article III standing.

Id.<sup>6</sup>

Similarly here, because the injuries alleged by plaintiffs are insufficiently "concrete and particularized" to constitute a judicially cognizable injury-in-fact, plaintiffs -- no matter how deep or sincere their offense at Congress' military policies -- lack standing to challenge the Solomon Amendment. See, e.g., Valley Forge, 454 U.S. at 486 (holding that the "intensity of the litigant's interest or the fervor of his advocacy" cannot overcome lack of personal injury).

## 2. Plaintiffs Have Failed To Establish Causation

Even if plaintiffs could be said to have satisfied their burden to clearly allege facts establishing that they have personally suffered an injury-in-fact, plaintiffs nevertheless fail to satisfy the "causation" requirement of standing because they cannot show that their alleged injuries are "fairly traceable to the challenged action of the *defendant*, and not the result of the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (emphasis supplied, quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

Under the clear terms of the Solomon Amendment, academic institutions are

---

<sup>6</sup> The plaintiffs in Alliance of Lesbian, Gay, Bisexual, Transgendered & Straight Students voluntarily dismissed their suit following Magistrate Judge Niedermeier's Report and Recommendation.

free to choose whether to permit the military to recruit on their campuses. If, however, an institution chooses to deny the military access to its campus, that institution (as opposed to its students or faculty) must forego federal funding from specified programs. Recipients of federal aid in conditional funding arrangements such as the Solomon Amendment are thus given "a choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid the necessity of abiding by those requirements)." O'Brien v. Massachusetts Bay Transp. Auth., 162 F.3d 40, 43 (1st Cir. 1998).

Had the law schools that are represented in plaintiffs' declarations elected to maintain their policies of prohibiting the military from recruiting on their respective campus, none of plaintiffs' alleged injuries would have come to pass: those campuses would have remained impervious to the military's recruiting efforts. Instead, each of the law schools chose to accept the federal money -- and its accompanying conditions<sup>7</sup> -- thereby creating the allegedly "hostile" environment of which plaintiffs

---

<sup>7</sup> See Appleton and Tokarz Decl. ¶¶ 12-13, 17, 24, 27 & Exhibit 4, 5 ; Declaration of Erwin Chemerinsky (USC School of Law) ¶¶ 26-27 & Exhibit 6; Declaration of William N. Eskridge, Jr. (Yale Law School) ¶ 57; Gerken Decl. ¶¶ 18, 30 & Exhibit 4; Law Decl. ¶¶ 19-20, 34-35 & Exhibits 8, 12; Maligno Decl. ¶¶ 10, 12; Declaration of Richard A. Matasar (New York Law School) ¶¶ 22-23 & Exhibit 10; Minuskin Decl. ¶¶ 18, 35, 39, 41 & Exhibit 4; Declaration of James S. Rogers (Boston College Law School) ¶¶ 16, 28; Seidman Decl. ¶¶ 17, 26 & Exhibit 6.

now complain. See Declaration of Sara Smolik ¶ 7 (stating that she felt "betrayed last September when the Law School faculty voted to suspend the Non-Discrimination Policy and allow military recruiters to interview students on campus," and that she was "shocked by how quickly and easily the faculty acquiesced. \* \* \* It was heartbreaking."); Declaration of Robert Sweeney ¶¶ 9-10 (stating that he "became profoundly disappointed with the way the Law School proceeded to handle the issue of military recruiting," and that "[t]he Law School's welcoming reception for the military, combined with its token and inadequate ameliorative efforts, sent a painful message to me").

The law schools' decisions, therefore, were "independent act[s] breaking the chain of causation between the challenged actions of [the government] and the injury to the plaintiffs." City of Detroit v. Franklin, 4 F.3d 1367, 1373 (6th Cir. 1993) (plaintiffs lacked standing to challenge federal census data based on injury resulting from state's decision to rely on that data), *cert. denied*, 510 U.S. 1176 (1994). Accord Lee v. Board of Governors of the Fed. Reserve Sys., 118 F.3d 905, 912-13 (2d Cir. 1997) (standing is "substantially more difficult to establish \* \* \* [w]hen a plaintiff's asserted injury arises from the government's allegedly unlawful regulation \* \* \* of someone else \* \* \*." (quoting Lujan, 504 U.S. at 562)); DeBolt v. Espy, 47 F.3d 777, 781-82 (6th Cir. 1995) (plaintiff lacked standing to challenge federal housing program

that allegedly encouraged private developers to build unequal housing; developers were more direct cause of alleged injury).

Hence, because plaintiffs' alleged injuries resulted (if at all) directly from the decisions of the law schools to accept the Solomon Amendment's conditions, rather than from the statute itself, plaintiffs also have failed to establish causation.

### 3. Plaintiffs May Not Assert the Rights of Absent Law Schools

As set forth above, the doctrine of standing also contains a prudential requirement that a plaintiff cannot rest his or her claim to relief on the legal rights or interests of third parties that are not parties to the litigation. See, e.g., Warth v. Seldin, 422 U.S. at 499. The Supreme Court therefore has held that federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." Singleton v. Wulff, 428 U.S. 106, 113 (1976).

Yet this is *precisely* what plaintiffs seek to do in this action. Despite the fact that not a single law school or other institution of higher learning is a plaintiff in this action, the very first paragraph of plaintiffs' complaint (and the very first sentence of their memorandum) states that "[t]his case is about the freedom of *educational institutions, specifically law schools*, to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government

intrusion." Complaint ¶ 1; Mem. at 1 (emphasis supplied). The interest which plaintiffs purport to vindicate plainly belongs to the law schools themselves, and not to the plaintiffs.

Nor do any of the limited exceptions to the prudential bar on third-party standing apply in this case. In Powers v. Ohio, 499 U.S. 400 (1991), the Supreme Court stated that a litigant seeking to assert the rights of another party must satisfy three interrelated criteria: "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." Id. at 411 (internal quotation marks and citations omitted). Plaintiffs cannot satisfy these criteria. Neither the organizational or individual plaintiffs have established an injury-in-fact, see supra Part II.A.1., and plaintiffs have failed to offer any evidence establishing that the law schools whom they seek to represent are unable to protect their own interests. The limited exception to the prudential bar against third-party standing therefore has no application in this case. See, e.g., Voigt v. Savell, 70 F.3d 1552, 1564, 1565 (9th Cir. 1995) (plaintiff must meet all three criteria to be entitled to limited exception to bar against third-party standing), *cert. denied*, 517 U.S. 1209 (1996).

\* \* \*

For these reasons, plaintiffs cannot establish any likelihood of success on their constitutional challenge to the Solomon Amendment because they lack standing to bring such a claim. This Court therefore should grant defendants' motion to dismiss for lack of standing.

**B. The Solomon Amendment Does Not Infringe Upon First Amendment Rights**

Even were this Court to determine that plaintiffs have standing to challenge the Solomon Amendment, none of their constitutional challenges to the statute can withstand scrutiny. This case involves a challenge to the facial validity<sup>8</sup> of an Act of Congress designed to ensure that military recruiters are allowed on campuses, and

---

<sup>8</sup> Facial invalidation of an Act of Congress "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). Indeed, the Supreme Court has described a facial challenge as "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Id. at 183 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)); see also FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). In order to prevail on such a challenge, plaintiffs must "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." Finley, 524 U.S. at 580. If the facially-challenged Act "contemplates a number of indisputably constitutional applications," id. at 584, it must be upheld.

which was enacted as an exercise of Congress' authority under the Spending Clause of Article I, § 8, cl. 1. Because the Solomon Amendment's provisions are conditions upon the receipt of federal assistance, and not regulatory restrictions, the Supreme Court's Spending Clause cases provide the appropriate framework for assessing the statute's constitutionality.

As we now demonstrate, the Solomon Amendment does not impose unconstitutional conditions on law schools or other institutions of higher learning, does not constitute improper viewpoint discrimination, and is not unconstitutionally vague.

1. The Solomon Amendment Does Not Transgress the Doctrine of Unconstitutional Conditions

Plaintiffs contend (Mem. at 21) that the Solomon Amendment violates the doctrine of unconstitutional conditions because it "forces law schools to abandon their academic freedom and their speech and associational rights on pain of a university-wide cutoff of all federal funds." Even assuming plaintiffs had standing to press such a claim on behalf of educational institutions, this contention is insubstantial. At bottom, the Solomon Amendment does not impose an unconstitutional condition on any individual's or institution's protected First Amendment rights because it is not conditioned on, or related to, speech.

Under the doctrine of unconstitutional conditions, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech' even if he has no entitlement to that benefit." Board of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)). A condition on federal funding will constitute an unconstitutional condition only if it places a condition on the recipient of a subsidy that "effectively prohibit[s] the recipient from engaging in [constitutionally] protected conduct outside the scope of the federally funded program." Rust v. Sullivan, 500 U.S. 173, 197 (1991).

Plaintiffs cannot satisfy this test for three essential reasons. As an initial matter, plaintiffs are not the recipients of any federal funds, and the Solomon Amendment therefore does not impose any conditions, unconstitutional or otherwise, upon them at all. As the Supreme Court explained in Rust, "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy, \* \* \* effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." 500 U.S. at 197. The unconstitutional conditions doctrine does not apply to non-recipients, such as plaintiffs, upon whom no conditions have been imposed.

The unconstitutional conditions doctrine does not apply to non-recipients, such as plaintiffs, upon whom no conditions have been imposed. Even assuming plaintiffs' claims of unconstitutional conditions were valid, the Solomon Amendment does not require these plaintiffs to make any choice between protected activity and the receipt of federal funds because they are not subject to the funding provision of the Amendment.

Second, plaintiffs' claims of unconstitutional conditions are *not* valid because the provision at issue has nothing to do with the protected conduct, speech, that plaintiffs claim is infringed upon. A condition on federal assistance violates the unconstitutional conditions doctrine only when it "prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." *Id.* (emphasis omitted). Here, the Solomon Amendment does not exceed that limitation because it does not prohibit the recipients from engaging in any protected conduct – they are free to speak as they please. They are only prohibited from discriminating against the military from gaining access to campuses in their recruitment activities.

In this crucial respect, this provision is no different than the numerous other provisions of federal law that prohibit government grants, funds, or other benefits to be given to institutions or organizations that discriminate on the basis of race. For

instance, a university that receives federal funds may not discriminate on the basis of race in programs funded by those funds. But that university, its faculty, or students, could not possibly complain that the funding restriction inhibits their associational rights in violation of the First Amendment. Indeed, courts have repeatedly rejected First Amendment challenges to laws that require non-discrimination in public accommodations. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 602-604 (1983).

Plaintiffs cite (Mem. at 23) Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), for just the opposite proposition -- that a law that requires accommodation *necessarily* interferes with expressive conduct. But that case does not stand for that proposition (nor did it involve Congress' Spending Clause authority). In Hurley, the Court explained that a law requiring access by a particular group to a particular accommodation "do not, as a general matter, violate \* \* \* the First Amendment." Id. at 572. Thus, there, a law that required public accommodations to be open to all races, creeds, sexes, or sexual orientations" did not "on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of public available goods, privileges and services on the proscribed grounds." Id. Hurley only found that statute inapplicable on First Amendment

grounds because the very conduct to which it applied -- a parade -- was inherently expressive. Thus, by applying the statute to the inherently expressive activity, the law had the "peculiar" effect of forcing a group to carry a message. *Id.* at 573-74. Unlike in *Hurley*, this is not a case where the activity addressed by the funding restriction at issue has any expressive character. Plaintiffs cannot seriously claim that requiring universities to open themselves up to military recruiters is remotely similar to requiring particular groups to parade -- a job fair is not an inherently expressive activity in the same way a parade is.<sup>9</sup>

And with respect to these plaintiffs, the non-recipients of funds, it is even more apparent from their own admissions that their ability to speak is not affected by the Solomon Amendment. As set forth above, the declarations submitted by plaintiffs are replete with examples in which members of the various law school communities have been free to express their disapproval of Congress' policy through protests, faculty

---

<sup>9</sup> Nor does *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which likewise did not involve Congress' Spending Clause authority, help plaintiffs' First Amendment claim. There, the application of the state's anti-discrimination law required a private group that engaged in "expressive association" to accept as a member a person with whom it disagreed. *See id.* at 650. Here, however, the provision at issue has no effect whatsoever on the membership of the plaintiff groups. They are not required to accept as a member -- or even interact with -- any member of the military as a result of the Solomon Amendment.

and/or student statements of disapproval, and "ameliorative" actions taken by the law schools. See supra notes 2-5 and accompanying text. The Solomon Amendment does not inhibit the exercise of any of these First Amendment rights. Law schools, law faculties, and law students remain free to engage[] in the protected conduct outside the scope of the federally [assisted] program." Rust, 500 U.S. at 197.

Finally, even assuming the provision somehow prohibited speech, it is well settled that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives." United States v. American Library Ass'n, 123 S. Ct. 2297, 2303 (2003) (plurality opinion) (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)). The reach of the Congress' spending power is broad, and it "is not limited by the direct grants of legislative power found in the Constitution." United States v. Butler, 297 U.S. 1, 66 (1936). Instead, the constitutional limitations on Congress when it exercises its spending power "are less exacting than those on its authority to regulate directly." South Dakota v. Dole, 483 U.S. at 209. Congress therefore is granted greater leeway under its spending power to encourage recipients to abide by its policy choices than it has when it seeks to regulate directly, and the Supreme Court has made clear that putative funding recipients who do not agree with Congress's policy choices when it places conditions on the availability of a federal subsidy may simply decline to accept the subsidy. Id.

at 211 ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans \* \* \* is not unusual. \* \* \* There is only a condition which the state is free at pleasure to disregard or to fulfill." (quoting Steward Machine Co. v. Davis, 301 U.S. 548 (1937))).

Hence, like the Children's Internet Protection Act which the Supreme Court upheld this past term, the Solomon Amendment "does not 'penalize' [law schools] that choose not to [provide access to military recruiters]." Id. at 208. To the extent the law schools wish to continue to prohibit military recruiters from campuses, "they are free to do so without federal assistance." American Library Ass'n, 123 S. Ct. at 2308. This is because ""[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."" Id. (quoting Rust, 500 U.S. at 193, in turn quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)). Rather, as the Court explained, ""[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right."" Id. (quoting Rust, 500 U.S. at 193, in turn quoting Regan v. Taxation Without Representation, 461 U.S. 540, 549 (1983)).

Plaintiffs' reliance (Mem. at 29) on Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), is misplaced. As the Supreme Court explained in American Library Ass'n, the Court in that case concluded "that a Government program of furnishing legal aid to the indigent differed from the program in Rust '[i]n th[e] vital respect that the role

of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control." Id. at 2309 (quoting Velazquez, 531 U.S. at 542-43). Here, in contrast, law schools and other institutions of higher learning, like the public libraries at issue in American Library Ass'n, "have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." Id.

For all these reasons, Plaintiffs have failed to demonstrate any likelihood of success on the merits of their assertion that the Solomon Amendment violates the doctrine against unconstitutional conditions.

2. The Solomon Amendment Does Not Discriminate on the Basis of Viewpoint, Nor Does it Regulate Speech in any Form

Plaintiffs next contend (Mem. at 31-33) that the Solomon Amendment runs afoul of the First Amendment because it discriminates on the basis of viewpoint. But because the Solomon Amendment does not target speech, it also does not target any viewpoint. Instead, it merely conditions the receipt of federal funds upon the institution's non-discrimination against military recruiters on campuses. A law school or institution of higher learning that prohibits or, in effect, prevents military recruiters

from campuses will be disentitled to those funds regardless of the viewpoint that prompted the decision to prohibit such recruiters from campuses.

Plaintiffs assert (Mem. at 35) that the Solomon Amendment is viewpoint-based because it does not apply to an institution that "has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). But this provision merely comports with the longstanding principle, codified by statute, that a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," is not required to engage in military service, 50 U.S.C. App. § 456(j), a provision which the Supreme Court has held does not run afoul of the Establishment Clause. See Gillette v. United States, 401 U.S. 437, 451-60 (1971). The Solomon Amendment no more targets a viewpoint for excluding institutions who have a longstanding policy of pacifism based on historical religious affiliation than does the Military Selective Service Act, which likewise excludes individuals who are conscientiously opposed to participation in war in any form, but provides that such exclusion "does not include essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. App. § 456(j).

Plaintiffs similarly contend (Mem. at 34-35) that the Solomon Amendment is viewpoint-based because an institution which demonstrates that "all employers are similarly excluded from recruiting on the premises of the covered school," 32 C.F.R.

§ 216.4(c)(3), is expressly exempted by the statute. This regulation merely reflects DoD's reasonable construction that an institution which prohibits *all* employers from recruiting on campuses is not one that has a policy or practice that specifically prohibits "the *Secretary of a military department or Secretary of Transportation* from gaining entry to campuses, or access to students." 10 U.S.C. § 983(b)(1) (emphasis supplied).

For these reasons, Plaintiffs have failed to demonstrate any likelihood of success on the merits of their claim that the Solomon Amendment is an unconstitutional viewpoint-based restriction on speech.

### 3. The Solomon Amendment Is Not Unconstitutionally Vague

Finally, plaintiffs contend (Mem. at 35-38) that the Solomon Amendment is unconstitutionally vague "for lack of clear guidelines and for the unbridled discretion exercised by military bureaucrats." Plaintiffs contend that the terms of the statute and implementing regulation are ambiguous, that the consequences of a violation are "opaque," and that persons of ordinary intelligence cannot understand what the law commands. None of these contentions has merit.

The void-for-vagueness doctrine requires that a statute define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

See, e.g., Kolender v. Lawson, 461 U.S. 352, 358 (1983). At the same time, there is no constitutional requirement that a statute define every factual situation that may arise: "[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). In other words, "[t]hat there may be marginal cases in which it is difficult to determine the side on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense." United States v. Petrillo, 332 U.S. 1, 7 (1947).

The Supreme Court therefore has cautioned that courts should not apply the vagueness standard mechanically, for "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). For example, greater leeway is allowed when statutes are regulatory (as opposed to criminal) in nature. See, e.g., Colautti v. Franklin, 439 U.S. 379, 390-91 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). This is because "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant

legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of a regulation by its own inquiry, or by resort to the administrative process." Hoffman Estates, 455 U.S. at 498 (internal footnote omitted).

Judged by these standards, the Solomon Amendment easily passes constitutional muster. The condition imposed by the Solomon Amendment in exchange for funding is clear and unambiguous: If a school (or any subelement thereof) prohibits or effectively prevents the military from recruiting on its campus, it (as opposed to its faculty or students) is not entitled to campus-based funding from the Department of Education and other specified agencies. See 10 U.S.C. § 983(b). The implementing regulations further clarify the scope of the Solomon Amendment's requirements, and specify certain circumstances which may (or may not) result in a funding denial. See 32 C.F.R. §§ 216.4(a), (c)(1)-(6). Finally, both the statute and implementing regulations provide that there will be a centralized decisionmaker -- the Secretary of Defense -- in order to ensure uniformity in application. See 10 U.S.C. § 983(b); 32 C.F.R. § 216.4(c).

These standards more than satisfy the constitutional requirement that the legislature "establish minimal guidelines to govern law enforcement," Kolender, 461 U.S. at 358. To be sure, the factual circumstances which would justify a denial of funding may vary based on the particular practices engaged in by individual schools.

But, once again, that is no warrant to hold the statute unconstitutional, for "the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." Boyce Motor Lines, 342 U.S. at 340.

The conclusion that the Solomon Amendment satisfies vagueness analysis is further underscored by the fact that DoD officials and military recruiters have engaged in repeated correspondence and discussions with officials at the various law schools, and informed those officials what actions or steps would (or would not) comply with the Solomon Amendment.<sup>10</sup> While the plaintiffs are no doubt unhappy with the results of those communications, it is well-settled that "the degree of notice to the complainant that his conduct was proscribed" is a persuasive factor bearing on vagueness analysis, for "[c]ourts are ill disposed to entertain the vagueness challenge of a party who had ample warnings that his actions violated statutory requirements." United States v. Clinical Leasing Service, Inc., 925 F.2d 120, 122-23 (5th Cir.), *cert. denied*, 502 U.S. 864 (1991).

---

<sup>10</sup> See Chemerinsky Decl. ¶¶ 20-23 & Exhibit 6; Eskridge Decl. ¶¶ 35-41, 47, 49, 52, 55 & Exhibits 5-10, 12, 14, 16, 18; Gerken Decl. ¶ 15 & Exhibit 4; Law Decl. ¶ 32; Maligno Decl. ¶¶ 7, 9 & Exhibits 1, 3; Matasar Decl. ¶¶ 19-20 & Exhibits 7, 9; Minuskin Decl. ¶¶ 17, 29-30, 32.

For all these reasons, plaintiffs have failed to demonstrate any likelihood of success on the merits of their vagueness challenge to the Solomon Amendment.

### **III. THE REMAINING EQUITABLE FACTORS WEIGH AGAINST ENTRY OF A PRELIMINARY INJUNCTION**

Because plaintiffs have failed to demonstrate any chance of success on the merits, which a moving party "must show" to be entitled to preliminary injunctive relief, see Bradley, 910 F.2d at 1175; Hohe, 868 F.2d at 72, this Court need not consider the remaining equitable factors. This is because "a failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction." Morton v. Beyer, 822 F.2d 364, 371 (3d Cir.1987) (citing In Re Arthur Treacher's Franchisee Litig., 689 F.2d 1137, 1143 (3d Cir.1982)).

Even were this Court to entertain these factors, it would not alter the conclusion that plaintiffs' motion for a preliminary injunction should be denied.

#### **A. Irreparable Injury**

Plaintiffs contend (Mem. at 38) that the mere assertion of a First Amendment violation, standing alone, is sufficient to demonstrate irreparable injury. That is incorrect. In cases in which a moving party's constitutional claim dovetails with the presumption of irreparable injury, "the presence of irreparable injury turns on whether the plaintiff has shown a clear likelihood of success on the merits." Beal v. Stern, 184

F.3d 117, 123-24 (2d Cir. 1999). Here, because plaintiffs have failed to show any possibility of success on the merits of their constitutional challenges to the Solomon Amendment, their claim of irreparable injury must fail as well.

Furthermore, it bears emphasis that this action was filed on September 19, 2003, nearly *one decade* after the Solomon Amendment's enactment. This unprecedented delay counsels strongly against any possible finding of irreparable injury. *See, e.g., Costello v. McEnery*, 767 F. Supp. 72, 78 (S.D.N.Y.) (holding that one-year delay in seeking injunctive relief "bolsters the Court's conclusion that there has been an insufficient showing of irreparable harm to justify the issuance of a preliminary injunction," in case involving alleged infringement on First Amendment rights), *aff'd*, 948 F.2d 1278 (2d Cir. 1991) (Mem.), *cert. denied*, 504 U.S. 980 (1992); *cf. Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 968 (2d Cir. 1995) (holding that nine-month delay in bringing Lanham Act injunction action negated the presumption of irreparable harm arising in such cases). As the Second Circuit has explained, the "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985) (internal quotes omitted).

## **B. Balance of Hardships**

The balance of hardships also weighs strongly against entry of plaintiffs' proposed injunction. "[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." Heart of Atlanta Motel, Inc. v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice). An Act of Congress is "presumptively constitutional," and this "presumption of constitutionality \* \* \* [is] an equity to be considered in favor of [the government] in balancing hardships." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice). Therefore, the challenged statute should "remain in effect pending a final decision on the merits by this Court." Turner Broadcasting Sys. v. FCC, 507 U.S. 1301, 1301 (1993) (Rehnquist, Circuit Justice) (internal quotation omitted). Accord Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, Circuit Justice).

## **C. Public Interest**

Finally, consideration of the public interest also weighs against entry of plaintiffs' proposed injunction. Congress has imposed on the military an affirmative obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the

Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 503(a). And, as the Third Circuit has explained, “Congress considers access to college and university employment facilities by military recruiters to be a matter of *paramount importance*. In other words, Congress views such access an integral part of the military’s effort to conduct ‘intensive recruiting campaigns to obtain enlistments.’” United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986) (emphasis supplied, quoting § 503(a)). This need is all the more compelling today, where our military is engaged on numerous fronts in the global war on terrorism. The Solomon Amendment furthers these interests by conditioning campus-based funding on the allowance of military recruiters on campuses.

These considerations counsel strongly against entry of the plaintiffs' proposed injunction. The Supreme Court has held that, in considering the public interest, courts must defer to Congress’ considered judgment when that judgment is clearly reflected in enacted legislation. The leading case is Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937), in which the Supreme Court stated that, “[i]n considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress” which is “deliberately expressed in legislation,” because “[t]he fact that Congress has indicated its purpose [in a statute] *is in itself a declaration of the public interest and policy which should be persuasive in inducing the courts to give relief.*”

Id. at 551, 552 (emphasis supplied).

The Supreme Court reaffirmed this venerable principle in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001), holding that, while a district court has discretion in determining whether to enter (or modify) a request for injunctive relief, that discretion "does not suggest that the District Court \* \* \* could consider any and all factors that might relate to the public interest or the conveniences of the parties \* \* \*. On the contrary, a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" 532 U.S. at 497 (quoting Virginian Ry. Co., 300 U.S. at 551. Rather, where as here, "the full play of the democratic process involving both the legislative and executive branches has produced a policy in the name of the public interests embodied in a statute and implementing regulation," it would be inappropriate for a court "to substitute its own determination of the public interest for that arrived at by the political branches, whether or not there may be doubt regarding the wisdom of their conclusion." Able v. United States, 44 F.3d 128, 131-32 (2d Cir. 1995) (per curiam).

## CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed, and plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

CHRISTOPHER J. CHRISTIE  
United States Attorney

VINCENT M. GARVEY  
Deputy Branch Director

MICHAEL A. CHAGARES (MC5483)  
Chief, Civil Division  
Assistant United States Attorney



MARK T. QUINLIVAN (MQ9087)  
Senior Trial Counsel  
U.S. Department of Justice  
20 Massachusetts Ave., N.W.; Room 7128  
Washington, D.C. 20530  
Telephone: 202-514-3346

Attorneys for Defendants

Dated: September 26, 2003

## CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on the 26th day of September 2003, I caused to be served a copy of the foregoing *Memorandum of Law in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction*, by overnight delivery, upon the following counsel of record:

Andrew Dwyer  
Dwyer & Dunnigan, L.L.C.  
17 Academy Street, Suite 1010  
Newark, NJ 07102

E. Joshua Rosenkranz  
Timothy P. Wei  
Sharon E. Frase  
Heller Ehrman White & McAuliffe LLP  
120 West 45th Street  
New York, NY 10036

Warrington S. Parker, III  
Aaron M. Armstrong  
Heller Ehrman White & McAuliffe LLP  
333 Bush Street  
San Francisco, CA 94104-2878

  
\_\_\_\_\_  
MARK T. QUINLIVAN

# **EXHIBIT 1**



unconstitutional. (Paper 4). Based on the following reasons, I recommend the Motion to Dismiss be GRANTED because Plaintiffs lack standing.

### BACKGROUND

The following facts, asserted in Plaintiffs' complaint, are taken as true for the purposes of the pending motion.

The legislation which underlies this dispute is the Solomon-Pombo Amendment (the "SPA").<sup>1</sup> The SPA prohibits certain federal agencies from providing federal funds to institutions of higher education which have policies which prevent the military from recruiting on their campuses. Three programs which are affected by the SPA are the Federal Perkins Loan program, the Federal Work-Study program, and the Federal Supplemental Educational Opportunity Grant program. These are "campus-based" student aid programs in which the educational institution receives the funds directly (rather than the student receiving the funds).

The United States military discriminates in employment on the basis of sexual orientation through its "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654(b). This policy mandates the discharge of persons having a "propensity or intent" to engage in homosexual acts. There is no comparable statute providing for the discharge of persons suspected of a propensity for heterosexual acts.

---

<sup>1</sup> Omnibus Consolidated Appropriations Act for 1997, Pub. L. No. 104-208, Div. A, Title I, § 101(e), 110 Stat. 3009-271, reprinted in 10 U.S.C. § 503 note.

Vermont Law School ("VLS") has a nondiscrimination policy which forbids discrimination based on sexual orientation or sex in education and employment. On-campus job interviews are among the services provided by VLS. Pursuant to its non-discrimination policy and Vermont law, VLS barred the military from recruiting on its campus because the military discriminates against women and gay men.<sup>2</sup> In 1997, shortly after the enactment of the SPA, the Judge Advocate General Corps ("JAG") of the United States Army notified VLS of its intention to send a recruiter to the VLS campus. In January 1998 VLS announced it would suspend application of its nondiscrimination policy to military recruitment rather than suffer the hardship of the loss of student aid funding.<sup>3</sup>

The Women's Law Group ("WLG") is an association of students, faculty and staff at VLS whose purposes include educating the community concerning discrimination based on sex and gender and defending the civil rights of women. The Equal Justice Foundation ("EJF") is an association of VLS students whose purposes include education concerning civil rights and inequities within the legal system. The Alliance of Lesbian, Gay, Bisexual, Transgendered and Straight Students (the "Alliance") is an association of VLS students, faculty and staff whose

---

<sup>2</sup> Plaintiffs allege that the military discriminates against all women in the enforcement of the "Don't Ask, Don't Tell" policy because it has been disproportionately applied to women. Although women make up only 13% of military personnel, 41% of those discharged under the policy are women.

<sup>3</sup> VLS students will receive approximately \$420,000 in the current academic year through the Perkins Loan and Work-Study programs.

purpose is to educate the community concerning issues of importance to its members, especially the civil rights of lesbian, gay, bisexual and transgendered persons, and to defend the civil rights of those persons.

Members of the plaintiff organizations who relied on the nondiscrimination policy when they chose to attend VLS felt betrayed and bewildered and suffered emotional distress when the policy was suspended. The learning climate at VLS, previously positive with regard to sexual orientation and sex, took on elements of hostility towards these issues. In addition, resources and energy that should have been devoted to the purposes of the law school and law study were diverted to dealing with and responding to the JAG interviews and VLS's suspension of the nondiscrimination policy.

#### DISCUSSION

Defendants have moved to dismiss, arguing that the Plaintiffs lack standing to challenge the SPA. The Defendants also move to dismiss on the merits of the case, arguing that the suit should be dismissed because the SPA is a valid exercise of Congress' power to place conditions on the receipt of federal funds. Since I find that the Plaintiffs do not have standing to bring this suit, I will not address the constitutionality of the SPA.

### I. Legal Standards

“The fundamental aspect of standing is [its focus] on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” United States v. Vazquez, 145 F.3d 74, 80 (2d Cir. 1998) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (internal quotation marks omitted)). The court must determine “whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” Id. at 81 (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (internal quotation marks and citation omitted)). “The standing issue must therefore be resolved ‘irrespective of the merits of [the] substantive claims.’” Id. (quoting Bordell v. General Elec. Co., 922 F.2d 1057, 1060 (2d Cir. 1991)).

When the 12(b)(1) motion argues that the complaint is defective at the pleading stage, the court must take the pleader’s allegations as true and construe the complaint in favor of the nonmoving party. See Vazquez, 145 F.3d at 81. “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (internal quotation marks and citation omitted)).

The plaintiff organizations have sued on behalf of their student members. An association has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Irish Lesbian and Gay Organization v. Giuliani, 143 F.3d 638, 649 (2d Cir. 1998) (quoting Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 343 (1977)). It is the first prong which is at issue here: Defendants argue that the members of the plaintiff organizations would not have standing to sue individually.

There is a three part test to determine whether an individual has standing. First, a plaintiff must demonstrate an "injury in fact"; second, there must be a causal connection between the alleged illegal conduct and the injury; third, the injury must be likely redressed by a favorable decision. See Latino Officers Association v. Safir, 170 F.3d 167, 170 (2d Cir. 1999) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Defendants maintain that the first two requirements are not met in this case, arguing that the Plaintiffs have failed to alleged a cognizable injury, and that any injury Plaintiffs have suffered is not caused by the SPA.

## II. Injury In Fact

To demonstrate an injury in fact, there must be “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” Latino Officers Assoc., 170 F.3d at 170 (quoting Defenders of Wildlife, 504 U.S. at 560). Plaintiffs assert the following injuries: the stigmatism of discrimination, the diversion of law school resources to which the students were entitled, and the diversion of the organizations’ resources.

### A. Stigmatic Injury

Stigmatic injury caused by discrimination “accords a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.” In re U.S. Catholic Conference, 885 F.2d 1020, 1025, (2d Cir. 1989) (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)). Thus the individual members of the organizations would have standing to assert a stigmatic injury if they can “identif[y] some concrete interest with respect to which [they] are personally subject to discriminatory treatment.” Allen, 468 U.S. at 757 n.22. If this injury “independently meets the causation requirement of standing doctrine,” then the stigmatic injury would be sufficient to support standing. Id.

In Allen, the concrete interest which was being discriminatorily impaired was the plaintiffs’ “interest in desegregated public school education.” Id. In this case,

however, it is not clear what "concrete interest" Plaintiffs allege is being "discriminatorily impaired."<sup>4</sup> Id.

Plaintiffs assert they were injured by the drain of the law school's resources, citing Gay and Lesbian Law Students Assoc. v. Board of Trustees, 673 A.2d 484 (Conn. 1996). In this case, Plaintiffs sued the University of Connecticut, arguing that the school violated the state antidiscrimination law by allowing JAG to recruit on campus. The Connecticut Supreme Court, applying the test set out in Lujan v. Defenders of Wildlife, held:

The infringement of the rights of the plaintiff's members under the [state] Gay Rights Law was concrete and particularized, as well as actual and imminent. The members had been denied equal placement opportunities because the career services office had allocated resources to the military, which could not, regardless of their abilities, hire them . . .

Id. at 491. Plaintiffs have not cited, and I have not found, any federal court which has recognized this as a cognizable injury.<sup>5</sup>

Plaintiffs also argue that their members have the right to be free from discrimination, and/or the right to be free from the intervention of a third party (the

---

<sup>4</sup> In their brief, Plaintiffs state that the students have been "personally denied equal treatment," but they do not state how.

<sup>5</sup> Plaintiffs cite to Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982), in support of this argument. However, as discussed in more detail below, the injury in Havens was the diversion of the organization's own resources, not a third party's resources.

Defendants) into private contracts where intervention results in employment discrimination. The Plaintiffs fail, however,

to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . It is evident that [the Plaintiffs are seriously offended by the military's discrimination], but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge Christian College v. Americans United for Separation of Church &

State, Inc., 454 U.S. 464, 485 (1982). The Plaintiffs have not asserted, for example, that any of their members attempted or desired to apply for military employment.<sup>6</sup>

While "[t]his threshold requirement for standing may be excused only where a plaintiff makes a substantial showing that application . . . would have been futile,"

Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997), Plaintiffs have not made such a claim in their complaint.

Since Plaintiffs have not sufficiently alleged any interest which has been discriminatorily impaired, their allegation of stigmatic injury cannot support standing.

---

<sup>6</sup> In addition, only lesbian or gay students would be able to claim such an injury. Accordingly, the Women's Law Group and the Equal Justice Foundation may not be proper Plaintiffs if the gay students are adequately represented by the Alliance.

**B. Diversion Of Resources**

As mentioned above, Plaintiffs also assert that their members were injured both by the diversion of law school resources, and diversion of the organizations' own resources.

When a defendant's discriminatory practices impair an organization's ability to engage in its regular activities, this may constitute a sufficient injury to confer standing to the organization. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (standing found where a housing organization had to expend significant resources to identify and counteract the defendant's discriminatory practices); see also Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 905 (2d Cir. 1993).

However, this is considered an injury to the organization, not to the members, and thus is sufficient to confer standing only where the organization is suing on its own behalf. See Ragin, 6 F.3d at 905. In this case, where the Plaintiff organizations have brought this suit on behalf of their members,<sup>7</sup> the diversion of the organizations' resources is not an injury to the individual members.

In addition, the injury is the diversion of the organization's own resources, not a third party's resources. See Havens Realty, 455 U.S. at 379. Thus the

---

<sup>7</sup> See Paper 6 at 19, Heading II ("The Plaintiffs Have Standing to Assert the Invalidity of SPA on Behalf of Their Student Members").

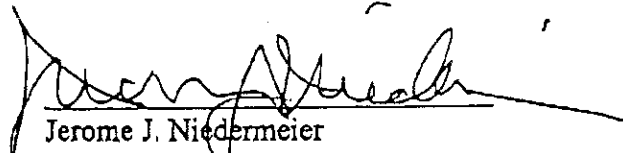
allegation that the SPA causes the law school's resources to be improperly diverted is not a cognizable injury.

In conclusion, since Plaintiffs have failed to show an "injury in fact" to their individual members, the Plaintiff organizations do not have associational standing to sue on behalf of their members.

### CONCLUSION

Based on the foregoing reasons, I recommend the Defendants' Motion to Dismiss be GRANTED.

Dated at Burlington, in the District of Vermont, this 10<sup>th</sup> day of  
November, 1999.

  
Jerome J. Niedermeier  
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appellate review of the district court's order. See Local Rule, 72.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a) and 6(e).