
United States Court of Appeals
for the
Third Circuit

Case No. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAM 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,

Appellants,

– against –

DONALD H. RUMSFELD, in his capacity as a 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 TOMPSON, 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,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL BRIEF FOR APPELLANTS

WARRINGTON S. PARKER, III
AARON M. ARMSTRONG
HELLER, EHRMAN, WHITE &
MCAULIFFE, LLP
333 Bush Street
San Francisco, California 94104-2878
(415) 772-6000

E. JOSHUA ROSENKRANZ
SHARON E. FRASE
HELLER, EHRMAN, WHITE &
MCAULIFFE, LLP
120 West 45th Street
20th Floor
New York, New York 10036-4041
(212) 832-8300

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

On October 28, 2004, President Bush signed a law amending the Solomon Amendment. The law does not change this appeal, other than perhaps to strengthen Plaintiffs' challenge to the statute as written. The new law says that schools must provide military recruiters access to campuses "in a manner equal in quality and scope to that provided other employers." 10 U.S.C. § 983 (2004). Yet, this only codifies the military's pre-amendment interpretation of the Solomon Amendment, which interpretation Plaintiffs challenged as unconstitutional. As a result, the military's "unwritten policy," as Plaintiffs termed it on appeal, has now become a "written policy" that possesses the same constitutional infirmities briefed and argued before the district court and on appeal.

As for the new law's legislative history, the October 28 law was justified by much the same rhetoric that caused Congress to enact the Solomon Amendment in the first place. Congress did not hold hearings, make findings or engage in any searching inquiry before enacting the new law. Instead, reminiscent of its justification for the original Solomon Amendment, Congress offered platitudes such as: "[i]f an institution of higher-learning wishes to bar . . . military recruiters from recruiting, it is free to do so—but it should not expect that decision to be endorsed and subsidized by the taxpayers of the United States." 150 Cong. Rec. H1710 (daily ed., Mar. 30, 2004) (statement of Rep. Boehner).

After sifting out the platitudes, all that remains of the legislative history are statements making clear that Congress' true aim was the suppression of speech. Various Congressmen noted that they were in favor of this latest version of the Solomon Amendment precisely so that students could not protest because, in their view, the new law required schools to prevent such activity. To the extent the relevant legislative history adds anything, then, it more clearly reveals that Congress' true motivation is the suppression of speech.

SUPPLEMENTAL STATEMENT OF FACTS

On October 28, 2004, President Bush signed the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 ("NDAA") (2004).¹ Section 552 of the NDAA, among other changes, modifies the Solomon Amendment so that it now denies federal funds to any institution of higher education that:

has a policy or practice (regardless of when implemented) that either prohibits or effectively prevents [military representatives] from gaining ~~entry to campuses~~ *access to campuses*, or access to students (who are 17 years of age or older) on campuses, *for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.*

¹ The Government has not yet assigned a Public Law number to this statute.

10 U.S.C. § 983(b)(1) (2004) (added language in italics, deleted language with strike-through).²

Congress' only apparent motivation for the amendment was this lawsuit. In his November 5, 2003 opinion, Judge Lifland noted that the Solomon Amendment did not require "equal access" and criticized the military's unwritten policy of demanding "full access" to law school career office facilities and services. *See* JA-83-4³ (Op.) (recognizing that schools need only "allow the military to come onto campus and to communicate with students for purposes of recruiting" and that "anything short of preventing or totally thwarting the military's recruitment efforts does not trigger a funding denial pursuant to the statute"). Reacting to this criticism, Representative Mike Rogers introduced a freestanding bill containing the "equal access" requirement. *See* H.R. Rep. No. 108-443, at 6 (2004) (explaining that proposed change was intended to "address the [district] court's opinion and codify the equal access standard"). When that did not progress beyond a floor vote in the House, *see* ROTC and Military Recruiter Equal Access to Campus Act of

² The Senate and House ultimately agreed in conference to adopt the language originally proposed in the House version of the NDAA. *See* June 22, 2004 Letter from E. Joshua Rosenkranz notifying the Court of pending legislation and describing proposed amendments.

³ This brief will adopt the abbreviations listed in Plaintiffs' opening and reply briefs, which will be cited respectively as "FAIR Br." and "FAIR Reply." The Respondent's Brief is cited as "Gov't Br."

2004, H.R. 3966, 108th § 4 (2004) (“Equal Access Act”), Congress enacted the “equal access” requirement through Section 552 of the NDAA.

As with all prior versions of the Solomon Amendment, there are no findings justifying Section 552. Section 552 certainly contains no findings, and the Congressional record is devoid of anything that would pass as a finding. Indeed, Congress did not so much as hold a single hearing or one debate to consider, weigh or discuss the necessity of the new law. The Armed Services Committee report on the NDAA merely stated, without further elaboration, that the intended effect of the provision was to provide military recruiters access to campuses and students that is equal in quality and scope to that provided other employers. H.R. Rep. No. 108-491, at 328 (2004) .

The only “evidence” offered in support of the amendment came in a letter to the House Armed Services Committee from Under Secretary of Defense for Personnel Readiness David C. Chu, who asserted that “some colleges and universities remain intransigent or outright opposed to compliance” with the Solomon Amendment’s requirement that “military recruiters receive access to students.” H.R. Rep. No. 108-443 at 7 (reprinting March 16, 2004 letter in Armed Services Committee report on Equal Access Act). However, the “particularly egregious” examples of noncompliance cited in the letter were not denials of access but rather failures to stifle student protest. *See id.* (stating that “military

recruiters and prospective recruits have been forced to endure verbal abuse and harassment,” and “gauntlets of taunting fellow students and faculty impeding the path to designated interview rooms”). The letter contained no evidence or findings of any kind as to the need for equal access, only an assertion that “[u]nder normal circumstances, such intransigence and opposition to the established laws of the land would be unacceptable—but now, at a time when our nation is at war, this situation is intolerable.” *Id.*

ARGUMENT

A. The October 2004 Amendment To The Solomon Amendment Merely Codifies The Military's Unwritten Policy, Which Plaintiffs Challenged And All Parties Briefed And Argued.

The recent amendment to the Solomon Amendment changes nothing. It does not change the rights at issue. And it does not change the scope or nature of Plaintiffs’ challenges. All it changes is that the Government can no longer defend the law, as it did throughout its brief, on the ground that it requires schools to permit nothing but entry to campus.

Prior to this latest amendment, the DOD interpreted the Solomon Amendment to mean that law schools had to provide military recruiters access “equal in quality and scope to that provided other employers.” Plaintiffs challenged this interpretation, calling it the “unwritten policy,” as well as the Solomon Amendment as actually written. Therefore, Plaintiffs expressly

challenged, briefed and argued that the “equal in quality and scope” requirements the military sought to impose—which have now been codified—were unconstitutional.⁴

Thus, Plaintiffs’ arguments that the unwritten policy violates the doctrine of unconstitutional conditions now apply to the amended law. *See* JA-45-46 (Op.) (holding that the unwritten policy does not violate the doctrine of unconstitutional conditions). The statute still imposes a university-wide funding ban on any institution that declines to subsidize the military’s recruiting activities, FAIR Br. at 31; FAIR Reply at 11, or refuses to disseminate the military’s recruiting message, FAIR Br. at 32; FAIR Reply at 8-9, or attempts to protest in the manner of its choosing by withholding services from military recruiters, FAIR Br. at 31; FAIR

⁴ For these reasons, the amendments do not moot this appeal. *See Northeastern Fla. Chapter of Assoc’d Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 661-62 (1993) (holding that enactment of new statute after grant of certiorari did not render case moot where new statute disadvantaged plaintiffs “in the same fundamental way”). A change in the law moots a case “only to the extent that it *removes* challenged features of the prior law.” *Naturist Soc’y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 2000) (emphasis added). This is not an instance where “interim events remove the effects of the violation that prevent the appellate court from granting any relief.” *Cinicola v. Scharffenberger*, 248 F.3d 110, 118 (3d Cir. 2001). Where, as here, Plaintiffs arguments as to whether the challenged law violates the First Amendment are either “unaffected” or “not substantially altered,” the case should proceed. *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1314-15 (11th Cir. 2000).

Reply at 13-15. The same infringements—compelled support and compelled speech—therefore continue.

Similarly, the new law targets speech in the same manner as the unwritten policy. The current statute, as did the unwritten policy, embraces the DOD’s command to law schools to support and disseminate the military’s discriminatory messages while abandoning their own message of non-discrimination. It therefore infringes on the same panoply of First Amendment rights. FAIR Br. at 21-2 (academic freedom), 22-3 (free speech and expressive association); FAIR Reply at 5-7 (military’s demands implicate speech); *see also* JA-57 (Op.) (holding that “law school’s qualify as expressive associations”). And, it does so without any apparent justification. FAIR Br. at 39-40; FAIR Reply at 17. Just as the military failed to establish that the unwritten policy was necessary to further its interests in recruiting, FAIR Br. at 40-41; FAIR Reply at 21-22, so too has Congress in its latest iteration of the Solomon Amendment. *See* Section B, *infra*.

Finally, the new statute is just as vague as the old unwritten policy. Law schools must still guess as to what constitutes a policy “that either prohibits, or in effect prevents” military recruiters from gaining access. FAIR Br. at 41-2. Although Congress has now decided that “access” should be “equal in quality and scope,” the statute still vests the same unbridled discretion in military bureaucrats to decide, as they have in the past, whether “equal” means equivalent, symmetrical,

exact parity or equal “plus.” See FAIR Br. at 43-4; see also H.R. Rep. No. 108-443 at 17 (additional view of Rep. Marshall) (“Whether [the] DoD was granted ‘equal access’ will be an after-the-fact inquiry . . . involv[ing] murky comparisons of the totality of the conditions for access offered to military recruiters and those offered to other recruiters, which may include, for example, judgments about locations, timing, public notice and the like.”) And of course, the new law does not change the fact that DOD remains of the view that the funding penalties in the statute apply to the entire university—an interpretation inconsistent with the actual terms of the Solomon Amendment, both old and new. FAIR Br. at 42-43.⁵

B. There Is Still No Basis For Deferring To Congress Because, Like Every Previous Version Of The Solomon Amendment, The Latest Iteration Contains No Findings, There Were No Hearings—The Law Was Merely Motivated By Unsupported Conjecture.

While Congress has now confirmed that it intends for law schools to take affirmative steps to assist the military, it remains the case that there is not a shred of evidence that a military need necessitates such draconian measures. It is simply Congress’ take, with no attempt to prove that it is demonstrably true, that “all our men and women in uniform” are “victims of an effort that is keeping us from

⁵ Given the 2004 amendments, Plaintiffs no longer need to argue that the military was ignoring Congress’ intent when it insisted on parity of treatment. The newly-added “equal access” language, however, does not detract from Plaintiffs’ congressional deference argument, or, as noted, the other arguments made.

recruiting good people because the campuses have lined up against . . . recruitment on campus.” 150 Cong. Rec. H1706 (daily ed., Mar. 30, 2004) (statement of Rep. King). Congress merely continues its belief that the new law is necessary to “squarely address[] the scandal of American colleges and universities banishing . . . military recruiters from campus while turning around and cashing checks to the tune of hundreds of millions of dollars each year.” *Id.* at H1706-7 (statement of Rep. Cox.). But this is not enough to justify the infringements that result. FAIR Br. at 39-41; FAIR Reply at 22-25.

It is not enough because even such impressionistic opinions as “[m]ilitary recruiters should have” equal access and that “the laws to prevent discrimination against . . . military recruiters should be updated,” H.R. 3966, and the military’s ability to fight the war on terrorism and perform its mission “at the highest standard” requires “effective and uninhibited recruitment programs” that “rel[y]heavily on the ability of military recruiters” to have equal access, H. R. Rep. No. 108-443 at 3-4, do nothing to justify the infringement of First Amendment rights. There is literally not a shred of empirical or passably quantitative evidence to suggest that these statements and beliefs are true. They are ruminations and notions and nothing more. They are simply the type of “assertion and conjecture” that courts continuously reject as justification for First Amendment harms. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

841 (1978) (striking criminal sanctions imposed against third party who divulged information regarding confidential state judicial review commission proceedings); *see also United States v. Grace*, 461 U.S. 171, 182 (1983) (invalidating ban on carrying signs or banners on sidewalks around Supreme Court building where there was no evidence of obstruction, threatened injury or interference with orderly administration); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (“We reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.”)

Indeed, rather than justify the new law as something narrowly tailored and necessary to address and remedy a real harm, if anything, the legislative history suggests that the very purpose of the new law is to squelch and inhibit speech. Representative McKeon, for example, determined that the bill had to pass precisely so that schools would prevent students from protesting the military’s presence on campus. Representative McKeon described a “[s]hocking” incident[] “at one of the most prestigious colleges in this country, New York University,” where “potential recruits were harassed and detained by protestors; and their pictures were displayed throughout the school on a poster entitled ‘Face of Complicity.’” 150 Cong. Rec. H1705 (daily ed., Mar. 30, 2004) . He deemed “this kind of behavior” to be “absolutely unacceptable” and demanded that it “[]not happen again.” *Id.* Another Representative declared such protests inconceivable “in a

country that is at war . . . with soldiers on the field . . . that such disrespect would be shown them by men and women their own age,” and demanded that Congress “end this foolishness.” *Id.* at H1706 (statement of Rep. Bachus); *see also* H.R. Rep. No. 108-443 at 7 (letter from Undersecretary Chu) (“Under normal circumstances, such intransigence and opposition to the established laws of the land would be unacceptable—but now, at a time when our nation is at war, this situation is intolerable.”)

The only “evidence” taken by Congress further reinforces that the suppression of speech was Congress’ true aim. The letter to the House Armed Services Committee from Under Secretary Chu asserts that “some colleges and universities have taken actions to ensure that the Department is placed at a pronounced competitive disadvantage in relation to other prospective employers.” H. Rep. No. 108-443 at 7 (reprinting March 16, 2004 letter in Armed Services Committee report on Equal Access Act). But, the examples of noncompliance with the Solomon Amendment cited in the letter were not denials of access. They were failures to *stifle student protest*. *Id.* (stating that “military recruiters and prospective recruits have been forced to endure verbal abuse and harassment,” and “gauntlets of taunting fellow students and faculty impeding the path to designated interview rooms”).

Crafting a tailored—let alone a narrowly tailored—speech neutral law was, therefore, the furthest thing from Congress’ collective mind. Congress has taken aim at speech. It has done so without justification and without any attempt to tailor its approach. This the First Amendment does not tolerate. *Cohen v. California*, 403 U.S. 15, 18 (1971) (overturning conviction based on wearing of jacket with anti-war message); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (cannot prevent even high school students from wearing arm band in protest of war); *Saunders v. Va. Polytechnic Inst.*, 417 F.2d 1127, 1130-31 (4th Cir. 1969) (cannot deny readmission to college student for engaging in protest while General Westmoreland is addressing school); *Rasche v. Bd. of Trustees of Univ. of Ill.*, 353 F. Supp. 973, 977 (N.D. Ill. 1972) (student cannot be punished for engaging in demonstration outside of ROTC building); *see also Cox v. Louisiana*, 379 U.S. 536, 547-48, (1965) (protestor cannot be arrested because protest involves loud cheering and clapping).

Indeed, even when viewed under the “speech-conduct” lens of *United States v. O’Brien*, 391 U.S. 367 (1968), or the “symbolic conduct” lens of *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086 (3d Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996), these statements and ruminations cannot justify the new or the old Solomon Amendment. The means chosen to effect a purpose cannot be “substantially broader than necessary.” *Ward v. Rock Against Racism*,

491 U.S. 781, 800 (1989). They must be specifically tailored to address real, not conjectural, harms. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms . . . [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”); *see also id.* at 666 (stating that Congress’ judgment regarding the necessity of a restriction on speech be supported by “reasonable inferences based on substantial evidence”). And, there must be some support in the record that establishes both the legislature’s consideration of and the effort to ameliorate any First Amendment harms. *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (noting that “our First Amendment jurisprudence requires that the [Defendants] identify the justifying secondary effects with some particularity, that they offer some record support for the existence of those effects and the [law]’s amelioration thereof.”) This is so whether or not strict or intermediate scrutiny applies. *Bartnicki v. Vopper*, 200 F.3d 109, 125 (3d Cir. 1999) (holding burden to provide a basis for the challenged governmental regulation “should not be viewed as de minimis, even when the regulation is subjected to intermediate scrutiny”).

As to all of these factors, the new law, as did the old, fails. The Solomon Amendment lacks any basis for the “equal access” requirement. Congress has

provided “nothing other than its *ipse dixit*” that the regulations will prevent a harm and that is not enough. *Id.* at 126. The record is devoid of any consideration, let alone any effort, to tailor or mitigate the impact on speech. Indeed, to the extent anything can be said about the impact on speech, the new law, if not the old, is expressly meant to curtail speech and protest. As with the old law, the new law is unconstitutional. The legislative history merely underscores that fact.

CONCLUSION

For the foregoing reasons and for reasons previously stated, this Court should reverse the District Court and grant Plaintiffs’ motion for a preliminary injunction.

DATED: November 3, 2004

Respectfully submitted,



E. Joshua Rosenkranz

Sharon E. Frase

HELLER EHRMAN WHITE & McAULIFFE LLP

120 West 45th Street

New York, NY 10036

Telephone: (212) 832-8300

Warrington S. Parker, III

Aaron M. Armstrong

HELLER EHRMAN WHITE & McAULIFFE LLP

333 Bush Street

San Francisco, CA 94104-2878

Telephone: (415) 772-6000

Attorneys for Plaintiffs-Appellants

SUPPLEMENTAL STATUTORY ADDENDUM

10 U.S.C. § 983 (2004)

[Reflecting amendments enacted pursuant to Section 552 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (2004)]

(a) Denial of funds for preventing ROTC access to campus.—No funds described in subsection (d)(1) 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 from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) Denial of funds for preventing military recruiting on campus.—No funds described in ~~subsection (d)(2)~~ *subsection (d)(1)* 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~~ *access to campuses*, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting *in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer*; 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.

(c) **Exceptions.**—The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that—

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) **Covered funds.**—(1) ~~The~~ *Except as provided in paragraph (2), the limitation established in subsection (a) applies* ~~limitations established in subsections (a) and (b) apply~~ to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available *for any department or agency for which regular appropriations are made* in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(C) *Any funds made available for the Department of Homeland Security.*

(D) *Any funds made available for the National Nuclear Security Administration of the Department of Energy.*

(E) *Any funds made available for the Department of Transportation.*

(F) *Any funds made available for the Central Intelligence Agency.*

(2) ~~The limitation established in subsection (b) applies to the following:~~

~~(A) Funds described in paragraph (1).~~

~~(B) Any funds made available for the Department of Transportation.~~

(2) Any Federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

(e) Notice of determinations.—Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary—

(1) shall transmit a notice of the determination to the Secretary of Education, *to the head of each other department and agency the funds of which are subject to the determination*, and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) Semiannual notice in Federal Register.—The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).