

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEPHEN B. BURBANK, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Civil Action No. 03-5497 JF
v.	:	
	:	
DONALD H. RUMSFELD, Secretary of	:	
Defense, in his Official Capacity,	:	
	:	
Defendant.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
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I. Introduction

This case was necessitated by the government’s plainly erroneous determination that the University of Pennsylvania Law School (the “Law School”) had violated the Solomon Amendment (the “Act”). In 1998, the Law School made accommodations to its anti-discrimination policy to comply with the Solomon Amendment’s requirement that the military be granted access to the campus and law students for recruitment purposes. Yet, notwithstanding the fact that for five years military recruiters were provided access to the campus and to law students consistent with the requirements of the Act, in 2003 the government threatened to invoke the sanctions of the Act to cut off millions of dollars in contracts and grants to the University of Pennsylvania unless the Law School abandoned its anti-discrimination policy with respect to military recruiting. As plaintiffs will show, the government’s demand that the Law School abandon its policy had nothing to do with the issue of access to campus or to students;

indeed, the demand would serve no legitimate, much less compelling, governmental interests. Nevertheless, these demands were intended to and did coerce the University to compel the Law School to abandon its anti-discrimination policy.

Contrary to the DOD's recent demands, and as recently recognized by the District Court for the District of New Jersey in Forum for Academic and Institutional Rights, Inc. v. Rumsfeld (FAIR), 291 F.Supp.2d 269 (D.N.J. 2003), the Act contains no requirement that military recruiters be treated identically to all other recruiters.¹ Rather, the Solomon Amendment requires only that schools grant military recruiters "entry to campuses," "access to students," and "access ... to ... information pertaining to students." 10 U.S.C. § 983(b) (West Supp. 2003). The Complaint alleges, and the defendant does not dispute, that the Law School has provided such entry, access and information since 1998.

Ironically, if the Law School were to grant the DOD's demand that it be treated identically to other recruiters, the military recruiters would not be permitted to recruit on campus at all, as the DOD does not comply with the Law School's anti-discrimination policy. What the DOD seeks is not identical treatment, but special treatment. The Act does not, however, require educational institutions to accord to the military special treatment, or every conceivable benefit or privilege that might be offered to other employers. Nor does the Solomon Amendment

¹ The FAIR case is presently before the Court of Appeals for the Third Circuit. However, as discussed below, that case does not present the central statutory claim made by plaintiffs in this case -- that the Law School has been in compliance with the Solomon Amendment. Rather, the FAIR case involves a facial, as opposed to an as-applied constitutional challenge to the Solomon Amendment. Accordingly, this case should not await the Third Circuit's ruling in FAIR. Two other cases on the Solomon Amendment are pending. See Burt v. Rumsfeld, No. 30 CV 1777 (filed October 16, 2003 D. Conn.); Student Members of SAME v. Rumsfeld, No. 03-CV 1867 (filed Oct. 30, 2003 D. Conn.).

compel colleges and universities to exempt the military from neutral and generally applicable anti-discrimination rules. Nevertheless, in 1998, the Law School arrived at an accommodation that would provide military recruiters with entry onto campus, and access to students and information as required by the Act, without compromising its anti-discrimination policy. That was achieved by having military recruiters coordinate interviews with law students through the Office of Career Services of the University, instead of the Career Planning and Placement Office of the Law School. This procedure was acceptable to the DOD until 2003 when, despite there being no change in the law or in the Law School's policy, the DOD suddenly declared the Law School in violation of the Act, and threatened to cut off millions in funding to the University.

The Law School's anti-discrimination policy lies at the core of its educational and professional mission. The government's coercion of the Law School to abandon its policy against non-discrimination – through the threat to terminate millions of dollars in federal grants and contracts to the entire University – harms the plaintiffs and other members of the academic community. The anti-discrimination policy governs all facets of the academic and social life of the Law School; it is a statement of belief in the dignity of all persons and of the importance of commitment to that principle in the education of tomorrow's professionals. Plaintiff students and faculty may justifiably question the institution's commitment to non-discrimination when they observe it violating its own policy. Such questions undermine the academic enterprise and make more difficult teaching and learning in pursuit of equal justice and diversity under the law. See, Affidavit (“Aff.”) of Professor Stephen B. Burbank, Attachment (“Attach.”) 2 to Plaintiffs’ Motion for Summary Judgment (“Pltffs’ Motion”), and Aff. of Ellen London, Attach. 3 to Pltffs’ Motion.

The Complaint sets forth two grounds in support of the plaintiffs' request for declaratory relief.² *First*, plaintiffs allege that the Solomon Amendment does not authorize the cut-off of federal funds to the University of Pennsylvania because the Law School had provided military recruiters with the statutorily required information and access to students on the University campus for purposes of military recruiting. *Second*, if the statutory claim is rejected, the plaintiffs assert that, as applied to the University of Pennsylvania, the Solomon Amendment violates their rights to freedom of speech, freedom of association, and academic freedom.

The government has moved to dismiss the Complaint, arguing that plaintiffs, who are faculty, students and a student organization at the Law School, lack standing. That very issue was recently addressed in the FAIR decision, in which that court explicitly held that law students, faculty and student organizations do have standing to challenge the Solomon Amendment. The government further argues that plaintiffs' statutory claim is not properly before the Court because the DOD's decision to terminate the University's funding was not "final." Finally, the government argues that the Solomon Amendment is constitutional. Remarkably, the government does not attempt to defend against the merits on plaintiffs' core claim: that the government cannot properly invoke the Solomon Amendment because the Law School was in full compliance with the statute's provisions regarding access to students, information, and the campus.

This Memorandum of Law, filed in opposition to the Motion to Dismiss and in support of Plaintiffs' Motion for Summary Judgment, demonstrates that (1) the Law School was in full

² A copy of the Complaint, with all Exhibits, is Attachment 1 to Plaintiffs' Motion for Summary Judgment.

compliance with the Act before the government, by its threat to suspend federal funding of University programs, coerced the University into requiring the Law School to abandon its anti-discrimination policy as to military recruiters, (2) plaintiffs have standing to bring this action, and (3) assuming that the statute authorized the government's actions, the application of the Act to the Law School violated the plaintiffs' First Amendment rights to freedom of speech, freedom of association and academic freedom.³

II. Undisputed Facts

In 1994 Congress adopted the Solomon Amendment, which mandated denial of federal funds to “any institution of higher learning that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruitment purposes: (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students.” Pub. L. No. 103-337, §558, 108 Stat. 2663 (1994). In the words of its proponents, the Act was intended to “send a message over the wall of the ivory tower of higher education,” 140 Cong. Rec. 11,441 (1994) (Statement of Rep. Pombo), to counter the perceived “anti-military” policies of certain universities.

In its present amended form the Act provides in relevant part:

(b) Denial of funds for preventing military recruiting on campus. No funds described in subsection (d)(2) may be provided

³ Plaintiffs do not, at this time, move for summary judgment on their due process and equal protection claims. There exist issues of fact with respect to these claims, which would also prevent granting of defendant's motion to dismiss. These issues include, among others, whether the DOD provided due process to the University, and whether the DOD has applied its policies equally to all institutions of higher education.

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 Homeland Security from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).

10 U.S.C.A. § 983(b) (West Supp. 2003). The “funds described in subsection (d)(2)” include funds administered by the DOD, the Department of Transportation, and any funds made available in an appropriations act covering the Departments of Labor, Health and Human Services, and Education, and related agencies. 10 U.S.C. § 983(d)(2) (2003).

For many years Penn Law School has refused to facilitate recruitment efforts by private and governmental employers who engage in discriminatory practices. The Penn Law School policy states:

The University of Pennsylvania Law School is committed to a policy against discrimination in employment based on race, color, sex, sexual or affectional orientation, religion, age, national origin, or disability. The Law School’s services are available only to employers whose standards and practices conform to this policy.

Under this policy, employers who verified compliance with the Law School’s anti-discrimination policy were permitted to recruit students through the Law School’s Career Planning and Placement Office. The Career Planning and Placement Office would establish a time and place for interviewing students, notify Law School students as to the dates that employers would be on campus, and when students submitted requests for interviews, would

schedule the interviews at the University's Office of Career Services, which is located at the Wharton School on the University's Campus.⁴

For several years after the passage of the Act, the Law School continued to apply its anti-discrimination policy to exclude non-complying military recruiters and private employers from the recruitment process. In 1998, however, in response to specific objections by military recruiters, the Law School made a special accommodation that ensured the military access, as required by the Act, *and* preserved the core principles of the policy. See, Aff. of Jo-Ann Verrier, Esq., Attach. 5 to Pltffs' Motion.⁵

Pursuant to this accommodation, military recruiters were referred to the University Office of Career Services, which in turn notified all law students with respect to the dates that military recruiters would be interviewing at the Office of Career Services (the same interviewing center

⁴ Ninety-five percent of Law School recruitment is done in the fall, at the University's Office of Career Services. This includes military interviews. (See Verrier Aff., ¶ 8, Attach. 5 to Pltffs' Motion.) The small number of private employer interviews that take place in the spring are held on the Law School campus. Military recruitment interviews held during the spring are held at the University's Office of Career Services. Both are on the University's campus.

⁵ The Law School has never had a policy of denying access to military recruiters. Rather, the Law School has a neutral anti-discrimination policy that applies to all recruiters. This policy, like others pertaining to recruitment (e.g., time, place, rules on contact with students) is meant to further legitimate interests of the Law School and its students. None of these measures violates the Solomon Amendment, even though the military (like other employers) might find it more convenient not to comply with them. Congress did not intend to confer on the military a sweeping privilege to recruit regardless of the school's established and evenly enforced policies. Thus, when the military declines to observe evenhanded rules, whatever consequences that flow are properly attributed to the government, not to the Law School. The military's refusal to accept the anti-discrimination policy does not transform a neutral and generally applicable policy into one that "prohibits, or in effect prevents" military recruitment any more than if the military refused to accept the neutral rules concerning time and place of interviews.

used by all other employers). Interviews with military recruiters were scheduled at Office of Career Services at the request of the students. Id. These procedures provided military recruiters with full access to all students. Military recruiters could interview every interested student. The Office of Career Services also e-mailed marketing and other materials from military recruiters to all students as part of the recruitment process. Id. The military thus had the advantage of interviewing every interested student (other employers could be restricted to a limited number of interested students) and had the further advantage of contact with students by e-mail.

These new procedures, while complying with the requirements of the Solomon Amendment, also preserved the Law School's anti-discrimination policy, as the Law School was not providing intermediary services to the military. From 1998 through the end of 2002, this accommodation was acceptable to the military. Then, in January 2003, without any relevant substantive change in the statute or regulations or in the Law School's treatment of military recruiters, the military demanded the Law School abandon its anti-discrimination policy. On January 30, 2003, the University of Pennsylvania received a letter from Colonel Daniel Fincher deeming the University in violation of the Solomon Amendment. See Exhibit ("Ex.") A to the Complaint, Attach. 1 to Pltffs' Motion. Wendy White, General Counsel for the University, was informed in subsequent conversations with Colonel Fincher that "the Department of Defense was taking the position that 'equal access' meant 'identical' access," and that "the military was unwilling to consider any different view." See, Aff. of Wendy S. White, Esq. ¶ 4, Attach. 6 to Pltffs' Motion. Wendy White officially responded to Colonel Fincher by letter dated March 19, 2003 stating that because the University "cannot put the ... federal funds received annually by

the University at risk,” the Law School would not enforce its non-discrimination policy against the military. See Ex. B to the Complaint, p. 2, Attach. 1 to Pltffs’ Motion.

On November 14, 2003, Plaintiffs brought this action, seeking a declaratory judgment that the Law School’s policies and practices in effect from 1998-2003 are in compliance with the Solomon Amendment, and, alternatively, that the Solomon Amendment as applied violates the plaintiffs’ rights to free speech, association and academic freedom under the First Amendment, and to due process and equal protection of the law under the Fifth Amendment.

III. Legislative History Of The Solomon Amendment

As the FAIR court noted, the Solomon Amendment was preceded by decades of legislation addressing the perceived effects of anti-military policies on military recruiting. See FAIR, 291 F.Supp.2d at 278-79, citing United States v. Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986). The history of that legislation makes it clear that the Solomon Amendment is directed at recruiting policies that single out the military for disfavored treatment, and not at neutral and generally applicable policies, such as the Law School’s anti-discrimination rules.

In 1972, in the midst of the Vietnam War, when campus protests were directed specifically at the military, Congress established permanent rules regarding use of DOD funds. “No . . . funds appropriated pursuant to this or any other Act for the Department of Defense,” it declared, “may be used at any institution of higher learning if the Secretary of Defense . . . determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution.” Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972) (emphasis added).

In 1994, a study requested by Congress “found 140 institutions of higher education that, for some reason or another, whatever reason, have denied [military] recruiters access to their campuses.” 140 Cong. Rec. S8172 (daily ed. July 1, 1994) (Statement of Sen. Nickles); see 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Statement of Rep. Underwood) (“Clearly, DOD has become lax in enforcing [the 1972] statute . . .”). Alarmed that “the 1970’s [were] starting to happen all over again,” id. at H3861, Representative Gerald Solomon of New York offered a floor amendment to DOD’s authorizing legislation for fiscal year 1995:

No funds available to the Department of Defense:

may be provided . . . to any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes—

(A) entry to campus or access to students on campuses; or

(B) access to directory information pertaining to student.”

Id.

The House accepted Representative Solomon’s amendment and it was included in the final bill. See id. at H3865, see also Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).⁶

In 1996, Congress expanded the Solomon Amendment to bar the use of DOD funds at any institution of higher education with an “anti-ROTC policy” (Pub. L. No. 104-106, § 541(a), 110 Stat. 186, 315-16 (1996)), and extended the prohibitions of the Solomon Amendment and the “anti-ROTC” legislation to cover “funds made available in this or any other Departments of

⁶ The legislative development of the Solomon Amendment demonstrates that it is a measure aimed at prohibiting “anti-military” bias. All of the predecessor acts limited their application to schools that “barred” military recruiters under policies that singled out the military for special unfavorable treatment. In introducing his 1994 amendment, Representative Solomon insisted that no great change was intended. See 140 Cong. Rec. H3862 (daily ed. May 23, 1994) (“[T]here is existing law already. We simply are enforcing existing law in encouraging it.”).

Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.”
Pub. L. No. 104-208, § 514, 110 Stat. 3009-270 to 3009-271 (1996). In 1999, Congress consolidated the original Solomon Amendment and the two 1996 acts. See Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999).⁷

As currently codified at 10 U.S.C. § 983(b), the Solomon Amendment bars specified federal funds from being used at any institution of higher education that

has a policy or practice . . . that either prohibits, or in effect prevents—
(1) the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or
(2) access by military recruiters for purposes of military recruiting to [certain specified directory] information pertaining to students”

10 U.S.C. § 983(b) (West Supp. 2003).

Significantly, Congress failed to enact a proposal that would have expressly required institutions of higher learning to provide military recruiters access to campus and students equal to that of other employers. On January 4, 1995, Representative Solomon introduced a bill that would have withheld federal funds from “any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes—(1) entry to any campus or access to students on any campus, *equal to that of other employers*” Military Recruiter Campus Access Act, H.R. 142, 104th Cong. § 2 (1995) (emphasis added). The failure of Representative Solomon’s 1995 proposal, and the fact that the Solomon Amendment contains no similar language, strengthens the view that federal law simply does not require the access to campus and students afforded to the military to be equal in all

⁷ Two 2002 amendments updated the statute to reflect the creation of the Department of Homeland Security. See 10 U.S.C.A. § 983(b) (West Supp. 2003).

respects to that of other employers. As the FAIR court stated, “[T]he statute could easily have provided that military recruiters are to be treated the same as other employers. *The statute does not so provide.*” FAIR, 291 F.Supp.2d at 321 (emphasis added).

IV. Standards

A. Rule 12(b)(6) Motion to Dismiss

A complaint is subject to dismissal for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6) only where it appears that no relief could be granted under any set of facts which could be proved consistent with the allegations. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). A complaint should not be dismissed unless it appears beyond any doubt that “the facts alleged in the complaint, even if true, fail to support the claim.” Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

B. Summary Judgment

Summary judgment is appropriate “if the pleadings. . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R.Civ. Pro. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Plaintiffs, as the moving parties, bear the burden of persuasion on the motions. United States v. One 107.9 Acre Parcel, 898 F.2d 396 (3d Cir. 1990). See also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file showing a genuine issue of material fact for trial.

When deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). A court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). As shown below, plaintiffs meet this standard. The defendant, in his motion to dismiss, does not even contest that the Law School's policy since 1998 has been in compliance with the requirements of the Solomon Amendment. If the defendant were to contest such compliance, he would have to come forth with evidentiary support, and not rely on conclusory allegations, as Colonel Fincher did in his letter to the University. See Ex. A to the Complaint, Attach. 1 to Pltffs' Motion.

V. Argument

A. **The Law School Has Been in Compliance With the Solomon Amendment Since 1998, and Defendant Has No Legal Basis to Threaten the Law School or the University With Loss of Federal Funding Based on that Statute.**

The Solomon Amendment directs that, "No [federal funding] may be provided . . . to an institution of higher education . . . that either prohibits, or in effect prevents - the Secretary of a military department . . . from gaining entry to campuses, or access to students . . . for purposes of military recruiting; or . . . access . . .to information pertaining to students . . ." 10 U.S.C. § 983 (b) (West Supp. 2003). In its Motion to Dismiss, the government has not contested the claim that

the University of Pennsylvania Law School was in full compliance with the statute. Yet, pre-litigation, in negotiations with the University of Pennsylvania and other universities and law schools, the government asserted that law schools must treat military recruiters identical to other recruiters. See, White Aff., ¶ 4, Attach. 6 to Pltffs' Motion. As the government now appears to concede in defendant's Motion to Dismiss, the plain language of the statute provides no support for this position.

Since 1998, the Law School has provided military recruiters full access to law students, despite the fact that the DOD is in violation of the Law School's non-discrimination policy with respect to sexual or affectional orientation. Under the 1998 accommodation, the Office of Career Services of the University of Pennsylvania, rather than the Law School's Career Planning and Placement Office, schedules the DOD's interviews with law students. This practice does not in any way prohibit or prevent the military's entry to the University campus, nor access to any of the students. To the contrary, military recruiters may meet on the University's campus with as many interested students as they wish during the same recruitment periods, as other recruiters. All students are informed when military recruiters will be on campus, and no student has ever been denied the opportunity to interview with the military. See, Verrier Aff., ¶ 7, Attach. 5 to Pltffs.' Motion. Thus, the Law School is in full compliance with the Solomon Amendment.

In FAIR, the court expressed "grave reservations" as to DOD's position that the statute requires institutions of higher education to provide military recruiters with treatment identical to that of other recruiters. FAIR, 291 F.Supp.2d at 321. As that court explained:

[T]he statute could easily have provided that military recruiters are to be treated the same as other employers. The statute does not so provide. . . . [T]he Court simply fails to see how the statute requires

absolute parity when all that it requires is that a school not “prohibit” or “in effect prevent” military recruiting efforts.

Id. (emphasis added).

The DOD’s recent, and unexplained, change in position that deems the Law School to be in violation of the Solomon Amendment is contrary to the expressed intent of Congress, and would unnecessarily present the issue of the constitutionality of the Act as applied here. As the Supreme Court has instructed, an administrative department or agency cannot construe a statute to mean anything beyond, or in conflict with, the plain language of the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, n.9 (1984) (“[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”); see also Federal Election Comm’n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (“[The Court] must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.”)

In an attempt to avoid the plaintiffs’ dispositive statutory argument, the government asserts that “Plaintiffs’ APA cause of action” should be dismissed because there has been no final agency action. Mem., at 24. This argument is unavailing for a number of reasons.

First, plaintiffs may challenge the *ultra vires* acts of the DOD either by way of clearly established non-statutory review, or under the APA.⁸ Federal courts will “ordinarily presume that

⁸ Plaintiffs have the undoubted prerogative “to decide what law [they] will rely upon.” The Fair v. Kohler Die & Speciality Co., 228 U.S. 22, 25 (1913).

Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.” Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 (1986). Hence, “[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority,” even in the absence of specific statutory authorization. Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988).⁹ Dart also makes clear that nothing in the APA altered the clearly established doctrine of “non-statutory review.” Id. at 224. See also, Khodara Environmental, Inc. ex rel. Environmental, L.P. v. Burch, 245 F. Supp.2d 695, 710-11 (W.D. Pa. 2002).

The Supreme Court has repeatedly approved the doctrine of “non-statutory review” of *ultra vires* executive actions. In American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108-09 (1902), the Court explained that the “acts of all [a government department’s] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . . . Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer.” Here, Colonel Fincher, acting on behalf of the DOD, has threatened to have millions of dollars in federal funds withdrawn from the University unless the Law School capitulates to the Colonel’s demand that military recruiters be treated identical in every way to all other recruiters, which

⁹ The APA is not a grant of jurisdiction. Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 457-58 (1999) (citing Califano v. Sanders, 430 U.S. 99 (1977)). As Califano explains in more detail, although the Administrative Procedure Act “undoubtedly evinces Congress’ intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials,” the source of jurisdiction for such challenges is not the APA, but rather the statute plaintiffs actually invoked, which in the case of Califano, and here, is 28 U.S.C. § 1331. See 430 U.S. at 104-06.

demand has no basis in the Solomon Amendment or any other law. If such demands are not subject to judicial review, despite having no basis in the law, then nothing would stop the Colonel from imposing other arbitrary demands, such as requiring all Law School faculty to salute military recruiters.

In Leedom v. Kyne, 358 U.S. 184 (1958), the National Labor Relations Board had violated a statutory prohibition relating to bargaining groups. The Court framed the legal question as whether “the law, apart from the review provisions of the [NLRA] affords a remedy?” Id. at 188. The Court answered, “We think the answer surely must be yes.” Id. The same is true here -- the law, apart from the review provisions of the APA, affords a remedy to plaintiffs who allege infringement of their rights and seek declaratory relief.

Second, under the independent APA cause of action, the agency action at issue here was final. The Supreme Court has explained that the APA’s finality requirement is “flexible” and “pragmatic.” Abbot Laboratories v. Gardner, 387 U.S. 136, 149-50 (1967). Where an agency “leads private parties [or state officials] to believe that [sanctions will be imposed] unless they comply,” its actions have the requisite degree of finality. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *see also*, Grand Canyon Trust v. Public Service Company of New Mexico, 283 F. Supp.2d 1249, 1252-53 (D.N.M. 2003) (unwritten agency actions are subject to judicial review under APA; telephonic communications of final decision are sufficient).

The record demonstrates that the DOD made a final determination that Penn Law School was not in compliance with the Solomon Amendment. The defendant seeks to avoid this result by discussing only the letter of January 30, 2003 sent by Colonel Fincher notifying the

University that military recruiting had been “inappropriately limited” at the Law School. See, Ex. A to the Complaint, Attach. 1 to Pltffs’ Motion. Plainly, this assertion could be made only if the DOD had decided that the accommodations reached in 1998 did not satisfy the Act. In addition, Colonel Fincher’s letter made it clear that severe financial sanctions would be imposed unless the law school provided the DOD with the identical access it demanded. Id. at p.2. Thus, under the standard set forth by the Supreme Court in Abbott Labs, the DOD’s actions had the requisite degree of finality. See Abbot Labs, 387 U.S. at 149-50.

The finality of the DOD’s decision is also reflected in a direct conversation between Colonel Fincher and University Counsel Wendy S. White, which is detailed in her affidavit. See, White Aff., Attach. 6 to Pltffs’ Motion. In that conversation, Colonel Fincher advised her that “the Department of Defense had determined that the University would be considered in violation of the Solomon Amendment unless it provided identical treatment to military recruiters as it provided to non-military recruiters.” He further stated that “the military was unwilling to consider any different view.” Id. at ¶ 4. Following that conversation, Ms. White sent Colonel Fincher a letter dated March 19, 2003 (Ex. B to the Complaint, Attach. 1 to Pltffs’ Motion), in which she asserted that the Law School was in compliance with the Act, because it provided military recruiters with the required access to students and entry to the campus. Nevertheless, as reflected in Ms. White’s letter, the DOD was insisting on more than what the Act required -- it was insisting on identical access. Ms. White asserted that because the University “cannot put the ... federal funds received annually by the University at risk the [Law School] will not enforce its non-discrimination policy with respect to military recruiters.” (Id. p. 2).

It must be stressed that Colonel Fincher's letter to the University of Pennsylvania was not an isolated initiative of a low-level government official. As the FAIR court discussed in detail, precisely the same process was initiated by DOD officials with numerous universities and law schools across the country. See FAIR, 291 F.Supp.2d at 282-83. In each case, a letter virtually identical to that sent by Colonel Fincher to the Pennsylvania Law School (in some instances, coming from Colonel Fincher himself), cited non-compliance with the Act. In each case, following a purported "opportunity" for "clarification," the DOD made it clear that its final decision was that identical access was required, and non-compliance with this interpretation of the Act would result in the cut-off of federal funds to the University. As the FAIR court stated:

[I]n or about 2001, the military began to express dissatisfaction with the law schools. The DOD and officers of various branches of the military notified various schools that they were not in compliance with the Solomon Amendment. . . . Plaintiffs allege that the DOD threatened law schools with the loss of not only DOD funding, but all federal funding, if the schools did not afford the military full access to career services, the students, and the law schools. Plaintiffs further allege that, despite written requests from various law schools, the DOD failed to offer specific guidance as to what the military requires of the law schools in order to be deemed compliant with the Solomon Amendment, and replied simply by way of notification that the schools remained in default.

Id., at 282 (record citations omitted).¹⁰

¹⁰ As FAIR court recounted, Colonel Fincher wrote to the USC Law School requesting "clarification" of the school's policies concerning military recruitment. USC explained that the school provided military recruiters with standard employer information and materials, provided students with information about how to apply for an interview with the military, and posted notices of the military recruiter's visit. Like the Penn Law School, military recruiters did not set up interviews through the law school's career placement office, but rather through on-campus ROTC offices at USC. Colonel Fincher responded that the law school's policy did not conform to the Solomon Amendment and to do so USC must allow the military full access to the services of the law school's career

Accordingly, there can be no doubt that the DOD made a final agency decision that the access provided by the Penn Law School was not sufficient under the Act. In these circumstances, the defendant cannot avoid judicial review of the *ultra vires* acts of the DOD. It is obviously inequitable to allow an agency to coerce parties into compliance and then escape judicial review by arguing that its coercive tactics did not reflect a “final” agency decision. Moreover, under the First Amendment, one need not incur the penalty first in order to assert a constitutional challenge; the threat of a penalty is sufficient. See FCC v. League of Women Voters, 468 U.S. 364 (1984) (radio station sued when federal funds received imposed burdens on its right to editorialize, without waiting to first incur the penalty); Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (legal services lawyers sued because their ability to advance certain arguments were chilled by the strings attached to government funds, even though not a single legal services office opted to incur the penalty).

Third, even if the decision was not “final” under the APA, plaintiffs still prevail because they did not have any opportunity to demand further administrative review. Once the University of Pennsylvania bowed to the government’s coercive pressure, the injury to plaintiffs was complete. The defendant’s actions had been given “practical binding effect which resulted in tangible legal consequences for the plaintiffs,” satisfying the finality requirement regardless of any formal criteria. De La Mota v. U.S. Dept of Educ., 2003 WL 21919774 at *8 (S.D.N.Y., Aug. 12, 2003), [copy attached in Appendix]. Any other rule would make it impossible for a

services office, the students, and the law school.” FAIR, 291 F.Supp.2d at 283. The Court rejected this argument. Id. at 320-21.

third party injured by actions taken in reliance on preliminary agency action to recover. That might be convenient for the government, but it is not the law.

In De La Mota, plaintiffs were Perkins Loan recipients whose loan cancellation benefits had been revoked by educational institutions in reliance on a Department of Education employee's eligibility determination. In rejecting the Department's claim that its determinations were not final for purposes of the APA, the court held that "it is of no moment that the agency action here came in the form of an 'informal' e-mail correspondence between a DOE employee and the law schools and plaintiffs." Id. "The practical effect of the DOE's action, not the informal packaging in which it was presented" controlled the finality question, and once the plaintiffs' "rights were determined and legal consequences flowed" judicial review was available. Id. at *8-*9. See also Ciba-Geigy Corp. v. E.P.A., 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review."). The same rule is applicable here.¹¹

Summary judgment in favor of the plaintiffs on the statutory cause of action set forth in Count I of the Complaint is appropriate. The Law School's procedures in effect from 1998-2003 were in compliance with the Solomon Amendment. The defendant's argument that plaintiffs have no cause of action because there has been no final agency action under the APA is simply

¹¹ It should be noted that "[t]he most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute"—precisely what plaintiffs allege here. Coca-Cola Co. v. F.T.C., 475 F.2d 299, 303 (5th Cir. 1973). Thus, judicial review would be available even if the claim was made under the APA claim and the agency action was deemed non-final.

wrong. Plaintiffs do not need to proceed by way of the APA, but rather may seek review of *ultra vires* actions of the DOD under 28 U.S.C. § 1331 and the doctrine of non-statutory review.

Under the APA, the DOD's action was final, and there was no opportunity to demand any further agency review. At the minimum, if the Court believes there is an issue of fact as to the statutory claim, such issue would require a denial of defendant's motion to dismiss.

B. Plaintiffs Have Standing To Bring This Action.

The government, having improperly assumed that plaintiffs' central claim in this lawsuit is a facial constitutional challenge to the Solomon Amendment, asserts that the standing inquiry is particularly rigorous since the Court is asked to strike down a legislative act of Congress. Mem. at 9. But plaintiffs have carefully sought to avoid the necessity of such action by seeking relief on non-constitutional grounds as well. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The plaintiffs' principal assertion is that the defendant's demand for precisely identical treatment — rather than the statutorily mandated access to students and the campus — is not authorized by the Solomon Amendment. See Compl. ¶ 34, Attach. 1 to Pltffs' Motion.¹² As demonstrated supra, the pre-litigation position of the Department of Defense is impossible to square with the text of the Solomon Amendment.

With respect to the issue of standing, the FAIR court recently ruled that faculty, students and student organizations have standing to challenge the Solomon Amendment. See FAIR, 291 F.Supp. 2d at 294-95. Plaintiffs believe that the same is true here for all of the reasons cited by the FAIR court.

¹² Plaintiffs seek only a declaratory judgment on this claim. See Compl. ¶ 42, Attach. 1 to Pltffs' Motion.

1. Plaintiffs Have Alleged Injury-in-Fact.

Plaintiffs have alleged injury-in-fact based upon infringement of their First Amendment Rights to receive (in the case of student and faculty plaintiffs) and to disseminate (in the case of faculty plaintiffs) the message of equal treatment and non-discrimination. The government avoids addressing the plaintiffs' allegations of injury by characterizing them as "entirely vacuous," and then constructs a straw man: the theory that plaintiffs are complaining about being "subjected to a message they find repugnant." Mem. at 11-12. But that is not at all the injury plaintiffs assert; rather, they claim that they "have been deprived of the benefits and protections of the Law School's anti-discrimination policy." Compl., ¶ 32, Attach. 1 to Pltffs' Motion; see also Burbank Aff. ¶ 9, Attach. 2 to Pltffs' Motion ("It has been more difficult for me as a teacher to honestly and effectively advocate equal justice under the law knowing that the Law School is acting in derogation of its stated policy."); see also Aff. of Bryan Tellevi, ¶ 3-4, Attach. 4 to Pltffs' Motion ("My choice of Penn Law was motivated in no small part by its explicit inclusion of sexual or affectional orientation in its antidiscrimination policy ... The Law School's current practice of making no distinction between military recruiters and recruiters from firms that do not discriminate undermines its asserted commitment to equality on the basis of sexual or affectional orientation.").

As the Complaint explains, the Law School's anti-discrimination policy:

is an important statement of Law School policy and was adopted and has been implemented, in the exercise of rights of free speech and academic freedom (a) to ensure full recognition of the worth and individual dignity of all law students, (b)

to commit (and to convey to the students the Law School's commitment) to the education and training of professionals who do not engage in invidious discrimination, (c) as part of the Law School's commitment to furthering tenets of professional responsibility, in that the faculty seeks to educate future lawyers about the importance of carrying on their professional work in a manner that does not deny or undermine the equal dignity and respect owed to clients and others, (d) to ensure that employers who seek to use the resources of the Law School to recruit students respect and adhere to this policy, and (e) to ensure that the student body will continue to be diverse.

Compl. ¶ 16, Attach. 1 to Pltffs' Motion.¹³

The defendant has coerced the University to compel the Law School to abandon its non-discrimination policy and, as a result, has compromised both the education that the Law School has promised to students and its express commitment to nondiscrimination. Plaintiff students, as the recipients of that education and of the antidiscrimination message, and plaintiff professors, as both recipients and instruments of transmission, are concretely injured by the government's interference with the Law School's educational and expressive activity. The Law School wishes to impart to the members of the Law School community, and the world at large, the message that responsible legal professionals do not condone or abet discrimination. The student plaintiffs wish to receive that message; the faculty plaintiffs wish to receive and transmit it; and all have been hampered by the government's intrusion.

This precise issue of standing was decided in favor of the plaintiffs in FAIR. The FAIR court ruled that “[i]t is well settled that the Constitution protects the exchange of information, both as to the speaker and the intended recipient.” FAIR, 291 F.Supp.2d at 292. The government attempts to distinguish FAIR and the overwhelming authority recognizing the right to receive information as cases that involve “governmental action that serves to *prevent or*

¹³ See also, Aff. of Stephen Burbank, Attach. 2 to Pltffs' Motion.

prohibit individuals from hearing a speaker or receiving access to information.” Mem. at 15.

The government then argues that plaintiffs are asserting some disfavored form of “indirect interference” with their First Amendment rights. *Id.* at 16. Neither argument accurately reflects the Complaint or the case law.

First, the government’s attempt to draw a line between direct prohibition of and “indirect interference” with protected speech ignores the numerous cases protecting speech that fall on the “indirect” side of the line. It is simply not the case that expression is protected only against prohibition; the First Amendment protects individuals and organizations from government action that compromises the clarity and comprehensibility of their message or undermines their ability to disseminate it regardless of the form the interference takes.¹⁴ See, e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). As discussed *infra*, Section V.C., the parade organizers in *Hurley* were not prevented or prohibited from speaking; their complaint was that the presence in their parade of a group they wished to exclude would “alter the expressive content of their parade.” *Id.* at 572-73. Nor were the Boy Scouts, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), subjected to any direct constraint on their speech. Instead, they were required to engage in conduct—accepting as a member an openly gay man—inconsistent with their asserted message that “homosexual conduct [is not] a legitimate form of behavior.” *Id.* at 651 (internal citations omitted).

¹⁴ This is not to say that all governmental action restraining expression is constitutionally prohibited; First Amendment jurisprudence recognizes that sufficiently weighty interests can support narrowly tailored burdens on speech. But such burdens are sufficient to establish standing. *See Meese v. Keene*, 481 U.S. 465, 479 n14 (1987) (“The risk of this reputational harm, as we have held earlier in this opinion, is sufficient to establish

The Law School and the plaintiffs seek to convey the message that discrimination is not a legitimate form of behavior, and that responsible legal professionals neither commit nor abet discriminatory acts. Prohibiting the Law School from making any distinction between military recruiters and employers who do not discriminate, in effect forces the Law School to do precisely what it urges its students not to: condone and abet discrimination.¹⁵ The defendant has placed plaintiffs in a situation where their message of anti-discrimination can only be phrased “Do as I say, not as I do.” Not only is this a much less persuasive and coherent message, but it makes the Law School, and its anti-discrimination policies, become hypocritical. See Aff. of Ellen London, Attach. 3 to Pltffs’ Motion.

This injury to expressive activity is the same injury recognized in Dale. And when expression is at issue, both speakers and listeners have standing to seek redress. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), 756 (“[w]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both”). This concept has been applied in the context of free speech at schools and universities. See, e.g., New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868, 877-78 (3d, 1981) (holding that students’ right to receive education “is a first amendment right distinct from the right to impart

appellee's standing to litigate the claim on the merits. Whether the risk created by the Act violates the First Amendment is, of course, a separate matter.").

¹⁵ The distinction the Law School makes is based directly on its anti-discrimination policy. The Law School has, in fact, banned private employers who discriminate from recruiting on campus. In contrast, and in order to comply with the Solomon Amendment, the Law School has not banned the military from recruiting, but has merely required it to use the University’s Office of Career Placement, rather than the Law School’s Career Planning and Placement Office, to assist in scheduling interviews.

knowledge”). Indeed, both the Supreme Court and the Third Circuit have stated that the listener’s First Amendment right “is nowhere more vital than in our schools and universities.” New Jersey-Philadelphia Presbytery, 654 F.2d at 878 (quoting Kleindeinst v. Mandel, 408 U.S. 753, 762-63 (1972)).

The government also asserts that Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) “found wanting . . . precisely the theory of ‘indirect interference’” that plaintiffs assert here. Mem. at 17. But Gregg is not a *standing* case at all; rather, it deals with the substantive scope of the First Amendment. 771 F.2d at 544 (“Although we affirm the dismissal of the private plaintiffs’ action in this case, we do so on grounds of lack of a cause of action, not lack of standing”).¹⁶

In short, plaintiffs have satisfied the injury-in-fact requirement of standing through the pleadings and affidavits showing the Plaintiffs’ rights to receive and disseminate the message of equal treatment and non-discrimination reflected in the Law School’s non-discrimination policy.

¹⁶ Indeed, even if Gregg were to apply, all it demands is that plaintiffs identify a “willing speaker” whose expression had been compromised by state action. Subsequent cases have read Gregg to stand simply for the proposition that a plaintiff asserting an infringement of the right to receive information faces “the requirement of pleading the existence of specific willing speakers.” Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1508 (D.C. Cir. 1995) (citing Gregg). If a willing speaker is identified, Taylor concludes, the plaintiff “has adequately pled facts supporting its standing to bring suit on First Amendment grounds.” Id. Thus the D.C. Circuit, like every other circuit, recognizes the First Amendment right that plaintiffs assert here. See id., at 1508 (“we agree with GAP that it has a First Amendment interest in receiving information from willing speakers within the RTC sufficient to support its standing to bring a constitutional challenge”). Plaintiffs have identified a willing speaker—the Law School and faculty plaintiffs. See, Cmpl’t ¶ 35, Attach. 1 to Pltffs’ Motion. (“The Law School and the University are willing to reinstitute the 1998-2003 procedures and would do so but for the defendant’s threat of funding termination.”). Therefore, plaintiffs have satisfied the injury-in-fact requirement.

2. Plaintiffs Have Established Causation.

The government next argues that the plaintiffs cannot satisfy the causation requirement of standing, which mandates a showing that their injuries are “fairly ... trace [able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court.” Lujan v. Defenders of Wildlife, et al., 504 U.S. 555, 560 (1992) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Again, this precise issue was resolved against the Government in FAIR. See FAIR, 291 F.Supp.2d at 293 (“The Court concludes that the alleged harm ... is fairly traceable to the Solomon Amendment”).

A plaintiff has standing to sue the government for the acts of a third-party if the government is the but-for cause of that third-party’s actions. As the Supreme Court put it in Bennett v. Spear, 520 U.S. 154, 169 (1997), “while, as we have said, it does not suffice if the injury complained of is ‘th[e] result [of] the *independent* action of some third party not before the court’ [citing Lujan], that does not exclude injury produced by determinative or coercive effect upon the action of someone else.” (emphasis in original). The Third Circuit has been even more explicit. In The Pitt News v. Fisher, 215 F.3d 354, 360-61 (3rd Cir., 2000), the Court squarely held that an injury from third-party activity (here the University’s demand that the Law School abandon its anti-discrimination policy) is fairly traceable to a defendant for standing purposes if the third party “would not have [caused the injury] ‘but for’ the actions of [the defendant]” (here the military’s threatened cut-off of federal funds to the University).¹⁷

¹⁷ The government seeks to distinguish cases such as Bennett v. Spear, 520 U.S. 154 (1997) and The Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), both of which held that the

The main thrust of the government’s argument on this point is that the Solomon Amendment leaves educational institutions “free to choose” whether to allow the military to recruit on campus (despite the military’s violation of an anti-discrimination provision). Mem. at 18. Such “freedom,” however, is illusory where, as here, the government has threatened to impose severe financial sanctions on the University if the Law School chooses to enforce its anti-discrimination provision. See South Dakota v. Dole, 483 U.S. 203, 211 (1987) (“in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns to compulsion.”) (internal citations omitted).

In this case, plaintiffs have explicitly alleged but-for causation, and have supported the allegation with documentary evidence that shows that the threatened revocation of millions in federal aid is the sole reason that the University directed the Law School to suspend its anti-discrimination policy. See Compl. ¶¶ 34, 35, and Ex. A and B thereto, Attach. 1 to Pltffs’ Motion; and White Aff., Attach. 6 to Pltffs’ Motion. Plaintiffs have satisfied the causation requirement.

plaintiffs had standing to sue the government for actions taken by a regulated third party, on the grounds that the individuals or organizations there “would have been subject to criminal sanction.” Mem. 20. But the magnitude of the sanctions, or whether they are criminal or non-criminal, is beside the point. The government has drawn a line that simply does not exist in the case law. See, e.g., D&F Afonso Realty Trust v. Garvey, 216 F.3d 1191, 1192, 1194 (D.C. Cir 2000) (construction company has standing to sue FAA for making a “hazard determination” that caused a town to refuse to issue an occupancy permit).

3. Plaintiffs' Standing Is Not Dependent Upon The Theory of Third Party Standing.

The government's argument that plaintiffs may not assert the rights of third parties, such as the Law School and the University, is largely irrelevant as plaintiffs do not need to assert the rights of third parties. Virginia State Board of Pharmacy demonstrates that the First Amendment allows would-be recipients of information to attack governmental regulation of willing speakers on the basis of their own rights, which are reciprocal and co-extensive.

In Virginia State Board of Pharmacy, consumers brought suit challenging a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs. 425 U.S. at 753-54. The statute did not place any constraints on consumers, nor was it possible for consumers to violate it. Nonetheless, the Court held that the First Amendment "protection afforded is to the communication, to its source and to its recipients both." Id. at 756. The consumers succeeded in challenging the statute — not by asserting the pharmacists' rights — but by asserting their own. As a substantive matter, the rights of the willing speaker and of the would-be recipient are essentially identical, but they are analytically distinct. As the Court put it, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." Id. at 757.

Virginia State Board of Pharmacy found no need to rely on a theory of third-party standing. Nor did the many other cases recognizing and enforcing the right to receive information. See, e.g., Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindeinst v. Mandel, 408 U.S. 753, 762-63 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965). Justice Brennan's concurrence in Lamont addressed the issue directly:

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.' Since the decisions today uphold this contention, I join the Court's opinion.

381 U.S. at 307-08 (Brennan, J., concurring) (citations omitted).

Thus, plaintiffs can argue on the basis of their own First Amendment rights that the defendant exceeded his statutory authorization, and that the Solomon Amendment creates an unconstitutional condition as interpreted and applied.

4. Plaintiffs Have Third-Party Standing.

Plaintiffs can also invoke the rights of the Law School and the University, as the requirements for third-party standing are satisfied. The test for third-party standing demands, first, that the plaintiff have suffered an injury-in-fact; second, that there be a sufficiently close relationship between the plaintiff and the absent party to ensure effective advocacy; and, third, that there be some hindrance to the third party's ability to assert his own interest. See Powers v. Ohio, 499 U.S. 400, 411 (1991). As demonstrated, supra, plaintiffs have suffered an injury-in-fact. The requirement of a close relationship is readily satisfied by the relationship between a school and its professors and students. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925) (school allowed to assert rights of students and parents); Truax v. Raich, 239 U.S. 33, 38-39 (1915) (employee allowed to assert rights of employer).

The remaining requirement, on which the government focuses, is that there "exist some hindrance to the third party's ability to protect his or her own interests." Mem. at 23, 24, quoting

Powers, 499 U.S. at 411. Such a requirement may not even be applicable in First Amendment cases. See Secretary v. Joseph H. Munson, Co., 467 U.S. 947, 957-58 (1984) (in First Amendment context “the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims”). The Third Circuit has read Munson to mean that “the prudential standards governing the assertion of third party rights may be relaxed in the First Amendment context.” The Pitt News, 215 F.3d at 364.

Moreover, the Supreme Court has recognized that privacy concerns can constitute a sufficient hindrance for the purposes of the Powers test outside the First Amendment context. In Carey v. Population Services Int’l, 431 U.S. 678, 684 n.4 (1977), the Court relied on the presumed embarrassment a minor would suffer from publicizing a desire to obtain contraceptives. The Third Circuit, likewise, has held that “a party need not face insurmountable hurdles to warrant third-party standing” and that the “stigma associated with receiving mental health services” presented a sufficient obstacle to suit by patients to justify granting third-party standing to their doctors. Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc., 280 F.3d 278, 290 (3d Cir. 2002).

It should not be surprising that educational institutions do not wish to be seen as opposing the military as they depend heavily on federal assistance and on donations from alumni and other sources. They may well hesitate to place themselves in a position that might be perceived (however incorrectly) as hindering the military’s ability to recruit students or otherwise to fulfill its important duties. Law schools have joined the Forum for Academic and Institutional Rights, Inc. in order to bring suit anonymously. As the court in FAIR observed, “FAIR membership is kept secret to allay members’ fears of retaliatory efforts on behalf of the government and private

actors if the law schools were to participate as named plaintiffs in a legal challenge.” FAIR, 291 F.Supp.2d at 286. It was the fear of financial sanctions that forced universities and law schools to capitulate to the government’s demands in the first place. This fear is certainly as much of a hindrance as the embarrassment occasioned by public knowledge that a minor seeks to buy contraceptives or an individual has received psychiatric treatment.

The FAIR court understood the point that law schools are hindered from asserting their own rights. Further, while the FAIR suit may be an adequate vehicle for a facial challenge to the Solomon Amendment, it did not provide the opportunity to present the argument raised by the plaintiffs in this action - - namely that Penn Law School’s accommodation to the military complies with the Solomon Amendment -- and to assert an “as-applied” constitutional challenge. Consequently, plaintiffs have demonstrated a sufficient hindrance to the University and Law School’s ability to assert their own rights, and have also satisfied the Powers test for third-party standing.

C. As Applied in This Case, the Solomon Amendment Violates the Doctrine of Unconstitutional Conditions Because It Deprives Plaintiffs of Their Rights to Academic Freedom, Freedom of Speech And Expressive Association by Compelling the Law School to Suspend Its Anti-Discrimination Policies to Avoid a University-Wide Cutoff of Federal Funds.

One must start with the basic proposition that the Law School’s anti-discrimination policy is an expression of policy that, as a matter of free speech and expressive association, as well as academic freedom, is fully protected from direct government interference under the First Amendment. As the sponsors of the Solomon Amendment conceded, the government could not directly order the Law School to abandon or amend the policy, as no compelling governmental interests would justify such action. See 140 Cong. Rec. at 11,439. Under the doctrine of

unconstitutional conditions, the government cannot achieve this same end by coercing the University of Pennsylvania (by threatening to terminate government grants and contracts) to force the Law School to abandon its anti-discrimination policy.

The government argues that the Solomon Amendment does not constitute an unconstitutional condition because (1) plaintiffs are not recipients of federal funds (Mem. at 30), (2) the Solomon Amendment “has nothing to do with protected speech” (Id.), (3) congressional spending power is properly asserted (Id., at 32-33), and (4) even if speech is involved, the Solomon Amendment entails only “an incidental limitation on speech . . .” (Id., at 33). The government is wrong on all counts.¹⁸

Initially, however, it is important to note that plaintiffs’ First Amendment challenge is not, as asserted by the government, one seeking “facial invalidation” of the Solomon Amendment. Mem. at 20. Rather, plaintiffs assert that because the Law School has provided the military statutorily required access to students and the campus, the Solomon Amendment, as applied, suppresses free speech, free association, and academic freedom. Simply put, the government has no legitimate interest in coercing the University and Law School, by threat of the loss of millions of dollars in federal grants and funds, to abandon its anti-discrimination policy when the application of that anti-discrimination policy in no way prevents the military full access to students. In this context, the direct impact of the Solomon Amendment upon First Amendment rights mandates relief. Even if that impact were incidental, it would be constitutionally prohibited.

¹⁸ The argument that the plaintiffs are not recipients of federal funds is essentially a standing argument which has been addressed, supra, Section V.B.

1. The Law School's Policy is Protected By The First Amendment.

a. Governing Standards

Penn Law School's decision not to permit recruiting by discriminatory employers is a fundamental expression of the Law School's and plaintiffs' core values of equality and human dignity. It is a critical part of the Law School's academic and professional environment. At Penn Law School, recruiting is not a simple economic transaction. It is an integral part of the School's academic and professional program and helps to foster the School's training of responsible professionals, and to build an academic community where mutual respect is honored. Employers who discriminate are not permitted to use the Law School's facilities to recruit students because this would send a message to the students, the employers and the world at large that the Law School tolerates invidious discrimination. Interference with the Law School's standards directly violates the Law School's right to tailor its message and the specific rights of the plaintiffs and the Law School "to determine ... who may teach, what may be taught, how it shall be taught and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring in result).

The Law School as a whole -- and its placement programs in particular -- seek to convey a number of messages, both to students and to employers: (1) responsible professionals do not engage in invidious discrimination, (2) students should seek employment with responsible employers who recognize and practice equality of treatment, and (3) the Law School refuses to assist employers who do not abide by such norms. In particular, the effort to convey respect for gay and lesbian students is furthered by the Law School's policy of not assisting employers who do not provide equal opportunities for these applicants. Requiring the Law School's placement

facilities to assist recruitment by employers who discriminate on the basis of sexual orientation interferes with the Law School's ability to convey its chosen messages. Such a requirement also directly interferes with the plaintiffs' rights to teach and learn in the pedagogical environment that the policy seeks to foster.

In this respect, the plaintiffs stand in the same position as the parade organizers in Hurley v. Irish American Gay Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), who successfully claimed that their parade was an expressive activity and that forcing them to include a gay/lesbian contingent violated their First Amendment rights.

Boy Scouts of America v. Dale, 530 U.S. 640 (2000), which struck down a state's application of an anti-discrimination law to prohibit the Boy Scouts from discharging a scoutmaster who was openly gay, provides further controlling case law support. The Court ruled that forcing the Boy Scouts to keep the scoutmaster "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior." Id. at 653. The Boy Scouts asserted that such a message would contradict their explicit mission statement, "to instill values in young people." Id., at 649. See also The Circle School v. Phillips, 270 F.Supp. 2d 616 (E.D. Pa. 2003) (school's right to expressive association in deciding how to communicate values and principles to students violated by state law that requires the school to start each day with Pledge of Allegiance or Anthem).¹⁹

¹⁹ In Pi Lambda Phi v. University of Pittsburgh, 229 F.3d 435, 438 (3d Cir. 2000), the Third Circuit noted that the Supreme Court "has not set a very high bar for expressive association" entitled to First Amendment protection.

The government's interference with the Law School's anti-discrimination message is more direct and intrusive than the interference in Hurley and Dale. In Hurley, the problem was not that the presence of the disfavored group would undermine the parade organizer's message; rather, the Court found First Amendment protection in the exclusion of certain disfavored messages on parade banners to protect against the possibility that the public would understand that the organizers actually endorsed those messages. Compulsion to include these messages would be compelled speech. Hurley, 515 U.S. at 574-75. In Dale, the problem was the confusion introduced into the speaker's message: "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform," sent "a message . . . that the Boy Scouts accept homosexual conduct as a legitimate form of behavior." Dale, 530 U.S. at 655-56 and 653. "[W]e must . . . give deference to an association's view of what would impair its expression." Id. at 653 (emphasis added).

The Supreme Court applied strict scrutiny in both Hurley and Dale, even though the anti-discrimination ordinances at issue purported to regulate only conduct. The same conclusion must apply here, given the Law School's explicit message. The parade organizers in Hurley had no discernable message. See Hurley, 515 U.S. at 562. Yet, that did not deprive them of the right to "exclude a message they did not like." Id. at 574. The Boy Scouts had an explicit mission statement, couched in terms similar to a law school's, "to instill values in young people," Dale, 530 U.S. at 649, but the statement said nothing about the particular value it claimed the ordinance was undermining. Id. at 650. Still, the Supreme Court held the compelled message to be unconstitutional.

Here, the government has not merely required the Law School to refrain from excluding military recruiters, which would be analogous to the requirement in Hurley and Dale. It has additionally compelled the Law School to assist and participate in discriminatory recruitment, a direct contradiction of the explicit anti-discrimination policy. The plaintiffs cannot credibly proclaim “we do not abet acts of discrimination,” when they do. Whatever the plaintiffs may say with respect to the importance of the anti-discrimination policy will ring hollow given the fact that it is not applied to the military. See, Tallevi Aff., ¶ 4, Attach. 4 to Pltffs’ Motion. In any event, any such proclamation would be a weak substitute for the plaintiffs’ and the Law School’s freedom to communicate policy in the way they consider most effective. See Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 15 (1986) (Court struck down requirement that utility company include a consumer group’s materials in its billing envelope on the ground that coerced access to the envelope of a private utility’s bill and newsletter will force the utility either to appear to agree with the intruding leaflet or to respond). So, too, as construed by the military, the Solomon Amendment forces the plaintiffs either to appear to agree that exclusion of gays and lesbians is within the legitimate scope of professional practice, or to respond to make their disagreement plain.

The First Amendment right of expressive association is heightened in the arena of academic freedom. The plaintiffs claim to be free from governmental interference or control with respect to decisions regarding a central mission of the Law School: the creation of an academic and professional environment free of invidious discrimination. The right to academic freedom has long been recognized by the Supreme Court, and this past Term the Court affirmed this doctrine: “We have long recognized that, given the important purpose of public education

and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003) (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)). See also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)); Board of Regents of Univ. of Wisconsin v. Southworth, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring) (“We have long recognized the constitutional importance of academic freedom.”)

The Supreme Court has regularly subjected infringements on speech and expressive association to heightened scrutiny in the university context. See Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 836 (1995) (noting danger of chilled speech in university context); Rust v. Sullivan, 500 U.S. 173, 200 (1991) (“the university is a traditional sphere of free expression . . . fundamental to the functioning of our society”). The anti-discrimination policy expresses values designed to foster non-discriminatory practices, and therefore, is a classic expression of academic freedom. See Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1985); Grutter, 123 S. Ct. at 2340 (“classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds”) (internal quotes and citation omitted).

As a matter of internal governance, the anti-discrimination policy regarding recruitment practices is an integral part of a larger “whole” of academic freedom. Transmissions of values can be achieved by classroom teaching and by administrative policies. The faculty determines how best “to provide that atmosphere which is most conducive to speculation, experiment and creation.” Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring) (internal citation omitted). The

faculty has the fundamental right “to determine for itself on academic grounds,” not just “who may teach . . . and who may be admitted to study,” but also “what may be taught, how it shall be taught,” id. (emphasis added), and what interventions are and are not “inconsistent with ‘its basic educational mission.’” Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citation omitted); Brown v. Li, 308 F.3d 939, 949-51 (9th Cir. 2002). See also Regents of University of Michigan, 474 U.S. at 226 n.12 (academic freedom depends upon “autonomous decisionmaking by the academy itself”).

b. As Applied, the Solomon Amendment Violates Plaintiffs’ First Amendment Rights.

In light of the direct effect of the Solomon Amendment on plaintiffs’ First Amendment right of free speech, expressive association, and academic freedom, strict scrutiny of the Act is required. Moreover, since the military has been granted access consistent with the Act and, therefore, the government can demonstrate no legitimate interest in coercing Penn Law School to abandon its anti-discrimination policy, even if the impact on First Amendment rights is incidental, plaintiffs still prevail on the First Amendment claims.

Under the accommodations made in 1998, Penn Law School’s policy provided exactly the access the Solomon Amendment sought to ensure. Military recruiters had access to the University of Pennsylvania campus and to all law students interested in a military career. The recruiters could inform students of their options; they could provide material touting the virtues of military life; and they could interview students. In contrast to private employers who did not comply with the Law School’s non-discrimination policy, military recruiters were provided accommodations for interviews at the University of Pennsylvania. However, military recruiters may not legitimately claim the endorsement of the Law School for their decision to discriminate

on the basis of sexual orientation. That is exactly what they have done by preventing the Law School from enforcing its anti-discrimination policy.

The message the Law School seeks to convey is supported by the Supreme Court's most recent interpretations of the Constitutional demands of equality. See Lawrence v. Texas, 123 S.Ct. 2472 (2003); Romer v. Evans, 517 U.S. 620 (1996). These cases make clear that discrimination against individuals by virtue of their sexual orientation implicates substantive due process and equal protection rights, and that adverse treatment of gays and lesbians because of the hostility of their fellow citizens is not a legitimate state interest. See also, Hensala v. Dep't of the Air Force, 343 F.3d 951 (9th Cir. 2003) (military's recoupment policy for financial aid provided to officers for medical education may not be applied to service members who merely declare their homosexuality, as opposed to service members who engage in same-sex conduct); Flores v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003) (cause of action for failure to enforce school's anti-discrimination policy to complaints of anti-gay harassment); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (finding that there is no rational basis for permitting a student to assault another student because of his sexual orientation).

The decision in FAIR denying plaintiffs' motion for a preliminary injunction is not controlling, since that case involved a facial challenge to the statute's requirement of "access" for military recruiters. In the context of denying a motion for a preliminary injunction, the court assumed that the law schools had not provided access and, therefore, had to balance strong governmental interests of access against what the court deemed "incidental" infringements of First Amendment rights. Here, by distinct contrast, the government has no legitimate interest in preventing the plaintiffs from enjoying the benefits of the anti-discrimination policy since the

accommodations undertaken by the Law School have provided the military with the access and information required by the Solomon Amendment.

Moreover, the decision in FAIR that, for the purpose of preliminary injunction analysis, the First Amendment rights of law schools, faculty and students were too “incidental” to deserve constitutional protection, is not persuasive. The FAIR court recognized that “[l]aw school recruiting policies have First Amendment value,” but held that the Solomon Amendment did not suppress speech as it “does not interfere with academic discourse by condemning or silencing an ideology or point of view.” FAIR, 291 F.Supp.2d at 302. However, the fact that other avenues of speech are open does not save governmental interference with free speech, or expressive association or academic freedom. A speaker’s freedom to reframe a message or to contradict a compelled message is never a suitable antidote to compelled speech, since such compulsion forces the speaker “to tailor its speech to an opponent’s agenda, and to respond to . . . arguments. . . where [it] might prefer to remain silent.” Pacific Gas v. Pub. Utility Comm’n, 475 U.S. 1, 10 (1986). see also, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255-58 (1974); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

The Solomon Amendment has far more than an incidental effect on free speech and association. The anti-discrimination policy is a core ideological statement intended to further interests in diversity, non-discrimination, and the dignity of each individual. The FAIR court failed to give sufficient value to the anti-discrimination policies of the law schools and their

central expression of academic freedom and thus erred in finding only an incidental degree of interference.²⁰

In determining that anti-discrimination messages were not suppressed, FAIR distinguished Dale on the ground that the Solomon Amendment does not require law schools to “accept military recruiters as members of their organization.” FAIR, 291 F.Supp.2d at 305. By focusing on the irrelevant issue of membership, the court did not address the primary First Amendment harm caused by the Solomon Amendment -- the abandonment of a law school’s principled anti-discrimination policy. Plaintiffs do not complain of the fact of the military on campus; indeed, the military can present their political views at the Law School in a number of ways. Rather, the harm results from the fact of compelled assistance by Law School personnel of military recruiters and the use of Law School facilities by recruiters who are in violation of the anti-discrimination policy.

The anti-discrimination policies governing on-campus recruiting are no less expressive than the messages that may be conveyed by parades. If, as in Hurley, a parade is intended to express a particular ideological viewpoint, so too does the Law School’s policy prohibiting employers who practice discrimination from receiving direct support from the Law School. It is not the nature of recruitment, but the substantive policies that control recruiting, that are at stake. Nor is there any valid distinction between conduct and speech. Dale involved “conduct” -- whether the Boy Scouts would be compelled to accept an openly gay Scout leader. The Dale

²⁰ Forcing the Penn Law School to subsidize a recruiting activity is like the unconstitutional forcing of union members to subsidize a union’s political activity, or unconstitutionally forcing a mushroom grower to contribute toward collective expressive activities. See Abood v. Detroit Bd. Of Educ., 431 U.S. 209 (1977); United States v. United Foods, Inc., 533 U.S. 405 (2001).

Court ruled that this type of compelled association would violate the First Amendment. Dale's doctrinal foundation permits no distinction based on whether the compelled activity is speech or conduct.

2. As Applied In This Case, The Solomon Amendment Imposes an Unconstitutional Condition on Federal Funding.

If the Federal government cannot directly require Penn Law School to entertain military recruiters without violating the First Amendment, it cannot seek to do so indirectly by penalizing the entire University for the Law School's refusal to accede to unconstitutional federal demands. A number of Supreme Court cases address this issue. In Speiser v. Randall, 357 U.S. 513 (1958), the Court held that a state could not make a property tax exemption for veterans contingent on their willingness to sign a loyalty oath, stating:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech . . . [D]enial of tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas."

Id. at 518-19, quoting American Communications Ass'n v. Douds, 338 U.S. 382, 402 (1950).

In O'Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996), the Court struck down the denial of a government contract because of a failure to comply with a requirement of political party membership. The Court stated that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited [and] that would allow the government to

produce a result which it could not command directly. Such interference with constitutional rights is impermissible.” Id. at 717 (internal citations omitted).

Most recently, the Supreme Court held that when the federal government funds legal services to the poor it cannot require in return that the funded lawyers refrain from challenging welfare laws. See Velazquez, 531 U.S. at 549. See also Conant v. Walters, 309 F.3d 629, 638 (9th Cir. 2002); Davey v. Locke, 299 F.3d 748, 756 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003) (denial of state aid to post-secondary students pursuing theological degrees violates First Amendment).

The “unconstitutional conditions” doctrine is an explicit limitation on the otherwise broad “Spending Clause” powers of Congress. See Velazquez, 531 U.S. at 547. In some circumstances it is permissible for the government, in the disbursement of public funds to private entities, to place restrictions on the use of the money to ensure that the message intended by the expenditure is not muddled. See Rust v. Sullivan, *supra*. But this governmental interest exists only in those situations where Congress has placed the limitation on the specific program funded by the government. In Rust, the Supreme Court upheld a rule prohibiting doctors in a federally funded family planning clinic from counseling about abortions, but the Court specifically noted that the restriction was limited to the activities of the specific program funded and not to activities in the rest of the hospital. 500 U.S. at 196-98.²¹ Similarly, the Supreme Court upheld a rule that libraries must block pornography from their computers when they benefit from a government program to pay for library computers, but that rule did not in any way affect what

²¹ Rust reaffirmed the principle that infringements on speech and expressive association are subject to heightened scrutiny in the university context. 500 U.S. at 200.

books or programs the library maintained outside the program. United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2307-08 (2003).

Under these cases, if Congress subsidized recruitment programs at law schools, it could insist that the funds flow only to those schools that are prepared to allow the military to recruit its students. But the First Amendment does not permit the government to threaten to cut off wholly unrelated grants or contracts to the entire University because the Law School refuses to support the government's message or refuses to submit to government pressure not to communicate its own message in a particular way. In Board of Trustees, Stanford University v. Sullivan, 773 F.Supp. 472 (D.D.C. 1991), the court ruled that a governmental regulation prohibiting a University from publishing data obtained as a result of research subsidized by the government was an unconstitutional condition on the exercise of First Amendment rights. While the restrictions in Rust were specifically tailored to the program being funded and thus qualified as governmental speech, in Board of Trustees the conditions had nothing to do with the funding. Here, too, the conditions mandating access have nothing to do with the funding purposes.

Velasquez bars what the Government is seeking to do here: "Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." 531 U.S. at 548-549. See also League of Women Voters, 468 U.S. at 400 (condition on federal funding violated unconstitutional conditions doctrine because the condition effectively covered the speaker and

not just the program); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (public employee may not be forced to relinquish First Amendment rights as condition of public employment).²²

VI. Conclusion

The government had no legal basis to threaten the University with the loss of federal funding under the Solomon Amendment, based on the activities of the Law School, when the Law School has been in full compliance with that statute. Moreover, plaintiffs are entitled to teach and learn under the Law School's anti-discrimination policy. This Court should therefore deny the defendant's Motion to Dismiss, grant the plaintiffs' Motion for Summary Judgment, and issue a Declaratory Judgment that the Law School's policies and practices in effect from 1998-2003 are in compliance with the Solomon Amendment or, in the alternative, that the Solomon Amendment, as applied, violates plaintiffs' rights to free speech, association and academic freedom.

²² The government makes the seriously misplaced argument that the Solomon Amendment "is no different than the numerous other provisions of the federal law that prohibit government grants, funds, or other benefits to be given to institutions or organizations that discriminate on the basis of race or sex." Mem. at 30-31. The Solomon Amendment, which enforces discriminatory practices, stands in stark contrast to those laws that prohibit federal financial support to institutions or organizations that discriminate on the basis of race. See, e.g., Robert Jones Univ. v. United States, 461 U.S. 574 (1983). Any First Amendment interests of an academic institution in exercising invidious discrimination is plainly outweighed by the government's compelling interest in resisting support for racial discrimination. See, e.g., Grove City Coll. v. Bell, 465 U.S. 555, 575-76 (1984).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 2nd day of February 2004, I caused a copy of the foregoing Motion for Summary Judgment, Order, and Memorandum to be served via Federal Express upon the following counsel of record:

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Dated: February 2, 2004

s/ Richard L. Berkman
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