

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

<b>Stephen B. Burbank, Anita L. Allen-Castellitto,</b>	:	
<b>Regina Austin, C. Edwin Baker, Eric Feldman,</b>	:	<b>C.A. No.</b>
<b>Douglas Frenkel, Frank Goodman, Seth F. Kreimer,</b>	:	
<b>Anne E. Kringel, Friedrich Kubler, Alan M. Lerner,</b>	:	
<b>Howard Lesnick, Bruce H. Mann, Stephen Morse,</b>	:	
<b>Wendell Prichett, Edward Rubin, Louis S. Rulli,</b>	:	
<b>Catherine T. Struve, Dina Lynn Schlossberg, Kim</b>	:	
<b>Lane Scheppelle, Clyde W. Summers, Erica Flores,</b>	:	
<b>Terri Keeley, Ellen London, Loren Stewart, Bryan</b>	:	
<b>Tallevi, Carlos Uriarte, Thaomee Xiong, and Lambda</b>	:	
<b>Law,</b>	:	
<b>Plaintiffs</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>Donald H. Rumsfeld, Secretary of Defense,</b>	:	
<b>in his Official Capacity,</b>	:	
<b>Defendant</b>	:	

**COMPLAINT**

Introduction

1. This is an action for declaratory and any other appropriate relief by the named plaintiffs who are full-time faculty members and students at the University of Pennsylvania Law School (“Law School”) against the Secretary of Defense in his official capacity for a judicial declaration that the defendant has violated plaintiffs’ rights by threatening to withhold hundreds of millions of dollars in grants and contracts from the University of Pennsylvania on the purported authority of the “Solomon Amendment,” 10 U.S.C. § 983 (“the Act”). The Act provides for the denial of certain federal funds to institutions of higher education that have a policy or practice that either prohibits or in effect prevents military recruiters entry to campuses or access to students on campuses for purposes of military recruiting.

2. By resolution of the faculty of the Law School, employers may use the facilities and services administered by the Law School’s Office of Career Planning and Placement (“CPP”)

only if they agree to abide by the Law School's policy forbidding discrimination on grounds of race, color, sex, sexual or affectional orientation, age, religion, national or ethnic origin or disability. The defendant does not abide by this non-discrimination policy with respect to gay and lesbian members of the armed forces and has sought to coerce the Law School to violate its anti-discrimination policy by threatening to deny federal contracts and grants to the entire University of Pennsylvania.

3. Since 1998 the Law School has provided the defendant with "entry to [the campus and] access to students . . . for purposes of military recruiting" as required by the Act. Under procedures adopted in 1998, military recruiters could meet with students at the same University interviewing locations used by other prospective employers and they were provided access to all students, whether or not the students expressed interest in a military career.

4. Under the procedures established in 1998, whereby military recruiters were provided entry to the campus and access to students as required by the Act, denial of federal contracts and grants would not be authorized by the Act.

5. In 2003, notwithstanding the fact that military recruiters had been provided full access to the campus and to students of the Law School, defendants notified the University that the Law School was not in compliance with the Act. Defendant threatened to terminate over \$500 million in federal funding, and thereby coerced the University to force the Law School to violate its anti-discrimination policy, and to provide to military recruiters specific Law School services that the Act does not require.

6. Because the access provided to military recruiters in the period 1998-2003 was fully consistent with the requirements of the Act, denial of grants and contracts to the University by the defendant would violate the rights of the plaintiffs under the United States Constitution, and specifically their rights under the First Amendment to free speech, association, and academic freedom, and their rights under the Fifth Amendment to due process and to the equal protection of the laws.

#### Jurisdiction

7. Jurisdiction is conferred upon this court by 28 U.S.C. §1331. Plaintiffs' claim for declaratory relief is authorized by 29 U.S.C. §2201 and 2202. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) and (e).

#### Parties

8. Plaintiffs Stephen B. Burbank, Anita L. Allen-Castellitto, Regina Austin, C. Edwin Baker, Eric Feldman, Douglas Frenkel, Frank Goodman, Seth F. Kreimer, Anne E. Kringel, Friedrich Kubler, Alan M. Lerner, Howard Lesnick, Bruce H. Mann, Stephen Morse, Wendell Prichett, Edward Rubin, Louis S. Rulli, Catherine T. Struve, Dina Lynn Schlossberg, Kim Lane Scheppele and Clyde W. Summers ("faculty member plaintiffs") are full-time members of the faculty at the Law School.

9. Plaintiffs Erica Flores, Terri Keeley, Ellen London, Loren Stewart, Bryan Tallevi, Carlos Uriarte and Thaomee Xiong ("student plaintiffs") are duly matriculated students at the University of Pennsylvania Law School. Plaintiffs Tallevi, Uriarte, and Flores identify as gay or lesbian. Plaintiff Lambda Law is a Law School student organization that provides support to Lesbian, Gay, Bisexual and Transgendered students.

10. Defendant Donald H. Rumsfeld is the Secretary of Defense. He is sued in his official capacity. The Secretary of Defense and the Department of Defense are responsible for the implementation of the Act and the Department of Defense determines whether a University is in compliance. If the Department of Defense determines that the University is not in compliance with the Act, all federal grants and contracts from the Department of Defense and the Departments of Education, Labor, Health and Human Services, Transportation and Homeland Security to the University are suspended.

#### Factual Allegations

11. In 1996, the Congress passed and the President signed Public Law 104-208, 10 U.S.C. §983 which, as amended, in pertinent part, states:

- (b) Denial of funds for preventing military recruiting on campus.  
No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for

student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents- -

(1) the Secretary of a military department or Secretary of 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 (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution) . . .

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

\* \* \*

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

(emphasis added).

12. The defendant Secretary of Defense has promulgated regulations pursuant to this statute which, in pertinent part, state:

(a) . . . no funds available under appropriations acts for any fiscal year for the Departments of Defense, Transportation . . . Labor, Health and Human Services, Education, and Related Agencies may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered school if the Secretary of Defense determines that the covered school has a policy or practice (regardless of when implemented) that either prohibits or in effect prevents the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, or access to directory information on students (student recruiting information).

\* \* \*

(c ) The limitations established in paragraph (a) of this section, shall not apply to a covered school if the Secretary of Defense determines that the covered school:

\* \* \*

(3) When not providing requested access to campuses or to students on campus, certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers.

32 C.F.R. §216.4 (emphasis added).

13. Recruitment of Penn law students by potential employers is organized and regulated by the Law School's Office of Career Planning and Placement ("CPP") pursuant to the policies and procedures established by the faculty of the Law School.

14. CPP assists students and graduates in identifying career objectives and obtaining employment that meets those objectives.

15. In 1991, the Law School Faculty adopted the following anti-discrimination policy:

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.

16. The 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 law

students respect and adhere to this policy, and (e) to ensure that the law student body will continue to be diverse.

17. The principle of non-discrimination set forth in the policy governs all members of the Law School community in every aspect of the academic, social, cultural, and political life of the school. The Law School admits students, grants them scholarships, grades their exams, recruits and promotes its faculty, and hires its staff in accordance with the policy. The same precepts of non-discrimination govern all activities, whether conducted by the Law School administration or by others, under the Law School's auspices.

18. The anti-discrimination policy is a fundamental value of the Law School community and has been uniformly applied to private employers who engaged in discriminatory practices. Any employer other than defendant who engaged in the discriminatory practices of the defendant would be barred from the Law School's recruitment program.

19. In 1998, upon the complaint of representatives of the defendant concerning possible non-compliance by the Law School with the Act, the Law School and University implemented procedures that would establish compliance with the Act and, at the same time, preserve and implement the Law School's anti-discrimination policy.

20. As of 1998, employers who verified compliance with the Law School's anti-discrimination policy were permitted to recruit students under the following procedures: (1) CPP would establish a time and place for interviewing students, (2) CPP would notify Law School students as to the dates that employers would be on campus, and (3) students would submit requests for interviews which, time permitting, would be scheduled during main recruiting periods at the University's Office of Career Services ("OCS").

21. To maintain the Law School's anti-discrimination policy and at the same time to provide military recruiters with the access to the campus and students to which they are entitled under the Act, the Law School and the University established the following procedures for military recruiters: (1) military recruiters were referred to the OCS, (2) OCS notified all law students with respect to the dates that military recruiters would be interviewing on campus at

OCS (the same interviewing center used by all other employers recruiting law students), and (3) interviews with military recruiters were scheduled at OCS.

22. Under the terms of the procedures adopted in 1998, the University provided military recruiters with full access to all students, whether or not the students had expressed an interest in military careers. Under this procedure, military recruiters could interview every interested student; other employers had no such guarantee. Further, OCS would send marketing and other materials from military recruiters by email to all students as part of the recruitment process.

23. The only other difference between the procedures for employers who are in compliance with the Law School's anti-discrimination policy and those applicable to the defendant, who is not in compliance, is the identity of the individuals in the University who act as intermediaries between employer/recruiters and students.

24. Under these procedures, military recruiters were free to fully engage in recruitment and related programs at the University. Upon invitation by a student group, military recruiters could also engage in debates and discussions in the Law School's classrooms and meeting spaces.

25. From 1998-2003, the defendant was not prohibited or prevented from entry to the campus or access to the students or to student recruiting information for military recruiting purposes.

26. During the period of 1998-2003, no student interested in military recruiting was denied access, or was in any manner limited in his or her access to military recruiters, and the military had access to all students, whether or not the students had expressed interest in military recruitment.

27. In January, 2003, the Judge Advocate General of the Air Force lodged a complaint with University President Judith Rodin, asserting that the Law School's practices and policies, in effect since 1998, did not comply with the Act and Department of Defense regulations. *See* Exhibit A.

28. A Department of Defense determination of non-compliance would have resulted in the denial of federal funding to the University as a whole, amounting to a loss of at least \$500 million for current research, teaching and student financial aid.

29. In March, 2003 notwithstanding the Law School's compliance with the Act, under threat of loss of federal financial grants and contracts, the President of the University ordered that the Law School suspend its anti-discrimination policy with respect to defendant's military recruitment. The termination of federal funds would have ended essential medical and other research, and would have reduced financial assistance to students, including some of the student plaintiffs. *See Exhibit B.*

30. In directing the Law School to suspend its anti-discrimination policy with respect to military recruitment, the University made clear to the defendant that it was doing so solely because of the threatened termination of federal funds, grants, and contracts and that the University believed that the procedures adopted in 1998 were in full compliance with the Act. *See, Exhibit B.*

31. The determination by the defendant that the Law School was in violation of the Act was not justified or authorized by the Act. To the contrary, the defendant had no legitimate justification for insisting on a change of the Law School's procedures and the suspension of its anti-discrimination policy with respect to military recruiters, as the defendant had been granted access to the campus and to all law students for purposes of military recruiting. The defendant's interest is purely symbolic, but it has caused direct and substantial injury to plaintiffs who have been deprived of their anti-discrimination policy.

32. The defendant threatened loss of federal funds to coerce the University into compelling the Law School to suspend its anti-discrimination policy with respect to military recruiters. As a consequence, the faculty and student plaintiffs have been injured by being deprived of the benefits and protections of the Law School's anti-discrimination policy. In addition, any loss of federal funds pursuant to a determination of non-compliance would deprive faculty plaintiffs of research grants for which they would otherwise qualify, and would deprive

student plaintiffs of financial assistance for tuition and related expenses. Further, staff at CPP have been compelled to operate CPP in violation of the Law School's anti-discrimination policy.

#### Count I

33. The allegations of paragraphs 1-32 are incorporated by reference.

34. The Act and the regulations promulgated by the defendant did not authorize the defendant to deny grants and contracts to the University of Pennsylvania or to the Law School operating under the procedures in effect during the years 1998-2003 since the Law School did not have a policy or practice "that either prohibit[ed] or in effect prevent[ed] . . . entry to [the] campus . . . or access to students . . . for purposes of Federal military recruiting." In March, 2003, the University directed the Law School not to apply its anti-discrimination policy with respect to military recruiters solely because of the unjustified threat of loss of substantial federal funding to the University made by defendant in January, 2003.

35. 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.

#### Count II

36. The allegations of paragraphs 1-35 are incorporated by reference.

37. To condition eligibility for federal financial grants and contracts to the University on the Law School's abandonment of its anti-discrimination policy violates plaintiffs' rights under the First Amendment to the United States Constitution by restricting, impeding and punishing plaintiffs' free speech, expression, and association, and by violating plaintiffs' right to academic freedom in the establishment of educational goals.

#### Count III

38. The allegations of paragraphs 1-37 are incorporated by reference.

39. To deny federal financial grants and contracts to the University and the Law School because of the Law School's anti-discrimination policy would violate the First Amendment to the United States Constitution by discriminating in the application and enforcement of the Act between educational institutions with "longstanding polic[ies] of pacifism based on historical

religious affiliation” and those institutions without such policies. Exempting institutions on the terms and conditions of the Act is an impermissible content-based discrimination. The Act singles out “religious” and “pacifist” beliefs for favorable treatment and denies similar treatment to associational and speech rights grounded in anti-discrimination principles.

Count IV 40. The allegations of paragraphs 1-39 are incorporated by reference.

41. To deny federal financial grants and contracts to the University and the Law School because of the Law School’s anti-discrimination policy would violate plaintiffs’ rights to due process and equal protection of the laws. Whatever discriminatory measures the defendant may

lawfully impose on gay and lesbian persons seeking to join or remain in the military, Congress may neither compel a private educational institution such as the Law School to provide assistance to employers who engage in discrimination based on sexual orientation nor coerce the educational institution to rescind or otherwise not apply its anti-discrimination policy by threatened termination of grants and contracts.

Relief

42. Enforcement of the provisions of the Act denying federal financial grants and contracts to the University of Pennsylvania and the Law School would cause irreparable injury to the plaintiffs. Issuance of the declaratory relief requested is necessary to resolve the uncertainty as to rights and regulations under the Act and the Constitution that currently exists and to prevent additional harm to the plaintiffs that results from the coerced suspension of the Law School's anti-discrimination policy with respect to military recruiters.

WHEREFORE, plaintiffs request this Court to order the following relief:

(a) Issue a declaratory judgment that the Law School's policies and practices in effect from 1998-2003 are in compliance with the Act and that termination of federal funding would be impermissible under the Act;

(b) In the alternative, issue a declaratory judgment that the Act violates 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;

(c) Award such other and further relief as may appear just, appropriate or reasonable.

Messing

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