No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

—v.—

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GAY & LESBIAN ADVOCATES & DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that is dedicated to defending the principles embodied in the Constitution, including those guaranteeing freedom of expression. This case raises issues of profound importance to the ACLU and its members. The ACLU has long opposed government efforts to compel a speaker to participate in the dissemination of a favored government message. The ACLU has also long opposed government efforts to penalize a speaker based on the speaker's viewpoint. The ACLU has appeared before this Court on numerous occasions in support of these principles both as party counsel and as *amicus curiae*.

Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest organization representing lesbians, gay men, bisexuals, transgendered people and people with HIV and AIDS. GLAD has litigated widely in New England on discrimination issues in employment, education, services and public accommodations under state and federal non-discrimination laws. In addition, GLAD has litigated in the area of the First Amendment, representing parties seeking to assert First Amendment and free speech and associational rights as well as those defending against overly broad speech-related claims challenging the robust enforcement of non-discrimination laws. GLAD was counsel for the band of gay marchers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995) and proposed intervenors

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization with more than 35,000 members that is committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal frequently has appeared as party counsel and as *amicus curiae* before this and other federal and state courts across the country, including in cases addressing First Amendment rights and rights to be free from invidious discrimination. The issues raised by this case are of great importance to the communities Lambda Legal serves.

The National Center for Lesbian Rights ("NCLR") is a nonprofit legal organization dedicated to achieving full equality for lesbian, gay, bisexual, and transgender people and their families. Since 1977, NCLR has litigated to end discrimination on the basis of sexual orientation and gender in family law, employment, education, immigration, and access to public accommodations. NCLR has litigated on behalf of parties seeking to exercise their First Amendment rights to freedom of speech and association, as well as on behalf of those seeking to defend viewpoint-neutral non-discrimination laws.

People For the American Way Foundation ("People For") is a nationwide, nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and activists across the country. Central to People For's mission are both the preservation of freedom of speech and the advancement of equal opportunity for all Americans, including gay and lesbian Americans.

People For regularly participates in litigation and non-litigation advocacy nationwide to combat discrimination and promote free speech and equal rights. People For has joined this brief in order to help vindicate the fundamental constitutional rights violated by the Solomon Amendment.

STATEMENT OF THE CASE

The Forum for Academic and Institutional Rights (FAIR) – an association of law schools – and other law school-affiliated organizational and individual plaintiffs brought this case challenging the Congressional mandate that requires universities and their subsidiary schools, including FAIR's member institutions (hereinafter, "Respondents"), to allow military employers to participate in their recruitment programs or lose virtually all of their federal funding.

Respondents administer recruitment programs for the benefit of their students and prospective employers. These recruitment programs consist of dialogue between employers and students – students seeking to persuade select employers to make offers, and employers seeking to persuade select students to accept them – as well as Respondents' communications with employers and students that enable this dialogue. *See* Amicus Br. of Law Sch. Career Serv. Prof'ls, at 7-17.

Respondents do not allow all prospective employers to participate in their recruitment programs. They require participating employers to certify that they do not discriminate in employment based on sexual orientation, among other characteristics. Respondents do this because they believe that employment discrimination is harmful and, thus, they are unwilling to assist employers that engage in such discrimination. *See* Court of Appeals Joint Appendix 330-31 (Decl. of E. Joshua Rosenkranz ¶¶ 7-8).

Under their policy commonly known as "don't ask, don't tell," military employers do not employ openly lesbian or gay servicemembers. *See* 10 U.S.C. § 654. Accordingly, unlike prospective employers that Respondents allow to participate in their recruitment programs, military employers cannot certify that they do not discriminate in employment based on sexual orientation.

Through the Solomon Amendment, Congress has required Respondents and their parent universities to allow military employers to participate in their recruitment programs, notwithstanding their discriminatory employment policies, or lose virtually all of the universities' federal funding. The Solomon Amendment provides, in relevant part, as follows:

> No funds described in [10 U.S.C. § 983(d)(1)] may be provided by contract or by grant 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 . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1). With limited exception, the federal funds put in jeopardy by the Solomon Amendment are all funds made available by the Department of Defense, the Department of Homeland Security, the Central Intelligence Agency, the National Nuclear Security Administration, the

Department of Transportation, and all agencies funded by the Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. 10 U.S.C. § 983(d)(1).

Respondents moved for a preliminary injunction to enjoin enforcement of the Solomon Amendment. In support of their motion, Respondents argued, among other things, that the Solomon Amendment constitutes an unconstitutional condition in violation of their right to free expression guaranteed by the First Amendment to the Constitution. The United States District Court for the District of New Jersey denied Respondents' motion. The United States Court of Appeals for the Third Circuit reversed and remanded with instructions to grant Respondents' motion but stayed its ruling pending review by this Court. This Court granted *certiorari*.

SUMMARY OF ARGUMENT

As both a form of compelled speech and a form of viewpoint discrimination, the Solomon Amendment constitutes an unconstitutional condition in violation of Respondents' right to free expression.

By commandeering Respondents' recruitment programs to disseminate the recruitment messages of military employers, the Solomon Amendment infringes Respondents' right not to speak. The infringement is only exacerbated by the fact that the Solomon Amendment commandeers resources that are essentially communicative.

The Solomon Amendment also regulates speech in a viewpoint discriminatory manner. It distinguishes between universities that seek to express their disapproval of military employers for pacifist reasons, and those that seek to express their disapproval of military employers for any other reason. It privileges a class of speakers – military employers – and privileges its speech by empowering military employers to

force their way into the communications between employers and students that lie at the core of Respondents' recruitment programs. The legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the employment policies of military employers.

Finally, the government has failed on this record to meet the burden of justification required by its abridgement of First Amendment rights.

ARGUMENT

A. The Solomon Amendment Constitutes an Unconstitutional Condition

In this brief, *Amici* focus their attention on why the Solomon Amendment constitutes both compelled speech and viewpoint discrimination rather than why the Solomon Amendment otherwise constitutes an unconstitutional condition.

Nevertheless, it bears emphasis that, where a grant of funds is conditioned on a restriction on speech, this Court examines whether the subject of the restriction is related to the object of the funds. The government may not "place[] a condition on the *recipient* of [a] subsidy rather than on a particular program or service" and thereby "effectively prohibit[] the recipient from engaging in . . . protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). Most federal funds received by a university and put in jeopardy by the Solomon Amendment are not directed toward programs involving military concerns. That fact

significantly bolsters the conclusion that the Solomon Amendment constitutes an unconstitutional condition.

B. The Solomon Amendment Compels Respondents to Assist in Disseminating the Recruitment Messages of Military Employers

This Court has long recognized that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Accordingly, "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

The autonomy protected by the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted). This is so because "*all* speech inherently involves choices of what to say and what to leave unsaid." *Hurley*, 515 U.S. at 573 (quotation omitted) (emphasis in original).

The government infringes the right not to speak where it commandeers a speaker's resources to disseminate the government's message. By commandeering Respondents' recruitment programs to disseminate the recruitment messages of military employers, the Solomon Amendment infringes Respondent's right not to speak. Such infringement is that much plainer where the commandeered resources are essentially communicative, as in this case.

In *Wooley*, this Court held that the State of New Hampshire could not enforce a law requiring automobile

drivers to display the State's motto on their license plates. *Wooley*, 430 U.S. at 717. The Maynards objected to the State's message on moral, religious, and political grounds. This Court recognized that the law "in effect require[d] that [the Maynards] use their private property as a mobile billboard for the State's ideological message or suffer a penalty," *id* at 715. This Court then held that the State could not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. Placing *Wooley* squarely in the line of cases following *Barnette*, this Court demonstrated the expansiveness of "the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Wooley turned solely on the fact that the government commandeered a speaker's resources – the Maynards' automobile – to disseminate the government's message – the State's motto. It was of no moment that an automobile, unlike a billboard, is not essentially communicative. It was enough that the State commandeered the automobile and transformed it into a type of billboard. Moreover, it was of no moment that the State's motto was not at odds with any message that the Maynards sought to disseminate. *Id.* at 717. Indeed, the Maynards did not seek to disseminate any message of their own; rather, they sought only to avoid disseminating the State's message.

Here, as in *Wooley,* the government has commandeered an unwilling speaker's resources – Respondents' recruitment programs – to disseminate the government's own recruitment messages. An important part of the government's message is that openly lesbian and gay students cannot serve in our nation's military. Compelling Respondents to assist in

disseminating that message is, without more, an abridgement of the right not to speak.[2]

Where the resources that the government seeks to commandeer are themselves communicative, the First Amendment violation is magnified, as this Court recognized in *Tornillo* when it held that the government may not compel the inclusion of a response to an editorial in a newspaper. *Tornillo*, 418 U.S. at 243, 258. In doing so, this Court recognized that the commandeering of a newspaper, an essentially communicative resource, engendered two concerns. Noting that "it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion," *id.* at 257, this Court recognized that the commandeering of an essentially communicative resource necessarily displaces speech that the resource could otherwise be used to communicate. This Court also recognized that the commandeering of an essentially communicative resource necessarily interferes with editorial control over speech that the resource is used to communicate. *Id.* at 258.

Hurley illustrates the same point. There, this Court held that the Commonwealth of Massachusetts could not enforce a law prohibiting sexual orientation discrimination in places of public accommodation against a parade organizer that sought to exclude a gay contingent identifying itself as such. *Hurley*, 515 U.S. at 559 ("Massachusetts may [not] require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey."). In doing so, this Court emphasized that a speaker does not shed First Amendment protection for lack of "a narrow, succinctly articulable message," or because the

[2] Respondents need not show that such commandeering has exacted an additional cost. *See Pacific Gas & Elec. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 5-6 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

organizer of an expressive vehicle "is rather lenient in admitting participants . . . combin[es] multifarious voices, or . . . fail[s] to edit [its] themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70. Where a speaker seeks to exclude an unwanted message from its own communicative event, this Court is especially mindful of the principle that it is "the choice of [the] speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

> [L]ike a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [parade organizer's] eyes comports with what merits celebration on that day. Even if this view gives the [parade organizer] credit for a more considered judgment than it actively made, the [parade organizer] clearly decided to exclude a message it did not like from the communication that it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id. at 574.

Respondents' recruitment programs are inherently communicative. At their core, they consist of dialogue between employers and students – students seeking to persuade employers to make offers, and employers seeking to persuade students to think highly of them and to accept whatever offers they make – as well as Respondents' communications with employers and students that enable this dialogue. *See Amicus* Br. of Law Sch. Career Serv. Prof'ls, at 7-17. Although commercial speech enjoys less

constitutional protection than other speech, it is nevertheless constitutionally protected so long as it does not propose an illegal transaction. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *see also Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973). Because the Solomon Amendment prohibits Respondents from excluding the recruitment messages of military employers from Respondents' own communicative events, it infringes Respondents' right not to speak. *See Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.").

Notably, even if the Solomon Amendment permits Respondents to express their viewpoint in an alternative way without fear of penalty,[3] the fact that it compels them to participate in the dissemination of a message at odds with their own message "begs the core question." *Tornillo*, 418 U.S. at 256 (recognizing that "compulsion to publish that which reason tells [a newspaper] should not be published is unconstitutional" even if the government does not "prevent[]

[3] Because the Solomon Amendment mandates that Respondents provide military employers access to their campuses and their students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer," 10 U.S.C. § 983(b)(1), it is unclear whether Respondents may engage in such speech without fear of penalty. Regardless, the Solomon Amendment is not a content-neutral restriction on expression, and the availability of alternative channels of communication is material only where a time, place, manner, or other content-neutral restriction on expression is at issue. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 879-80 (1997).

the [newspaper] from saying anything [that] it wishe[s]") (quotations and footnote omitted).

As discussed above, *Wooley* resolved that "core question" by holding that the First Amendment bars the government from commandeering a speaker's resources to disseminate the government's own message. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), does not overrule or limit *Wooley*. *Johanns* holds only that, as a general rule, compelled funding of government speech through targeted exactions, as through general taxes, does not raise constitutional concerns. *Id.* at 2062. The line demarcating the types of resources that the government may commandeer to disseminate its own messages continues to be drawn at funding.

Johanns' holding reflects the practical reality that the legislative branch could not meaningfully exercise its taxing powers if, as a general rule, the judicial branch permitted federal taxpayers to direct their taxes to fund only the dissemination of those government messages that they support. *See id.*; *see also id.* at 2066 (Thomas, J., concurring). Indeed, the government could not meaningfully function if this were so. As this Court has noted, "virtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object." *Federal Communications Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 385 n.16 (1984) (citation omitted); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."). Thus, "[i]t is for Congress to decide which expenditures will promote the general welfare," *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (citation omitted), and the constitutional guarantee of free

expression typically may not be invoked to limit the constitutional power to tax. *Cf. Hernandez v Commissioner of Internal Revenue*, 490 U.S. 680, 699-70 (1989) ("[E]ven a substantial burden [on the right of free exercise] would be justified by the broad public interest in maintaining a sound tax system, free of myriad exceptions flowing from a wide variety of religious beliefs . . . . [T]he tax system could not function if denominations were allowed to challenge the tax system on the ground that it operated in a manner that violates their religious belief . . . . This argument knows no limitation.") (quotations omitted).

Johanns is inapposite here because this case does not involve compelled funding of government speech. The government has levied no tax on Respondents as a means of compelling them to participate in the dissemination of the recruitment messages of military employers. Rather, it has commandeered Respondents' recruitment programs as a means of doing so. Moreover, unlike the special assessment on beef producers in *Johanns*, which purported to benefit all beef producers by funding advertisements promoting the beef industry, the Solomon Amendment does not purport to benefit Respondents in any way.

Even in the context of a taxing scheme, this Court acknowledged in *Johanns* that "[t]here might be a valid [First Amendment] objection if those singled out to pay the tax are closely linked with the expression in a way that makes them appear to endorse the government message." *Johanns*, 125 S. Ct. at 2065 n.8 (quotation omitted). This acknowledgement implicitly recognized that the First Amendment stakes increase where the government compels a private organization or individual to participate in the dissemination of the government's message, and there is a plausible risk that the government's message will be misattributed to the private organization or individual who is compelled to participate in its dissemination. *See Hurley*,

515 U.S. at 575-77; *Pacific Gas*, 475 U.S. at 15-17; *but see id.* at 21 (Burger, C.J., concurring) (declining to endorse such reasoning). Accordingly, Respondents' claim that their right not to speak has been infringed is only strengthened by the fact that the Solomon Amendment may induce them to speak where they otherwise might not have done so[4] in order to disassociate themselves from the recruitment messages of military employers, especially given their long history of requiring participating employers to certify that they do not maintain discriminatory employment policies. *See Pacific Gas*, 475 U.S. at 15-16 ("[The] pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.") (quotation omitted).

Respondents, however, need not establish a risk of misattribution to establish an infringement of their right not to speak. *See Wooley*, 430 U.S. 705. In this way, the analysis of the right not to speak diverges from the analysis of the right of expressive association, under which a showing of risk of misattribution or of impeding a chosen message may be critical to establishing a First Amendment violation in some circumstances. The right of expressive association is infringed where the government compels an expressive association to associate with a third party in such a manner that the presence of the third party threatens in a significant way the ability of the expressive association effectively to shape or communicate its views. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This risk of obfuscating or nullifying an intended message is often a critical inquiry where the right of expressive association is concerned. *See Dale*, 530 U.S. at 653-54 (concluding that the presence in the Boy Scouts of James Dale, who was a visible and active proponent of gay rights and a community leader, sent a

[4] *But see* n.3 *supra*.

message of acceptance that was contrary to the Boy Scouts' views regarding "homosexual conduct").

In short, *Johanns* does not change the legal analysis applicable to this case. Indeed, *Johanns* took pains to distinguish compelled funding of government speech from compelled participation in the dissemination of government speech. *Johanns*, 125 S. Ct. at 2060 (distinguishing *Wooley*); *id.* at 2066 (Thomas, J., concurring) (same). *Johanns* serves only to reaffirm the principle that the government may not compel a speaker to participate in the dissemination of speech, including government speech.[5]

C. The Solomon Amendment Penalizes Respondents Based on Their Viewpoint That Military Employers Should Not Be as Highly Regarded as Other Employers Because of Their Discriminatory Employment Policies

By regulating the way in which Respondents administer their recruitment programs, the Solomon Amendment not only regulates speech but does so in a viewpoint discriminatory manner. Viewpoint discrimination by the government is anathema to the constitutional guarantee of free expression. Because "[t]here is an equality of status in the field of ideas," it is presumed that government action "must afford all points of view an equal opportunity to be heard." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quotation and footnote omitted). Accordingly, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for

[5] Although the government presumptively cannot insist that its viewpoint be included in a private forum, private organizations and individuals presumptively can insist that their viewpoints be included in a public forum. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972).

the restriction." *Rosenberger*, 515 U.S. at 829 (citation omitted); *see also Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citations omitted).

The Solomon Amendment does not apply to universities that seek to exclude military employers from their recruitment programs based on "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2); *cf. Gillette v. United States*, 401 U.S. 437, 461 n.23 (1971) (noting that any accommodation of conscientious objectors is not constitutionally mandated). Thus, the Solomon Amendment distinguishes between universities that seek to express their disapproval of military employers because of their martial policies, and those that seek to express their disapproval of military employers for other reasons, including their employment policies.

In addition, the Solomon Amendment singles out a class of speakers – military employers – and privileges its speech by empowering military employers to force their way into the communications between employers and students that lie at the core of Respondents' recruitment programs. Whether characterized as discrimination based on type of speaker or discrimination based on point of view, the government may no more favor the views of military employers as a class than it may favor the views of labor picketers as a class, *Mosley*, 408 U.S. at 94 (impermissible content discrimination), or disfavor the views of religious publications as a class, *Rosenberger*, 515 U.S. at 831 (impermissible viewpoint discrimination).

The legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the discriminatory employment policies of military employers. *See Cornelius v.*

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.") (citations omitted). As described by one bill sponsor, the purpose was to "put [institutions of higher education] on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed." Using one campus as an example, the sponsor said the school's ban was adopted "because a vocal minority at the university disagreed with military personnel standards." "These colleges and universities," he went on, "need to know that "their starry-eyed idealism comes with a price. If they are too good – or too righteous – to treat our Nation's military with the respect it deserves . . . or to afford our military the same recruiting opportunities offered to private corporations – then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America." 140 Cong. Rec. H3860-03 (1994). Because its legislative history reflects a desire to penalize the expression of a viewpoint, the Solomon Amendment furthers an interest "so plainly illegitimate that [it] . . . immediately invalidate[s] the [law]." *Vincent*, 466 U.S. at 804; *see also Velazquez*, 531 U.S. at 548-49 ("[E]ven Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.") (citations omitted).[6]

As a viewpoint-based enactment, the Solomon Amendment does not merit the more deferential analysis

[6] By contrast, a university's decision to enforce a neutral nondiscrimination policy does not constitute viewpoint discrimination (even assuming the inquiry is limited to public universities subject to the First Amendment) because, as this Court has repeatedly recognized, laws prohibiting acts of discrimination are not "…aim[ed] at the suppression of speech…." *Roberts v. United States Jaycees,* 468 U.S. 609, 623-24 (1984).

applied to regulation of conduct. In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court held that, "when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376 (quotations omitted). The governmental interest, however, must be "unrelated to the suppression of free expression." *Id.* at 377. A governmental interest in the suppression of a particular viewpoint, by contrast, triggers strict scrutiny.

Texas v. Johnson, 491 U.S. 397 (1989), is illustrative. In *Johnson*, this Court overturned a criminal conviction for flag desecration. In doing so, this Court recognized that the government may not "proscribe particular conduct *because* it has expressive elements." *Id.* at 406 (emphasis in original).

> If the [criminal prohibition] is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether [the proffered] interest justifies [the] conviction under a more demanding standard.

Id. at 403 (citations and footnote omitted).

Johnson's assessment of whether the criminal prohibition on flag desecration was intended to suppress expression is especially instructive. The State proffered an interest in "preventing breaches of the peace," *id.* at 407, an interest that this Court presumed to be unrelated to the suppression of expression, *id.* at 408 n.4. This Court, however, insisted that the proffered interest be "implicated on [the] facts." *Id.* at 404. Finding no "evidence offered by the State" in support of the proffered interest, *id.* at 408, this Court

concluded that "the State's interest in maintaining order [was] not implicated on [the] facts," *id.* at 410. *Cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 442 (2002) ("[O]ur cases require . . . that municipalities rely upon evidence that is reasonably believed to be relevant to the secondary effects that they seek to address.") (quotation omitted); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("[R]espondents have not demonstrated that the place or manner of the speech produces a detrimental secondary effect on society.") (quotation omitted).

The State also proffered an interest in "preserving the flag as a symbol of nationhood and national unity," *Johnson*, 491 U.S. at 407, an interest that this Court held was related to the suppression of expression, *id.* at 410. Indeed, this Court characterized the interest as one in suppressing a particular viewpoint:

> [T]he State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if [the State] means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

Id. at 413 n.9 (emphasis in original).

Accordingly, this Court concluded that the criminal prohibition on flag desecration was not justified by any interest unrelated to suppression of expression.

The Solomon Amendment is similarly flawed. Like the State's reliance on potential disruptions of the peace in *Johnson,* the government's assertion that the Solomon Amendment was intended to promote military readiness is

unsupported by the record, which, by contrast, starkly illuminates the government's retaliatory interest in penalizing universities that disagree with the military's "don't ask, don't tell" policy. *See* § D, *infra.*

"The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (quotation and citation omitted). By impermissibly penalizing Respondents based on their viewpoint that military employers should not be as highly regarded as other employers because of their discriminatory employment policies, the Solomon Amendment thwarts this purpose of the First Amendment.

D. The Record Does Not Show That the Solomon Amendment Has a Constitutionally Sufficient Justification

Whether viewed as compelled speech or viewpoint discrimination, the Solomon Amendment cannot be upheld unless it satisfies strict scrutiny. On this record, it clearly does not and therefore the grant of preliminary injunctive relief was appropriate. Indeed, the government did not introduce *any* evidence below that would permit this Court to conclude that the government has met its burden of establishing that the Solomon Amendment furthers a compelling interest by the least restrictive means.[7] Moreover,

[7] While there are a few conclusory assertions in the legislative history of the Solomon Amendment suggesting that military readiness is furthered by access to recruitment programs, *see, e.g.*, 142 Cong. Rec. H5674-03

it is not enough for the government to establish that military readiness is a compelling government interest; the government must also establish that the Solomon Amendment in fact furthers military readiness, and does so by the least restrictive means.

In *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622 (1994), this Court held that federal statutory provisions requiring cable television systems to carry broadcast television signals were subject to intermediate scrutiny, *id.* at 661-62, and that the proffered government interests were important ones, *id.* at 662-64.[8] Nevertheless, given the "paucity of evidence" addressing the relationship between the law at issue and the proffered government interests, *id.* at 667-68, a plurality of this Court concluded that, "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied [the requisite] inquiry," *id.* at 665.[9]

The reasoning in *Turner* applies equally in this case:

> That the Government's asserted interests are important in the abstract does not mean . . .

(1996), those conclusory assertions were neither supported by data nor specific to the *law school* recruitment programs that are at issue here.

[8] *Turner* was an intermediate scrutiny case. Its insistence on factual support for the government's asserted interests applies *a fortiori* where strict scrutiny applies.

[9] In *Turner*, this Court remanded with instructions to develop the record. *Id.* at 668. Because *Turner* was an appeal following the entry of summary judgment for the government, *id.* at 626-27, the government would not otherwise have had another opportunity to develop the record before final disposition of the case. In this case, this Court need not do likewise. Because this case is an interlocutory appeal following from the grant of preliminary relief for Respondents, the government will have another opportunity to develop the record before final disposition of the case.

> that [the law at issue] will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at 664 (quotation and citations omitted).

Any argument that the Solomon Amendment was motivated by concerns about military readiness is further undermined by the fact that the Solomon Amendment accommodates the viewpoint of universities that seek to exclude military employers from their recruitment programs for a reason other than disapproval of their discriminatory employment policies, as discussed above. *See* 10 U.S.C. § 983(c)(2). Even if the government had proffered some support for its military readiness rationale, which it has not, such exemptions "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

Accordingly, on this record, this Court must conclude that the Solomon Amendment lacks a constitutionally sufficient justification.

CONCLUSION

Amici respectfully submit that this Court should affirm that the Solomon Amendment constitutes an unconstitutional condition in violation of the right to free expression, and hold that it impermissibly compels speakers to participate in the dissemination of a message and it impermissibly penalizes speakers based on their viewpoint.

Respectfully submitted,

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