No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS AND LAW STUDENTS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Page

UNITED STATES CONSTITUTION

FEDERAL STATUTES

Cited Authorities

Page

CONGRESSIONAL MATERIALS

MISCELLANEOUS

BLANK PAGE

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are law professors and law students who support petitioners and oppose the practice of prohibiting military recruiters from meeting with law students on campus.

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1. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* law professors and law students state that no counsel for a party has written this brief in whole or in part and that no other person or entity, other than *Amici* law professors and law students, or their counsel has made a monetary contribution to the preparation or submission of this brief.

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Ben Shapiro; Peter B. Siroka; Brett A. Shumate; Brian J. Sullivan; Daniel J. Sullivan; Adam Steiner; Jackson A. Stephens; Zack Streit; Brett J. Talley; Ryan Warden; and Tracye Winfrey.[2]

Respondents assert a constitutional entitlement to violate the Solomon Amendment by excluding military recruiters from law schools while continuing to receive federal funds that were expressly conditioned on equal treatment of the United States military in the on-campus interview process. The United States Court of Appeals for the Third Circuit held that the Solomon Amendment unconstitutionally burdened respondents' First Amendment rights. In fact, the Solomon Amendment is a simple and unambiguous condition on the privilege of receiving federal funds; it inflicts no constitutional harm on respondents. Rather, the group whose interests are most severely compromised by the Third Circuit's unauthorized judicial surgery on the Solomon Amendment are law students, who are denied the information necessary to evaluate a legal career in the military.

If the Third Circuit's legal analysis is allowed to stand, *Amici* law students will be deprived of opportunities to acquire first-

2. *Amici* law students attend the following law schools: Benjamin N. Cardozo School of Law; Case Western Reserve University School of Law; Catholic University of America Columbus School of Law; Chicago-Kent School of Law; DePaul University Law School; Georgetown University Law Center; George Mason University School of Law; George Washington University Law School; Harvard Law School; Hofstra University School of Law; New York Law School; Northwestern University School of Law; Roger Williams University School of Law; Stanford Law School; University of Florida Levin College of Law; University of Mississippi School of Law; University of Pittsburgh School of Law; University of Southern California Law School; University of Texas School of Law; University of Washington School of Law; University of Virginia School of Law; and Wake Forest University School of Law.

hand information from military recruiters about potential careers in the armed forces. Moreover, the role of *Amici* law professors in providing professional guidance to students interested in careers in public service will be distorted. The Third Circuit's judgment will also frustrate the core mission of academic institutions – promoting the free and open exchange of ideas. Finally, the Third Circuit's decision will deprive the Nation's armed forces of a diverse pool of candidates for legal careers.[3]

SUMMARY OF THE ARGUMENT

This is a Spending Clause case, as the District Court correctly recognized. *Forum for Academic and Institutional Rights v. Rumsfeld* ("*FAIR*"), 291 F. Supp. 2d 269, (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004). The "Solomon Amendment," 10 U.S.C. § 983(b), merely conditions a university's continuing receipt of federal funds on affording military recruiters the same access to the student body that the school grants to all other prospective employers. The Solomon Amendment thus is a perfectly ordinary contractual condition; no different from any that might be attached to a gift or bequest to an academic institution. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (noting that Spending Clause conditions are "much in the nature of a contract"). Remarkably, the Third Circuit simply ignored the Spending Clause – not even purporting to apply the five-part test for assessing the constitutionality of spending conditions set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987).

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3. The legal analysis and conclusions expressed in this brief represent the views of individual *Amici* and do not purport to reflect the position of any law school, university, or other group or association with which the individual *Amici* may have an employment, membership, or other relationship or connection.

Instead of simply adhering to the *Dole* inquiry, the Third Circuit's decision "confuses motive with coercion," and thereby erects a legal principle that is grounded in "a philosophical determinism by which choice becomes impossible." *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Solomon Amendment does not prohibit or penalize any school for expressing disagreement with congressional policy.[4] In truth, these law schools want to have it both ways – exclude military recruiters from opportunities accorded to other public and private employers *and* insist that Congress continue to send them federal funds. Such a result deprives Congress of the power to control disposition of federal funds and forces the Federal Government to subsidize conduct that undermines compelling federal interests.

The Third Circuit's analysis cannot be reconciled with this Court's decisions. Such reasoning would convert the federal statute at issue in *Dole* into an "unconstitutional condition" that impinged on South Dakota's Twenty-First Amendment right to establish the minimum drinking age without federal interference. Likewise, despite this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), Title VI and Title IX would, under the panel's reasoning in *FAIR*, violate the First Amendment right of universities to control their "expressive associations" in

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4. Respondents are motivated by antipathy toward a federal statute the constitutionality of which respondents do not challenge. *See* 10 U.S.C. § 654(b) (defining eligibility for military service); *see also FAIR*, 390 F.3d at 250 (Aldisert, J., dissenting) (citing *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996)) (explaining that the federal courts have repeatedly upheld the constitutionality of Congress' statutory separation policy). *Amici* do not take any position with regard to the policy's merit. However, this case is no more about homosexual rights than *Dole* was about age discrimination.

admissions, hiring, sports teams, and educational programs.[5] The Third Circuit's decision improperly deprives Congress of an important tool to encourage – but not command – conduct consistent with federal policy and would place important anti-discrimination laws, such as Title VI and Title IX, in serious legal jeopardy.

Even if the Spending Clause did not resolve this case, and even if the Solomon Amendment were an affirmative mandate to provide on-campus access to military recruiters, it would still not violate the First Amendment right to expressive association. The Third Circuit's reliance upon this Court's decisions in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), is wildly misplaced. *Dale* and *Hurley* illustrate that forced *membership* in an expressive association can raise First Amendment concerns. Allowing a governmental employer temporary access to a competitive recruiting forum is at the opposite end of the spectrum from *Dale* and *Hurley*. No one understands job fairs and interview weeks as fora of expression for the law schools. Rather, they create an opportunity for the students to receive and evaluate first-hand information about various careers.

The Third Circuit's farfetched conclusion that this limited access amounts to a "forced" endorsement of every nuance of military employment policy displays a singular lack of understanding of the forum involved and the scope of the Solomon

5. The Solomon Amendment certainly is more limited in scope and much further removed from the expressive activities at the core of academic freedom than the sweeping bans on race and sex discrimination contained in Title VI of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2004d-4a, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

Amendment itself. *FAIR*, 390 F.3d at 239. Like the California statute upheld by this Court in *Pruneyard Shopping Center v. Robins,* 447 US. 74, 86 (1980), the Solomon Amendment requires only neutral access, dictates no government message, and allows express disavowal of endorsement by the forum owner. It is hard to see how according military recruiters equal treatment with law firms, state governmental entities, and public interest groups such as the ACLU can be seen as an "endorsement" of any particular military policy.

The Solomon Amendment does not target the content of speech, does not coerce respondents to say or not to say anything, and does not punish any form of expressive association. It does no more than what Title VI and Title IX do – it creates positive incentives for conduct that furthers a compelling governmental interest. Because the Solomon Amendment is aimed at conduct, *viz.*, the selective denial of physical access to campus for recruiting purposes, the Third Circuit should have applied intermediate scrutiny. Under that test, as with the prohibition on burning draft cards, an anti-discrimination principle protecting the important function of military recruiting (particularly in the context of an all-volunteer army) certainly passes muster. *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting as "remote and attenuated" the university's claim that application of Title VII to faculty hiring violates the First Amendment). Because the Solomon Amendment would not violate the First Amendment even if it were cast as an affirmative prohibition on discriminatory conduct, *a fortiori* it poses no constitutional problem in its present form, as a condition on the voluntary acceptance of federal educational funds.

Amici respectfully urge this Court to reverse the Third Circuit's decision and uphold the application of the Solomon Amendment to law school recruiting.

ARGUMENT

I. THE SOLOMON AMENDMENT IS A VALID EXERCISE OF CONGRESS' SPENDING CLAUSE AUTHORITY.

This is a routine Spending Clause case. The Spending Clause provides that "[t]he Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The spending power permits Congress to attach conditions to the receipt of federal funds. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (likening Spending Clause legislation to a contract: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions") (internal quotation marks omitted). Congress thus may employ "the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *see also New York v. United States*, 505 U.S. 144, 168 (1992) (recognizing that the federal spending power is a "permissible method of encouraging a State to conform to federal policy choices"); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947) ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.").

Congress' "broad spending power" is subject only to the limitations set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987). Under *Dole*, a congressional Spending Clause enactment must: (1) benefit the general welfare; (2) place unambiguous conditions on the acceptance of the federal funds; (3) be related to the enactment's purpose; and (4) not contravene an independent constitutional limit on federal power. *Id.* at 207-08. In addition, the Court has suggested that a Spending Clause condition might violate

the Constitution if its operation is overly coercive, effectively giving the recipients of federal funds "an offer they can't refuse." *Id.* at 211. The Solomon Amendment easily passes muster under every prong of the *Dole* inquiry. Nothing in the First Amendment – or any other part of the Constitution – compels Congress to subsidize those whose objective is to undermine a compelling federal objective such as military recruitment.

A. The Solomon Amendment Easily Satisfies the Dole Inquiry.

First, the Solomon Amendment was enacted to benefit the general welfare. *Dole* explained that courts must "defer substantially to the judgment of Congress" when making this determination, 483 U.S. at 207, and that "the concept of welfare or the opposite is shaped by Congress." *Id.* at 208 (quoting *Helvering v. Davis*, 301 U.S. 619, 645 (1937)). Congress enacted the Solomon Amendment in 1994 "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military." 140 CONG. REC. H3861 (daily ed. May 23, 1994) (statement of Rep. Solomon). Given the substantial deference to which Congress is entitled – and Congress' unique obligation "[t]o raise and support Armies," U.S. CONST. Art I, § 8, cl. 12 – the enactment of the Solomon Amendment to ensure military recruiters equal access to law students certainly benefits the general welfare. *See Solorio v. United States*, 483 U.S 435, 447 (1987) (stating that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged") (internal quotation marks omitted) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986)); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.").

Second, the Solomon Amendment places unambiguous conditions on the acceptance of the federal funds. This Court has consistently held that clear federal requirements enable the recipient to understand the consequences of accepting federal funds and make a knowing waiver of any constitutional right the Federal government designates as conditioned by acceptance of the grant. *See Dole*, 483 U.S. at 207-08; *New York*, 505 U.S. at 172. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). For example, the Court upheld the federal drinking-age restrictions in *Dole* after concluding that "the conditions could not be more clearly stated." 483 U.S. at 207-08.

Here, the Solomon Amendment's plain language notifies the law schools that denying military recruiters equal access to students will result in the loss of some federal funds. *See* 10 U.S.C. § 983(b).[6] Like Title

6. The Solomon Amendment provides that:

> No funds described in subsection (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–(1) 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)-(b)(1).

IX,[7] the Solomon Amendment withholds federal funds from those academic institutions that deny equal access to a certain class of individuals. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) ("We conclude, therefore, that the Department may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations.").[8] Congress has spoken with an unmistakably clear voice.

Third, the Solomon Amendment bears the necessary relationship to the distribution of these federal funds. *Dole*, 483 U.S. at 207; *see also United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.") (citation omitted); *New York*, 505 U.S. at 167 (requiring only that the conditions "bear some relationship to the purpose of the federal spending").

As explained above, like Title IX, the Solomon Amendment conditions the receipt of some federal funds granted to academic institutions on a law school's agreement to refrain from discriminating against a particular class of individuals. *See* 10 U.S.C. § 983(b). Congress has the right to ensure that

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7. Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

8. Congress later superseded an aspect of *Grove City* not at issue here. *See* 42 U.S.C. § 2000d-4a(1)(a) (enacting a more expansive definition of "program or activity" to prohibit discrimination throughout an entity if any part of the entity receives federal funds).

federal funds are not subsidizing discrimination. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 329-31 (1978); *Lau v. Nichols*, 414 U.S. 563, 569 (1974) ((quoting 110 Cong. Rec. 6543 (March 30, 1964) (Sen. Humphrey, quoting President Kennedy's message to Congress, June 19, 1963)); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004). Tying federal funding to non-discriminatory treatment of federal employees obviously passes any "nexus" test. The Solomon Amendment therefore "bears some relationship" to the allocation of the federal funding involved here.

Fourth, the Solomon Amendment does not violate an independent constitutional provision. Importantly, the Spending Clause does not prohibit Congress from conditioning the acceptance of federal funds on the voluntary forbearance of a prerogative that a recipient might otherwise enjoy. *See Dole*, 483 U.S. at 210; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) ("A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program."). Quite the opposite, the spending power allows for "the indirect achievement of objectives which Congress is not empowered to achieve directly." *Dole*, 483 U.S. at 210; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (noting that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions"); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 270 (1991) (finding that "indirect encouragement to state action was a valid use of the spending power") (citations and internal quotation marks omitted).

Instead, the "independent constitutional bar" limitation vindicates the "unexceptionable proposition that the power may

not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210; *see also Am. Library Ass'n*, 539 U.S. at 203 n.2 (explaining that the inquiry is "whether the condition that Congress requires would . . . be unconstitutional if performed by the library itself") (internal quotation marks omitted). For example, the Federal Government could not grant federal funds on the condition that recipients engage in racially or sexually discriminatory action or inflict cruel and unusual punishment. *See Dole*, 483 U.S. at 210. There can be no serious argument that requiring universities to grant military recruiters equal access contravenes an independent constitutional provision. *See FAIR*, 390 F.3d at 229 (noting that plaintiffs base their argument instead on the unconstitutional conditions doctrine).

Finally, the Solomon Amendment is not unconstitutionally coercive. *See Dole*, 483 U.S. at 211. Indeed, it is not coercive at all. As the Court explained in *Grove City*, "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. at 575; *see also Metro. Wash. Airports Auth.*, 501 U.S. at 285 ("Placing conditions on a desire . . . does not amount to compulsion."); *Dole*, 483 U.S. at 211 ("We cannot conclude . . . that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective."). Universities that find it distasteful to comply with eligibility rules governing the disbursement of federal funds can avail themselves of the "simple expedient of not yielding to" the federal demand and reject the federal funds. *Oklahoma*, 330 U.S. at 144 (internal quotation marks omitted); *New York*, 505 U.S. at 168 ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.").

B. The Third Circuit Erroneously Characterized the Solomon Amendment as an "Unconstitutional Condition."

The Third Circuit blithely labeled the Solomon Amendment a "penalty" that unconstitutionally conditions a federal benefit on the abdication of a law school's First Amendment rights. *FAIR*, 390 F.3d at 229 n.9 (stating that "the Solomon Amendment does not create a spending program; it merely imposes a penalty – the loss of general funds"). According to the court, "the Government may not propose a penalty to produce a result which [it] could not command directly." *Id.* at 229 (internal quotation marks omitted) (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)). The Third Circuit misapprehended the Solomon Amendment in two important respects.

First, the Third Circuit assumed, without any explanation, that Congress could not achieve the goals of the Solomon Amendment through an affirmative ban on discrimination against military recruiters. *See id.* at 229. That assumption ignores this Court's repeated holdings that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *O'Brien*, 391 U.S. at 377; *see also Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) ("Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."); THE FEDERALIST No. 23, at 143 (Alexander Hamilton) (E. Earle ed., 1938) ("[I]t must be admitted . . . that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any manner essential to its efficacy – that is, in any matter essential to the formation, direction, or support of the NATIONAL FORCES.").

Given Congress' decision to maintain an all-volunteer army, protecting the military's right to equal treatment as a potential employer could be viewed as every bit as critical to the effective muster of forces as the draft card was in the context of conscription. *O'Brien*, 391 U.S. at 382. The Third Circuit's failure to consider this necessarily antecedent question is blatant error.

Second, the conditions the Solomon Amendment places on the acceptance of federal education funds are not in any sense a "penalty." They are not in the nature of a civil or criminal fine, a provision requiring the forfeiture of existing assets, or even civil punitive damages. Breach of the condition results in a loss of *future federal grants*. If the Solomon Amendment's funding condition is a "penalty," then so are the conditions Title IX places on funding recipients' equal treatment of female students. *See* 20 U.S.C. § 1681(a). Simply labeling the Solomon Amendment a penalty does not make it so.[9]

Dole and its progeny expressly permit Congress to use its spending authority to achieve federal policy objectives that lie beyond Congress' enumerated Article I authority. 483 U.S. at 207 (concluding that "objectives not thought to be within Article I's enumerated legislative fields . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds") (internal citations and quotation marks omitted);

9. That the Solomon Amendment is codified in a distinct provision, or was enacted sometime after the federal funds were originally allocated, is immaterial. *See, e.g.*, 42 U.S.C. § 2000d-4a (1988 amendment to Title VI of the 1964 Civil Rights Act that expanded the scope of Congress' spending power with respect to educational institutions). Congress can obviously begin funding a program and later decide that certain conduct is to be promoted or discouraged within the programmatic area. The Spending Clause does not limit Congress to the funding conditions tied to the first appropriations bill to address the subject matter.

see also Metro. Wash. Airports Auth., 501 U.S. at 270 (finding that "indirect encouragement to state action was a valid use of the spending power") (citations and internal quotation marks omitted). Congress' use of its spending authority to advance the cause of civil rights is but one such example. *See e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 185-186 (2002) ("Title VI invokes Congress's power under the Spending Clause to place conditions on the grant of federal funds.") (citation omitted); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (noting that the Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause").

If it were not for this settled understanding of the scope of the federal spending power, forcing South Dakota to forego its Twenty-First Amendment immunity in exchange for federal highway dollars, or forcing a State to forego its Eleventh Amendment immunity in exchange for *all* federal funds, would be equally unconstitutional. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 737 (1999) ("[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit.") (citation omitted); *Dole*, 483 U.S. at 211 ("Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.").

The Third Circuit's idiosyncratic articulation and application of the "unconstitutional conditions" doctrine in this case would undo decades of this Court's Spending Clause jurisprudence. *Compare FAIR*, 390 F.3d at 229 ("[I]f the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.") *with Am. Library Ass'n, Inc.*, 539 U.S. at 203 n.2 ("CIPA does not directly regulate private conduct; rather,

Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds. Therefore, *Dole* provides the appropriate framework for assessing CIPA's constitutionality.").

Moreover, this federal spending condition, which essentially erects an equal treatment requirement within a type of "limited public forum," raises none of the concerns present in cases where funding conditions are used to prohibit certain private speech or to distort the usual functioning of an existing medium. *See Legal Servs. Corp. v. Valazquez*, 531 U.S. 533, 542-53 (2001); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375 (1984). Here, the non-discrimination requirement is designed to expand speech and is fully consistent with the scope and purpose of on-campus recruiting.[10]

Thus, the errors in the Third Circuit's analysis are twofold. First, as discussed above, the Third Circuit is wrong about the scope of Congress' Spending Clause power. It is quite clear that Congress can incentivize these universities to engage in or forgo conduct that the Federal Government could not mandate or

10. The "coercion" principle that animates much of this Court's "unconstitutional conditions" doctrine jurisprudence is also noticeably absent from this case. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) ("We see nothing to distinguish this from the coercion exercised in our other unconstitutional conditions cases.") (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Perry v. Sindermann*, 408 U.S. 593 (1972)); *see also Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc), *petition for cert. filed*, 73 U.S.L.W. 3734 (U.S. Jun. 6, 2005) (No. 04-1655) ("[I]n the Spending Clause context, any role that the unconstitutional-conditions doctrine might have in cabining Congress's authority to give funds in exchange for waiving immunity is already part-and-parcel of the standard Spending Clause analysis."). Likewise, satisfaction of the *Dole* non-coercion mandate nullifies FAIR's compelled speech claim.

prohibit under Article I. Second, even if Congressional power beyond the Spending Clause were relevant in this case, Congress could, subject to other specific constitutional or statutory limitations related to the protection of religious belief or expression, ban discrimination against the military in "job fairs" or "employment days" that were otherwise explicitly or practically designated as open by a law school.[11] These errors – along with the erroneous application of strict scrutiny to a content-neutral statute – led the Third Circuit to an application of the "unconstitutional conditions" doctrine that cannot be reconciled with this Court's consistent approach to Spending Clause enactments.

C. The Third Circuit's Rationale Threatens the Validity of Other Federal Anti-Discrimination Laws.

In addition to the serious harm that FAIR's discriminatory ban would inflict on law students seeking to engage with military recruiters and on military recruitment itself,[12] affirmance would

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11. Congress was careful in drafting the Solomon Amendment to include an exemption where the "institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). This case, of course, does not present the question of whether the First Amendment would require this exemption, or a broader one, for religious institutions.

12. As *Amicus* Judge Advocates Association persuasively explains, FAIR's discriminatory policy of restricted access will significantly and irreparably harm the military's ability to recruit and maintain a competent legal officer corps. *See* Brief for Judge Advocates Association as Amicus Curiae in Support of Petitioners at 16, *Rumsfeld v. Forum for Academic and Institutional Rights* (No. 04-1152) (noting that "[o]ver 50% of the new Navy Judge (Cont'd)

also fundamentally undermine longstanding civil rights laws that contain language analogous to the Solomon Amendment. *See, e.g.*, 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"); 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

For example, before this case, it was beyond dispute that FAIR could not successfully assert a right to discriminate against veterans in admissions or employment in order to register protest against military policies. *See, e.g.*, 38 U.S.C.

(Cont'd)

Advocates had their first meeting with Navy personnel during an on-campus interview. Half of the Marine Corps' new Judge Advocates are recruited during their second and third year of law school through on-campus recruiting methods.") (internal quotation marks omitted). Forcing military recruiters to interview students on park benches or to use passive means such as newspaper advertisements or bulletin board announcements will significantly limit their ability to attract quality candidates. Furthermore, the harm from such disparate treatment would increase with each passing year, as the military must recruit a certain number of students into the program to replace those who retire and those who have deployed to support "commanders, U.S. service members, and their families[,] especially considering the 'increasingly challenging recruiting environment' brought about by the Global War on Terror." *Id.* at 11-12 (quoting Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 1 (Feb. 6-7, 2004)).

§ 4311(a).[13] But following the approach of the Third Circuit, FAIR could next successfully challenge federal protections for veterans under the theory that its rights of expressive association were damaged by being forced to accept statutory burdens that protect veterans from discrimination in employment or law school admissions. Under the Third Circuit's analysis, "forced" student recruiting and employment would certainly be an equally, if not more egregious, "unconstitutional condition."

The same rationale that empowers schools that accept federal funding to disassociate themselves from military personnel therefore would conflict with this Court's precedent and would seemingly permit discrimination against women, *Grove City Coll.*, 465 U.S. 555, or on the basis of race. *Lau*, 414 U.S. at 569 ("The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.") (citations omitted); *see also Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 606 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975) ("In extending financial assistance, Congress unquestionably has plenary power to impose such reasonable conditions on the use of granted funds or other

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13. A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a)

assistance as it deems in the public interest."). The Third Circuit's decision, if affirmed, would undercut these decisions and place federal anti-discrimination statutes in obvious jeopardy.

II. THE SOLOMON AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO EXPRESSIVE ASSOCIATION.

The Solomon Amendment does not violate the right to expressive association identified in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). The First Amendment protects the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Government action violates the First Amendment when it "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648 (citing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)). Accordingly, the "forced inclusion of an unwanted person in a group" may intrude into the internal structure or affairs of an association. *Id.*

This Court has twice found that a "state requirement . . . would significantly burden [an] organization's right to oppose or disfavor" a certain viewpoint. *Id.* at 659; *see also Hurley*, 515 U.S. at 557 (holding that state law violated the First Amendment by "requir[ing] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey"). The Solomon Amendment, however, does not impact the schools' leadership, membership, or message in the manner of *Dale* and *Hurley* and, as a consequence, implicates fundamentally different endorsement interests.

The state law at issue in *Dale* restricted the Boy Scouts' ability to select its leaders and the individuals who, on an everyday basis, would directly impart values and ideals to the organization's young membership. *See Dale*, 530 U.S. at 641. The Court found that this forced membership "of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform" interfered with the Boy Scouts' ability to advance its policy on sexuality. *Id.* at 655-56.

Similarly, in *Hurley*, the relevant state law required a parade organization to allow a group to march in the parade and to carry an identifying banner objectionable to the parade organizers. *See Hurley*, 515 U.S. at 561. The gay and lesbian group in *Hurley* conveyed, through its organization and means of publicity, a message that conflicted with the parade organizers' message. *Id.* at 570 (noting that the organization "was formed for the very purpose of marching in [the parade,] in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants"). Moreover, the Court found that the forced inclusion in the parade amounted to membership selection. *Id.* at 580-81 (explaining that the gay and lesbian organization "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members").

Dale and *Hurley* merely illustrate that if the government requires an expressive entity to accept someone as a member or spokesman, the First Amendment might thereby be offended. With respect to some organizations, like the Boy Scouts or a parade organization, membership – or *leadership* – has expressive content. *See, e.g., Hurley*, 515 U.S. at 570. Unlike *Dale* and *Hurley*, however, the Solomon Amendment does not

affect a law school's ability to select its leaders, membership, or message. The Solomon Amendment merely requires a law school that has voluntarily accepted federal funds to provide military recruiters the same access to students that the school provides to other recruiters. *See* 10 U.S.C. § 983(b).

Moreover, affording military recruiters equal access to students – given the countless other potential employers that appear on campus – hardly qualifies as an endorsement of a contrary viewpoint and would not "interfere[] with the [law school's] choice not to propound a particular point of view." *Dale*, 530 U.S. at 654. On-campus law school recruitment is an open forum utilized by dozens – if not hundreds – of private and public interest firms and government employers representing myriad perspectives. *See FAIR*, 291 F. Supp. 2d at 283-84, *rev'd*, 390 F.3d 219 (3d Cir. 2004).[14]

14. With respect to religious displays, the Court has looked at the *context* of a religious item – oftentimes, simply what surrounds the display – to determine whether a government has endorsed a particular religious belief. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 614 (1989) ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the *context* in which the contested object appears") (internal quotation marks and citation omitted) (emphasis added); *see also McCreary County v. ACLU*, No. 03-1693, slip op. 26 (U.S. June 27, 2005) ("We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of *context*.") (emphasis added). Thus, the presence of numerous other employers alleviates any theoretical concern that granting equal access to military recruiters might somehow signify a law school's endorsement of one element of only that recruiter. *See Van Orden v. Perry*, No. 03-1500, slip op. 12 (U.S. June 27, 2005) (holding that the presence of a monument with the Ten Commandments on the Texas State Capitol grounds, among 17 monuments and 21 historical markers, did not violate the Establishment Clause).

It strains credulity to argue that the on-campus presence of one particular organization will confuse or mislead attendees into believing that the school has taken a position contrary to its mission statement. *See Rosenberger v. Univ. of Va.*, 515 U.S. 819, 850 (1995) (noting that the fact that the religious publication competed with 15 other publications with widely divergent viewpoints "significantly diminishe[d] the danger that the message of any one publication is perceived as endorsed by the University"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 395 (1993) (stating that where school property "had repeatedly been used by a wide variety of private organizations . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed"); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that "[i]n light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place").

Indeed, every factor that led this Court to reject the "forced endorsement" argument in *Pruneyard* is present here. The panel's attempt to distinguish *Pruneyard* in a convoluted footnote, *FAIR*, 390 F.3d at 241 n.23, is singularly unpersuasive. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

In the end, the Solomon Amendment does not affect a law school's ability to select its leaders or membership or lead to any confusion with respect to the law school's point of view. Providing equal access to military recruiters no more endorses Congress' views on any particular subject than it endorses the views of any other potential employer. Before, during, and after

the recruitment occurs, the law school's membership, leadership, and message remain unchanged.[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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15. Moreover, even if this case impinges on some First Amendment right, it does so only incidentally and easily satisfies the intermediate scrutiny standard articulated in *O'Brien*, 391 U.S. at 376. Recruiters in general, and military personnel in particular, aim to convince students to join or show interest in their organization. Any intrusion on a law school's First Amendment interests therefore is trivial and incidental to this legitimate goal. Additionally, the military has a significant — indeed compelling — governmental interest in having direct access to students at law schools. The ability to interact directly with students in a manner equal to that of other non-military recruiters is essential to maintaining a necessary and superior officer corps. *See supra* n.12. Consequently, to the extent the Solomon Amendment incidentally affects any First Amendment rights, the military's significant interest in competing on equal footing with private employers easily satisfies the *O'Brien* test. *See* 391 U.S. at 376-77; *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting university's claim that Title VII, as applied to faculty hiring, violated the First Amendment).

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