UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STUDENT MEMBERS OF SAME, (STUDENT/FACULTY ALLIANCE FOR MILITARY EQUALITY), et al. Plaintiffs, v. DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense Defendant.	)	Civil Action No. 3:03CV01867 (JCH)

ROBERT A. BURT, et al. Plaintiffs, v. DONALD H. RUMSFELD, in his official capacity as United States Secretary of Defense Defendant.	)	Civil Action No. 3:03CV01777 (JCH)

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP) AND NOBEL LAUREATES IN SUPPORT OF PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND RULES

LEGISLATIVE MATERIAL

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

The American Association of University Professors ("AAUP") is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines, including law, dedicated to advancing the interests of higher education. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. The Association's members include both faculty members and academic administrators on the campuses of public and private law schools and other institutions of higher education throughout the country, including Yale University and Yale Law School.

AAUP seeks to become involved in litigation as *amicus curiae* only in cases raising important legal issues in higher education. AAUP has participated in such cases before the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit and this Court. *See, e.g., Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992); *Kennedy v. Connecticut Dep't of Public Safety*, 115 F.R.D. 497 (D. Conn. 1987). As in those cases, the issue presented here is of great importance to AAUP and the field of higher education.

One of AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of university life. The AAUP's *1940 Statement of Principles on Academic Freedom and Tenure* ("*1940 Statement*")[1] is the country's fundamental, most widely-accepted description of the basic attributes of academic freedom and tenure. The *1940 Statement* has been endorsed by over 180 professional organizations and learned societies, incorporated into hundreds of university and college faculty handbooks, and cited by the Supreme Court. *See*

[1] The *1940 Statement* was developed by AAUP together with the Association of American Colleges (now the Association of American Colleges and Universities).

e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578-79 & n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). The *1940 Statement* makes clear the importance of academic freedom in furthering the common good and reminds those in academia that our profession and our institutions are judged by our actions as well as our utterances. It recognizes both the value of individual academic freedom for the faculty in research, scholarship and teaching, and the importance of the faculty's role in constructing an appropriate educational environment as "citizens, members of a learned profession, and officers of an educational institution." *1940 Statement* at 4. AAUP's statement *On the Relationship of Faculty Governance to Academic Freedom* elaborates on these issues, noting both that "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked," and that "the faculty should have primary authority over decisions about such matters [as] . . . the maintenance of a suitable environment for learning . . . ." AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, AAUP Policy Documents 224, 225, 227 (2001 ed.). The central tenets of the *1940 Statement* and *On the Relationship of Faculty Governance to Academic Freedom* form the basis for AAUP's interest in this case. So too does AAUP's 28-year adherence to its 1976 policy *On Discrimination* – which commits "[t]he Association to . . . take measures . . . against . . . discrimination including, but not limited to, [discrimination on the basis of] sexual orientation." AAUP, *On Discrimination,* AAUP Policy Documents 185.

AAUP is deeply troubled by the Solomon Amendment, generally, and its application to Yale Law School, specifically. The statute and governmental actions challenged in this case raise serious constitutional concerns and conflict with AAUP's policies on academic freedom and nondiscrimination.

Amici also include five Nobel Laureates from a variety of fields. *Amicus* John B. Fenn is a Research Professor of Analytical Chemistry at Virginia Commonwealth University. Dr. Fenn shared the 2002 Nobel Prize in Chemistry. *Amicus* Dudley R. Herschbach is a Research Professor of Science at Harvard University. Dr. Herschbach received the 1986 Nobel Prize in Chemistry. *Amicus* Roald Hoffmann is the Frank H.T. Rhodes Professor of Humane Letters and Professor of Chemistry at Cornell University. Dr. Hoffmann received the 1981 Nobel Prize in Chemistry. *Amicus* Leon M. Lederman is a Professor of Science at the Illinois Institute of Technology. Dr. Lederman was a co-recipient of the 1988 Nobel Prize in Physics. *Amicus* Harold Varmus is President of Memorial Sloan-Kettering Cancer Center and a former Director of the National Institutes of Health. Dr. Varmus was a co-recipient of the 1989 Nobel Prize in Medicine or Physiology. *Amici* Nobel Laureates have grave concerns that the application of the Solomon Amendment in this case would have a dangerous chilling effect on the research conducted at universities nationwide. By intruding on the Yale Law School faculty's rights of free speech and academic freedom, the government's actions in this case threaten the vital independence of institutions of higher education, intruding on pedagogical autonomy and the fundamental right of schools and their faculty to choose, for themselves, what and how to teach.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the attempt by the federal government to cut off federal funds to all of Yale University in an effort to prevent the Yale Law School faculty from expressing its disapproval of discrimination within the United States military. The government's actions here infringe upon two separate yet related constitutional rights protected by the First Amendment – the right to communicate a message free from governmental intrusion and the fundamental right of academic freedom and educational self-governance.

The Solomon Amendment authorizes the federal government to deny all funding to a university if any "subelement" of the university, such as a law school, "has a policy or practice … that either prohibits, or in effect prevents" access to campus, students on campus, or student information for the purpose of military recruiting. 10 U.S.C. § 983(b). Although the Yale Law School has always provided the access required under the Solomon Amendment and its implementing regulations, the military has threatened to cut off all funding to Yale University unless the Yale Law School gives the military access *identical* to the access provided to nondiscriminatory employers. In clear violation of the First Amendment, the military has taken this position specifically to suppress the law faculty from sending a message of opposition to discrimination in the military. The military has explicitly stated that it cannot accept the degree of access Yale provides to military recruiters because it cannot allow Yale to "send the message that employment in the Armed Forces is less honorable or desirable than employment with the other organizations that Yale permits to participate in its [Career Development Office] programs." *See* Carr Ltr., May 29, 2003 at 3 (attached hereto at Tab A).

The First Amendment prohibits the military from applying the Solomon Amendment in this way. Under the doctrine of unconstitutional conditions, the government cannot place a restriction on federal funds in order to suppress a message it dislikes, particularly when the message is wholly unrelated to the funding program at issue. Nor does the First Amendment permit the government to use the power of the federal purse to intrude on academic freedom by coercing educators to abandon their chosen pedagogical practices. If this were not true, then the independence of American universities would be gravely threatened. In 2002, the federal government provided approximately $87 billion in funding to universities and colleges across the nation. Approximately $300 million went to Yale University alone. If the government can hold

these funds hostage to suppress criticism and deprive Yale and its faculty of their basic right to self-governance, then not only will freedom of speech and academic freedom suffer, but so will the entire system of university research that has proved so valuable to the nation.

STATEMENT OF FACTS

A. The Solomon Amendment and DoD's Implementing Regulations

In various forms over the years, the United States Armed Forces have imposed a ban on lesbian, gay, and bisexual service members. *See* 10 U.S.C. § 654. That stance conflicted with the nondiscrimination policies of colleges and law schools across the nation, which, starting in the late 1970s, began to add sexual orientation to their list of prohibited categories of discrimination. In 1978, for example, the Yale Law School faculty collectively amended its written nondiscrimination policy to prohibit sexual orientation-based discrimination in all aspects of Law School life, including recruiting. By the end of 1990, nearly every law school in the country had adopted similar policies prohibiting on-campus recruiting by prospective employers who discriminated on the basis of sexual orientation.

Notwithstanding the apparently negligible adverse effect of these nondiscrimination policies on military recruiting,[2] Congress in 1994 passed the first version of the so-called "Solomon Amendment" (named for former Representative Gerald Solomon), which denied Department of Defense ("DoD") funds "to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses." National Defense Authorization Act for FY 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663 (1994). As the legislative history makes clear, Congress passed the Solomon Amendment as a way to punish

[2] *See* 140 Cong. Rec. H3863 (Rep. Underwood) (Department of Defense initially opposed the Solomon Amendment as "'unnecessary, duplicative, and potentially harmful to defense research'").

those schools and their faculty who expressed a collective view condemning the military's discriminatory policies. *See*, *e.g.*, 140 Cong. Rec. H3861 (Rep. Solomon). Through the Solomon Amendment, the federal government sought to convey to "colleges and universities . . . that their starry-eyed idealism comes with a price." *Id.* at H3863 (Rep. Pombo). Indeed, one of the co-sponsors of the law, Representative Richard Pombo, ardently urged his colleagues "to support the Solomon Amendment, *and send a message over the wall of the ivory tower of higher education*." *Id.* (emphasis added).

In its initial iteration, the Solomon Amendment had little effect on Yale Law School and other law schools across the country, because it restricted only federal funds provided through the Department of Defense, a grant source largely irrelevant to law schools. One year later, however, Congress amended the Solomon Amendment to regulate funds not only from the Department of Defense, but also from the Departments of Labor, Health and Human Services, Education, and related agencies. Omnibus Consolidated Appropriation Act, 1997, Pub. L. No. 104-208, § 514, 110 Stat. 3009 (1996) (presently codified at 10 U.S.C. § 983(d)(2)). In 2002, Congress further expanded the reach of the Solomon Amendment to cover funds from the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, Title XVII, §§ 1704(b)(1),(g), 116 Stat. 2135 (2002). In its current form, the Solomon Amendment prohibits provision of these various government funds "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 . . . that either prohibits, or in effect prevents" access to campuses, students on campuses, or student information for the purpose of military recruiting. 10 U.S.C. § 983(b).

B. The Military's Application of the Solomon Amendment to Yale

As noted above, Yale Law School policy has prohibited discrimination on the basis of sexual orientation since 1978. All employers, including DoD, that refuse to certify their compliance with the Law School's nondiscrimination policy may not receive assistance from the Law School's Career Development Office ("CDO") and are barred from the CDO's fall and spring recruiting programs. Despite these restrictions, the Law School provides the military with access to its campus, its students, and student contact information as required by the Solomon Amendment. The military has been able to request and receive student contact information. Recruiters have been welcome to meet with individual students or groups of students at the students' invitation in any available location at the Law School. Additionally, the Law School has not prohibited the military from contacting, interviewing or hiring its students and has not prohibited CDO career counselors from discussing military opportunities with law students.

After passage of the Solomon Amendment in 1994, the Department of Defense began to send annual letters to Yale Law School and, beginning in 2001, to Yale University President Richard Levin, asking whether the Law School was allowing military recruiters on its campus and asking Yale University to confirm its compliance with the Solomon Amendment. Each year, Yale confirmed its compliance with the Solomon Amendment and explained the various ways in which the Law School provides military recruiters access to its campus, students and student information. Each time the military declined to pursue the matter further, suggesting that the access provided by Yale was sufficient to meet the legitimate interests of the military.

Although Yale had not changed its policy or practice in any way, the military in May 2002 suddenly and inexplicably threatened to deprive Yale University of approximately $300 million in annual federal funding unless the Law School granted military recruiters exactly the

same access provided to nondiscriminatory employers. In the face of this extreme threat, the Law School – despite its continued belief that it was in full compliance with the Solomon Amendment and the DoD's implementing regulations – suspended its nondiscrimination policy with respect to the armed forces so that the military could participate in CDO-sponsored recruiting programs in the Fall of 2002. At the same time, through discussions with the military, Yale sought to make it clear that there had been and would continue to be no practical impediment to military recruiting efforts at the Law School.

The government, however, flatly rejected Yale's position. *See* Carr Ltr., May 29, 2003 (attached hereto at Tab A). In doing so, DoD explicitly stated that its principal objection lay not in the *degree of access* provided, but rather in the *message* conveyed by the law school's continued adherence to its nondiscrimination policy. "[B]y singling out military recruiters," DoD protested, "Yale sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." *Id.* at 3. Finding that message unacceptable, DoD insisted that the Law School provide "access equal in scope and quality to that provided to other recruiters." *Id.* at 1, 4.[3]

The Law School consistently has maintained that it provides the access required under the Solomon Amendment. Nonetheless, in response to the military's continued threat to cut off all federal funds to Yale University, the Law School has been forced to suspend the application of its nondiscrimination policy to military recruiters.

[3] Notwithstanding DoD's assertions, Yale Law School does not "single out" military recruiters, but instead seeks to apply to them the same nondiscrimination policy applied to every other recruiter.

ARGUMENT

I. THE APPLICATION OF THE SOLOMON AMENDMENT TO YALE LAW SCHOOL VIOLATES THE FIRST AMENDMENT.

A. The Military's Express Purpose in Applying the Solomon Amendment to Yale Law School is to Suppress the Communication of the Faculty's Message.

For over 25 years, the Yale Law School and its faculty have declared their opposition to discrimination on the basis of sexual orientation. They have expressed this opposition not only through a written nondiscrimination policy, but also through actions taken in conformity therewith. By doing so, the Law School and its faculty have sought to create an educational environment that is open and welcoming to gay and lesbian faculty, students, and staff, who continue to face discrimination in many social contexts, including the military. The Law School's opposition to the military's discriminatory practices is of central importance in creating this open and welcoming environment, because it sends an unmistakable message to current and would-be members of the Law School community, and to those beyond: Yale Law School disapproves of discrimination and will not give aid and support to those, like the military, who do.[4]

There is no doubt that the military has purposely sought to suppress that message through the particular way in which it has chosen to apply the Solomon Amendment.[5] Although the express terms of the Solomon Amendment and DoD's implementing regulations do not require

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[4] In addition, as discussed *infra* Part II, the policy is an affirmative act of educational self-governance that reflects the faculty's fundamental decisions about what and how to teach, which are protected by the constitutional right of academic freedom.

[5] The anti-discrimination message of the Yale Law School faculty and their peers was not lost on Congress, which passed the Solomon Amendment specifically to punish schools that purportedly act as if they are "too good – or too righteous – to treat our Nation's military with the respect it deserves." 140 Cong. Rec. H3863 (Rep. Pombo). The government enacted the Solomon Amendment to silence opposition to the military's discriminatory recruiting policy and to "send a message over the wall of the ivory tower of higher education." *Id.*

equal access, *see* 10 U.S.C. § 983(b); 32 C.F.R. § 216.4, DoD has concluded that the slightest disparate treatment of military recruiters is unacceptable. DoD has twisted the words of the statute and of its own implementing regulations, so as to demand treatment by the Law School identical to that given to employers who do not discriminate. It has done so in order to suppress Yale's "message" that military employment is "less honorable or desirable" than employment with nondiscriminatory recruiters. Carr Ltr., May 29, 2003, at 3 (Tab A).

The invidious purpose behind DoD's actions is even more apparent when viewed in the context of the Solomon Amendment's regulatory scheme, which *permits* exclusion of military recruiters in numerous circumstances where the school is not conveying a message protesting military policy. For example, DoD will not penalize schools that deny access to military recruiters because of a lack of student interest, *see* 32 C.F.R. § 216.4(c)(6)(ii), schools that exclude all employers from on-campus recruiting, *see id.* § 216.4(c)(3), or schools that have "a long-standing policy of pacifism based on historical religious affiliation," *see id.* § 216.4(c)(2). By contrast, the government will vigorously pursue and punish institutions, like Yale Law School, that "send the message" that the military's discriminatory policies are wrong.

B. The Military's Stated Purpose for Requiring Identical Access Is Improper Under the First Amendment.

The military's stated purpose in requiring identical access – the suppression of Yale's message – is clearly improper under the First Amendment. The "enduring lesson" of the Supreme Court's free speech jurisprudence is "that the government may not prohibit expression simply because it disagrees with its message." *Texas v. Johnson*, 491 U.S. 397, 416 (1989). Indeed, "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Where, as here, the government targets speech "based on . . . the message it

conveys," the constitutional violation is "blatant." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)); *see also*, *e.g.*, *Virginia v. Black*, 123 S. Ct. 1536, 1547 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985); *Buzzetti v. City of New York*, 140 F.3d 134, 139-40 (2d Cir. 1998); *Gen. Media Communications, Inc. v. Cohen*, 131 F.3d 273, 280-81 (2d Cir. 1997). Through the Solomon Amendment and DoD's subsequent interpretations, the government has deliberately (and admittedly) suppressed one particular idea: the Law School faculty's message of tolerance, nondiscrimination, and, by extension, criticism of current military policy. The First Amendment forbids such action.

Whatever putatively content-neutral interests the government may now advance to justify its insistence on identical access, the military's May 29, 2003 letter clearly indicates that the government's real purpose was to suppress "the specific motivating ideology or the opinion or perspective" of the Law School, *Rosenberger*, 515 U.S. at 829 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)) – a quintessential case of viewpoint discrimination. The government simply "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). Just as it would be inappropriate for DoD to insist that its policies not be criticized by Law School faculty during recruiting season, it also is inappropriate for the military to insist that the Law School conduct recruiting so as not to send a message criticizing DoD policies. A direct regulation of speech by DoD is not meaningfully different from a demand for identical treatment justified on the theory

that the "separate but equal" treatment of military recruiters would convey a message of disapproval by the Law School.

The military's policy not only aims at suppressing the Law School's message, but also significantly burdens the communication of that message by suppressing it *in fact* and by compelling the Law School to espouse the opposite view: that discrimination on the basis of sexual orientation is perfectly acceptable and even necessary for the national defense. Like any institution, Yale Law School is often judged more by its deeds than its words. However much Yale touts its commitment to diversity and tolerance, the participation of military recruiters in CDO-sponsored recruiting programs "send[s] a message" that the Law School accepts discrimination "as a legitimate form of behavior." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). This contradicts the message of nondiscrimination Yale Law School strives to convey. Just as Courts must "give deference to an [expressive] association's view of what would impair its expression," so too must Courts give deference to a faculty's view of what would impair its expression. *Id.*; *see also, e.g., Democratic Party of the United States v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). The Court must therefore defer to the law faculty's reasoned, experienced judgment about the ill effects of the military's application of the Solomon Amendment on its expressive freedom.

The government asserts that the military's application of the Solomon Amendment does not significantly burden the Law School and faculty's right to free speech because it "do[es] not preclude any avenue of expression other than enforcement of the non-discrimination certification requirement." Mot. to Dismiss at 33. Not only does this argument ignore the basic principle that state action taken for the purpose of suppressing a particular message is *per se* unconstitutional, it also ignores the basic precept that "one is not to have the exercise of his liberty of expression

in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (internal quotation marks and citation omitted); *see also, e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. N.J.*, 308 U.S. 147, 163 (1939). The existence of alternative means of communication has never served to cure purposeful viewpoint discrimination, and the government has offered no support suggesting otherwise.

It is the Law School faculty – and not the government – that has the constitutional right to determine *for itself* the appropriate means or method of expression. "The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). As the Supreme Court explained in *Dale*, "the First Amendment protects [a speaker's] *method* of expression." *Dale*, 530 U.S. at 655 (emphasis added). To convey the message of tolerance and equality, the Law School and its faculty have chosen to prohibit discriminatory recruiting, a practice that falls squarely within the time-honored tradition of "nonviolent, politically motivated boycott designed to force governmental and economic change." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982). That expressive choice cannot be purposefully suppressed.

C. There is No Merit to the Government's Arguments that the Law School Policy Lacks Expressive Content or that the *O'Brien* Standard Applies.

The government takes the untenable position that the Law School's nondiscrimination policy is not protected by the First Amendment because it is devoid of expressive content. Controlling Supreme Court and Second Circuit precedent squarely foreclose this argument. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," this Court must ask "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be

understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); alteration in original); *see also Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003). The Law School and its faculty's unmistakable intent in creating and enforcing its nondiscrimination policy is to convey the message that the military's discrimination on the basis of sexual orientation is morally reprehensible and pedagogically unsound in a school of law. This clearly qualifies as a "specific, particularized message" and is a far cry from the "broad statement[s] of cultural values" that the Second Circuit has held fall outside the scope of First Amendment protection. *Zalewska*, 316 F.3d at 319-20. By denying CDO assistance to recruiters that discriminate, the Law School and its faculty give substance to the pedagogical message that bigotry and intolerance are inimical to legal teachings of justice and the practice of law. The government does not dispute that this was the Law School's intent, nor does it dispute that the Law School's message was likely to be understood by the Law School community and the military. Therefore, under *Texas v. Johnson* and *Zalewska*, the Law School's nondiscrimination policy and its actions in conformity therewith are protected by the First Amendment.

The government's argument that the Law School's nondiscrimination policy lacks a sufficiently expressive element is belied by the government's own actions and statements. As noted above, DoD rejected the access provided by the Law School and Yale's proposed alternative arrangements precisely because, in the government's words, the Law School's recruiting policy "*sends the message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." Carr Ltr., May 29, 2003, at 3 (Tab A) (emphasis added). The

government cannot object to the Law School's message and then claim that no such message exists.

In fact, the Yale Law School's refusal to condone and subsidize the military's discriminatory recruiting efforts constitutes expression at the very core of the First Amendment. "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Claiborne Hardware Co.*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Moreover, "expression of dissatisfaction with the policies of this country [lies] at the core of [those] values." *Texas v. Johnson*, 491 U.S. at 411; *see also*, *e.g.*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (noting that the test of the substance of our constitutional freedom "is the right to differ as to things that touch the heart of the existing order"). As the Second Circuit has recognized, "[c]riticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people." *Velasquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

As we elaborate *infra* Part II, the Law School's speech is entitled to the greatest measure of First Amendment protection not only because of its content, but also because of the university environment in which the message is conveyed. The Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003) (citations omitted). For this reason, the courts have routinely subjected infringements on speech and expressive association to especially heightened scrutiny in the university context. *See Rosenberger*, 515

U.S. at 835; *Rust v. Sullivan*, 500 U.S. 173, 200 (1991); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

But even beyond the academic context, the Supreme Court's decisions in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Dale* make clear that the First Amendment bars the government from attempts to force private organizations to engage in conduct that would send a message conflicting with their core values. In *Hurley*, the Court recognized the First Amendment right of parade organizers to exclude from a St. Patrick's Day parade a gay, lesbian and bisexual group that wanted to march under its own banner. *Id.* at 574-75. The organizers' choice "not to propound a particular point of view," the Court explained, "is presumed to lie beyond the government's power to control." *Id.* at 575. Similarly, in *Dale* the Court held that the Boy Scouts' moral condemnation of homosexuality was protected speech and that the state's anti-discrimination law could not be used to prohibit the organization from discharging an openly gay assistant scoutmaster. *Dale*, 530 U.S. at 656, 659. The presence of the assistant scoutmaster, the Court concluded, would interfere with the Boy Scouts' expressive policy, "send[ing] a message" that the Scouts accept homosexuality "as a legitimate form of behavior." *Id.* at 654; *see also*, *e.g.*, *Boy Scouts of America v. Wyman*, 335 F.3d 80, 93 (2d Cir. 2003) (holding that the Boy Scout's membership and employment policies constitute protected speech because they are intended to impart the message that homosexuality is immoral), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 23, 2003) (No. 03-956).

Like *Hurley* and *Dale*, this case involves an organization seeking to convey a message and set of values primarily through the adoption and enforcement of organizational policy. As the Court explained in *Dale*, it is "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 540 U.S. at 650. In fact, the

associational message at issue in *Dale* and *Hurley* was far less explicit than the nondiscrimination principle expressly and unequivocally conveyed by Yale Law School and its faculty. *See id.* at 651-52; *Hurley*, 515 U.S. at 562 (parade organizers "had no written criteria and employed no particular procedures for admission" to parade).

The government makes much of the recent district court decision in *Forum for Academic and Institutional Rights, Inc. (FAIR) v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J 2003). That decision is not binding on this Court, particularly given than an appeal is currently pending before the U.S. Court of Appeals for the Third Circuit. In addition, the district court's decision in *FAIR* has little persuasive force here, because that court did not address the particular facts establishing the military's viewpoint discrimination in this case, namely, the military's written statement that it was seeking to suppress the Yale's message.

In the event that the Court concludes, as it should, that the Law School's nondiscrimination policy is entitled to First Amendment protection, the government argues in the alternative that the constitutionality of the funding restriction as applied to Yale should be tested under the *O'Brien* standard. The government's reliance on *O'Brien*, however, is misguided. Unlike *O'Brien*, this case involves speech in the most classic sense: a written policy barring recruiters from campus unless they certify their compliance with the Law School's nondiscrimination policy.[6] Even if the *O'Brien* standard were to apply, moreover, government

[6] It is telling that the government cites only *O'Brien* and fails even to mention the many cases in which the Supreme Court has accorded the full measure of First Amendment protection to expressive conduct. In addition to the conduct in *Hurley* and *Dale*, the Court has recognized that the First Amendment shields the burning of a cross, *Virginia v. Black*, 123 S. Ct. at 1547, the burning of an American flag, *Texas v. Johnson*, 491 U.S. at 406, and the refusal to salute it, *West Virginia Board of Education v. Barnette*, 319 U.S. at 632. The First Amendment also protects the wearing of American military uniforms, *Schacht v. United States*, 398 U.S. 58, 90 (1970), and black armbands, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969), to protest American military involvement in Vietnam.

regulations pass this standard only if they serve a "governmental interest . . . *unrelated to the suppression of free expression*." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added). In *O'Brien* this interest concerned the government's need to protect the smooth and proper functioning of the selective service system. In this case, however, the government's admitted interest in cutting off funds to Yale University is to suppress the message of the Yale Law School. This interest fails the *O'Brien* standard because it is *directly related* to the suppression of free expression. *See Texas v. Johnson*, 491 U.S. at 411 n.7 (noting, in striking down the Texas flag burning statute, that the statute was directly "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity."); *Cohen v. California*, 403 U.S. 15, 28 (1971) ("The only 'conduct' which the State sought to punish . . . [was] the fact of communication."); *see also Dale*, 530 U.S. at 659 (noting that *O'Brien* is inapplicable in cases where the challenged government action "directly and immediately affects associational rights").

The Second Circuit has held that under *O'Brien*, the government's interest is unrelated to the suppression of free expression only if that interest persists whether or not the regulated conduct were to be performed in private. In *Young v. New York City Transit Authority*, 903 F.2d 146, 159 (2d Cir. 1990), the Second Circuit noted that even if "O'Brien had destroyed the card in private with no witnesses, the governmental interest . . . would have been unchanged." But if the Yale Law School faculty had promulgated a secret policy, unknown to the public, the government's interest in this case would vanish, because then the Law School would not then have sent the message which the military seeks to suppress. The military has sought to cut off federal funds to Yale University precisely because the Yale Law School faculty has promulgated a public policy that "sends a message that employment in the Armed forces is less honorable or desirable than employment with the other organizations that Yale permits to participate in its

[Career Development Office] programs." *See* Carr Ltr., May 29, 2003 at 3 (attached hereto at Tab A). The *O'Brien* test thus has no application. Instead, the government's funding restriction must survive strict scrutiny, a standard the government has not even attempted to satisfy in its brief.

D. As Applied by the Government in this Case, the Solomon Amendment's Funding Restrictions Impose an Unconstitutional Condition.

Contrary to the government's suggestions, the Solomon Amendment and DoD's actions are not insulated from constitutional scrutiny merely because they restrict expression indirectly through a funding scheme, rather than through a direct regulation of speech. As the Supreme Court has made clear, viewpoint-based regulations are "presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830. Although the Court has recognized a narrow exception to this rule when the government is itself the speaker or when the government relies on private parties to convey information specific to a government program, *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001), that narrow exception does not apply here. The First Amendment prohibits the government from using funding restrictions to punish private speakers for expressing views that are outside the scope of the federally funded program. *Id.; see also Rust*, 500 U.S. at 197 (noting that funding restrictions that "effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program" are especially suspect). Thus, the government may not, as it has here, threaten to withdraw federal funds earmarked for medical or scientific research in order to suppress the Law School's message of moral opposition to discrimination in the military.

Under the doctrine of unconstitutional conditions, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Board of Comm'rs of Wabaunsee Cty. v. Umbehr*,

518 U.S. 668, 674 (1996) (quoting *Perry v. Sniderman*, 408 U.S. 593, 597 (1972); alteration in original). The Supreme Court has made clear that invidious viewpoint discrimination is impermissible as a condition of federal funding. *See NEA v. Finley*, 524 U.S. 569, 587 (1998) (noting that "in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983)); *see also Rosenberger*, 515 U.S. at 830; *Rust*, 500 U.S. at 194; *Wyman*, 335 F.3d at 92.[7]

In the present case, the military has unabashedly aimed at the suppression of Yale's message, which it considers a "dangerous idea." In an effort to silence the Law School's moral opposition to the military's discriminatory policies, the government has demanded that Yale provide the military with precisely the same access it provides to nondiscriminatory employers. That is clearly impermissible under the Supreme Court's unconstitutional conditions jurisprudence. The military's threatened funding cut-offs are aimed not at defining the federally funded programs in the Yale medical school or the chemistry department, but rather at preventing the free expression of Yale Law School and its faculty.

In the two most relevant precedents, *Velazquez* and *Rosenberger*, the Supreme Court struck down funding restrictions that, like the present one, discriminated on the basis of

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[7] In *Rust v. Sullivan*, the Court reaffirmed the fundamental notion that governmental funding conditions may not effectively serve to "suppress[] a dangerous idea," but also created a narrow exception to the prohibition on viewpoint discrimination in federal funding. In upholding a restriction that prohibited doctors participating in federally-funded family planning clinics from discussing abortion with their patients, the Court recognized that the government may disfavor certain viewpoints when "the government is itself the speaker," or when "the government use[s] private speakers to transmit specific information pertaining to [the government's] own program." *Velasquez*, 531 U.S. at 541 (internal quotation marks and citation omitted). Although the narrowness of this exception was only implicit in *Rust*, it has been made explicit in subsequent cases. *Id.*; *see also Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *Rosenberger*, 515 U.S. at 833.

viewpoint. In *Velazquez*, the Court invalidated a funding restriction that prohibited local recipients of Legal Services Corporation funds from challenging or seeking to reform a federal or state welfare system. *Velazquez*, 531 U.S. at 548. The Court held that Congress could not "define the scope of the litigation it funds to exclude certain vital theories and ideas." *Id.* In *Rosenberger*, the Court struck down a restriction that denied funds to a school newspaper that offered a Christian viewpoint. The Court invalidated the funding restriction because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Rosenberger*, 515 U.S. at 831. The government plainly cannot condition the funding of private speech on the exclusion of certain viewpoints the government finds undesirable, particularly where the exclusion is unrelated to the definition of the program that the government funding is designed to establish.

The conditions that DoD seeks to put on federal funding in this case are especially constitutionally suspect given the unique role that institutions of higher education play in our constitutional democracy. In delineating the limits on government funding schemes, the Supreme Court has "recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted" by basic First Amendment principles. *Rust*, 500 U.S. at 200. These principles require that DoD's actions in this case be set aside because they fundamentally and impermissibly distort the traditional sphere of free expression at the Law School. *See Velasquez*, 531 U.S. at 543 (holding that the government may not use "an existing medium of expression and to control it … in ways that distort [the medium's] usual functioning.").

The implications of this case, however, go far beyond Yale Law School. American universities would face grave consequences if the government were permitted to use its funding in the way it has here. In 2002, the federal government provided approximately $87 billion in funding to universities and colleges across the country.[8] It is not difficult to imagine that members of the faculties at these institutions often take positions in conflict with official government policy. Under the government's view of the First Amendment in this case, it would be constitutionally permissible for the government to withdraw all federal funds to a university unless a particular faculty member or group of professors agreed to cease communicating a message that the government disliked. Such governmental power over university faculties would have far-reaching and devastating consequences for research and education.

American research, chiefly conducted at universities, is currently the finest in the world. The position taken by DoD gravely threatens this pre-eminence by disrupting the separation of scientific research from political supervision and control. DoD claims the right to hold federally funded university research hostage to the government's efforts to suppress dissenting speech. It claims the right to force universities and their faculties to face a Hobson's choice of either forfeiting their academic freedom of research and expression, or forfeiting the funds critical to their research. "In reality, the [university would be] given no choice, except a choice between the rock and the whirlpool – an option to forego a privilege which may be vital to [the university's] livelihood or submit to a requirement which may constitute an intolerable burden." *Frost v. Railroad Comm'n*, 271 U.S. 583, 593 (1926). The doctrine of unconstitutional conditions forbids the government from forcing universities and their faculties to make this

[8] This includes student aid of $38.5 billion, research funding of $25.7 billion and institutional aid of $22.8 billion. *See* United States Dep't of Educ., *Digest of Education Statistics 2002*, Table 363 p. 421, Columns 5, 7, and 8.

choice. "[C]onstitutional guaranties, so carefully safeguarded against direct assault, [should not be] open to destruction by the indirect but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Id.*

The government's attempt to fit this case within the limited *Rust* exception for governmental speech is unavailing. The government's funding of Yale University and Yale Law School "cannot be classified as governmental speech even under a generous understanding of the concept." *Velazquez,* 531 U.S. at 542-43. The government does not disburse funds to Yale in order to convey any particular message; rather, it provides funds to Yale to encourage a broad array of research and educational objectives. Like the programs at issue in *Velazquez* and *Rosenberger*, the government's funding of Yale is "designed to facilitate private speech, not to promote a governmental message." *Id.* at 542. Moreover, unlike the private doctors in *Rust*, the Yale Law School faculty are not "transmit[ing] specific information pertaining to [the government's] own program." *Id.* at 541. The *Rust* exception is therefore entirely beside the point. The position that Yale University is speaking for the government in all the manifold programs for which the University receives federal funds is nothing short of absurd.

The government also cannot seek refuge in *Grove City College v. Bell*, 465 U.S. 555 (1984), *overruled in part by* the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In *Grove City*, the Supreme Court held that Title IX's funding conditions, which required adherence to nondiscrimination requirements, did not violate a college's First Amendment rights. Unlike in *Grove City*, where the government sought to advance a generally applicable interest in combating discrimination, the government's stated interest in this case – suppressing Yale's "message" – is plainly constitutionally impermissible. *See Rosenberger*, 515

U.S. at 828; *Johnson*, 491 U.S. at 416; *Mosley*, 408 U.S. at 95; *Buzzetti*, 140 F.3d at 139-40; *Cohen*, 131 F.3d at 280-81.[9]

Ultimately, the government simply cannot hide behind the indirect nature of its speech-suppressive actions in this case. DoD's attempts to silence the Yale Law School and its faculty's criticism of government policy violate the "fixed star in our constitutional constellation": "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. As the Supreme Court has made clear, that principle limits governmental action seeking to induce adherence to state-sanctioned orthodoxy, "[r]egardless of the nature of the inducement." *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

II. THE SOLOMON AMENDMENT INTERFERES WITH THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF ACADEMIC FREEDOM.

The viewpoint discrimination inflicted by the Solomon Amendment and DoD's policies would offend core First Amendment principles in any setting. This harm is exacerbated in the context of the academy, where those policies completely undercut the Law School faculty's unique constitutional prerogatives and basic right of academic freedom.

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[9] In addition, in *Grove City*, Title IX's funding restrictions applied solely to the college's financial aid program and placed at risk only government aid to that particular program, making it plausible that Grove City could simply choose to forgo the federal funds in question. Here, by contrast, federal funding to all of Yale University is at stake. The coercion of the funding restriction in this case is therefore much greater. *See* David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 Wm. & Mary Bill Rts. J. 619, 635-36 (2001) (noting that *Grove City* involved a "minor loss of funding" and that an unconstitutional conditions claim would probably succeed if all of a university's federal funds were at stake: "almost no colleges are able to survive without federal funding").

A. The First Amendment Firmly Protects the Right of Academic Freedom.

The Supreme Court has long recognized the constitutional significance of the right of academic freedom. For nearly fifty years, the Court's cases have reaffirmed the notion that educational institutions "occupy a special niche in our constitutional tradition." *Grutter*, 123 S. Ct. at 2339. The right of academic freedom precludes government efforts to regulate the intellectual life of a university and protects the ability of an institution, and its faculty, to make decisions affecting the institution's educational structure and environment.

The Court first recognized the right to academic freedom in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Court reversed the conviction of a lecturer at the University of New Hampshire for refusing to answer questions that were part of the State attorney general's investigation of "subversive persons," including questions about the content of a lecture he had given at the university. In recognizing the unquestionable "invasion" of Sweezy's First Amendment right of academic freedom, the Court explained:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. Justice Frankfurter, in a concurring opinion, further elaborated on the right of academic freedom, noting the importance of the right of a university and its faculty to be free from governmental control. "When weighed against the grave harm resulting from the governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Id.* at 261 (Frankfurter, J., concurring). Justice Frankfurter recognized that a "free society" depended on

"free universities," which meant "exclusion of governmental intervention in the intellectual life of an university." *Id.* at 262.

In *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589 (1967), the Court held unconstitutional New York laws intended to bar the employment of "subversive persons" as applied to professors at the State University of New York. In voiding the loyalty laws for vagueness, the Court observed that the laws would impermissibly chill professors' constitutional rights, including the right of academic freedom, which the Court explicitly acknowledged as a "special concern of the First Amendment." *Id.* at 603. The Court explained that academic freedom was a "transcendent value to all of us," and a freedom "which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*; *see also*, *e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion); *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Barnette*, 319 U.S. at 642.

After *Keyishian*, the Court continued to consider academic freedom "a special concern of the First Amendment," even though it was "not a specifically enumerated constitutional right." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J. concurring). In *Bakke*, Justice Powell relied upon Justice Frankfurter's concurring opinion in *Sweezy* to elaborate on the right of academic freedom:

> It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)). Justice Powell thus concluded that the right of academic freedom included the right of a university and its faculty

"on academic grounds" to "make its own judgments as to education," including the "selection of its student body." *Id.*

More recently, the Court has reaffirmed the right of academic freedom as including the right of a university, through its faculty, to govern its own affairs. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court deferred to the professional judgment of faculty members about whether a student should be dismissed for failure to complete the requirements of an academic program. Similarly, in *Board of Regents of the University of Wisconsin v. Southworth,* 529 U.S. 217, 232 (2000), the Court sustained a university's decision that a mandatory student activity fee supporting extracurricular student speech served the school's educational mission. The Court in *Southworth* declined to interfere with the university's decision about what speech "is or is not germane to the ideas to be pursued in an institution of higher learning." *Id.*

In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court also acknowledged that academic freedom depends on the free exercise of the professional judgment of instructors. *Id.* at 586. In holding unconstitutional a Louisiana act forbidding the teaching of evolution unless creationism was also taught, the Court concluded that the act served to "diminish academic freedom." *Id.* at 586 n.6. It recognized academic freedom as a "principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment." *Id.*

Most recently in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), the Supreme Court kept to its "tradition of giving a degree of deference" to the academic decisions of educators. *Id.* at 2339. In *Grutter*, the Court reviewed the University of Michigan Law School's admission policy, a policy drafted by a faculty committee to increase the diversity of the law school's

student body, against a challenge that the policy unlawfully discriminated on the basis of race. In upholding the policy, the Court observed that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.* Citing Justice Powell's opinion in *Bakke*, the Court recognized the "educational autonomy" grounded in the First Amendment, *see id.*, noting, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.*

Echoing the Supreme Court's precedents, lower court decisions have recognized that academic freedom hinges on the free exercise of the professional judgment of faculty members, whether that judgment is exercised with respect to the curriculum, s*ee, e.g., Dube v. State University of New York*, 900 F.2d 587, 597-98 (2d Cir. 1990) (academic freedom permitted professor to discuss controversial topics in classroom); *Hardy v. Jefferson Community College*, 260 F.3d 671, 682-83 (6th Cir. 2001), *cert denied*, 535 U.S. 970 (2002) (professor's right to academic freedom protected his use of offensive language in the classroom); *Burnham v. Ianni*, 119 F.3d 668, 690 n.19 (8th Cir. 1997) (acknowledging that academic freedom protected professors' decision to display photographs of themselves for scholarly purposes), or whether that judgment is exercised with respect to institutional standards, *see, e.g., Clements v. Nassau County*, 835 F.2d 1000, 1004-05 (2d Cir. 1987) (deferring to the judgment of faculty members on academic dismissals).

Cases applying the right of academic freedom plainly demonstrate a profound respect for the academic decisions made by educational institutions and their faculties. At its core, academic freedom protects the right of educational institutions and their faculties to make

decisions – without governmental interference – that affect the institution's educational structure and environment.

B. As Applied to Yale in this Case, the Solomon Amendment Infringes on the Right of the Law School and its Faculty to Determine the Manner in Which They Teach the Values Central to the Legal Profession.

The adoption and implementation of the Law School's nondiscrimination policy represents precisely the type of educational judgment protected by the First Amendment right to academic freedom. As the Supreme Court's cases make clear, institutions of higher learning and their faculties have a right of educational autonomy, grounded in the First Amendment, to determine "what may be taught," "how it shall be taught," and what policies are essential to their educational mission. *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)). By conditioning the receipt of federal funding on the Law School's abandonment of its nondiscrimination policy, the Solomon Amendment here impermissibly infringes on that right.

The choice to adopt and implement a nondiscrimination policy is a pedagogical decision on the part of the Law School's faculty that is protected under the right of academic freedom. AAUP's policies provide that academic freedom hinges on the faculty's ability "to bring to bear on issues at hand not merely their disciplinary competencies, but also their first-hand understanding of what constitutes good teaching and research generally, and of the climate in which those endeavors can best be conducted." *On the Relationship of Faculty Governance to Academic Freedom*, AAUP Policy Documents at 225. In this case, the Law school faculty have made a reasonable pedagogical decision to teach professional values through the adoption, implementation, and enforcement of a nondiscrimination policy.

"'[T]he law and lawyers are what law schools make them,'" Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 n.1 (1992) (quoting a May 13, 1927 letter from Felix Frankfurter, Professor, Harvard law School, to Mr. Rosenwald). In addition to teaching substantive legal knowledge, a law school and its faculty are dedicated to the mission of training practitioners – a mission that "carries with it a responsibility to train them to practice in accordance with certain professional standards." Norman Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J. Legal Educ. 215, 216 (1984). ABA Standards also provide that "[a] law school shall require of all students in the J.D. program instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct." ABA Standards, Standard 302(b); *see also* ABA Section of Legal Educ. & Admission to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 138-141 (1992) (reporting that law schools are integral to teaching the professional values of "justice, fairness, and morality").

Given this educational mission, it is the business of law schools and their faculties to develop methods to teach legal professional values. Law schools and their faculties choose to inculcate values in a variety of ways. In addition to the professional responsibility classes that appear in the formal curriculum, law schools teach values indirectly, through clinical programs, pro bono programs, and the institutional policies that the law school and faculty members adopt. *See* Stephen Wizner, *Can Law Schools Teach Students to Do Good? Legal Education and the Future of Legal Services of the Poor*, 3 N.Y. City L. Rev. 259, 260 (2000) (observing that values are taught through a law school's institutional culture, which includes "extracurricular student activities, law school pro bono programs, professional activities of the faculty, visiting speakers,

and career planning and placement services" informal curriculum); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247, 253 (1978) ("the total learning environment influences what students learn"). These aspects of the curriculum are an important medium through which students learn values, and may wield a more powerful influence on students' ethical attitudes than the formal classroom. *See* Cramton, 29 J. Legal Educ. at 253 ("The development of ethical attitudes is probably more affected by the hidden curriculum than by the formal curriculum.").

The Law School's nondiscrimination policy is an integral part of its pedagogical strategy; it reflects the intentional choices of the Law School faculty about how to teach the professional values of sensitivity, justice, and fairness that students will need to exhibit as lawyers. The faculty adopted the policy to reinforce legal professional values in ways that the formal curriculum cannot accomplish. The policy represents the Law School's efforts to fulfill its educational mission to inculcate ethical standards by action as well as by precept.

The pedagogical purpose of the policy is particularly evident because the policy substantively mirrors actual standards of conduct that law school graduates must follow upon entering the legal profession. The rules adopted by the highest courts of a number of jurisdictions specifically provide that it is professional misconduct for a lawyer to discriminate in employment on the basis of sexual orientation.[10] A number of jurisdictions prohibit a lawyer from discriminating on the basis of sexual orientation in the course of representing a client.[11]

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[10] *See*, *e.g.*, Cal. R. Prof'l Conduct 2-400(B); D.C. R. Prof'l Conduct 9.1; Ill. R. Prof'l Conduct 8.4(a)(9)(A); 22 N.Y. comp. Codes R. & Regs. § 1200.3(A)(6) (DR 1-102); Ohio Code Prof'l Responsibility DR 1-102(B); Vt. R. Prof'l Conduct 8.4(g); Wash. R. Prof'l Conduct 8.4(g).

[11] *See, e.g.,* Ariz. R. Prof'l Conduct 8.4 cmt. ("A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, . . . sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."); Del. R. Prof'l Conduct 8.4(d) cmt. 3 (same); Tenn. R. Prof'l

Other states prohibit lawyers from engaging in conduct involving discrimination or manifesting bias on the basis of sexual orientation either in their professional capacities or in the conduct of adjudicatory proceedings.[12] In addition, the codes of judicial conduct of more than thirty states expressly prohibit judges from manifesting bias or prejudice based on sexual orientation in the performance of their duties.[13]

The decision of the Law School and its faculty to teach professional values – a primary goal of legal education – through the adoption, implementation and enforcement of its nondiscrimination policy, exemplifies the educational autonomy that academic freedom protects. The military's application of the Solomon Amendment impermissibly burdens this academic freedom. It robs the school and its professors of the ability to choose for themselves the most effective mechanisms for teaching professional standards and values to their students.

The military's application of the Solomon Amendment undercuts a nondiscrimination policy that is one of the most powerful tools for teaching professional values. Ethics are best "taught by example." Cramton, 29 J. Legal Educ. at 253. As law school is a student's first exposure to the legal profession, faculty members "inevitably serve as important role models for students and therefore must adhere to "the highest standards of ethics and professionalism."

Conduct 8.4(d) cmt. 2 ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, . . . sexual orientation,. . . . may violate paragraph (d) if such actions are prejudicial to the administration of justice. . .").

[12] *See*, *e.g.*, Fla. R. Prof'l Conduct 4-8.4(d); Ind. R. Prof'l Conduct 8.4(g); Mass. R. Prof'l Conduct 8.4; Minn. R. Prof'l Conduct 8.4(g); N.J. R. Prof'l Conduct 8.4(g); N.M. R. Prof'l Conduct 16-300; N.D. R. Prof'l Conduct 8.4(d); Tex. R. Prof. Conduct 5.08(a).

[13] *See, e.g.,* Fla. Code of Jud. Conduct Canon 3B(5)-(6); Idaho Code of Jud. Conduct Canon 2(C); Ill. Code of Jud. Conduct Canon 3(A)(8); Kan. Code of Jud. Conduct Canon 3(B)(5); Minn. Code of Jud. Conduct Canon 3(A)(5); Miss. Code of Jud. Conduct Canon 3(B)(5); Neb. Code of Jud. Conduct Canon 3(B)(5); Okla. Code of Jud. Conduct Canon 3(B)(4); Tex. Code of Jud. Conduct Canon 3(B)(6); Utah Code of Jud. Conduct Canon 3(B)(5); W. Va. Code of Jud. Conduct Canon 3(B)(5); *see also* Deborah L. Rhode & David Luban, *Legal Ethics* 53 (3d ed. 2001).

Comm'n on Professionalism, American Bar Ass'n, *"....In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism* 19 at 268 (1986). These professional values "can either be enhanced or undermined by the behavior of faculty in and out of the classroom." *Id.* By compelling faculty members to behave in a manner inconsistent with their adopted nondiscrimination policy, the Solomon Amendment – particularly as applied by the government in this case – cuts to the very heart of their academic freedom to teach professional values to students in the most effective possible way.

It is true that the right of academic freedom, like all other constitutional rights, is not absolute and must be balanced against competing interests.[14] In this case, however, there is no indication that the access Yale has afforded the military has impeded military recruiting efforts at the Law School. It follows that the state's interests in this case are negligible, if not illegitimate, and simply can not outweigh the interests of the Law School and its faculty to determine the pedagogical atmosphere of the school. The government has rejected the access offered by Yale because it communicates a "message" that military employment is "less honorable or desirable than employment with other organizations." Not only does this interest in silencing of the Law School and its faculty not outweigh the faculty's right to make pedagogical decisions affecting the institution's educational structure, it is also plainly improper.

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[14] There is, of course, nothing . . . that assumes the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* The Concept of Academic Freedom 59, 78 (Edmond L. Pincoffs ed. 1972).

Just as the constitutional value of academic freedom prevents the government from imposing direct restrictions, it also prevents the government from imposing these restrictions by placing conditions on funds, particularly when these conditions are unrelated to the purpose for which the funds have been appropriated. The government's actions here essentially hold hostage much-needed research funding – funding with no connection either to the military or the Law School itself – for the illegitimate purpose of forcing the Law School faculty to abandon their chosen methods of legal education.

Allowing the government to withhold funding in this way will have grave consequences on the research conducted at American universities. As noted above, *supra* note 8, in 2002 the federal government spent $25.7 billion on university research alone. Were the government's actions in this case permitted to stand, there would be no principled line defining the boundaries of federal intervention in university and law school curricula and policies across the country. Using the power of the federal purse, the government could then strip schools and their faculty of the ability to determine what and how to teach, and could ensure, for example, that all university research be consistent with, and support, official government policy.

CONCLUSION

For the foregoing reasons, the government's application of the Solomon Amendment to Yale Law School violates the fundamental constitutional rights of free speech and academic freedom.

Respectfully submitted,

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