The court finds that YLS is not in compliance with the Solomon Amendment, as amended, when it conditions recruiting on subscription to the NDP. In addressing this claim, the court's analysis is controlled by the plain meaning of the statute. See United States v. Awadallah, 349 F.3d 42, 51 (2d Cir. 2003); see also United States v. Proyect, 989 F.2d 84, 87 (2d Cir.1993) ("[W]hen the language of the statute is clear, its plain meaning ordinarily controls its construction."). The Solomon Amendment plainly states that funding may be denied if an institution has a policy that "prohibits, or in effect prevents . . . [military recruiters] from gaining access to campuses, or access to students . . . on campuses . . . 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). It is undisputed that military recruiters are not allowed access to the CDO if they do not sign the NDP. Non-military recruiters that sign the NDP have access to the CDO. YLS' policy of requiring subscription to the NDP as a condition of participation in CDO recruiting programs clearly "in effect" prevents military recruiters from accessing students through the CDO.

The argument that the military has the opportunity to sign the NDP is unavailing. The statute does not say that military recruiters must have the same opportunity to comply with an institution's policies as non-military employers, nor does it say that military recruiters must have access to the same procedures as non-military employers in order to gain access to students. Congress could have easily drafted the Amendment to say either, but it did not. In arguing that YLS has not "prohibited" or "prevented" access as proscribed by the Solomon Amendment, see Pls' Reply Mem. in Further Supp. Summ. J. at 3-4 [Dkt. No. 52], the Faculty ignore other language in the

Solomon Amendment that requires access to students to be "in a manner that is at least equal in quality and scope" to that given to other recruiters. See FAIR, 390 F.3d at 228 (after September 11, 2001, DoD began a policy of requiring not only access to campuses, but "treatment equal" to other recruiters). The statute clearly states that an institution's policies cannot prohibit or prevent military recruiters from accessing campuses and students in a manner at least equal to other recruiters. In effect, the NDP does just that.

The fact that recruiting interviews take place off-campus does not eliminate the Solomon Amendment violation. The CDO is located on-campus. Prospective employers seeking to participate in YLS' official recruiting program must register with the CDO. Once registered, employers send pertinent information to the CDO, and CDO employees communicate that information to YLS students, via the Law School website. Law students review these communications, sign up for interviews with employers of their choice, and submit resumes, all online through the CDO. Registered employers can also post job listings online through the CDO and download student resumes from the CDO database. In order to participate in YLS' official recruiting program, an employer must have access to the CDO and its computers, and these are part of the YLS campus. To prevent military recruiters from accessing the CDO and its programs is to deny military recruiters access to a part of Yale's campus.

In sum, YLS may offer military recruiters the same opportunity as non-military recruiters to comply with its policy regarding subscription to the NDP, but that policy "in effect prevents" military recruiters from gaining access to campus and students on campus "at least equal in quality and scope" to that afforded other recruiters.

Therefore, under the plain meaning of the Solomon Amendment, YLS is not in compliance with the Solomon Amendment. The plaintiffs' motion for summary judgment on its statutory claim is therefore denied.

It is the view of this court that both sides have had "a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried" on the plaintiffs' statutory claim. Ramsey v. Coughlin, 94 F.3d 71, 73-74 (2d Cir. 1996). Generally with regard to their motion for summary judgment, the Faculty have asserted that there are only five issues of fact material to its claims, and those are not seriously in dispute. See Mem. Supp. Summ. J. at 15. The plaintiffs have strenuously pressed that no material issue of fact is in dispute and that summary judgment is appropriate.

This court is convinced that all the evidence material to this claim is before the court (certainly that the plaintiffs would submit) and that awaiting a motion for summary judgment by DoD "would not alter the outcome." Ramsey, 94 F.3d at 74. Based on the analysis above of the statutory claim, the court concludes that DoD is entitled to summary judgment on the statutory claim as a matter of law based on the undisputed facts. Entry of summary judgment for the non-movant DoD is appropriate and expedient. See Ramsey, 94 F.3d at 74; see also Hispanics for a Fair & Equitable Reapportionment v. Griffin, 958 F.2d 24, 25 (2d Cir. 1992); Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991).

C. Solomon Amendment Is An Unconstitutional Condition

The Faculty and Professor Rubenfeld assert that the condition imposed on federal grants to Yale University by the Solomon Amendment is an unconstitutional condition. The essence of the plaintiffs' claim is that the Solomon Amendment as

applied by DoD denies a benefit to Yale University on a basis that infringes their constitutionally protected rights.

For more than half a century, the Supreme Court has expressly recognized that, even though a person may not be entitled by right to a valuable benefit and "even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." Perry v. Sindermann, 408 U.S. 593, 597 (1972). While having no "right" to do so, see id., Yale University receives $300 million from the federal government.

In Perry, the Supreme Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech." Id. The basis for this conclusion is that otherwise the government could create indirectly "a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . . Such interference with constitutional rights is impermissible." Perry, 408 U.S. at 597.

DoD argues that the unconditional conditions doctrine is inapplicable because the Solomon Amendment is merely an exercise of Congress's power under the Spending Clause. See U.S. CONST. art. 1, § 8, cl. 1. The Spending Clause does permit conditions to be imposed that are reasonably related to the purpose of the federal program. See So. Dakota v. Dole, 483 U.S. 203, 213 (1987)(O'Connor, J., dissenting); see also Rust v. Sullivan, 500 U.S. 173, 196 (1991). Here, DoD makes no claim, nor could it the court believes, that the condition imposed by the Solomon Amendment is in

any way related, let alone reasonably, to the purposes for which the federal funds have been given to Yale. The condition here is imposed on the recipient, not on "a particular program." Rust, 500 U.S. at 197. Under these circumstances the Spending Clause power cannot excuse a violation of the unconstitutional conditions doctrine as addressed in Perry and its progeny.

The Supreme Court has held that an important question to be determined is whether "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Dole, 483 U.S. at 211. Put another way, is the government, by imposing conditions on the receipt of funds by Yale University, coercing the plaintiffs. Here, that issue is not in dispute because DoD has conceded the fact of coercion. See Tr. at 124. There is no question of fact that the Faculty, acting as Yale Law School, voted to suspend its NDP because of the threatened cut-off of $300 million to other parts of Yale University. This court concludes, as a matter of law, that this conceded coercion is well past the point of pressure and is compulsion.

There remains only the issue of whether the plaintiffs' constitutional rights have been violated. See Perry, 408 U.S. at 597. That issue is hotly contested by the parties. Therefore, the court must determine whether the coerced NDP suspension caused by the Solomon Amendment has resulted in an unconstitutional violation of the plaintiffs' rights.

1. First Amendment/Compelled Speech Claim

a. Introduction. The plaintiffs make two related, but distinct, arguments that DoD is compelling them to speak against their will in violation of their rights under the First Amendment. The Faculty argue that, in being compelled to suspend the NDP and include military recruiters in the CDO recruiting process, they are being prevented from sending their chosen message - - that discrimination will not be tolerated - - and forced to convey a very different message - - that discrimination will be tolerated in certain circumstances. See Mem. Supp. Summ. J. at 18-19. Professor Rubenfeld presses a slightly different argument: even if the Faculty Members are not being forced to send any message themselves, DoD is violating the plaintiffs' First Amendment rights by compelling them to *help* disseminate *DoD's* recruiting message, a message with which Professor Rubenfeld and the Faculty disagree.

DoD replies that it is not materially impeding First Amendment expression. DoD contends that YLS' message is getting through to its intended audience loud and clear, and that, at most, plaintiffs' complaint is that suspension of the NDP makes them appear hypocritical. This, DoD asserts, is not a cognizable First Amendment claim.

In addition, DoD argues that YLS is not being forced to convey implicit approval of discrimination by allowing military recruiters into the CDO. YLS allows hundreds of recruiters to participate in the CDO program and DoD contends that YLS cannot be perceived as endorsing all the views of each of these potential employers. DoD claims that observers cannot possibly understand YLS to be endorsing the military's discriminatory policies in light of the school's 27-year history of preaching non-

discrimination based on sexual orientation. Additionally, DoD argues that the presence of military recruiters at CDO events only twice a year does not force the Faculty Members to "declare a belief," West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624, 631 (1943), or invade their "freedom of mind," Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Finally, DoD argues that to the extent that YLS is being compelled to do anything, it is being compelled to aid military recruiters in the *act* of recruiting, not in speech. Thus, DoD argues, the constitutionality of the Solomon Amendment should be examined in light of the Supreme Court's test for the regulation of expressive conduct formulated in United States v. O'Brien. See 391 U.S. 367, 377 (1968) (holding that a statute forbidding an individual to destroy his draft card did not violate the individual's First Amendment rights).

b. Free Speech Right. As Justice Jackson stated in Barnette, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." Wooley, 430 U.S. at 714. In other words, the First Amendment guarantees both "the right to speak freely and the right to refrain from speaking at all." Id.; see also Pac. Gas & Elec. v. Pub. Util. Comm'n of California, 475 U.S. 1, 11 (1986) (Powell, J., plurality opinion); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 71 (2d Cir. 1996). These two complementary concepts serve as "components of the broader concept of

individual freedom of the mind." Wooley, 430 U.S. at 714 (quotation omitted).

Where the government compels no actual speech from an individual, but "only" compels him to aid a third party in disseminating that third party's speech, a First Amendment violation occurs. See Pacific Gas, 475 U.S. at 15 (Powell, J., plurality opinion) (stating that a California utility regulation requiring a utility company to include a third-party's newsletter in its billing envelopes constituted unconstitutional compelled speech); United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (holding that a mandatory assessment imposed on mushroom producers to support advertising promoting general mushroom sales violated the producer's First Amendment right against compelled speech). That the governmental action does not restrict an objecting party from communicating its own message does not render that action constitutional. See United Foods, 533 U.S. at 411. Nor is a violation of the freedom not to speak, or not to aid others in disseminating their speech, cured by the speaker's ability to efficiently or effectively disclaim or controvert the speech it has been forced to disseminate. See, e.g., Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974) (a newspaper cannot be forced to print replies to its editorials, despite its clear ability to print a response); see also Pacific Gas, 475 U.S. at 16-18 (Powell, J., plurality opinion) (utility company cannot be forced to include the newsletter of a third party in its envelopes, despite ability to respond). The First Amendment grants a speaker "the autonomy to choose the content of his own message." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995).

In Wooley v. Maynard, the State of New Hampshire passed a statute requiring every non-commercial vehicle to have a license plate bearing the state motto "Live Free

or Die." 430 U.S. at 707. The plaintiffs in Wooley were Jehovah's Witnesses whose religious beliefs conflicted with the state's motto, and who were repeatedly charged with violating New Hampshire's statute by covering up the motto on their automobile. See id. at 707-08. The Supreme Court held that the state could not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." Id. at 713. Even though display of the motto was "a more passive act" than the forced act of saluting the flag found in Barnette, "the difference is essentially one of degree." Wooley, 430 U.S. at 715.

In Miami Herald, the State of Florida had passed a "right of reply" statute that required any newspaper that assailed the personal character or official record of a candidate for public office to print any reply the candidate might have, free of charge. See 418 U.S. at 244. The *Miami Herald* printed several editorials critical of a candidate for a seat in the Florida House of Representatives and refused to publish the candidate's replies, in violation of the statute. See id. at 243-44. The candidate argued that the statute was constitutional because it did not "prevent[ ] the *Miami Herald* from saying anything it wished." Id. at 256. The Supreme Court disagreed, holding that "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." Id. at 258. The Court reached this conclusion despite the fact that the newspaper had already expressed its views in the original editorials, and it could do so again in future editorials in response to the

candidate's replies.

Likewise, in Pacific Gas, the Supreme Court said that the state could not force a corporation to "assist in disseminating [a third party's] message" by including the third party's newsletter in empty space found in the corporation's billing envelopes. 475 U.S. at 15 (Powell, J., plurality opinion). The Public Utilities Commission of California decided that the excess space in utility companies' billing envelopes belonged to the People of California, and it ordered the companies to include the newsletter of a third party association in those envelopes in order to provide "a variety of views" on utility issues to ratepayers. See id. at 5-6 (Powell, J., plurality opinion). Pacific Gas appealed the Commission's ruling, arguing that it had a First Amendment right "not to help spread a message with which it disagrees . . . ." Id. at 7 (Powell, J., plurality opinion). The Supreme Court agreed, stating that not only was it unconstitutional for the Commission to force the utility to use its private property to disseminate a third party's message, but such compulsion could also force the utility to speak in response to the third party's message, an additional unconstitutional result. See id. at 15-16 (Powell, J., plurality opinion) ("[this] kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster"). Thus, not only did the ability of the utility company to respond easily fail to cure the constitutional violation: it actually created the potential for a further violation.

c. Violation of Freedom of Speech. The Solomon Amendment violates the plaintiffs' First Amendment right to freedom of speech. First, they have been coerced into assisting DoD in sending its message. DoD's message that the Faculty Members do not wish to aid in disseminating is that it is acceptable for

an organization to exclude homosexuals, or at a minimum those who admittedly engage in homosexual conduct, from employment. This message is the essence of the military's "Don't Ask, Don't Tell" policy. See 10 U.S.C. § 654(b). The right of the Faculty and Professor Rubenfeld to refrain from aiding another in the latter's speech has been violated by the Solomon Amendment requirement that the CDO include DoD's recruiting message. Pacific Gas, 475 U.S. at 15 (Powell, J., plurality opinion). Second, the Faculty's right to express their message without modification by DoD is also being violated. The Solomon Amendment has forced the Faculty to change their message from a categorical statement that "employers who discriminate based on sexual orientation are not welcome at YLS-sponsored recruiting events" to an equivocal statement that includes the disclaimer "except for the military."[22] Forced alteration of the Faculty's message violates their First Amendment right to freedom of speech. See id. at 16 (governmental coercion that causes alteration of one's message is violative of the First Amendment).

It is quite clear from the cases discussed that DoD's argument, that no violation has occurred because the Faculty are free to disclaim, and indeed have disclaimed, DoD's position, is unavailing in this case.[23] The fact that the YLS' message of its suspended NDP "gets through" DoD's "Don't Ask, Don't Tell" policy does not insulate

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[22]That the Faculty's message is altered by the enforcement of the Solomon Amendment is tellingly revealed by the language used by Colonel Carr: "Moreover, by singling out military recruiters, [YLS] 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 [YLS] permits to participate in its CDO programs." Carr Letter at 3. Successful enforcement of the Solomon Amendment alters that message.

[23]Thus, no need for discovery arises concerning the plaintiffs' ability to respond. See, e.g., Def's Local Rule 56 at 8, ¶ 8.

DoD from the violation of the plaintiffs' First Amendment rights. See Miami Herald, 418 U.S. at 257-58. Even if it could be said that allowing DoD to participate in the CDO recruiting program could never be viewed as an endorsement by YLS of DoD's policy, under the cases discussed above the First Amendment has still been violated.[24]

DoD claims that the military does not come to campus primarily to "advocate a message of discrimination against gays and lesbians" and may not even discuss its "Don't Ask, Don't Tell" policy during recruiting. Tr. at 68-69. This claim is immaterial. The Supreme Court in Pacific Gas said that, despite not knowing exactly what the third party would say once it was given the bully pulpit at the utility company's expense, the government could not compel an organization "to associate with speech with which [it] *may* disagree." 475 U.S. at 15 (Powell, J., plurality opinion) (emphasis added). Here, it is clear that DoD's message of its "Don't Ask, Don't Tell" policy stands in direct contravention of the YLS NDP. The underlying "Don't Ask, Don't Tell" policy, and the military's express rejection of the NDP, serve as sufficient "speech messages" for the purpose of the court's First Amendment analysis. "Were the government freely able to compel . . . speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." Id. at 16.

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[24]DoD's argument that no one would understand YLS to endorse the military's policy because YLS does not endorse all the views of the 250 employers who participate in the CDO program lacks merit. YLS does endorse the view expressed by every recruiters' endorsement of YLS' NDP. See FAIR, 390 F.3d at 237 (even if the law schools' sole disagreement with military recruiters is over signing the NDP policy, this is enough for a First Amendment violation).

DoD seeks to avoid plaintiffs' claim of a freedom of speech violation by arguing that recruiting is not speech, but merely conduct designed to perform the function of filling employment vacancies, and that any speech that occurs is incidental to this conduct. See, e.g., O'Brien, 391 U.S. at 376-77. Therefore, according to DoD, recruiting should be equated with the act of burning one's draft card, id., and not to speech such as the words "Live Free or Die" on a license place, see, e.g., Wooley, 430 U.S. at 713. The consequence of treating recruiting as conduct, and not speech, is that the court would examine the Solomon Amendment using the lower, intermediate scrutiny standard. Compare O'Brien, 391 U.S. at 377 (propounding the intermediate scrutiny test for communicative conduct), with Pacific Gas, 475 U.S. at 19 (Powell, J., plurality opinion) (examining compelled speech using strict scrutiny).

It should first be noted that the NDP is unquestionably speech and that the Solomon Amendment infringes on the Faculty's right to speak, or utter, the NDP. Further, DoD's argument ignores the vast amount of communication inherent in recruiting. See FAIR, 390 F.3d at 236-37. Recruiting involves more than an employer alerting potential employees to a vacancy, and potential employees responding to the alert, although this is a speech message in itself. At its essence, recruiting is a bilateral discussion of the objective and subjective positives and negatives of an employer and potential employee that will lead each party to make a decision concerning whether or not to voluntarily associate with the other. The Third Circuit put the employer's goal succinctly: "to convince prospective employees that [the] employer is worth working for." Id. at 237. As such, "recruiting necessarily involves 'communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes' – the

hallmarks of First Amendment expression." Id. (quoting Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)). Clearly, DoD seeks such communication because it presses its right to participate in the CDO's FIP and SIP, in which students sign up for personal interviews, and strenuously argues that all the other access to students, student information, and the YLS campus is inadequate. The Solomon Amendment exists, therefore, to require YLS to permit DoD speech in recruiting.

d. Strict Scrutiny. Having found that YLS, acting through the Faculty, has been unconstitutionally coerced into foregoing its own message and into assisting DoD in the dissemination of DoD's message of its "Don't Ask, Don't Tell" policy, the court's analysis does not end there. Because not all burdens on constitutional rights are constitutional violations, the court must next address whether the government's action can withstand scrutiny.

DoD argues that the Solomon Amendment should be examined under the intermediate scrutiny test promulgated by O'Brien for communicative conduct. While the issue of where precisely one draws the line between conduct and speech for these purposes is not always an easy one, it does not present particular difficulty in this case. The NDP is clearly a speech message.[25] And as already discussed, the recruiting coerced by the Solomon Amendment involves speech and communication of a viewpoint. Thus, the court rejects DoD's argument that the intermediate scrutiny test

[25]The court imagines one might argue that promulgating a policy like the NDP is an action or conduct, but if that is so, it is no less protected expression than the act of publishing a newspaper. See Miami Herald, 418 U.S. at 256 (state cannot compel editors to publish specific matter).

applies. See id. at 236-37 (oral and written communication used for recruiting purposes is speech); see also Wooley, 430 U.S. at 715 (New Hampshire motto "Live Free or Die" on license plate sufficient "ideological message" to invoke First Amendment protection); Boy Scouts of America v. Dale, 530 U.S. 640, 651-52 (2000) (promulgated regulations such as Scout Law, the Boy Scout Oath, and organization position statements sufficient evidence of protected First Amendment expression).

A governmental regulation that burdens a private individual or organization's First Amendment rights by compelling that individual or organization to speak or assist in disseminating another's speech is subject to strict scrutiny. See Pacific Gas, 475 U.S. at 19 (Powell, J., plurality opinion) (regulation could be found valid "if it were a narrowly tailored means of serving a compelling state interest."); see also FAIR, 390 F.3d at 242 (citing Riley v. Nat'l Ass'n of the Blind of North Carolina, Inc., 487 U.S. 781, 798 (1988) (regulation impairing speakers' First Amendment rights under the compelled speech doctrine could not survive "exacting First Amendment scrutiny")). While strict scrutiny is an exacting standard, the Supreme Court has clearly rejected the proposition that "strict scrutiny is 'strict in theory, but fatal in fact.'" Landell v. Sorrell, 382 F.3d 91, 112 (2d Cir. 2004) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)). Under the strict scrutiny test, DoD bears two burdens: 1) proving the existence of a compelling state interest and 2) showing that the restriction is narrowly tailored to advance that interest. Id. at 110.

The first of the Government's burdens, a compelling interest, is not at issue here. The plaintiffs do not contest that Congress's interest in raising and maintaining an

effective military is a compelling government interest.[26] Tr. at 11. However, the presence of a broad compelling interest does not necessarily mean that the Congress has chosen a narrowly tailored avenue to address that interest. Because the court finds that the Solomon Amendment is not narrowly tailored, it need not decide whether Congress's interest in raising an effective military is compelling in this setting. The court will assume this interest is compelling, as it believes it is. The court will, therefore, proceed to address DoD's other burden under the Landell test, whether the speech restriction is narrowly tailored.

In Landell, the Second Circuit wrote "to explain the nature of the narrow tailoring inquiry required" in the First Amendment setting. 382 F.3d at 125. It explained that "[t]he narrow tailoring inquiry examines the 'fit' between means and ends." Id. In addition to showing that the Solomon Amendment significantly advances Congress's interest in raising and maintaining a military, "[i]n order to satisfy the 'narrow tailoring' standard, the [DoD] must also prove that the mechanism chosen is the *least restrictive means* of advancing that interest." Id. at 126 (emphasis in original) (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000)). This is to say, "'[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'" Id. at 126 (quoting Playboy Entm't Group, 529 U.S. at 813). Therefore, the court must address the extent to which Congress's interest is advanced by the Solomon Amendment and whether the government has created an issue of fact

[26]The Faculty did suggest at oral argument that, while the government has a compelling interest to raise and maintain a military, it does not have a compelling interest in doing so by forcing its way into the CDO recruiting process. See Tr. at 11-12. The court views this as a narrow tailoring argument that it will address, *infra*.

with regards to its burden of proving the absence of less restrictive alternatives, which alternatives would be as effective in advancing its compelling interests while impinging less on First Amendment rights. See id.

In Landell, the State of Vermont defended, *inter alia*, mandatory campaign spending limits enacted in an attempt to reform its campaign finance laws and battle political corruption. See id. at 96. Vermont had argued that it "'had already explored less restrictive alternatives and found them to be ineffective.'" Id. at 132. It cited its previous failed attempt to impose voluntary spending limits through legislation. Id.

The Second Circuit found this to be insufficient evidence of narrow tailoring. In remanding the case to the district court for reconsideration of the narrow tailoring issue, the Second Circuit requested findings of fact relating to several questions: "(1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the [government's] interests." Id. at 136 (emphasis in original).

Here, DoD has offered no proof that the Solomon Amendment is the least restrictive means by which the Congress can successfully raise and maintain an effective military. DoD claims that it has confronted "disaffection" on college campuses that "impairs the ability of the military to recruit," a problem that is "compounded" by periodic military spending cuts. Mem. Opp. Summ. J. at 3. While it claims that "Congress has taken a *variety* of steps over the years to remedy the problem," it lists

only several iterations of the same step. Id. at 3 (emphasis added). DoD lists attempts by Congress, beginning in 1968 and continuing through the present day, to penalize institutions of higher learning who it believes are "barring" military recruiters from their campuses by denying them various forms of federal funding. See id. at 3-4. The Solomon Amendment is merely the most recent, and most reaching, of these attempts. See id. at 4-5.

The absence of any evidence of Congressional attempts at alternative types of regulation, information concerning which has been available to DoD since the beginning of this litigation, weighs heavily against its narrow tailoring claim. As the Third Circuit noted,

> Unlike the typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

FAIR, 390 F.3d at 234-35. Therefore, the Third Circuit found that the Solomon Amendment was not narrowly tailored, and thus unconstitutional under strict scrutiny analysis. See id. at 242. In this case, DoD has failed to produce any evidence to support a finding that the Solomon Amendment is narrowly tailored to substantially advance a compelling governmental interest.

In addition, DoD offers no evidence to support a finding that the Solomon Amendment, and the suspension of the NDP for the past two years at YLS that it caused, has advanced its goal of raising an army through effective recruiting. DoD

merely asserts that the CDO program "provides an easy and efficient means of assisting students in finding jobs," a means the military must have access to in order to compete successfully for students.[27] Mem. Opp. Summ. J. at 29-30. Despite the fact that any information on military recruiting successes and failures is uniquely within the control of the military, DoD has offered no evidence that either 1) the number of recruits it obtained prior to the suspension of the NDP was insufficient, or 2) that implementation of the Solomon Amendment, in the form of the suspension of the NDP, has increased, or is even likely to increase, the number of those recruits. In fact, the only reference made to any success or failure of recruiting in this litigation is the military's admission that, in the more than two years the NDP has been suspended, it has obtained only one recruit and that this recruit did not come to the military via the CDO program. See Def's Local Rule 56 at ¶ 49. While it is mathematically possible for military recruiting at Yale to have been worse prior to suspension of the NDP, DoD has offered no evidence that such was the case. This is plainly insufficient to carry the government's burden of creating at least a material issue of fact concerning how enforcement of the Solomon Amendment is narrowly tailored to advance the interests of Congress in raising an army.[28]

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[27]It bears noting that approximately 50% of Yale law school students obtain employment as judicial law clerks, a recruiting process that does not use the CDO program or any form of on-campus recruiting. See Bryant Decl. at ¶ 5. This would appear to undercut DoD's assertion that access to the CDO program is necessary to law student recruiting.

[28]DoD has not come forward, as required under Local Rule 56(a), with evidence to create even an issue of fact that Congress considered alternative legislation, that the Solomon Amendment in fact materially advanced Congress's goals, or that other, less restrictive, alternatives would not be as effective as the Solomon Amendment. These facts are all within DoD's control.

Therefore, the Solomon Amendment cannot withstand strict scrutiny and is unconstitutional as applied to YLS. The motion for summary judgment of the Faculty and Professor Rubenfeld on the First Amendment compelled speech claim is granted.

2. Faculty's First Amendment/Association Claim

The Faculty also assert that their First Amendment right to freedom of association is infringed by the Solomon Amendment. For more than four decades, the Supreme Court has recognized that individuals have a First Amendment freedom to associate in order to advance shared beliefs. See Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 418-19 (2d Cir. 2004) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)). Among the most highly protected forms of association is that undertaken to express opinions on public issues. See NAACP v. Claiborne, 458 U.S. 886, 913 (1982). Such First Amendment expression "'is more than self-expression; it is the essence of self-government.'" Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)). Supreme Court case law reflects "a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

The Faculty assert that its NDP is an expression of their views on employment discrimination based on, *inter alia*, sexual orientation. Both discrimination and sexual orientation are public issues today. By requiring potential employers to subscribe to the NDP prior to becoming part of the YLS recruiting program, the Faculty argue that they are using their freedom to associate, or disassociate, both to inculcate their values in their students and to propagate publicly their beliefs regarding discrimination. The

Faculty claim that the Solomon Amendment impermissibly interferes with their First Amendment right to disassociate from an entity, the United States military, whose explicit policies conflict with YLS' institutional beliefs, as expressed in the NDP. The Faculty claim that they "intended to convey [their] disapproval of the military's discrimination against gays and lesbians by denying military recruiters the services of the CDO." Mem. Supp. Summ. J. at 22. The Faculty argue that this refusal constitutes a decision not to permit the military to officially associate itself with YLS recruiting programs. According to YLS:

> it is not the mere presence of military recruiters at the Law School that distorts the Faculty Members' message and damages the protective educational environment they have sought to create. It is the military's commandeering of Law School resources in carrying out its discriminatory recruitment practices under the Law School's auspices that the Nondiscrimination Policy forbids.

Mem. Supp. Summ. J. at 23-24. The Faculty rely on cases such as Claiborne, Hurley, and Dale for the proposition that the First Amendment guarantees a private institution's right not to associate itself with an entity whose explicit policies conflict with the private party's institutional values.

DoD argues that should the court analyze the case at bar on associational grounds, Hurley and Dale do not provide support for the Faculty's position. DoD distinguishes Hurley by noting that it involved marching in a parade, "a quintessential form of expressive activity," and that the participation of the gay and lesbian group that attempted to march would result in that group's message being attributed to the parade organizers. Mem. Opp. Summ. J. at 17. DoD claims that YLS' long tradition of opposing discrimination, the sophistication of the average law school student, and

statements made by several YLS students evidencing their understanding that YLS is being forced to choose between the NDP and federal funding, provide evidence that the chance of such misattribution "is vanishingly small." Mem. Opp. Summ. J. at 18. The unlikelihood of misattribution and YLS' ability to publicize their disagreement, DoD argues, bars any associational claim.

In this regard, DoD also seeks to distinguish Dale on several grounds. First, it argues that the Solomon Amendment does not force YLS to accept military recruiters as members of their organization, but merely as temporary visitors to their campus. Second, the military recruiters would not be speaking "for" YLS, as an assistant scout master would for the Boy Scouts. Third, DoD argues that while one of the Boy Scouts' main goals was to instill values in young people, a goal threatened by the presence of a leader who espoused values the Scouts opposed, recruiting is essentially an economic activity, and military recruiters do not seek to instill any values in the students they interview. Thus, military recruiting does not "[strike] at the heart of [YLS'] goals," Mem. Opp. Summ. J. at 20, and the Faculty's associational rights are not violated. The court disagrees and finds that there is substantial support for the Faculty Members' association claim.

In Dale, the Boy Scouts appealed a New Jersey Supreme Court decision that held that the state's public accommodations law denied the Boy Scouts the ability to revoke an assistant scout master's membership in the organization upon learning that he was gay. 530 U.S. at 644. The Boy Scouts argued that "homosexual conduct is inconsistent with the values it seeks to instill," and that by forcing it to include an open and avowed homosexual, the New Jersey public accommodations law violated its First

Amendment right of expressive association. Id.

In order to determine the Boy Scouts' claim, the Supreme Court formulated a three-part test. As concisely summarized by the Third Circuit recently, these elements are: "(1) whether the group is an "expressive association;" (2) whether the [governmental] action at issue significantly affects the group's ability to advocate its viewpoint; and (3) whether the [government's] interest justifies the burden it imposes on the group's expressive association." FAIR, 390 F.3d at 231; see also Dale, 530 U.S. at 648-58.

a. Expressive Association. In concluding that the New Jersey law violated the Boy Scouts' First Amendment rights, the Dale Court noted that "the First Amendment's protection of expressive association is not reserved for advocacy groups." 530 U.S. at 648. "Associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that *could* be impaired in order to be entitled to protection." Id. at 655 (emphasis added). However, "to come within [the First Amendment's] ambit, a group must engage in some form of expression, whether it be public or private." Id. at 648. The Court found that, through its written mission statement, the Scouts directly expressed the values it supports and attempts to instill in its members. Id. at 649. The Court further held that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Id. at 650. Thus, the Court found the Boy Scouts to be an expressive association.

In examining the Boy Scouts' ability to advocate its viewpoint, the Court first noted that the Scout Oath and Law, on which the Scouts based their claim, does not explicitly mention sexual orientation. See id. However, the Scouts interpreted the terms "morally straight" and "clean" as being at odds with homosexuality and homosexual conduct. See id. The Scouts asserted that "it 'teach[es] that homosexual conduct is not morally straight' . . . and that it does 'not want to promote homosexual conduct as a legitimate form of behavior.'" Id. at 651. The Dale Court accepted that assertion, stating that it "need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality" and rejected the notion that it is the "role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." Id.

Thus, YLS does not need to be an advocacy group to claim a right to freedom of association, but it must engage in some expression, publicly or privately, in order to be protected by the First Amendment. See id. at 648. Like the Boy Scouts, YLS has asserted the values that it seeks to espouse outwardly and to inculcate within the law school. See Mem. Supp. Summ. J. at 22. Furthermore, YLS has promulgated a written policy statement outlining those values. See id. This written policy is the NDP, which clearly states that YLS is opposed to employment discrimination on the basis of, *inter alia*, sexual orientation. See Slifkin Decl. at Ex. E. YLS has gone further than the Boy Scouts and explicitly adopted a policy that announces *how* it expresses the NDP both to its students and to the outside world: by banning prospective employers from using CDO services if they do not subscribe to the NDP. YLS is clearly an expressive association for the purposes of First Amendment analysis.

b. Affect Ability to Advocate. Turning to the extent to which New Jersey's law interfered with the Scouts' expression, the Dale Court explicitly gave great deference to "an association's view of what would impair its expression." 530 U.S. at 653. While the Court noted that an organization could not immunize itself from anti-discrimination laws simply by asserting inclusion of a disfavored individual would impair its message, it gave great weight to the fact that Dale was openly gay and a leader in the gay community in concluding that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Id. In fact, Dale's openly gay status and the Boy Scouts' assertions that his presence would impair their message appear to be the only two things the Court considered in finding substantial interference. See id. at 651-56.

DoD's argument - - that Dale is distinguishable because military recruiters do not become a part of the faculty and do not officially speak for YLS while they are on campus - - does not bear up. First, Hurley makes clear that mere participation in an event sponsored by an expressive association is sufficient to invoke that association's First Amendment protections. See, e.g., 515 U.S. at 572-73 (noting that "every participating unit affects the message conveyed by [a] private organizer"). Secondly, the Dale Court held that the Boy Scouts could expel Dale, not merely remove him from his leadership position in the Scouts. See, e.g., Dale, 530 U.S. at 645. It was Dale's "presence," id. at 653, not his position as an official spokesman for the Scouts, that "would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," id.

The key to Dale's analysis of the second factor is the substantial deference given to a private organization's determination of 1) what its message is and 2) what significantly interferes with its ability to advocate its chosen message. As the Supreme Court pointed out, once an organization asserts a message or value that it seeks to express, federal courts "need not inquire further to determine the nature of the [organization's] expression." Id. at 651. Likewise, great deference is due to "an association's view of what would impair its expression." Id. at 653. As the Third Circuit has pointed out, in Dale "the reason why there was 'no question' . . . that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*."[29] FAIR, 390 F.3d at 233 (citing Dale, 530 U.S. at 653) (emphasis in original).

YLS makes two things clear. First, it clearly asserts that, through its NDP and its policy that employers cannot utilize the CDO without subscribing to the NDP, it seeks to express the idea that employment discrimination based on sexual orientation, even if done by the military, is wrong. See Mem. Supp. Summ. J. at 22. YLS also makes clear that it believes giving military recruiters access to the CDO, and therefore to officially-sanctioned-YLS-recruiting programs, substantially affects its ability to advocate its chosen message opposing employment discrimination, both to its students and to the

[29]While not a factor in its decision, the court notes that the deference the Dale Court accorded expressive associations would appear to be particularly appropriate in the university setting, in light of the Supreme Court's "tradition of giving a degree of deference . . ." to universities because they "occupy a special niche in our constitutional tradition." Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003); see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.).

public. See Mem. Supp. Summ. J. at 23-24.

The Supreme Court's analysis in Dale lends significant support to this argument. The majority in Dale made much of Dale's status as an openly homosexual male and a leader in the gay community. 530 U.S. at 653. His inclusion in the Scouts forced them to "send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Id. And as the Court in Hurley noted, requiring the parade organizers to include an unwanted group "requir[ed] petitioners to alter the expressive nature of their parade." 515 U.S. at 572-73.

Here, the military is completely open about its policy of excluding individuals who engage in homosexual conduct from service in the armed forces. The statutory underpinnings of the "Don't Ask, Don't Tell" policy can be found in the United States Code. See 10 U.S.C. 654(b). Nothing could constitute a more open espousal of a given viewpoint than codification in the laws of our nation. Thus, as the inclusion of an open homosexual in an organization opposed to homosexuality obviously impaired the Boy Scouts' message in Dale, the inclusion of the military in YLS' recruiting program impairs its message: it forces it to "send a message . . . that [YLS] accepts [employment discrimination based on sexual orientation] as a legitimate form of behavior." See, e.g, Dale, 530 U.S. at 653. When viewed in conjunction with the high level of deference afforded to organizations by the Supreme Court in Dale as to what an organization claims is its message and as to its claim that the Government's action will undermine YLS' message, it becomes obvious that the Solomon Amendment substantially interferes with the Faculty Members' ability to advocate their viewpoint. It "requires" YLS "to alter the expressive content" of its policy. Hurley, 515 U.S. at 572-73.

c. Strict Scrutiny. Finally, the Dale Court undertook the balancing inquiry demanded by the third prong of its test by applying strict scrutiny. In explicitly rejecting the use of O'Brien intermediate scrutiny, the Court found that laws "directly and immediately affect[ing] associational rights" must be reviewed using "traditional First Amendment analysis . . . ." Dale, 530 U.S. at 659. The Dale Court focused on the compelling interest prong of strict scrutiny. See id. Concluding that New Jersey's interest in preventing discrimination was not compelling enough to justify the burden on the Boy Scouts' associational rights, the Court held that New Jersey's attempt to apply its public accommodation law to the Scouts ran afoul of the First Amendment. Id.

As in Dale, strict scrutiny applies in the case at bar, and DoD must prove that it has a compelling interest that "justif[ies] such a severe intrusion on [an organization's] rights to freedom of expressive association." Id. "But '[i]t is not enough to show that the [DoD's] ends are compelling; the means must be carefully tailored to achieve those ends.'" FAIR, 390 F.3d at 234 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). See also Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990) (applying strict scrutiny to patronage system requiring membership in or support of the Republican Party). In the instant case, the court again assumes that the government's interest in raising and maintaining a military is a compelling one. Therefore, the court must consider the second prong of strict scrutiny analysis: narrow tailoring.

The Solomon Amendment is not narrowly tailored to serve the government's compelling interest. As the court laid out more fully above, DoD fails to offer any proof,

despite any such proof being within its control, that it could carry its burden of narrow tailoring. See Section IV.C.1.d, *supra*. It offers neither proof that the Solomon Amendment substantially advances the government's interests, nor proof that it is the least restrictive means. See Landell, 382 F.3d at 126.

Therefore, the Solomon Amendment is not narrowly tailored to advance a compelling government interest, and thus unjustifiably burdens the Faculty Members' First Amendment right of expressive association. The court concludes that there are no material issues of fact, and the Faculty's motion for summary judgment on their First Amendment freedom of association ground is granted as a matter of law.

3. Faculty's Fifth Amendment/Educational Autonomy Claim

As a second basis for their unconstitutional conditions claim, the Faculty Members assert that the Solomon Amendment violates their right to educational autonomy. Framing it as a substantive due process right under the Fifth Amendment, the Faculty describe it as the right "to ban discriminatory conduct from all of the Law School's activities in order to protect their students and to create the environment necessary to carry out the Faculty Members' educational mission." Mem. Supp. Summ. J. at 29. The Faculty cite a handful of cases that they argue recognize "a faculty's autonomous governance of the [university's] educational environment," id. at 30, as a right "'implicit in the concept of ordered liberty.'" Id. at 29 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969)). This argument reaches too far.

The substantive due process rights recognized in Palko are those that "have been found to be implicit in the concept of ordered liberty . . . ." 302 U.S. at 325; see

also Local 342, Long Island Pub. Serv. Employees v. Town Bd. of the Town of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994). They are "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled in part on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964)). The Supreme Court has warned, however, that federal courts should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985)); see also Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 144 (2d Cir. 1994). The Collins Court explained that "[t]he doctrine of judicial self-restraint requires [federal courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." 530 U.S. at 125; see also Local 342, 31 F.3d at 1196.

The cases cited by the Faculty provide for a substantive due process right both to educate and to an education. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400 (1923). A school's right to educate clearly includes the right to make determinations concerning the school's curriculum and qualifications necessary for membership in the student body. See id. (holding that teacher had the fundamental right to teach the German language to his students); see also Grutter, 539 U.S. at 328-29 (granting as a result of the university's "special niche in our constitutional tradition," a degree of deference to "a university's academic decisions" including its determination that student body diversity constitutes a compelling interest for the purposes of student admissions); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (holding that a school

does not violate a student's First Amendment rights when it makes editorial decisions for a publication printed pursuant to a class within its curriculum); Ewing, 474 U.S. at 225 (showing "great respect" for a university's determination of "a genuinely academic decision," such as when a student should be dropped from an academic course of study). The Supreme Court has also extended deference to an educational institution's decision to promote extracurricular student speech through content neutral funding of student organizations. See Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 232-33 (2000).

However, the scope of this "right to educate" is not as broad as the Faculty suggest. The American "concept of ordered liberty" is not implicated when the federal government passes a law governing who may participate in college recruiting programs. Such a law does not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Palko, 302 U.S. at 325. The court is aware of no case law that compels the conclusion the Faculty urge.

The Faculty have urged the court to view the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), as, *inter alia*, calling into question the constitutionality of the "Don't Ask, Don't Tell" policy. This court reads Lawrence as limited to the most private of personal, sexual relationships between consenting adults. See 539 U.S. at 573-74. According to the Lawrence Court:

> . . . our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the

universe, and of the mystery of human life."

Id. (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)). No "most intimate and personal choice" is implicated in recruiting in an educational environment.

Therefore, the court finds that this is precisely the type of situation in which it should exercise the judicial restraint appropriate in the substantive due process area. Furthermore, because the plaintiffs' substantive due process educational autonomy claim is functionally a First Amendment academic freedom claim, see Keyishian v. Bd. of Regents of the Univ. of the State of New York, 385 U.S. 589, 603 (1967) ("[Academic] freedom is . . . a special concern of the First Amendment . . . ."), the court need not create, and must forgo creating, a new substantive due process right, see City of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) ("'[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims'") (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994)).

For the foregoing reasons, the court grants the DoD's motion to dismiss the Faculty's Fifth Amendment claim and denies as moot the Faculty's motion for summary judgment on that claim.

V. CONCLUSION

For the reasons stated above, the plaintiffs' motion for summary judgment [Dkt. No. 34] is granted in part and denied in part, and the still-pending defendant's motion to dismiss [Dkt. No. 12] is granted in part and denied in part. The defendant's motion to

dismiss the plaintiffs' First Amendment compelled speech and association claims is **DENIED** as moot, and the plaintiffs' motion for summary judgment on those claims is **GRANTED**. The defendant's motion to dismiss the plaintiffs' Fifth Amendment claim is **GRANTED**, and the plaintiffs' motion for summary judgment on that claim is **DENIED**. The plaintiffs' motion for summary judgment on their statutory compliance claim is **DENIED**, and the court *sua sponte* **GRANTS** summary judgment to the defendant on that claim. Defendant's request pursuant to Rule 56(f) is **DENIED**.

Accordingly, the Solomon Amendment is hereby declared unconstitutional as applied, and the defendant is enjoined from enforcing it against Yale University based upon Yale Law School's Non-Discrimination Policy. The Clerk is ordered to close the case.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 31st day of January, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge