**No. 04-1152**

IN THE

# Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,
*Petitioners*,
v.
FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,
*Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## *AMICUS CURIAE* BRIEF OF THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

GREGORY S. COLEMAN
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

DIANE HARVEY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8781

*Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

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## INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the *Cato Supreme Court Review*. The instant case raises squarely the question of the limits of the federal government's power when seeking to intrude upon a private institution's First Amendment rights to freely associate and advocate its views and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

## SUMMARY OF ARGUMENT

"If 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 . . . or other matters of opinion." *W. Va. Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). Petitioners do not directly reject that proposition. But even if the government does not tell law schools what to think, it certainly considers itself an expert on how law schools should be run. Its briefs and

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[1] In conformity with Supreme Court Rule 37, amicus has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. Amicus also states that counsel for a party did not author this brief in whole or in part, and no person or entities other than the amicus, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

those of its amici fairly groan under the weight of high-handed advice instructing respondents about how to educate their students. *See* Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with the "function of institutions of higher education" to "expose students to a wide range of views"); *id*. at 21 (suggesting students are "mature" enough to distinguish the recruiters' views from that of the institution); *id*. at 22 (suggesting that compliance with the Solomon Amendment will pose "no difficulty" in conducting law schools' pedagogical functions). *See also* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' policies "severely compromise" student interests and frustrate the "core mission" of an academic institution).

In *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), this Court expressed grave doubts about the ability of nine justices to second-guess the quality and degree of expressive interests asserted by expressive associations. *Id*. at 651-53. It should apply similar skepticism to petitioners' dismissive attitude toward the interests asserted by respondent law schools here. Just as it is no business of the Court, or the state, to tell private law schools what their message should be, it is also no business of the Court, or the state, to tell law schools how to best convey their message.

The "message" at issue here is, of course, education about the value of a particular principle of non-discrimination, conveyed through a gentle symbolism: The respondent law schools exclude from their campus hiring a powerful employer who would discriminate against their students. It is a message that speaks without words or the use of force, but is as clear as any commandment of the Old Testament: As you do, you will have done to you. That policy of expressive moderation is, moreover, supported by important educational

considerations: chief among them the need to instruct effectively without polarizing the campus and alienating close-minded students who need instruction most. Speech codes and harangues promote resistance and rebellion. Symbolism and subtlety, a respondent might bet, open minds and shape norms.

Petitioners' logic, which denies First Amendment protection to respondents because of the supposedly marginal nature of the expressive interests at issue, would impose upon those law schools committed to expressive moderation a strange choice: between (1) abandoning the form of instruction chosen, or (2) denouncing the disfavored views with unrelenting—and, in their view, ineffective—hostility. It is a "freedom" to be quixotically strident, but not to be calculatingly measured. That is a supremely odd outcome given that the First Amendment is designed to promote, above all, the free *exchange* of ideas. *See*, *e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2004) (First Amendment embodies "[o]ur profound national commitment to the free exchange of ideas") (citation omitted). It is also an outcome expressly forbidden by *Boy Scouts of America* v. *Dale*. 530 U.S. at 656. ("[t]he fact that the organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection").

Agree or disagree with respondents' view of how to educate, their associational assessment is beyond the competence of this Court to assess. Here, once the Court accepts, as it must, respondents' reasonable claim to the Court's recognition of an important interest in pursuing their chosen manner of educational message formation, the Court should also recognize that no countervailing government interest remotely worthy of equivalent respect has been identified by petitioner. Where, as here, there are less restrictive means to accomplish the government's purpose (*i.e.*, loan repayment programs, television and

radio recruiting campaigns), coercive regulations like the Solomon Amendment cannot withstand strict scrutiny.

## ARGUMENT

In 2003, the Forum for Academic and Institutional Rights ("FAIR"), a group of law schools and law school faculties, sued the Department of Defense and other federal agencies seeking a preliminary injunction enjoining enforcement of the Solomon Amendment. The district court denied FAIR's application for a preliminary injunction, reasoning that FAIR was not likely to establish that the Solomon Amendment was unconstitutional.

The Third Circuit reversed, correctly holding that the Solomon Amendment (1) improperly compels the law schools to use their personnel and resources to disseminate the military's recruiting message, and (2) interferes with the law schools' voluntary right of association by preventing the law schools from teaching "by example" that discrimination on the basis of sexual orientation is wrong. *Forum for Academic & Institutional Rights* v. *Rumsfeld ("FAIR")*, 390 F.3d 219 (3d Cir. 2004). Because the Third Circuit properly concluded that the Solomon Amendment impaired the law schools' First Amendment rights, the court applied strict scrutiny, which required the court to determine if "the Government's interest in recruiting military lawyers is compelling, and . . . whether the Solomon Amendment is narrowly tailored to advance that goal." *Id.* at 234-35, 242. Given the sparse record before it, the Third Circuit appropriately concluded that the government failed to produce "a shred of evidence that the Solomon Amendment materially enhances its stated goal"; "the Solomon Amendment," it said, "could barely be tailored more broadly." *Id.* at 234-35.

The Third Circuit also properly held that the Solomon Amendment amounted to an inappropriate penalty on

protected speech and associational rights. That, too, was correct: Under the unconstitutional conditions doctrine, 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.* at 229 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). That doctrine is a sensible application of a simple common sense observation: The federal government's ever expanding power to disburse benefits is more than a contractual bargaining chip. Here, wielded disproportionately and in a way that is designed to achieve by indirect pressure outcomes the Bill of Rights is designed to prevent, it is a weapon.

The Court of Appeals therefore correctly concluded that Congress could not condition the law schools' receipt of nearly all of their federal funds, despite a complete absence of any nexus between funds and targeted conduct, on the law schools' surrender of control over their methods of associational expression.

## I. THE LAW SCHOOLS ASSERT PROTECTED ASSOCIATIONAL RIGHTS.

### A. BROAD FIRST AMENDMENT PROTECTION OF EXPRESSIVE ASSOCIATION IS ESSENTIAL TO OUR SYSTEM OF ORDERED LIBERTY.

As has long been recognized by this Court, the First Amendment is "the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.). The theory of the First Amendment is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

As a consequence, for over forty years, this Court has recognized an individual's right under the First

Amendment to freely associate in order to advance shared ideas. *See NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Focusing upon the close link between free speech and free assembly, the *Patterson* Court determined that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id*.

Protecting the freedom to associate secures two key benefits. First, it "preserv[es] political and cultural diversity and . . . shield[s] dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). Second, by ensuring wide dissemination of information, the First Amendment exposes error and allows individuals and government to avoid unsound ideas more effectively and efficiently, illuminating ideas that might otherwise be ignored. *See, e.g.*, Daniel A. Farber, *Free Speech Without Romance*: *Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 557-58 (1991) ("The First Amendment is based on the belief that people will make better decisions if they are more fully informed . . . [and that] [n]ormally, the availability of greater information can only benefit economically rational individuals—the more information individuals have, the more knowledgeably they can define their ends, calculate their means, and plan their actions.").

To secure these benefits, the First Amendment rejects a "paternalistic approach" to governance of the marketplace of ideas. *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Farber, 105 Harv. L. Rev. at 557 n.15. To control the effects of bad speech, the First Amendment therefore counsels not more government, but a larger constellation of private speech producers.

While the government and its amici pretend to take the side of free speech, contending that the Solomon Amendment ensures student access to a greater quantity of information than would exist in its absence (*see, e.g.*, Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with "expos[ing] students to a wide range of views")), its position is patently paternalistic. In the judgment of Department of Justice lawyers and their amici, members of Congress and the executive branch understand how to maximize the contribution of individual private educational associations to the public welfare much better than the private professional educators whose interests are at issue here. *See* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' hostility to the policies reflected in the Solomon Amendment "severely compromise" student interests and frustrate the "core mission" of an academic institution). Legal protection for the "marketplace" of ideas rests on a different presumption: that the combined efforts, tactics, and resulting collision of a multitude of individual private sector speakers and associations, not the ministrations of official overseers, will maximize the quality and diversity of information available to the informational marketplace. The Amendment reflects a common sense economic insight: Even well-intentioned regulation of the process of exchange may distort the marketplace for speech, just as it does for other goods—not only by giving state-preferred competitors an unwarranted subsidy but, just as often, by irrationally distorting the speech marketplace in ways unforeseen by regulators, benefiting no one.

### B. FAIR ASSERTS SUBSTANTIAL FIRST AMENDMENT INTERESTS.

#### 1. FIRST AMENDMENT PROTECTIONS FOR EXPRESSIVE ASSOCIATION INCLUDE PROTECTION FOR ORGANIZATIONAL STRUCTURE AND AUTONOMOUS MESSAGE FORMATION.

In *Boy Scouts of America* v. *Dale,* this Court held that a private non-profit organization constituted an expressive association and noted that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups . . . . 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." 530 U.S. 640, 648, 655 (2000). As *Dale* made clear, so long as a law "significantly affect[s]" an association's "expression," the law cannot be applied to that association unless it is the "least restrictive means" of "serv[ing] compelling state interests." *Id.* at 655.

The fundamental tenets of associational freedom are not confined to cases where expressive associations seek to exclude members the association believes do not reflect its values and beliefs, a point first underscored in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The *Hurley* Court determined that a state's public accommodation statute, which prohibited discrimination with respect to sexual orientation, should not restrict a private group's decision to prohibit gay marchers in its St. Patrick's Day parade. According to the Court, the parade was "a form of expression, not just motion," even though there was not a "succinctly articulable message." *Id*. at 568-69. Thus, the Court emphasized that First Amendment protection

extends not only to a parade's "banners and songs . . . for the Constitution looks beyond written or spoken words or mediums of expression." *Id.* at 569. The Court, in other words, acknowledged that the First Amendment protects the association's delivery of its message even if it is symbolic expression and not a spoken word. Consistent with *Hurley*, *Dale* recognized that "[g]overnment actions that may unconstitutionally burden" the freedom of association "may take *many* forms, *one* of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" 530 U.S. at 648 (citation omitted) (emphasis added).

*Dale* and *Hurley* thus established that the freedom to associate, if it is to secure a meaningful right to translate principles into concerted action and influence, must include the freedom from any governmental conduct that seeks to intrude upon the internal structure or affairs of the association. That right logically includes, at a minimum, an association's right: (1) to freedom of autonomous message formation, (2) to unfettered delivery of the group's message, (3) to define itself and its members, (4) to choose who shall speak on behalf of the group and who shall not, and (5) to exclude competing messages that might dilute the group's chosen expression or values.

### 2. COURTS OWE DEFERENCE TO LAW SCHOOLS' IDENTIFICATION OF STRUCTURAL EXPRESSIVE INTERESTS.

In *Dale*, the Court not only recognized that rights of associational freedom extend beyond membership, to organizational structure, but also recognized that an expressive association's assessment of the expressive interests at stake deserves deference. Which mode of expression will be the most effective for a given association must be determined not by the Court but by

the association itself. *See Meyer* v. *Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

a. In *Dale*, this Court rejected the New Jersey Supreme Court's attempt to second-guess the expressive interests asserted by the Boy Scouts. In effect, the New Jersey Supreme Court argued that the Scouts did not deserve First Amendment protection because the Scouts had not been hostile *enough* to homosexual scouts. The Scouts did not expressly disapprove of homosexuality, limiting their official statements on matters of sexual orientation to a series of "empty moral bromide[s] devoid of substantive content." Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 120 (2000). While it had indeed excluded a few token individual scoutmasters based on their avowed sexual orientation, the Boy Scouts "rarely, if ever, denie[d] membership based on any selection criteria other than age or gender." *Dale* v. *Boy Scouts of America*, 734 A.2d 1196, 1234 (N.J. 1999). Indeed, neither the "charter nor bylaws . . . permit[ted] the exclusion of any boy." *Id*. at 1234-35. Moreover, the organization's official policy directed scoutmasters to eschew formal discussion of sexuality because the Scouts "believe[d] that boys should learn about sex and family life from their parents." *Id*. at 1203. In fact, affidavits of hundreds of scouts stated that they were wholly "unaware of any [Scout] position on the morality of homosexuality." *Id*. at 1240. Based on the "inconsistency and vagueness" of the Scouts' official line on matters of sexuality, the New Jersey Supreme Court denied the Scouts First Amendment protection, holding that to gain the benefit of free speech protections it must show a "clear, particular, and consistent message" of animus to homosexuality. *Id*.

On appeal, this Court sensibly rejected the New Jersey's Supreme Court's approach, ruling that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Dale*, 530 U.S. at 656. "As we give deference to an association's assertions regarding the nature of its expression," reasoned Chief Justice Rehnquist's majority opinion, "we must also give deference to an association's view of what would impair its expression." *Id.* at 653. "If the Boy Scouts wish[] Scout leaders to avoid questions of sexuality and teach *only by example*," concluded the Court, "this fact does not negate the sincerity of its belief expressed above." *Id*. at 653, 655 (emphasis added). *Dale* did not, in other words, second-guess the Boy Scouts' chosen form of pedagogy.

An opposite result, of course, would have been perverse. The Boy Scouts' vague policy on homosexuality reflected a considered, and quite reasonable, organizational policy: "a studied compromise" between competing factions that "a large and successful organization must make to stave off schism or disintegration." Epstein, 74 S. Cal. L. Rev. at 128. By refusing to second-guess the organizations' asserted expressive interests, the Court therefore avoided playing "havoc with the position of [a] mainstream institution who [would have been] put to an unnecessary choice: voice extreme positions or choose moderate ones and forfeit [its] right to manage [its] internal affairs." *Id.* at 127.

b. Here, despite *Dale*'s counsel of humility, petitioners and their amici take the position that the law schools' recruiting policies are merely incidental to the law schools' expressive interests and thus not entitled to any First Amendment protection. *See*, *e.g.*, Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with the "function of institutions of higher

education" to "expose students to a wide range of views"); *id*. at 21 (suggesting students are "mature" enough to distinguish the recruiters' views from that of the institution); *id*. at 22 (suggesting that compliance with the Solomon Amendment will pose "no difficulty" in conducting law schools' pedagogical functions). *See also* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' policies "severely compromise" student interests and frustrate the "core mission" of an academic institution). Petitioners ask, in effect, the Court to substitute its judgment about how to educate students for that of the respondents.

Much like the Boy Scouts, respondents have chosen a moderate mode of educational expression. It is a mode of expression that does not penalize disfavored views expressed within the student body. It does not shame and marginalize student speakers whose campus speech is disfavored. Instead of proscriptions and expulsions, it employs a gentle symbolism to convey respondents' chosen message. Rather than target students, it targets a societally powerful outside employer. And it does so by fighting fire with fire, discriminating against that employer, by barring it from using associational property to solicit students in a discriminatory fashion. Like the Scouts, respondents' educational strategy teaches "by example." *Dale*, 530 U.S. at 653, 655.

The respondents' associational policies, again like those of the Scouts, are supported by an eminently reasonable associational strategy. A law school may bet that coercion and harangues (*e.g.*, speech codes and professorial rants) polarize and divide, inciting rebellion among dissenting students and closing, rather than opening, resistant minds. Instead, that law school may opt for a soft touch, betting symbolism will plant seeds more effectively, by defusing the hostility that often poses an

insuperable barrier to transforming deep-seated societal norms. It is an educational strategy at least as worthy of deference as the Boy Scouts' judgments about how to best regulate its expressive message.

By denying recognition of a valid First Amendment interest because of respondents' expressive moderation, petitioners would force on law schools committed to expressive moderation a choice no less perverse than the choice the New Jersey Supreme Court would have forced on the Boy Scouts: express disapproval of disfavored views in an extreme manner or choose expressive moderation and forfeit First Amendment protection. Respondents and other law schools would be left with a "freedom" to be (from one pedagogical point of view) ineffectively strident but not to be calculatingly measured in expression.[2]

c. The risks of adopting the government's dismissive attitude toward the First Amendment interests expressed here underscore the stakes of this case. Any constitutional principle worthy of the name must occupy a sizeable field. Yet, if petitioners have their way, the rights of expressive association recognized in *Dale* and similar cases would accord only formal rights to "associate." Their reasoning would preserve the rights of individual members of associational groups to speak their mind (which, of course, they had before they entered the association); but, by denying the association a broad and unconditioned right to control the organization's resources when implementing its strategy of choice, the protection would ultimately fray at the point organizations translate

[2] Conditioning First Amendment protection on the clarity and strength of expression is also patently inconsistent with this Court's First Amendment protection of the right *not to speak at all*. *See* Section I.C, *infra*.

principles into concerted action. Indeed, petitioners' reasoning would, in some cases, provide a special bargaining endowment to the most hard-edged and doctrinaire members of associations in their battles over the direction of associational strategy, the exact result *Dale* sought to avoid.

### C. Denying Recognition Of A Protected Expressive Interest In This Case Would Force Respondents To Subsidize Views With Which They Disagree.

Petitioners would not only deny the respondents the right to choose their own methods of expression, but would force respondents to subsidize speakers with whom they disagree—or, in the alternative, subsidize competitors in the educational marketplace who curry favor with government. That forced choice underscores that the Solomon Amendment inevitably, and unavoidably, coerces respondents to support speech inconsistent with their associational principles.

The First Amendment guarantees both "the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), this Court applied that principle to hold unconstitutional Florida's "right of reply" statute, which required any newspaper that criticized the official record of a candidate for public office to print—free of charge—any reply the candidate might have to the critique. Similarly, in *Pacific Gas & Electric* v. *Public Utility Commission of California*, 475 U.S. 1 (1986), this Court held that California could not force a utility company to "assist in disseminating [a third party association's] message" by requiring the third party's message to be included on the utility's billing envelopes. *Id*. at 14-15. The Court reasoned that it was unconstitutional not only

to force the utility company to print the association's message, but that such compulsion could force the utility company to respond, potentially creating a second constitutional violation.

Here, the government seeks not only to force the law schools to forgo their message that discrimination in employment is wrong, it would create the situation where the law schools will be compelled to speak in order to counteract the government's message. *See* Pet. Br. at 22 & n.3 (noting that a fear of mistaken inference is self-imposed, since it may be corrected by "vociferous[]" criticism of government policy by, for example, "faculty members"). Not only would such a response constitute compelled speech, but the response itself could be viewed as violating the mandate of the Solomon Amendment by creating a situation in which the law schools' criticism of the hiring policy of the U.S. military, by fomenting hostility towards the military, would "prevent" the law schools from providing military employers with "access to students . . . at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (2005).

Nor does the "choice" to forgo funding save the Solomon Amendment from charges of "coercion." By forgoing funding, respondents are placed in the position of subsidizing *competitors* in the educational marketplace (for examples, *see*, *e.g.*, Brief of Amicus Curiae Law Professors and Law Students in Support of Petitioners) who hew to the government's party line. The wealth transfer is the product of a simple calculus: Respondents and their supporters must pay for educational subsidies in the form of taxable contributions. If they forgo drawing from the benefit pool in order to preserve their expressive rights, they are nonetheless forced to contribute to other schools' educational subsidies, through general tax contributions. But they no longer receive any benefit in

return; the result is a net gain for competing schools at respondents' expense. Thus, the Solomon Amendment creates the conditions for a transfer of wealth from respondents to third parties, no matter how respondents choose to respond to the choice it poses. Put simply, it creates a Hobson's choice, one that is inconsistent with legal protection against forced subsidization of speech.

### D. THE SOLOMON AMENDMENT FAILS TO SURVIVE STRICT SCRUTINY.

Since the Solomon Amendment significantly affects the law schools' rights of expression, it is subject to strict scrutiny.[3] As noted in *Dale*, the freedom of expressive association can be trumped by a showing of "compelling state interests, unrelated to the suppression of ideas, that *cannot be achieved through means significantly less restrictive* of associational freedoms." *Dale*, 530 U.S. at 648 (internal citation omitted) (emphasis added). Accordingly, petitioners must establish that their trampling on respondents' First Amendment rights is justified by a compelling interest, here, recruiting military lawyers. In addition, petitioners must demonstrate that the Solomon Amendment is narrowly tailored to accomplish that interest.

The Third Circuit "presume[d] that the Government has a compelling interest in attracting military lawyers," *FAIR*, 390 F.3d at 234, and petitioners make much of

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[3] Wisely, petitioners do not argue that the Solomon Amendment could actually withstand strict scrutiny and instead confine their constitutional analysis to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). As the Third Circuit correctly concluded, however, as in *Dale*, "*O'Brien* is inapplicable" where the government action at issue "directly and immediately affects associational rights." *FAIR*, 390 F.3d at 244; *see also Dale*, 530 U.S. at 659.

Congress' authority to "provide for the common [d]efence and general [w]elfare." Pet. Br. at 15-16 (citing U.S. Const. art. I). But petitioners utterly fail to show that the Solomon Amendment is narrowly tailored to achieve such ends. Nor do petitioners establish that the Solomon Amendment is a necessary means of furthering that compelling interest. Indeed, the statements of certain members of Congress made during floor debate on the Solomon Amendment, *see, e.g.*, *FAIR*, 390 F.3d at 225-226 (recounting such statements as that of Congressman Pombo that Congress needed to "send a message over the wall of the ivory tower of higher education" that there is a price to be exacted for "starry eyed idealism"), clearly establish that the Amendment is nothing more than a pretext for penalizing respondents' First Amendment rights of association.

First, the Solomon Amendment is not by any means narrowly tailored to accomplish its goal. The Amendment, as amended in 2004, now requires educational institutions to provide military recruiters access to students and campuses "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1). And as respondents demonstrated below, the military has not limited its demands for access to that of a mere "periodic" visitor. For example, the military has demanded that the law schools disseminate the military's message by advertising through the law schools' various channels of communication. As the Third Circuit observed, the U.S. military has more than ample resources to recruit law students through means that would not infringe on the law schools' First Amendment rights, including through the use of attractive student loan repayment programs and direct media advertising. Yet petitioners fail to allege, much less establish through affidavit or evidence, a single fact that would support their

assertion that the law schools' enforcement of their non-discrimination policy "undermines the military's recruitment effort," *see* Pet. Br. at 17, sufficient to justify the use of "the [federal government's] power [to] violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

Petitioners have also failed to produce any evidence that the Solomon Amendment enhances the military's recruitment efforts. In fact, there is evidence that the reverse is true, as illustrated by the district court's observation that the Amendment has incited consistent and vocal protests in the educational communities since its inception. *See Forum for Academic & Institutional Rights, Inc.* v. *Rumsfeld*, 291 F. Supp. 2d 269, 315 (D. N.J. 2003). The Solomon Amendment simply cannot withstand a strict scrutiny analysis.

## II. THE SOLOMON AMENDMENT IS AN UNCONSTITUTIONAL CONDITION.

### A. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IS APPLICABLE TO RESPONDENTS' FIRST AMENDMENT CLAIMS.

In *Perry* v. *Sindermann*, 408 U.S. 593 (1972), 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*. at 597. 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.

The "unconstitutional conditions" doctrine announced in *Perry* rightly recognizes that wealth transfers occasioned by government bargaining may result in distributions of wealth and power that the Bill of Rights is designed to foreclose. "[O]nce the government goes beyond its role as an enforcer of private rights to create and administer a system of positive welfare rights," the "greater scope of government action necessarily makes it easier for the state" to offend constitutional limits on its powers over individual choices. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 81 (1988). Under these circumstances, a "bargain that is made [by government] with one citizen may have the effect of freezing other citizens out of the market or setting them at a competitive disadvantage," skewing the marketplace in ways that the Constitution's positive restraints on state action are supposed to prohibit. *Id*. at 103.

The unconstitutional conditions doctrine therefore is necessary to ensure that government does not '"lever' its . . . advantage" in a way that alters the economic position of a discrete group of citizens within enclaves that are strictly protected from government manipulation by the Bill of Rights. *Id*. at 104. The goal, in First Amendment cases like this, is to ensure that the discretionary "lever" afforded by government disbursement of funding does not systematically "distort the outcome of the political process" in ways that should not be possible in a strict regime of government neutrality toward protected speech. *Id*. at 79.

Here, the Solomon Amendment achieves what the First Amendment is designed to foreclose: It selectively transfers wealth from one class of educational institutions

to a competing class of educational institutions based on the willingness of some of these institutions to forgo educational speech distasteful to government officials. As discussed (*see* Part I.C), the benefits at issue (a set of federal educational subsidies) are funded in part by the respondent law schools and their supporters. If the respondents refuse to admit military recruiters, they lose benefits but must continue to subsidize the provision of similar benefits to competitors. The Solomon Amendment thus effectively transfers wealth from a disfavored class of educational institutions to a favored class (including the schools of some of petitioners' amici). That wealth transfer skews the relative power of the two sets of institutions from what it would be in a benefit-free world.

Thus, while the Solomon Amendment concededly does not proscribe heterodoxy, the Amendment makes heterodoxy either (1) a steeply uncompetitive position in the educational market, if the Amendment's offer is declined or (2) largely ineffectual, in the view of respondents (*see* Part I.B.2), if the Amendment's offer is accepted. That choice, if allowed to reign unchecked, is inconsistent with meaningful First Amendment protection for associational and expressive freedom. *See* Epstein, 102 Harv. L. Rev. at 104 (the Court should "organize its thinking on unconstitutional conditions in particular and constitutional law in general around one proposition: where the Court routinely allows strategic behavior and implicit wealth transfers by government, there constitutionalism ends").

### B. Application Of The Unconstitutional Conditions Doctrine Is Justifiable On Alternative Grounds.

Finally, while this case raises a First Amendment question, and amicus believes respondents' case is wholly

supportable on that basis, it also agrees that "[n]o theory of associational freedom that places speech on a pedestal and leaves other forms of collective behavior to the tender mercies of the state can endure." Epstein, 74 S. Cal. L. Rev. at 142. What the respondent law schools urge, in effect if not in fact, is a right not only to choose methods of expressive association, but a subsidiary right to exclude certain individuals from their facilities. Their argument underscores that the rights debated here "resonate[] . . . at least as well with the right to property and the rights of liberty generally," as they do with the right to speech and association. *Id*. at 141. Indeed, the two sets of rights are inextricably linked—and, in the long run, neither set of constitutional rights, nor the pluralism that they make possible, can live without firm, categorical judicial recognition of the other.[4] *See*, *e.g.*, Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-2004 Cato Sup. Ct. Rev. 9, 10 (2004) ("[T]he Constitution—written and unwritten—protects both economic and non-economic liberty. Both are essential, and each supports the other.").

[4] It is true that many of the respondent law schools have come to embrace these constitutional principles at a late hour and, it must be admitted, rather selectively. Even so, the consistency of a party's support for constitutional principle is not a touchstone for enforcement of that party's constitutional rights.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

GREGORY S. COLEMAN
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

DIANE HARVEY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8781

*Counsel for Amicus Curiae*

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