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Rumsfeld v. FAIR: The Solomon Amendment and Free Speech

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Rumsfeld v. FAIR: The Solomon Amendment and Free Speech

Summary

Today virtually all law schools have a nondiscrimination policy that prevents employers who discriminate on the basis of race, gender, religion, or sexual orientation from recruiting on campus. In 1993, Congress passed the "Don't Ask, Don't Tell" policy, which allows the military to exclude or discharge any member who "engages in a homosexual act" or "states that he or she is a homosexual." Because the military bans openly gay service members, some law schools, citing their nondiscrimination policies, began barring military recruitment on campus. In response, Congress passed the Solomon Amendment.

Under the present version of the Solomon Amendment, federal funding is withheld from any "institution of higher education" or "subelement" (i.e., law school) that has a "policy or practice" that "either prohibits, or in effect prevents" military recruiters access to students "equal in quality and scope to that provided to other recruiters."

In September 2002, the Forum for Academic and Institutional Rights (FAIR), an association of law schools and professors, sued the Department of Defense, asserting that it was unconstitutional for the federal government to condition university funding on compliance with the Solomon Amendment. FAIR sought, on First Amendment grounds, a preliminary injunction against enforcement of the Solomon Amendment. A federal district court upheld the Solomon Amendment, but the U.S. Court of Appeals for the Third Circuit reversed the district court's decision and issued a preliminary injunction relative to the enforcement of the Solomon Amendment. The Third Circuit held that FAIR would prevail on its claim of unconstitutional conditions because the Solomon Amendment violated the law schools' First Amendment rights under the doctrines of expressive association and compelled speech.

The Department of Defense appealed the Third Circuit's decision to the U.S. Supreme Court. The government argues that the First Amendment is not implicated because the Solomon Amendment targets an institution's *conduct*, not its speech, and because it does not force an institution to take a position on an issue contrary to its beliefs. According to the government, if a school chooses not to allow equal access, it simply foregoes funding. In contrast, FAIR argues that the government cannot exact a price for a law school's expressive right to stand by its nondiscrimination policy. Moreover, FAIR asserts that requiring law schools to grant equal access to military recruiters forces schools to disseminate, facilitate, and host military recruiting messages in violation of the doctrine of compelled speech. The Supreme Court will hear the parties' oral arguments on December 6, 2005.

This report was prepared under the general supervision of Larry M. Eig, Legislative Attorney, and will be updated as events warrant.

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Background

Today virtually all law schools have a formal nondiscrimination policy that prevents employers from obtaining access to a school's career service facilities if the employer discriminates on the basis of race, gender, religion, or sexual orientation.[2] More than a decade ago, some law schools, citing their nondiscrimination policies, began refusing access and assistance to military recruiters based on the military's "don't ask, don't tell" policy, which excludes from the military those who engage in homosexual acts or say they are homosexual.[3]

In 1994, in response to law schools' refusal of military recruiters, Congress passed an amendment to the annual defense appropriations bill.[4] Under this amendment, named after its sponsor, Representative Gerald Solomon, Department of Defense (DOD) funds could not be provided to an "institution of higher education" or a "subelement" of such an institution (i.e., a law school) if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students.[5] In 1997, Congress amended the Solomon Amendment to include all federal funds made available through the DOD, the Department of Homeland Security, the Department of Health and Human Services, the Central Intelligence Agency, and other enumerated agencies.[6] However, the amendment does not deny funding to educational institutions that have a "longstanding religious-based policy of pacifism."[7]

To comply with the amendment, colleges began allowing military recruiters access to their campuses and students, but some did not provide military recruiters

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[1] This report was prepared under the general supervision of Larry M. Eig, Legislative Attorney.

[2] *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004) (hereinafter *FAIR*).

[3] 390 F.3d at 225; *see also* [http://www.fac.org/analysis.aspx?id=15207].

[4] 390 F.3d at 225.

[5] *Id*. at 225-27.

[6] *Id*. at 226; *see also* 10 U.S.C. § 983(d)(1).

[7] *Id*. at 226.

with the same level of assistance provided to other potential employers.[8] For example, some schools kept literature regarding military opportunities in the library instead of the placement office, refused to provide assistance arranging interviews, and relegated interview sites to the campus ROTC office.[9] Until September 11, 2001, these practices were not considered a violation of the Solomon Amendment.[10] However, after 9/11, the DOD began enforcing an informal policy that required universities to provide military recruiters access to students "equal in quality and scope to that provided to other recruiters."[11] In the summer of 2005, Congress modified the Solomon Amendment to include the DOD's informal policy.[12]

In September 2002, the Forum for Academic and Institutional Rights (FAIR), an association of law schools and professors, sued DOD and other federal departments, asserting that it was unconstitutional for the federal government to condition university funding on compliance with the Solomon Amendment.[13] FAIR sought, on First Amendment grounds, a preliminary injunction against enforcement of the Solomon Amendment.[14] A district court upheld the Solomon Amendment, but, in a 2 to 1 decision, the Third Circuit found that the amendment violated the law schools' First Amendment rights by unlawfully compelling them to convey messages in support of the military's policy of exclusion of gays and lesbians.[15] On May 2, 2005, the U.S. Supreme Court granted certiorari.[16] Oral argument is scheduled for December 6, 2005.

Issues Before the Supreme Court

In their briefs, the parties in *FAIR* addressed several lines of free speech cases to support their respective positions. The First Amendment principles developed in these cases are discussed below, following a discussion on the degree to which Congress can require entities to take certain actions by placing conditions on their receipt of federal funding.

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[8] *Id.* at 227.

[9] *Id*. at 227-28.

[10] *Id.*

[11] *Id*.

[12] *Id*. at 228.

[13] *Id*.

[14] *Id.*

[15] *See* CRS Report, *Homosexuals and U.S. Military Policy: Current Issues*, by David F. Burrelli and Charles Dale, for a detailed discussion on U.S. military policy pertaining to homosexuals.

[16] 390 F.3d 219 (3d Cir.), cert. gr. No. 04-1152.

Unconstitutional Conditions Doctrine

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."[17] Thus, in the context of this case, if compliance with the Solomon Amendment compromises First Amendment rights of educational institutions, it arguably imposes an impermissible unconstitutional condition.

On the other hand, the Supreme Court regularly recognizes that Congress, incident to its power to provide for the general welfare (Art. I, § 8, cl. 1), may attach conditions to the receipt of federal funds.[18] Congress frequently has employed this power to further policy objectives by conditioning federal moneys upon compliance with federal directives.[19] Given the ubiquity of federal funding, this power allows Congress to affect matters that it might lack the power to regulate directly.[20] By insisting that funds be spent for a specific purpose, the government may effectively endorse one viewpoint over another.[21]

In certain circumstances, the practice of conditioning spending on certain criteria is considered an exception to the unconstitutional conditions doctrine.[22] The Court has noted that "a refusal to fund protected activity [i.e. speech], without more, cannot be equated with the imposition of a 'penalty' on that activity."[23] For example, in *Rust v. Sullivan*, the Court upheld a government regulation that prohibited family planning clinics that accept federal funds from engaging in abortion counseling or referrals.[24] In *Rust*, the Court concluded that "the government [was] not denying a benefit to anyone, but was instead simply insisting that public funds be spent for the purposes for which they were authorized," and not for other purposes. Still, the exception may not apply in the context of the Solomon Amendment. Rather than directing that a benefit (i.e., federal funding) be used for particular purposes, the amendment solely imposes a penalty by cutting off general funds.[25]

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[17] Perry v. Sindermann, 408 U.S. 593, 597 (1972)(striking down a state university's refusal to renew a teacher's contract because of his public criticism of the college administration).

[18] *See* South Dakota v. Dole, 483 U.S. 203, 206-207 (1987). For a detailed discussion of freedom of speech and government funding, see CRS report *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

[19] 483 U.S. at 206-07.

[20] *See* CRS Report, *Freedom of Speech and Press*, by Henry Cohen.

[21] United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003).

[22] 390 F.3d at 229 n. 9.

[23] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

[24] 500 U.S. at 196.

[25] *Id*.

In *FAIR*, the government argues that the unconstitutional conditions doctrine is only implicated when Congress aims "at the suppression of dangerous ideas."[26] The government asserts that the Solomon Amendment is not intended to suppress ideas but rather to target the institution's *conduct* in denying equal access to military recruiters.[27] Further, according to the government, educational institutions remain free to criticize the military without the risk of losing federal funds.[28] No law school has been denied funding for open and vocal criticism of the military's policies.[29] Lastly, the government asserts that an alternative to compliance with a funding condition is simply to decline federal assistance.[30]

In contrast, FAIR argues that the government "cannot attach strings to a benefit to 'produce a result which [it] could not command directly.'"[31] In the context of this case, FAIR argues that the government cannot exact a price for the law school's First Amendment expressive right to stand by its nondiscrimination policy. FAIR cites *Speiser v. Randall* to explain why the unconstitutional conditions principle is applicable. In *Speiser*, the Court held that a state could not condition a property tax exemption for veterans on their willingness to sign a loyalty oath.[32] The Court explained that the condition violated the First Amendment because the state was penalizing veterans for engaging in certain forms of speech and because the effect was the same as if the state were to fine them for this speech.[33] Similarly, in this case, FAIR asserts that cutting off all federal funding "is harsher than the penalty Congress attaches to almost any direct command."[34] The "price" of denying equal access to military recruiters is a cut-off of almost all federal money — not just to the law school, but to any department within the university. FAIR's brief states that the penalty for noncompliance with the Solomon Amendment is a funding loss as high as several hundred million dollars.[35] Therefore, FAIR claims, this case is a classic example of an unconstitutional condition.

First Amendment Analysis

Expressive Association. In *Boy Scouts of America v. Dale* (2000), the Supreme Court held that applying a state public accommodations law that prohibited discrimination based on sexual orientation violated the Boy Scouts' expressive right

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[26] Brief for the Petitioners, at 41-42, Rumsfeld v. FAIR, No. 04-1152.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 42-43.

[31] Brief for the Respondents, at 36, Rumsfeld v. FAIR, No. 04-1152, *citing* Speiser v. Randall, 357 U.S. 513, 526 (1958). *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[32] *Id.* at 37.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 35-36.

to exclude gay scoutmasters.[36] The Boy Scouts argued that homosexual conduct is inconsistent with its general mission of "instilling values in young people" and particularly those values embodied in the terms "morally straight" and "clean."[37] The Scouts asserted that the presence of a gay scoutmaster who is open and honest about his sexual orientation would interfere with the Scouts' choice not to propound a point of view contrary to their beliefs.[38] The Court agreed with the Boy Scouts' position, explaining that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association [when] the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[39] The Court deferred to the Boy Scouts' "view of what would impair its expression" and concluded that the presence of gay scoutmasters would "significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior."[40]

In *Rumsfeld v. FAIR*, the Third Circuit cited *Boy Scouts v. Dale* for the proposition that, just as New Jersey could not force the Boy Scouts to accept gays as scoutmasters, the United States cannot require colleges and universities to accept the presence of military recruiters on campus.[41] The Third Circuit further analogized the two cases by explaining that, just as a gay scoutmaster's presence in the Boy Scouts "would, at the very least, force the organization to send a message . . . that the Boy Scouts accept homosexual conduct as a legitimate form of behavior, the presence of military recruiters would, at the very least, force the law schools to send a message, . . . that the law schools accept employment discrimination as a legitimate form of behavior."[42]

Central to an expressive association analysis is the deference a court gives to the association's determination of what will impair its expression. In this case, the degree of deference accorded to the law schools' belief that the presence of military recruiters impairs their message of fairness and social justice will inform the expressive association question. FAIR argues that even though it was not self-evident that a gay scoutmaster would interfere with the Boy Scouts' mission, in the end, the Court deferred to the organization's assertion that homosexuality was inconsistent with its message.[43] Even greater deference is due to law schools in the current case, FAIR asserts, because schools have ardently and explicitly refused to assist discriminatory employers for decades.[44]

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[36] Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000).

[37] *Id* at 648-52.

[38] *Id*. at 650.

[39] *Id*. at 648 (*citing* New York State Club Assn v. City of New York, 487 U.S. 1, 13 [1988]).

[40] *Id*. at 651.

[41] 390 F.3d at 232 (*citing Dale*, 530 U.S. at 648-53).

[42] *Id*. (*citing* Dale, 530 U.S. at 653).

[43] Brief for Respondents, at 30, Rumsfeld v. FAIR, No. 04-1152.

[44] *Id*.

Conversely, the government argues that the Solomon Amendment does not implicate the First Amendment right to associate because it does not force institutions to take a position on an issue that is contrary to their beliefs.[45] Unlike *Dale*, where the presence of a gay scoutmaster sent the message that the Boy Scouts approve of homosexual conduct, the Solomon Amendment has no similar result.[46] In the government's view, giving military recruiters access to campus cannot reasonably be viewed as an endorsement by the law school of the military's policies toward homosexuals.[47] According to the government, just as the recruiters of numerous other employers granted access to campus are understood to speak for their employers, rather than the institution, "students and the public both can readily understand that military recruiters speak for the military, not for the educational institutions they visit."[48]

Compelled Speech. The government can infringe the First Amendment not only by censoring, but also by compelling speech. The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all."[49] One question under the compelled speech doctrine is whether the government compels expression when it forces people to use their property to publicize a particular message chosen by the government. For example, in *Wooley v. Maynard*, the Court struck down a state statute that required drivers to display the state motto on their license plates.[50] In *Miami Herald Publishing Co v. Tornillo*, the Court struck down a state statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their record.[51] The Supreme Court has also found unconstitutional government action that forces a private speaker to include another private speaker's message. For example, in *Pacific Gas & Electric Co v. Public Utilities Commission of California*, the Court held that a private utility company cannot be forced to include in its billing envelopes material prepared by a public interest group.[52]

Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court held that private citizens organizing a parade may not be forced to include a group whose message they do not wish to convey.[53] The sponsors of the parade contended that a state law compelling them to issue a permit to a group of individuals who sought to convey a gay pride message, with which the organizers did not agree, violated their First Amendment right under the compelled speech

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[45] Brief for Petitioners, at 20, Rumsfeld v. FAIR, No. 04-1152.

[46] *Id.*

[47] *Id.* at 21.

[48] *Id.* at 20.

[49] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[50] 430 U.S. 705 (1977).

[51] 418 U.S. 241 (1974).

[52] 475 U.S. 1 (1986).

[53] 515 U.S. 557, 559 (1995).

doctrine.[54] The Court concluded that the parade organizers were using the parade to express their own point of view, that the presence of a group marching under a gay pride banner would likely convey to the public that the parade organizer approved of the message, and that disclaiming a message is impractical in a moving parade.[55]

The government argues that *Hurley* is inapposite here because "law school recruitment programs are not a form of expressive enterprise akin to a parade" and because, unlike a parade, recruitment programs are designed to permit an exchange of information, not to convey the law school's own message.[56] Moreover, the Solicitor General distinguishes this case from *Hurley, Wooley, Tornillo* and *Pacific Gas* by claiming that in all these cases, the government directly mandated a party to express a view that the party disagreed with.[57] In contrast, educational institutions are not compelled to do anything. In the government's view, schools voluntarily accept federal funding; if the schools choose not to allow equal access, they simply forego funding.[58]

FAIR argues that requiring equal access forces law schools to disseminate, facilitate, and host military recruiting messages in violation of the doctrine of compelled speech.[59] "What the government characterizes throughout its brief as 'access to students' is nothing less than a demand that law schools distribute, post, print, email and otherwise provide forums for the speech of military recruiters."[60] FAIR asserts that just like the forced inclusion of a group in a parade in *Hurley*, the Solomon Amendment forces schools to admit unwanted military recruiters to its private informational fairs.[61] Additionally, just as the government could not force a motorist to display a state motto on his license plate in *Wooley*, it cannot force a private institution to display the military's posting on its bulletin boards.[62]

Expressive Conduct. The Supreme Court has long protected conduct that communicates under the First Amendment. Certain questions arise when evaluating conduct that conveys a message. For example, When should conduct be analyzed under the First Amendment? When may the government regulate conduct that communicates?

Conduct is analyzed as speech under the First Amendment if (1) there is an intent to convey a specific message and (2) there is a substantial likelihood that the

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[54] *Id*. at 581.

[55] *Id*. at 573-77.

[56] Brief of Petitioners, at 28-29, Rumsfeld v. FAIR, No. 04-1152.

[57] *Id*. at 25-26.

[58] *Id*. at 32.

[59] Brief of Respondents, at 21, Rumsfeld v. FAIR, No. 04-1152.

[60] *Id*.

[61] *Id*. at 22.

[62] *Id*.

message will be understood by those receiving it.[63] When a person seeks to convey an idea through an expressive symbol, the First Amendment is implicated. For example, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court concluded that students' wearing of black armbands in protest of the Vietnam war was speech protected by the First Amendment.[64] Additionally, picketing, sit-ins, and protesting in support of a variety of causes are considered to have a degree of First Amendment protection.[65] In this case, the court must consider whether the law schools' resistance to the military's recruitment on campus, based on its ideological disagreement with the military's sexual orientation policy, is *itself* expressive conduct protected by the First Amendment.

Government regulation of Expressive Conduct — The* O'Brien *Test. However, even conduct deemed communicative is subject to governmental regulation under certain circumstances. In *United States v. O'Brien*, the Supreme Court included a four-prong test to evaluate the constitutionality of a government regulation that incidentally impairs expressive conduct. The Court stated, "a governmental regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on First Amendment freedom is no greater than necessary to achieve the government's purpose."[66]

O'Brien scrutiny of expressive conduct is less rigorous and more deferential than the strict standards applied in some free speech contexts, and it is more difficult to demonstrate a constitutional violation under a theory of expressive conduct than under other First Amendment doctrines, such as compelled speech and expressive association.[67] Under the "intermediate" scrutiny test in *O'Brien*, the government would need only show that requiring law schools to grant the military access serves a government interest that is *important*, and that this incidental restriction on First Amendment rights is no greater than necessary to advance the interest in recruiting qualified military lawyers. By contrast, strict scrutiny analysis would require the government to show that an interest in recruiting qualified military lawyers is *compelling* and that the Solomon Amendment is narrowly tailored to advance that goal.[68]

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[63] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies at 1027.

[64] 393 U.S. 503 (1969).

[65] *See* Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (a sit-in by black citizens in a segregated area; *see also* Schacht v. United States, 398 U.S. 58 (1970) (wearing American military uniforms in a dramatic presentation criticizing American involvement in Vietnam); *see also* Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (picketing in support of a wide variety of causes).

[66] 391 U.S. 367, 377 (1968).

[67] *FAIR*, 390 F.3d at 242.

[68] *Id.*

The government begins its expressive conduct argument by claiming that an institution's denial of equal access to military recruiters is not expressive conduct protected by the First Amendment in the first place.[69] Further, even if the institution's actions were considered expressive conduct, the Solomon Amendment, in the government's view, satisfies the intermediate scrutiny standard articulated by the Supreme Court in *O'Brien*.[70] The government cites *O'Brien* for the proposition that conduct is not automatically labeled speech solely because the person engaged in the conduct intends to express an idea.[71] In *O'Brien*, the Court emphasized that "it is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment."[72] Here, the government claims, denying military recruiters equal access to campus does not involve enough expressive components to give the conduct First Amendment protection. The government asserts that, unlike an armband in protest of the Vietnam War or a traditional protest activity like picketing, denying equal access does not involve the use of expressive symbols.[73] Additionally, institutions may decide to deny equal access for reasons unrelated to the intent to convey a message, such as to avoid the controversy surrounding the military's presence on campus.[74]

The government also claims that even if the Court were to recognize denying equal access as sufficiently expressive, the Solomon Amendment satisfies the four-prong test articulated elsewhere in *O'Brien*. The Amendment "serves the compelling governmental interest in the recruitment of the most talented men and women to serve in the armed forces; that interest is unrelated to the suppression of ideas; and that interest would be achieved less effectively if military recruiters did not have the same access to students as other employers."[75] The Solicitor General notes that the last component of the *O'Brien* test does not require the government to use the least restrictive means available to recruit individuals for the armed forces, but rather, the test is satisfied when the government's interest would be achieved "less effectively" if it were not allowed to regulate.[76]

FAIR, on the other hand, argues that the conduct the Solomon Amendment requires is communicative to the core and cannot survive strict or intermediate scrutiny. FAIR asserts that, where a constitutional right is at stake, "the government

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[69] Brief for Petitioners, at 33.

[70] *Id*. at 32.

[71] *Id*.

[72] *Id*. at 33-34.

[73] *Id*. at 34.

[74] *Id*.

[75] *Id*. at 36.

[76] *Id*. at 35-36.

must do more than just waft around an interest and call it a day."[77] Rather, the government must address an actual problem and justify the means chosen to advance the interest. Here, the government argues that the problem it seeks to address is the harm to military recruiting caused by restricted campus access. But FAIR asserts that the government has presented no evidence to demonstrate that military recruitment is negatively affected by the exclusion of recruiters from law school campuses. Rather, according to FAIR, the record indicates that the JAG Corps has had an increase in the number of qualified applicants, and it is not self-evident that various recruiting methods, such as financial incentives and advertising, would be inferior to on-campus recruiting.[78] FAIR also cites the Third Circuit's observation that alternative recruiting approaches might actually produce better results than the Solomon Amendment, which can actually impede recruitment by generating ill-will toward the military.[79]

Additionally, if as the government claims, the problem sought to be cured was the harm to military recruiting from restricted campus access, the Solomon Amendment's means are, in FAIR's opinion, ill-fitted to address this interest. Because the means chosen by Congress demanded that military recruiters get "every single communicative service" provided to other employers, the government must, according to FAIR, justify these means with more than an assertion that "on-campus recruiting furthers the government interest and enhances recruitment."[80] Absent a clearer nexus between the government's interest and the means chosen and, further, without showing that campus access is no greater a restriction on free speech than is necessary to serve that interest, the Solomon Amendment, according to FAIR, cannot withstand even intermediate scrutiny.

Concluding Observations

The Supreme Court's characterization of the speech aspects implicated in requiring campus access will determine the level of scrutiny used to evaluate the constitutionality of the Solomon Amendment. If the Court emphasizes the associative or compelled speech aspects of requiring campus access, the Solomon Amendment will be subject to more rigorous scrutiny and less likely to be upheld. However, if the Court views the Solomon Amendment as primarily targeting conduct and not speech, the Court will apply intermediate scrutiny, and it will be more difficult, but still possible, to demonstrate that the Solomon Amendment violates First Amendment rights.

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[77] Brief for Respondents, at 44.

[78] *Id*. at 45, 48.

[79] *Id*. at 48 (*citing* 390 F.3d 219).

[80] Brief for Respondents, at 46.