No. 04-1152

IN THE

Supreme Court of the United States

DONALD 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

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BRIEF OF NALP (THE NATIONAL ASSOCIATION FOR LAW PLACEMENT), SYRACUSE UNIVERSITY, AND INDIVIDUAL LAW SCHOOL PROFESSORS AND ADMINISTRATORS, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

SAM HELDMAN *
HILARY E. BALL
GARDNER, MIDDLEBROOKS, GIBBONS, KITTRELL, OLSEN, WALKER & HILL, P.C.
2805 31st St. NW
Washington DC 20008
(202) 965-8884

* Counsel of Record

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INTERESTS OF *AMICI*

NALP, the association for legal career services professionals, was founded in 1971 as the National Association for Law Placement.[1] It is a membership organization dedicated to facilitating legal career counseling and planning, recruitment, and retention, and to the professional development of law students and lawyers. Its membership includes more than 950 public and private sector legal employers (including law firms large and small, as well as many branches of local, state

[1] No counsel for any party authored this brief in whole or in part, and no one but *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to this filing are on file with the Clerk.

and federal government) and approximately 200 law schools (among them virtually every ABA-accredited law school). Its members are integrally involved in the processes of recruiting and placement of law school graduates. NALP has an unequivocal and longstanding non-discrimination policy that includes sexual orientation, and insists upon adherence to fair and non-discriminatory access in legal recruitment. NALP has an interest in ensuring that the Court is fully informed as to the nature of the recruiting and placement process, and is uniquely situated to assist in that regard. NALP also has an interest in helping law school career services professionals retain the freedom to perform their jobs in accordance with the values that are central to the schools they serve. Finally, NALP has an interest in helping to eradicate discrimination within the employment opportunities that are available to law students and graduates.

Syracuse University has an interest in this litigation, as an institution of higher learning that adheres to policies and practices of non-discrimination. The University consists of thirteen schools and colleges, including a College of Law. The University is committed to the equal access and full participation of all members of its community. In this regard, Syracuse University and its constituent schools and colleges do not discriminate on the basis of race, creed, color, gender, national origin, religion, marital status, age, disability, veteran's status, sexual orientation, gender identity, and gender expression. The University's non-discrimination policy applies to admissions, employment, and access to and treatment in programs, services, and activities, including recruitment by prospective employers at the College of Law and the other colleges and schools. To compel the University to assist military recruiters, despite the military's discrimination on the basis of sexual orientation, would violate the University's non-discrimination policy. Therefore,

Syracuse University seeks to uphold its non-discrimination policy and vindicate its rights to academic freedom by this appearance as *amicus*.

The individual *amici* are members of the faculty and administration at Cornell Law School in Ithaca, New York. Their interests in participating in this litigation and in joining this brief are three-fold: (1) to express their commitment to their schools' nondiscrimination policy, a policy that the law under review seeks to override; (2) to show their respect and support for those of their students who, because of their sexual orientation, are most directly and seriously affected in an adverse manner by the law under review; and (3) to affirm their solidarity with the efforts and determination of their law schools' placement offices to perform their placement activities in a way that diminishes, rather than fosters, employment discrimination on the basis of sexual orientation. The individual *amici* are Gregory S. Alexander, A. Robert Noll Professor of Law; Eric T. Cheyfitz, Associated Faculty, Cornell Law School, and Ernest I. White Professor of American Studies and Humane Letters, Cornell University College of Arts and Sciences; Karen V. Comstock, Assistant Dean for Public Service; Angela B. Cornell, Lecturer; Patricia G. Court, Lecturer in Law and Assistant Director of the Law Library; Cynthia R. Farina, Professor of Law, Cornell Law School, and Associate Dean of the University Faculty, Cornell University; Richard D. Geiger, Associate Dean of Admissions and Financial Aid; Reg Graycar, Visiting Professor of Law, Cornell Law School, and Professor of Law, The University of Sydney Faculty of Law; Carol Grumbach, Director of the Lawyering Program and Senior Lecturer; Robert C. Hockett, Assistant Professor of Law; Barbara J. Holden-Smith, Associate Dean for Academic Affairs and Professor of Law; Julie M. Jones, Lecturer in Law and Reference Law Librarian; Douglas A. Kysar, Professor of Law; Sheri Lynn Johnson, Professor of Law and Assistant Director of Cornell Death Penalty Project; Mitchel Lasser,

Professor of Law; Risa L. Lieberwitz, Associated Faculty, Cornell Law School, and Associate Professor of Labor Law, Cornell University School of Industrial and Labor Relations; Anne Lukingbeal, Associate Dean and Dean of Students; Estelle M. McKee, Lecturer; Bernadette A. Meyler, Assistant Professor of Law; JoAnne M. Miner, Director of the Legal Aid Clinic and Senior Lecturer; Trevor W. Morrison, Assistant Professor of Law; Annelise Riles, Professor of Law and Director of Clarke Program in East Asian Law and Culture, Cornell Law School, and Professor of Anthropology, Cornell University College of Arts and Sciences; Steven H. Shiffrin, Professor of Law; Gary J. Simson, Professor of Law; Winnie F. Taylor, Professor of Law; and W. Bradley Wendel, Associate Professor of Law.

SUMMARY OF THE ARGUMENT

This brief focuses on three points. Each of them has to do with the nature of the recruiting process at law schools, a topic with which NALP and its members, as well as the other *amici* joining in this brief, are intimately familiar.

First, we discuss the many sorts of things that law school career services offices do to assist employers in the recruiting process. An appreciation of this point is important in order to understand what the Solomon Amendment would (at least on Petitioners' view) require law schools to do at the request of military recruiters, and in order therefore to understand where this case fits within the First Amendment landscape. Petitioners' position logically implies that the Solomon Amendment's "equal access" command would entitle military recruiters to every kind of assistance that is given to any other employer; Petitioners offer no limiting principle short of that. So, this case is not merely about whether military recruiters are allowed to physically enter law school campuses, or even whether they can talk with interested students on campus. Beyond that, the case asks, among other things, whether

military recruiters will be entitled to a substantial amount of resources and assistance from law schools and their career services professionals, even where the military's discriminatory policy against gay and lesbian lawyers is contrary to the values to which the schools are committed. These facts put this case in the heartland of the constitutional prohibition of "compelled speech." Furthermore, the military is seeking what no other employer gets: assistance without compliance with a school's requirement of adherence to a nondiscrimination policy.

Second, we discuss the fact that recruiting consists primarily of speech, and indeed entails a great deal of highly expressive speech on the part of the prospective employer. This speech goes far beyond a mere proposal of a mundane economic transaction (though it is worth noting that even humdrum economic proposals, such as proposals of sales of goods, are "speech"). This point is worth emphasizing, even if it may seem obvious, because the District Court's minimization of the point was important to that court's erroneous denial of a preliminary injunction. Law school career services offices are integrally involved in speech—in facilitating, disseminating, and providing a forum for the speech of recruiting employers and students, and in speech of their own as well.

Third, Petitioners err in arguing that a law school's decision to offer certain recruiting-related services is, in itself, evidence that the military needs those services in order to recruit. Employers of law graduates are not all the same, in terms of the assistance they need from law schools in order to recruit effectively. Some, for instance, need assistance in making law students aware of the employers' very existence. Others, whose name recognition is already high, have other needs. Still others may be able to recruit effectively with little or no involvement by law school career services professionals. So, one cannot assume that the military has a

need for every recruiting-related service that a law school provides. Furthermore, one cannot assume that each school even has a set menu of services that it is willing to provide, or that (if such a menu exists) it is defined by the school's view of what any employer needs; so, Petitioners' argument is based on a false premise in this regard. In the end, even though the military may *desire* affirmative assistance and resources from schools, that is not proof that the *need* is sufficient to justify the impairment of First Amendment interests.

ARGUMENT

Our contribution in this brief is largely factual, about the nature of the recruiting process. We will also point out some ways in which these facts affect the legal analysis. Some of the facts that we address herein are supported by evidence in the record, or are proper subjects for judicial notice. To whatever extent our discussion herein may go beyond the record and the scope of judicial notice, it is based on the extensive and intimate experience of NALP and its members, and of the other *amici*. If the Court were uncertain as to the correctness of any statement herein, the proper outcome would be a remand for further factual development. The Court should certainly not declare the Solomon Amendment constitutionally valid if that conclusion would rest to any degree on an assumption that our statements herein about the recruiting process are incorrect.

I. LAW SCHOOL CAREER SERVICES PROFESSIONALS PROVIDE AN ENORMOUS AMOUNT OF ASSISTANCE IN FORMULATING AND DISSEMINATING THE MESSAGES OF RECRUITERS, FAR BEYOND MERELY ALLOWING THEM TO ENTER THE CAMPUS; REQUIRING THAT AMOUNT OF ASSISTANCE FOR MILITARY RECRUITERS WOULD INFRINGE FIRST AMENDMENT INTERESTS.

Law school career services offices provide an enormous amount of assistance, of various sorts, to employers in the recruiting process. As will become apparent in this discussion, and as will be discussed more directly below, this assistance has to do with "speech." Law school career services offices are integrally involved in facilitating, disseminating, and providing a forum on school property for the speech of recruiting employers, as well as engaging in expressive speech of their own. These facts are important because they demonstrate how very much Petitioners seek to require from law schools that receive federal funds and from those schools' career services professionals, under the rubric of "equal access." Under Petitioners' view of the law, law schools and their staff will be actively involved in disseminating and even helping to craft the expressive speech of the military recruiters. This, in turn, strengthens the argument that the Solomon Amendment is invalid under the doctrines of "compelled speech" and "expressive association." These facts bring this case within the scope of such cases as *Wooley v. Maynard*, 430 U.S. 705 (1977), and differentiate it from cases such as *Johanns v. Livestock Marketing Ass'n*, 125 S.Ct. 2055 (2005); this case is a far cry from a mere tax-like targeted financial assessment that funds speech. These facts further highlight the analogy between this case and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

Petitioners' view is that the Solomon Amendment's standard of "equal access" for military recruiters goes far beyond a mere rule that the gates of the campus must be open. The standard, on their view, goes far beyond a rule that military recruiters must be free to meet at on-campus spots with students who invite them, and even beyond a rule that interview space must be provided on a university's campus if it is made available to other employers. On occasion this point falls out of sight in Petitioners' Brief, as when they argue that the decision of the Court of Appeals "appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive activity." (Brief for the Petitioners at 31). And the point certainly falls far out of sight in the briefs of most of Petitioners' *amici*, who tend to frame the case in terms merely of the opportunity to enter campus, or the availability of on-campus interviews, rather than addressing the broader range of services that Petitioners' view of the Solomon Amendment would compel.[2]

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[2] *See, e.g.*, Brief of the Judge Advocates Association at 2-3 ("Denying military recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the Judge Advocate General's Corps . . ."); *id.* at 3 ("Particularly in this time of war, denying military recruiters the access needed to conduct on-campus interviews will have a devastating impact . . ."); *id.* at 12-13 ("[I]t is much easier for the students when employers interview at the law school. By denying equal access, the military is at a competitive disadvantage . . ."); *id.* at 14-20, 24, 26-27, 30 (asserting that on-campus interviews are important to military recruiting); Brief of the American Legion at 3 ("[T]here simply are no adequate substitutes for individualized, face-to-face interactions between the men and women of the military and interested students."); *id.* at 23 (describing "personal interaction with the men and women of the Armed Forces" as "arguably the most important aspect of military recruiting."); *id.* at 24 (arguing that on-campus interviews are important to recruiting); *id.* at 28 (asserting that what is at stake is whether to permit "institutions to ban military recruiters from their campuses"); *id.* at 28-29 (repeating this assertion); Brief of Admiral Charles S. Abbot, et al., at 19 (arguing that "[b]anning military recruiters from campus" is detrimental to recruiting).

But again the right to come onto school property is not the extent of this case by any means. Far beyond that, according to Petitioners, the standard is that military recruiters are entitled upon request to the same level of *assistance* in the various aspects of recruiting that any other recruiter receives. (*See*, *e.g.*, Brief for the Petitioners at 37 (arguing that a school must provide military recruiters with "conveniently located" interview facilities, dissemination of literature, and affirmative assistance in scheduling interviews, if it provides such things to other employers); Pet. App. 8a (noting the contention by the responsible official at the United States Department of Defense, that universities are required to provide the military with the same level of assistance from their career services offices as is provided to other recruiters)). Once having stretched the phrase "equal access" to include a right to assistance and treatment beyond being allowed on campus, Petitioners offer no limiting principle to their definition. Petitioners' view, by its own logic, is that a law school whose university receives federal funds must give military recruiters every kind of recruiting help that the school gives to some other employer. That is why it becomes necessary to focus on what sorts of help that would entail.

Law school staff facilitate, disseminate, and provide the forum for, recruiters' speech in a variety of ways. Indeed, they make a point of telling recruiters that they are willing to take on that role. The Office of Career Counseling and Placement of NYU School of Law, for instance, tells employers, "If you . . . wish to enhance your on-campus recruiting strategy, we encourage you to get in touch with us. . . . We are always pleased to speak with you about 'Effective Recruiting' practices at NYU School of Law and how you can maximize your efforts on campus."[3] Likewise, Harvard

[3] <http://www.law.nyu.edu/depts/careerservices/employer/index.html>. This site, and all other web sites cited herein, were last visited Sept. 9, 2005.

Law School tells employers: "[W]e are aware of your needs and are *ready to assist you* with your recruitment efforts at Harvard. . . . We are always happy to sit down with you and discuss ways in which you can *get your message out* to students in an effective manner."[4]

Arranging one-on-one interviews is, of course, a large aspect of the work of law school career services offices. This can involve notifying employers of the days or weeks set aside for interviewing "seasons," inviting and accepting employers' requests to be included in the process, taking students' requests for interviews with particular employers, and scheduling the interviews at times that fit within students' and employers' needs. NYU, for instance, schedules thousands of on-campus interviews per year;[5] other schools do the same. Some law schools host these interviews on campus. Others, however, do not—either because of lack of adequate and appropriate space, or for other reasons. Some schools provide teleconferencing or videoconferencing services to facilitate long-distance interviewing;[6] this literally offers a platform for the recruiter's speech using the school's facilities. Other schools may even go so far as to provide lodging at the school's own expense for recruiters who travel from other cities.[7]

Some employers, in order even to build a sufficient pool of applicants to interview, need to take steps to entice students

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[4] <http://www.law.harvard.edu/ocs/employers/What_We_Do_Recruiting.htm> (emphasis supplied).

[5] <http://www.law.nyu.edu/depts/careerservices/recruiting/index.html>.

[6] Cornell University is an example. *See* <http://www.lawschool.cornell.edu/career/Career.asp?InterviewviaVideoconference>.

[7] Roger Williams University provides this sort of help. *See* <http://law.rwu.edu/Career+Services/Information+for+Employers.htm> ("Please know that any employer traveling to Bristol to interview our students will be hosted at our expense at the Bristol Harbor Inn, overlooking the Narragansett Bay.").

to apply. Employers do this in a number of ways, many of which can involve affirmative assistance by law school career services offices. Some employers, with help from schools, take a sort of "direct mail" approach through campus mailbox systems, by having student mailboxes stuffed with their written recruiting materials; some law schools offer their assistance in this regard.[8] Some schools disseminate to their students periodical "newsletters" or the like, which contain statements by prospective employers.[9] Others post notices of available positions.[10]

Some employers find it appropriate to do even more to "advertise" themselves to the students at some schools; and again many law school career services offices actively assist these efforts. Some employers, for instance, host social receptions to which students are invited; and some schools assist in the scheduling and coordination of these events.[11] Other employers seek the same benefits by hosting information sessions in a setting that is more like a meeting than a social reception; and again law school career services offices often assist in scheduling and coordinating those, and sometimes in providing on-campus space for such meetings. Other employers seek, and obtain, assistance from law school career services professionals in arranging "field trips" of a sort, for law students to visit the employers' offices for a first-hand view of some aspects of law practice.

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[8] Harvard is an example. *See* <http://www.law.harvard.edu/ocs/employers/faqs_general.htm>.

[9] <http://www.law.harvard.edu/ocs/Fall_2004_Employer_Pages/Reaching_Out_to_Students.htm>.

[10] <http://www.law.nyu.edu/depts/careerservices/employer/index.html>; <http://www.law.harvard.edu/ocs/employers/other_recruitment_options.htm>.

[11] <http://www.law.nyu.edu/depts/careerservices/contacts.html>;http://www.law.harvard.edu/ocs/Fall_2004_Employer_Pages/Reaching_Out_to_Students.htm>.

Many schools have recurring "meet the employer nights," or gatherings on campus at which students and employers' representatives can meet in a cordial, low-pressure, event that is more like a cocktail reception than an interview or meeting.[12] These events are, fundamentally, the occasion for speech all around. Petitioners' view of "equal access" would mean that they are entitled, as a matter of statute, to an invitation to every such reception that any school hosts. As noted above, Petitioners have offered no limiting principle for their view of "equal access" that would avoid this consequence. This is, we submit, one good example of what is at stake in the "compelled speech" and "expressive association" aspects of this case: a governmental demand for an invitation to school-sponsored social networking events.

In addition to the things that have been described above, many schools arrange for "job fairs" at which a large number of potential employers set up tables or private spaces. Some of these are on-campus, and some are not. Students can attend these fairs and visit the representatives of the employers that interest them. Schools often exercise a sort of editorial judgment in defining the nature of these fairs and of the set of employers who are invited to participate. Some such fairs, for instance, are meant for "public interest" employers.[13] Others fairs or special interview programs are designed for government entities, or for categories of employers defined by location and/or firm size,[14] and practice

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[12] Northwestern University, for instance, has its "Meet the Employers Night"; an invitation to recruiters is available at <http://www.law.northwestern.edu/career/employers/documents/letter.pdf> (pdf file).

[13] *See, e.g.*, <http://www.law.nyu.edu/depts/careerservices/recruiting/consortium.html>. Other public service career fairs are listed at <http://www.pslawnet.org/cms/index.php?pid=54> .

[14] George Washington University, for instance, holds a "Small and Medium Employer Interview Program," described at <http://www.law.gwu.edu/CDO/Information+for+Students/Recruitment+and+Job+Fair

area.[15] Others are meant for employers seeking students of color.[16] Schools spend substantial resources in creating specialized career fairs of all of these sorts, each ordinarily accessible only to a set of employers defined according to specific criteria.[17]

These fairs offer another good conceptual test for application of Petitioners' view of "equal access," and demonstrate how forced inclusion of military recruiters would impair the "expressive association" that is involved in the composition of such fairs. Petitioners would, one would hope, recognize that they are not entitled to participate in job fairs that are focused on categories of employers that do not include the military (such as fairs for small firms, or for patent firms); this is because the military does not meet the criteria for inclusion.[18] But perhaps Petitioners would press their view of "equal access" so far as to mean that a school would have to sponsor a "JAG fair" or "meet the JAGs night" upon request, if the school sponsored similar events focused on some other categories of employers. Again, the lack of a limiting principle in Petitioners' view is striking.

Even all of the description above is far from an exhaustive list of the programs that law school career services offices

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s/Spring+Recruiting+Programs.htm >.

[15] Loyola University Chicago, for instance, hosts a "Patent Law Interview Program," described at <http://www.luc.edu/law/academics/special/center/intellectual/patent_law.shtml>.

[16] <http://www.law.nyu.edu/depts/careerservices/recruiting/consortium.html>.

[17] A large number of career fairs are listed on NALP's website at <http://www.nalp.org/content/index.php?pid=98>.

[18] Yet by this same token one could argue that the military does not meet the criteria for inclusion in *any* of the career fairs or indeed any of the other programs at issue here, and therefore can fairly be excluded, because one of the criteria is that all these programs are meant for employers who do not discriminate.

create in order to facilitate communication between recruiters and students. Many schools use other methods as well, such as the creation of networks of alumni in certain fields who are willing to discuss their careers with students.[19] In all these ways, career services professionals and the schools they serve use the schools' time, energy, facilities and resources to disseminate recruiters' speech, and to create situations in which recruiters can speak directly to students one-on-one or in larger groups.

Indeed, schools' assistance to recruiters is not simply a matter of some menu of available services. To the contrary, many schools (if not all) are happy to consider novel requests from employers, and to brainstorm with employers to develop new and better ways to facilitate discussions between recruiters and students.[20] Career services professionals engage directly with employers; they speak with employers to *encourage* the employers to recruit at their schools, and they also speak with employers to *teach* the employers how to recruit more effectively. Harvard, as noted above, makes it clear that its career services office is ready and able to counsel an employer on effective recruiting techniques in order to "get [its] message out" to students;[21] and other schools do this as well. Career services professionals can advise employers, for instance, as to which methods of information-dissemination tend to work best for different sorts of employers; a firm with a special practice niche might

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[19] <http://www.law.nyu.edu/depts/publicinterest/career/network/index.html>

[20] One example is Wayne State University, as described at <http://www.law.wayne.edu/current/career_services.html> ("We meet with employers at the Law School and in the community for recruiting purposes as well as brainstorming on law school recruiting, associate retention, and other issues.").

[21] <http://www.law.harvard.edu/ocs/employers/What_We_Do_Recruiting.htm>

be advised to put on one sort of event, while a megafirm might be advised to put on another sort, and a prosecutor's office might be advised to do something of a different nature. Career services professionals can also advise every type of employer as to how best to describe its practice and opportunities in order to stand out from the crowd of other prospective employers; career professionals come to know what the students at their schools most want to know from prospective employers, and how best to reach the particular groups of students who might be the most interested in a particular employer's offerings. Does this sort of advice come within "equal access," in the sense that military recruiters would have the right, at any school whose university receives federal funds, to obtain counseling and advice from career professionals? On Petitioners' view, it would; Petitioners offer no limiting principle by which assistance in scheduling interviews and distributing literature would (as they say) be required, yet the school's assistance in formulating the interviewers' message, in order to reach students effectively, would not.

Career professionals' work also entails a great amount of communication—expressive speech—with students. In groups, and in one-on-one contact, career professionals help students through the process of identifying their interests and their values, and in deciding which prospective employers most likely fit the bill. They can inform students as to which careers might be best for those who are seeking litigation experience early in a career, and which might be best for those seeking less all-consuming work schedules, and so forth. Career professionals also come to know, and can help students in understanding, which types of employment might be harder to obtain given a student's record, and which might be more readily available. Whether Petitioners claim a statutory entitlement that career professionals perform this counseling aspect of their job in a certain way is, at this point, unclear. Does "equal access" require a career service

professional to mention the possibility of a military career to every student who mentions a potential interest in public service? Certainly we would urge that "equal access" does not go that far; but the point shows how difficult it is even to get a clear picture of what the Solomon Amendment requires on Petitioners' view.

All of the above, we submit, demonstrates that law school career offices are active in facilitating, disseminating, and providing a forum for the speech of recruiters who have access to the schools' career programs. Even if this case were only about whether a law school could be made (on pain of a devastating loss of funding) to provide on-campus space for military recruiters, still the intrusion on the school's property, personnel, and facilities would be significant. Even just an on-campus information session would entail, at the very least, the provision of physical space and utilities, and the involvement of staff to arrange for, and oversee, the military's use of the facilities. This burden is important not merely because of the expense involved to the school (though that is legally important too) but also because it would be compelling the school to provide a forum for speech that it would prefer not to facilitate. But Petitioners seek much more than that. The record already shows, for instance, military officials placing demands on schools about such matters as *where* on campus they will do their recruiting interviews, *how much* assistance and of what sort they will receive from school officials, and indeed *which university officials* will do the assisting.[22] As seen above, Petitioners' view of "equal access" would harness a school's career staff

[22] *See* Declarations in Support of Plaintiffs' Motion for Preliminary Injunction, including the declaration of Susan Appleton and Karen Tokarz (Joint Appendix ("JA") 35-39), the declaration of Erwin Chemerinsky (JA 59-64), the declaration of Richard Matasar (JA 198, and the declaration of Alan Minuskin (JA 218-21).

and resources very significantly in active efforts to assist military recruiters in crafting their message and getting it to students.

II. RECRUITING AT LAW SCHOOLS, BY THE MILITARY AND OTHER EMPLOYERS, IS EXPRESSIVE SPEECH.

We have been speaking, above, of the "speech" of recruiters. Recognizing that recruiting consists largely of "speech" is important in applying the relevant legal doctrines. For instance, the "compelled speech" doctrine is applicable precisely because recruiting consists of speech. The fact that the Solomon Amendment would compel schools to actively promote and facilitate military recruiters' speech—often through speech on the part of the school itself—brings this case within the heartland of the First Amendment.

There should be no doubt that recruiting—at least those aspects of recruiting that take place on-campus or through law school career offices—is composed primarily of "speech" in the normal sense of that word. But, to the extent it is relevant to distinguish between levels of expressiveness in speech—between the humdrum and the more fully expressive—recruiting involves a great deal of expressive speech on the part of the prospective employer. The Court of Appeals was correct in recognizing this, as well as recognizing that this is as true of the military as it is of any other entity. (Appendix to Petition, or "Pet. App.," 27a-29a (section of decision of Court of Appeals titled "Recruiting is Expression.")). A recent quotation from a spokesman for the Department of Defense underscores the point that the military's recruiting is expressive speech. Bill Carr, Deputy Under-Secretary of Defense for Military Personnel Policy, explained the government's position about the matters underlying this case: "We have to go out and find [most military recruits], and anything that gets in the way of *clear*

and open talk compromises our effort. That's why we support the Solomon Amendment, because if we want to *tell our story to people*, and there is a *censorship of our message*, then our costs of doing business rise."[23]

Consistent with the quotation above from Deputy Under-Secretary Carr, Petitioners appear to concede the point,[24] although they try to minimize it. However, the point is worth emphasizing because the District Court went astray by minimizing the extent to which recruiting is expressive speech. (Pet. App. 152a, 154a, 171a ("Any expressive component to recruiting is incidental . . .")). Moreover, the point is important to many of the legal issues in the case. For instance, the expressive nature of the recruiters' speech strengthens the analogy of this case to *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). To the extent that Petitioners and their *amici* may contend that the speech involved in recruiting is merely the proposal of an economic transaction, that is both factually

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[23] "Annals of Law: Sex and the Supremes," The New Yorker, Aug. 1, 2005, p. 35 (emphasis supplied). While agreeing with Deputy Under-Secretary Carr that recruitment consists of "clear and open talk," of the military "tell[ing its] story," and disseminating its "message," we disagree with other aspects of his view. Law schools' enforcement of anti-discrimination policies, and their efforts not to provide affirmative assistance to the government's speech, is a far cry from "censorship." Moreover, as explored further below, there is nothing but the government's *ipse dixit* to show that the refusal to provide such affirmative assistance is a significant stumbling block in the way of effective military recruitment of law students.

[24] Petition, p. 10 (referring to the "speech" of military recruiters and "the statements made by" them); Brief of Petitioners, p. 13 ("when recruiters visit campus they speak for their employers . . ."); *id.* at 14 ("the speech of the [military] recruiters remains the speech of the government and the military . . ."); *id.* at 22 ("military recruiters speak for the military . . ."); *id.* at 33 n.5 ("the speech at issue is government speech . . ."); *id.* at 29 (arguing that military recruiters do not "engage in political or ideological activity").

false and legally misguided. It is factually false because the speech involved in recruiting goes well beyond humdrum matters of economics. And it is legally immaterial because even matter-of-fact proposals of economic transactions (such as the routine business of buying a few mushrooms, *see United States v. United Foods*, 533 U.S. 405 (2001)) are "speech" that invokes the First Amendment's protections.

Expressive speech is not "incidental" to recruiting, as the District Court wrongly stated; it is central. In particular, the type of recruiting most at issue in this case—on-campus recruitment by prospective employers—is richly expressive communication with students, by which employers explain and advocate their vision of the nature and purpose of the legal employment that they offer. Among the on-campus aspects of recruiting that consist of verbal communication from employers are the distribution of written materials (announcing the employer's desire for applicants, or inviting students to social events); the compilation (for students' review) of firm résumés, brochures, answers to questionnaires, and the like, in which employers describe themselves and the jobs they offer; receptions and information sessions at which employers meet with students; and interviews, which are nothing but verbal communication or "speech."

The "speech" of recruiters varies substantially in content from employer to employer. Each recruiter is encouraged to speak in its own unique voice about the unique aspects of the employment that it offers. Thus, for instance, *amicus* NALP itself provides forms as a service to employers, with the explicit purpose of "aid[ing] communication among job seekers, employers, and law schools."[25] These forms, completed by employers, are then compiled in the annual NALP Directory of Legal Employers, which (in addition to being

[25] <http://www.nalp.org/content/index.php?pid=68>

available online)[26] is maintained in print form at most law schools' career offices. Employers are encouraged to fill out a "NALP form" that "offers employers a thorough yet succinct way to *tell their story* to candidates."[27] Those forms instruct recruiters to use the form to "[t]ell your story" and to "discuss special characteristics of your" firm, company, government entity or public interest organization.[28]

As even this first step in the recruiting process reflects, recruiting entails creative and substantive communication—speech, expression—that is unique to each recruiting employer. Moreover, a prospective employer's verbal communications with students tell much about the beliefs and values of the employer. Therefore, even if one defined "speech" for this purpose as including only those communications that touch upon matters of social or public concern, the expression that takes place in recruiting would meet that test. This is true, again, even at the step of the employer's completing of the NALP form. Some employers dramatically explain their advocacy on issues of public concern.[29] Some law firms, while emphasizing service to clients, also richly express their commitment to pro bono work and particular values.[30] Other firms make a point of emphasizing "quality of life" issues.[31] Others take still

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[26] <http://www.nalpdirectory.com>

[27] <http://www.nalp.org/content/index.php?pid=68> (emphasis supplied).

[28] <http://www.nalp.org/assets/29_0506firm.pdf> (law firm); <http://www.nalp.org/assets/28_0506corp.pdf> (corporation); <http://www.nalp.org/assets/30_0506govt.pdf> (government) <http://www.nalp.org/assets/31_0506pubint.pdf> (public interest organization) (all pdf files)

[29] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=P0718&id=1&yr=2005> (ACLU Reproductive Freedom Project).

[30] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=F3761&id=1&yr=2005> (Arnold & Porter, Denver office).

[31] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=

different approaches; a perusal of the NALP Directory shows each employer speaking in a unique voice, seeking to differentiate itself from others and thereby to attract student applicants.

The JAG Corps of the various branches of the military, like other recruiting employers, take advantage of the NALP form's opportunity to tell their story to students. Each uses the particular expressive approach that it deems appropriate and useful, and these military recruiters' speech goes well beyond anything that could be fairly described as a mere proposal of some economic transaction. The Marine Corps' NALP form warns and inspires: "Your quest to become a Marine Corps' Officer will challenge you [as you] have never been challenged before. You will be pushed to your mental and physical limits to determine whether you have what it takes to lead Marines. It is not an easy road, but, if you succeed, you will be changed forever. Your first and greatest responsibility is leading the world's finest, U.S. Marines under your command."[32] The Air Force's NALP form seeks to inspire with a different approach: "[J]oining The Judge Advocate General's Corps allows an attorney to engage in public service within an institution highly respected by the American public. We firmly believe that our judge advocates make a valuable and lasting contribution to their country."[33] The other branches participate as well.[34]

F3249&id=1&yr=2005> (Dickstein, Shapiro, Morin & Oshinsky, Washington office).

[32] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0394&id=1&yr=2005>

[33] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0369&id=1&yr=2005>

[34] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0437&id=1&yr=2005> (United States Navy); <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0295&id=1&yr=2005> (United States Army).

The NALP Directory is only the beginning of expressive speech by employers in the recruiting process; there is only so much expression that can be fit on such a form, but there are endless opportunities for expression through other avenues. Again, this expression allows each employer to differentiate itself and to attract the students who would likely be the best "fit" with the needs, values, and style of the particular employer. Some employers create and disseminate further written materials. Others have receptions, allowing for more one-on-one or small-group discussion of the employer's opportunities and values in a somewhat informal setting. Most use an interview as part of the recruiting and hiring process, whether on-campus or off. Such interviews consist of the employer's expressive speech as well as the student's. Students, of course, query prospective employers about much more than the number of billable hours and the salary. Many students, if not all of them, take an employer's values and style, as conveyed through expressive speech in interviews and elsewhere, as important considerations in deciding on future employment. Some students may be moved most by a prosecutor's explanation of the values served by that type of practice; others find themselves resonating with the speech and values of a public defender's office, or a municipal law department, or a small personal injury firm, or a large firm with a national practice.

Some of these opportunities for speech take place without the assistance of law school staff and without the use of law school facilities. Consider, for instance, the quite impressive internet recruiting presence of the Army JAG Corps, a well-designed, richly expressive series of pages including information about the history of the Corps, discussion of the values that it seeks to promote, and personal testimonials by some current members.[35] But some of this expressive speech,

[35] <http://www.goarmy.com/jag/index.jsp>

as has been discussed above, draws upon schools' resources, and it is those resources that the Solomon Amendment seeks to harness.

In all of these aspects of recruiters' expression, and more, recruiters are speaking to matters that are of important public concern as well as being important to law students considering employment: employers are offering their vision of the part they think their lawyers should play in the economic and political life of the nation and in our system of justice. Military recruiters likewise richly express the values that military lawyers are expected to further, and the reasons why they believe these values are important to the life of the nation. This, too, is speech and expression in the fullest sense of those words. Therefore, this case cannot be disposed of on the assertion that recruiting is somehow outside the scope of, or at the periphery of, the First Amendment's concerns.

III. PETITIONERS ARE WRONG IN ASSERTING THAT A SCHOOL'S OFFERING OF CERTAIN RECRUITING-RELATED ASSISTANCE IS ITSELF PROOF THAT MILITARY RECRUITERS NEED THAT ASSISTANCE IN ORDER TO RECRUIT EFFECTIVELY.

Once it is recognized that First Amendment interests are implicated and infringed by the Solomon Amendment, the question of necessity becomes critical. Because First Amendment interests are not absolute, they can under appropriate circumstances be overridden by sufficiently compelling public interests. In this regard, the Court of Appeals found it important that Petitioners had presented no evidence that they needed the assistance of law schools in order to recruit effectively. (Pet. App. 23a-24a, 40a, 45a-46a). Petitioners now contend that the absence of such evidence is immaterial, because the level of assistance that they need in order to recruit effectively is defined by the level of

assistance that law schools provide to other employers. (Brief of Petitioners, p. 40 ("When an educational institution [provides various services and assistance to recruiters], it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when an educational institution denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the institution itself views as integral to effective recruiting . . .").

Petitioners' argument on this point is incorrect because it wrongly assumes that every employer has the same needs, and that law schools provide only the things that every employer needs in order to recruit effectively. In fact, the needs of various employers are quite different. Furthermore, law schools often go the extra mile and provide much more than what might be strictly necessary in order to make effective recruiting possible. Law schools' decisions about what facilities and services to provide through their career placement offices do not amount to, and are not formulated as, judgments about what *any* employer—much less *every* employer—needs in order to recruit effectively.

Some employers, for instance, need law schools' assistance in making law students even aware that they exist and that they hire law graduates. This may be the case, for instance, with small private firms, or with certain unique public-sector or public-interest entities. Those entities may, further, make different requests from different law schools; they may ask some schools merely to make their firm résumé or other literature available, while asking other schools to arrange on-campus interview sessions, or to help them identify student groups whose members might be most likely to be interested in those entities' employment opportunities. One can take it as granted, we believe, that the United States military does not need law schools' help in making students aware that the

military exists and that there are lawyers in its ranks; any law student who reads newspapers or watches television will know it. But in any event there is no evidence that the military does have such a need. Other employers may depend heavily on law schools' career fairs, "meet the employers nights" or similar events, of the sorts that have been discussed above. But again, one cannot assume that the military needs assistance of that sort from law schools.

One part of the issue, in regard to the Solomon Amendment, is on-campus physical presence of recruiters to interview or otherwise. Some employers depend heavily on on-campus interviewing or informational sessions, and find it useful beyond that to host on-campus social receptions. Others do not; they find on-campus physical presence unnecessary to their recruiting efforts, or find that the expense exceeds the benefits. Those who do without physical presence include, notably, various arms of the United States government. The Department of Justice, for instance, seems to do little or no on-campus interviewing when it hires entry-level lawyers. Instead, it relies on an on-line application process followed by interviews at its own facilities.[36] Other Departments also seem not to engage in any on-campus recruiting.[37] We know of no suggestion that this recruiting process, with little or no involvement by law schools and no on-campus presence, is ineffective in attracting the best applicants for attorney positions in the federal government. Would such a process bring a sufficient number of the best

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[36] The process is explained on the Justice Department's website, including <http://www.usdoj.gov/oarm/arm/hp/hp.htm> and <http://www.usdoj.gov/oarm/arm/hp/hpfaqs.htm>.

[37] For examples of Departments who describe hiring practices without any indication that they use on-campus interviews, consider the Commerce Department's Office of General Counsel, described at <http://www.ogc.doc.gov/vacancies.html>, and the Solicitor of Labor, <http://www.doi.gov/sol/sohonsup.html >.

applicants to the military as well? The question does not answer itself. It is an issue on which one would want to see evidence, if there was any. But Petitioners offered none.

If one were to make any assumption about the military's needs, in the absence of actual evidence, the more plausible assumption based on the general experience of these *amici* would be that the military would be able to recruit effectively without law schools' assistance and without access to on-campus interviewing space. For most employers, the process of recruiting is in large part the process of differentiating themselves from their competitors in the eyes of students. Law firms and others try to make themselves noticed in a vast field of prospective employers that may all look much alike on the surface; and law school events and law school staff can help a firm in its effort to differentiate itself through its expressive communication. The military, it seems fair to say, has no such trouble in differentiating itself from other prospective employers, with no help from law schools. A firm might get lost in a crowd of firms, but the military stands out on its own as obviously different in various ways from other employment options. The military therefore likely has less need of law school assistance than most other employers do. For similar reasons—and, in addition, because the military has its own office space for interviews in many more cities than even the largest firm—it would seem reasonable to assume that the military has less need of on-campus interviewing facilities than do most employers. Again, it reasonably seems that it is probably easier for the military, than for most employers, to catch the eye of those students for whom it might be a good fit; and for those who might be willing to do all that it takes to join the armed forces, a trip off-campus to learn more is likely not much of a hurdle.

In short, law schools provide a wide range of services to prospective employers. Some employers need some, some employers want others, and some employers need little or

nothing at all. Some schools, moreover, provide assistance that goes beyond what any employer might be said to "need." Some schools might not even think at all in terms of what employers might "need," when deciding what sorts of services to provide to employers. That is, a school might instead focus its thinking on students' interests rather than on what an employer needs in order to find good employees, and a school might therefore offer to employers such things as the school thinks will *entice* them to campus even if that goes beyond what any employer might legitimately need. In that case, Petitioners' proposed equation of "help offered" and "help needed" would be faulty at its core. Furthermore, as noted above, it is not the case that each law school has only a set "menu" of services that it is willing to provide; so, Petitioners' attempt to utilize such a menu as dispositive proof that it needs all services on the menu is, for this reason as well, factually unfounded. In any event, there is certainly no reason to assume that an employer as well-known and large as the United States military needs any level of assistance from law schools in order to attract well-qualified applicants. The absence of evidence on the point therefore supports the decision of the Court of Appeals, because the Solomon Amendment's infringement of First Amendment interests is not justified on this record.

CONCLUSION

The matters discussed herein, together with the reasoning of the Court of Appeals and the arguments of Respondents, demonstrate that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

SAM HELDMAN *
HILARY E. BALL
GARDNER, MIDDLEBROOKS,
GIBBONS, KITTRELL, OLSEN,
WALKER & HILL, P.C.
2805 31st St. NW
Washington DC 20008
(202) 965-8884

* Counsel of Record