IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No.: 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., a New Jersey membership organization; SOCIETY OF AMERICAN LAW TEACHERS, INC., a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAM NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

vs.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDG, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

On Appeal From the United States District Court
For the District of New Jersey

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION, in support of *Defendants-Appellees*

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FEDERAL RULE 26.1

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INTEREST OF AMICUS CURIAE

The National Legal Foundation (NLF) is 501 c(3) public interest law firm. The NLF has a vital interest in the proper application of First Amendment principles since most of our litigation concerns these principles. We are particularly interested in assuring that constitutional case law not be improperly invoked by one side of a hotly debated political and social issue to the detriment of all those bound by the resulting court decisions.

ARGUMENT

The District Court's decision below addressed the Plaintiffs' standing as well as their unconstitutional conditions, viewpoint discrimination, and void for vagueness claims. *See generally Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (hereinafter, "*FAIR*"). However, this Brief will not address the standing issue nor the void for vagueness claim. Rather, it will address primarily the unconstitutional conditions claim and secondarily why a proper analysis of that claim renders an analysis of the viewpoint discrimination claim unnecessary.

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT ON DIFFERENT GROUNDS BECAUSE THE DISTRICT COURT IGNORED BINDING PRECEDENT.

This Court should affirm the District Court's holding that the Solomon Amendment does not impose an unconstitutional condition upon the Plaintiffs

(hereinafter, collectively, "the law schools" and similar phrases). However, it should do so on different grounds. The District Court improperly concluded that "the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment." *FAIR*, 291 F. Supp. 2d at 301. This conclusion cannot stand. The varying facts of each case may require careful analogizing or distinguishing of the *facts* of prior cases. However, the *principles* , *i.e.*, the rules and rationales were binding on the District Court.

In particular, *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) (hereinafter, "*ALA*"), provided the proper framework under which to analyze the instant case. Indeed, the District Court admitted that both the law schools and the Defendants had argued the case under the "unconstitutional conditions" doctrine as articulated by the Supreme Court in *ALA*. FAIR, 291 F. Supp. at 298-301.

In *ALA*, the plaintiff libraries, library associations, and individuals argued that the two federal programs requiring the installation of Internet filters as a condition of receipt of federal funding was both an invalid exercise of the Congress' Spending Clause authority and the imposition of an unconstitutional condition. *ALA*, 539 U.S. at ___, 123 S. Ct. at 2301-09. The Court rejected the

first argument under *South Dakota v. Dole*, 483 U.S. 203 (1987), noting that libraries that complied with the filter requirement would not thereby violate the First Amendment. *ALA*, 539 U.S. at ___, 123 S. Ct. at 2303. The Court rejected the second argument under *Rust v. Sullivan*, 500 U.S. 173 (1991), noting that the libraries would not be denied a benefit because of the exercise of their Free Speech rights. *ALA*, 539 U.S. at ___, 123 S. Ct. at 2307-08. In the instant case, the law schools make only the second type of claim. Thus, as will be explained below, this case should be decided under the applicable portions of *ALA* and *Rust*.

Contrary to the District Court's view, the principles of *ALA* and *Rust* are simple, straightforward, and easily applicable to the instant case. Indeed, the principles are so easy of application that the Court did not even need to decide the issue of standing[1] and conducted its analysis in five paragraphs. By contrast, the District Court in this case engaged in an unduly complex analysis. The primary hallmark of its analysis was its refusal to rely upon the cases that guided the Supreme Court in *ALA* and instead invoking cases that are clearly out of place. In particular, the District Court's entire analyses of academic freedom and expressive association (including its analyses of message dilution and compelled speech under

[1] This Court could also bypass the standing issue, at least for the unconstitutional conditions claim since, here, as in ALA, the unconstitutional conditions analysis is so straightforward. As will be shown, assuming without deciding whether standing exists, the law schools' unconstitutional conditions claim is as easily disposed of as was the claim in *ALA*.

Boy Scouts of America v. Dale, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)) was unnecessary. *See FAIR*, 291 F. Supp. 2d at 301-14.

The analysis that the District Court should have engaged in would also have led it to the same conclusion that it reached: the Solomon Amendment does not impose an unconstitutional condition upon the law schools, and thus passes constitutional muster. However, it would have reached the proper conclusion in a more direct route and under the proper binding precedent. It is on this ground that this Court should affirm.

Before examining the Solomon Amendment under the *ALA* test, we note the inadequacy of the District Court's reasons for declining to employ the test. As noted above, the District Court wrote that 'the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment." *FAIR*, 291 F. Supp. 2d at 301.

However, the District Court only noted two differences. First, the District Court stated that in *Rust* and *ALA* a specific government spending 'program" was in sight, whereas here, according to the District Court that is not true. *FAIR*, 291 F. Supp. 2d at 300. This reasoning is flawed for several interrelated reasons. First, in *ALA* two different 'programs" were at issue (the E -rate and the LSTA programs).

ALA, 539 U.S. at ___, 123 S. Ct. at 2301 (explaining the two programs). Here more than two "programs" are at issue. Yet there is nothing in the Supreme Court's unconstitutional conditions jurisprudence that indicates that the number of "programs" is constitutionally significant. Neither the law schools nor the District Court had any problem describing representative programs. Brief for Appellants at 3; *FAIR*, 291 F. Supp. 2d at 270.

Furthermore, the District Court placed undue importance upon the literal words of *Rust*. The District Court quoted the Supreme Court's statement from *Rust* that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *FAIR*, 291 F. Supp. 2d at 299 (quoting with attribution but without quotation marks or pinpoint citation *Rust*, 500 U.S. at 194). This language makes sense in the *Rust* context since the Court was speaking of the Title X family planning counseling "program." *Id.* at 178. However, in *ALA*, as mentioned, more than one program was at issue and the Supreme Court used language more appropriate to multiple programs. It noted that the unconstitutional conditions analysis was applicable to evaluating "receipt of federal assistance," "recei[pt of] . . . subsidies," and receipt of "funds." *ALA*, 539 U.S. at ___, 123 S. Ct. at 2307-08. The emphasis was always on the money, not the form of the program nor on the number of the programs.

Furthermore, the distinction that the District Court sought to make appears

to be completely erroneous. While not entirely clear in its reasoning, the District Court appears to be contrasting the *Rust* programs with the fact that the Solomon Amendment places conditions on numerous educational grants and contracts. *Cf.* *FAIR*, 291 F. Supp. 2d at 299-300 with *FAIR*, 291 F. Supp. 2d 270. However, as the Supreme Court made clear in *Rust*, Title X also placed conditions on numerous family planning grants. 500 U.S. at 178. To the extent that the District Court is trying to distinguish a narrower category of grants (family planning) from a broader category of grants (those appropriate to the various fields of study at a university), the District Court merely baldly asserts that this is constitutionally significant without citing any authority whatsoever for that proposition.

Another reason why the District Court claimed that *ALA* does not control the instant litigation is because in *ALA* and *Rust* "particular viewpoints which were contrary to the Government's value judgment were entirely suppressed. The Solomon Amendment, by contrast, does not directly or entirely exclude a point of view." *FAIR*, 291 F. Supp. 2d at 300. While this statement is entirely correct, it does not constitute a reason why *ALA* does not control. Rather it merely makes the analysis even simpler.

The District Court's final stated reason for rejecting binding precedent is that it cannot tell whether cases such as *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) are controlling. *FAIR*, 291 F. Supp. 2d at 300-01 ("Whether these

cases are controlling depends on whether the Solomon Amendment suppresses speech or substantially inhibits the exercise of other protected rights.'). This is not much of a reason to say the least. The proper understanding of *Velazquez* in an unconstitutional conditions context will be examined below.

II. THE SOLOMON AMENDMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE LAW SCHOOLS BECAUSE THE SUBJECT PROGRAMS HELP FUND TRADITIONAL EDUCATIONAL FUNCTIONS AND BECAUSE THE LAW SCHOOLS' OBJECTIONS ARE NOT CONSTITUTIONALLY SIGNIFICANT.

As noted above, the analysis that the District Court should have engaged in, following the lead of the Supreme Court in its recent *ALA* case, is quite straightforward. The Court quite simply noted that the Internet filter requirement was part of programs designed to 'help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." *ALA*, 539 U.S. at ___, 123 S. Ct. at 2308. It did not matter at all, constitutionally, that the condition itself was onerous to the libraries, indeed so onerous that they were willing to sue over it. It did not matter that the libraries considered the filters to constitute censorship, nor that censorship was in diametric opposition to the values that the libraries had publicly and vehemently expressed for approximately 70 years. *ALA*, 539 U.S. at ___, 123 S. Ct. at 2322 (Souter, J., dissenting).

The analysis is no more complicated here. All of the grant and contract

programs subject to the Solomon Amendment help fund the traditional functions of universities[2] and their component law schools. It does not matter, constitutionally, that the law schools find the recruiting requirement onerous. It does not matter that the law schools consider the military's homosexual conduct policy to be discriminatory. It does not matter that this policy is in conflict with the Association of American Law Schools' very public anti-discrimination policy that it promulgated in 1990. *See FAIR*, 291 F. Supp. 2d at 280-82.

Much like libraries, universities "pursue the worthy missions of facilitating learning and cultural enrichment." *ALA*, 539 U.S. at ___, 123 S. Ct. at 2303. Universities served and continue to serve several other purposes including research, socialization and job placement. *See* James Mulhern, *A History of Education* 399-404 (2d ed., 1959); s*ee generally* Robert Paul Wolff, *The Ideal of the University* (1969), *Higher Education in American Society* (Phillip G. Altbach & Robert O. Berdhal, eds., rev. ed., 1987). Particularly germane to the discussion of the universities' role in connection with the Solomon Amendment is the function of placement.

In medieval times, "universities grew up to prepare men for . . . professions." Mulhern, *A History of Education* at 282. In early America,

[2] Throughout this Brief, the term "universities" will be used for institutions of higher education. Institutions other than universities that are institutions of higher education, such as colleges, are meant to be included in this term.

universities' original purpose was to cultivate professionals. "[T]he need for clergymen. . .prompted the establishment of colleges." Wolff, *The Ideal of University* at 9. In 1636, Harvard College was founded "[t]o supply. . .pulpits with learned ministers and the colony with teachers and magistrates." Mulhern, *A History of Education* at 402. Throughout the years there has been much debate over the purpose that universities *should* serve, but all "camps" have agreed that one main purpose of universities is to provide students with the skills to be employed: "Today there is significant agreement between the business-industrial interests and the educators regarding the values of . . . studies, the sciences and technology in the education of *leaders for business, industry, the professions, and public service at home and abroad*." *Id.* at 614 (emphasis added). It is a generally accepted principle that a historical and modern function of universities is to provide students with an education that places them in certain occupations.

The student affairs function of universities can be traced to colonial days and the emphasis on career guidance began in earnest after World War I. G. Gary Grace, *Student Affairs and External Relations*, New Directions for Student Services, Winter 2002, 103-10. By the 1970's the placement and career services functions began the transition to their current critical component of America's universities. Gary L. McGrath, *The Emergence of Career Services and Their Important Role in Working with Employers,* New Directions for Student Services,

Winter 2002, 69-83. Looking at law schools specifically, '[b]y 1984, every accredited law school in the United States had a placement service." Abbie Willard Thorner, *Legal Education in an Era of Change: Legal Education in the Recruitment Marketplace: Decades of Change*, 1987 Duke L.J., 276, 276 n.1.

In *ALA*, the Court noted that because libraries have traditionally excluded pornography from their collections, Congress was permitted to impose the filtering requirement. 539 U.S. at ___, 123 S. Ct. at 2308. Similarly, here, because universities have traditionally assisted students in obtaining employment, Congress can impose a requirement allowing recruiting for military employment.

In one way, this is the end of the required analysis under *ALA*. However, the Court also explained why its analysis does not constitute an unconstitutional "penalty" and why *Velazquez* does not apply. This Brief will look at each of these points in turn.

First, in *ALA*, the Court noted that refusing to fund the Internet activities of recipient libraries that refused to accept the filtering requirements was not a penalty. 539 U.S. at ___, 123 S. Ct. at 2308. While the idea that attaching such strings is tantamount to creating a penalty may appeal to common sense (and garnered the support of Justice Stevens in *ALA, id.*), this is precisely the view that the *ALA* Court rejected. The Court noted that the filtering requirement

> does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet

> access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.

Id.

Similarly here, the Solomon Amendment does not penalize universities that choose to refuse access to military recruiters or deny them the right to speak out against the military's homosexual conduct policy. Rather, the Solomon Amendment simply reflects Congress' decision not to subsidize their doing so. To the extent that universities wish to engage in their traditional educational functions including research and placement without permitting military recruiters on campus, they are free to do so without federal assistance.

Finally, the *ALA* Court explained why *Velazquez* does not apply. The Court pointed out that "Velazquez held only that viewpoint-based restrictions are improper when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead funds to encourage a diversity of views from private speakers*." 539 U.S. at ___, 123 S. Ct. at 2309 (internal quotations omitted; alteration and emphasis original). The Court then noted that forum analysis was entirely inappropriate because the libraries had not installed Internet terminals "to provide a forum for Web publishers to express themselves, but rather to provide patrons with online material of requisite and appropriate quality." *Id.* The distinction is important. Certainly, Web publishers "speak" or engage in

expressive activities. And certainly libraries know that when they install Internet terminals. However, it does not logically follow that the libraries' purpose was to open a forum for those publishers.

For similar reasons, the law schools' concerns about viewpoint discrimination and the District Court's analysis of those concerns are completely out of place. Universities do not engage in placement services, including opening their campuses to recruiters to provide a forum for those recruiters. This is true despite the fact that those recruiters "speak." Nor do universities offer placement services as a vehicle for their own speech despite the fact that they may "speak" in process. As noted above, placement services are part and parcel of the student affairs functions of universities and have their historical roots in America's colonial era. The purpose of placement services is to assist students in a similar manner as do housing services, food services, and other student affairs functions. G. Gary Grace, *Student Affairs and External Relations*, New Directions for Student Services, Winter 2002, 103-10. *Velazquez'* viewpoint discrimination concerns are as out of place here as they were in *ALA*.

III. THE LAW SCHOOLS' VIEWPOINT DISCRIMINATION CLAIM MUST FAIL BECAUSE A VIEWPOINT DISCRIMINATION ANALYSIS IS INAPPLICABLE IN THIS UNCONSTITUTIONAL CONDITIONS CONTEXT.

For the reasons just stated, *i.e.*, that forum analysis, and, therefore, viewpoint discrimination concerns are out of place in this case, the law schools' viewpoint

discrimination claim must also fail. Although the law schools break this claim down into several sub-arguments and although the District Court analyzed each, *FAIR*, 291 F. Supp. 2d at 314-17, it need not have done so. Under a proper unconstitutional conditions analysis, the District Court would have recognized, as discussed above, viewpoint concerns are simply not germane to the instant case.

Perhaps in an effort to disguise this fact, the law schools place their viewpoint discrimination argument before their unconstitutional conditions argument in their brief. (*See* Brief of Appellant, Table of Contents, at iii.) However, should this Court employ the *ALA* analysis advocated in this Brief, this Court would have no need to consider the viewpoint discrimination claim.

CONCLUSION

For these reasons regarding the unconstitutional conditions and viewpoint discrimination claims and for other reasons stated by the Appellee, we respectfully request that this Court affirm the District Court, partially on other grounds.

Respectfully submitted
this 26th day of February, 2004

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