No. 04-1152

In The

Supreme Court of the United States

DONALD H. RUMSFELD, ET AL,
Petitioners.

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Petitioner*

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Legal Foundation (NLF) is a 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.

SUMMARY OF THE ARGUMENT

This Court should reverse the Third Circuit's decision because the Third Circuit misapplied the unconstitutional conditions doctrine by ignoring binding precedent and holding that the Solomon Amendment impairs Respondents' First Amendment rights under the doctrines of expressive association and compelled speech. Specifically, the Third Circuit analyzed this case under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bosto*n, 515 U.S. 557 (1995), rather than under *United States v. American Library Association, Inc*., 539 U.S. 194 (2003) and *Rust v. Sullivan*, 500 U.S. 173 (1991).

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent accompany this Brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE THIRD CIRCUIT'S DECISION BECAUSE THE THIRD CIRCUIT IGNORED BINDING PRECEDENT.

The District Court in the instant case held, *inter alia*, that the Solomon Amendment did not violate Respondents' First Amendment free speech rights under either the doctrine of expressive association or compelled speech. *See generally Forum for Academic and Institutional Rights, Inc. v. Rumsfel*d, 291 F. Supp. 2d 269 (D.N.J. 2003) (hereinafter "*FAIR*"). The Third Circuit reversed both of these holdings. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld,* 390 F.3d 219 (3rd Cir. 2004) (hereinafter "*FAIR*").

In so doing, although they came to opposite conclusions, *both* courts applied the wrong lines of cases. As will be explained below, the Third Circuit merely rubber-stamped the District Court's reasoning for rejecting the controlling cases. Therefore, to understand the underlying error, one must look at the District Court's opinion in some details.

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*"), provides 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 this Court in *ALA*. *FAIR*, 291 F. Supp. at 298-301.

In *ALA*, the plaintiff libraries, library associations, and individuals argued that two federal programs requiring the installation of Internet filters as a condition of receipt of federal funding constituted both an invalid exercise of Congress' Spending Clause authority and the imposition of an unconstitutional condition. *ALA*, 539 U.S. at 198-213. This Court rejected the first argument under *South Dakota v. Dol*e, 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 202. This Court rejected the second argument under *Rust v. Sulliva*n, 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 211-12. 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 *Rus*t.

Contrary to the District Court's view, the principles of *ALA* and *Rust* are simple, straightforward, and easily applicable to the instant case. In 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 this 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 *Boy Scouts of America v. Dal*e, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bosto*n, 515 U.S. 557 (1995)) was unnecessary. *See FAIR*, 291 F. Supp. 2d at 301-14.

The analysis in which the District Court should have engaged 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 line of this Court's precedent. Similarly, the proper course of action for the Third Circuit would have been to correct the District Court's reliance on *Dale* and *Hurley* and to affirm on different grounds, *i.e.*, under *ALA* and *Rust*.

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 199 (explaining the two programs). Here, it is true that more than two "programs" are at issue. However, there is nothing in this 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. Third Circuit Brief for Appellants at 3; *FAIR*, 291 F. Supp. 2d at 270.

Furthermore, the District Court placed undue importance upon the literal words of *Rus*t. The District Court quoted this 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 *Rus*t, 500 U.S. at 194).

This language makes sense in the *Rust* context since this 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 this 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 210. 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 this Court made clear in *Rus*t, Title X also placed conditions on numerous family planning grants. 500 U.S. at 178. To the extent that the District Court was 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 asserted 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 was that it could not tell whether cases

such as *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) were 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 Third Circuit rubber-stamped most of this reasoning and relegated the issue of the supposed inapplicability of *Rust* and *ALA* to a footnote, stating:

> As the District Court noted, the Supreme Court's exception to the unconstitutional conditions doctrine for selective spending programs does not apply here. *FAIR*, 291 F. Supp. 2d at 299-300. When the Government appropriates for a particular spending program, it may endorse one viewpoint over another by conditioning its spending on certain criteria. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211, 156 L. Ed. 2d 221, 123 S. Ct. 2297 (2003) (providing library assistance funds to only those libraries who agree to block obscene Internet sites); *Rust*, 500 U.S. at 192-93 (funding family planning services that eschew abortion counseling). In those cases, "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." *Rust*, 500 U.S. at 196; *see also Am. Library Ass'n*, 539 U.S. at 211. That exception does not apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty—the loss of general funds.

FAIR, 390 F.3d at 229 n.9.

Because the Third Circuit relegated the controlling line of cases to a footnote, it failed to realize that those very cases explain why the Solomon Amendment does not impose a penalty. This will be explained below in Part II.

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 in which the District Court and the Third Circuit should have engaged, following this Court's lead in *ALA* is quite straightforward. In *ALA*, this 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 211. 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 the putative censorship was in diametric opposition to the values that the libraries had publicly and vehemently expressed for approximately seventy years. *ALA*, 539 U.S. at 237 (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. Under the

[2] Throughout this Brief, the term "universities" will be used for institutions of higher education. Institutions other than universities

rationale in *ALA*, 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 202. 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, universities' original purpose was to cultivate professionals. "[T]he need for clergymen . . . prompted the establishment of colleges." Wolff, *supra,* at 9. In 1636, Harvard College was founded "[t]o supply . . . pulpits with learned ministers and the colony with teachers and magistrates." Mulhern, *supra*, 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

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that are institutions of higher education, such as colleges, are meant to be included in this term.

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 an 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.

All of this presents us with a situation that is exactly analogous to the facts of *ALA*. In *ALA*, this Court noted that because libraries have traditionally excluded pornography from their collections, Congress was permitted to impose the filtering requirement. 539 U.S. at 212. 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 could be the end of the required analysis under *ALA*. However, the *ALA* Court went further and distinguished the funding conditions in *ALA* from those in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). The Court did so in order to explain why the conditions in *ALA* did not constitute an unconstitutional "penalty" and why *Velazquez* did not apply to the facts before it. *ALA*, 539 at 212-13. This additional aspect of the *ALA* Court's analysis

sheds light on the District Court's and Third Circuit's error in holding that the Solomon Amendment impairs the law schools' First Amendment rights under the doctrines of expressive association and compelled speech. It also helps explain why the law schools' viewpoint discrimination claim is flawed. We will look briefly at these additional aspects of the *ALA* opinion.

As noted previously, the Third Circuit, in rubber-stamping the District Court's rejection of the applicability of *ALA* and *Rust*, claimed that the Solomon Amendment imposes a penalty. The irony is that *ALA* itself explains why this is not so. In *ALA*, this 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 212. While the idea that attaching such strings is tantamount to creating a penalty may superficially appeal to common sense, 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* did not apply to the facts before it. 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 213 (internal quotations omitted; alteration and emphasis original). This 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. (Although the Third Circuit did not even address the viewpoint discrimination claim, it is important to note why the claim is unfounded.)

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 the 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*.

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, that viewpoint concerns are simply not germane to the instant case.

CONCLUSION

For the foregoing reasons regarding the unconstitutional conditions and viewpoint discrimination claims and for other reasons stated by the Petitioners, this Court should reverse the Third Circuit's decision.

Respectfully submitted
this 16th day of July, 2005

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