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**

## BRIEF AMICUS CURIAE OF SERVICEMEMBERS LEGAL DEFENSE NETWORK IN SUPPORT OF RESPONDENTS


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## QUESTIONS PRESENTED

Did the Third Circuit correctly conclude that the Solomon Amendment imposes an unconstitutional condition on federal funding by requiring colleges and universities, as a condition on their receipt of federal funds, to provide military recruiters with the same support and access provided to any other recruiter, despite the schools' longstanding policy of refusing to abet employers engaged in discrimination?

More specifically, did the Third Circuit correctly refuse to accept the Government's bare assertion that the Solomon Amendment's intrusion on the rights of civilian institutions is necessary and its argument that this Court's cases on military deference preclude further judicial scrutiny?

## RULE 29.6 DISCLOSURE STATEMENT

The Servicemembers Legal Defense Network is a non-profit legal services and policy organization. It has no corporate parents or affiliates.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Cases:**

**Statutes and Constitutional Provisions:**

**Other Authorities:**

## BRIEF AMICUS CURIAE OF SERVICEMEMBERS LEGAL DEFENSE NETWORK

Pursuant to Supreme Court Rule 37.3,[1] Amicus Curiae Servicemembers Legal Defense Network ("SLDN") submits this brief in support of Respondents. This brief addresses the question whether the Third Circuit correctly refused to accept the Government's bare assertion that the Solomon Amendment, 10 U.S.C. § 983, is necessary to serve a compelling military need and its argument that this Court's cases concerning deference to the military and to Congress in military affairs preclude further judicial scrutiny of the justifications offered for the statute.

## INTERESTS OF AMICUS CURIAE

SLDN is a national, not-for-profit legal services and policy organization dedicated to protecting the rights of military personnel affected by the military's "Don't Ask, Don't Tell" policy. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (Nov. 30, 1993) [hereinafter "Don't Ask, Don't Tell"]. SLDN's honorary board is comprised of retired senior military officers and senior enlisted members, and many of the organization's governing board members and staff members are military veterans.

SLDN works to ensure that all Americans have the freedom to serve. Its mission is to end discrimination against and harassment of military personnel affected by

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[1] Counsel for Petitioners and counsel for Respondents have consented to the filing of this brief; letters evidencing such consent are on file with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than SLDN and its members and counsel has made a monetary contribution to the preparation or submission of this brief.

"Don't Ask, Don't Tell" and related forms of intolerance. For more than a decade, SLDN has worked to end the military's discriminatory policy and has provided free legal services to those harmed by "Don't Ask, Don't Tell." SLDN has responded to more than 6,900 requests for assistance and has effected almost three dozen different changes to military policy and practice.

SLDN's work also encompasses the impact of the Solomon Amendment, which effectively requires colleges and universities to assist in the military's practice of discrimination in recruiting as a condition on the receipt of federal funding. In addition, each year, representatives of SLDN speak at colleges and universities across the nation, educating on the discriminatory impact of the "Don't Ask, Don't Tell" policy. Given its familiarity with the military and its many years of work in connection with the policy of "Don't Ask, Don't Tell"—as well as with the Solomon Amendment itself—SLDN not only has a great interest in the outcome of this case but is uniquely well-positioned to assist the Court in its consideration of these important issues.

## STATEMENT OF THE CASE

For many years, law schools have followed a policy of refusing to provide recruiting assistance to employers that engage in various forms of discrimination. In the 1970s, law schools began to extend this policy to bar access to employers that discriminate on the basis of sexual orientation, and in 1990, the Association of American Law Schools voted unanimously to include sexual orientation in the list of protected categories in law school non-discrimination policies.

The military has an explicit policy of discriminating on the basis of sexual orientation—a policy known as "Don't

Ask, Don't Tell." As a result, law schools have typically refused to offer the military's recruiters affirmative assistance. Most law schools did not completely bar military recruiters from their campuses, however, instead providing accommodations that would enable military recruiters to reach students without offending the institutions' non-discrimination policies. Those accommodations included, but were not limited to, allowing military recruiters to recruit at alternate locations.

In 1994, Congress passed the Solomon Amendment, which effectively required law schools to exempt the military from their non-discrimination policies. In 2004, after the pendency of this lawsuit (and partly in response to it), Congress amended the statute to expressly require that schools give the military access and assistance that is at least equal in quality and scope to the access provided to any other employer. Ronald W. Reagan Nat'l Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004) [hereinafter "2004 Provision"]. If any part of a college or university fails to comply with the terms of the Solomon Amendment, the entire institution will be denied federal funding, including not only grants and contracts from the Department of Defense, but also virtually any federal grants or contracts available to the academic institutions (other than student aid).

This lawsuit was brought by a coalition of law schools and law faculty who contended that the Solomon Amendment is an unconstitutional condition on federal funding, requiring that law schools speak for, associate with, and host military recruiters and disseminate the military's recruitment message. Although the district court denied the plaintiffs' motion for a preliminary injunction, the Third Circuit reversed, holding that the plaintiffs had established a likelihood of success on the merits of their First Amendment claims. *See Forum for Academic & Institutional*

*Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) [hereinafter *FAIR*]. In the course of its ruling, the Third Circuit noted that "the Government ha[d] chosen to submit no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting." *Id.* at 245. The Third Circuit rejected the Government's bare assertion of military need, and it refused to accept the Government's argument that this Court's cases concerning deference in military affairs relieved it of further obligation to demonstrate military need. *Id.* This Court granted certiorari on May 2, 2005. 125 S.Ct. 1977 (2005).

## SUMMARY OF ARGUMENT

One of the most important ideals of our system of government is that even in times of military conflict, the rights recognized by the Founders and conferred by the Constitution cannot be arbitrarily impinged. Thus, as this Court recognized more than seventy years ago, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934).

To be sure, this Court has held that the military is, "by necessity, a specialized society separate from civilian society," and thus "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed." *Parker* v. *Levy*, 417 U.S. 733, 743, 756 (1974). Accordingly, in several cases, this Court has deferred to empirical judgments by Congress and the armed forces with regard to certain "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). Even in cases where deference is appropriate, however, this Court has recognized that it must not "abdicate" its "ultimate responsibility to decide the

constitutional question." *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).

In this case, the Government and its amici seek to expand the notion of military deference far beyond what this Court has previously recognized. They contend that even if the Solomon Amendment infringes on the First Amendment rights of civilians and civilian institutions, this Court should uphold it without any meaningful review at all, simply because it has an articulable connection to military affairs. Moreover, they ask this Court to ***presume*** that Congress must have found a real military need for the infringement, despite the legislative history that shows that the law was motivated by a desire to punish schools, not by any empirical judgment that the access the military already had to law school and university students was insufficient to meet its needs.

The Government's reliance on military deference in this case must be rejected for several reasons. First, the concept of judicial deference in military affairs has no application where—as here—Congress is regulating the conduct of non-military personnel in non-military space. Second, deference is not warranted here because the Solomon Amendment concerns recruiting on law school and university campuses—a matter with regard to which the military has no unique expertise and about which the judiciary is perfectly well equipped to make judgments. And third, in enacting the Solomon Amendment, Congress conducted no factual investigation and made no studied choice between alternatives, and thus there is no empirical judgment to which the judiciary can defer.

Moreover, regardless of whether concepts of deference apply in this context, this Court cannot ignore the fact that there has ***never*** been a credible showing—either before Congress or in this litigation—that the Solomon Amendment and its 2004 "equal access" provision were no

broader than necessary for the military to meet its recruiting needs. When the Solomon Amendment was originally enacted, there was no reason to believe that law school policies of restricting access to employers who discriminate had actually impaired the military's ability to fill its needs for new lawyers. Indeed, as discussed below, the Department of Defense actually objected to the Solomon Amendment in 1994, on the ground that it was ***not*** necessary. *See infra* at 19-20. Neither the Government nor its amici have pointed to any evidence that the military is unable to recruit a sufficient number of qualified applicants through the many other means of access it has to students at colleges and law schools. And no one has even suggested that the military was unable to meet its recruiting needs for lawyers because of any inadequacy in the accommodations that were in place before 2001, when the military began to demand "equal access." Under these circumstances, to uphold the Solomon Amendment based on the Government's bare assertion of military need would indeed be an "abdicat[ion]" of this Court's responsibility to decide constitutional questions.

## ARGUMENT

The modern concept of military deference is based on two ideas: Congress's power to raise and regulate armies and navies, U.S. CONST. art. I, § 8, cl. 12-14, and the judiciary's presumed lack of competence in certain matters of military strategy and operations. This Court has recognized both of these rationales in granting "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker* v. *Goldberg*, 453 U.S. 57, 66 (1981).

The second of these ideas—the courts' presumed lack of competence in military affairs—is critical to the concept of

military deference. *See id.* at 65. Military deference cannot be justified purely by reference to the fact that Article I of the Constitution gives Congress the power to raise and regulate armies. After all, Congress ***always*** acts in furtherance of powers granted by Article I, and yet this Court does not always defer to its judgments.[2]

Significantly, "deference does not mean abdication." *Rostker*, 453 U.S. at 70. Congress is not "free to disregard the Constitution when it acts in the area of military affairs," *id.*, and thus this Court has made clear that its deference in military affairs does not insulate congressional or military judgments from meaningful judicial review. *Id.* at 70 ("[s]imply labeling the legislative decision 'military' . . . does not automatically guide a court to the correct constitutional result"); *see also United States* v. *Robel*, 389 U.S. 258, 263-64 (1967) ("the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit"). This Court will defer—not to rhetoric or constitutional arguments—but to specific "professional judgment[s] of military authorities concerning the relative importance of a particular military interest." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). And even where the doctrine of military deference applies, it does not excuse the Government from showing the extent to which its restriction on constitutional rights is actually tailored to serve important governmental interests.

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[2] As then-Judge Clarence Thomas observed in a non-military context: "We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

Indeed, only last Term, this Court undertook careful constitutional review of the Government's detention of an American citizen as an enemy combatant, despite the fact that the Government had invoked the principle of deference to the Executive Branch in military judgments. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2651-52 (2004) (plurality op.). As the Court explained:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

*Id.* at 2649-50; *see also id.* at 2655 (Souter, J., concurring) (judiciary is charged with "deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war"). Thus even when deference is appropriate, the judiciary still bears the responsibility of deciding whether the statute or military regulation infringes on the liberties guaranteed in the Constitution.

In this case, the Government contends that this Court should defer to the bare assertion by the statute's sponsors that it is necessary to compel civilian institutions to associate with and speak on behalf of the military.[3] As discussed

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[3] The Government contends that if the Solomon Amendment comes within the scope of the First Amendment, this Court's analysis under the intermediate standard for expressive conduct in *United States* v. *O'Brien*, 391 U.S. 367 (1968), should be conducted with due deference to Congress's military judgments about the need for and breadth of the statute. Brief for the Petitioners at 35-39 [hereinafter "Gov't Br."]. The

below, this position represents a dramatic and unjustified expansion of military deference, both with regard to the scope of the doctrine and with regard to the nature of the deference Congress enjoys when the doctrine applies.

## I. This Court's military deference cases have no application here because of the nature of the congressional action under review.

By its nature, the congressional action at issue here is entitled to no special quantum of deference. This Court should reject the Government's and its amici's reliance on concepts of military deference for three different reasons. First, the notion of military deference does not apply in the context of a law that burdens the rights of civilians and civilian institutions in civilian space. Second, neither the military nor Congress has unique expertise beyond that of the judiciary with regard to the effectiveness of various methods of recruiting university and law school students, and the courts are fully capable of considering such matters themselves. And finally, the legislative history makes clear that Congress did not make any empirical judgments about whether the Solomon Amendment and its 2004 "equal access" provision are necessary—and no broader than necessary—for the military to meet its recruiting needs.

### A. Principles of deference in military affairs do not apply to laws that direct the conduct of civilian institutions in civilian space.

The most obvious flaw in the Government's position on deference is that it seeks to apply the doctrine to a law that burdens the First Amendment rights of civilians in civilian space. This Court's deference cases do not go nearly this far.

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Government does not argue that military deference could save the Solomon Amendment if it is subject to strict scrutiny.

Indeed, this Court has recognized the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972).

This Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974). Thus, for example, this Court has allowed the military discretion to determine how it will prosecute crimes committed by military personnel—even when they occur off-duty and in civilian space. *See, e.g., Solorio* v. *United States*, 483 U.S. 435 (1987) (military court has jurisdiction over service member to prosecute crime committed off-duty and in private home). Similarly, the Court has engaged in deferential review with regard to restrictions placed on the free speech of civilians in military space. *See, e.g., Greer* v. *Spock*, 424 U.S. 828, 839 (1976) (rejecting First Amendment challenge by political candidates to rule barring campaigning on base, because military authorities had adopted a "considered" policy, "objectively and evenhandedly applied," of keeping military activities on base free from partisan political campaigns); *United States* v. *Albertini*, 472 U.S. 675 (1985) (declining to scrutinize whether rule barring certain civilians with past security problems from entering military base for demonstration was most appropriate or narrow means of preserving security).

Unlike the laws and regulations at issue in these cases, however, the Solomon Amendment is directed solely at the conduct of civilian institutions in their own space. The Solomon Amendment forces civilian institutions to speak for the armed forces, to associate with them, and to assist in their discriminatory practices. Thus it does not concern a specific regulation within military society; it concerns how civilian institutions must behave when the military reaches into civilian society. The Third Circuit recognized this

important distinction and thus properly concluded that the principle of deference to military judgment was not applicable. *FAIR*, 390 F.3d at 245 n.27. ("[T]his case involves the military's compelled presence on the campuses of civilian institutions.").

This Court's decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), (*cited in* Gov't Br. at 39), does not support the application of deference principles with respect to a law imposing a burden on the constitutional rights of civilians in civilian space. In *Rostker*, this Court invoked the notion of military deference in the course of considering an equal protection challenge to Congress's decision to compel only men to register for the draft. Unlike this case, however, *Rostker* was fundamentally about a decision by Congress ***not*** to burden civilians unnecessarily. Recognizing that "[t]he purpose of registration was to prepare for a draft of combat troops," *Rostker*, 453 U.S. at 76, the Court concluded that congressional judgments about who should be required to participate in the draft "are based on judgments concerning military operations and needs" and necessarily began with a military judgment about the "'proper role of women in combat,'" *id.* at 68 (quoting S. REP. No. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647). "Since women are excluded from combat, Congress concluded that [women] would not be needed in the event of a draft, and therefore decided not to register them." *Id.* at 77.[4]

Moreover, the constitutional claim in *Rostker* was brought by male registrants for the draft—individuals who

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[4] As discussed below, *Rostker* is an example of how this Court has proceeded to engage in meaningful judicial review even after noting that Congress is entitled to special deference in military affairs. *See Rostker*, 453 U.S. at 69-70, 87-88. The Court rejected the Government's argument that the usual intermediate scrutiny for sex-based classifications should be replaced in the military context with rational basis review. *Id.*

were on their way toward possibly becoming military personnel and who were objecting to the necessarily non-civilian process of draft registration. *See id.* at 68 ("Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one."). Here, however, the burden falls not on prospective service members themselves but rather on civilian universities and law schools, who are being compelled to assist the military in its effort to reach prospective service members. Thus the impact of the statute is well within the "civilian world" that this Court discussed in *Rostker*. And when Congress takes action that burdens constitutional rights in civilian society, it cannot avail itself of the doctrine of military deference, let alone excuse itself from judicial review simply on the ground that its action has some connection to the military.

From this perspective, this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968)—discussed at length in the parties' briefs—is instructive precisely because it is ***not*** about military deference. Indeed, *O'Brien* shows that this Court applies ordinary First Amendment analysis—and not any deferential standard—in reviewing a military-related justification on civilian speech. The petitioner in *O'Brien* was convicted of burning his draft card as part of a public protest, and the case concerned whether the law against the destruction of draft cards impermissibly burdened his First Amendment rights. Significantly, this Court did not defer to Congress's judgment that the law was supported by an important interest and was sufficiently narrow. Instead, the Court decided the case under a general First Amendment principle that would apply to any case concerning expressive conduct, and it engaged in its own factual analysis of the purposes served by the law—including the specific administrative role of the draft card and the information contained on it—and whether there were "alternative means" of assuring the continuing availability

of selective service cards. *Id.* at 376-82. Thus even though the case concerned a judgment related to military staffing—and the conduct of a potential future member of the armed services—this Court did not hesitate to inquire into the sufficiency of the interest underlying the statute.[5]

In this case as well, the judiciary bears the responsibility of assessing whether the Solomon Amendment's burden on the First Amendment rights of civilian institutions is necessary and sufficiently narrow to survive constitutional scrutiny. As this Court recognized in *Laird* v. *Tatum*, "[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." 408 U.S. 1, 15-16 (1972); *see also Gilligan* v. *Morgan*, 413 U.S. 1, 12 n.16 (1973). Thus the principle of deference in military affairs is not applicable or appropriate when the Government is compelling speech by civilian institutions to civilians in civilian space.

### B. Deference is not warranted here because the Solomon Amendment does not concern a matter that is within the military's unique expertise and inappropriate for judicial resolution.

This Court's military deference cases are also inapplicable here because the issue on which the Government is demanding deference—the sufficiency and effectiveness of various methods of recruiting university

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[5] *O'Brien* is instructive only in the sense that this Court applied the same constitutional analysis in a case regarding draft cards that it would apply in any case involving expressive conduct. In the instant case, a more stringent First Amendment analysis applies, given that the Solomon Amendment is about compelled speech. As in *O'Brien*, however, this Court should not alter its First Amendment analysis simply on the ground that the military is involved.

and law school students—is one about which the military has no unique experience beyond what the judiciary itself has. This is an issue the judiciary is capable of considering on its own, in the same manner and with the same amount of deference as when any other Act of Congress is challenged.

As discussed above, the modern doctrine of military deference is based on two ideas: Congress's constitutional power to raise and regulate armies, and the judiciary's presumed lack of competence with respect to certain matters of military strategy and operations. This Court made this point clear in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), which is cited by the Government's amici in describing the scope of the deference doctrine.[6]

*Gilligan* concerned a claim brought by a group of Kent State students after the Governor of Ohio called in the National Guard in a period of civil disorder and several students were injured or killed. Among other relief, the students sought "a judicial evaluation of the appropriateness of the 'training, weaponry and orders' of the Ohio National Guard," *id.* at 5, and demanded that the district court "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." *Id.* at 6. Not surprisingly, the Court declined to grant this very broad and intrusive relief, which would have vested control of internal military matters with the judiciary on an ongoing basis. The Court explained that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject ***always*** to civilian control of the Legislative and Executive

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[6] *See* Brief of Amici Curiae U.S. Congressman Richard Pombo et al. at 9, 12 [hereinafter "Pombo Br."]; Brief of Amici Curiae Eagle Forum Education and Legal Defense Fund at 8-10 [hereinafter "Eagle Forum Br."].

Branches." *Id.* at 10 (emphasis in original). According to the Court, it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.*

For similar reasons, this Court has deferred to the military's judgment concerning certain specific military interests, following meaningful judicial review. For example, this Court has declined to intervene in the relationships between enlisted service members and their superior officers (*Chappell* v. *Wallace*, 462 U.S. 296 (1983)) and in military promotion policies and assignments (*Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953)). The Court has also deferred to the "considered professional judgment of the Air Force" with regard to the importance of standardized uniforms in preserving "the necessary habits of discipline and unity." *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986) (rejecting Jewish service member's claim that military's rule against non-uniform headgear infringed his right to free exercise).

Where the issue at hand does not fall within the military's unique expertise, however, there is no basis for the judiciary to review regulations or congressional action with increased deference. In *Frontiero* v. *Richardson*, for example, this Court considered an Equal Protection challenge to a statute requiring female service members to show proof of their husbands' dependence before they could seek dependent benefits, while requiring no such proof from male service members who claimed their wives as dependents. 411 U.S. 677 (1973). The Court applied strict scrutiny and found that the military's goals of "administrative convenience" and cost savings were insufficient justifications for the sex-based classification. *Id.* at 688-91. In so holding, the Court did not defer to Congress's presumed conclusions about the need for this legislation. *See id.* at 689. ("In order to satisfy the demands

of strict judicial scrutiny, the Government must demonstrate" that the selected statutory scheme is actually cheaper and more convenient than alternatives). [7]

In this case, too, the Government is demanding that this Court defer to the judgments of Congress and the military with respect to matters that fall well outside the scope of the military's unique expertise and that do not concern matters of military strategy and operations, about which this Court has a presumed lack of competence. *See Gilligan*, 413 U.S. at 10. There is no doubt that the military has a compelling interest in maintaining a strong volunteer force, including college and law school graduates. But with regard to whether the military has a compelling need to recruit on campus in the same fashion as other employers do—and whether other, less burdensome alternatives to the Solomon Amendment would accomplish the same recruiting goals—this Court is equally able to reach a conclusion. Indeed, these questions have far more in common with an employment discrimination case in federal court than they have with this Court's cases granting deference to congressional and military judgments regarding specific military needs and operations. For this reason as well, deference to Congress here is not warranted.

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[7] Other courts have expressly recognized that not all judgments that relate to the military are entitled to deference. *See Anderson v. Laird*, 466 F.2d 283, 296 (1972) (per curiam) (Bazelon, C.J., concurring in judgment) (refusing to grant special deference to judgment of military regarding requirement that cadets at military academies attend religious services because requirement did not "involve programs vital to our immediate national security, or even to military operational or disciplinary procedures"); *see also Hartmann* v. *Stone*, 68 F.3d 973, 985 (6th Cir. 1995) (refusing to grant military deference regarding regulation against religious child care services on military base, because "the Army has wandered far afield," having ventured beyond "where the link to its combat mission is clear").

### C. In enacting and amending this legislation, Congress made no empirical judgments or studied choices to which this Court can defer.

Military deference is inapplicable here for another reason as well: there is no reasonable basis from which to presume that Congress made empirical judgments or studied choices to which this Court may now defer. This Court has granted deference only with respect to Congress's "studied choice of one alternative in preference to another" in terms of furthering goals related to "military needs and operations." *Rostker* v. *Goldberg*, 453 U.S. 57, 69 n.6, 72 (1981). Even the Government characterizes this Court's deference cases as relating only to "***empirical*** judgments." Gov't Br. at 39 (emphasis added).

Even setting aside Congress's failure to make factual findings, the legislative history shows that Congress did not base its adoption of the Solomon Amendment and the 2004 "equal access" provision on any credible factual evidence that those measures were necessary for successful military recruiting. There is no reason to believe that Congress considered any less restrictive alternatives to these enactments and concluded that those alternatives would be insufficient. Indeed, even the Government has characterized Congress's decision as merely a "common-sense conclusion that personal access to students on campus furthers recruitment." Reply Brief for the Petitioners in Support of Petition for a Writ of Certiorari at 7-8; *see also* Gov't Br. at 36 ("Congress reasonably concluded that equal access to students enhances the military's recruitment efforts."). But even if it were true that the Solomon Amendment "furthers recruitment," that would not be sufficient to justify a significant intrusion on the First Amendment rights of civilians. *See Boy Scouts of America Inc.* v. *Dale*, 530 U.S. 640, 648 (2000) (under strict scrutiny, requiring proof that goals cannot be achieved through

means significantly less restrictive of First Amendment freedoms); *O'Brien*, 391 U.S. at 377 (under intermediate scrutiny, requiring proof that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

Moreover, the legislative history strongly indicates that Congress's true purpose in enacting the Solomon Amendment was not military need at all but rather ***retribution***—to punish uncooperative law schools for their intransigence. *See, e.g.*, 140 CONG. REC. H3863 (daily ed. May 23, 1994) (statement of Rep. Pombo, co-sponsor of Solomon Amendment) (statute would "send a message over the wall of the ivory tower of higher education" that schools' "starry-eyed idealism comes with a price"); 140 CONG. REC. S8173 (daily ed. Jul. 1, 1994) (statement of Sen. Thurmond) ("It is not unfair to refuse to pay money to an institution which denies access to their facilities. It is just good business.").

Most of the legislative history supporting the enactment of the Solomon Amendment in 1994 consists of generalized assertions regarding the importance of recruiting, without supporting findings or evidence, such as statistics or surveys, showing a real need for the Solomon Amendment. *FAIR*, 390 F.3d at 225-27. The bill's co-sponsor, for example, asserted generally that the practice of many institutions of denying access to military recruiters under an anti-discrimination policy represented a threat to national security and that "[r]ecruiting is the key to an all-voluntary military." 140 CONG. REC. H3861 (daily ed. May 23, 1994) (statement by Rep. Solomon). Representative Goodlatte similarly stated that "[c]ampus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people." 142 CONG. REC. H5716 (daily ed. May 30, 1996) (statement of Rep. Goodlatte); *see also* 150 CONG. REC. H1705 (daily ed. Mar. 30, 2004) (statement of Rep. Cunningham) ("We have an all-

voluntary force, and to allow access on to our campuses is a good thing.").[8] But as the Third Circuit explained, "invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting." 390 F.3d at 245 (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 89 (1981)).

Other than commenting on the general desirability of on-campus recruiting, neither the sponsors nor the military proffered any evidence to show that the military was actually having trouble recruiting lawyers or college graduates, or that the Solomon Amendment would materially enhance the military's recruiting results. The Department of Defense itself actually ***objected*** to the

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[8] *See* 141 CONG. REC. E13 (daily ed. Jan 4, 1995) (statement of Rep. Solomon) ("I am told by the Pentagon that schools across the country are getting the message and preparing to accommodate recruiters rather than lose their precious funding. But to pick up the stragglers who are still not complying, further action is necessary.... Barring military recruiters is an intrusion on Federal prerogatives, a slap in the face to our Nation's fine military personnel, and an impediment to sound national security policy."); H.R. REP. 108-443, at 3 (Mar. 23, 2004) (accompanying Ronald Reagan Nat'l Defense Authorization Act, FY 2005, Pub. L. No. 108-375, 118 Stat. 1811) ("The committee believes that at no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs."); 151 CONG. REC. H316 (daily ed. Feb. 2, 2005) (statement of Rep. Kline) (exclusion of military recruiters "threatens to severely damage the ability of the military to recruit the highly qualified candidates necessary during a time of war"); 140 CONG. REC. E1127 (daily ed. Jun. 8, 1994) (statement of Rep. Bereuter) ("In banning military recruiters, the universities are making wholly inappropriate value judgments about the Armed Forces, and they undermine the absolutely essential efforts of the Armed Forces to recruit and retain the highest quality military force.").

proposed law as "unnecessary" and "duplicative" of earlier legislation that had enabled the Department to withhold its own funding from any institution that prohibited military recruiting on campus. *See* 140 CONG. REC. H3864 (daily ed. May 23, 1994). And in expanding the Solomon Amendment two years later in 1996, Representative Solomon merely repeated the asserted generalized "need" for the changes, without citing any evidence in support:

> [R]ecruiting is the key to our all-voluntary force, which has been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and to colleges, by informing young people of the increased opportunities that an honorable military career can provide . . . . That is why we need this amendment.

142 CONG. REC. H 6887 (daily ed. Jun. 26, 1996) (statement of Rep. Solomon).

Even more dramatically, Congress also heard no facts and considered no alternatives in the fall of 2004, when it passed H.R. 3966—the provision that amended the Solomon Amendment to require expressly that colleges and universities provide military recruiters with the same access and support they provide to private recruiters. Throughout the late 1990s, most law schools had provided the military with some form of limited access, and there was and is no reason to believe that those accommodations were inadequate for the military's recruiting needs. Yet without any reason to believe it was necessary, Congress proceeded to enact the most intrusive portion of the Solomon Amendment—the provision that requires schools to speak for, associate with, and host military employers just as they do employers who comply with the schools' non-discrimination policies.

The scope of the equal access provision itself confirms that it was intended to punish schools, rather than to serve a specific military need. If Congress had truly believed that recruiting on campus with the school's full assistance was critically important—and had no acceptable alternative—it would have compelled schools to allow the military to recruit on campus whether or not other employers were offered the same opportunity.

The only discussion of the 2004 equal access provision occurred in a single floor debate in the House of Representatives, and in a Committee on Armed Services Report. *See* 150 CONG. REC. H1695, H1702 (daily ed. Mar. 30, 2004); H.R. REP. 108-443 (Mar. 23, 2004). This discussion quite transparently revealed the true motivation behind the provision: a desire to "reestablish the pre-eminence of the military on our campuses across this country" and to address the district court's decision in this litigation, which questioned the Department of Defense's ability to demand equal access to campuses for military recruiters on penalty of withholding federal funds. 150 CONG. REC. H1706 (daily ed. Mar. 30, 2004) (statement of Rep. King) (specifically citing the instant case). As one skeptical member of Congress recognized, Congress never answered the question of, "Is this the best way to do it?," with regard to the equal access requirement. *Id.* at H1708 (statement of Rep. Abercrombie). Instead, the bill was "rammed through the Committee on Armed Services . . . without a single hearing" and no opportunity to debate. *Id.* at H1709 (statement of Rep. Meehan).[9]

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[9] Other members of Congress have acknowledged the lack of evidence or findings as to the necessity for the equal access provision. 150 CONG. REC. H1699 (daily ed. Mar. 30, 2004) (statement of Rep. Frank) ("[N]o one really believes and the military has not said, oh, we are being so hindered by these recruitment restrictions that we cannot get enough people. This is to penalize those institutions that are just standing up particularly for the principle of nondiscrimination and particularly for the principle that

Moreover, the only evidentiary material proffered in support of the 2004 "equal access" amendment consisted of a single letter from an official of the Department of Defense. H.R. REP. 108-443, pt. 1, at 7 (Mar. 23, 2004) (Letter from David S.C. Chu, Under Secretary of Defense, to Hon. Duncan L. Hunter, Chairman of Committee on Armed Services of Mar. 16, 2004). This letter, however, did not document any need for the equal access amendment to the statute. Instead, it railed against "some colleges and universities [that] remain intransigent or outright opposed to compliance." *Id.* The "particularly egregious" examples that it offered related not to military need, nor even to denied access, but rather to unwelcome protests: "[M]ilitary recruiters and prospective recruits have been forced to endure verbal abuse and harassment" at the hands of "gauntlets of taunting fellow students and faculty impeding the path" of potential recruits "to designated interview rooms." *Id.* Setting aside the question of protests, however —which the 2004 provision did not address—this letter did not even suggest that the military's recruiting effort was disadvantaged by the institutions' measures to accommodate military recruiting while adhering to their anti-discrimination policies.[10] Thus there is no reason to

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qualified members of their university communities ought not to be discriminated against and punishing them to reinforce an unfair policy hurts the military."); 150 CONG. REC. H1708 (daily ed. Mar. 30, 2004) (statement of Rep. Abercrombie) (issue deserved full discussion, which it had not had, and "some common sense, some common legislative sense" to address the issue "in a manner that will resolve it under constitutional methodology that is worthy of this body").

[10] *See also* 151 CONG. REC. H312 (daily ed. Feb. 2, 2005) (statement of Rep. McGovern) ("[T]here is no lack of access to for the military on America's campuses. Every university that wants an ROTC program has one. According to the *Wall Street Journal*, more than 52,000 college students are enrolled in ROTC programs, up from 48,000 in 2000. Many credit feelings of patriotism engendered by the September 11 attacks, and it comes as no surprise that military enlistment by college graduates has also increased since the events of September 11.").

believe that Congress actually concluded—or had any basis for concluding—that the access military recruiters were receiving before the "equal access" provision was inadequate to meet military recruiting targets.

In light of this history, it is apparent that Congress did not make any judgment at all about whether the Solomon Amendment's intrusions on schools were necessary or even beneficial to the military's recruiting efforts. And there is no reason to believe that Congress considered the question whether less burdensome measures—like the accommodations schools made for the military in the years before the "equal access" requirement—were insufficient to meet the military's needs. Thus even if some deference were appropriate in the context of a law that regulates the conduct of civilians in civilian space, Congress made no empirical judgments or considered choices to which this Court may defer.

## II. Regardless of deference, this Court cannot ignore the fact that neither the Government nor its amici have shown that the Solomon Amendment is necessary—and no broader than necessary—to serve a compelling military need.

Throughout this litigation, the Government has presented no evidence whatever showing that the Solomon Amendment is the least restrictive means to achieve a compelling interest, or—under the *O'Brien* analysis—that its intrusion on the rights of schools "is no greater than is essential" to serve the military's recruiting needs. *O'Brien*, 391 U.S. at 377. As the Third Circuit explained, "this is not a case where the Government has presented ***less*** evidence than might otherwise be required; here the Government has presented ***no*** evidence." 390 F.3d at 245 n.26 (emphasis in original); *see also id.* at 235 ("The Government has failed to proffer a shred of evidence that the Solomon Amendment

materially enhances its stated goal."). And the Government has not even argued that it cannot recruit effectively through alternative methods that would be less burdensome on the First Amendment rights of colleges and universities. *Id.* at 242.

Whether or not this is an appropriate case for deference, this Court cannot ignore the utter absence of factual justification—both in Congress and in this litigation—for a statute that intrudes so heavily on the rights of civilians. As discussed above, even in cases where this Court has noted that it would defer to the determinations of Congress in military affairs, it still must ensure that the constitutional rights of American citizens are protected. *See Rostker*, 453 U.S. at 70 ("Simply labeling the legislative decision 'military' . . . does not automatically guide a court to the correct constitutional result."). Indeed, in *Rostker*—upon which the Government and its amici rely as an instructive example of judicial deference in military affairs—this Court refused to change its constitutional analysis simply because the decision related to the military. *Id.* at 69 (rejecting the Government's argument that a sex-based classification in draft registration should be reviewed under only a rational basis standard). Thus, even after explaining that deference was appropriate in that case, the *Rostker* Court proceeded to assess the registration statute carefully in terms of Congress's purpose and the means it chose:

> This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. . . . The fact that Congress and the Executive have decided that women should

> not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.

*Id.* at 78-79. Here too, whether deference is appropriate or not, the Court must still meaningfully assess the purposes of Congress and the means it chose, and it cannot ignore the absence of factual evidence supporting that choice.

Without specific proof—either in the legislative history or in the record—it is far from reasonable to assume that the military has no alternative but to demand the assistance of law schools and universities for its recruiting efforts. As the Third Circuit observed, the military is different from other employers and has many options for recruiting:

> Unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

390 F.3d at 234-35 (footnote omitted).

With respect to the equal access requirement added to the Solomon Amendment in 2004, the Government's presumption of necessity is even more tenuous. Schools are required by law to provide the military with contact information for students (10 U.S.C. § 983(b)(2))—a requirement that obviously puts the military at a

tremendous advantage over other employers in terms of the ability to contact students directly. Particularly in light of that requirement, there is no reason whatever to suppose that the military needs the same sort of access and support from colleges and law schools as would an employer that may not be able to contact students directly.

It is also far from reasonable to assume that this Nation's armed services require the same kind of introduction to students as would a small law firm or a firm in a distant city—about which students may be completely unaware. And even if a particular group of students may be unaware that the military offers employment opportunities in their chosen field, there is no reason to conclude that a mailing, a poster, or a campus newspaper advertisement would not be sufficient to alert them. Many new lawyers may be predisposed to seek out military service after law school because they or members of their families have served previously, either in the active military or in the Reserve Office Training Corps. The Army, for example, has a program through which active duty commissioned officers may attend law school "at government expense if funding permits."[11] For these lawyers, there is no reason to believe that on-campus recruiting would make any difference at all.

Further, once students have been made aware of the opportunities for military service in their respective fields, it is unlikely that having to conduct the interviews themselves at a different location would materially impair the results of the military's recruiting effort. Off-campus recruiting may even be beneficial to the military, as the Third Circuit noted, in that it removes potential recruiters and recruits from the protests that often accompany military recruiters when they

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[11] *See* ArmyStudyGuide.com, Army Programs: The Funded Legal Education Program, *available at* http://www.armystudyguide.com/programs/info/flep.htm.

actually conduct their interviews on campus. *See* 390 F.3d at 245.

Evidence in the record underscores the lack of any need for the "equal access" amendment in 2004. From the time that the Solomon Amendment was enacted in 1994 until 2001, when the military began to demand "equal access," military recruiting did not suffer from law schools' refusal to give the military the exact same access it would give to other employers. Indeed, military recruiters routinely thanked law schools for the access and assistance they were granted and marveled at having to turn qualified applicants away. *See, e.g.*, Letter from Steven H. Levin, U.S. Army Judge Advocate Recruiting Officer, to Irene Dorzback, Assistant Dean of New York University School of Law (Nov. 3, 1998), *at* J.A. at 169. ("Competition has become very keen in the past few years for both our intern and our JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position.").

In briefing in this Court, various amici have attempted to fill the void in the record left by the Government's failure of proof, though only with anecdotal and similarly conclusory evidence.[12] ***None*** of this evidence supports the conclusion that the military has no effective alternatives for recruiting—or in other words, that forcing colleges and universities to host, support, and speak for military recruiters is necessary for the military to meet its needs.

For example, the Judge Advocates Association asserts that the on-campus interview "is the most critical part of the Judge Advocate recruiting process,"(Brief of Amici Curiae Judge Advocates Association at 10-11 [hereinafter "Judge

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[12] *See, e.g.*, Judge Advocate's Br. at 5-20, 24-30; Eagle Forum Br. at 8-10, 15-16; Pombo Br. at 10-12; Brief of Amici Curiae Adm. Charles S. Abbott et al. at 7-10, 14-20, 27-30 A1-A10.

Advocate's Br."] (citing Declaration of Rear Admiral Jeffrey L. Fowler, U.S. Navy)), which was submitted in support of the Government's application for a stay of the Third Circuit's decision.[13] At most, however, this Declaration indicates that more than 50% of the Navy JAG Corps' new hires each year "had their first meeting with Navy personnel during an on-campus interview." *Id.* at 16 (quoting Rear Admiral Jeffrey L. Fowler, U.S. Navy). It does not establish that these applicants would not have joined Navy JAG without an on-campus interview or that the Navy had no other way to reach these students.

For all these reasons, there is no reason to conclude that the Solomon Act is "essential"—or even beneficial—to military recruiting. Indeed, the lack of evidence presented by the Government on this point further supports the conclusion that the Solomon Amendment was the result of rhetoric, rather than real military need. And without a real and compelling justification for the Solomon Amendment's intrusion on First Amendment liberties, it cannot be upheld.

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[13] Although the Judge Advocates Association also relies on other declarations of military officers, those declarations are no more specific and similarly do not provide evidence in support. *See* Judge Advocate's Br. at 12 (quoting Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps) ("'Access to law students that is inferior to that provided other employers precludes the [military] from being able to reach potentially interested students in the manner that is most convenient and attractive to the students.'"); *Id.* at 13 (citing Declaration of Major General Thomas J. Romig, U.S. Army) (refusal to enforce the Solomon Amendment will "ultimately result in accession of less talented Judge Advocates"); *Id.* (citing Amended Declaration of Major General Jack L. Rives, U.S. Air Force) ("Each year the United States Armed Forces must recruit hundreds of Judge Advocates in order to effectively defend the nation"); *Id.* at 19 (quoting Declaration of Under Secretary of Defense for Personnel and Readiness Dr. David S. C. Chu) ("'Developing, funding, and implementing alternative methods of recruiting would unavoidably take time, and we do not have the luxury of living with impaired recruiting capabilities while the process plays out.'"); Rear Admiral Jeffrey L. Fowler, United States Navy) ("[T]he on-campus interview . . . is the most critical part of this process.").

## CONCLUSION

For all the reasons discussed above and in the Respondents' briefs, the judgment of the Third Circuit should be affirmed.

Respectfully submitted.

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