UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STUDENT MEMBERS OF SAME, (STUDENT/FACULTY ALLIANCE FOR MILITARY EQUALITY), et al., Plaintiffs,	)	
v.	)	Civil Action No. 3:03CV01867(JCH)
DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense, Defendant.	)	Dated: January 15, 2004

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant Donald H. Rumsfeld, in his official capacity as United States Secretary of Defense, by and through undersigned counsel, hereby moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). This Court lacks jurisdiction to hear plaintiffs' claims, and, in any event, plaintiffs' constitutional challenges fail to state claims for which relief can be granted. The reasons supporting this motion are set forth in more detail in the accompanying Memorandum of Law and attached exhibits.

THEREFORE, defendant respectfully requests that the instant motion be GRANTED and that this action be DISMISSED.

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED

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Dated: January 15, 2004

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs bring this case to challenge the constitutionality of an Act of Congress commonly known as the Solomon Amendment, 10 U.S.C. § 983(b), as it has allegedly been applied to Yale Law School by the United States Department of Defense ("DOD" or "defendant"). The Solomon Amendment, by its terms, bars certain federal agencies from providing federal funds to institutions of higher education that prohibit, or effectively prevent, the military from recruiting on their campuses.

Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform," Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.), and the "best teaching of th[e] Court's experience admonishes [the judiciary] not to entertain constitutional questions in advance of the strictest necessity," Parker v. Los Angeles County, 338 U.S. 327, 333 (1949). The Complaint here suffers from a series of defects that deprive this Court of jurisdiction and, in any event, require dismissal of plaintiffs' constitutional challenges on the merits.

To begin with, the Solomon Amendment does not apply to the plaintiff law student organizations; it applies to law *schools* and other institutions of higher education. It is Yale Law School and its parent institution Yale University – neither of which is a party to this action – that are directly affected by the funding restrictions established by the Solomon Amendment, and it is those institutions that must decide whether to comply with the statute in order to receive federal funds. Plaintiffs therefore have failed to establish that they have suffered a constitutionally meaningful injury-in-fact, or that the harms of which they complain are fairly traceable to the statute or DOD's actions. Moreover, as a prudential matter, plaintiffs may not bring suit on behalf of the absent Yale University and its law school. Plaintiffs' Complaint, therefore, must be dismissed for lack of standing, particularly given that the standing inquiry must be "especially

rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-820 (1997).

Even if plaintiffs were able to overcome these standing hurdles, dismissal of their Complaint would nonetheless be warranted. Plaintiffs' claims are not ripe. Although plaintiffs challenge DOD's interpretation and application of the Solomon Amendment with respect to Yale Law School – in particular, DOD's alleged conclusion that the statute requires military access that is equal to that afforded to other employers – the fact is that DOD has never reached any final determination regarding the Law School's or University's compliance with the Solomon Amendment. What plaintiffs challenge is nothing more than a staff level interpretation of the Act that has yet to be adopted by the DOD official designated to make determinations under the Solomon Amendment. Indeed, as part of his decision-making process, that official is engaged in on-going communications directly with Yale University concerning the military's access to Yale students. Thus, there has been no "final agency action" as required by both the ripeness doctrine and the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

Plaintiffs' First Amendment challenges, moreover, fail to state claims upon which relief can be granted. The doctrine of unconstitutional conditions, invoked by plaintiffs, has no possible application here because the Solomon Amendment imposes conditions only upon law *schools* (and other academic institutions), not upon the plaintiff student organizations or their members. In any event, the Solomon Amendment is a valid exercise of Congress' Spending Clause authority, and the conditions imposed by the statute have nothing to do with speech. They are merely a prohibition on discrimination against the military in student recruiting activities. The statute in no way prohibits plaintiffs (or law schools, law faculty, law school

organizations, or law students generally) from speaking out against and even vigorously protesting Congress' policy choices regarding service in the armed forces. And even to the extent the Solomon Amendment can be deemed to affect both conduct and speech, the statute passes constitutional muster because the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The Solomon Amendment, moreover, does not represent content-based regulation of speech. For these reasons, the only prior court to have addressed the constitutionality of the Solomon Amendment has concluded that it passes First Amendment muster. See Forum for Academic & Institutional Rights, Inc. v. Rumsfeld, — F. Supp. 2d —, Civ. No. 03-4433 (JCL), 2003 WL 22708576, at *23-46 (D.N.J. Nov. 5, 2003) (hereafter "FAIR"), *on appeal*, No. 03-4433 (3d Cir.).

Finally, plaintiffs' due process and equal protection cause of action should be rejected because plaintiffs have failed to identify any recognized substantive due process right that is implicated by enforcement of the Solomon Amendment or how the mere presence of military recruiters on campus infringes any student's equal protection rights. For all these reasons, plaintiffs' Complaint should be dismissed.

BACKGROUND

A. Military Recruiting and the Solomon Amendment

The Constitution authorizes Congress to "provide for the common Defence and general Welfare of the United States," to "raise and support Armies," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, § 8, clauses 1, 12, 18. Congress has long recognized the importance of the military's ability to recruit in order to maintain the United States' Armed Forces. See, e.g., 10 U.S.C. § 503(a)

(directing branches of the military to "conduct intensive recruiting campaigns to obtain enlistments"). Since the Vietnam War, however, Congress has confronted "disaffection" with regard to the military among some students and faculty at institutions of higher learning that impairs the ability of the military to recruit. See generally H.R. Rep. No. 1149, 92d Cong., 2d Sess. 79 (1972). Periodic reductions in military spending have compounded this problem, making the recruitment of "the most highly qualified candidates from around the country . . . even more important." 141 Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995).

Congress has taken a variety of steps over the years to remedy the problem. To encourage educational institutions to open their campuses to military recruiters, Congress has included amendments to several appropriations acts that prohibited the distribution of certain federal funds to institutions of higher learning that barred military recruiters from their campuses. See, e.g., Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972); Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905, 914 (1970); National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968).

As recently as 1995, the restrictions on federal funding in this regard were limited to Department of Defense funds. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A., Title V, § 558, 108 Stat. 2663, 2776 (1994). On January 4, 1995, however, in response to the continued refusal of many institutions to allow the military to recruit on their campuses, Congressman Gerald B.H. Solomon introduced the Military Recruiter Campus Access Act, which expanded the funding restriction to include funding from other agencies as well. See 141 Cong. Rec. E13-01 (statement of Rep. Solomon) (Jan. 4, 1995). The stated purpose of the proposed legislation was to further discourage educational institutions from

closing their campuses to military recruitment and thereby "interfering with the Federal Government's constitutionally mandated function of raising a military." Id.

Congress enacted Congressman Solomon's proposed legislation as part of the Omnibus Consolidated Appropriations Act of 1997. The Solomon Amendment provided that any "covered educational entity" that prevented access by military recruiters to campuses, students, or student information risked not only Department of Defense funding, but all funds available from the Departments of Labor, Health and Human Services, Education, and any related agency. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271 (1996).

Following the most recent Congressional changes in 1999, the statute now prohibits the provision of these funds by contract or grant to an institution of higher education, including any subelement of that institution, if the Secretary of Defense determines that the institution, or any subelement of the institution, has a policy or practice that prohibits, or in effect prevents, military recruiting on campus. See National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Title V, § 549(a)(1), 113 Stat. 609 (October 5, 1999). Specifically, the statute now provides, in its current form, and in relevant part:

> **(b) Denial of funds for preventing military recruiting on campus**.– No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents–
>
>> (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

> (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):
>
> (A) Names, addresses, and telephone listings.
>
> (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

10 U.S.C. § 983(b).[1] The Solomon Amendment includes an exception from its requirements where an "institution of higher education . . . has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

The Department of Defense has promulgated regulations implementing the Solomon Amendment (among other Acts). See 63 Fed. Reg. 56,819 (Oct 23, 1998); 65 Fed. Reg. 2056 (Jan. 13, 2000). The regulations are set forth at 32 C.F.R. Part 216.

B. Proceedings

On October 30, 2003, two students organizations at Yale Law School filed the Complaint in this case, challenging the Solomon Amendment and its alleged application to Yale Law School by DOD.[2] According to the Complaint, in 1978, Yale Law School amended its formal written

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[1] The funds described in subsection (d)(2) include funds made available for the Departments of Defense and Transportation, as well as those in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act. See 10 U.S.C. § 983(d)(2). The Solomon Amendment also applies to funds from the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, Title XVII, §§ 1704(b)(1),(g), 116 Stat. 2314-16 (2002). Furthermore, in the Department of Defense Appropriations Act of 2000, Congress specified that "[d]uring the current fiscal year and hereafter, any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs may be used for the purpose for which the grant is made without regard to any provision to the contrary in . . . [the Solomon Amendment]." Pub.L. 106-79, Title VIII, § 8120, 113 Stat. 1260 (Oct. 25, 1999).

[2] Two weeks earlier, individuals allegedly constituting the majority of the faculty

(continued...)

non-discrimination policy to prohibit discrimination on the basis of sexual orientation. Compl. ¶¶ 2, 24. Employers who refuse to certify their compliance with the non-discrimination policy are barred from school-sponsored recruiting services. Id. ¶ 25. In light of Congress' policy concerning homosexual conduct in the Armed Forces, see 10 U.S.C. § 654, DOD has allegedly refused to sign the required assurances of non-discrimination. Compl. ¶ 27. Accordingly, since 1978, military recruiters have been denied the use of Yale Law School's Career Development Office ("CDO"). Id. ¶ 25. Plaintiffs contend, however, that the Law School has offered the military other assistance in its recruitment efforts, such as the option to meet with students or groups of students at any student's request. Id. ¶ 27.

Plaintiffs claim that, since 2002, the military has insisted that it be given access to the facilities of the CDO equal to the access granted to other employers, despite DOD's failure to assure its compliance with the non-discrimination policy. Id. ¶ 30. Moreover, plaintiffs allege, DOD has threatened to deprive Yale University of approximately $300 million of annual federal funding unless such access is granted. Id. ¶ 31. In response, Yale Law School has, since the fall of 2002, temporarily suspended the requirement that the military subscribe to the non-discrimination pledge as a condition of access to CDO services. Id. ¶ 34.

Based on the foregoing allegations, plaintiffs contend: (1) that the "coercive" effect of the Solomon Amendment and its application by DOD infringes their First Amendment right "not to endorse or associate with employers" who refuse to subscribe to the non-discrimination policy, id. ¶¶ 40-44; (2) that the Solomon Amendment's exception in 10 U.S.C. 983(c)(2) for schools

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[2](...continued)
members of Yale Law School brought their own challenge to the Solomon Amendment, Robert A. Burt, et al. v. Donald H. Rumsfeld, No. 3:03CV01777 (JCH). DOD has filed an unopposed motion to consolidate the Burt and SAME matters for all purposes. That motion is pending before the Court.

that exclude military recruiters for "pacifism based on historical religious affiliation" constitutes viewpoint discrimination in violation of the First Amendment, id. ¶¶ 46-47; (3) that the Solomon Amendment violates the Fifth Amendment due process and equal protection rights of gay and lesbian students, id. ¶¶ 49-50; and (4) that DOD's interpretation of the Solomon Amendment as applied to Yale Law School and Yale University is unlawful and inconsistent with the statute, id. ¶¶ 36-38. In terms of relief, plaintiffs seek a declaratory judgment that the Yale Law School policies in effect prior to September 2002 did not violate the Solomon Amendment, and, in the alternative, a declaration that the Solomon Amendment and DOD's application of the Solomon Amendment to Yale Law School are unconstitutional under the First and Fifth Amendments. Id. at p. 19. Plaintiffs further seek to enjoin DOD from terminating or threatening to terminate any federal funding to Yale Law School or Yale University, or "attempting otherwise to enforce the Solomon Amendment" against Yale University. Id.

STANDARDS

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a court to dismiss a claim for lack of subject matter jurisdiction. Where a challenge to a court's subject matter jurisdiction is made pursuant to Rule 12(b)(1), it is the burden of the party seeking to invoke the power of the court to establish that the relevant jurisdictional requirements are satisfied. Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003). In addition, when considering a Rule 12(b)(1) motion, a court "may refer to evidence outside the pleadings." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a court to dismiss an action for failure to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion, the court "must accept the factual allegations of the complaint as true and must draw all

reasonable inferences in favor of the plaintiff." Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). Dismissal for failure to state a claim is appropriate only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

Article III, § 2, of the Constitution "extends the 'judicial power' of the United States only to 'Cases' and 'Controversies.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). The "case or controversy" requirement serves to "define[] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and "[t]he several doctrines that have grown up to elaborate that requirement are 'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

The Article III requirement that a litigant have "standing" to invoke the power of a federal court is "perhaps the most important of these doctrines." Id. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth, 422 U.S. at 498. A plaintiff must satisfy three requirements to establish standing. "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" Steel Co., 523 U.S. at 103. (citation omitted). "Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." Id.

In addition to these Article III requirements, the standing doctrine also contains certain prudential requirements – or judicially self-imposed limits – on the exercise of federal jurisdiction. Of relevance here, these prudential considerations include "the general prohibition on a litigant's raising another person's legal rights." Allen, 468 U.S. at 751.

At the pleading stage, "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" Renne v. Geary, 501 U.S. 312, 316 (1991) (citation omitted). Moreover, the standing inquiry must be "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines, 521 U.S. at 819-20. Plaintiffs here have not established either constitutional or prudential standing.

A. Plaintiffs Have Failed To Allege A Cognizable Injury In Fact

To qualify as an injury in fact, an "alleged injury must be legally and judicially cognizable." Raines, 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Moreover, the injury or threat must be "both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted). Plaintiffs' alleged injuries plainly fail to satisfy these requirements.

Plaintiffs' primary assertion of injury is that "they have chosen to be a part of an association [Yale Law School] that rejects the message of discrimination," yet are now being "force[d] . . . to adopt [that] message." Compl. ¶¶ 40-41. But, in fact, plaintiffs are not forced to "adopt" any message. Regardless of what conditions the Solomon Amendment may impose on

federal funding or what decisions Yale Law School makes with respect to military recruiting, plaintiffs are free to reject the notion that discrimination against homosexuals should be tolerated. Plaintiffs have not been forced to abandon this notion or forego expressing it even though Yale Law School has temporarily allowed military recruiters access to CDO services. Moreover, plaintiffs cannot claim constitutional injury merely because they chose to attend Yale Law School as an endorsement of particular "messages" implicit in the school's policies and the school has since suspended those policies. A student's decision to attend a particular school does not somehow rise to the level of constitutionally protected expression; otherwise, state universities would be unable to amend or repeal their policies without violating the First Amendment rights of students who might endorse those policies.[3] In addition, at least some of plaintiffs' members (who include first-year law students) presumably chose to attend Yale Law School after the suspension of the non-discrimination certification requirement in the fall of 2002.

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[3] Although plaintiffs allege that they are "recipients" of the Law School's non-discrimination message, Compl. ¶ 5, they do not appear to assert any First Amendment injury to a "right to receive" that message, see id. ¶¶ 40-44. Nor would they have standing to raise any such claim. The cases in which the courts have found a constitutional right to receive information involved government defendants who "sat directly astride the channel of communication, restricting the flow of information." Gregg v. Barrett, 771 F.2d 539, 548 (D.C. Cir. 1985). See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (school board ordered the removal of books from a public library); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (state prevented the dissemination of drug price information to customers); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (government forbid foreign journalist from entering the United States and speaking to American academics). Here, in contrast, the Solomon Amendment does not prevent any individual from speaking, but only provides that schools that deny military recruiters access to students must forego federal funding. Thus, at most, plaintiffs could argue that the presence of military recruiters on campuses *indirectly* interferes with their ability to receive a message of non-discrimination. Any such "theory of indirect interference with free speech [is] an impermissible expansion of the right to receive information doctrine." Gregg, 771 F.2d at 548.

Plaintiffs' other principal claim of injury – that they are being "singled out for uniquely prejudicial treatment based solely on their status as gay men and lesbians," Compl. ¶ 50 – lacks any actual foundation. Based on the Complaint, it appears that the principal real-life consequence of DOD's alleged application of the Solomon Amendment to Yale Law School is that military recruiters have been permitted to attend CDO events. But neither the Equal Protection Clause nor the Due Process Clause is violated merely because gay and lesbian students might, at recruiting events, come in contact with persons expressing views that they find repugnant. Indeed, plaintiffs' claim amounts to an allegation that they have suffered some stigmatic or dignitary injury as a result of government action. Federal courts have flatly rejected the argument that such an injury, without some concrete personal harm, is sufficient to confer standing. See, e.g., Allen, 468 U.S. at 755 (claim of noneconomic, stigmatizing injury accords a basis for standing only to those persons who are personally impacted by challenged discriminatory conduct); Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes."); Am. Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986) ("To be made indignant by knowing that the government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit."). As the Supreme Court explained in Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982), the "psychological consequence presumably produced by observation of [government] conduct with which one disagrees" is not a personal injury for purposes of standing.

In fact, one court to have considered a similar challenge to the Solomon Amendment by law students recommended dismissal of that action for lack of standing. In Alliance of Lesbian,

Gay, Bisexual, Transgendered & Straight Students v. Cohen, No. 1:99-CV-34, slip op. at 1 (D. Vt. Nov. 10, 1999) (attached hereto at Tab 1), student groups from the Vermont Law School alleged that the Solomon Amendment "coerced" the law school into allowing military recruiters on campus. The court recommended that the case be dismissed, finding that none of the plaintiffs had identified "'any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" Id. (quoting Valley Forge, 454 U.S. at 485).[4]

In any event, even if psychological or stigmatic harm could somehow confer standing for plaintiffs' equal protection claim – which it cannot – it would still be insufficient to establish plaintiffs' standing to pursue any Fifth Amendment due process claim. As noted above, standing requires an alleged injury to a "*legally protected* interest." Lujan, 504 U.S. at 560 (emphasis added). It is axiomatic, however, that "[s]ubstantive due process protects only those interests that are 'implicit in the concept of ordered liberty.'" Local 342, Long Island Public Service Employees, UMD, ILA, AFL-CIO v. Town Bd. of Town of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Indeed, "where the alleged right . . . cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental, notions of substantive due process will not apply." Id. (internal quotation marks and citation omitted). The Supreme Court has emphasized that "the doctrine of judicial self-restraint" requires courts "to exercise the utmost care whenever [they] are asked to break new ground" in the field of substantive due process. Collins v. City of Harker Heights, 503 U.S.

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[4] The plaintiffs in Alliance of Lesbian, Gay, Bisexual, Transgendered & Straight Students voluntarily dismissed their suit following the Report and Recommendation issued by Magistrate Judge Niedermeier.

115, 125, (1992)). This is "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Id.

Here, plaintiffs have not even clearly described the nature of the due process right they claim to have been infringed. Whatever that right may be, however, it undoubtedly strays far afield from established due process rights, which traditionally involve "'the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life.'" Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979) (quoting Kelley v. Johnson, 425 U.S. 238, 244 (1976)) (citing Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923)). The law school recruiting process at issue here bears little resemblance to the more intimate and personal contexts in which due process rights have previously been recognized. Accordingly, plaintiffs have not identified a "legally and judicially cognizable" due process injury that can give rise to standing. Raines, 521 U.S. at 819.

As a final matter, to the extent that plaintiffs are purporting to rest their standing on the allegation that certain of their members receive financial aid under the Federal Perkins Loan Program, plaintiffs' claim of injury is insufficient. First, given that the non-discrimination certification requirement has been suspended and that, as discussed in Part II below, DOD has not yet made any determination concerning Yale's compliance with the Solomon Amendment, plaintiffs are not in any "real and immediate" danger of losing any financial aid. See City of Los Angeles, 461 U.S. at 102. Second, and more importantly, the Perkins Loan Program (through which educational institutions receive funds for student aid) is not even affected by the Solomon Amendment. Congress has specified that "any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs

may be used for the purpose for which the grant is made without regard to any provision to the contrary in . . . [the Solomon Amendment]." Pub.L. 106-79, Title VIII, § 8120, 113 Stat. 1260 (Oct. 25, 1999).

B. Plaintiffs Have Failed To Establish Causation

Even if plaintiffs could satisfy their burden of alleging facts establishing that they have personally suffered cognizable injuries, they would nevertheless have to show that those injuries are "fairly . . . traceable to the challenged action of the *defendant*." Lujan, 504 U.S. at 560 (emphasis added, citation omitted). Article III is not satisfied where the causation between defendant's illegal conduct and the injury is "too attenuated," Matter of Appointment of Indep. Counsel, 766 F.2d 70, 74 (2d Cir. 1985), where the harm alleged is the "'result of the independent action of some third party not before the court,'" Lujan, 504 U.S. at 560 (citation omitted), or where the alleged injury is wholly self-inflicted, see St. Pierre v. Dyer, 208 F.3d 394, 402 (2d Cir. 2000). Moreover, as the Supreme Court has observed, standing is "'substantially more difficult to establish'" when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*." Lujan, 504 U.S. at 562 (citations omitted).

Plaintiffs here allege that DOD's application of the Solomon Amendment to Yale Law School has "forced" Yale to abandon its requirement that recruiters subscribe to the non-discrimination policy, and this abandonment has, in turn, has caused plaintiffs' injuries. Compl. ¶ 7. But under the plain terms of the Solomon Amendment, academic institutions are not "forced" to do anything. Rather, they are given "a choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid the necessity of abiding by those requirements)." O'Brien v. Massachusetts Bay Transp. Auth., 162 F.3d 40, 43 (1st Cir. 1998). Properly understood, therefore, plaintiffs' injuries arise

out of Yale's "independent choice[]" to accept federal funds along with the attendant conditions imposed by the Solomon Amendment; the injuries are thus not "*necessary* product[s] of the challenged legislative scheme." Garelick v. Sullivan, 987 F.2d 913, 920 (2d Cir. 1993) (emphasis added). Yale's decision, in other words, amounted to an "independent act breaking the chain of causation between the challenged actions of [the government] and the injury to the plaintiffs." City of Detroit v. Franklin, 4 F.3d 1367, 1373-74 (6th Cir. 1993) (plaintiffs lacked standing to challenge federal census data based on injury resulting from state's decision to rely on that data); see also DeBolt v. Espy, 47 F.3d 777, 781-82 (6th Cir. 1995) (plaintiff lacked standing to challenge federal housing program that allegedly encouraged private developers to build only certain types of housing where developers were the more direct cause of alleged injury).

Neither the Supreme Court's decision in Bennett v. Spear, 520 U.S. 154 (1997), nor the Second Circuit's decision in Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621 (2d Cir. 1989), compel a contrary conclusion. In Bennett, the Supreme Court held that petitioners had standing to challenge a biological opinion issued by the Fish and Wildlife Service where the harm that petitioners suffered resulted most directly from action by the Bureau of Reclamation in compliance with the biological opinion. While noting that the Bureau of Reclamation, which was not a party to the action, was "technically free to disregard the Biological Opinion and proceed with its own proposed action," the Court emphasized that the Bureau would do "so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment." 520 U.S. at 170. Thus, the Court held that the petitioners had properly alleged that their injury was "fairly traceable" to the biological opinion of the Fish and Wildlife Service. Id. at 170-71.

In contrast to Bennett, in which the danger of criminal sanction virtually compelled the Bureau of Reclamation's action, the analogous third party here – Yale – was faced only with the type of *choice* that is common in Spending Clause cases – accept federal funds and allow access to military recruiters on campuses, or decline to accept those funds and freely discriminate against military recruiters. See, e.g., Rust v. Sullivan, 500 U.S. 173, 199 n.5 (1991) ("Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidies."); South Dakota v. Dole, 483 U.S. 203, 209 (1987) ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans . . . is not unusual"); Grove City College v. Bell, 465 U.S. 555, 575 (1984) (recipient of federal funds "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). Unlike the action of the Bureau of Reclamation in Bennett, Yale's decision was entirely voluntary and subject to its own discretion; no threat of criminal sanctions loomed.[5]

In Fulani, the Second Circuit found that a minor party candidate for President who claimed injury due to her exclusion from the presidential debates had standing to challenge the IRS's grant of tax exempt status to the debate sponsor. 882 F.2d at 628. Because under Federal Election Commission rules tax exempt status was a prerequisite for debate sponsorship, the court noted that "*[b]ut for* the government's refusal to revoke the League's tax-exempt status, then, the League, as a practical matter, would have been unable to sponsor the allegedly partisan debates which caused the injury of which Fulani complains." Id. at 623-24. The court did not, however,

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[5] Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), which was relied upon by the court in FAIR, 2003 WL 22708576, at *19, is similarly distinguishable. That case, like Bennett, involved injury, not as a result of independent choices by third parties, but as a result of third party conduct that was driven by the threat of criminal sanctions. 215 F.3d at 358-59.

adopt "but for" causation as the applicable standard for analyzing traceability. Nor did it preclude the possibility that in other cases the presence of contributing causal factors could defeat traceability even where a defendant's action was one cause of a plaintiff's injury. Indeed, the court distinguished Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), on the ground that in that case the presence of other causal factors undermined plaintiff's ability to trace its injury to an organization's tax exempt status, whereas in Fulani, the causal chain was "far more clearly drawn." Fulani, 882 F.2d at 628 n.5; see also id. at 630-31 (Cardamone, J., concurring) ("Invocation of more than the phrase 'but for' is needed to link plaintiff's injury to the defendant's conduct.").

Here, Yale's decision to accept federal funds conditioned on compliance with the Solomon Amendment constituted an independent causal factor with respect to the injury alleged by plaintiffs. While plaintiffs may not have been injured "but for" the Solomon Amendment, it is equally true that the Solomon Amendment alone – without a desire by Yale for funding and its voluntary actions to obtain that funding – would have resulted in no injury to plaintiffs at all. See Fulani v. Brady, 935 F.2d 1324, 1329 (D.C. Cir. 1991) ("[A]n injury will not be 'fairly traceable' to the defendant's challenged conduct . . . where the injury depends not only on that conduct but on independent intervening or additional causal factors."). Thus neither Bennett nor Fulani allows attribution of plaintiffs' alleged injuries to the government, rather than to Yale.

C. Plaintiffs May Not Assert The Rights Of The Absent Law School And University

As set forth above, the doctrine of standing also contains a prudential requirement that a plaintiff cannot base its claim for relief on the legal rights or interests of third parties that are not parties to the litigation. See, e.g., Allen, 468 U.S. at 751. Thus, "[e]ven when a case falls within the[] constitutional boundaries [of Article III], a plaintiff may still lack standing under the

prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979). Two policies justify this limitation:

> [F]irst, the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights.

Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (plurality opinion) (internal citation omitted).

The lawsuit here cannot be squared with this prudential limitation on standing. Not only does the Solomon Amendment itself apply only to institutions of higher education, rather than to student organizations or their members, but plaintiffs here have expressly relied on the interests of Yale University and Yale Law School in asserting their claims. The essence of their "Statutory Construction" claim, for example, is that DOD has "impermissibly broadened the scope of the [Solomon Amendment] . . . by interpreting it to require the *Law School* to grant the military access to the fall and spring interview programs" and has "improperly concluded . . . that *Yale University* as a whole . . . can be denied all federal funding." Compl. ¶¶ 37-38 (emphases added). Similarly, plaintiffs allege that "the Solomon Amendment . . . constitutes impermissible viewpoint discrimination because it punishes . . . *law schools* not wishing to associate with the military based on principles of non-discrimination." Id. ¶¶ 47 (emphasis added)

Whatever their views may be, Yale Law School and Yale University, both which are sophisticated entities, surely are the best proponents of their own rights with respect to the Solomon Amendment's impact on them. Even assuming that Yale student organizations suffer some injury here (whether cognizable or not), they have no place serving as Yale's proxy where

the school itself is capable of, but has refrained from, asserting its own claim. See Powers v. Ohio, 499 U.S. 400, 411 (1991) (limited exception to the prudential bar on third-party standing applies where, inter alia, there is "some hindrance to the third party's ability to protect his or her own interests."). Allowing plaintiffs here to challenge a legal regime to which they are not even subject would undermine the core purpose of the prudential standing doctrine.

II. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOT RIPE

A further jurisdictional bar to plaintiffs' claim is the ripeness doctrine. This doctrine

> is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)). In determining whether a matter is ripe, courts examine "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" Id. at 733 (quoting Abbot Labs., 387 U.S. at 149). In the Second Circuit, relevant factors include:

> (1) whether the issue to be reviewed is more legal or factual in nature, (2) whether the agency action is likely to have an immediate and substantial impact upon the complaining party, (3) whether judicial review would delay or impede effective enforcement of the relevant administrative scheme, (4) whether the agency's actions are final, and (5) whether an adequate factual record has been established.

Able v. United States, 88 F.3d 1280, 1289-90 (2d Cir. 1996). Consideration of these factors here leads clearly to the conclusion that this matter is not ripe for adjudication.

As an initial matter, there has been no final agency action in this matter. Plaintiffs challenge the Solomon Amendment as it has been interpreted and applied with respect to Yale Law School. But the fact is that DOD has not finally and authoritatively staked out any position

with regard to the application of the Solomon Amendment to Yale. The Solomon Amendment specifically provides that a cut-off of funding may occur only "if the Secretary of Defense determines that [an] institution (or any subelement of that institution) has a policy or practice . . . that either prohibits, or in effect prevents" access to students for recruiting purposes. See 10 U.S.C. § 983(b). By regulation and directive, the Secretary's power to make this determination has been delegated to the Principal Deputy Under Secretary of Defense for Personnel and Readiness (the "Principal Deputy"). See 32 C.F.R. § 216.5(a) (empowering the Assistant Secretary of Defense for Force Management Policy to make a "final determination" under the Solomon Amendment); DOD Directive 5124.8 ¶ 1.2 (assigning to the Principal Deputy the functions previously assigned to the Assistant Secretary of Defense for Force Management Policy) (attached hereto at Tab 2).

Here, although plaintiffs allege that DOD has demanded access at Yale Law School equal to that granted to other employers and that DOD has opined that Yale Law School was in violation of the Solomon Amendment, Compl. ¶¶ 30, 38, the Principal Deputy – the relevant decision-maker – has taken no such position. Indeed, the Principal Deputy has taken no position at all as to either the proper interpretation of the Solomon Amendment and DOD's implementing regulations or Yale's compliance. In fact, the most recent correspondence from DOD cited in the Complaint is a May 29, 2003, letter, not from the Principal Deputy, but from a subordinate (the Acting Deputy Under Secretary of Defense (Military Personnel Policy)) which stated that only he "intend[ed]" to "recommend" to the Principal Deputy that Yale University be determined ineligible for funding. See Declaration of William J. Carr (attached hereto at Tab 3), ¶ 1 & Ex. A at 5. Since that May 29, 2003, letter, Yale University administrators and the Principal Deputy himself have not only traded direct written communications concerning Yale's compliance with

the Solomon Amendment, but have also had a face-to-face meeting at the Principal Deputy's office.[6] See Carr Decl., ¶¶ 2-4 & Exs. B, C at 1, D. In fact, the contacts between Yale and the Principal Deputy are on-going. The Principal Deputy's most recent letter to Yale, in which he requested specific information concerning military recruiters' access at Yale Law School as an aid to his decision-making, was mailed less than one month ago. See Carr Decl. ¶ 4 & Ex. D. The Principal Deputy is presently awaiting a response from Yale. Carr Decl. ¶ 5.

In these circumstances, final agency action is plainly not present. The Supreme Court has held that "two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). In this case, given the pendency of this matter before the Principal Deputy and his specific request for more information from Yale, DOD's decision-making process clearly has not been "consummat[ed]." See id. Regardless of what tentative and interlocutory positions may have been taken by a subordinate DOD official in earlier communications – including the position that the Solomon Amendment requires "equal access" – those communications do not represent the DOD's final and fixed opinion on the Solomon Amendment or Yale's compliance with it. See Dalton v. Specter, 511 U.S. 462, 469-470 (1994) (recommendations by commission appointed by President and by Secretary of Defense concerning military base closures, where closures would

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[6] The fact that Yale's administrators, rather than its students, have represented Yale in its communications with DOD concerning the Solomon Amendment further undercuts any argument that the plaintiffs here have prudential standing to challenge the statute's impact on Yale or that the statute impacts them in any direct fashion.

not occur absent President's discretionary approval, were "'like the ruling of a subordinate official, not final and therefore not subject to review.'" (quoting Franklin v. Massachusetts, 505 U.S. 788, 797 (1992)).[7] Nor did any "*legal* consequences" flow from the earlier communications – irrespective of how Yale may have reacted to them. See Bennett, 520 U.S. at 178 (emphasis added); see also Franklin, 505 U.S. at 798 ("Because the Secretary's report [of census data] carries no direct consequences for the reapportionment [of seats in the House of Representatives], it serves more like a tentative recommendation than a final and binding determination."). Only the Principal Deputy is authorized to determine Yale ineligible for funding; unless and until he does so, funding remains intact.

Under the present circumstances, the Court's intervention at this juncture would "'disrupt[] the agency's processes'" and would deprive "'the agency an opportunity to apply its expertise and correct its mistakes.'" Air Espana v. Brien, 165 F.3d 148, 152 (2d Cir. 1999) (citation omitted). In fact, if the Principal Deputy concludes that compliance with the Solomon Amendment does not require suspension of the non-discrimination certification requirement, plaintiffs' lawsuit will have proven to be unnecessary. Id. (final agency action requirement "[r]elieves the courts from having to engage in piecemeal review which . . . upon completion of

[7] See also, e.g., Am. Paper Instit., Inc. v. EPA, 882 F.2d 287, 288-289 (7th Cir. 1989) (policy statement of EPA's Region V, which was not applied by the EPA Administrator, was not final agency action); Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1378 (9th Cir. 1983) (letters containing "conclusions by subordinate officials" of the FDA that defendants were in violation of federal law were not final agency determinations); Air Brake Sys., Inc. v. Mineta, 202 F. Supp. 2d 705, 712-13 (E.D. Mich. 2002) (letter from chief counsel of National Highway Traffic and Safety Administration stating that plaintiff's product did not meet certain standard was not final agency action despite plaintiffs' resulting loss of sale); Estee Lauder v. FDA, 727 F. Supp. 1, 4-6 (D.D.C. 1989) (letter from director of compliance at FDA stating that FDA was "prepared to take" regulatory action unless plaintiff changed its labeling practices did not constitute "final agency action" for purposes of ripeness inquiry).

the agency process might provide to have been unnecessary" (internal quotation marks and citation omitted)).

In the absence of final agency action, the other relevant factors relating to the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration" do not favor adjudication at this time. As noted above, because the Principal Deputy has not formally adopted an interpretation of the Solomon Amendment and its implementing regulations or applied that interpretation to Yale, judicial review would interfere with the relevant administrative scheme envisioned by the Solomon Amendment and DOD regulations. Moreover, given that DOD is still in the process of gathering information as to the nature of the access that Yale offers military recruiters versus other recruiters – having asked Yale for specific information in this regard and still awaiting Yale's response – the factual record is still in flux. And that factual record is undoubtedly relevant to plaintiffs' claims that the degree of access offered by Yale Law School to military recruiters prior to the fall of 2002 satisfied the Solomon Amendment.

Plaintiffs may argue that adjudication at this time is appropriate because DOD's actions have already had an immediate and substantial impact upon them and because delayed review will result in further hardship. But such an argument is plainly without basis. To the extent that plaintiffs suffer any cognizable injury, it is a result of the Law School's suspension of its non-discrimination certification requirement – an action that, as discussed above, DOD has never authoritatively stated was required and that Yale therefore effected unnecessarily and prematurely.

In sum, therefore, given the on-going communications between Yale and the Principal Deputy, and the fact that the Principal Deputy has not reached a final determination in this

matter, adjudication would undermine a central purpose of the ripeness requirement: "'to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Ohio Forestry Ass'n, Inc., 523 U.S. at 733 (quoting Abbot Labs., 387 U.S. at 148-49)).

III. THERE IS NO CAUSE OF ACTION OR BASIS FOR JURISDICTION FOR PLAINTIFFS' NON-CONSTITUTIONAL CHALLENGES

The lack of final agency discussed above further dooms plaintiffs' claims – separate and apart from the question of ripeness – because it renders inapplicable the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Although plaintiffs have not cited to the APA in their Complaint, where there is no specific authorization for review contained in a substantive statute, the judicial review provisions of the APA provide the only vehicle for challenging an agency's alleged interpretation and application of a substantive statute on non-constitutional grounds. See 5 U.S.C. § 706(2) (empowering court to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) ("The 'right of action' in such cases is expressly created by the Administrative Procedure Act . . . which states that 'final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.'" (citing 5 U.S.C. § 704)). Here, because the Solomon Amendment does not otherwise provide for judicial review, plaintiffs would be required to rely on the APA in order to assert their allegations (principally in Count I) that DOD has misinterpreted the Solomon Amendment. See, e.g., Compl. ¶¶ 31, 37-38.

In order to invoke the APA, however, "the 'agency action' in question must be 'final agency action.'" Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 704)); Top Choice Distribs., Inc. v. U.S. Postal Service, 138 F.3d 463, 466 (2d Cir. 1998)

("Finality is an explicit requirement of the APA."). Indeed, as the Second Circuit has noted, the "requirement of finality is jurisdictional." Air Espana, 165 F.3d at 152.[8] Here, because there has been no final agency action, plaintiffs cannot rely on the APA and cannot identify any other cause of action or basis for jurisdiction with respect to their allegations that DOD has incorrectly interpreted and applied the Solomon Amendment. Any challenge on these grounds must therefore fail.[9]

IV. PLAINTIFFS' FIRST AMENDMENT CAUSES OF ACTION FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Even were this Court to determine that plaintiffs have jurisdiction to challenge the Solomon Amendment, plaintiffs' First Amendment challenges to the statute and DOD's alleged interpretation of it could not withstand scrutiny. The Solomon Amendment neither unconstitutionally conditions federal funds nor represents content-based regulation of speech.[10]

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[8] The APA also provides the only express waiver of sovereign immunity applicable to plaintiffs' claims. See 5 U.S.C. § 702

[9] Plaintiffs cannot satisfy the "final agency action" requirement on the theory that they are challenging DOD regulations, rather than DOD's specific application of the Solomon Amendment to Yale. In the absence of any application of DOD regulations to Yale, plaintiffs suffer no injury. Moreover, because the regulations implementing the Solomon Amendment, like the statute itself, pertain only to institutions of higher education, not students, only Yale itself would have prudential standing to challenge them. See Part I.C. above.

[10] It is not clear whether plaintiffs are purporting to assert any facial challenge to the Solomon Amendment, but such a challenge could not succeed in any event. A facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Here, as discussed below, the Solomon Amendment is constitutional even as applied to Yale.

A. The Solomon Amendment Does Not Transgress The Doctrine Of Unconstitutional Conditions

Plaintiffs' principal First Amendment challenge is that the Solomon Amendment and its alleged interpretation by DOD place an unconstitutional condition on Yale University's receipt of certain federal funds by conditioning those funds on the abrogation of plaintiffs' First Amendment rights not to endorse or associate with employers who refuse to subscribe to the non-discrimination policy. Compl. ¶¶ 40-44. As the district court in FAIR correctly concluded, such a challenge is plainly without merit. 2003 22708576, at *1 ("[T]he compulsion exerted by the Solomon Amendment, as an exercise of Congress' spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment rights of free speech, expressive association, and academic freedom.").

1. It is well settled that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." See United States v. American Library Ass'n, 123 S. Ct. 2297, 2303 (2003) (plurality opinion) (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)). The reach of the Congress' spending power is broad, and it "is not limited by the direct grants of legislative power found in the Constitution." United States v. Butler, 297 U.S. 1, 66 (1936). Instead, the constitutional limitations on Congress when it exercises its spending power "are less exacting than those on its authority to regulate directly." Dole, 483 U.S. at 209. Putative funding recipients who do not agree with Congress' policy choices when it places conditions on the availability of a federal subsidy "can simply decline the subsidies." Rust v. Sullivan, 500 U.S. 173, 199 n.5 (1991); see also Dole, 483 U.S. at 210; Grove City College v. Bell, 465 U.S. 555, 575 (1984) (petitioner's First Amendment rights not violated where it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]").

It is equally well-settled, however, that the congressional spending power "is not unlimited." Dole, 483 U.S. at 206. Thus, under the doctrine of unconstitutional conditions, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." Board of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (citation omitted). A condition on federal funding will constitute an unconstitutional condition only if it places a condition on the recipient of a subsidy that "effectively prohibit[s] the recipient from engaging in [constitutionally] protected conduct outside the scope of the federally funded program." Rust, 500 U.S. at 197.

2. Although plaintiffs here invoke the unconstitutional conditions doctrine as the basis for their First Amendment claims, for two reasons that doctrine does not even apply.
First, plaintiffs are not the direct recipients of any federal funds. Thus, the Solomon Amendment does not impose upon them any conditions at all. As the Supreme Court explained in Rust, "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy, . . . effectively prohibiting the *recipient* from engaging in the protected conduct outside the scope of the federally [assisted] program." Id. (second emphasis added). The unconstitutional conditions doctrine is simply inapplicable to non-recipients such as plaintiffs upon whom no conditions have been imposed.

Second, the doctrine of unconstitutional conditions is not implicated in this case because the Solomon Amendment has nothing to do with protected speech. Recruiting at law schools does not constitute speech. It constitutes primarily, if not exclusively, conduct. Military recruiters do not come to campus to express views on Congress' policy on homosexual conduct in the military; they come to recruit for the military. Likewise, law schools do not welcome potential employers on campus because of their views; they welcome them in order to facilitate

the job searches of their students. As the district court observed in FAIR, "[r]ecruiting has an economic or functional motive; the advocacy of causes, which lies at the very heart of solicitation, is virtually absent." 2003 WL 22708576, at *34.

The plaintiffs nevertheless assert that expressive conduct is implicated in this case, perhaps on the theory that requiring employers to certify their compliance with non-discrimination principles has some symbolic value. This theory has no merit. As an initial matter, the non-discrimination policy and related certification requirement is administered by, and was suspended by, Yale Law School – not the plaintiff student organizations or their members. See Compl. ¶¶ 2, 4, 32, 34.[11] Plaintiffs cannot assert a violation of *their own* First Amendment rights just because the *Law School's* ability to speak has allegedly been infringed.

In any event, the non-discrimination certification requirement has no First Amendment value. The Supreme Court has rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968). In fact, in O'Brien, the Court held that even the public burning of a military registration certificate was not protected "symbolic speech" under the First Amendment. Id. The non-discrimination certification requirement at issue here involves even less expressive content than in O'Brien – at most, a "kernel of expression," which is "not sufficient to bring . . . activity within the protection of the First Amendment." See City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

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[11] Plaintiffs' allegation on this point is slightly different than the allegations set forth by the plaintiffs in the related case, Robert A. Burt, et al. v. Donald H. Rumsfeld, No. 3:03CV01777 (JCH). The plaintiffs in that case allege that the non-discrimination policy and related certification requirement are policies of the *faculty* of Yale Law School (not the Law School itself). See Burt Compl. ¶¶ 2-3, 11, 14, 17 (Oct. 16, 2003)

Plaintiffs can seek no support from Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). In that case, the Supreme Court held that the organizers of Boston's St. Patrick's Day parade could not be compelled under an anti-discrimination ordinance to allow a gay, lesbian, and bisexual organization to participate in the parade. Id. at 581. Although Hurley may seem analogous to the instant cases inasmuch as it involved the First Amendment right of a party to exclude certain groups from its event, Hurley is in fact entirely inapposite. Whereas the anti-discrimination ordinance in Hurley violated the First Amendment because it forced parade organizers to alter the expressive content of their parade by including a message with which they disagreed, see id. at 572-73, "a recruiting function does not proclaim an overall message which could be destroyed by the presence of an individual recruiter," FAIR, 2003 WL 22708576, at *34. Indeed, unlike a parade, the provision of recruiting services at a law school is not inherently expressive. See Hurley, 515 U.S. at 568 (parades have "inherent expressiveness").

Nor does Boy Scouts of America v. Dale, 530 U.S. 640 (2000), help plaintiffs' First Amendment claims. There, the application of the state's anti-discrimination law required a private group that engaged in expressive activity to accept as a leader a person with whom it disagreed. See id. at 659. Here, however, the provision at issue not only has no effect on expressive conduct, but also has no impact whatsoever on the leadership, or even the membership, of Yale's student body or student organizations. Plaintiffs are not even required to even interact personally with any member of the military as a result of the Solomon Amendment (although they may incidentally encounter military recruiters at recruiting events).

Ultimately, therefore, no First Amendment rights are even implicated, much less infringed, by law school recruiting. Congress is thus free to condition federal funding to Yale on access to campus for military recruiting purposes.

3. To the extent that plaintiffs' First Amendment rights are implicated by the Solomon Amendment, and thus that the doctrine of unconstitutional conditions is even potentially applicable, the relevant authority for evaluating any First Amendment interests is United States v. O'Brien, 391 U.S. 367 (1968). In that case, as alleged here, the Court was concerned with government regulation of conduct that resulted in incidental limitations on First Amendment freedoms. Id. The Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. at 376. In particular, the Court explained, a government regulation is sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id.

The Solomon Amendment easily satisfies the O'Brien test. First, the Constitution empowers Congress "[t]o raise and support Armies," and to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, clauses 1, 12. The Supreme Court has emphasized that it affords a "broad construction of Congress' power under the . . . Spending Clauses," New York v. United States, 505 U.S. 149, 158 (1992), and also "has long held that the power 'to raise and support armies . . . is broad and sweeping,'" Wayte v. United States, 470 U.S. 598, 612 (1985) (quoting O'Brien, 391 U.S. at 377). Indeed, the Court has emphasized that "[j]udicial deference . . . is at its apogee when reviewing congressional decision-

making in" the military context. Weiss v United States, 510 U.S. 163, 177 (1994) (citation omitted).

The Solomon Amendment thus is plainly within the constitutional power of Congress. As the district court correctly analyzed in FAIR, "[i]f Congress possesses the power to conscript manpower for military service and the concomitant power to enact legislation in furtherance thereof, it also possesses the lesser power to recruit manpower for military service and enact the necessary enabling legislation." 2003 WL 22708576, at *38.

Second, there can be no question that the Solomon Amendment furthers an important governmental interest. Congress has imposed on the military an affirmative obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the armed forces. See 10 U.S.C. § 503(a). Moreover, "Congress considers access to college and university employment facilities by military recruiters to be a matter of *paramount importance*." United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986) (emphasis added).

Third, the Solomon Amendment is unrelated to the suppression of free expression. Congress was not concerned with *why* institutions of higher education denied access to military recruiters, it was only concerned with the possibility *that* such institutions denied access to military recruiters. As the district court correctly determined in FAIR, "[t]he Solomon Amendment is . . . unrelated to the suppression of ideas" because "[a] law school or institution of higher learning that prohibits or in effect prevents military recruiters from gaining entry to campus or access to students will be disentitled to those funds regardless of the viewpoint that prompted the decision to deny assistance to such recruiters or prohibit them from campuses." 2003 WL 22708576, at *39.

Finally, any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The Supreme Court has held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985). In applying this test, "courts will not second-guess the decisions of responsible government officials acting within constitutional constraints." In re G & A Brooks, Inc., 770 F.2d 288, 298 (2d Cir. 1985).

The Solomon Amendment and its purported application to Yale Law School easily satisfy the applicable standard. As the district court noted in FAIR, "[a]lthough it may be true . . . that military recruiters can still contact students and interview students either off-campus or at some on-campus location, this ignores the fact that a law school recruiting function is the chief mechanism of connecting current law students with future employers. Without access to such mechanisms, the substantial governmental interest in gaining access to campuses for the purpose of military recruiting will be achieved less effectively." 2003 WL 22708576, at *39.

Moreover, the Solomon Amendment and DOD's alleged interpretation of it do not preclude any avenue of expression other than enforcement of the non-discrimination certification requirement. Indeed, "institutions remain free to voice objections to the military and its internal policies and to take ameliorative actions to distance themselves from the military's discriminatory policy." Id. This case is therefore not unlike United States v. Weslin, 156 F.3d 292, 298 (2d Cir. 1998), in which the Second Circuit held that a prohibition on obstructing access to abortion clinics was narrowly tailored under O'Brien because "anti-abortion protestors . . . wishing to exercise free speech rights under the First Amendment [remain] at liberty to hold

signs, pass out handbills, speak conversationally, and so forth, anywhere and anytime they choose."

In this regard, the Solomon Amendment is fully consistent with a lesson implicit in the Supreme Court's decisions in unconstitutional conditions cases – "that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (2d Cir. 1999) aff'd, 531 U.S. 533 (2001); see, e.g., Rust, 500 U.S. at 196-97 (upholding prohibition on use of federal family planning funds for abortion counseling where employees of fund recipients "remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the [federally-funded] project"); FCC v. League of Women Voters of Calif., 468 U.S. 364, 400 (1984) (rejecting statute that barred federally funded public broadcasting stations from editorializing, but emphasizing that Congress could cure the statute by amending it to allow stations to establish non-federally-funded affiliates for editorializing). Here, in accordance with the Supreme Court's teaching, any First Amendment burden on law students is restricted to a limited domain – recruiting by potential employers – and does not constrain them from expressing their views or associating freely in any other aspect of their personal or professional lives.

Ultimately, perhaps most instructive on the issue of unconstitutional conditions is Grove City College v. Bell, 465 U.S. 555, 575 (1984). In that case, a private college and four of its students alleged that the First Amendment barred the Department of Education from conditioning federal assistance to educational institutions on their compliance with the prohibition on sex discrimination contained in Title IX of the Education Amendments of 1972. Id. The Court concluded that this claim "warrant[ed] only brief consideration," as it was plain that the federal

program "infringe[d] no First Amendment rights of the College or its students." Id. at 575-76. As the Court explained, "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Id. at 575.

Likewise here, the Solomon Amendment imposes only a "reasonable and unambiguous" condition on "federal financial assistance that educational institutions are not obligated to accept." See id. Yale could "terminate its participation in . . . [federally-funded programs] and thus avoid the requirements of [the Solomon Amendment]." Id. Under Grove City College, Yale's choice to seek federal funds does not give rise to a First Amendment claim by its students. See id. at 575-76.

B. The Solomon Amendment Is Not A Content-Based Restriction On Speech

Plaintiffs contend that the Solomon Amendment constitutes viewpoint discrimination in violation of the First Amendment because it "penalizes only those students, like Plaintiffs, who attend law schools that seek to apply otherwise generally applicable non-discrimination policies to military recruiters" but does not adversely affect students of "institutions that exclude military recruiters for other reasons, such as 'pacifism based on historical religious affiliation.'" Compl. ¶ 46 (quoting 10 U.S.C. § 983(c)(2)).

This contention is easily disposed of. The Solomon Amendment no more constitutes an impermissible content-based restriction on speech than does the Military Selective Service Act, which similarly excludes individuals who "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form" but does not exclude those who oppose participation in war based on "essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. App. § 456(j). Indeed, the district court in FAIR expressly relied on the Military Service Act in rejecting the same viewpoint discrimination

argument plaintiffs assert here. See 2003 WL 22708576, at *41 (holding that the Solomon Act "merely comports with the long-standing principle" reflected in 50 U.S.C. App. § 456(j)). As that court noted, it "would serve no common-sense purpose to invoke the Solomon Amendment against pacificist schools where military recruiting efforts would be futile." Id.

V. PLAINTIFFS' FIFTH AMENDMENT CAUSE OF ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' Fifth Amendment cause of action fails largely for the reasons discussed in Part I.A. above. Although plaintiffs claim injury to their substantive due process rights, in fact, their allegations do not implicate any rights "'implicit in the concept of ordered liberty." See Local 342, 31 F.3d at 1196 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Substantive due process rights have been recognized only with respect to the most intimate areas and relationships in life, and do not extend to law school recruiting fairs. See Part I.A. above.

With regard to the plaintiffs' equal protection claims, it clear that no student's equal protection rights are infringed by the mere presence at law school recruiting events of military personnel. Any "psychological consequence" to gay and lesbian students that may be "produced by observation of" military recruiters does not rise to the level of a cognizable personal injury. Valley Forge, 454 U.S. at 485; Alliance of Lesbian, Gay, Bisexual, Transgendered & Straight Students, slip op. at 9. Moreover, plaintiffs' allegation that the Solomon Amendment "requir[es] the suspension of the Law School's nondiscrimination exclusively and solely for lesbian and gay students" simply misses the mark. SAME Compl. ¶ 41. As the district court noted in FAIR, "the Solomon Amendment continues to target the same conduct, to wit, denial of access to campus and students for military recruiting, even if the underlying viewpoint that might prompt an institution to deny such access is subject to change." 2003 WL 22708576, at *34. It is immaterial whether access to campus is restricted in response to the Congress' policy on

homosexuality in the armed forces, or because of a disagreement with a particular military engagement, or for no reason at all.

In any event, to the extent it is even relevant, every court of appeals to have considered the question has held that Congress' policy on homosexual conduct does not transgress equal protection or substantive due process. See, e.g., Able v. United States, 155 F.3d 628, 631-36 (2d Cir. 1998); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1132-36 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc). Moreover, Congress' need "[t]o raise and support Armies," U.S. Const. art. I, § 8, clause 12, and the military's obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the Armed Forces, see 10 U.S.C. § 503(a), undoubtedly justify any infringement on Fifth Amendment rights posed by the participation of military recruiters at law school recruiting events.

CONCLUSION

For the foregoing reasons, plaintiffs cannot establish either the constitutional and prudential elements of standing or the ripeness of their claims, cannot establish a cause of action or basis for jurisdiction for their non-constitutional claims, and have not stated First and Fifth Amendment claims for which relief can be granted. Plaintiffs' Complaint therefore should be dismissed.

Respectfully submitted,

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Dated: January 15, 2004

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant's Motion to Dismiss Plaintiff's Complaint, the accompanying memorandum of law, and the attachments thereto, have been served by first class mail, postage prepaid, this 15th day of January, 2004, on:

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