No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

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

Brief of Professors William Alford, William Andrews, David Barron, Elizabeth Bartholet, Robert Clark, Christine Desan, Charles Donahue, Richard Fallon, Jody Freeman, Gerald Frug, Heather Gerken, Ryan Goodman, Lani Guinier, Daniel Halperin, Bruce Hay, Philip Heymann, Elena Kagan, David Kennedy, Duncan Kennedy, Randall Kennedy, Reinier Kraakman, Kenneth Mack, Dan Meltzer, Frank Michelman, Martha Minow, Robert Mnookin, Todd Rakoff, Frank Sander, David Shapiro, Joseph Singer, Carol Steiker, Henry Steiner, Guhan Subramanian, Laurence Tribe, Elizabeth Warren, Paul Weiler, Lloyd Weinreb, Lucie White, David Wilkins, and Bernard Wolfman as *Amici Curiae* in Support of Respondents

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INTEREST OF *AMICI CURIAE*[1]

Amici are full-time faculty members at the Harvard Law School.[2] We are deeply committed to a fundamental moral principle: "A society that discriminates based on sexual orientation—or that tolerates discrimination by its members—is not a just society." App. 149 (Memorandum from then-Dean Robert C. Clark to the Harvard Law School Community). Our goal is to vindicate Harvard Law School's right to apply its evenhanded antidiscrimination policy to all recruiters—including those from the United States military—in harmony with the numerous federal, state, and local laws that outlaw various forms of discrimination by private actors.[3]

INTRODUCTION

The points we make in this brief are simple but perhaps surprising. *First*, the Solomon Amendment's prohibition on funding is triggered only by policies that target the military or its recruiters for disfavored treatment. *Second*, once it is understood that evenhanded recruiting policies are beyond the statute's ken, it is clear that Harvard Law School is in full compliance—and the same is likely true of the vast majority of United States law schools.

The events that gave rise to this litigation involve law schools' insistence that they will assist only those employers that pledge not to discriminate against the law schools' stu-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission.

[2] Elena Kagan signs this brief in her capacity as a Professor of Law.

[3] Dean Clark's August 23, 2002, Memorandum to the Harvard Law School Community describes the culmination of threats that led to the Law School's initial decision to suspend application of its antidiscrimination policy with respect to military recruiters. *See* App. 145-49. The military has recruited on campus pursuant to this suspension of the school's policy in most of the subsequent years.

dents on various grounds, including sexual orientation. These policies do not single out military recruiters for disfavored treatment: Military recruiters are subject to *exactly the same terms and conditions of access as every other employer.* When other recruiters have failed to abide by these tenets, they have been excluded.[4] When military recruiters have agreed to follow them, they have been welcomed.[5]

Accordingly, this case is not—and never has been—about whether law schools may "discriminate" against the military or whether they must provide "equal access" to military recruiters. Instead, the question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school's failure to make a special exception might incidentally hinder or preclude military recruiting. The answer is "no."

The statute actually passed by Congress requires no such special exemption. Instead, it targets university policies that "prohibit[], or in effect prevent[]" military recruiters "*from gaining access*" to campuses and students "*in a manner* that is . . . equal in quality and scope" to that provided to any

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[4] During the 1990s, for example, Yale Law School's Career Development Office refused to assist a non-profit organization that had announced its intent to discriminate based on religion and sexual orientation. App. 77 (Eskridge Decl.). In 1981, NYU Law School's Office of Career Counseling and Placement declined to facilitate on-campus interviews by the FBI after being informed that the Bureau "would not hire homosexual Law School students or graduates." *Id.* at 152 (Law Decl.).

[5] Before 1997, recruiters from the United States Army signed Washington University School of Law's non-discrimination assurance and were "allowed to use the School of Law Career Services Office facilities." C.A. App. 102 (Appleton and Topaz Decl.). The same result occurred in 1982 when the United States Navy's Office of the General Counsel assured NYU Law School that all of its "hiring and advancement . . . [was] based on merit without regard to race, color, national origin, religion, age, sex, sexual orientation, handicap, political affiliation or marital status." App. 167; *see id.* at 153 (Law Decl.).

other employer. 10 U.S.C. § 983(b)(1) (emphases added). Nor are the government's current enforcement efforts consistent with the statutory background or legislative history, both of which make clear the Solomon Amendment's focus on policies that are specifically "anti-military." The Solomon Amendment's structure and the most closely related statutory provision also point in the same direction. In short, all recognized indicators of meaning suggest the same thing: The Solomon Amendment rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military.

STATEMENT

As the District Court recognized, *see* Pet. App. 90a, and the government briefly acknowledges, *see* U.S. Br. 2, the history of the Solomon Amendment does not begin with the statute's enactment in 1994. Rather, the Solomon Amendment built on nearly three decades of legislation addressing the perceived effects of anti-military recruiting rules. Because this history provides important background for understanding the statute's current text, we describe it in some depth. Viewed as a whole, the legislative history suggests a single conclusion: that the Solomon Amendment is aimed at policies that single out the military, either by precluding military recruiting entirely or subjecting military recruiters to special unfavorable treatment.

The Solomon Amendment's Predecessors

The relevant history begins at a time when our Nation was deeply divided over the military's involvement in Southeast Asia. By the mid-1960s, many students had become troubled by "all connections between the university and the war." Report of the President's Commission on Campus Unrest 32 (Sept. 26, 1970) [hereinafter, "Commission Report"]. "[R]ecruiters . . . [came] to be regarded as symbols of the war" and "[d]emonstrations focus[ing] on representatives of

the armed services, the CIA and Dow Chemical Company" erupted at campuses across the country. Frederick W. Obear, *Student Activism in the Sixties*, *in* Protest! Student Activism in America 11, 20 (Julia Foster & Durward Long eds., 1970). On a number of occasions, protestors engaged in "[p]hysical obstruction of recruiters," *id.*, and other forms of "harass[ment]," Commission Report 32. Responding to these and other tumultuous events, a number of college and university faculties "passed resolutions to ban military recruiters." William R. Morgan, *Faculty Mediation in Campus Conflict*, *in* Foster & Long, *supra*, at 365, 377; *see also* 114 Cong. Rec. S6952 (daily ed. June 10, 1968) (Sen. Curtis) (discussing letter from Defense Department official listing 22 colleges and universities that had "tak[en] the position that certain of our recruiters cannot come on the campus").

Congress first responded to these "sentiment[s] in connection with the war" (*id.* at S6955 (Sen. Stennis)) during the summer of 1968. A Senate floor amendment to NASA's authorizing legislation for that year established a general rule against use of Agency funds at any "institution of higher learning" where "recruiting personnel of any of the Armed Forces of the United States [were] being barred from the premises or property of such institution." Pub. L. No. 90-373, § 1(h), 82 Stat. 281-82 (1968). The 1968 Act's prohibition, however, was not absolute; funds could continue to flow if NASA's Administrator determined that a particular grant was "a continuation or renewal of a previous grant . . . which [was] likely to make a significant contribution to the aeronautical and space activities of the United States." *Id.*

For the next four years, Congress stuck closely to the precedent it had established in 1968: declaring in defense-related agencies' annual funding statutes that specified dollars could not be used at colleges and universities that "barred" military recruiters but permitting exceptions to be

made for important ongoing work.[6] In 1972, however, Congress abandoned the practice of yearly funding riders and established permanent rules regarding use of Defense Department funds. "No . . . funds appropriated pursuant to this or any other Act for the Department of Defense," it declared, "may be used at any institution of higher learning if the Secretary of Defense . . . determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution." Pub. L. No. 92-436, § 606(a), 86 Stat. 740 (1972). Like each of its predecessors, however, the 1972 legislation authorized Executive Branch officials to overlook violations of the statute's requirements in certain specified circumstances.[7]

Given the Vietnam-era campus protests directed specifically at the military, it is unsurprising that the 1972 legislation trained its fire on policies that targeted military recruiters and banned them from campus entirely. The House Armed Services Committee explained:

> For several years students, faculties and administrations of some institutions of higher learning have indicated complete disaffection with any military activities on their campuses. As a result, military recruit-

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[6] For example, the language from the 1968 legislation reappeared in each NASA authorization bill between 1969 and 1972. *See* Pub. L. No. 91-119, § 1(h), 83 Stat. 197 (1969); Pub. L. No. 91-303, § 1(h), 84 Stat. 370 (1970); Pub. L. No. 92-68, § 1(h), 85 Stat. 175 (1971); Pub. L. No. 92-304, § 1(h), 86 Stat. 160 (1972). During 1970 and 1971, the authorizing bills for the Department of Defense contained provisions that were "identical in substance" to those in the NASA legislation. H.R. Rep. No. 91-1022, at 78 (1970); *see* Pub. L. No. 91-441, § 510, 84 Stat. 914 (1970); Pub. L. No. 92-156, § 502, 85 Stat. 427 (1971).

[7] *See* § 606(a) (if the Secretary of the relevant service certified a national security need); § 606(b) (if the Secretary of Defense determined that an expenditure was a continuation of an already-existing program with significant national defense benefits).

> ers have been barred from the campuses by the policy of some universities . . . .
>
> The Committee recognizes that each educational institution has the absolute right to determine whether it desires to have any association with the military forces of its country, and this includes the right to determine whether it desires to permit military recruiters . . . on its campus.
>
> On the other hand, Congress has the right and duty to determine how the appropriations made for the Department of Defense . . . should be spent. Whether the Government should spend monies at colleges and universities which, as a matter of policy, bar military recruiters . . . is a decision to be made by Congress. . . .
>
> If some institutions desire divorcement from the military, the separation should be made total and complete.

H.R. Rep. No. 92-1149, at 79-80 (1972).

The Original Solomon Amendment

The 1972 legislation was never repealed. Nonetheless, over time, it appears that "DOD . . . bec[a]me lax in enforcing [the 1972] statute." 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Underwood). Responding to these enforcement concerns, Representative Gerald Solomon of New York offered a floor amendment to the Defense Department's authorizing legislation for fiscal year 1995. "No funds available to the Department of Defense," the proposal stated,

> may be provided . . . to any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes—
>
> (A) entry to campuses or access to students on campuses; or
>
> (B) access to directory information pertaining to students.

Id. at H3861.

Representative Solomon made one thing clear: The Solomon Amendment was designed to "enforc[e] existing law." *See id.* at H3862 ("[T]here is existing law already. We are simply enforcing exiting law . . . ."). Without changing the nature of the underlying prohibition, the Solomon Amendment addressed enforcement concerns by eliminating the "waiver" mechanism that had until then permitted Executive Branch officials to continue funding in certain situations notwithstanding a school's failure to comply with the statutory requirements.

Subsequent Developments

Over the next decade, Congress on several occasions adjusted the consequences educational institutions would suffer if they failed to comply with the Solomon Amendment's mandate. None of these changes, however, altered the basic contours of the "existing law" that Representative Solomon had announced his intent to "enforc[e]." 140 Cong. Rec. H3862 (daily ed. May 23, 1994).[8]

In 2004, developments in this case prompted Congress to make a targeted change to the Solomon Amendment's substantive requirements. For many years, the Defense Depart-

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[8] In 1996, Congress extended both the Solomon Amendment and its sister "anti-ROTC" legislation to cover "funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act." Pub. L. No. 104-208, § 514(a), 110 Stat. 3009-270; *see infra* pp. 15-16 (discussing the "anti-ROTC" provision). In 1999, it consolidated the original Solomon Amendment, the "anti-ROTC" statute, and their 1996 extensions, *see* Pub. L. No. 106-65, § 549(a), 113 Stat. 609-11, declared that violations by any "subelement" would require withholding designated funds from an entire "institution of higher education," § 549(a), 113 Stat. 609, and also made clear that neither prohibition applied to federal funds made "available solely for student financial assistance," Pub. L. No. 106-79, § 8120, 113 Stat. 1260. In 2002, Congress updated the statute to reflect the creation of the Department of Homeland Security. *See* Pub. L. No. 107-296, § 1704(b), 116 Stat. 2314.

ment and several universities had reached accommodations whereby law schools permitted military recruiters "to gain access to [their] campuses" but "reaffirm[ed] their opposition to the military's exclusionary employment policy by not providing them affirmative assistance in the manner provided to other recruiters." Pet. App. 7a. By 2003, however, the government had taken to asserting that the Solomon Amendment "requir[ed] universities to provide military recruiters access to students that is equal in quality and scope to that provided to other recruiters" (App. 129)—a position about whose validity the District Court expressed "grave reservations" in its opinion denying respondents' motion for a preliminary injunction. Pet. App. 180a; *see also* Brief of Professors William Alford *et al.* in Support of Appellants and in Support of Reversal at 17-22, *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (making the same point).[9]

In response to the District Court's opinion, the Administration asked Congress to modify the Solomon Amendment to ensure that military recruiters would have "the opportunity to compete for students on a footing equal with other prospective employers." H.R. Rep. No. 108-443 (Pt. I), at 7 (2004) (quoting letter from David S. C. Chu, Under Secretary of Defense, to the Hon. Duncan L. Hunter, Chairman, House Committee on Armed Services). Congress agreed, acting to "address the court's opinion and codify the equal access standard." *Id.* at 6. In its current form, the Solomon Amendment, in pertinent part, bars specified federal funds from flowing to any "institution of higher education" that

> has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

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[9] The argument noted above was the second of two made in *amici*'s Third Circuit brief. The first was the one made here: that Harvard Law School's antidiscrimination policy did not trigger the Solomon Amendment's funding prohibition in the first place. *See id.* at 9-17.

> (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1).

SUMMARY OF ARGUMENT

The government's litigation strategy is clear: to portray the Solomon Amendment as just another antidiscrimination law, like the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *See* U.S. Br. 19-20, 24-25. Again and again, it characterizes the Solomon Amendment as requiring only that "the federal government should have an equal opportunity to recruit the very students whose educations it has supported." U.S. Br. 11. In its opening brief, the government uses the phrase "equal access" *52 times*.

This soothing rhetoric, however, stands in sharp contrast to the government's aggressive implementation of the Solomon Amendment. As its actions towards Harvard, *see supra* note 3, and other law schools demonstrate, the government is demanding far more than equality of treatment; rather, it is insisting on being given a special exemption from even-handed antidiscrimination policies. In short, the government has chosen to enforce the Solomon Amendment as if it conferred upon the military a unique privilege—one shared by no other employer, including other agencies of the Federal Government—to disregard neutral and generally applicable rules designed to govern the conduct of all recruiters.

There is, however, a better way to read the statute—one that could resolve this case without requiring this Court to venture into the constitutional tangle presented in the parties' briefs. Consistent with the statute's text, its history, and the government's own rhetoric, the Court should hold that the statute confers no such unprecedented trump. Rather, like all

of its legislative predecessors, the Solomon Amendment applies only to policies that single out military recruiters for special disfavored treatment, not evenhanded policies that incidentally affect the military. Because there is nothing in the statutory text that would support a special rule for anti-discrimination policies, the only alternative would be to hold that the Solomon Amendment confers upon military employers the extraordinary right to claim immunity from *any* policy—no matter how evenhanded—that they deem burdensome to their recruiting efforts.

ARGUMENT

I. The Solomon Amendment Bars Only Anti-Military Policies; It Does Not Give Military Recruiters A Special Right To Disregard Neutral And Generally Applicable Recruiting Rules

This Court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). To do that, it "must examine the statute's text in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620 (2005). Here, each of those indicators of meaning points to a single conclusion: that the Solomon Amendment's funding prohibition is triggered only by policies that bar military recruiting as such or single out military recruiters for special disfavored treatment.

As written, the Solomon Amendment's funding limitation is triggered if

> an institution of higher education . . . has a policy or practice . . . that either prohibits, or in effect prevents [military recruiters] . . . from gaining access to campuses, or access to students on campuses, . . . in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1).

There is no allegation that any of the law schools in question restricts military recruiting as such, much less "prohibit[s]" military recruiters from gaining access on terms comparable to every other employer. Nor can there be any credible suggestion that the law schools crafted their antidiscrimination policies with the aim of excluding the military. There is nothing inherently suspicious about those policies, their adoption, or their application to suggest they may be pretexts for anti-military sentiment.[10]

Nor have law schools "in effect prevent[ed]" military recruiting. Congress took care to provide that it would not be a defense under the Solomon Amendment that an anti-military recruiting policy stopped short of an outright ban and instead required that such recruiting occur at times, in places, or under circumstances that made military recruiting difficult or impossible.[11] But there is no allegation of that here, and we are aware of no law school that has imposed upon military recruiters onerous requirements that are applicable to no others.

The only way a law school's evenhanded antidiscrimination policy could implicate the Solomon Amendment, therefore, would be if the statute required that military recruiters be given a preferential exemption from evenhanded and otherwise applicable recruiting rules. Nothing in the statutory text requires such special treatment. In addition, because the Solomon Amendment contains no reference to antidiscrimi-

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[10] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("almost the only conduct subject to" an animal sacrifice ordinance was "the religious exercise of Santeria church members"); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (local act altered the shape of a city from a square to a 28-sided figure, which had the effect of removing all but four or five African-American voters without removing a single white voter).

[11] *Cf. Lane v. Wilson*, 307 U.S. 268, 270-71 (1939) (12-day window for voter registration applied only to persons who had not been permitted to vote under an earlier unconstitutional voting scheme).

nation policies, any such reading would necessarily require that military recruiters be deemed immune from *any* neutral and generally applicable recruiting rule that might incidentally inconvenience the military more than at least one other recruiter.[12] So far as we are aware, the government has never attempted to defend such an interpretation, and with good reason: it would be implausible in the extreme.

Seeking to ameliorate unhealthy competition, minimize disruption of the educational process, and affirm fundamental community values, educational institutions often place a variety of limitations on the conduct of employers during the recruiting process. For example, many law schools refuse to permit employers to "pre-screen" interviewees—on any basis—before on-campus interviews.[13] Others restrict the use of personal or otherwise confidential information that employers acquire during a particular recruiting season,[14] bar employers from communicating with students before December 1 during their first semester of study,[15] insist that offers of

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[12] *Cf. Exxon Mobil*, 125 S. Ct. at 2621 (stressing that "[t]he terms of [28 U.S.C.] § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction").

[13] *See, e.g.*, Office of Career Services, University of Chicago Law School, Information for Employers, *available at* http://www.law.uchicago.edu/careersvcs/information_employers.html ("It is the University of Chicago Law School's policy not to permit the prescreening of student resumes for the purpose of on-campus interviewing. You are obliged to interview students who were successfully scheduled during the computerized bidding process.").

[14] For example, Columbia Law School requires that "potential employers not use student e-mail addresses submitted on resumes for one recruitment program to globally solicit students' participation in another program in which they have not expressed an interest." Office of Career Services, Columbia Law School, Communication of Employment Opportunities, *available at* http://www.law.columbia.edu/careers/career_services/employers/Hiring_Informat/Employment_Oppo.

[15] *See, e.g.*, Office of Career Services, Duke Law School, Employer Interviewing Guide, *available at* http://www.law.duke.edu/career

employment be held open for specified periods,[16] or require prospective employers to pay fees designed to defer costs associated with the interviewing process.[17] And nearly every law school in the Nation declines to assist employers unless they certify that they will not distinguish among the school's students on various grounds—including sexual orientation—"that, in the law school['s] judgment, bear no relation to merit." App. 3.

In our view, none of those measures—including the anti-discrimination requirement—violates the Solomon Amendment, even though the military (like other employers) might find it more convenient not to comply, and even if the government's failure to do so forecloses recruiting at a given school. There is no indication that Congress intended to confer on the military a sweeping privilege—one enjoyed by no other employer, including other agencies of the federal government—to recruit whenever and however it wishes. And if the military fails to comply with the same evenhanded rules that govern everyone else, any resulting inability to interview is properly attributed to *the government's* "polic[ies] or practic[es]" rather than those of the educational institution in question.[18]

/employerinterview.html ("[F]all interviews with first-year students are not permitted.").

[16] *See, e.g.*, Office of Career Services, Harvard Law School, Recruiting Policies & Guidelines, *available at* http://www.law.harvard.edu/ocs/employers/Fall_OCI/Recruiting_Policies_and_Guidelines.htm.

[17] *See, e.g.*, Office of Career Services, University of Michigan School of Law, Recruiting at Michigan 2005-2006, p. 9, *available at* http://www.law.umich.edu/CurrentStudents/CareerServices/pdf/career.recruiting.2005.pdf.

[18] The fact that exclusion of lesbians, gays, and bisexuals from military service is currently mandated by Congress does nothing to change this analysis. *See* 10 U.S.C. § 654(b) & (c). Before § 654's enactment in 1993, such exclusions were based on military practice rather than congressional directive. *See* H.R. Rep. No. 103-200, at 286 (1993) (bill "would establish and *codify the Department of Defense policy* relating to

The 2004 amendments only strengthen the view that the Solomon Amendment is fundamentally an antidiscrimination measure. The first hint comes from the section heading in the enacting legislation: "Equal Treatment Of Military Recruiters With Other Recruiters." Pub. L. No. 108-375, § 552, 118 Stat. 1911 (2004). Consistent with this focus on parity, the amended statutory text neither requires law schools to facilitate military recruiting, nor mandates that they permit military recruiting in all instances. Rather, it tells law schools that they may not prevent military recruiters "from *gaining access*" to their facilities or students "*in a manner* that is at least equal in quality and scope" to that provided to any other employer. 10 U.S.C. § 983(b)(1) (emphases added). This phrasing confirms that the Solomon Amendment is simply not triggered if the terms and conditions under which the military is entitled to "gai[n] access" are *precisely the same* as those offered to all others.[19]

This reading of the statute is also supported by the historical context out of which the Solomon Amendment

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the appointment, enlistment, induction and separation of homosexuals in the Armed Forces . . . ." (emphasis added)); *id.* at 287 (bill "carrie[s] forward the fundamental tenets upon which the *DOD policy* regarding homosexuals has long been based" (emphasis added)). A change in the origination point within the government of a given policy cannot alter the analysis of whether the impacts of that policy are properly attributable to it or to a private party. If governmental policy precludes some of its own recruiters from complying with a school's evenhanded recruiting rules, any resulting inability to interview is properly attributable to the government—regardless of whether the policy originated with Congress, the Secretary of Defense, or a local military official.

[19] Nor does this reading deprive the 2004 amendments of significance. Rather, as both context and the legislative history suggest, *see supra* pp. 7-8, the new language was added to foreclose institutions' ability to single out military recruiters for disadvantageous treatment so long as they provided some minimal level of access. *See* Pet. App. 181a (District Court noting that the previous version of the Solomon Amendment "d[id] not provide" that "military recruiters are to be treated the same as other employers").

evolved. The predecessor acts that Representative Solomon announced his intent to "enforc[e]" (140 Cong. Rec. H3862 (daily ed. May 23, 1994)) were enacted in response to university policies that singled out the military *because it was the military* and they limited their application to schools that "barred" military recruiters as such. *See supra* pp. 3-6. Further underscoring the focus on specifically anti-military policies is the fact that the original Solomon Amendment—like all of its predecessors—applied only to defense-related funds. *See supra* pp. 4-7.

The Solomon Amendment's emphasis on specifically anti-military policies is further confirmed by a closely related statutory provision: 10 U.S.C. § 983(a), which addresses treatment of ROTC programs and their members. As originally enacted in 1996, this provision barred Defense Department funds from flowing "to any institution of higher education that . . . has an anti-ROTC policy." Pub. L. No. 104-106, § 541(a), 110 Stat. 315. In defining the critical words "anti-ROTC policy," that legislation used precisely the same language as that found in the Solomon Amendment: "a policy or practice . . . that . . . *prohibits, or in effect prevents*" either the Secretary of Defense from operating an ROTC unit at a given school or a student at one institution from enrolling in an ROTC unit at another. *Id.*, 110 Stat. 316 (emphasis added).[20]

Understanding § 983(a) as limited to "anti-ROTC" policies—and thus reading the Solomon Amendment as limited to "anti-military" policies—is necessary to avoid interpretative oddities. The statute mandates a funding cut-off if a school has "a policy or practice . . . that either prohibits, or in

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[20] The words "anti-ROTC policy" were removed from the statute during the 1999 recodification, *see* Pub. L. No. 106-65, § 549(a), 113 Stat. 609-11, but the current provision continues to refer to policies that "prohibit[], or in effect prevent[]" ROTC units or membership, 10 U.S.C. § 983(a). Tellingly, the Defense Department's implementing regulations continue to use the words "anti-ROTC policy," 32 C.F.R. § 216.4(b) (2005), and to define that phrase in terms of policies that "prohibit[], or in effect prevent[]" ROTC activities or participation, § 216.3(a).

effect prevents, . . . a student . . . from enrolling in a[n ROTC] unit . . . at another institution." 10 U.S.C. § 983(a)(2). A situation could easily arise where: (1) a college required all students with a given major to take a class that was offered only at one particular time; but (2) the only nearby ROTC unit had mandatory activities that conflicted with the course's meeting schedule. If the government's enforcement policies with respect to the Solomon Amendment reflected an accurate view of the meaning of "in effect prevents," then the school's requirement would presumably be one that "in effect prevent[ed] [the] student . . . from enrolling in a[n ROTC] unit . . . at another institution." And if that were true, institutions of higher learning could presumably be required to modify scores of neutral and generally applicable policies to ensure that their students' ability to participate in ROTC was not impaired. Like the Solomon Amendment, then, the ROTC provision is most sensibly read to rule out only policies that target ROTC programs and participants for special negative treatment.

Another provision points in the same direction. In 1996, Congress amended the Solomon Amendment to make clear that its limitations on funding should not be applied to any institution that "has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2); *see* Pub. L. No. 104-208, § 514(c)(2), 110 Stat. 3009-271. Although such schools are unquestionably, in some sense, "anti-military," Congress apparently deemed it significant that they "are not *simply* antimilitary based on a political position of the time but rather have that deep-seated opinion." 142 Cong. Rec. H5716 (daily ed. May 30, 1996) (Rep. Goodlatte) (emphasis added). This further supports the view that the object of the Solomon Amendment's funding condition is policies that are "anti-military" as such. There is nothing remotely "anti-military," however, about insisting that military recruiters follow the same evenhanded rules as everyone else.

Finally, *amici*'s argument is perfectly consistent with the Solomon Amendment's legislative history. That history

makes clear Congress's concern that military recruiters not be singled out for special burdens. *See supra* pp. 3-9. But there are, so far as *amici* are aware, *no* statements by supporters of either the Solomon Amendment or its subsequent extensions declaring that the statute entitles the military to demand immunity from evenhanded recruiting rules. To the contrary, the debates are replete with statements that the statute requires no more than that the military be provided "the opportunity to recruit,"[21] "the same recruiting opportunities offered to private corporations,"[22] "access . . . that is equal to other employers,"[23] or "fair and equal treatment."[24] Although some opponents of the Solomon Amendment have opined that it was "designed among other things to punish institutions which refuse to permit recruiting by the Department of Defense because it discriminates against individuals on the basis of their sexual orientation,"[25] such claims warrant little weight. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation."); *see also NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 66 (1964) ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach.").

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[21] 140 Cong. Rec. H3861 (daily ed. May 23, 1994) (Rep. Solomon).

[22] 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Pombo).

[23] H.R. Rep. No. 108-443 (Pt. I), at 4 (2004).

[24] 150 Cong. Rec. H1711 (daily ed. Mar. 30, 2004) (Rep. Rogers).

[25] 140 Cong. Rec. S8278 (daily ed. July 1, 1994) (Sen. Moynihan); *see also, e.g.*, 150 Cong. Rec. H1695-96 (daily ed. Mar. 30, 2004) (Rep. McGovern); *id.* at H1705 (Rep. Frank); *id.* (Rep. Woolsey); *id.* at H1709 (Rep. Stark); *id.* at H1710 (Rep. Blumenauer); 140 Cong. Rec. H3864 (daily ed. May 23, 1994) (Rep. Schroeder); *id.* (Rep. Engel).

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It is true that the Solomon Amendment was enacted by Congress not long after it first mandated exclusion of lesbians, gays, and bisexuals from military service. *See* Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1670 (1993). *But see supra* note 18. And it may well be that some members of Congress thought or hoped that either the Solomon Amendment or its recent amendments would require universities to condone the military's failure to comply with evenhanded antidiscrimination policies. But that is not the issue. The issue here is the proper meaning of the law Congress has *actually* enacted, not the uncodified and unstated desires of some of its drafters. If Members wish to enact a law exempting military recruiters from any policy that might somehow impair military recruiting—or to undertake the highly delicate and politically charged task of defining a sub-category of such policies from which the military should be deemed immune—they may do so, subject, of course, to constitutional constraints. But they have not done so. And this Court should not do it for them.[26]

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[26] There is no issue of *Chevron* deference in this case. The Department of Defense has never propounded an interpretive regulation that addresses the issue raised and to which a court could be asked to defer. Tellingly, the government has not seen fit to request deference of any kind at any stage of this litigation.

If anything, the position of the Executive Branch appears to support the statutory reading advanced by *amici*. The near-constant refrain of the government's brief—that the Solomon Amendment requires no more than "equal access"—is fully consistent with *amici*'s position but undercuts any assertion that the statute confers upon military recruiters a special privilege to disregard evenhanded antidiscrimination rules. In addition, Defense Department regulations support the view that the Solomon Amendment grants the military no freestanding exemption from neutral and generally applicable recruiting policies. Though not purporting to interpret the underlying statutory language, the regulations instruct that the funding prohibitions "shall not apply . . . if . . . the covered school . . . [w]hen not providing requested access to campuses or to students on

II. Sound Principles Of Judicial Restraint Counsel That This Court Should Resolve The Question Of Statutory Coverage Before Turning, Only If Necessary, To Constitutionality

The threshold statutory question discussed in this brief—whether evenhanded antidiscrimination policies even implicate the Solomon Amendment—should certainly be addressed before the Court takes up the complex constitutional issues implicated by the Court of Appeals' stated grounds of decision. As Justice Brandeis explained, a court should "not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of. . . . [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide

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campus, certifies that *all employers are similarly excluded* from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least *equal in quality and scope to that afforded to other employers*." 32 C.F.R. § 216.4(c)(3) (2005) (emphases added). If *all* employers who refuse to abide by an institution's antidiscrimination policy are "similarly excluded," then the "quality and scope" of access afforded to the military *is* the same as that "afforded to other employers."

Given all of these facts, the varied assertions made by an assortment of sub-cabinet officials in correspondence with law schools and their parent universities about what the Solomon Amendment requires should not be given any special weight in construing the statute. *See, e.g.*, App. 95-96, 99-100, 103-04, 107-08, 111-12, 116, 118-19, 123-24, 128-33, 187-88, 202-03. Absent an agency determination embedded in something other than the Defense Department's enforcement practices or the government's litigating position, there is nothing to which *Chevron* deference could be accorded. At most, the letters would be entitled to deference based on their persuasiveness pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See United States v. Mead*, 533 U.S. 218, 228 (2001). But as noted above, the government has never requested that sort of deference, and none would be warranted in any event because the letters generally make unadorned threats rather than attempt to articulate a coherent vision of the Solomon Amendment's proper meaning.

only the latter." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (concurring opinion).

This sound policy of avoiding "questions of a constitutional nature unless absolutely necessary to a decision of the case" (*id.* at 327) does not exist exclusively—or even principally—for the benefit of the particular parties before the Court. Accordingly, its application should not turn on their litigation strategies, and the fact that the parties have not addressed the threshold statutory question does not change the fact that this Court should do so. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500, 507 (1979) (affirming a judgment on statutory grounds despite the fact that the party that had prevailed below made only constitutional arguments). *Cf. Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) (remanding for reconsideration of statutory issues that "would moot the constitutional issues presented by the case" despite the fact that "[t]he parties have not briefed the statutory question").

Taking up the statutory question first would be especially prudent here because there is no way of deciding the Solomon Amendment's constitutionality, either way, without venturing into uncharted terrain. Even upholding the Amendment as properly construed could plunge the Court into contentious issues surrounding the spending power. Is there some limit on the use of conditional spending to exert pressure on private acts of conscience and communication? *Cf. Rust v. Sullivan*, 500 U.S. 173, 199 (1991) (noting that the Court has consistently rejected the position "that funding by the Government . . . is invariably sufficient to justify Government control over the content of expression"). Is there some point where "inducement" passes illicitly over into "coercion"? *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). One need not take a position on these matters (and *amici* do not) to see that they are critically important and that this case presents no record conducive to addressing them cleanly.

Moreover, on the government's account—which would permit Congress to attach whatever conditions to federal funds it wishes so long as it does not seek to suppress particular viewpoints (*see* U.S. Br. 41)—its defense of the Solomon Amendment is still highly problematic. As noted earlier, the Solomon Amendment currently exempts from its funding prohibition educational institutions that have "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). In light of this provision, the government is simply wrong in asserting that the Solomon Amendment "is entirely indifferent to an institution's reason for denying equal access." U.S. Br. 42. Rather, as currently enforced, the statute honors one sincerely held commitment (that religious pacifism is an adequate justification for excluding military recruiters), while failing to give equal regard to another (that students should be treated without regard to sexual orientation by the university community and by those—military or otherwise—whom it invites onto its campus). In other words, the Solomon Amendment not only exempts a single category of schools, it does so based on the specific *views* behind those institutions' wish to restrict military recruiting—something that should be more than enough to raise concerns about Congress's aim in enacting the statute.

On the other hand, if the Court of Appeals' stated justifications for concluding that the Solomon Amendment is likely unconstitutional were applied to the Amendment as we read it—an exercise not undertaken below—the consequences could be worrisome. *See* Pet. App. 11a-47a. Our concern, first and foremost, is in furthering the eradication of invidious discrimination. Accordingly, we are deeply concerned about an opinion that would accept the assertion that the Solomon Amendment requires nothing more than equal access—but *then* conclude that the statute is nonetheless unconstitutional because it infringes upon associational rights,

compels unwilling speech, or restricts expressive conduct.[27] Most obviously, such an approach could encourage attempts by discriminatory employers, educational institutions, or other groups to evade compliance with various pieces of federal civil rights legislation—including the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—by asserting that granting equal treatment without regard to race or sex would send a "message" with which they disagree. *Cf.* U.S. Br. 19-20, 24-25.

An additional complication in our view is the possibility that affirmance of the Court of Appeals' reasoning would be invoked by discriminators in efforts seeking immunity from the large and growing number of laws and ordinances that outlaw unequal treatment on the basis of sexual orientation. By one recent count, 23 States, the District of Columbia, and at least 183 cities and counties now prohibit sexual-orientation discrimination in areas such as education, employment, housing, and public accommodations.[28]

At this point in our history, there are—happily—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender. And while this Court has recognized the compelling

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[27] If this Court were to accept the position of these *amici*, the propriety of proceeding to address the constitutional issue when the Court of Appeals had not done so on our understanding of the statute, and when sorting out issues of standing would pose its own difficulties, would seem doubtful. If, instead, the Court were to reject the position of these *amici* and thus could not avoid reaching the constitutional question, *amici* express no view of how the constitutional analysis should proceed, nor of the implications of a holding that such a requirement is unconstitutional.

[28] *See* Lambda Legal, Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation, *available at* http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217.

nature of the government's interest in stamping out discrimination against racial minorities and women[29]—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry.[30] As a result, civil rights laws banning sexual-orientation discrimination are those most likely to be challenged under the First Amendment theory endorsed by the court below and least likely to be upheld on the ground that they advance a compelling governmental interest.

There is no need for the Court to undertake this journey. There is another road the Court could take—one consistent with the best traditions of judicial restraint. As we have explained, the Court should hold that the Solomon Amendment is simply a measure that bars policies or rules that target the military for disfavored treatment. Were Congress ever actually to enact a law conferring upon military recruiters alone the unprecedented right to claim immunity from even neutral and generally applicable recruiting rules—like those adopted by Harvard Law School—there would be time enough to consider these sensitive and difficult constitutional issues.

CONCLUSION

For the reasons given above, this Court should affirm on alternative grounds.

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[29] *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (acknowledging the government's "fundamental, overriding interest in eradicating racial discrimination in education"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting society's "compelling interest in eradicating discrimination against its female citizens").

[30] This Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), for example, contains no statement about the strength of the government's interest in eliminating discrimination based on sexual orientation.

Respectfully submitted.

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