

FAIR V. RUMSFELD

390 F.3D 219 (3D CIR. 2004)

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|---|-----|
| Introduction | 717 |
| I. Background | 718 |
| II. District Court | 721 |
| A. Unconstitutional Conditions Claim..... | 722 |
| B. Viewpoint Discrimination..... | 724 |
| C. Void-for-Vagueness | 725 |
| D. Holding | 725 |
| III. Third Circuit | 726 |
| A. Expressive Association | 726 |
| B. Compelled Speech..... | 729 |
| C. Holding..... | 731 |
| D. Dissent | 731 |
| IV. Procedural Posture..... | 732 |
| V. Implications | 733 |
| A. DOD Strategy for Trial | 734 |
| B. <i>FAIR</i> 's Reliance on <i>Dale</i> | 735 |
| Conclusion | 735 |

INTRODUCTION

On November 29, 2004, the Third Circuit in *Forum for Academic and Institutional Rights* (“*FAIR*”) v. *Rumsfeld*¹ held that the Solomon Amendment, a federal law requiring law schools to permit military recruiters on campus to recruit,² was unconstitutional.³ The decision

1. 390 F.3d 219 (3d Cir. 2004) [hereinafter *FAIR II*] (holding that the enforcement of the Solomon Act against law schools violates their First Amendment rights under the doctrines of expressive association and compelled speech).

2. See 10 U.S.C.S. § 983(b) (2004) (conditioning the receipt of federal funding, which is vital to the functioning of academic institutions, on the offering of the military equal access to campus recruiting).

3. See *FAIR II*, 390 F.3d at 246 (holding that the Solomon Amendment burdened the law schools’ right to free speech because it required the schools to express a message that was incompatible with their nondiscrimination policies). The court also reasoned that there was no compelling government interest justifying the denial of free speech. *Id.*

marked a victory for law schools nationwide, who may soon be able to enforce their existing nondiscrimination policies against military recruiters without the risk of losing federal funding.⁴

I. BACKGROUND

For decades, law schools have had policies preventing employers who discriminate against certain classes of individuals from recruiting on their campuses.⁵ In the 1970s, law schools began expanding their recruitment policies to include a prohibition against sexual orientation discrimination.⁶ In 1990, recognizing the prevalence of these policies in its member schools, the Association of American Law Schools ("AALS") voted to require all member schools to exclude employers who discriminate on grounds of sexual orientation from campus recruiting activities.⁷ The AALS has enforced this policy by requiring employers who recruit at law schools to provide written assurance that they do not discriminate, *inter alia*, against gays or lesbians.⁸ Because the military effectively banned homosexual service members from its ranks for the better part of the century, law schools began enforcing their nondiscrimination policies by preventing the military from recruiting on campus.⁹

4. See Heller Ehrman White & McAuliffe LLP, *Frequently Asked Questions About the Third Circuit's Decision in the Solomon Amendment Case (FAIR v. Rumsfeld)* [hereinafter *Frequently Asked Questions*] (opining that the scope of the injunction on the Solomon Amendment might well be national because the remedy would have to cover each plaintiff in the litigation and there are plaintiffs from all over the country involved in the case), available at <http://www.law.georgetown.edu/solomon/documents/FAIRvRumsfeldQA.pdf> (last visited June 6, 2005). Note that the law firm of Heller Ehrman argued *FAIR v. Rumsfeld* before the Third Circuit. *FAIR II*, 390 F.3d at 219.

5. See, e.g., ASS'N OF AM. LAW SCH. ("AALS"), BYLAWS § 6-3(b) (2004) (prohibiting discrimination on the basis of, *inter alia*, race, sex, national origin, and disability), available at <http://www.aals.org/bylaws.html> (last visited June 6, 2005); see also *FAIR II*, 390 F.3d at 224 (explaining how law schools have long required equal opportunity in the job recruitment process).

6. See *FAIR II*, 390 F.3d at 224-25 (describing how some law schools, as early as 1970, began requiring that on-campus recruiters not discriminate based on sexual orientation).

7. See AALS, EXECUTIVE COMMITTEE REGULATIONS § 6-3.2(a) (2004) (mandating that member law schools have employers certify to the school's nondiscrimination policy as a condition of obtaining Career Services assistance), available at <http://www.aals.org/ecr> (last visited June 6, 2005); see also Marcia Coyle, *Law Schools v. Defense Department: Bush to Appeal over Military Recruiting*, NAT'L LAW J., Jan. 31, 2005, at 1 (explaining how the AALS made it a requirement of membership in the association that law schools ban employers who discriminate on grounds of sexual orientation).

8. See *The AALS Commitment to Nondiscrimination and the AALS' Amelioration Requirement* ¶2 (describing how the AALS enacted this measure in their regulations to enforce their nondiscrimination policies), at <http://www.law.georgetown.edu/solomon/Commitment.html> (last visited June 6, 2005).

9. See *id.* (summarizing the military's history of discrimination against homosexuals); see also Michelle Lore, *Minnesota Law Schools Review Ruling on On-campus Military Recruiting*, MINN. LAW., Dec. 20, 2004 (noting that after the AALS enacted the 1990 policy, law schools nationwide began banning on-campus military recruiting) (on file with the *Journal of Gender, Social Policy & the Law*).

In 1993, Congress passed the Don't Ask–Don't Tell–Don't Pursue Policy (“Don't Ask, Don't Tell”).¹⁰ Under this statute, the military may discharge any service member who “engage[s] in . . . a homosexual act” or “state[s] that he or she is a homosexual.”¹¹ Because Don't Ask, Don't Tell bans openly gay service members, the military has been unable to comply with AALS's nondiscrimination policy.¹² The effect of this tension between AALS and military policy has been national resistance against military recruitment in law schools.¹³

To respond to this resistance, Representative Solomon introduced a bill that conditioned the receipt of Department of Defense (“DOD”) funds by educational institutions on the inclusion of the military in campus recruitment activities.¹⁴ In 1995, Congress enacted the “Solomon Amendment.”¹⁵ Over the years, Congress has amended the Solomon Amendment a number of times in response to law schools prohibiting military recruitment on their campuses.¹⁶ Under the most current revision, law schools risk losing extensive federal funding if they do not allow the military to recruit on campus “in a manner that is at least equal in quality and scope” as is provided to “any other employer.”¹⁷

Initially, the DOD lackadaisically enforced the Solomon Amendment,

10. See 10 U.S.C.S. § 654 (1993) (providing for the separation of a service member from the military if he or she engages in homosexual acts or proclaims him or herself to be a homosexual); Howard J. Bashman, *Striking Down the Solomon Amendment on Military Recruiting: A Hollow Victory at the Expense of Our Military*, CHRON. OF HIGHER EDUC., Jan. 7, 2004, at 14 (noting that President Clinton signed “Don't Ask, Don't Tell,” into law in 1993, allowing the military to continue to discriminate on the basis of sexual orientation).

11. 10 U.S.C.S. § 654(b).

12. See, e.g., *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 168 (D. Conn. 2005) (mentioning that the Department of Defense has refused to certify its compliance with Yale Law School's nondiscrimination policy because of “Don't Ask, Don't Tell”).

13. See *FAIR II*, 390 F.3d at 225-26 (noting how law schools' resistance to military recruiting after “Don't Ask, Don't Tell” sparked the creation of the Solomon Amendment).

14. See 140 CONG. REC. H3861-63 (daily ed. May 23, 1994) (statement of Sen. Solomon) (urging his colleagues to “send a message over the wall of the ivory tower of higher education” that if schools are too self-righteous to treat the military with respect, then they can do without the benefits of federal funding).

15. See 10 U.S.C.S. § 654; *FAIR II*, 390 F.3d at 226 (noting that, despite some initial resistance on Capitol Hill, the House passed the Solomon Amendment by a vote of 271 to 126). The Senate approved the bill several months later. *Id.*

16. Compare Pub. L. No. 92-436, § 606, 86 Stat. 734 (1972) (denying DOD funding to institutions that blocked military recruiters), with Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996) (expanding the penalty to include funds from the Departments of Transportation, Labor, Health and Human Services, and Education), and Pub. L. No. 106-65, § 549(a)(1) (1999) (extending the scope of the Solomon Amendment to any “subelements” of academic institutions), and Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004) (requiring not only military access to campus recruiting, but access “in a manner that is at least equal in quality and scope” to that provided to other employers). *But see* Pub. L. No. 106-79, 113 Stat. 1212 (1999) (revising the Solomon Amendment so the penalty for noncompliance does not affect funds “available solely for student financial assistance or related administrative costs”).

17. See 10 U.S.C.S. § 983(b).

but it began to demand strict compliance after the September 11, 2001, terrorist attacks.¹⁸ Law schools that had policies allowing the military on campus, but in a limited capacity, began feeling DOD pressure to conform to the statute by providing equal access to military recruiters.¹⁹ By 2003, most law schools had adopted policies exempting the military from their law schools' nondiscrimination policies.²⁰

Currently, the AALS policy excuses member law schools from the enforcement of the nondiscrimination policy against the military, provided that the school takes ameliorative steps to mitigate the message being sent to students by allowing the military on campus.²¹ In most schools, these ameliorative steps consist of protests on the day or days the military is present on campus.²²

The Solomon Amendment forces law schools to choose between receiving federal funding and protecting gay or lesbian students from discrimination.²³ The Amendment compels schools to send a message that their educational institutions condone such discrimination, despite their

18. See *FAIR II*, 390 F.3d at 227 (noting that following the 2001 terrorist attacks, the DOD began demanding compliance with the Solomon Act); see also Coyle, *supra* note 7, at 1 (reporting that the "changed environment" of post-September 11 caused the DOD to step up enforcement of the Solomon Amendment, which sparked the recent lawsuits including *FAIR v. Rumsfeld*).

19. See *FAIR II*, 390 F.3d at 227 (noting that prior to the fall of 2001, the DOD did not seem to consider restricted military access to campus recruiting to be a violation of the Solomon Amendment); see also Burt, 354 F. Supp. 2d at 168-69 (summarizing how Yale, which required the military to recruit off campus, did not have problems with the DOD until after the fall of 2001).

20. See *FAIR II*, 390 F.3d at 228 (explaining that because of "the millions of dollars at stake, every law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.").

21. See Memorandum from Carl Monk, to the Deans of Member and Fee-Paid Schools (Jan. 24, 2000) (mentioning that member law schools that allow the military on campus should dissociate themselves from the military's discrimination and take steps to remedy any adverse effects of non-compliance with the AALS nondiscrimination policy), at <http://www.aals.org/00-2.html> (last visited June 6, 2005).

22. See Memorandum from AALS Deputy Director Bari Burke, to the Deans of Member and Fee-Paid Law Schools (May 14, 1998) (asking schools to publicly express their disapproval of discrimination against the military's position of discrimination based on sexual orientation), at <http://www.aals.org/98-23.html> (last visited June 6, 2005); see also Stacy J. Evans, *Military Recruitment and a Few Good Ameliorative Measures*, NALP BULLETIN 1-2 (2003) (listing ways law schools can ameliorate the negative effects of allowing the military to recruit on campus, including: 1) a letter from the dean to the students explaining the school's position on discrimination against homosexuals; 2) the creation of a faculty resolution to treat all students equally regardless of sexual orientation; 3) holding a protest against the military's "Don't Ask, Don't Tell" policy; and 4) having a diversity day to show campus solidarity), available at http://www.nalp.org/assets/library/140_0903mil.pdf (last visited June 6, 2005).

23. See Patrick Fitzgerald, *Law School Antidiscrimination Policy Upheld by Court*, STANFORD DAILY, Feb. 15, 2005 (noting that most law schools are torn between honoring their nondiscrimination policies and receiving federal funding), available at http://www.stanforddaily.com/tempo?page=content&id=16134&repository=0001_article (last visited July 17, 2005).

nondiscrimination policies.²⁴ On September 19, 2003, an association of law schools and law faculty (FAIR) sued the DOD, seeking an injunction on the enforcement of the Solomon Amendment.²⁵

II. DISTRICT COURT

Plaintiffs sought a preliminary injunction against the Solomon Amendment, arguing that the Solomon Amendment was unconstitutional.²⁶ The plaintiffs' first argument was that the Solomon Amendment unconstitutionally conditioned federal funding on the surrendering of First Amendment rights.²⁷ Second, the plaintiffs argued that the Solomon Amendment discriminated on the basis of viewpoint by only promoting a pro-military recruiting message and punishing those schools that chose to exclude the military because they found the military's message to be repugnant.²⁸ The plaintiffs last argued that the Solomon Amendment was unconstitutionally vague.²⁹ The United States District Court for the District of New Jersey summarily rejected all three arguments and denied plaintiffs' motion for a preliminary injunction.³⁰ Central to the court's holding was that the act of recruiting was not itself a form of speech; if anything, it was expressive conduct, demanding a lower level of scrutiny

24. See *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 281-82 (D. N.J. 2003) [hereinafter *FAIR I*] (explaining that law schools "are loathe" to engage in recruitment activities that would suggest that the military's discrimination against homosexuals is acceptable).

25. See *id.* at 275-76.

26. See Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 19, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) [hereinafter Plaintiffs' Brief].

27. See *id.* at 19-31 (explaining how the Solomon Amendment unconstitutionally conditions receipt of federal funding on the law schools' relinquishment of the First Amendment rights of academic freedom, expressive association, and freedom from compelled speech). *But cf.* Memorandum of Law in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction at 22, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) [hereinafter Defendants' Brief] (arguing that the unconstitutional conditions doctrine is inapplicable in the present case because the Solomon Amendment does not restrict speech). Law schools, the defendants point out, are "free to speak as they please." Defendants' Brief, *supra*, at 24.

28. See Plaintiffs' Brief, *supra* note 26, at 31-32 (contending that the Solomon Amendment should be struck down because it unconstitutionally promotes the military's viewpoint and punishes law schools that attempt to ban military recruiting to avoid that viewpoint). *But cf.* Defendants' Brief, *supra* note 27, at 29-31 (suggesting that it is impossible for the Solomon Amendment to discriminate on the basis of viewpoint because the law does not even target speech).

29. See Plaintiffs' Brief, *supra* note 26, at 33-36 (arguing that the Solomon Amendment, as well as the DOD's interpretations of it, is unconstitutionally vague, because there are no clear guidelines for compliance and it has the potential to be arbitrarily applied in a discriminatory manner). *But cf.* Defendants' Brief, *supra* note 27, at 31-34 (explaining that the terms of the Solomon Amendment are clear: if a school denies the military equal access to on-campus recruiting, it loses federal funding).

30. See *FAIR I*, 291 F. Supp. 2d at 275 (denying the plaintiffs' motion for a preliminary injunction because the district court found plaintiffs failed to establish a likelihood of success on the merits of their constitutional claims).

under the First Amendment.³¹

A. *Unconstitutional Conditions Claim*

The court first considered whether the Solomon Amendment unconstitutionally conditioned federal funds on the relinquishment of First Amendment rights.³² The court began its analysis by noting that the Spending Clause granted Congress the authority to enact the Solomon Amendment.³³ Congress, the court stressed, has wide latitude under the Spending Clause to condition the receipt of funding in furtherance of important policy objectives.³⁴ However in some instances, the court noted, the First Amendment trumps the Spending Clause.³⁵ In these instances, courts apply the unconstitutional conditions doctrine.³⁶

Under the doctrine of unconstitutional conditions, the state may not deny a benefit to a person on a basis that infringes on that person's constitutionally protected interests.³⁷ Thus, for the doctrine to apply, the plaintiffs had to identify a constitutionally protected interest that was being infringed upon.³⁸ The plaintiffs argued that their constitutionally-protected interests of academic freedom and First Amendment rights under the expressive association and compelled speech doctrines were being unconstitutionally conditioned by the Solomon Amendment.³⁹

31. *See id.* at 310-14 (deciding that because the Solomon Amendment only indirectly infringes on speech, intermediate scrutiny, not strict scrutiny, should be applied to analyze whether the Solomon Amendment is constitutional).

32. *See id.* at 299-301 (laying the framework for discussion of the unconstitutional conditions doctrine). The doctrine of unconstitutional conditions prohibits the state from denying a benefit to a person on a basis that infringes on a constitutionally protected interest. *Id.* at 299.

33. *See id.* at 298 (noting that "the Spending Clause is the appropriate starting point for assessing the constitutionality of the Solomon Amendment").

34. *See id.* at 298-99; *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (explaining that the Spending Clause allows Congress to attach conditions to the receipt of federal funds and the Supreme Court has emphasized that "Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives").

35. *See FAIR I*, 291 F. Supp. 2d at 299 (warning that congressional spending power is not unlimited). Other constitutional provisions in some instances trump congressional spending power. *Id.*

36. *See id.* (noting that "[t]raditional Spending Clause analysis does not apply in situations where the spending power clashes with First Amendment rights."). In those cases, it is proper to apply the unconstitutional conditions doctrine to consider whether the condition of federal funding unconstitutionally infringes on First Amendment freedoms. *Id.*

37. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (explaining that the state cannot constitutionally compel an individual to relinquish his or her constitutionally protected rights by providing or denying an incentive for giving up rights).

38. *See FAIR I*, 291 F. Supp. 2d at 301 (stating that "[a] finding of an unconstitutional condition presupposes that there is a relinquishment of a constitutional right.>").

39. *See* Plaintiffs' Brief, *supra* note 26, at 19-31 (arguing how compliance with the Solomon Amendment forced law schools to relinquish their academic freedom and First Amendment rights under the expressive association and compelled speech doctrines). *But*

The court decided that academic freedom, while important, could not stand alone as a constitutionally protected interest.⁴⁰ The court agreed that the plaintiffs qualified as expressive associations, but held that law schools were not forced to contradict their nondiscrimination policies because at no point during campus recruiting does the military ever become a member of a law school.⁴¹ Nor does the military ever have the authority to speak on the school's behalf.⁴² The court also found it persuasive that the plaintiffs were able to engage in ameliorative measures, such as Judge Advocate General ("JAG") protests, which could counteract any harmful effect created through military recruitment.⁴³ Finally, the court rejected the notion that the plaintiffs had a constitutionally protected interest under the compelled speech doctrine because the court saw recruiting as an economic activity.⁴⁴

The court balanced the interests involved to determine whether the Solomon Amendment violated the First Amendment.⁴⁵ Because the court perceived recruitment as a mixture of speech and non-speech, it applied intermediate scrutiny to the Solomon Amendment.⁴⁶ The court found that

cf. Defendants' Brief, *supra* note 27, at 22 (asserting that the Solomon Amendment cannot violate the unconstitutional conditions doctrine because the statute is unrelated to speech).

40. *See FAIR I*, 291 F. Supp. 2d at 303 (deciding for the purposes of the case at bar that "the right to academic freedom is not cognizable without a foundational free speech or associational right."). The court also explained that if the Solomon Amendment unconstitutionally conditions the law schools' academic freedom, it is only because it also infringes on the law schools' free speech or associational rights. *Id.*

41. *See id.* at 304 (finding that law schools have official policies pertaining to sexual orientation issues, which is enough to make them expressive associations for the purpose of the First Amendment). The court continued its analysis of the expressive association doctrine and decided that it is inapplicable to the case at bar because law schools are not forced to speak or restricted from speaking when the military is on campus. *Id.* at 306.

42. *See id.* at 305 (deciding that requiring law schools to permit the military to recruit on campus does not force law schools to send a message that is antagonistic to law schools' nondiscrimination policies because at no point can it be said that the military recruiters have the authority to speak on the law schools' behalf). The court further pointed out that law schools are able at any point to proclaim their own message condemning the military's employment discrimination, as many schools do through campus-wide protests and other "ameliorative measures." *Id.* at 305-06.

43. *See id.* (stating that "[w]hile there is tension between the Solomon Amendment and law school recruiting policies, there are ways of relieving that tension by taking ameliorative measures to distance the law schools from the military's discriminatory policy.>").

44. *See id.* at 307-08 (distinguishing the case at bar from cases involving the solicitation of contributions and proselytizing, because recruiting is essentially an economic activity, where soliciting contributions and proselytizing implicate free speech interests, including communication of information and dissemination and propagation of views and ideas).

45. *See id.* at 310 (noting that the final step in the expressive association analysis involved "balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries.>").

46. *See id.* at 311 (applying intermediate scrutiny because the Solomon Amendment affects associational rights in an indirect and less immediate fashion). The court found that heightened, or strict scrutiny, is only appropriate where state action directly burdened expressive rights. *Id.* at 310. *But see* Plaintiffs' Brief, *supra* note 26, at 28 (arguing that the Solomon Amendment does directly burden law schools' First Amendment rights, so the

the Solomon Amendment did not violate the plaintiffs' rights under the unconstitutional condition doctrine because: 1) it was authorized by Congress; 2) it furthered a substantial state interest; 3) it did not target speech; and 4) any incidental restriction on speech was no more than was necessary to meet the state interest.⁴⁷

B. Viewpoint Discrimination

The court next considered whether the Solomon Amendment was unconstitutional as invidious viewpoint discrimination.⁴⁸ The court noted that the government may not regulate speech based on the message it conveys, but refused to deem the Solomon Amendment a governmental restriction on speech.⁴⁹ The plaintiffs argued that the Solomon Amendment discriminated on the basis of viewpoint by promoting a pro-military message and by punishing law schools that chose to exclude the military.⁵⁰ The court rejected both of these arguments. The court distinguished the present case from a situation in which the state effectively drives a viewpoint from discourse.⁵¹ Law schools that are in compliance with the Solomon Amendment, the court noted, are still able to express their anti-discrimination message through ameliorative measures, such as JAG protests.⁵² Additionally, the court stressed that the Solomon Amendment's impact on speech was incidental and thus the plaintiffs' use

proper standard to apply to the statute to weigh its constitutionality is strict scrutiny).

47. See *FAIR I*, 291 F. Supp. 2d at 312-14 (applying intermediate scrutiny to the case at bar and finding the Solomon Amendment's incidental burdening of the law schools' expression constitutional).

48. See *id.* at 314-15 (analyzing whether the plaintiffs were correct in claiming that the Solomon Amendment discriminates on the basis of viewpoint by promoting only a pro-military message and by punishing those schools that ban military recruiting because they disagree with the message).

49. See *id.* (finding that while the state may not regulate speech based on its content, the Solomon Amendment's incidental restriction on speech is not a situation where there is a risk of "excising specific ideas or viewpoints from the public discourse").

50. See Plaintiffs' Brief, *supra* note 26, at 226 (arguing that the legislative history indicates that the Solomon Amendment was passed to "'send a message over the wall of the ivory tower of higher education,'" which clearly indicates that the law discriminates on the basis of viewpoint by promoting a pro-military message at the expense of law schools' First Amendment freedoms) (internal citations omitted); see also 140 CONG. REC. 11,441 (1994) (Rep. Pombo) (stating that higher education needs to know that their "starry-eyed idealism" comes with a price and urging his colleagues to support the Solomon Amendment).

51. See *FAIR I*, 291 F. Supp. 2d at 314-16 (noting that while the Solomon Amendment had the effect of restricting expression, that restriction was incidental to the statute's primary purpose and thus it could not be said that the Solomon Amendment preferred one viewpoint to another). The law schools' viewpoint is still quite present in the public discourse through the use of ameliorative measures. *Id.* at 315.

52. See *id.* (arguing that if the Solomon Amendment really did promote a pro-military message at the expense of the law schools' anti-discrimination message, then law schools that engaged in ameliorative measures would be unable to do so and still be in compliance with the statute). The fact that law schools are able to engage in protest without any statutory consequences proved to the court that the Solomon Amendment could not be discriminating on the basis of viewpoint. *Id.*

of the viewpoint discrimination doctrine was unavailing.⁵³

C. *Void-for-Vagueness*

Finally, the court considered the plaintiffs' third argument, that the Solomon Amendment was unconstitutionally vague, leaving too much discretion in the hands of the DOD.⁵⁴ Under the void-for-vagueness doctrine, a law cannot be so vague that an individual of "common intelligence must necessarily guess at its meaning."⁵⁵ Additionally, under the doctrine, the law must provide specific standards for those who apply it to avoid arbitrary enforcement.⁵⁶ The court noted that laws that burden First Amendment rights must regulate with narrow specificity.⁵⁷ The court, however, applied a lower vagueness standard in reviewing the Solomon Amendment because the Solomon Amendment did not directly burden speech.⁵⁸ The court found the Solomon Amendment was not unconstitutionally vague because the statute and regulations were clear as to what conduct triggered the withholding of federal funds and on the penalty for noncompliance.⁵⁹

D. *Holding*

The district court denied the plaintiffs' motion for preliminary injunction, and found the Solomon Amendment constitutional under the doctrines of unconstitutional condition, viewpoint discrimination, and void-for-vagueness.⁶⁰

53. *See id.* at 316-17 (finding that because the Solomon Amendment's burden on speech is incidental, "any threat of government compulsion to adopt a particular viewpoint is far too tenuous and insubstantial to trigger constitutional alarm.").

54. *See id.* at 317-21.

55. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

56. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (explaining that laws can be vague by failing to provide explicit standards for those who apply them). The *Grayned* Court noted that the requirement of specific standards helps to avoid arbitrary and discriminatory enforcement of a law. *Id.*

57. *See FAIR I*, 291 F. Supp. 2d at 317 (noting that the vagueness analysis is different in the context of the First Amendment). "Because First Amendment freedoms need breathing space to survive," courts tend to require that the state be very clear with its legislation and "regulate only with narrow specificity." *Id.* at 317-18 (internal citations omitted); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (holding that because First Amendment freedoms are delicate and are so cherished by our society, the government may only regulate with narrow specificity when First Amendment freedoms are burdened by the application of a law).

58. *See FAIR I*, 291 F. Supp. 2d at 318.

59. *See id.* at 318-21 (indicating that the statute is clear on the penalty for noncompliance and discussing what conduct could trigger the penalty).

60. *See id.* at 296-322 (holding that the enforcement of the Solomon Amendment against law schools is constitutional because recruitment is not a form of expression, and the statute's infringement on speech is incidental and unsubstantial). The court held that the law is clear as to its terms for compliance and penalties for noncompliance. *Id.*

III. THIRD CIRCUIT

On appeal, the Third Circuit reversed the district court's dismissal and remanded the case, directing the lower court to issue the preliminary injunction enjoining the enforcement of the Solomon Amendment.⁶¹ The court found the enforcement of the Solomon Amendment against the law schools to be an unconstitutional condition.⁶² The plaintiffs argued, and the court found, two constitutional theories that supported a finding of an unconstitutional condition, expressive association and compelled speech.⁶³ The Third Circuit held that the plaintiffs would likely prevail under either theory.⁶⁴ Notably, unlike the district court, the circuit court saw the act of recruiting as expression, requiring a strict scrutiny analysis under the First Amendment.

A. *Expressive Association*

The Third Circuit first addressed the plaintiffs' claim of expressive association to determine if they satisfied the unconstitutional conditions doctrine.⁶⁵ There are three elements a court must consider in an expressive association claim: "(1) whether a group is an 'expressive association,' (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association."⁶⁶ In analyzing this claim, the court focused heavily on the Supreme Court's analysis in *Boy Scouts of America v. Dale*,⁶⁷ a case where the Supreme Court held that the Boy Scouts ("BSA"), as an expressive association, could not be forced

61. See *FAIR II*, 390 F.3d at 246 (finding that "the Solomon Amendment cannot condition federal funding on law schools' compliance" because that condition infringes upon the plaintiffs' constitutionally protected interests under the expressive association and compelled speech doctrines). Note that this case was decided 2-1 on a panel of three judges. See *id.* at 246-47 (Aldisert, J., dissenting) (dissenting because the majority did not presume that the Solomon Amendment was constitutional, and because the dissent did not believe that there was a connection between permitting the military on campus and requiring law schools to breach their nondiscrimination policies).

62. See *id.* at 229 (agreeing with the district court that the Supreme Court's exception to the unconstitutional conditions doctrine for selective spending programs does not apply to the case at bar, because the Solomon Amendment does not create a spending program). *But see id.* at 248 (Aldisert, J., dissenting) (criticizing the majority for not applying a presumption of constitutionality to the Solomon Amendment).

63. See *FAIR II*, 390 F.3d at 230. *But see id.* (noting that the plaintiffs' third proposed theory of vagueness, which they had argued at the district court level, has been mooted on appeal by the 2004 Amendment of the Solomon law).

64. See *id.* at 235, 242-43.

65. See *id.* at 235 (holding that the plaintiffs have a constitutionally protected interest under the expressive association doctrine and thus are likely able to prove the merits of their unconstitutional conditions claim).

66. *Id.* at 231 (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648-49 (2000)).

67. See *Dale*, 530 U.S. at 648 (recognizing an expressive association's right to exclude an unwanted person who could significantly affect that group's ability to advocate its viewpoint).

to accept an openly gay man as assistant scout master because doing so would force the organization to express a message that was contrary to their long-held belief that homosexuality is an illegitimate lifestyle.⁶⁸

The Third Circuit first considered whether the plaintiffs constituted expressive associations. An “expressive association” is a group that engages in some form of public or private expression above a *de minimus* level.⁶⁹ The court noted that law schools are highly expressive organizations because they have philosophies and values that are ingrained in their students as part of the students’ education.⁷⁰ Consequently, the court found the first element of the expressive association doctrine satisfied.

The court next considered whether the enforcement of the Solomon Amendment significantly affected the plaintiffs’ ability to advocate their viewpoint. The court analogized *Dale* to *FAIR* and concluded that the law schools’ ability to advocate their viewpoint was significantly affected by the enforcement of the Solomon Amendment.⁷¹ In *Dale*, the Court noted that the BSA felt that homosexuality was inconsistent with their Scout Oath.⁷² The *FAIR* court similarly found that the law schools believed that employment discrimination was inconsistent with their commitments to justice.⁷³ In *Dale*, the Court felt that homosexuals were not role models consistent with the expectations of scouting families.⁷⁴ Similar to the reasoning of *Dale*, the *FAIR* court found that law schools felt that the exclusionary practices of the military did not provide a model consistent with expectations of the legal community at large.⁷⁵ The Third Circuit also

68. See *FAIR II*, 390 F.3d at 231-32 (analogizing the BSA’s right to exclude gays because gay conduct is antagonistic to the BSA’s viewpoint, with the law schools’ right to exclude the military because the military’s employment discrimination is antagonistic to the schools’ viewpoint). But see *id.* at 260 (Aldisert, J., dissenting) (arguing that the *Dale* logic cannot be applied to *FAIR*, because unlike requiring BSA to take on a gay man as an assistant scout master, the Solomon Amendment does not require law schools to take on the military in any membership capacity).

69. See *Pi Lambda Phi, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443-44 (3d Cir. 2000) (defining the term of art, “expressive association”).

70. See *FAIR II*, 390 F.3d at 231 (finding that the plaintiffs are expressive associations because they have demonstrated “that the law schools possess clear educational philosophies, missions and goals”) (internal citation omitted).

71. See *id.* at 233 (deciding to give the same deference to the law schools’ opinion as to what affects the dissemination of their message that was given to the Boy Scouts in *Dale*).

72. See *Dale*, 530 U.S. at 652 (noting the BSA believes that homosexual conduct does not conform to the “morally straight” standard of the Scout Oath).

73. See *FAIR II*, 390 F.3d at 232 (highlighting how both the BSA in *Dale* and the law schools in *FAIR* were similarly forced to adopt a message that was inconsistent with their values).

74. See *Dale*, 530 F.3d at 652 (stressing that the BSA does not “allow for the registration of avowed homosexuals as members or as leaders”).

75. See *FAIR II*, 390 F.3d at 232 (noting that the BSA in *Dale* and the law schools in *FAIR* both desired to set an example to their members and saw the inclusion of an inconsistent message as antagonistic to that goal).

noted that the *Dale* court gave great deference to the Boy Scouts' view of acts which would impair its expression, recognizing that the association itself is best situated to ascertain how state action impairs its message.⁷⁶ The Third Circuit gave similar discretion to the plaintiffs in the present case, finding that the plaintiffs met the second element of the expressive association doctrine.⁷⁷

Finally, the court considered whether the state's interest justified the burden it imposed on the plaintiffs.⁷⁸ The court began by presuming that the state has a compelling interest in attracting military lawyers.⁷⁹ However, the court noted that the state action must also be narrowly tailored to achieve the compelling interest.⁸⁰ Here, the military had other means of attracting military lawyers.⁸¹ For example, the military has access to considerable funding and may attract recruits through sophisticated programs that are generally unavailable to other employers, such as television commercials, public advertisements, and loan repayment programs.⁸² The court also noted that the government failed to provide any evidence that the Solomon Amendment materially enhanced its goal of attracting military lawyers.⁸³ In fact, the court suggested that the Solomon Amendment may detrimentally affect the military's efforts to recruit lawyers, because it has generated much ill-will in academia.⁸⁴ The court decided that while the state's interests are compelling, its chosen means are not narrowly tailored to meet those interests.⁸⁵ Thus, the court found that

76. *See id.* at 233 (noting the *Dale* Court's instruction to deter an organization's opinion as to what compromises the expression of its viewpoint when considering the second element of the expressive association doctrine) (quoting *Dale*, 530 U.S. at 653).

77. *See FAIR II*, 390 F.3d at 233 (taking note of the fact that "FAIR has supplied written evidence of its belief that the Solomon Amendment's forcible inclusion of and assistance to military recruiters undermines their efforts to disseminate their chosen message of nondiscrimination. Accordingly, we must give *Dale* deference to this belief . . .").

78. *See id.* at 234 (finding that while the state interest is compelling, the Solomon Amendment still violates the First Amendment because it is not narrowly tailored).

79. *See id.*

80. *See id.* (explaining that under strict scrutiny a compelling interest alone is not enough; the state must also demonstrate that the law or policy in question is "narrowly tailored").

81. *See id.* at 235 (explaining that the state "has given [the court] no reason to suspect that [other means of attracting military lawyers] are less effective than on-campus recruiting.").

82. *See id.* (exploring alternative methods for attracting military lawyers).

83. *See id.* (implying that if the DOD had provided proof that the Solomon Amendment is necessary to attract military lawyers, the court might have found the Solomon Amendment constitutional).

84. *See id.* (finding nothing in the record to prove that the Solomon Amendment "materially enhances its stated goal" and musing that "it may plausibly be the case that the Solomon Amendment . . . actually *impedes* recruitment") (emphasis in original).

85. *See id.* (stating that "[the] availability of alternative, less speech-restrictive means of effective recruitment is sufficient to render the Solomon Amendment unconstitutional under strict scrutiny analysis.").

the third and final element of the expressive association doctrine was met, holding that the plaintiffs would likely prevail on their expressive association claim.⁸⁶

B. Compelled Speech

The court then turned to the plaintiffs' second theory of unconstitutionality: compelled speech. The court noted that there are three general categories of compelled speech, propagation, accommodation, and subsidizing.⁸⁷ First, the court found that the act of recruiting was expression. It then determined that law schools disagreed with the speech of military recruiting. The court then found that law schools must propagate, accommodate, and subsidize the military's expressive message. Finally, the court found that requiring the law schools to propagate, accommodate and subsidize these messages failed strict scrutiny.

The court began by finding that the act of recruiting was a form of expression,⁸⁸ noting that the purpose of recruiting is to attract employees.⁸⁹ This purpose necessarily requires the communication of information, dissemination of ideas, and other hallmarks of First Amendment expression.⁹⁰

The court next addressed whether the law schools disagreed with the military recruiters.⁹¹ The court noted that the law schools' did not take issue with most military positions;⁹² rather, schools opposed solely the

86. *But see id.* at 260 (Aldisert, J., dissenting) (disagreeing with the majority's application of the expressive association doctrine because recruiting is not expression in the nude; it is "an economic activity whose expressive content is strictly secondary to its instrumental goals.").

87. *See id.* at 235-36 (noting that the Supreme Court has recognized "impermissible compelled speech in three categories of government action"); *see, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (propagation); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (accommodation); *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (subsidizing).

88. *See id.* at 237 (explaining that recruiting is a form of expression because, *inter alia*, it "conveys the message that 'our organization is worth working for'"); *see also* *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (pointing out that recruiting involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes[.]" which are hallmarks of First Amendment expression).

89. *See FAIR II*, 390 F.3d at 237 (explaining that the communication that is required to attract employees is going to require expression, whether the purpose of the act is economic and functional in nature or not).

90. *See id.* (deciding that recruiting is a form of expression under the First Amendment). *But see id.* at 256 (Aldisert, J., dissenting) (arguing that recruitment is really better characterized as expressive conduct, not bare-boned expression).

91. *See id.* at 237-40 (exploring the extent to which a viewpoint must be inconsistent with another to warrant protection under the compelled speech doctrine). The court here found that the law schools' viewpoint was inconsistent enough with the military's viewpoint to warrant protection under the compelled speech doctrine. *Id.*

92. *See id.* at 237 (noting that the law schools do not seem to disagree with the value, opinion and endorsement of the military to the extent that they show the honor and reward

military's position on employment of homosexuals.⁹³ Finding that the degree of disagreement required to trigger First Amendment scrutiny is minimal at best, the court held that the law schools met the degree necessary by squarely opposing the military's position on the employment of homosexuals as codified by Don't Ask, Don't Tell.⁹⁴

Next, the court turned to the question of whether law schools must propagate, accommodate and subsidize the military's expressive message. The court found that under the current version of the Solomon Amendment, law schools not only had to grant access to the military, they also had to actively participate in the communication of the military's message.⁹⁵ By requiring law schools to distribute newsletters and post notices about military recruitment, the Solomon Amendment forced law schools to disseminate the military's message.⁹⁶ By requiring law schools to invite the military on campus to recruit, the Solomon Amendment forced law schools to accommodate the military's message.⁹⁷ Finally, by requiring law schools to use their campus recruiting resources to assist the military in recruitment, the Solomon Amendment forced law schools to subsidize the military's message.⁹⁸ Consequently, the court found all three types of compelled speech applicable to the current case.

Finally, the court considered whether under a strict scrutiny analysis, the compelled speech in the present case was unconstitutional.⁹⁹ The court found that the compelled speech failed strict scrutiny because although there was a compelling state interest in attracting military lawyers, the means were not narrowly tailored to the ends.¹⁰⁰ Thus, the court found that the plaintiffs likely met the compelled speech doctrine and would likely prevail on their unconstitutional condition claim.¹⁰¹

of military experiences).

93. *See id.* at 238-39 (deciding that the law schools' viewpoint juxtaposed with the military's *de jure* discrimination under Don't Ask, Don't Tell is plainly inconsistent enough to trigger First Amendment protection under the compelled speech doctrine).

94. *See id.* at 239 (holding that the military's policy against homosexual service members is sufficiently in conflict with the law schools' anti-discrimination policies).

95. *See id.* at 240 (pointing out that "[t]he statute insists not only on access to campus for military recruiters, but the active and equal assistance of law schools' career service offices.").

96. *See id.* (finding that such distribution compels law schools to propagate the military's discriminatory viewpoint).

97. *See id.* (finding that by requiring law schools to include the military in interviews and recruiting receptions, the Solomon Amendment is forcing law schools to accommodate the military's viewpoint).

98. *See id.*

99. *See id.* at 242 (noting that a law that compels speech might still be constitutional if it passes strict scrutiny).

100. *See id.* (presuming that there are less restrictive means for the state to use to achieve their goal of military recruitment of lawyers).

101. *See id.* at 243.

C. Holding

The Third Circuit reversed the district court's decision. The court held that the plaintiffs would likely prevail on the merits of their unconstitutional conditions claim, because their First Amendment rights were being violated by the Solomon Amendment under the expressive association and compelled speech doctrines.¹⁰² The court found that by establishing a likelihood of success on the merits of a First Amendment claim, which is the first element of the standard for preliminary injunction, the plaintiffs necessarily established the second preliminary injunction element of irreparable harm.¹⁰³ Because the plaintiffs' First Amendment rights would be impaired every campus recruitment season and because the DOD would have another opportunity to meet their constitutional burden at a trial on the merits, the court found the interests at play balanced in the plaintiffs' favor.¹⁰⁴ Finally, the court determined that the public would be served by enjoining the Solomon Amendment because the public is always served by enjoining state action that violates First Amendment rights.¹⁰⁵ Accordingly, the court reversed the district court's dismissal of the case, and instructed the lower court to issue a preliminary injunction against the Solomon Amendment.

D. Dissent

Judge Aldisert wrote a dissenting opinion, finding three issues that would compel a judgment for the DOD in support of the Solomon Amendment.¹⁰⁶ The dissent argued that the court should presume the constitutionality of the Solomon Amendment.¹⁰⁷ Precedence dictates, the dissent argued, that the court is under the duty to adopt the interpretation of a law that saves it from a constitutional attack.¹⁰⁸ Second, the dissent

102. *See id.* (finding that the plaintiffs met the first element of the standard for preliminary injunction, which is a likely success on the merits of their claim).

103. *See id.* (holding that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

104. *See id.*

105. *See id.* (concluding that the fourth and final element of the standard for preliminary judgment, whether the granting of an injunction would benefit the public interest, has been met in the present case).

106. *See id.* at 246-47 (Aldisert, J., dissenting) (arguing that the plaintiffs must overcome a presumption of constitutionality, the court must make a permissible factual inference, and only if any inference can be made can the court analyze the First Amendment claims).

107. *See id.* at 248 (stating that "[t]he starting point for analysis must be fealty to the precept that congressional statutes are presumed to be constitutional.").

108. *See id.* (Aldisert, J., dissenting); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (citing the principle that "[a]s between two possible interpretations of a statute . . . our plain duty is to adopt that which would save the Act" from a constitutional attack). *But see FAIR II*, 390 F.3d at 229 n.8 (responding to the dissent by pointing out that the canons of statutory construction do not apply in this case, because it is not argued that there are two interpretations of the Solomon Amendment).

criticized the majority for neglecting to identify and discuss the congressional authority behind the Solomon Amendment.¹⁰⁹ The scope of congressional authority, the dissent argued, compels the court to conduct a balancing test of First Amendment and congressional interests before the court engages in constitutional doctrinal analyses.¹¹⁰ Finally, the dissent took issue with the majority's assumption that the mere presence of the military on a school's campus suggested a breach of the law school's anti-discrimination policies.¹¹¹ The dissent emphasized the qualities associated with military service: pride and honor.¹¹² Additionally, the dissent suggested that the public understands that any message adopted by the military does not necessarily reflect law schools' values merely because law schools allow the military on campus.¹¹³

IV. PROCEDURAL POSTURE

After the Third Circuit reversed the district court's denial of a preliminary injunction, the DOD petitioned the Supreme Court to review the case.¹¹⁴ The DOD argued that the Third Circuit erred in its holding because the Solomon Amendment does not directly burden speech and the court applied the incorrect level of scrutiny to the law.¹¹⁵ Additionally, the DOD asserted a pressing need for immediate review.¹¹⁶ Not only would any injunction involve the "grave act" of invalidating an Act of Congress, the DOD argued, but in the present case, an injunction against the Solomon Amendment would detrimentally affect military recruiting, which could

109. See *FAIR II*, 390 F.3d at 249 (Aldisert, J., dissenting) (listing the various powers in the Constitution granting Congress the authority to enact the Solomon Amendment). The dissent found no reported case where any act of Congress intended to support the military has been declared unconstitutional. *Id.* at 249-50.

110. See *id.* at 250 (explaining that for the court to even reach First Amendment analysis, the plaintiffs "must first demonstrate that the mere presence of recruiting officers on campus constitutes a compellable inference that the law schools will be objectively and reasonably viewed as violating their anti-discrimination policies.").

111. See *id.* at 251 ("I am unwilling to accept that there is a permissible inference, let alone a compellable one, that a military presence on campus to recruit, in and of itself, conjures up an immediate impression of a discriminatory institution.").

112. See *id.* (stressing that the universal perception of those who serve in the armed forces is a positive one, that service men and women are considered heroes, and not one of a discriminatory institution).

113. See *id.* at 252 (explaining that "[f]rom these basic precepts of logic we cannot conclude that the mere presence of a uniformed military recruiter permits . . . the inference that a law school's anti-discrimination policy is violated.").

114. See *id.*, petition for cert. filed, 73 U.S.L.W. 3531 (U.S. Feb. 28, 2005) (No. 04-1152).

115. See *id.* at 12 (arguing that the Third Circuit's analysis of the plaintiffs' constitutional rights under the expressive association and compelled speech doctrines was flawed because the Solomon Amendment only has an incidental effect on their First Amendment rights). *Id.* at 11-13.

116. See *id.* at 13.

ultimately compromise national security.¹¹⁷

On May 2, 2005, the Supreme Court granted certiorari and will hear the case in its next session.¹¹⁸ In the meantime, the DOD has motioned the Third Circuit to temporarily stay its mandate to the district court until the Supreme Court decides the case.¹¹⁹ Accordingly, for the time being, the Third Circuit will not instruct the district court to issue an injunction against the Solomon Amendment.¹²⁰

V. IMPLICATIONS

If the district court ultimately issues an injunction, there is a good chance that the injunction will be national in scope. This is because the plaintiffs in *FAIR* were an association of law schools and law professors from all over the country.¹²¹ Nationwide injunction of the Solomon Amendment would effectively invalidate the law; if this occurs, every law school with a policy against inviting employers who discriminate on the basis of homosexuality will be able to ban the military from on-campus recruiting without risking the loss of federal funds.¹²²

But the implications of *FAIR* extend beyond law schools' ability to ban military recruiters from their campuses. For the first time in a federal appellate court decision, law schools have been recognized as expressive associations.¹²³ That means schools have the right to exclude a person or entity if the inclusion of that person or entity substantially impairs schools' ability to communicate their chosen message.¹²⁴ Additionally, as the

117. *See id.* at 24-26 (arguing that the enjoining of a law on a constitutional basis itself is enough to merit Supreme Court review). Additionally, the DOD asserted that *FAIR* demanded immediate review, because permitting law schools to ban military recruiting could hurt the functioning of the military, which could be a national security concern. *Id.*

118. *See FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S.Ct. 1977 (May 2, 2005) (No. 04-1152).

119. *See* Appellees' Motion to Stay the Mandate, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (requesting that the Third Circuit temporarily delay issuing its mandate to the lower court to issue a preliminary injunction until the Supreme Court reviews *FAIR II*); *see also* *FAIR v. Rumsfeld*, 390 F.3d 219, No. 03-4433 (3d Cir. 2004) (order granting a stay on the mandate).

120. *See id.* (granting a stay on the issuance of a mandate "until further notice of the court").

121. *See* FED. R. CIV. P. 65(d) (mandating that injunctions cover each party to the action); *Frequently Asked Questions*, *supra* note 4, at 3 (explaining that because *FAIR* is an association of law schools and law faculty from across the nation, an injunction would likely have to be national in scope to provide an effective remedy for every plaintiff); *see also Burt*, 354 F. Supp. 2d at 156 (following *FAIR* and finding the Solomon Amendment unconstitutional as applied to the faculty of Yale law school). *Burt* illustrates the use of the *FAIR* logic outside the Third Circuit. *Id.*

122. *See FAIR II*, 390 F.3d at 246.

123. *See id.* at 231.

124. *See Dale*, 530 U.S. at 647-60 (finding a constitutional right to exclude a person from membership in expressive association, if the inclusion of that entity would substantially impair the communication of the expressive association's viewpoint).

dissent noted, *FAIR* represents the first instance in which a law created under Congress's spending power for the benefit of the military was invalidated.¹²⁵ If the Third Circuit's decision stands, these types of laws may receive greater judicial scrutiny in the future.¹²⁶ Finally, if law schools are permitted to ban the military from on-campus recruiting, and the military believes the ban impacts its ability to attract military lawyers, Congress may choose to rethink Don't Ask, Don't Tell.¹²⁷

A. DOD Strategy for Trial

Vital to the Third Circuit's holding in *FAIR* was the fact that the DOD offered no proof that access to military recruiting in law schools was necessary to attract military lawyers.¹²⁸ Because of this fact, the Solomon Amendment failed examination under both the strict scrutiny and intermediate scrutiny standards.¹²⁹ The court seemed to suggest that its finding might have been different had the DOD identified any evidence that the military's success in attracting military lawyers was necessarily tied to its access to law school campuses.¹³⁰ At the trial for permanent injunction, the DOD might be able to defend the constitutionality of the Solomon Amendment by presenting the missing evidence, which the Third Circuit found lacking at the preliminary injunction stage.¹³¹ To win on the merits at trial, the DOD must prove that the Solomon Amendment is carefully tailored to attract military lawyers.¹³²

125. See *FAIR II*, 390 F.3d at 247 (Aldisert, J., dissenting) (observing that *FAIR* marked the first time a statute that was intended to support the military was ever declared unconstitutional under any First Amendment grounds).

126. See *id.* at 250 (declaring that the *FAIR* majority departed from the long-lived practice of presuming that laws benefiting the military are constitutional).

127. See Lore, *supra* note 9, at 5 (suggesting that the *FAIR* lawsuit focused on anti-discrimination, and not antimilitary principles, and indicating that if the Don't Ask, Don't Tell policy were altered, law schools would not restrict the military's on-campus recruitment efforts); Christopher Wolf, *Stop Hunting Gay Troops: The Military's 'Don't Ask, Don't Tell' Policy Is Baseless, Un-American Discrimination*, LEGAL TIMES, Jan. 10, 2005, at 54 (encouraging the DOD to petition Congress for a rethinking of Don't Ask, Don't Tell instead of appealing the *FAIR* decision). But see Scott D. Gerber, *Allow Military Recruitment*, NAT'L L.J., Dec. 15, 2003, at 34 (asserting that *FAIR* sued to challenge Don't Ask, Don't Tell). If professors do not like the Solomon Amendment, they should take their grievances to Congress. *Id.*

128. See *FAIR II*, 390 F.3d at 246 (concluding that "mere incantation of the need for legal talent cannot override a clear *First Amendment* impairment.") (emphasis in original).

129. See *id.* at 234-35 (finding that the Solomon Amendment would fail intermediate scrutiny as well, because there was no proof in the record that there is any nexus between the state's means, the Solomon Amendment, and the state's ends, attracting military lawyers).

130. See *id.* at 245-46.

131. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 (1987) (stating that a court may grant permanent injunctive relief if the plaintiff shows a likelihood of success on merits).

132. See *FAIR II*, 390 F.3d at 234-35 (suggesting that the DOD might convince the district court that the Solomon Amendment survives strict scrutiny analysis by proffering

B. FAIR's Reliance on Dale

The Third Circuit's decision in *FAIR* also has an element of irony for proponents of gay and lesbian rights.¹³³ In *FAIR*, the law schools relied heavily on the *Dale* decision in arguing that the Solomon Amendment unconstitutionally conditioned the law schools' expressive association rights.¹³⁴ In *Dale*, the Court used the expressive association doctrine to deny homosexual membership in the BSA.¹³⁵ That decision was seen as a blow to the gay community.¹³⁶ Yet *FAIR* adopted the same logic—that a private organization has a First Amendment right to exclude those who substantially impair the organization's ability to communicate the organization's chosen message—and applied it to vindicate gay and lesbian rights.¹³⁷ When the Supreme Court reviews the *FAIR* decision, it will confront an interesting choice, either affirming the law schools' rights to support their homosexual students by banning the military from recruiting on their campuses, or distinguishing and thus weakening the *Dale* decision, in which a private organization successfully used First Amendment principles to discriminate against homosexuals.¹³⁸

CONCLUSION

Since the enactment of the Solomon Amendment in 1994, law schools have had to choose between receiving vital federal funding and supporting their gay and lesbian students by banning the military from on-campus recruiting.¹³⁹ On November 30, 2004, the Third Circuit found that the

evidence at trial of the Solomon Amendment's necessity in attracting military lawyers).

133. See *id.* at 230-34 (following the logic of *Dale* in holding that the Solomon Amendment cannot condition federal funds on law schools' relinquishment of their right to support their homosexual students). Interestingly, the *Dale* holding is widely perceived as anti-gay rights. See *Dale*, 530 U.S. at 661; David L. Hudson, Jr., *Boy Scouts Case Helps Gay Rights Cause*, ABA JOURNAL E-REPORT, Dec. 3, 2004 (arguing that use of *Dale* to promote anti-discrimination is an unexpected outcome) (on file with the *Journal of Gender, Social Policy & the Law*).

134. See *FAIR II*, 390 F.3d at 230-32 (comparing the law schools' situation in *FAIR* with the BSA's situation in *Dale*). The *FAIR* court followed the *Dale* Court's logic in reasoning that the law schools, as expressive associations, had the First Amendment right to exclude persons who significantly compromised the communication of the schools' viewpoint. *Id.* at 234.

135. See *Dale*, 530 U.S. at 661 (holding that the BSA as an expressive association had the First Amendment right to exclude homosexuals, because including homosexuals would significantly infringe on BSA's ability to communicate their viewpoint).

136. See Hudson, *supra* note 133 (considering *Dale* to be a discriminatory case before *FAIR* made it into a principle of First Amendment freedom).

137. See *id.* (noting that *Dale*'s "expansive view of expressive association turned out to be exactly what was needed to give law schools . . . a basis" to challenge the Solomon Amendment).

138. See *FAIR II*, 390 F.3d at 230-32 (applying *Dale*'s expansive expressive association language to render the enforcement of the Solomon Amendment against law schools to be unconstitutional).

139. Compare AALS, EXECUTIVE COMMITTEE REGULATIONS § 6-3.2(a) (2004) (directing

enforcement of the Solomon Amendment against law schools was unconstitutional.¹⁴⁰ The court found the statute unconstitutionally conditioned federal funds on the relinquishment of the law schools' First Amendment rights under the doctrines of expressive association and compelled speech.¹⁴¹ Central to the court's holding was the recognition that the act of recruiting was a form of expression.¹⁴² Regardless of how the Supreme Court rules on the case, the Third Circuit's recognition of the law schools' expressive association rights will likely impact the debate between military and law school interests.

MICHAEL J. COLLINS

member law schools to require employers to certify to the school's nondiscrimination policy as a condition of obtaining Career Services assistance), available at <http://www.aals.org/ecr/2004ECRs.pdf> (last visited June 10, 2005), with 10 U.S.C.S. § 983(b) (requiring law schools to provide military access to their on-campus recruiting in a manner that is "at least equal in quality and scope" as that which they provide to any other employer, or risk losing federal funding).

140. See *FAIR II*, 390 F.3d at 246.

141. See *id.* at 234-35, 243.

142. Compare *id.* at 234 (applying strict scrutiny to the Solomon Amendment because recruiting is a form of expression), with *FAIR I*, 291 F. Supp. 2d at 311-312 (applying intermediate scrutiny to the Solomon Amendment because recruiting is mixed speech and non-speech).