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.*,
*Respondent*s.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF TEXAS, ALABAMA, COLORADO, DELAWARE, FLORIDA, INDIANA, KANSAS, MICHIGAN, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Solomon Amendment's equal-access condition on federal funding likely violates the First Amendment to the Constitution.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Petitioners. The *amici* States have a strong interest in the continuing vitality of our Nation's all-volunteer armed forces. The men and women of the armed forces risk their lives each day in service of our Nation, and all Americans have an interest in ensuring that our soldiers receive the very best education and training available. The *amici* States agree that "recruiting is the key" to maintaining a strong and effective military composed wholly of those who have chosen to serve their country, 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon), and they have an interest in seeing that Congress has no need to employ its more sweeping and intrusive powers of conscription in order to provide for our common defense. Because the Solomon Amendment facilitates the military's ability to recruit some of our nation's best and brightest young people to serve as lawyers in our armed forces, *see* 142 CONG. REC. 12,712 (1996) (statement of Rep. Goodlatte), the *amici* States have an interest in the statute, and urge the Court to uphold it.

The *amici* States additionally recognize the important role that National Guard units—also composed entirely of volunteers—play in each State. Any decision restricting the United States Military's ability to recruit on college and university campuses would have similar adverse consequences for National Guard units across our country. For this reason as well, the *amici* States urge the Court to uphold the Solomon Amendment.

The *amici* States also have an interest in the broader implications of the court of appeals's holding in this case that an equal-access condition on the receipt of higher-education funds likely violates the First Amendment rights of higher-education institutions. Many state laws link public funding with university decisions relating to, among other things, admissions, courses offered, course credits issued, accreditation, and recruitment. The *amici* States do not believe that such legislation should be subject

to strict scrutiny whenever an institution of higher education, as represented by self-selected members of its faculty, believes that the law at issue has an incidental effect on a message that the school or its faculty desires to communicate. The lower court's conclusion to the contrary could cast doubt on a variety of state laws regarding higher education, and the *amici* States ask the Court to reverse the court of appeals's judgment.

SUMMARY OF THE ARGUMENT

Pursuant to its power to raise and support armed forces for our common defense, *see* U.S. CONST. art. I, §8, cl.1, 12, Congress has provided institutions of higher education with a strong incentive to refrain from placing undue restrictions on the military's ability to recruit on campus, 10 U.S.C. §983(b). The Solomon Amendment places a simple condition on the receipt of certain federal funds provided by contract or grant to institutions of higher education: institutions choosing to receive the specified funds must provide military recruiters with access to their campuses and students on equal terms to the access they provide to any other employer. *Id.* No more is required.

Though it is framed as a condition on funding expenditures typical of legislation under the Spending Clause, the Solomon Amendment also falls well within Congress's constitutionally enumerated powers to raise and support our military. *See Forum For Academic & Institutional Rights* ("*FAIR*") *v. Rumsfeld*, 390 F.3d 219, 245 (CA3 2004), *cert. granted*, 125 S.Ct. 1977 (2005); *FAIR v. Rumsfeld*, 291 F.Supp.2d 269, 312 (D.N.J. 2003); U.S. CONST. art. I, §8, cl.1, 12. The only challenge before the Court concerns whether this equal-access condition on receipt of federal funds, passed pursuant to that unquestioned congressional power, likely infringes Respondents' speech-related First Amendment rights.

As a funding condition reaching only employment-related recruiting activity on our Nation's campuses, the Solomon Amendment should not be subject to strict scrutiny review. Conditions on the receipt of funds expended by federal or state governments threaten the free speech rights of funding recipients only when the conditions are "aimed at the suppression of dangerous ideas." *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (citation omitted); *Speiser v. Randall*, 357 U.S. 513, 519 (1958). The Solomon Amendment's sole purpose is to facilitate recruitment for our all-volunteer armed forces. It is not aimed at the suppression of any idea, dangerous or otherwise, and the record in this case demonstrates that it has not in fact led to the suppression of ideas. *FAIR*, 390 F.3d, at 235, 245; *FAIR*, 291 F.Supp.2d, at 282. Indeed, neither law school faculty members nor students are known for their inability or reluctance to express their views. And, on this record, the Solomon Amendment's funding condition does not infringe the free-speech rights of the complaining federal funding recipients.

Neither are the First Amendment's compelled-speech and expressive-association doctrines relevant here. Because the Solomon Amendment operates as a funding condition, and not as a direct mandate, it compels no speech whatsoever—funding recipients may choose to take the money, with its equal-access condition, or to decline the federal funds and conduct their career-services activities as they please. And with respect to funding recipients' expressive-association rights, the Solomon Amendment reaches only those recipients who have voluntarily associated with the government's educational-subsidy programs. Should an institution wish to send a clear and unequivocal message disassociating itself from the government and the government's military-employment policies, it need only decline the government's financial assistance for its educational enterprises.

Prudential considerations also counsel against affirming the court of appeals's judgment. Subjecting the Solomon Amendment to strict scrutiny under the First Amendment, as the court of appeals has done, could have far-reaching consequences for many state laws that affect university conduct. Such laws should not be subject to strict-scrutiny review under the First Amendment because, like the Solomon Amendment, they are not aimed at the suppression of dangerous ideas. The Court should reject the court of appeals's erroneous conclusion to the contrary.

ARGUMENT

I. SUBJECTING THE SOLOMON AMENDMENT'S EQUAL-ACCESS FUNDING CONDITION TO STRICT SCRUTINY COULD HAVE FAR-REACHING CONSEQUENCES FOR MANY STATE LAWS DESIGNED TO INFLUENCE UNIVERSITY CONDUCT.

The Solomon Amendment stands virtually alone in the importance of the national interest it addresses—the continuing vitality of our all-volunteer military forces, *see* 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon)—and in the explicit grant of power the Constitution provides to Congress to legislate on this issue, U.S. CONST. art. I, §8, cl.1, 12 ("The Congress shall have Power . . . To raise and support Armies . . . ."). As a law designed to influence the conduct of institutions of higher education, however, the Solomon Amendment is far from unique. Texas and the *amici* States have many laws affecting university conduct. The *amici* States share a concern that adoption of the court of appeals's approach—subjecting the Solomon Amendment's equal-access funding condition to strict-scrutiny review under the First Amendment to the Constitution—could encourage challenges to a variety of state laws relating to the operation of in-state institutions of higher education.

Under the Solomon Amendment, educational institutions choosing to receive certain federal funds must provide military

recruiters the same access that they provide to those recruiting for any other employer. 10 U.S.C. §983(b). Notwithstanding the fact that the Solomon Amendment applies only to those institutions of higher education voluntarily receiving federal funds, *and* the fact that it addresses only the career-services-related conduct of such institutions, the court of appeals subjected the funding condition to strict First Amendment scrutiny when it determined that the complaining institutions "believe [that] the message they choose to express is impaired by the Solomon Amendment." *FAIR*, 390 F.3d, at 235, 242.

The *amici* States have promulgated extensive legislation—often functioning as a condition on funding—affecting university decisions relating to, *inter alia*, admission, courses offered, course credits issued, recruitment, employment, and accreditation. Such legislation should not be subject to strict scrutiny whenever an institution of higher education, as represented by some collection of its faculty, believes that the law at issue has an incidental effect on a message that the school or its faculty desires to communicate. *See id.*

A. State Laws Impact University Admission.

Texas law places certain constraints on the admissions decisions made by those institutions of higher education supported by the public fisc. For example, publicly-funded universities cannot discriminate against those who have been home-schooled: "an institution of higher education must treat an applicant for admission to the institution as an undergraduate student who presents evidence that the person has successfully completed a nontraditional secondary education according to the same general standards as other applicants for undergraduate education who have graduated from a public high school." TEX. EDUC. CODE §51.9241(b). Home-schooled applicants cannot be required to obtain a GED or

to take any special examination in order to be admitted to a publicly-funded university. *Id.* §51.9241(c).

Other States have taken similar steps to ensure that institutions of higher education treat home-schooled students the same as those who attended a more traditional high school. *See, e.g.,* ARIZ. REV. STAT. §15-1626(A)(9) (regarding admission to state universities); *id.* §15-1646 (regarding access to university scholarships); N.M. STAT. ANN. §21-1-1 (regarding admission to state universities); S.C. CODE ANN. §59-149-50 (regarding state-funded scholarships). Similarly, Illinois law prohibits discrimination in its public universities' admissions processes against those enrolled in the State's charter high schools. 110 ILL. COMP. STAT. ANN. 205/9.07.

Public academic teaching institutions in Texas also may not admit an applicant on a state-funded athletic scholarship unless the applicant otherwise meets certain of the institution's minimum academic standards. TEX. EDUC. CODE §51.9245. And under Texas law, public academic teaching institutions must admit every applicant for admission who has graduated with a grade point average in the top ten percent of the student's high school graduating class. *Id.* §51.803(a).

Many more States have delegated some form of authority over the admissions policies of their public institutions of higher education to their respective State educational boards. *See, e.g.,* COLO. REV. STAT. ANN. §23-1-113(1)(a) (authorizing State commission to implement admissions standards); FLA. STAT. ANN. §1007.261 (setting minimum requirements for admission); IOWA CODE. ANN. §256.16 (providing State board with power to adopt admissions rules for those institutions providing practitioner preparation); KY. REV. STAT. ANN. §164.020(8) (authorizing State council to approve minimum qualifications for admission); MASS. GEN. LAWS ANN. ch. 75, §2 (making admissions standards subject to approval of State board); MO. ANN. STAT. §173.005(5)

(providing State board with power to establish admissions guidelines); OR. REV. STAT. §351.070 (3)(g) (authorizing State board to prescribe qualifications for admission); PA. CONS. STAT. ANN. tit. 24, §20-2006-A(a)(6) (providing State board with power to establish general policies for admission); WIS. STAT. ANN. §36.11(3) (same).

These laws relating to university admissions practices typically apply only to those institutions of higher education receiving state support—principally a state's public universities. To be sure, the relationship between a state and its public universities differs fundamentally from the relationship between the federal government and the public and private universities subject to the Solomon Amendment's equal-access funding condition. *See, e.g., Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976) (holding that Texas's public universities are State agencies); *see also* TEX. EDUC. CODE §61.003. But the court of appeals's opinion contains no limiting principle by which to distinguish between public and private universities receiving state funds. *See, e.g., FAIR*, 390 F.3d, at 225 (noting that virtually every law school has a similar policy governing the use of career-services facilities).

To the extent that the court of appeals's analysis locates the First Amendment rights at issue principally in an educational institution's faculty—as is implicit in the court of appeals's reliance upon the faculty-approved career-services policies at issue, *see id.*, at 224-25—public university faculties would likely have, if anything, fewer obstacles to making constitutional claims under the court of appeals's approach than their counterparts at private institutions of higher education. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822 (1995) (noting that a public university, as an instrumentality of the State, is bound by the First and Fourteenth Amendments); *Perry v. Sindermann*, 408 U.S. 593, 594, 597 (1972) (addressing First Amendment rights of a professor employed by a public junior college).

The court of appeals's holding that the Solomon Amendment likely infringes a law school's—or its faculty's—First Amendment rights to control access to its campus and students thus threatens to undermine these state laws relating to who should have access to a university's educational enterprise. If, for example, the faculty of a public institution of higher education decided that it did not wish to endorse or accommodate the message that completion of a home-school education is "equivalent to graduation from a public high school," *see* TEX. EDUC. CODE §51.9241(b), the Texas law requiring that institution to provide an equal opportunity for admission to the home-schooled student could be deemed subject to strict-scrutiny review under the court of appeals's analysis. *See FAIR*, 390 F.3d, at 235.

B. State Laws Impact University Courses and Credits.

State laws relating to classes offered and academic credits issued by institutions of higher education could also be threatened if the Court affirms the court of appeals's conclusion that the Solomon Amendment must be subjected to strict-scrutiny review under the First Amendment.

In Texas, "[e]very college and university receiving state support or state aid from public funds shall give a course of instruction in government or political science which includes consideration of the Constitution of the United States and the constitutions of the states, with special emphasis on that of Texas." TEX. EDUC. CODE §51.301(a). This course of instruction must have a credit value of at least six semester hours, and no college or university receiving state support may grant an undergraduate degree to a student until that student has received credit for such a course. *Id.* Similarly, no college or university receiving support from the State of Texas may grant an undergraduate degree to a student until that student has received six semester hours of credit for a course in American history. *Id.* §51.302.

Many States have similar laws requiring that specific courses be offered by in-state institutions of higher education. *See, e.g.,* ARK. CODE ANN. §6-61-105 (providing that no college or university may grant a baccalaureate degree to a student who has not passed a course in American history or government); COLO. REV. STAT. ANN. §22-1-109 (requiring that instruction in the United States Constitution continue in state colleges and universities); DEL. CODE ANN. tit. 14, §4103 (same); MO. ANN. STAT. §170.011 (requiring that instruction in the United States Constitution continue in all colleges and universities); NEV. REV. STAT. 394.150 (same); N.J. STAT. ANN. §18A:6-3 (providing that instruction in the United States Constitution shall continue in state colleges and universities); TENN. CODE ANN. §49-7-110 (providing that no college or university receiving state support may grant a baccalaureate degree to a student who has not passed a course American history); VA. CODE ANN. §23-130 (requiring the curriculum at Virginia Tech to include courses in agriculture, mechanic arts, and military tactics); VA. CODE ANN. §23-164.9 (requiring the curriculum at James Madison University to include courses in education).

Most of these state laws relating to courses offered and credits issued, like the Solomon Amendment, are applicable only to institutions of higher education that receive "state aid from public funds." TEX. EDUC. CODE §51.301(a); *see also, e.g.,* COLO. REV. STAT. ANN. §23-1-113.2; TENN. CODE ANN. §49-7-110. Some, however, apply without regard to state funding. *See, e.g.,* ARK. CODE ANN. §6-61-105; MO. STAT. ANN §170.011; NEV. REV. STAT. 394.150. If the Solomon Amendment's conditional requirement that universities provide their students with equal on-campus access to governmental recruiters is subjected to strict-scrutiny review, these requirements that universities provide their students with on-campus instruction in government-related topics might well also be required, upon a First Amendment challenge, to satisfy the strict-scrutiny standard.

C. State Laws Impact University Students' Selective Service Registration.

Texas law also conditions receipt of any form of financial assistance funded by state revenue, including student loans guaranteed by the State, on a student's registration with the selective service as required by federal law. TEX. EDUC. CODE §51.9095. A majority of the States have placed a similar restriction on the use of public-education funds.[1]

These conditions on the receipt of state educational funds are almost identical to those in the federal law that the Court upheld in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 859 (1984). Although the federal law was challenged in that case principally as a violation of the Fifth Amendment, *see id.*, the Court gave no hint that the funding condition may have been infirm instead on free-speech grounds. To the contrary, the Court noted approvingly that this condition on receipt of federal funds earmarked for education was designed to "promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources." *Id.*, at 855-56.

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1. *See*, *e.g.*, ALA. CODE §36-26-15.1(a)(2); ALASKA STAT. §14.43.125; ARIZ. REV. STAT. §15-1841(A); ARK. CODE ANN. §6-80-102(c); CAL. EDUC. CODE §69400; COLO. REV. STAT. ANN. §23-5-118(1); DEL. CODE ANN. tit. 29, §6104; GA. CODE ANN. §20-3-519.1(2); IDAHO CODE §46-503(1); 105 ILL. COMP. STAT. 5/30-17.1; LA. REV. STAT. ANN. §17:3151; ME. REV. STAT. ANN. tit. 20-A, §12801; MISS. CODE ANN. §37-101-283; MO. ANN. STAT. §105.1213; MT. CODE ANN. §20-1-225; N.H. REV. STAT. ANN. §187-A:39; N.C. GEN. STAT. ANN. §143B-421.1(a)(2); N.D. CENT. CODE §15-10-36; OHIO REV. CODE ANN. §3345.32; S.D. CODIFIED LAWS §13-53-1.1; TENN. CODE ANN. §49-4-904(2); UTAH CODE ANN. §53B-11-104(1); VA. CODE ANN. §23-38.12; W. VA. CODE §15-1F-10; WIS. STAT. ANN. §36.11(27), 39.28(6).

If strict scrutiny is not the appropriate standard by which to review the federal selective service system's funding condition, neither should it be applied to state laws that condition receipt of public funds on registration with the selective service. Nor should it be applied to the Solomon Amendment. If the funding condition designed to facilitate the military's recruitment of students on campus is subject to strict-scrutiny review, however, *see FAIR*, 390 F.3d, at 234, 242, a subsequent challenge to the funding conditions designed to facilitate the military's possible conscription of students on campus, *see*, *e.g.*, TEX. EDUC. CODE §51.9095, could well also be subject to the same high standard of review.

D. State Laws Impact University Recruitment.

Many States also have laws relating to the recruitment of students both into and from institutions of higher education in certain circumstances. For example, in order to "provide adequate numbers of women and minority applicants for all positions" in the Texas Department of Transportation, the Department must "coordinate recruiting efforts with college placement officers and college student organizations" and "develop an extensive cooperative education program with colleges." TEX. TRANSP. CODE §201.403(a). There is no indication that the Department has met with resistance in its campus recruiting efforts, but if the need arose, the Texas Legislature should be free to condition future receipt of state funds on a university's continued cooperation with the Department of Transportation's on-campus recruiting efforts.

Texas has also established a "rural physician recruitment program," in which selected Texas medical schools receive funds collected by the State in return for developing programs designed to "recruit students from rural communities and encourage them to return to rural communities to practice medicine." TEX. GOV'T CODE §487.503(a). Similarly, the "medical and health care professions recruitment fund" is a special fund in the state treasury

designed to "support the recruitment of underrepresented ethnic minorities" into health-care-profession programs at institutions of higher education. TEX. EDUC. CODE §§51.711, .713. Programs eligible to receive these recruitment funds must be operated by accredited institutions of higher education and must agree to accept a substantial percentage of minority and women students. *Id.* §51.716(a).

Many States have analogous publicly funded recruitment programs. *See*, *e.g.*, ARK. CODE ANN. §6-81-1301 (university-assisted teacher-recruitment program); *id.* §21-3-501 (cooperative-education program designed to help recruit Arkansas college students into Arkansas government employment); CAL. EDUC. CODE §44393 ("paraprofessional" teacher-recruitment program); FLA. STAT. ANN. §1009.60 (program designed to recruit minority students for educational training and employment as public-school teachers); KY. REV. STAT. ANN. §161.165 (program for recruitment of minority teachers); MD. CODE ANN., HEALTH-GEN. §10-1502 (program for recruitment of early-childhood mental-health professionals); MISS. CODE ANN. §37-149-7 (program funding professional teacher recruiters who make oral presentations on all public-school campuses); MO. ANN. STAT. §168.430 (Teachers Corps program recruiting fifty college seniors annually with university assistance); OHIO REV. CODE ANN. §4701.26 (program funding education and recruitment of Certified Public Accountants); PA. CONS. STAT. ANN. tit. 24, §22-2211-A (program funding education and recruitment of health professionals practicing in-State).

These statutes demonstrate that Texas, and the other *amici* States, view recruitment into and from institutions of higher education—much like employment both inside and outside the university context—as an inherently commercial activity, rather than an inherently expressive one. *See*, *e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 640 (1984) (O'Connor, J., concurring

in part and concurring in the judgment) ("Recruitment [is a] commercial activit[y], even when conducted for training rather than for profit."). The recruitment programs referenced here also reflect the States' view that there is nothing untoward in linking distribution of governmental funds with university decisions to facilitate the recruitment of students into particular professions. The Court should disavow the court of appeals's contrary holdings. *See FAIR*, 390 F.3d, at 235, 236 ("Recruiting is expression.").

E. State Laws Impact University Employment.

Institutions of higher education are also universally subject to state and federal laws prohibiting certain discriminatory employment practices. *See*, *e.g.* 42 U.S.C. 2000e *et seq.* ("Title VII"); TEX. LAB. CODE §21.051. Under state law, no university in Texas, whether private or public, can choose to take adverse action against an employee or a prospective employee "because of race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE §21.051; *see also id.* §21.002(8). Virtually every State has a comparable prohibition on discriminatory employment practices.[2]

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2. *See*, *e.g.* ALASKA STAT. §18.80.220; ARIZ. REV. STAT. §§41-1461 to -1465; ARK. CODE ANN. §§16-123-101 to -108; CAL. GOV'T CODE ANN. §§12900–12996; COLO. REV. STAT. ANN. §§24-34-401 to -406; CONN. GEN. STAT. §46a-99; DEL. CODE ANN. tit. 19, §§710–728; FLA. STAT. ANN. §§760.01–760.11; GA. CODE ANN. §§34-1-3, 34-5-1, 34-6A-4; HAW. REV. STAT. §§378-1 to -9; IDAHO CODE §§67-5901 to -5912; 775 ILL. COMP. STAT. 5/1-101 to 5/2-105; IND. CODE ANN. §§22-9-1-1 to -8-3; IOWA CODE ANN. §§216.1–216.20; KAN. STAT. ANN. §§44-1001 to -1044, 44-1111 to -1119; KY. REV. STAT. ANN. §§ 344.010–344.110; LA. REV. STAT. ANN. §§23:301 to :369; ME. REV. STAT. ANN. tit. 5, §§4551-4632; MASS. GEN. LAWS ANN. ch. 151B, §§1-10; MICH. COMP. LAWS ANN. §§37.2101–37.2804, 37.1101, 408.381; MINN. STAT. ANN. §§363.01–363.15; MO. ANN. STAT. §§213.010–213.137, 290.400–290.460, 209.162, 375.1306, 290.145; MT. CODE ANN. §§49-1-101 to -2-601; NEB. REV. STAT. ANN. §§48-1101 to -1126; NEV. REV. STAT. ANN. §§613.310–613.435; N.H. REV. STAT.

Although litigation concerning the Texas statute is not uncommon, to date there has been no suggestion that the statute might infringe upon a university's—or its faculty's—First Amendment rights of speech or expressive association. *See*, *e.g.*, *Tex. A&M Univ., Corpus Christi v. Vanzante*, 159 S.W.3d 791 (Tex. App.—Corpus Christi 2005, no pet.); *Vincent v. W. Tex. State Univ.*, 895 S.W.2d 469, 472 (Tex. App.—Amarillo 1995, no writ). The Court should ensure that its decision in this case will not give rise to such challenges. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (rejecting claim that application of Title VII in the university context violated the First Amendment).

F. State Laws Impact University Accreditation.

In order to "prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees," TEX. EDUC. CODE §61.301, Texas also regulates the use of certain academic terminology by private institutions of higher education, *id.* A private institution may not officially call itself a "law school" or a "school of law," for example, until it has been issued a certificate of authority to do so by the Texas Higher Education Coordinating Board. *Id.* §61.313(a).

These regulations—designed to protect the public from the harms "degree mills" cause to prospective employers and to

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ANN. §§354-A:1 to -A:14; N.J. STAT. ANN. §§10:5-1 to :5-28; N.M. STAT. ANN. §§28-1-1 to -1-15; N.Y. EXEC. LAW §§290-301; N.D. CENT. CODE §§14-02.4-01 to -21; OHIO REV. CODE ANN. §§4112.01–4112.99; OKLA. STAT. ANN. tit. 25, §§1101–1706; OR. REV. STAT. §§659.010–659.115, 659.400–659.435, 659.990; PA. CONST. STAT. ANN. tit. 43, §§951-963; R.I. GEN. LAWS §§28-5-1 to -39; S.C. CODE ANN. §§1-13-10 to -110; S.D. CODIFIED LAWS §§20-13-1 to -56; TENN. CODE ANN. §§4-21-101 to -408; UTAH CODE ANN. §§34A-5-101 to -108; VT. STAT. ANN. tit. 21, §§495–495g; VA. CODE ANN. §2.2-2639; WASH. REV. CODE ANN. §§49.60.010 to .320; W. VA. CODE §§5-11-1 to -20; WIS. STAT. ANN. §§111.31-111.395; WYO. STAT. ANN. §§27-9-101 to -106.

legitimate institutions of higher education—come closer to regulating speech than any of the preceding statutory provisions. Even so, First Amendment challenges to the constitutionality of these accrediting regulations should properly be governed by the Court's commercial-speech cases, *see*, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979), and not those applying a higher standard of review, *see*, *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Indeed, the federal government has recognized the importance of ensuring the quality of education received at degree-granting postsecondary institutions. Federal financial assistance in the form of Pell Grants and work-study programs, for example, is available only to students attending institutions that have been accredited by an agency recognized by the Department of Education. *See* 20 U.S.C. §§1070, 1091, 1094. Similarly, the States should be allowed to establish laws ensuring that those organizations within their borders that wish to hold themselves out as institutions of higher education provide an acceptable level of instruction. Those States which have chosen to do so, *see*, *e.g.* IOWA CODE ANN. §261.9; LA. REV. STAT. ANN. §17:1808; NEB. REV. STAT. §§85-1609, -1707; OKLA STAT. ANN. tit. 70, §4103; VA. CODE ANN. §23-276.3, have not thereby offended the First Amendment rights of any educational institution or its faculty.

Under the court of appeals's analysis of the Solomon Amendment's constitutionality, however, a school that has not met the Texas Higher Education Coordinating Board's standards for a certificate of authority might succeed in subjecting the accreditation process to strict scrutiny if individual faculty members can claim that requiring permission to use the term "law school" impairs a "message they choose to express." *See FAIR*, 390 F.3d, at 235.

Neither the Solomon Amendment, nor the many provisions linking state funding with regulation of university conduct, nor the statutes governing university employment and accreditation practices should be treated as laws directly "abridging the freedom of speech," U.S. CONST. amend. I, whenever an institution of higher education or individual faculty members can allege an incidental impact on the communication of a desired message. The *amici* States ask the Court to hold that the Solomon Amendment's equal-access funding condition should not be subjected to strict-scrutiny review under the First Amendment.

II. THE SOLOMON AMENDMENT IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S POWER TO RAISE ARMED FORCES FOR OUR COMMON DEFENSE.

A. The Solomon Amendment's Funding Condition Does Not Violate the First Amendment Rights of Funding Recipients.

1. The Solomon Amendment's equal-access funding condition is not aimed at the suppression of ideas.

Texas and the *amici* States share a firm conviction in the real limitations on our federal government's power to regulate state action under the Spending Clause. *See*, *e.g.*, *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in the judgment) (noting that there must be "some obvious, simple, and direct relation" between the condition and the expenditure of funds). The *amici* States agree with Petitioners, however, that explicit conditions placed on receipt of either federal or state funds will contravene the free-speech rights of prospective funding recipients only when the conditions are "aimed at the suppression of dangerous ideas." *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (citation omitted); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) ("Congress'[s] antecedent funding decision cannot be aimed at the suppression of ideas thought

inimical to the Government's own interest."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (noting that government may not aim at the suppression of dangerous ideas in the provision of subsidies); *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (holding ban on public broadcasters' editorializing designed "to curtail expression of a particular point of view on controversial issues of general interest" constitutionally infirm); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (stating that when governmental subsidies are not aimed at the suppression of dangerous ideas, the power to encourage actions deemed in the public interest is broad).

None of the state laws described above places conditions on a university's receipt of public funds in order to suppress free expression. *See*, *e.g.*, TEX. EDUC. CODE §§51.301, .716, .9095, .9241. Neither does the Solomon Amendment. The Solomon Amendment is designed to facilitate the federal government's recruitment of our all-volunteer armed forces, and it does so by imposing the modest requirement that those institutions of higher education choosing to receive specified federal funds must afford military recruiters the same access to campuses and students that such institutions afford to any other employer. 10 U.S.C. §983(b). The Solomon Amendment is thus aimed at conduct—career-services-related recruiting activity—and not the suppression of any idea, dangerous or not.

Institutions of higher education, along with their faculties and students, remain free to express disagreement with the military, its employment policies, and the federal government that has statutorily mandated the military's employment policies, *see* 10 U.S.C. §654. In fact, as both the district court and the court of appeals recognized, the Solomon Amendment has not suppressed expression critical of the military and its recruiting practices—if anything, the law has nurtured a good deal of such expression. *See FAIR*, 390 F.3d, at 245 ("The record is replete with references to

student protests and public condemnation."); *FAIR*, 291 F.Supp.2d, at 282. And should an institution of higher education so desire, in addition to expressing its vehement disagreement with the military's statutorily mandated employment practices, the university may also go further and deny the military on-campus recruitment opportunities—by declining to accept the government funding. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984).

2. The Solomon Amendment's equal-access funding condition does not compel funding recipients' speech.

Notwithstanding the fact that the Solomon Amendment only places a reasonable and explicit condition on the deliberate choice to receive federal funds, the court of appeals erroneously concluded that its application to Respondents likely violates the compelled-speech doctrine. *FAIR*, 390 F.3d, at 236. The Solomon Amendment does not *require* higher education institutions to do anything. They are free to forgo federal funds and refuse the military recruiters access to their campuses. Thus, nothing is compelled. This fact sets the Solomon Amendment apart from the direct mandates at issue in the Court's compelled-speech cases. *See*, *e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005) (compelled assessments for generic advertising of beef); *United States v. United Foods, Inc.*, 533 U.S. 405, 413-16 (2001) (compelled assessments for generic advertising of mushrooms); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561 (1995) (state law requiring parade organizer to include a group displaying a message the organizer did not wish to include); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 6-7 (1986) (state commission's order requiring public utility to include another speaker's message in its billing envelopes); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (state law requiring motorists to display state motto on license places); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (agency

shop provision requiring public employees to pay a fee to support ideological speech of employee union).

3. The Solomon Amendment's equal-access funding condition does not violate funding recipients' expressive-association rights.

The court of appeals's conclusion that the Solomon Amendment impairs Respondents' expressive-association rights rests on the Court's recent decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *Dale* is distinguishable on several grounds.

Principally, unlike the direct regulation at issue in *Dale*, *see id.*, at 645, the Solomon Amendment functions as a condition on the receipt of funds, and so reaches only the conduct of those institutions that have expressly chosen to associate with the federal government. Any unwanted effect that the military's presence on campus may have on an educational institution's ability to advocate its viewpoint, *see id.*, at 650, can be cured simply by declining federal assistance for the institution's enterprise, *see Grove City Coll.*, 465 U.S., at 575.

Dale also involved the forced inclusion, as a *member*—indeed, as a *leader*—in the Boy Scout organization, of one whose presence was deemed to conflict with the organization's message. *See Dale*, 530 U.S., at 648, 650. Here, however, the military has only a temporary presence on the law-school campuses. Military recruiters do not become members of, nor are they even affiliated with, the law school, and thus they are not perceived to speak from within the organization. *Cf. id.*, at 655 (noting the message sent by "[t]he presence of . . . [a] gay rights activist in an assistant scoutmaster's uniform").

Also, the Boy Scouts caters to youth, many of whom are elementary-school children. Adults, on the other hand, comprise a law-school community. There is a far greater threat that a message

will be misconstrued, or missed altogether, when it is aimed at young children than when it is directed at adults, all of whom here possess, at a minimum, a college education. Just as the Court has recognized a significant distinction between young children and adults in determining what is permissible under the Establishment Clause, *compare Lee v. Weisman*, 505 U.S. 577, 592-94 (1992), *with Marsh v. Chambers*, 463 U.S. 783 (1983), this distinction should likewise matter when resolving whether a particular government action "affects in a significant way the group's ability to advocate public or private viewpoints," *Dale*, 530 U.S., at 648.

The court of appeals concluded that "the presence of military recruiters 'would, at the very least, force the law schools to send a message' . . . that the law schools 'accept' employment discrimination 'as a legitimate form of behavior.'" *FAIR*, 390 F.3d, at 232 (quoting *Dale*, 530 U.S., at 653). This ignores the key fact that it was Dale's "presence *in* the Boy Scouts," *Dale*, 530 U.S., at 653 (emphasis added), that threatened to send the unwanted message, and that a temporary visitor to campus, when he or she speaks, is not customarily viewed as speaking on behalf of the university. *See FAIR*, 291 F.Supp.2d, at 304-05 (recognizing the critical difference between a leader in the organization and an "unwanted periodic visitor"). Although military recruiters may well articulate a message the complaining law schools disagree with, no educational institution is hindered in its ability to articulate on its own behalf. Institutions of higher education remain free to advocate against the military's mandated employment policies, and they may do so—and have done so robustly—before, during, and after the military recruiters' on-campus visits. *See, e.g., FAIR*, 291 F. Supp.2d, at 282. Thus, the temporary presence of military recruiters does not have a meaningful effect on a law school's ability to articulate its view as required for a successful constitutional challenge under *Dale*. *See* 530 U.S., at 648.

B. The Solomon Amendment Rests on Congress's Broad Power to Raise and Support Armies.

The *Amici* States have a particular interest in the Court's resolution of this case to the extent that the Court's treatment of the Solomon Amendment may impact the many state laws linking expenditure of public funds with regulation of university conduct. But the *amici* States also encourage the Court to recognize—as the court of appeals almost entirely failed to do—the explicit constitutional provision upon which the Solomon Amendment is based, and which sets it apart from so much state and federal legislation: Congress has been expressly entrusted with the power, and the attendant duty, to raise and support armed forces for our common defense. U.S. CONST. art. I, §8, cl.1, 12 ("The Congress shall have Power . . . To raise and support Armies . . . ."); *see also id.*, cl.1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . of the United States . . . ."); *id.*, cl.1, 13 ("The Congress shall have Power . . . To provide and maintain a Navy . . . ."); *id.*, cl.1, 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . .").

The constitutional power to raise and support armies, and to enact legislation necessary and proper to that end, "is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Indeed, the Court has confirmed that pursuant to this power, Congress may constitutionally conscript individuals for military service, notwithstanding the "vital interference with the life, liberty and property of the individual" that conscription represents. *Lichter v. United States*, 334 U.S. 742, 756 (1948). And the power to conscript is not limited to individuals: congressional "power to draft business organizations to support the fighting men who risk their lives can be no less." *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942).

If the constitutional power to raise and support armed forces for our common defense includes the power to forcibly press both individuals and organizations directly into military service, it surely includes the lesser power to prohibit individuals and organizations from acting to interfere with the military's efforts to recruit those who might voluntarily choose to serve their country. *See*, *e.g.*, *O'Brien*, 391 U.S., at 382. But the Solomon Amendment does not even do that: it simply requires that those who willingly accept federal funding for their educational enterprises must provide federal military recruiters access to their campuses and students that is equal to the access provided to any other employer. Under the Court's holdings in *Lichter*, 334 U.S., at 756, *Bethlehem Steel Corp.*, 315 U.S. at 305, and *Selective Draft Law Cases*, 245 U.S. 366 (1918), the Solomon Amendment, at least as applied to the private individuals and institutions bringing this suit, is, *a fortiori*, entirely constitutional.

And indeed, providing the military with an equal opportunity to recruit those who will make the voluntary choice to enlist helps to ensure that Congress will have no need to exercise its far more sweeping and intrusive power of conscription for military service. To that end, the *amici* States urge the Court not to second-guess the congressional judgment that the strength of our Nation's all-volunteer military "can only be maintained with effective and uninhibited recruitment programs," and that the success of such programs "relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers." H.R. REP. No. 108-443, Pt. 1, at 3-4 (2004).

The Solomon Amendment is a necessary tool designed to ensure the continuing vitality of our all-volunteer armed forces. It ensures that the best and the brightest men and women remain available in our Nation's service. Its equal-access funding

condition does not violate the First Amendment rights of funding recipients, and so the Court should uphold this vital statute.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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