

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONALD H. RUMSFELD, SECRETARY OF :

4 DEFENSE, ET AL., :

5 Petitioners, :

6 v. : No. 04-1152

7 FORUM FOR ACADEMIC AND :

8 INSTITUTIONAL RIGHTS, INC., ET AL. :

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10 Washington, D.C.

11 Tuesday, December 6, 2005

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:06 a.m.

15 APPEARANCES:

16 PAUL D. CLEMENT, ESQ., Solicitor General, Department of

17 Justice, Washington, D.C.; on behalf of the

18 Petitioners.

19 E. JOSHUA ROSENKRANZ, ESQ., New York, New York; on

20 behalf of the Respondents.

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P R O C E E D I N G S

[10:06 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Rumsfeld versus Forum for Academic and Institutional Rights.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONERS

GENERAL CLEMENT: Thank you, Mr. Chief Justice, and may it please the Court:

The Solomon Amendment conditions the Federal funding of educational institutions on receiving something that any donor would expect, the opportunity to recruit students educated at the funded institutions. That opportunity allows the military a fair shot at recruiting the best and the brightest for the military's critical and vital mission.

The Federal Government does not insist on any predetermined level of access; rather, it simply asks what other employers receive. Likewise, the recipient schools remain free to criticize the military and its policies, and, of course, they remain free to decline Federal funds altogether. As a result of these circumstances, the Solomon Amendment comports with both the Constitution and with common sense.

1 JUSTICE SCALIA: When you say that it asks
2 what other employers receive, but these institutions, I
3 gather, would not allow other employers, who have the
4 same policy against the hiring of homosexuals, to
5 interview at their institutions. So, you're receiving
6 what other employers in the same situation would
7 receive.

8 GENERAL CLEMENT: Well, I think, Justice
9 Scalia, that you have to look at the -- I think, the
10 statute in two steps. One is, I think it's quite clear
11 that it gives the military a right to gain access to
12 campus as a condition, that it has -- that they have to
13 gain access to campus in order to perform their
14 military recruitment.

15 JUSTICE O'CONNOR: Yes, but it says -- I
16 thought it says that the military must have equal
17 access with any other employer. Now, every other
18 employer is subject to the same policy, presumably, of
19 the law school.

20 GENERAL CLEMENT: Well, with respect, Justice
21 O'Connor, I think there's several points to be made in
22 response to that. First of all, I think the Solomon
23 Amendment itself is a recognition that the military is
24 not like any other employer for purposes of its policy
25 and its treatments of homosexuals. And I think that,

1 unlike any other employer, the military's policy is a
2 result of a congressional mandate. And --

3 JUSTICE KENNEDY: Well, that's fine, but you
4 were the one that made the argument that they want the
5 same access as other employers. That's --

6 GENERAL CLEMENT: And what --

7 JUSTICE KENNEDY: -- when you -- I just --

8 GENERAL CLEMENT: -- what I would say --

9 JUSTICE KENNEDY: -- want to make sure what
10 the calculus is, at the outset.

11 GENERAL CLEMENT: Well, and Justice Kennedy,
12 I think the point I would say is, in terms of gaining
13 access to campus, we want to gain access at a level,
14 and under circumstances, that perhaps some other
15 employer would be excluded. Well, once access is
16 gained, then the question arose under the prior version
17 of the statute, all right, if access is gained, what
18 level of access suffices? And on that second-order
19 question of what level of access suffices, then you
20 look to what is provided to any other employer. And
21 so, that's why, when I say that we don't ask for any
22 predetermined level, we don't ask for seven meetings a
23 year, we don't ask for entrance into the public-address
24 system or the e-mail system. We simply say, "Once you
25 let us on campus, just give us, and extend to us, an

1 opportunity to recruit on the same terms as others."

2 And that obviously reflects the commonsense judgment
3 that the military is competing for the same pool of
4 students that the other employers are competing for.

5 JUSTICE BREYER: The constitutional argument,
6 I guess, is, "Does the Constitution require access --
7 is -- does it permit a statute which says you have to
8 give access to the military, when you wouldn't give
9 access to any other employer?"

10 GENERAL CLEMENT: That's exactly right,
11 Justice Breyer.

12 JUSTICE BREYER: All right. Now --

13 GENERAL CLEMENT: And, of course, we take the
14 --

15 JUSTICE BREYER: So, then what you're saying,
16 it --

17 GENERAL CLEMENT: -- position that --

18 JUSTICE BREYER: -- and then what's the
19 answer to that question, "Does the Constitution" -- how
20 does the -- what's the answer?

21 GENERAL CLEMENT: I think there's -- I mean,
22 there's -- the Constitution is -- has no difficulty
23 with such a statute. It is this statute. As I say,
24 there's -- if you want to think about it being
25 preferential entry into campus, and then, at that

1 point, equal access on terms of the -- the terms that
2 are extended -- however you want to think about it,
3 though, there's no difficult constitutional question
4 here.

5 JUSTICE SOUTER: Well, your argument --

6 JUSTICE SCALIA: No, but it seems me you've
7 got us off galloping in the wrong direction. The
8 statute doesn't require simply giving the same access
9 that you give to other employers. It requires much
10 more than that. It requires that they -- it prohibits,
11 or cuts off, funds if an institution either prohibits
12 or, in effect, prevents the Secretary of a military
13 department from gaining access to campuses for purposes
14 of military recruiting in a manner that is at least
15 equal in quality and scope to the access to campuses
16 and to students that is provided to any other employer.
17 So, it seems to me that the statute demands more than
18 simply you give the same access as all other employers.
19 If you allow any other employer, you have to give it
20 to the military in the same manner.

21 GENERAL CLEMENT: I think that's right,
22 Justice Scalia. I'm -- and I'm sorry if I got us off
23 on the wrong foot.

24 JUSTICE GINSBURG: General --

25 GENERAL CLEMENT: I think there is this

1 debate --

2 JUSTICE BREYER: Yes, but it is an important
3 question, because the -- there is an amicus brief that
4 says, "Go read the statute." And, really, the statute
5 was not about homosexuals in the military, it was a
6 statute about universities in Vietnam not letting
7 military people on campus. So, in the -- at the heart
8 of the statute was a matter which was unique to the
9 military. Now, this is a matter that isn't unique to
10 the military. So, why not interpret the statute in the
11 way that the amicus brief suggests in order to avoid a
12 difficult constitutional question?

13 GENERAL CLEMENT: Well, a couple of points,
14 Justice Breyer. I don't think there is a difficult
15 constitutional question to be avoided here, and I'll
16 get back to that whenever I can.

17 As to the statutory-interpretation question
18 itself, I think that in -- the proper frame of
19 reference here is probably not the original 1969
20 version of this, which conditioned only NASA's fund.
21 The original starting point is probably about 1996,
22 when the first version of the modern Solomon Amendment
23 was introduced. And there have been a couple of
24 iterations of it, but I think one important reference
25 point is the version that was in force at the start of

1 this litigation, and that's actually reproduced at page
2 88(a) of the petition appendix in the District Court
3 opinion. And if you look at that against 88(a) of the
4 petition appendix, there would be no question that what
5 is at stake here is access to the campus, and the
6 amicus argument that's being raised is not even
7 available; because the statute at that point is, I
8 think, in fairness, materially identical, except for
9 that last clause, which says "in a manner equal in
10 scope to -- in character to that of any other
11 institution." So, it's clear that when this litigation
12 starts, there's no argument available to the amicus
13 that the statute effectively accomplishes nothing.

14 Now, what happens under this version of the
15 statute is, a second-order question arises. Okay, the
16 -- in order to comply with the Solomon Amendment,
17 universities have to give access, they have to allow
18 the military to gain entry and gain access to the
19 students in the terms of the then-extant statute. The
20 --

21 JUSTICE STEVENS: May I interrupt with one --

22 GENERAL CLEMENT: Sure.

23 JUSTICE STEVENS: -- brief question? Would
24 that be true if the university didn't allow any access
25 whatsoever to any employer?

1 GENERAL CLEMENT: As a regulatory matter, the
2 military took the position that if they simply barred
3 access to --

4 JUSTICE STEVENS: No --

5 GENERAL CLEMENT: -- anybody --

6 JUSTICE STEVENS: -- not the regulatory
7 matter. The statute.

8 GENERAL CLEMENT: I think you could read the
9 statute either way on that question, Justice Stevens.
10 They interpreted it to say that there was no equal --
11 there is no obligation to give entry if no employer was
12 on campus at that time.

13 The other thing they interpreted in the
14 statute as a regulatory matter, though, was this
15 second-order question of, "All right, if they get some
16 access, is unequal access enough?" And as a regulatory
17 matter, they said, "No. We need access that is equal
18 in character and scope to that provided to any other
19 employer." And then what Congress did in the iteration
20 of the statute that's at issue here, which is
21 reproduced starting at page 185(a) of the petition
22 appendix is they effectively codified and ratified that
23 regulatory interpretation by adding the phrase "in a
24 manner that is at least as equal in quality and scope
25 to the access to campuses and to other students that is

1 to -- provided to any other employer."

2 JUSTICE GINSBURG: General --

3 GENERAL CLEMENT: But I think --

4 JUSTICE GINSBURG: -- Clement, do I
5 understand, with respect to that brief that offered a
6 statutory interpretation to avoid a constitutional
7 question, your answer is, that would be an unreasonable
8 interpretation of the statute that we now have? And if
9 we're talking about a predecessor statute in 1968, from
10 the Vietnam days, that -- this would have been a highly
11 academic question, because there weren't any such
12 policies in any law schools with respect to recruiting.

13 GENERAL CLEMENT: No, that's true, Justice
14 Ginsburg. That's why I said, in response to Justice
15 Breyer, that I think that the proper point to start to
16 focus on is the -- these -- is the 1994 Solomon
17 Amendment. And, at that point, there is a question
18 about this policy. At that point, the American
19 Association of Law Schools does have its recruiting
20 policies beginning in place, and I think the provision
21 has been amended a number of times in the years since
22 1994. There have been changes in the scope of the
23 funding that's covered. First, student-aid funds were
24 put in, then they were taken out. And then, this is
25 the most recent iteration of the provision.

1 There's no question that what's at issue here
2 is more than just the Vietnam-era concerns about ROTC
3 presence on statute, because that's addressed in a
4 different subsection of the statute. That's addressed
5 in 10 U.S.C. 983(a). So this provision, 10 90- -- 10
6 U.S.C. 983(b) is specifically addressed at the problem
7 of access to campuses for recruiting. And, I think,
8 especially when you read the statute in light of the
9 relevant history of the prior administrative
10 interpretation, and that being codified and ratified by
11 Congress, it's very clear that this phrase "in a manner
12 that is at least equal in quality and scope to the
13 access provided to any other employer," is just that,
14 it's a regulation of the manner of access, once access
15 is granted. And it addresses this difficult question
16 of, If you allow some entry and access onto campus,
17 what level of access is sufficient? And so, I think
18 that --

19 JUSTICE SCALIA: What does Title X of the
20 United States Code deal with?

21 GENERAL CLEMENT: It deals with the military.

22 JUSTICE SCALIA: Why do you chose to defend
23 this principally on the basis of the Spending Clause,
24 and not on the basis of what it -- what it was, seemed
25 to me, enacted in order to achieve, and that is the

1 congressional power to raise and support armies.

2 GENERAL CLEMENT: Well, Justice Scalia, I
3 think the statute is clearly supported under both
4 provisions, under the spending authority and the
5 Article I authority to raise and support armies. I
6 think, in answering your question, we tended to focus
7 on the fact that it was a spending condition, because
8 we thought, under this Court's precedence, that made it
9 an even more straightforward case. We certainly think
10 it would be constitutional, even if it were a direct
11 imposition, and we certainly think the fact that this
12 is an exercise of Congress's undoubted authority to
13 raise and support an army, is relevant to the
14 constitutional analysis.

15 And if I could move over to the
16 constitutional question and address that for a minute,
17 I think one of the arguments that's raised on the other
18 side is that there's an interference with associational
19 interests in this case, and I think there are other
20 statutes that, frankly, have much more of an
21 interference with a university's associational
22 interest. I mean, Title VII, for example, regulates
23 who can be members of the university. And I raise that
24 also because another provision in Title -- in terms of
25 this same area of the military, requires that there not

1 be discrimination against veterans in hiring and
2 employment. And you could easily see that a university
3 could take their position to its logical conclusion and
4 say, "In order to show just how much we don't like the
5 military's policy, we're not only going to not let
6 military recruiters on campus, but we are going to not
7 hire former military people, veterans, and we're not
8 going to admit them to our classes." Now, who's in the
9 classroom, and who's a member of the university --

10 JUSTICE GINSBURG: That would --

11 GENERAL CLEMENT: -- seems --

12 JUSTICE GINSBURG: -- be rather farfetched.
13 The pitch that's being made is an equality pitch, that
14 we are teaching our students equality, the equal
15 stature of all people. So, I think that your example
16 does not fit --

17 GENERAL CLEMENT: Well, with respect, Justice
18 Ginsburg, I'm not sure I understand why not. It's the
19 same idea. In order to teach equality, that there
20 should be no discrimination against homosexuals, we're
21 going to exclude, (a), military recruiters, and, while
22 we're at it, the former military, as well, because they
23 voluntarily joined the forces knowing that they had a
24 discriminatory practice. It's no stretch of the
25 imagination to think that the principle that's being

1 articulated by Respondents, would stretch well beyond
2 simply a direct antidiscrimination motive.

3 For example, NYU -- this is in the joint appendix,
4 at page 153 -- NYU, for 3 years, had a policy of
5 excluding recruiters from the State of Colorado, simply
6 because Colorado had passed Amendment II, which this
7 Court dealt with in the Romer case. And so, it's not a
8 matter of saying that, "Well, you know, the only think
9 that's at issue here is excluding employers that are,
10 themselves, discriminatory." The free-speech interests
11 that are articulated on the other side, would extend to
12 any basis for criticizing the military, whether it was
13 not liking the war in Iraq, the war in Afghanistan, or
14 the discriminatory hiring policies.

15 I also think, with respect to the issue of
16 discrimination, it's worth pointing out here that
17 there's more than one way to understand whether or not
18 the military's policy is discriminatory. Certainly
19 respondents are entitled to view it as being
20 discriminatory. But the Congress that mandates this
21 same policy towards homosexuals, I think, is equally
22 entitled to look at it and say, "No, there's no
23 discrimination going on here, because you have to take
24 into account the special role of the military."

25 JUSTICE SOUTER: Okay, but even if you do

1 that, you're still left, it seems to me, with the
2 problem -- whether you characterize the problem as
3 discriminatory and antidiscriminatory university policy
4 or not, you're still left with a speech problem that
5 they raise, that, in effect, you are forcing them, in
6 effect, to underwrite your speech, up to a point, and
7 you are forcing them to change their own message.
8 You're forcing them into hypocrisy, in one alternative.
9 And those arguments don't depend upon the -- sort of,
10 the discriminatory character of what may be at stake.

11 GENERAL CLEMENT: I think that's exactly
12 right Justice Souter, and I think those arguments would
13 be the same even if what was going on here was a
14 concern about the military's other policies. You would
15 still have a concern that the military is being forced
16 onto campus to make its own speech, and you would still
17 have the concern that that interferes with the message
18 --

19 JUSTICE SOUTER: So, discrimination --

20 GENERAL CLEMENT: -- the university --

21 JUSTICE SOUTER: -- or no discrimination,
22 you've got a speech issue that you're going to address.

23 GENERAL CLEMENT: I agree. I mean, I think,
24 ultimately, that cuts in our favor, because it shows
25 that the other side's position is not limited to this

1 narrow context, but is a much broader first-amendment
2 claim.

3 Now, turning to that first-amendment claim, I
4 think what's wrong with that claim is several things.
5 I think, with respect to what the military itself
6 wants, it simply does not want a -- primarily a speech
7 activity to take place, it wants access for recruiting,
8 which is a traditional commercial enterprise, it is an
9 activity that is something that is regulated by Title
10 VII in other Federal statutes. Sure, there may be some
11 incidental speech involved in that, but primarily it is
12 an instrumental activity designed to get --

13 JUSTICE SCALIA: It happens, in this case, to
14 be specifically authorized by the Constitution.

15 GENERAL CLEMENT: It does, indeed, Justice
16 Scalia, and I think, though -- I mean, there is this
17 sense in which we certainly concede that there maybe
18 some incidental speech involved; certainly,
19 military recruiters are engaged in speech. I'm --
20 we're not sure that's really the relevant speech. But
21 even the university itself --

22 JUSTICE SOUTER: No, but you're making a --
23 if I understand what you're saying, you are making a
24 kind of O'Brien argument that the -- that the burden on
25 speech, whatever it may be, is an incidental burden to

1 something else. Well, that -- I think we have to draw
2 this line between recruiting, on the one hand, which is
3 what the military wants to do, and the Solomon
4 Amendment, on the other hand. As I understand it, the
5 Solomon Amendment is directed, or is responsive,
6 entirely to positions taken by law schools on, among
7 other things, first-amendment expressive grounds, so
8 that if we are going to address the Solomon Amendment,
9 I think we are addressing an exclusively first-
10 amendment-speech expression issue.

11 GENERAL CLEMENT: Well, Justice Souter, I
12 guess -- I'm inferring that you're drawing that
13 conclusion from some of the statements of some of the
14 floor sponsors about their purposes enacting the
15 Solomon Amendment. I mean, if you look at the text of
16 the Act alone --

17 JUSTICE SOUTER: I don't --

18 GENERAL CLEMENT: -- I don't think --

19 JUSTICE SOUTER: -- know of any other reason
20 for the Solomon Amendment.

21 GENERAL CLEMENT: Well, I think the reason
22 for the Solomon Amendment is to ensure that military
23 recruiters, in fact, have an equal opportunity to
24 recruit the same pool of individuals that all the other
25 employers are trying --

1 JUSTICE SOUTER: But --

2 GENERAL CLEMENT: -- to recruit.

3 JUSTICE SOUTER: But they're -- but the
4 Solomon Amendment, in order to accomplish that, is
5 addressed to a particular expressive problem which
6 occurs for the military -- and for the law schools, for
7 that matter -- in law-school recruiting. So, it seems
8 to me that -- for -- I mean, my only point is that the
9 Solomon Amendment seems to have one objective.
10 Whereas, the "don't burn your draft-card rule," in
11 O'Brien, had two -- or had a -- let's say, had a
12 primarily nonspeech objective with an incidental-speech
13 burden. Here, the sole objective, in the real world,
14 seems to be an expressive objective.

15 GENERAL CLEMENT: Well, if by -- "the
16 expressive objective" you're talking about is the
17 military's own recruiting, I guess --

18 JUSTICE SOUTER: No, this express --

19 GENERAL CLEMENT: -- I agree with you.

20 JUSTICE SOUTER: Yes, but the expressive
21 objective is, the law schools are taking a position on
22 first-amendment grounds. That position is interfering
23 with military recruitment. No question about it. I
24 don't know how much, but I will assume that there is no
25 question about it. The Solomon Amendment is addressed

1 solely, as I understand it, at the expressive
2 activities which have, as you say, this interference.
3 Its sole objective is expressive.

4 GENERAL CLEMENT: No, I would disagree,
5 Justice Souter. If the -- if the law schools were
6 denying access to military recruiters, for any reason,
7 be it a first-amendment reason that they'd say it's a
8 first-amendment reason, or just because they couldn't
9 be bothered, the Solomon Amendment would be written
10 exactly the same way, which would say, "Look, the
11 military has an opportunity to get onto campus, and,
12 once it gets there, it ought to get the same basic
13 opportunities as other employers."

14 JUSTICE SCALIA: You cannot convert a law
15 into a law directed at the first -- at first-amendment
16 rights, can you, by simply saying, "The reason I am
17 disobeying it is to express -- whatever, disaffection
18 with the war, my objection to homosexuality, or
19 anything else -- or to homosexual discrimination -- or
20 anything else"? Does that convert it to a law directed
21 against the first amendment?

22 GENERAL CLEMENT: Absolutely not, Justice
23 Scalia. And I would go further and say it's also not a
24 problem, if, in the real world, the conduct that
25 Congress sought to regulate was, in fact, in practice,

1 generated by first-amendment concerns. I think that
2 describes O'Brien.

3 JUSTICE SOUTER: Well, in --

4 JUSTICE O'CONNOR: Well, let me ask another
5 question that may shed a little light on it. Does the
6 Solomon Amendment pose any restrictions on the extent
7 to which the law schools can distance themselves from
8 the military's views? Can there be signs up at every
9 recruitment office, saying, "Our law school doesn't
10 agree with any discrimination against gays"? I mean,
11 can they come forward with their position on this in
12 every recruitment office without violation of the
13 amendment?

14 GENERAL CLEMENT: Yes, they can, Justice
15 O'Connor. I think they would be, in fairness -- I want
16 to be clear -- I think there might be a line where
17 there would be -- the recruitment office could conduct
18 itself in a way that would effectively deny access.
19 But I think, with that caveat, there is --

20 JUSTICE STEVENS: But --

21 GENERAL CLEMENT: -- nothing in the Act that
22 prevents the universities --

23 JUSTICE STEVENS: Let me ask you --

24 GENERAL CLEMENT: -- from disclaiming --

25 JUSTICE STEVENS: -- this question, to follow

1 up on Justice O'Connor's thought. Can -- are you
2 saying that the school can engage in speech expressing
3 its views about the military policies, can it engage in
4 symbolic speech by affording access, which is equal in
5 all functional requirements, but yet sends a message
6 that they are really disagreeing with what's going on
7 by, say -- let a law school say, "Well, for -- most
8 employers will let you use the regular law-school
9 placement facilities, but, for the military, we will
10 require you use the college facilities to send a
11 message that we disapprove, if the college facility is
12 equally of -- good, as a matter of functioning"?

13 GENERAL CLEMENT: Well, Justice Stevens, I
14 would say, to the -- I think, the main thrust of your
15 question, no, which is to say that if what you have in
16 mind is really forcing them to go to the undergraduate
17 campus, I think the military would take the position
18 that that's not equal in scope. Now, if there's a way,
19 though --

20 JUSTICE STEVENS: But is it not equal because
21 of the message it sends or because it denies the
22 opportunity to recruit as effectively?

23 GENERAL CLEMENT: It's the latter, Justice
24 Stevens, and only the latter --

25 JUSTICE STEVENS: What if I had an example

1 where they were equal -- equally effective as
2 recruitment avenues. Could they -- could they make the
3 military take one that was equally effective, but it
4 sent a message, "Well, we really don't like what you're
5 doing"?

6 GENERAL CLEMENT: I mean, my own --

7 CHIEF JUSTICE ROBERTS: Sort of like a
8 separate-but-equal.

9 JUSTICE STEVENS: Yes.

10 GENERAL CLEMENT: Well, I mean --

11 [Laughter].

12 GENERAL CLEMENT: -- I guess I'm -- I'm
13 resisting a little bit just because I'm not -- I think
14 it would depend on the --

15 JUSTICE STEVENS: So, the --

16 GENERAL CLEMENT: -- hypothetical.

17 JUSTICE STEVENS: -- the point I'm trying to
18 make is, Does your agreement, that you can engage in
19 speech by posting banners or handing a note, apply to
20 symbolic speech --

21 GENERAL CLEMENT: It could --

22 JUSTICE STEVENS: -- the kind of conduct that
23 is symbolic speech?

24 GENERAL CLEMENT: It could apply to some
25 symbolic speech, I believe. It's just -- I'm having

1 trouble, because, in a practical matter, if you look at
2 the record here, I think it's telling. If you look, at
3 joint appendix, at pages 215 and 219, describes the
4 real situation at Boston College. And they want to say
5 that, "Well, it's not really much of an imposition on
6 the military, because all you have to do is get the
7 recruiting list from the reserve desk at the law
8 library, and then go to" --

9 JUSTICE STEVENS: No, that's a functional --

10 GENERAL CLEMENT: -- the main campus, which
11 is a mile and a half away.

12 JUSTICE KENNEDY: But the --

13 JUSTICE STEVENS: That's a functional
14 difference.

15 JUSTICE KENNEDY: -- the resistance to any
16 statute, I assume, could be justified as symbolic
17 speech.

18 GENERAL CLEMENT: Well, and I think -- I
19 mean, I'm -- I think that some resistance by some parts
20 of the university might be fine. I think if the
21 recruiting office -- this is the caveat I tried to give
22 Justice O'Connor -- if the recruiting office engages in
23 conduct that effectively negates the access that
24 they're providing, then I think you would have a
25 different situation.

1 JUSTICE GINSBURG: General Clement, can you
2 be affirmative now? Because we have an example, from
3 Justice Stevens, which is the Yale example. The -- it
4 was the main campus, instead of the law school. What -
5 - the recruiter is there. He's in the same room that
6 other recruiters use. What can the law faculty do to
7 disassociate itself from -- to say that, "We don't
8 tolerate discrimination of any kind"? What can the law
9 school do, concretely, while the recruiter is in the
10 room?

11 GENERAL CLEMENT: I mean, concretely, they
12 could put signs on the bulletin board next to the door,
13 they could engage in speech, they could help organize
14 student protests. I would draw the line, though, at
15 saying that they have to go to the undergraduate
16 campus, because I think, as a practical matter --

17 JUSTICE KENNEDY: You mean, they could
18 organize a student protest at the hiring interview
19 rooms, so that everybody jeers when the applicant comes
20 in the door and the school could organize that?

21 GENERAL CLEMENT: The school could --

22 JUSTICE KENNEDY: As -- when it's --

23 GENERAL CLEMENT: -- organize --

24 JUSTICE KENNEDY: -- when it's, say, a job
25 fair, and all the employers are there, but then they

1 jeer just the -- and the school organizes a line
2 jeering the -- both the recruiters and the applicants,
3 that's equal access?

4 GENERAL CLEMENT: I think that would be equal
5 access. I think you have to draw a practical line --

6 JUSTICE KENNEDY: I'm surprised that --

7 GENERAL CLEMENT: -- here between --

8 JUSTICE KENNEDY: -- you think that --

9 GENERAL CLEMENT: -- between access and
10 allowing the speech, but I think it -- you have to be -
11 -

12 JUSTICE SCALIA: You're not going to be an
13 Army recruiter, are you?

14 [Laughter.]

15 GENERAL CLEMENT: I don't think the military
16 and the Army recruiters -- and I -- and I won't be one
17 of them -- but I think the Army recruiters are not
18 worried about being confronted with speech, they're
19 worried about actually not being allowed onto the same
20 law schools --

21 JUSTICE KENNEDY: Well, --

22 JUSTICE SCALIA: They're worried about having
23 students driven off. And if you have jeering and
24 picketing, do you really think that that fulfills the
25 purposes of this amendment?

1 GENERAL CLEMENT: I don't know if it would
2 fulfill every purpose, but I think the amendment has to
3 accommodate the first-amendment --

4 JUSTICE KENNEDY: You think if you --

5 GENERAL CLEMENT: -- interests at --

6 JUSTICE KENNEDY: -- have jeering --

7 GENERAL CLEMENT: -- a university.

8 JUSTICE KENNEDY: -- jeering and picketing if
9 a black person came to recruit and people didn't -- and
10 a school faculty didn't like blacks?

11 GENERAL CLEMENT: Well, I think that would --

12 JUSTICE KENNEDY: I think that that's an
13 extraordinary position you're taking.

14 GENERAL CLEMENT: Well, but, Justice Kennedy,
15 I think you have to distinguish what the Constitution
16 would allow the Government to do and what this statute
17 does, which is to say -- I mean, what you have in mind
18 is a --

19 JUSTICE KENNEDY: We're talking --

20 GENERAL CLEMENT: -- race example --

21 JUSTICE KENNEDY: -- about the practical
22 meaning of "equal access."

23 GENERAL CLEMENT: Right, but in -- the
24 practical meaning has to turn on the statute at issue.
25 And Title VI, for example, in the race context,

1 forbids all discrimination because of race. And so,
2 some of the conduct that you have in mind may well
3 violate that statute. And if Congress wants to write a
4 different statute that provides more rights to the
5 military, we would be here defending it as valid first-
6 amendment legislation. But this statute gives, not a
7 right to be free of any discrimination, but a right to
8 equal access. And we think that the right way to frame
9 that inquiry is say, "Access, yes, but be respectful of
10 speech."

11 And the last thing I would say, if I could
12 reserve the rest of my time for rebuttal, is simply
13 that it's worth remembering that the recruiting office
14 is not the heart of first-amendment activity on campus.

15 And if the recruiting office acts in a way that
16 ensures access, and the rest of the university engages
17 in speech, that's a common sense way to accommodate the
18 interest of the military recruiters and the first
19 amendment.

20 If I may reserve.

21 CHIEF JUSTICE ROBERTS: Thank you, General.

22 Mr. Rosenkranz, we'll hear now from you.

23 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

24 ON BEHALF OF RESPONDENTS

25 MR. ROSENKRANZ: Thank you, Your Honor. Mr.

1 Chief Justice, and may it please the Court:

2 This case is not about whether military
3 recruiters will be barred at the campus gates.
4 Congress had a law on the books that guaranteed entry
5 to campus, but that was not what Congress really
6 wanted. So, it passed a new law. What Congress really
7 wants is to squelch even the most symbolic elements of
8 the law schools' resistance to disseminating the
9 military's message, which is why it gave us the current
10 version of the statute. The current version isolates
11 for regulation the most communicative aspects of the
12 law schools' resistance. The law schools --

13 CHIEF JUSTICE ROBERTS: No, that's --

14 MR. ROSENKRANZ: -- -- are saying --

15 CHIEF JUSTICE ROBERTS: I'm sorry, but the
16 most communicative aspect is saying what you think
17 about a particular policy. This is conduct, denying
18 access to the military recruiters.

19 MR. ROSENKRANZ: Your Honor, this is a
20 refusal to disseminate the messages of the military
21 recruiters. It is a refusal to send e-mails, post
22 bulletins, and make arrangements for mutual exchange of
23 ideas. It is "conduct" only in the sense that they are
24 moving molecules, but it's speech that they are being
25 forced to engage in. And I have to emphasize, this

1 case is not about entry. The Solomon Amendment does
2 not require schools to give entry to military
3 recruiters, it requires them to give entry to a
4 recruiter only if they provide entry to some --

5 CHIEF JUSTICE ROBERTS: Well, no that --

6 MR. ROSENKRANZ: -- other employer.

7 CHIEF JUSTICE ROBERTS: So, if you had a
8 policy that, "We're going to deny any employer that
9 uses tanks," do you think that would pass muster under
10 the Solomon Amendment?

11 MR. ROSENKRANZ: Well, Your Honor, for a
12 pacifist religious institution, absolutely.

13 CHIEF JUSTICE ROBERTS: What about Yale Law
14 School?

15 MR. ROSENKRANZ: No, because it has no
16 morally-based, conscious-driven reason for refusing to
17 disseminate that message.

18 JUSTICE SCALIA: Oh, where do you find that?
19 In -- it has to be a morally-based, conscience-driven
20 --

21 MR. ROSENKRANZ: Well, Your Honor --

22 JUSTICE SCALIA: I thought we were talking
23 about freedom of speech, not the religion clauses.

24 MR. ROSENKRANZ: Well, Your Honor, what I'm
25 saying is, under the -- under this Court's

1 jurisprudence in the first amendment, it's actually
2 relevant whether the reason for refusing to disseminate
3 the message lies at the heart of the first amendment.

4 JUSTICE SOUTER: Well, is -- what about
5 Hurley? Is there something deeply moral or conscience-
6 driven about the position to exclude the gay-rights
7 contingent in the parade, in Hurley?

8 MR. ROSENKRANZ: Well, Your Honor, it was
9 certainly a reason that they gave, and it was based
10 upon a political view of the legitimacy of
11 homosexuality.

12 JUSTICE SOUTER: So, you're --

13 MR. ROSENKRANZ: But I hasten to add, I'm not
14 arguing that that is a required element of a compelled-
15 speech claim. I'm simply arguing that when someone has
16 a reason for resisting disseminating a message, that
17 situates it further -- closer to the heart of the first
18 amendment. Congress came back, after it --

19 JUSTICE SOUTER: Well --

20 MR. ROSENKRANZ: -- had a --

21 JUSTICE SOUTER: Excuse me, that -- I
22 understand that, so far as the associational claim may
23 go. But so far as the speech claims may go, I don't
24 understand it.

25 MR. ROSENKRANZ: Your Honor, I --

1 JUSTICE SOUTER: I can say, or refuse to say,
2 anything I want to, for any reason I want to, however
3 bad that reason, however nonmoral that reason is. And
4 I don't see how, in the speech -- on the speech claims,
5 we get into moral basis at all.

6 MR. ROSENKRANZ: Your Honor, I accept that as
7 a proposition of the compelled-speech doctrine,
8 absolutely. And what I'm trying to point out is that
9 in this case what Congress has done is to engage in the
10 most viewpoint-oriented regulation of speech. The
11 reason Congress does not -- the reason Congress is
12 insisting that the law schools disseminate the
13 recruiting messages is because of the message of the
14 law --

15 CHIEF JUSTICE ROBERTS: But it doesn't --

16 MR. ROSENKRANZ: -- schools themselves --

17 CHIEF JUSTICE ROBERTS: -- it doesn't insist
18 --

19 MR. ROSENKRANZ: -- in providing --

20 CHIEF JUSTICE ROBERTS: It doesn't insist
21 that you do anything. It says that, "If you want our
22 money, you have to let our recruiters on campus."

23 MR. ROSENKRANZ: Yes, Your Honor, and, under
24 the doctrine of unconstitutional conditions, the
25 analysis is exactly the same.

1 CHIEF JUSTICE ROBERTS: Under -- what about
2 South Dakota against Dole? South Dakota had a
3 constitutional right, under the twenty-first amendment,
4 to set whatever drinking age it wanted, and yet we
5 upheld the Spending Clause condition that if they
6 accepted Federal funds, they had to set their drinking
7 age at 21.

8 MR. ROSENKRANZ: Yes, Your Honor. And in
9 subsequent cases -- and, in fact, in Dole itself --
10 this Court pointed out that all bets are off when there
11 is a superseding constitutional right. Here, we're
12 talking about the Bill of Rights and the first
13 amendment. I mean, Rosenberger and Rust --

14 CHIEF JUSTICE ROBERTS: There's the right to
15 -- in the Constitution, to raise a military.

16 MR. ROSENKRANZ: Well, that is a Government
17 interest, for sure. All Government interests --

18 JUSTICE KENNEDY: What --

19 MR. ROSENKRANZ: -- can be --

20 JUSTICE KENNEDY: What you're --

21 MR. ROSENKRANZ: -- traced --

22 JUSTICE KENNEDY: What you're arguing is that
23 what is, for all intents and purposes, "conduct" can be
24 infused by the school, at its option, with a first-
25 amendment quality. Yet your argument would allow

1 schools to exclude anybody in uniform from a cafeteria.

2 MR. ROSENKRANZ: Absolutely not, Your Honor,
3 because --

4 JUSTICE KENNEDY: Why not?

5 MR. ROSENKRANZ: -- because --

6 JUSTICE KENNEDY: What's the point?

7 MR. ROSENKRANZ: -- what the law schools are
8 engaging in --

9 JUSTICE KENNEDY: It's an express -- it's an
10 -- it's solely for an expressive purpose.

11 MR. ROSENKRANZ: Your Honor, there's a
12 difference between refusing to abide by a universally
13 applicable regulation of conduct, on the one hand, and
14 the Solomon on -- Amendment, on the other hand, which
15 is refusing to assist the dissemination of a message.
16 Recruiting is all about speech. Yes --

17 JUSTICE SCALIA: What do you --

18 MR. ROSENKRANZ: -- it has --

19 JUSTICE SCALIA: What do you do about the --
20 about the cases where we have required colleges to
21 allow some student activities to put forward their
22 views on campus, when other student activities are
23 allowed to do that? It seems to me that that flatly
24 contradicts the proposition that when you compel an
25 institution to permit somebody else to speak, you are

1 violating that institution's first-amendment rights.

2 MR. ROSENKRANZ: Well, Your Honor, that is
3 for public schools, and public schools are subject to
4 the first-amendment rights of those who want to enter
5 their forum. But there is a critical difference
6 between that forum, Your Honor, which the schools
7 opened up to everyone, and the forums in career
8 services, which the schools filter on the basis of one
9 very important --

10 JUSTICE SOUTER: No, but, Mr. Rosenkranz,
11 isn't the -- I thought the distinction was that in
12 determining the forum for recruiting, the university is
13 speaking. The university isn't creating a forum from a
14 lot -- for a lot of third parties; it's speaking,
15 itself. And I understand the essence of your claim to
16 be that its speech is being affected, either by being
17 mixed with something it doesn't want to say or by
18 being, in effect, forced to support it doesn't --
19 something it does not want to say.

20 MR. ROSENKRANZ: Your Honor, it's important
21 to keep in mind that there are two messages going on
22 here, and they are clashing. There is the military's
23 message, which the schools are interpreting as, "Uncle
24 Sam does not want you," and there is the school's
25 message, which is, "We do not abet those who

1 discriminate. That is immoral." And --

2 JUSTICE GINSBURG: And you would take, Mr.
3 Rosenkranz, that same position. If this was not
4 special to law faculties -- I mean, we're told that the
5 recruiters could go to the main campus; most of these
6 places, the restriction is limited to the law
7 faculties. Suppose it was universitywide policy that
8 we do not give equal access to military recruiters. I
9 think your argument says it doesn't matter if it's
10 special to the law school or the whole university. Do
11 I understand it correctly?

12 MR. ROSENKRANZ: Yes, Your Honor. If the
13 university had such a policy, then the university would
14 be able to enforce it. But I hasten to add --

15 JUSTICE KENNEDY: And so for members --

16 MR. ROSENKRANZ: -- the university --

17 JUSTICE KENNEDY: -- for medical schools, we
18 can't get medical schools for our Armed Forces --
19 chaplains, the same way, because it -- schoolteachers
20 who teach on military bases -- in order to make the
21 point.

22 MR. ROSENKRANZ: Your Honor, at this point,
23 and for some --

24 JUSTICE KENNEDY: And that's --

25 MR. ROSENKRANZ: -- several --

1 JUSTICE KENNEDY: -- that's all for an
2 expressive reason.

3 MR. ROSENKRANZ: Justice Kennedy, for several
4 decades, law schools have had these policies and
5 applied them to career-services offices. No other
6 schools within the --

7 JUSTICE BREYER: But that isn't --

8 JUSTICE O'CONNOR: But --

9 MR. ROSENKRANZ: -- universities.

10 JUSTICE BREYER: -- that isn't relevant.

11 JUSTICE O'CONNOR: But the Government takes
12 the position that the law school is entirely free to
13 convey its message to everyone who comes.

14 MR. ROSENKRANZ: Yes, Justice O'Connor, and -
15 -

16 JUSTICE O'CONNOR: So, how is the message
17 affected --

18 MR. ROSENKRANZ: Well --

19 JUSTICE O'CONNOR: -- in that environment?

20 MR. ROSENKRANZ: -- let me answer in two
21 parts. First, of course, under the compelled-speech
22 cases, the ability to protest the forced message is
23 never a cure for compelled-speech violation, but --

24 CHIEF JUSTICE ROBERTS: But --

25 MR. ROSENKRANZ: -- what's going on --

1 CHIEF JUSTICE ROBERTS: I'm sorry, but, on
2 compelled speech, nobody thinks that these -- law
3 school is speaking through those employers who come
4 onto its campus for recruitment. Everybody knows that
5 those are the employers. Nobody thinks the law school
6 believes everything that the employers are doing or
7 saying.

8 MR. ROSENKRANZ: That's correct, Your Honor,
9 but, again, endorsement is also not an element of
10 compelled-speech claim. But let me -- let me bring
11 those two questions together on a factual point. The
12 law schools are disseminating a message that they
13 believe it is immoral to abet discrimination. When --

14 JUSTICE O'CONNOR: But --

15 MR. ROSENKRANZ: -- they --

16 JUSTICE O'CONNOR: -- they can say that to
17 every student who enters the room.

18 MR. ROSENKRANZ: And when they do it, Your
19 Honor, the answer of the students is, "We don't believe
20 you. We read your message as being that there are two
21 tiers. There's a" --

22 JUSTICE BREYER: Oh, there are --

23 MR. ROSENKRANZ: -- "double standard" --

24 JUSTICE BREYER: -- students --

25 CHIEF JUSTICE ROBERTS: The reason they don't

1 believe you is because you're willing to take the
2 money. What you're saying is, "This is a message" --

3 [Laughter.]

4 CHIEF JUSTICE ROBERTS: -- "we believe in
5 strongly, but we don't believe in it, to the tune of
6 \$100 million."

7 MR. ROSENKRANZ: That's right, Your Honor.
8 And the problem with this Solomon Amendment is that the
9 unconstitutional-conditions doctrine says that you
10 can't put a private speaker to that crisis of
11 conscience.

12 JUSTICE STEVENS: May I just be sure I have
13 one thing straight? The content of the compelled
14 speech, as I understand it, is you're aiding in the
15 recruitment of the Armed Forces, right?

16 MR. ROSENKRANZ: That's correct --

17 JUSTICE STEVENS: And so, it --

18 MR. ROSENKRANZ: -- Your Honor.

19 JUSTICE STEVENS: -- would still have been
20 compelled speech if, 25 years ago, Congress passed a
21 statute saying, "University, you must allow our people
22 on campus to recruit," and they some -- for some
23 reason, didn't want to help. But that would have been
24 a violation of the first amendment of the school if
25 there were no other debate, just they didn't want the

1 Army on because they had to provide facilities that
2 would aid recruitment.

3 MR. ROSENKRANZ: Yes, Your Honor. If it was
4 -- certainly, if it was against their conscience to do
5 so --

6 JUSTICE STEVENS: So that it would have
7 violated the first amendment during World War II when
8 the -- whenever they are trying to raise an army, if
9 they had compelled an unwilling university to provide
10 recruitment facilities to the military.

11 MR. ROSENKRANZ: Well, yes, Your Honor,
12 unless there is a compelling need. And the difficulty
13 with the Solomon Amendment --

14 JUSTICE STEVENS: Well, that be compelled
15 speech, though, in your view. That's the kind of
16 speech we're talking about, anything that helps the
17 military raise an army.

18 MR. ROSENKRANZ: Anything that -- not
19 anything that helps the military raise an army; any
20 communication that a school is required to engage in.

21 JUSTICE SOUTER: Okay.

22 JUSTICE BREYER: So, why isn't --

23 JUSTICE SOUTER: Isn't that the point? I
24 mean, your point is not that -- as I understand, that,
25 for any reason, if the -- if the university, for any

1 reason, during World War II, had excluded recruiters,
2 and there had been the equivalent of the Solomon
3 Amendment, that there would have been a first-amendment
4 problem. As I -- is -- maybe I don't understand your
5 argument, but I thought your argument was, or is, that
6 if they do it for some purpose of conscience, which
7 implies a message -- e.g., if it is a pacifist college
8 -- there would be a first-amendment problem. But if
9 they're doing it simply because space is short and they
10 would rather provide one more biology classroom, there
11 wouldn't be a first-amendment problem, World War II or
12 today, would there?

13 MR. ROSENKRANZ: That is absolutely right --
14 correct, Justice Souter, which is why I answered your
15 very early question with --

16 JUSTICE SCALIA: So, you --

17 MR. ROSENKRANZ: -- an answer that is --

18 JUSTICE SCALIA: -- are saying that --

19 MR. ROSENKRANZ: -- by conscience --

20 JUSTICE SCALIA: -- that every time somebody
21 gives as his reason for violating a law that he wants
22 to send a message that he disagrees with that law --

23 MR. ROSENKRANZ: No, Your Honor.

24 JUSTICE SCALIA: -- that raises a first-
25 amendment question.

1 MR. ROSENKRANZ: No, Your Honor. Every time

2 --

3 JUSTICE SCALIA: Well --

4 MR. ROSENKRANZ: -- someone says that as a
5 reason for refusing to host a message of an unwelcome
6 messenger, that's a compelled-speech violation.

7 JUSTICE BREYER: So, in fact, to be clear,
8 you also think schools that are angry at the military
9 because they're too favorable to gays in the military,
10 they have the same right.

11 MR. ROSENKRANZ: Absolutely, Your --

12 JUSTICE BREYER: Okay.

13 MR. ROSENKRANZ: -- Honor, because --

14 JUSTICE BREYER: And also the same right Bob
15 Jones University, because they disapprove of social
16 mixing of the races?

17 MR. ROSENKRANZ: If -- to answer the first
18 hypothetical first, if that's a matter of conscience,
19 absolutely --

20 JUSTICE BREYER: All right, so --

21 MR. ROSENKRANZ: -- if we're talking --

22 JUSTICE BREYER: -- so, what -- and there are
23 a lot of people in the country, they may -- there's
24 few, anyway -- may not believe in either affirmative
25 action, they may not believe in -- they may not believe

1 in diversity, they may not -- they may even believe in
2 racial segregation, for all I know. I hope there are
3 not too many --

4 MR. ROSENKRANZ: Your Honor --

5 JUSTICE BREYER: -- but there might, and
6 those people all have the same right.

7 MR. ROSENKRANZ: Well, they have the same
8 first-amendment right.

9 JUSTICE BREYER: Yes, okay. So, if that --

10 MR. ROSENKRANZ: But --

11 JUSTICE BREYER: -- if that's the case, then
12 of course it's going to be pretty tough --

13 MR. ROSENKRANZ: But, Your Honor, the --

14 JUSTICE BREYER: -- for the military to get
15 people on campus. And I just wonder, if that's an
16 important need, why you don't have here what I'd say is
17 normal in the first-amendment area, that the remedy for
18 speech you don't like, is not less speech, it is more
19 speech.

20 MR. ROSENKRANZ: Your Honor, the problem with
21 the Solomon Amendment is that the Government is
22 demanding absolute parity. We have a statute before us
23 that demands exactly the same services, without regard
24 to whether the military actually needs them. In order
25 for Congress to justify the parity requirement, which

1 is the only statute before this Court, Congress has to
2 state a need. It has to say why it needs what --

3 JUSTICE SCALIA: Here's a need. How about
4 this? We have said in our opinions -- and I am quoting
5 from Rostker versus Goldberg -- "Judicial deference is
6 at its apogee when legislative action under the
7 congressional authority to raise and support armies and
8 make rules and regulations for their governance is
9 challenged." And that's precisely what we have here.

10 MR. ROSENKRANZ: Your Honor, this Court
11 defers to Congress, in matters of the military, when
12 the military or the Congress is especially expert and
13 this Court is especially naive. This Court has never
14 deferred to a congressional statute about military when
15 --

16 JUSTICE SCALIA: I don't think it has to do
17 with expertise. I think it has to do with immense
18 national importance.

19 MR. ROSENKRANZ: Your Honor, it has to do
20 with expertise, as well. That's precisely what this
21 Court --

22 JUSTICE BREYER: But I would --

23 MR. ROSENKRANZ: -- said in Rostker.

24 JUSTICE BREYER: -- I would like the answer
25 to my question, because I'm thinking, as you correctly

1 say, if you have that right, so do all the worse
2 segregationists you can imagine, et cetera.

3 MR. ROSENKRANZ: And the --

4 JUSTICE BREYER: And here -- yes, and here
5 there is a need of some kind to get the military in.
6 And what the Government in this statute asks you --
7 because I, personally, couldn't find anything in the
8 record that finds that student who thinks, by letting
9 the military person in, that that school, which
10 basically is completely against the military in this
11 area, suddenly becomes for it. And I haven't even
12 found in the record an instance where there was a
13 recruiter who told people that they couldn't join the
14 military if they were gay.

15 MR. ROSENKRANZ: Well --

16 JUSTICE BREYER: So, we have not a tremendous
17 demonstration there of a need on the university side.
18 And my question was, What's wrong with the Government
19 saying, "University, you disapprove of what we do. The
20 remedy for such a situation is not less speech, it is
21 more speech."

22 MR. ROSENKRANZ: Your Honor, the --

23 JUSTICE BREYER: Go and explain it.

24 MR. ROSENKRANZ: -- the direct answer to that
25 last question is that all bets are off when what the

1 Government is doing is compelling the speech of a
2 private actor, because the Government is not allowed --

3 JUSTICE GINSBURG: Does it compel the speech
4 of a private actor when the Government says, "Colleges
5 and Universities, you are not going to get Federal
6 money if you discriminate on grounds of race or gender.

7 And we don't care what your private attitude may be,
8 we will refuse to contract, we will debar you from
9 future contracts, if you don't -- not only say, 'We
10 won't discriminate,' but have an affirmative action
11 plan." You know that is not hypothetical. This was
12 the U.S. policy in the early '70s.

13 GENERAL CLEMENT: Yes, Your Honor. I
14 understand the hypothetical, at least -- especially as
15 to the first half, which links to Justice Breyer's
16 earlier question. There is an enormous difference,
17 under this Court's jurisprudence, between
18 antidiscrimination laws and the sort of law we have
19 here, the Solomon Amendment. And the difference is,
20 the Government -- it is both on the need side and on
21 the infringement side. On the need side, the
22 Government has a compelling interest that is different
23 from just regulating the conduct. The compelling
24 interest that the Government has is a completely
25 separate interest in seeing to it that not a penny of

1 Federal money ever goes to support an institution that
2 taxpayers would not be in a position to go to. That's
3 Bob Jones and Norwood.

4 And, on the infringement side, this Court has
5 said, that the act of discriminating against
6 individuals is entitled to no first-amendment
7 protection, regardless of whether there's a first-
8 amendment right at stake. And I should add, also, that
9 the vast majority of schools that are subject to Title
10 VI or to Title IX have no such expression that is at
11 stake. They are not articulating a message, "We really
12 need to discriminate on the basis of race or on the
13 basis of gender."

14 JUSTICE SCALIA: Mr. Rosenkranz, could you
15 tell me which elements of your argument rest upon
16 compelled actual speech and which rest upon compelled
17 symbolic speech? Because the latter, I have to tell
18 you, I'm not very fond of. What compelled actual
19 speech is imposed on the -- you mentioned something
20 about e-mails, they have to send e-mails to say where
21 the recruiter will be located --

22 MR. ROSENKRANZ: Well --

23 JUSTICE SCALIA: -- is that the compelled
24 speech you're worried about?

25 MR. ROSENKRANZ: It is -- Your Honor, it is

1 the forced hosting of a messenger-based decision --

2 JUSTICE SCALIA: Well, that's symbolic
3 speech. I'm talking about actual speech. What
4 expression is the university -- real, you know, words -
5 - words -- is the --

6 MR. ROSENKRANZ: Well, but --

7 JUSTICE SCALIA: -- university --

8 MR. ROSENKRANZ: -- with the --

9 JUSTICE SCALIA: -- compelled to utter by
10 this legislation?

11 MR. ROSENKRANZ: Under the parity
12 requirement, what the university is compelled to do is
13 sit down with the employers and help counsel them on
14 what their students are interested in and how best to
15 shape the message. The Third Circuit went out of its
16 way to point out that, and the National Association for
17 Law Placement brief is very compelling on that. They
18 also have to disseminate literature, post bulletins on
19 bulletin boards, help the recruiter -- or, excuse me,
20 the law firm develop cocktail parties --

21 JUSTICE SCALIA: No, I suppose when you --
22 when the police knock at the door and say, you know, "I
23 have a warrant," I suppose somebody has to say, "Come
24 in." Is that compelled speech? Does that --

25 MR. ROSENKRANZ: No, Your Honor, there are --

1 JUSTICE SCALIA: Does that -- does that raise
2 a first-amendment problem?

3 MR. ROSENKRANZ: It does not. And there are
4 many circumstances in which words are used that are
5 incidental to an action. These are not words used that
6 are incidental to the action.

7 JUSTICE KENNEDY: What's happening here is
8 the perspective employers, the recruiters, are
9 proposing a commercial transaction. And it seems to me
10 quite a simple matter for the law schools to have a
11 disclaimer on all of their e-mails and advertisements
12 that say, "The law school does not approve -- and, in
13 fact, disapproves -- of the policies of some of the
14 employers who you will meet."

15 MR. ROSENKRANZ: Your Honor --

16 JUSTICE KENNEDY: That's the end of it.

17 MR. ROSENKRANZ: -- no matter what the
18 Government does, it cannot convert the career-services
19 enterprise into a value-neutral proposition. For the law
20 school, from its perspective, it's especially value-
21 driven. Yes, the --

22 JUSTICE KENNEDY: Do law schools have an
23 interest in the Constitution that other people don't?

24 MR. ROSENKRANZ: Your Honor, I'm not claiming
25 any exceptionalism for the law schools. The AAUP brief

1 does --

2 JUSTICE KENNEDY: All right. Well, I --

3 MR. ROSENKRANZ: -- a brilliant job --

4 JUSTICE KENNEDY: -- I suppose, under your
5 view, law schools really shouldn't permit firms -- law
6 firms on campus if those firms, say, oppose -- take
7 litigation positions opposing gay marriage.

8 MR. ROSENKRANZ: Your Honor, as Dale points
9 out, it's up to the private institution to decide what
10 its metrics --

11 JUSTICE KENNEDY: That's --

12 MR. ROSENKRANZ: -- are going to be.

13 JUSTICE KENNEDY: That's your position. Your
14 position is, the schools could, and probably should, do
15 that to make their message known.

16 MR. ROSENKRANZ: My position, Your Honor, is
17 that the schools are entitled to make their own
18 judgments about what messages they will disseminate.
19 And even --

20 CHIEF JUSTICE ROBERTS: Dale is -- Dale --

21 JUSTICE KENNEDY: Even with reference to
22 commercial -- proposed commercial transactions?

23 MR. ROSENKRANZ: Yes, Your Honor. But, I
24 would hasten to add, that is not what recruiters are
25 doing. It is no more commercial than what United Foods

1 was doing in an -- advertising, saying -- or resisting
2 the message, "Mushrooms are good."

3 JUSTICE BREYER: Do you agree with the
4 Government, that the statute, as fairly interpreted, is
5 violated when a school which uniformly applies to all
6 employers the rule, "You can't come in if you have the
7 discrimination against hiring gay people"?

8 MR. ROSENKRANZ: Yes, Your Honor.

9 JUSTICE STEVENS: You agree that it is
10 violated.

11 MR. ROSENKRANZ: Yes, Your Honor. The
12 statute focuses on the manner of providing access; and
13 the manner of providing access is through the career-
14 services --

15 JUSTICE GINSBURG: Would you require any
16 accommodation -- I mean, you have said, "It's up to the
17 faculty to choose which causes to assist" -- I think
18 you put it that way, or one of the amici did -- "and
19 which to resist." And you've already told me that this
20 happens to be the law school, could be the whole
21 university. Could the law faculty, or the university,
22 take the position, "We're not going to -- we don't like
23 your message, and we are not going to let you have any
24 of our facilities. We're not going give you the room
25 on the main campus. Just a total bar"?

1 MR. ROSENKRANZ: Your Honor, we're certainly
2 not advancing that position here. The Solomon
3 Amendment requires no such thing. The Solomon
4 Amendment does not require that schools give entry to
5 military personnel.

6 JUSTICE GINSBURG: No, but a school --

7 MR. ROSENKRANZ: It says you must do it only
8 if the other guy does it.

9 JUSTICE GINSBURG: -- a school, as a matter
10 of its own policy says, "We don't like discrimination,
11 and we're not going to give discriminators access to
12 any of our facilities, period."

13 MR. ROSENKRANZ: Your Honor, are -- you're
14 asking me what I would be arguing for my clients if
15 they were actually making --

16 JUSTICE GINSBURG: I'm asking --

17 MR. ROSENKRANZ: -- taking that position?

18 JUSTICE GINSBURG: -- you, Is there any
19 obligation, since you've said there is a compelling
20 State interest -- compelling Government interest in
21 recruiting, is there some obligation to accommodate, or
22 could the faculty just say, "We choose the causes that
23 we assist and the ones we resist"?

24 MR. ROSENKRANZ: And that is as to entry to
25 campus, Your Honor? You're --

1 JUSTICE GINSBURG: Yes.

2 MR. ROSENKRANZ: -- asking if -- we are not
3 pressing this point to the Court. If the Court is
4 asking what my opinion would be if I --

5 JUSTICE GINSBURG: I'm asking --

6 MR. ROSENKRANZ: -- were a judge --

7 JUSTICE GINSBURG: -- is the -- if it
8 logically follows, from your position, about "choosing
9 the causes we resist and the ones that we assist."

10 MR. ROSENKRANZ: Your Honor, if I were
11 advancing that argument, it would be, this is a
12 viewpoint-discriminatory statute which is subject to
13 strict scrutiny. The Government is advancing a single
14 message, and, even when the first-amendment rights that
15 are at stake are minimal under this Court's opinion in
16 R.A.V., strict scrutiny would apply. The Government
17 has never come forward with a shred of evidence that
18 it actually needs to be on campus, as opposed to
19 directly off campus, or as opposed to publishing
20 notices in student publications, or advertizing. But -
21 -

22 JUSTICE STEVENS: When you --

23 MR. ROSENKRANZ: -- we are not advancing --

24 JUSTICE STEVENS: -- were talking about --

25 MR. ROSENKRANZ: -- that argument.

1 JUSTICE STEVENS: -- the government's
2 message, the message is, "Join the Army." Is that
3 right?

4 MR. ROSENKRANZ: Yes, Your Honor. The
5 message is, "Join the Army." What the schools hear is
6 --

7 JUSTICE STEVENS: And that's a viewpoint-
8 discriminatory message.

9 MR. ROSENKRANZ: No, I'm sorry. The
10 viewpoint discrimination, Your Honor, is in the
11 congressional statute that says, "We will force you to
12 host a single speaker with a single message," just as
13 in Pacific Gas --

14 JUSTICE STEVENS: The single message is,
15 "Join the Army."

16 MR. ROSENKRANZ: I'm sorry, Justice Stevens,
17 I didn't --

18 JUSTICE STEVENS: The single message is,
19 "Join the Army."

20 MR. ROSENKRANZ: The single message is, "Join
21 the Army," that is correct. And the Government is
22 promoting only that one message. But this --

23 JUSTICE SOUTER: I thought your argument was,
24 the single message is, "Join the Army, but not if
25 you're gay."

1 MR. ROSENKRANZ: Yes, Your Honor --

2 JUSTICE SOUTER: And --

3 MR. ROSENKRANZ: -- that is --

4 JUSTICE SOUTER: -- which leads me to the
5 question, in response to your answer to Justice
6 Ginsburg a moment ago, in your view is the compelling
7 interest on the part of the Government recruitment or
8 the refusal to accept gays?

9 MR. ROSENKRANZ: The compelling interest on
10 the Government's side is the recruitment interest.
11 We're not arguing that the Government has a compelling
12 interest in excluding anyone. That's precisely why --

13 JUSTICE SOUTER: No, but, are you --

14 MR. ROSENKRANZ: -- the law --

15 JUSTICE SOUTER: -- are you saying that the
16 Government -- that the only compelling-interest
17 argument that the Government can raise here is the
18 discriminatory argument? Since nobody denies that, if
19 the Government were recruiting without the
20 discrimination, that there would -- there would --
21 there would be no problem with it. Everyone would
22 agree with -- that that was a compelling --

23 MR. ROSENKRANZ: Well --

24 JUSTICE SOUTER: -- interest. But, I thought
25 your argument on compelling interest was that the only

1 compelling interest that the Government can assert is
2 the discriminatory interest.

3 MR. ROSENKRANZ: No, Your Honor, what I'm
4 saying is, if the Government wants to assert a need, it
5 has to identify the need. It has to say, "We need more
6 than contact information. We need more than a room --
7 entry to campus -- a room on campus, a posting on a
8 bulletin board. We need everything."

9 The story of the Solomon Amendment, Your
10 Honor, is the story of private institutions trying
11 desperately to accommodate the Government's need, even
12 in light of their own moral scruples.

13 JUSTICE BREYER: Well, the speech is on their
14 side. The Government just says, "Let our recruiters
15 in." So, why isn't it sort of like, "Pay the property
16 tax"? "I don't want to. I hate the government."

17 MR. ROSENKRANZ: Well, Your Honor --

18 JUSTICE BREYER: -- "I'm withholding the
19 money because I want to express my message."

20 MR. ROSENKRANZ: The speech is on both sides,
21 because the schools are being forced to host the
22 Government's message. The --

23 JUSTICE BREYER: The message is, "Join the
24 Army." The --

25 MR. ROSENKRANZ: The message --

1 JUSTICE BREYER: -- message of the property
2 tax is, "Pay the -- pay for the" --

3 MR. ROSENKRANZ: The message --

4 JUSTICE BREYER: -- "Government's expenses."

5 MR. ROSENKRANZ: The message that the schools
6 are hearing is, "Join the Army, but not if you're gay."
7 And the schools have been trying desperately to
8 accommodate the Government, up until the point where
9 Congress says, "We don't actually want any of those
10 things. We want them only if you supply them to
11 someone else. We want them only if you have viewpoint-
12 based reason that you don't want to give it to us."
13 There's some reason in the law school's conscience, or
14 the academic institution's conscience, that it wants to
15 treat this category of employers differently from any
16 other. Congress's --

17 CHIEF JUSTICE ROBERTS: And you -- and you're
18 perfectly free to do that if you don't take the money.

19 MR. ROSENKRANZ: Your Honor, Congress, here,
20 is imposing a sanction, which this Court has treated as
21 exactly the same as a penalty. When --

22 JUSTICE SCALIA: Suppose that a law-school
23 faculty could decide that it does not favor a
24 particular war, and use that as the basis for excluding
25 recruiters, "By allowing this recruiter to come on

1 campus, you are making me speak, in effect, to our
2 students, saying, 'Join the Army and fight the war that
3 we're now engaged in.'"

4 MR. ROSENKRANZ: Your Honor, again, we're
5 not --

6 JUSTICE SCALIA: "And I don't want to do
7 that." Now --

8 MR. ROSENKRANZ: We are not talking about --

9 JUSTICE SCALIA: -- what would be the
10 difference?

11 MR. ROSENKRANZ: -- coming on campus. We are
12 talking about affirmative assistance to the highest
13 degree --

14 JUSTICE SCALIA: Yes, okay --

15 MR. ROSENKRANZ: -- in disseminating the --

16 JUSTICE SCALIA: -- fine. I'm saying the
17 same thing.

18 MR. ROSENKRANZ: The answer is yes, Your --

19 JUSTICE SCALIA: But I'm saying --

20 MR. ROSENKRANZ: -- Honor.

21 JUSTICE SCALIA: -- you would say that the
22 same situation would apply if the university faculty
23 does not favor the particular war that the United
24 States is --

25 MR. ROSENKRANZ: Yes, Your Honor.

1 JUSTICE SCALIA: -- engaged in, and,

2 therefore, obstructs the effort to raise --

3 MR. ROSENKRANZ: Your Honor --

4 JUSTICE SCALIA: -- an army --

5 MR. ROSENKRANZ: -- it's very --

6 JUSTICE SCALIA: -- by not allowing them to
7 come on campus.

8 MR. ROSENKRANZ: It is very important to
9 distinguish obstruction from refusal to subsidize,
10 which, at the Government's instance, this Court has
11 been doing for 30 years, both --

12 JUSTICE SCALIA: It's obstruction when you
13 refuse to give them what you give what you give
14 everybody else.

15 MR. ROSENKRANZ: It is refusal to treat them
16 the same as everyone else, because they are not the
17 same as everyone else in the law schools' estimation.
18 And the Government --

19 JUSTICE SCALIA: -- fighting a war.

20 MR. ROSENKRANZ: Well, the Government has to
21 identify precisely what its need is, why it needs Yale
22 college personnel rather than Yale -- excuse me -- why
23 it needs Yale law-school personnel rather than Yale
24 college personnel --

25 JUSTICE STEVENS: May I ask you --

1 MR. ROSENKRANZ: -- to make the appointments.

2 JUSTICE STEVENS: -- this question, with that
3 very point in mind? Does it necessarily follow, if
4 there are occasional applications of this statute that
5 might be invalid, that the whole Solomon Amendment
6 needs to be struck down?

7 MR. ROSENKRANZ: Your Honor, the -- this is
8 not about application of the statute in one
9 circumstance. The whole statute has to be struck down,
10 because the Government is demanding absolute parity and
11 there's no way for this Court to rewrite the statute.
12 We don't know whether Congress would go back and go to
13 the entry requirement, just bear entry, to entry-plus,
14 or to a parity requirement, which is -- which it has
15 now shifted to. So, there is simply no way to know
16 exactly how Congress would rewrite the statute. But
17 this is, at its heart, an as-applied challenge. It's
18 about law schools with nondiscrimination policies.

19 CHIEF JUSTICE ROBERTS: Thank you --

20 MR. ROSENKRANZ: Thank you --

21 CHIEF JUSTICE ROBERTS: -- Counsel.

22 MR. ROSENKRANZ: -- Your Honors.

23 CHIEF JUSTICE ROBERTS: General Clement, you
24 have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

1 ON BEHALF OF PETITIONERS

2 GENERAL CLEMENT: Thank you, Mr. Chief
3 Justice. I'd like to make just a few points in
4 rebuttal.

5 First of all, in starting with the compelled-
6 speech problem, there are only two kinds of speech that
7 are at issue here. First, there is the compelled
8 speech of the military recruiters. And no one thinks
9 that that speech is being misattributed to the schools.
10 Even in the secondary-school context, in Mergens, this
11 Court understood that secondary students could
12 distinguish between the school's message and that of
13 school groups.

14 Now, the second piece of speech that's at
15 issue is that of the university, when they incidentally
16 send an e-mail around telling the students where the
17 military recruiters are going to be on a certain day.
18 And certainly in the context of recruiting, that kind
19 of incidental speech does not implicate any compelled-
20 speech doctrine. In the Title VII context, for
21 example, if an employer says that there's a job
22 opening, and says that to a white applicant, it has to
23 say the same thing to an African-American applicant.
24 Nobody would think that that other -- saying that to
25 the African-American applicant, which is, of course,

1 compelled speech by Title VII, violates the
2 Constitution.

3 I would also say, just as the last point on
4 compelled speech, that it's something of a stranger in
5 a strange land in the context of this case, since we
6 are talking about a funding condition, not a
7 compulsion.

8 Second, let me move to the argument that the
9 Respondents have about trying to distinguish this case
10 from Justice Stevens' World War II hypothetical. And,
11 as I understand it, it boils down to the argument that
12 the way that the legislature was reacting here to this
13 problem and observing what it observed on campus
14 somehow implicates different constitutional issues,
15 different first-amendment issues. And I think the
16 O'Brien case stands as an obstacle to that argument.
17 In that case, if you look at it, the argument was
18 exactly the same. There already was a prohibition that
19 required you to have your draft card with you.
20 Congress then passed a second statute that prohibited
21 burning your draft card.

22 Now, what did the Representatives say about
23 that? Well, Representative Bray, of Indiana, said that
24 this was an effort to get at "communist stooges and
25 beatniks." Now, this Court did not strike the statute

1 down on that basis. It looked at the text of the
2 statute and upheld the statute as a reasonable statute.

3 Let me also, then, move to what you could
4 call the "Bob Jones problem." And I think you have to
5 have be cautious about interpreting this statute in
6 applying a rule and having it come back in the context
7 of other statutes that even the law schools like, like
8 Title VI and Title IX. I don't think it's enough to
9 simply say that race is going to be different. For one
10 thing, Federal statutes also prohibit, as a condition
11 on funding, universitywide discrimination on the basis
12 of disability and on the basis of age. Now, those
13 aren't things that trigger heightened scrutiny, and I
14 think one has to be worried about converting this rule
15 in this case to something that's going to threaten
16 those statutes.

17 This Court, in Hishon, for example, made the
18 point that all discrimination can be recharacterized as
19 somebody simply saying -- exercising their
20 associational rights, "I don't want to associate with
21 you, because you're female," in Hishon. You have to be
22 leery of that kind of recharacterization.

23 The last point I would make is that there's
24 simply no limit on Respondent's argument in this case.

25 I don't think their matter of conscious limitation is

1 going to be enforceable by the courts. And, beyond
2 that, I think, even in this case, there is more at
3 issue here than just the military's policy on
4 homosexuals. If you look at the original statement of
5 the American Association of Law Schools -- which is in
6 the joint appendix at 246 and 249 -- they were
7 concerned, first and foremost, about the military's
8 policies on homosexuals, but also about the
9 discrimination in sex, on what kind of combat roles
10 that women could have, what they call career-advancing
11 positions. So, even if Congress changed "don't ask,
12 don't tell" tomorrow, the -- presumably, the law
13 schools would still be here protesting the military's
14 position on gender, or perhaps the war in Iraq, or
15 perhaps the war in Afghanistan.

16 And the last point in showing there is no
17 limits on their position is, as Justice Kennedy pointed
18 out, any conduct can be imbued with communicative force
19 just by saying, "We're opposed to this, and, therefore,
20 we're going to engage in this conduct." That's simply
21 not enough to generate a significant first-amendment
22 interest.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, General.

25 The case is submitted.

1 [Whereupon, at 11:06 a.m., the case in the
2 above-entitled matter was submitted.]
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