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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RUMSFELD, SECRETARY OF DEFENSE, ET AL. *v.* FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

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

No. 04–1152. Argued December 6, 2005—Decided March 6, 2006

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties, whose members have policies opposing discrimination based on, *inter alia,* sexual orientation. They would like to restrict military recruiting on their campuses because they object to the Government's policy on homosexuals in the military, but the Solomon Amendment—which provides that educational institutions denying military recruiters access equal to that provided other recruiters will lose certain federal funds—forces them to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive those funds. In 2003, FAIR sought a preliminary injunction against enforcement of an earlier version of the Solomon Amendment, arguing that forced inclusion and equal treatment of military recruiters violated its members' First Amendment freedoms of speech and association. Denying relief on the ground that FAIR had not established a likelihood of success on the merits, the District Court concluded that recruiting is conduct, not speech, and thus Congress could regulate any expressive aspect of the military's conduct under *United States* v. *O'Brien,* 391 U. S. 367. The District Court, however, questioned the Department of Defense (DOD) interpretation of the Solomon Amendment, under which law schools must provide recruiters access at least equal to that provided other recruiters. Congress responded to this concern by codifying the DOD's policy. Reversing the District Court's judgment, the Third Circuit concluded that the amended Solomon Amendment violates the unconstitutional conditions doctrine by forcing a law school to choose between surrendering First

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Amendment rights and losing federal funding for its university. The court did not think that *O'Brien* applied, but nonetheless determined that, if the activities were expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under that decision.

Held: Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech and association, the Third Circuit erred in holding that the Solomon Amendment likely violates the First Amendment. Pp. 5–21.

1. The Solomon Amendment should be read the way both the Government and FAIR interpret it: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access. Contrary to the argument of *amici* law professors, a school excluding military recruiters could not comply with the Solomon Amendment by also excluding any other recruiter that violates its nondiscrimination policy. The Secretary of Defense must compare the military's "access to campuses" and "to students" to "the access to campuses and to students that is provided to any other employer." 10 U. S. C. A. §983. The statute does not focus on the content of a school's recruiting policy, but on the result achieved by the policy. Applying the same policy to all recruiters does not comply with the statute if it results in a greater level of access for other recruiters than for the military. This interpretation is supported by the text of the statute and is necessary to give effect to the Solomon Amendment's recent revision. Pp. 5–8.

2. Under the Solomon Amendment, a university must allow equal access for military recruiters in order to receive certain federal funds. Although there are limits on Congress' ability to condition the receipt of funds, see, *e.g., United States* v. *American Library Assn., Inc.,* 539 U. S. 194, 210, a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds. Pp. 8–20.

(a) As a general matter, the Solomon Amendment regulates conduct, not speech. Nevertheless, the Court of Appeals concluded that the statute violates law schools' freedom of speech in a number of ways. First, the law schools must provide military recruiters with some assistance clearly involving speech, such as sending e-mails and distributing flyers, if they provide such services to other recruiters. This speech is subject to First Amendment scrutiny, but the compelled speech here is plainly incidental to the statute's regulation of

conduct. Compelling a law school that sends e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance to the flag, *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, or forcing a Jehovah's Witness to display a particular motto on his license plate, *Wooley* v. *Maynard,* 430 U. S. 705, and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Second, that military recruiters are, to some extent, speaking while on campus does not mean that the Solomon Amendment unconstitutionally requires laws schools to accommodate the military's message by including those recruiters in interviews and recruiting receptions. This Court has found compelled-speech violations where the complaining speaker's own message was affected by the speech it was forced to accommodate. See, *e.g., Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557, 566. Here, however, the schools are not speaking when they host interviews and recruiting receptions. They facilitate recruiting to assist their students in obtaining jobs. Thus, a law school's recruiting services lack the expressive quality of, for example, the parade in *Hurley*. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military's policies.

Third, freedom of speech can be violated by expressive conduct, but the expressive nature of the conduct regulated by the Solomon Amendment does not bring that conduct within the First Amendment's protection. Unlike flag burning, see *Texas* v. *Johnson,* 491 U. S. 397, the conduct here is not so inherently expressive that it warrants protection under *O'Brien*. Before adoption of the Solomon Amendment's equal-access requirement, law schools expressed their disagreement with the military by treating military recruiters differently from other recruiters. These actions were expressive not because of the conduct but because of the speech that accompanied that conduct. Moreover, even if the Solomon Amendment were regarded as regulating expressive conduct, it would be constitutional under *O'Brien*. Pp. 8–18.

(b) The Solomon Amendment also does not violate the law schools' freedom of expressive association. Unlike *Boy Scouts of America* v. *Dale,* 530 U. S. 640, where the Boy Scouts' freedom of expressive association was violated when a state law required the organization to accept a homosexual scoutmaster, the statute here does not force a law school "'to accept members it does not desire,'" *id.,* at 648. Law schools "associate" with military recruiters in the sense that they interact with them, but recruiters are not part of the school. They are outsiders who come onto campus for the limited purpose of

trying to hire students—not to become members of the school's expressive association. The freedom of expressive association protects more than a group's membership decisions, reaching activities that affect a group's ability to express its message by making group membership less attractive. But the Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making membership less desirable. Pp. 18–20.

390 F. 3d 219, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.