No. 03-4433

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., et al.,

Plaintiffs-Appellants,

vs.

DONALD H. RUMSFELD, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the District of New Jersey

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY; CENTER FOR REPRODUCTIVE RIGHTS; COMPASSION IN DYING FOUNDATION; NATIONAL LESBIAN AND GAY LAW ASSOCIATION; NATIONAL LAWYERS GUILD; NATIONAL RESOURCES DEFENSE COUNCIL; NEW YORK CIVIL LIBERTIES UNION; NOW LEGAL DEFENSE AND EDUCATION FUND; BENJAMIN N. CARDOZO SCHOOL OF LAW'S GAY AND LESBIAN LAW STUDENT ALLIANCE; BOSTON COLLEGE LAW SCHOOL'S LAMBDA LAW STUDENTS ASSOCIATION; BRANDEIS SCHOOL OF LAW LAMBDA LAW CAUCUS; CORNELL LAW SCHOOL'S LAMBDA LAW STUDENTS ASSOCIATION; CORNELL CHAPTER OF THE NATIONAL LAWYERS GUILD; HARVARD LAW SCHOOL LAMBDA; NEW YORK UNIVERSITY SCHOOL OF LAW OUTLAW; SEATTLE UNIVERSITY SCHOOL OF LAW OUTLAWS; UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW OUTLAW; AND UNIVERSITY OF MICHIGAN LAW SCHOOL OUTLAWS IN SUPPORT OF APPELLANTS

Lawrence S. Lustberg
Philip G. Gallagher
Jonathan L. Hafetz
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, P.C.
One Pennsylvania Plaza, 37th Floor
New York, NY 10119-3701
(212) 649-4700
Attorneys for Amici Curiae

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Amici, described below, have contacted counsel for all parties to this lawsuit and have obtained their consent to the filing of this brief amici curiae.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that is dedicated to protecting the rights set forth in the Constitution. The ACLU has long taken the position that the right to engage in anonymous political association is a core First Amendment right, and has long sought to preserve the confidentiality of its own membership list. The ACLU often advocates on behalf of its anonymous members precisely because those members fear the consequences of being identified publicly. If this associational freedom, which has been recognized for decades, is diminished or abolished, dissent, so vital to achieving change in a democracy, will be imperiled.

The American Civil Liberties Union of New Jersey ("ACLU-NJ") and the New York Civil Liberties Union ("NYCLU") are private non-profit, non-partisan membership organizations and are state affiliates of the ACLU. As such, they are dedicated to protecting the First Amendment and other fundamental principles of individual liberty embodied in the Constitution.

The Center for Reproductive Rights ("Center"), founded in 1992, is a non-profit legal advocacy organization dedicated to promoting reproductive rights worldwide. The Center has the largest and most diverse reproductive rights docket and has secured significant constitutional protections for its clients in a number of cases, including: Ferguson v. City of Charleston, 532 U.S. 67 (2001) and Stenberg v. Carhart, 530 U.S. 914 (2000). The Center's clients include women seeking reproductive health care services, such as contraception and abortion, as well as physicians and clinics. Additionally, those who provide and seek reproductive

health services have been subjected to violence and harassment. Doctors and clinic workers have been murdered; clinics have been bombed and blockaded; and patients have been abused and intimidated. Understandably, the Center's clients and donors wish to maintain the confidentiality of their personal information, including their residential addresses and private telephone numbers and, in many cases, their identities. Without an assurance that the Center will maintain the confidentiality of this information, many of its clients would be afraid to bring lawsuits and many donors would be afraid to provide financial support. Thus, insuring that organizations have standing to represent their clients and donors without revealing identifying information is integral to the Center's mission.

The Compassion in Dying Federation ("Compassion") provides national leadership for client service, legal advocacy and public education to improve pain and symptom management, increase patient empowerment and self-determination and expand end-of-life choices to include aid-in-dying for terminally ill, mentally competent adults. Founded in 1993 at the peak of the AIDS epidemic, Compassion helped to enact, defend, and responsibly implement Oregon's Death with Dignity Law allowing terminally ill, mentally competent adults to hasten death, with physician assistance. It catapulted to the national stage with constitutional challenges to laws prohibiting assisted dying in two states – Washington and New York. All of the courts that considered these claims, including the Supreme Court, recognized that the issues could only wisely be considered in the context of the concrete experiences of individual dying patients, and that these individuals had compelling reasons to choose to be represented anonymously and confidentially. Because its mission includes engaging in advocacy on sensitive public questions in support of vulnerable individuals, Compassion's ability to represent anonymous clients who may be subject to retaliation, humiliation, or harassment is essential to

its work. Accordingly, Compassion is deeply committed to upholding the district court's holding that the associational plaintiffs have standing to represent the interests of their anonymous members.

The National Lawyers Guild ("NLG") is a national association of legal professionals and law students with offices in New York City. The NLG was founded in 1937 as the first inter-racial bar association in the United States and has long advocated against injustice and discrimination, including discrimination on the basis of sexual preference. The NLG has brought numerous lawsuits on behalf of its members who have been subject to government misconduct. The NLG also has student chapters at 91 law schools whose members are directly affected by the Solomon Amendment. One of these chapters, the Cornell Chapter of the NLG, which shares the NLG's mission, also takes part in this brief amici curiae in its associational capacity.

Established in 1988, the National Lesbian and Gay Law Association ("NLGLA") is a non-profit membership corporation and the only national association of lesbian, gay, bisexual, transgender and intersex ("LGBTI") attorneys, law students, judges, other legal professionals, and affiliated LGBTI legal and political associations. The NLGLA works to achieve its mission of promoting justice in the legal profession through political and legal advocacy and public education at the international, national, state and local levels. Being identified as an LGBTI individual may subject a person to discrimination in important aspects of civic life, including housing, employment and school. Affiliated LGBTI law student organizations have at times requested that NLGLA maintain the secrecy of their affiliation, or refrain from expressly referencing the student group as an organization of LGBTI law students, out of fear that its law school will identify it as an LGBTI-related organization and withdraw its formal

campus recognition. If NLGLA is unable to assert associational standing on behalf of its members without exposing them to retaliatory action, its ability to engage in advocacy and public education will be severely limited.

The Natural Resources Defense Council ("NRDC") is a national, nonprofit, nonpartisan environmental advocacy organization with a principal office located in New York City. It has more than 460,000 members nationwide. In order to vindicate the environmental rights of its members, and of the members of local and regional groups to which it often provides legal representation, NRDC maintains a large docket of federal court litigation. In every federal lawsuit it brings, NRDC must establish that both it and any co-plaintiff groups have constitutional standing to sue on behalf of their members. Additionally, NRDC has investigated cases – for example, cases involving workers' exposure to harmful chemicals due to their employers' unlawful practices – where there is a need to keep NRDC members' identities concealed in order to protect them from retribution by defendants or potential defendants. NRDC seeks to preserve the opportunity for itself, and for other similar groups, to bring such cases in the future.

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for over 30 years. NOW Legal Defense frequently appears as counsel and as amicus curiae in federal and state courts nationwide on behalf of individuals who have experienced sex discrimination. Its clients include women who are survivors of domestic violence, recipients of abortion services, victims of sexual harassment, welfare recipients and others who are vulnerable to retaliation and worse should their identities be publicly revealed. For example, NOW Legal Defense recently served as co-counsel in a class action challenging New Jersey's Child Exclusion law, which denies welfare benefits to children born to mothers

receiving welfare. Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306 (N.J. 2003). Because of the privacy interests at issue in that case, the identities of individual clients were given protection by the courts. NOW Legal Defense is very concerned about the implications for its work should it not be able to assert associational standing on behalf of clients when appropriate, without risking public exposure of their identities.

Amici also include nine law school student associations: Benjamin N. Cardozo School of Law's Gay and Lesbian Law Student Alliance; Boston College Law School's Lambda Law Students Association; Brandeis School of Law Lambda Law Caucus; Cornell Law School's Lambda Law Students Association; New York University School of Law OUTLaw; Seattle University School of Law OutLaws; Harvard Law School Lambda; University of California, Hastings College of the Law OUTLaw; and University of Michigan Law School OutLaws.[1] The mission of each organization includes promoting the participation of lesbian, gay, bisexual, and transgender law students in the law school community. Like the student and student group plaintiffs in this lawsuit, the members of these organizations have been injured by the government's enforcement of the Solomon Amendment, specifically by depriving them of the opportunity to receive their law schools' chosen non-discrimination message and by disrupting their law schools' academic environment.[2] They each require standing to assert a legal challenge to the Solomon Amendment and thus possess a strong interest in the outcome of this appeal, and particularly in this Court's affirming the district court holding that the

[1] Each association appears only on behalf of its members; no association represents the school or university with which they are affiliated.

[2] Unlike the other law schools, the University of Michigan had excepted military recruiters from its non-discrimination policy prior to the recent application of the Solomon Amendment.

student and student group plaintiffs had standing to challenge the government's enforcement of the Solomon Amendment.

PRELIMINARY STATEMENT

Amici curiae, nine national and local advocacy organizations and ten law student associations, respectfully submit this brief in order to urge this Court to affirm the district court's holding that the plaintiffs have standing to challenge the government's application of the Solomon Amendment. Amici address only issues related to standing doctrine in this brief, but do not, by their silence, express agreement with the district court's opinion on the merits of whether plaintiffs should have been granted a preliminary injunction.

Because they frequently engage in litigation on behalf of unpopular or vulnerable individuals and groups, amici advocacy organizations are deeply troubled by the government's contention that an organization's refusal to identify its members or clients precludes it from asserting standing to protect their interests. During the struggle of the civil rights movement, the courts recognized that the ability of individuals to work together to effect social change without fear of retaliation was a vital aspect of the First Amendment right of free association. Although the issues and lawsuits that might expose individuals to retaliation have changed over the decades, many organizations must still protect membership and client information in order to engage in collective action. The government's assertion that organizations, like FAIR, cannot assert associational standing unless they name they members threatens core First Amendment rights, is contrary to the law, and should be rejected.

Likewise, amici student associations urge this Court to reject the government's argument that students at law schools threatened with sanctions under the Solomon Amendment have not been harmed by the government's actions. Like the student plaintiffs, the student amici have experienced the adverse effects of the government's enforcement of the Solomon Amendment.

Specifically, their law schools had adopted non-discrimination policies in order to send a message of opposition to discrimination and to promote an open academic environment. Because of the government's enforcement of the Solomon Act, however, the students are no longer the recipients of this message or of the learning environment promised them by their schools. As the district court held, these injuries are sufficient to confer standing on the student and student group plaintiffs.

STATEMENT OF FACTS

On October 15, 2003, a number of associations of law schools, law professors, and law students, as well as individual law professors and students, filed an amended complaint challenging the constitutionality of the so-called Solomon Amendment, 10 U.S.C. § 983(b) (2003), which prohibits certain federal cabinet agencies from providing funds to an educational institution if that institution or any part thereof fails to provide assistance to military recruiters comparable to the assistance provided other employers. JA-7-8 (Op.). Specifically, the plaintiffs alleged that the Solomon Amendment deprived them of their right to free speech and was unconstitutionally vague. JA-515-17 (2d Am. Compl. ¶¶ 42-55). Among other harms, the plaintiffs alleged that the Solomon Amendment compromises the law schools' message of non-discrimination; disrupts an academic atmosphere that had benefited law students and law professors; prevents law professors from creating the pedagogical atmosphere they deem most appropriate for education; and disallows law students from receiving messages of non-discrimination. JA-501, 504-06 (2d Am. Compl.).

The plaintiffs requested a preliminary injunction; the government moved to dismiss the complaint in its entirety because each plaintiff lacked standing. Among other arguments, the government asserted that the refusal of plaintiff

Forum for Academic and Institutional Rights ("FAIR") to disclose publicly its membership list prevented it from asserting associational standing. JA-430-34 (Tr.). The government also contended that the Solomon Amendment's disruption of the learning environment created by law schools for the benefit of their students caused no injury, and that the law school students therefore lacked standing to challenge the Solomon Amendment. JA-427-29 (Tr.).

The district court rejected these arguments. The court found that FAIR's allegation that its members were law schools that had suffered an injury-in-fact – the suspension of their non-discrimination policies due to the threatened loss of millions of dollars in government funds – provided a basis for standing. JA-28 (Op.). It also held that, because "students have a legally cognizable right to receive information and messages sent by their schools," JA-40, they too had sufficiently alleged an injury-in-fact. Although finding in plaintiffs' favor on all issues related to standing, the court denied plaintiffs' motion for a preliminary injunction, concluding they were unlikely to prevail on the merits of their First Amendment claims. JA-74, 79, 88 (Op.). This appeal followed.

ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT FAIR'S REFUSAL TO REVEAL ITS MEMBERSHIP LIST TO THE GOVERNMENT DOES NOT DEPRIVE IT OF STANDING TO CHALLENGE THE SOLOMON AMENDMENT.

1. THE RIGHT OF ORGANIZATIONS TO LITIGATE ON BEHALF OF UNNAMED MEMBERS OR CLIENTS HAS LONG BEEN RECOGNIZED AS AN IMPORTANT ASPECT OF THE FIRST AMENDMENT RIGHT OF ASSOCIATION.

The Supreme Court made clear long ago that an association may sue to vindicate the constitutional rights of its members because the two are "in every

practical sense identical" and because the association provides "the medium through which its individual members seek to make more effective the expression of their own views." NAACP v. Alabama ex. rel Patterson, 357 U.S. 449, 459 (1958); see Roe v. Operation Rescue, 919 F.2d 857, 865 (3d Cir. 1990) ("'[T]he primary reason people join an organization is to create an effective vehicle to vindicating interests that they share with others.'") (quoting International Union, UAW v. Brock, 477 U.S. 274, 290 (1986)).[3] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." E.g., Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). Under the first prong of this test, an association must demonstrate that its members have suffered an injury-in-fact. Id. at 343-44; Warth v. Seldin, 422 U.S. 490, 511 (1975). To engraft a membership disclosure requirement onto the injury-in-fact test for standing, as the government effectively proposed below, is unsupported in the law and would chill the expressive activity of associations like amici, preventing them from vindicating the constitutional rights of their members and clients.

It was "hardly a novel perception" almost a half-century ago that compelling disclosure of otherwise confidential membership lists can constitute an unconstitutional restraint on freedom of expression, NAACP v. Alabama, 357 U.S.

[3] While plaintiffs have named two law school members of FAIR in the Second Amended Complaint (JA-500-01), FAIR had standing to bring this action even prior to this amendment based on the core First Amendment principles, discussed herein, safeguarding the confidentiality of membership lists. In any event, however, the government continues to dispute FAIR's standing even after the identification of these members. JA-427, 430-34 (Tr.).

at 462. It is no less "novel" today. E.g., Anderson v. United States, 298 F.3d 804, 810 (9th Cir. 2002). An association's ability to maintain the confidentiality of its membership list is "vital" to preserving freedom of association. Gibson v. Florida Leg. Investigation Comm., 372 U.S. 539, 544 (1963); see also Black Panther Party v. Smith, 661 F.2d 1243, 1265 (D.C. Cir. 1981) ("Membership lists of groups engaged in political expression clearly deserve . . . First Amendment protection."), vacated without opinion on other grounds, 458 U.S. 1118 (1982). Advocacy organizations like amici frequently promise their members that their names will remain confidential, and those members rely on that assurance in joining these organizations to engage in protected First Amendment activity, including litigation. This confidentiality is critical – indeed, often "indispensable" – to organizations that express unpopular or dissident views. Id.; see Gibson, 372 U.S. at 556-57; Bates v. Little Rock, 361 U.S. 516, 523-24 (1960); see also Watkins v. United States, 354 U.S. 178, 197 (1957) ("forced revelations [that] concern matters that are unorthodox, unpopular, or even hateful to the general public" may have "disastrous" consequences for the freedom of association). To breach this confidentiality will at least chill members and would-be members in their exercise of "constitutionally enshrined rights of free speech, expression and association." Gibson, 372 U.S. at 557; see also International Soc'y for Krishna Consciousness, Inc. v. Lee, 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) (privacy in membership intended not only to protect individual members from harassment and intimidation but also to "prevent the chilling effect that disclosure may have on the willingness of individuals to associate with the group") (internal quotation marks omitted).

The Supreme Court long ago linked First Amendment associational freedoms and the confidentiality of membership information. During the civil rights movement, southern states sought to require the NAACP to disclose its

membership lists in an effort to discourage membership and cripple the oldest and largest civil rights organization in the United States. See M. Tushnet, Making Civil Rights Law: Thurgood Marshall and the United States Supreme Court, 1931-1961, at 289-93 (1994). For public officials who opposed the goals of this then-dissident and unpopular organization, compelling disclosure of membership lists provided a powerful weapon by which to lash out directly at individuals who supported the NAACP. See W. Eskridge, Jr., "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," 100 Mich. L. Rev. 2062, 2092 (2002) Recognizing the importance of privacy in membership to freedom of expression, the Supreme Court struck down these membership disclosure requirements in a series of landmark decisions. See, e.g., Gibson, 372 U.S. at 556-57; NAACP v. Alabama, 357 U.S. at 462 ; see also Shelton v. Tucker, 364 U.S. 479, 487 (1960) (chilling effect of requiring teacher to disclose organizational affiliations). The protections of the Constitution, and the standing to invoke those protections, not only allowed the NAACP to survive in the South but also enabled the next generation of civil rights organizations to grow and develop, including the nascent gay rights movement, beginning in the 1960s. See Eskridge, supra, 100 Mich. L. Rev. at 2092, 2339.

The government's discussion of NAACP v. Alabama, supra, in the proceedings before the district court was both troubling and misguided. See JA-417 (Defs.' Ltr. Br.). Specifically, the government contended below that NAACP v. Alabama had no applicability to this case since FAIR had not made an "'uncontroverted showing'" that previous disclosure of membership lists had exposed its members to retaliation. See JA-417 (Defs.' Ltr. Br.) (quoting NAACP v. Alabama, 357 U.S. at 462). FAIR, however, had alleged that if law schools were to appear as named plaintiffs in a legal challenge to the Solomon

Amendment, "the law schools, and often the larger universities of which the law schools are a part, would be targeted for retaliation by governmental actors, including the military, or by private organizations." JA-533 (Greenfield Decl.); see JA-498-99 (2d Am. Compl. ¶¶ 7(b)-(c)). More specifically, FAIR's law school members feared the loss of "millions of dollars in earmarked federal appropriations or contracts by faceless federal bureaucrats, without ever having a chance to discuss the blackball." JA-533 (Greenfield Decl.). It was precisely these fears that prevented law deans, law schools, and universities from attempting to vindicate their rights by filing a legal challenge to the Solomon Amendment and prompted them to establish FAIR to make such a challenge possible. JA-534 (Greenfield Decl.).

Neither a law school nor any other plaintiff need actually experience such reprisals before bringing a First Amendment challenge. Rather, parties asserting a First Amendment privilege in the confidentiality of membership information need show only "a reasonable probability that the compelled disclosure of [its membership list] will subject [its members] to threats, harassment, or reprisals from either Government officials or private parties." Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 93 (1982) (emphasis added) (citation and internal quotation marks omitted). The government's discussion of NAACP v. Alabama, however, would suggest that the members of the NAACP had to experience actual retaliation before the organization could assert its members' constitutional rights in court without revealing their names. This cannot be so. Indeed, to hold otherwise would undermine the Supreme Court's decisions in NAACP v. Alabama and its progeny, and the right to freedom of association it sought to guarantee.

The government's standing argument, moreover, poses a danger not only to FAIR but to all advocacy organizations that engage in litigation. Legal advocacy, of course, has long been a protected form of freedom of association. NAACP v. Button, 371 U.S. 415, 431 (1963). For organizations like amici, it sometimes represents "the most effective form of political association," id., if not the "sole practicable avenue" for their members and clients to seek redress of their grievances. Id. at 429. To condition the ability to bring suit to enforce a constitutional, statutory, or other legal right on the identification of clients or members would not only chill this protected First Amendment activity, but would, as a result, effectively immunize allegedly unconstitutional government action from judicial review, particularly where that action targets unpopular or dissident groups. See, e.g., Familias Unidas v. Briscoe, 544 F.2d 182, 192 (5th Cir 1976) (to deny plaintiff organizations the right to maintain the confidentiality of their membership lists "would be an abdication by the federal court of not only its federal stature, but its judicial robes as well"). And the importance of maintaining the confidentiality of membership and client information is further heightened in cases, like this one, challenging vague or overbroad statutes that particularly threaten associational freedoms because they "lend themselves to selective enforcement against unpopular causes." Button, 371 U.S. at 435. In granting unbridled discretion to government officials, these statutes open the door to arbitrary enforcement and can "easily become a weapon of oppression, however evenhanded [their] terms appear." Id. at 436. Forcing an organization to disclose its membership in order to challenge such a statute or regulation would chill constitutionally protected advocacy by justifiably increasing fears that its members would be subjected to exactly the arbitrary acts that that their challenge seeks to prevent.

The Supreme Court has thus consistently imposed a heightened standard on the government in demanding membership information. See, e.g., Gibson, 372 U.S. at 546 (government must show "substantial relation between the information sought and a subject of overriding compelling state interest"); Bates, 361 U.S. at 524 (government must show "so cogent an interest . . . as to justify the substantial abridgment of associational freedom which such disclosures will entail"). Even in instances where the government's purpose in obtaining membership lists is legitimate, such as in investigating unlawful activity, it still cannot "broadly stifle fundamental personal liberties" like freedom of association. Shelton, 364 U.S. at 488. Rather, the government must show that "the information sought is so relevant that it goes to the 'heart of the matter'; that is, the information is crucial to the party's case." Anderson v. Hale, 2001 WL 503045, at *4 (N.D. Ill. May 10, 2001) (quoting Black Panther Party, 661 F.2d 1268); see also Hastings v. North East Indep. Sch., 615 F.2d 628, 632 (5th Cir. 1980) (upholding refusal of union to disclose its membership list during discovery based on the risk of retaliation). The government is thus precluded from making the sweeping demands for disclosure it has made here. See Anderson, 2001 WL 503045, at *4 (inquiring party must also "exhaust all reasonable alternative sources of information by which [it] could obtain the information in less chilling manner") (citing Zerilli v. Smith, 656 F.2d 705, 714-15 (D.C. Cir. 1981)). What the government effectively asked the district court to impose was a rule requiring an association to respond to such an improper request if it wishes to bring suit on behalf of its members, even when an injury has been plainly and satisfactorily alleged in the pleadings. Such a requirement is unnecessary as a matter of black letter standing law, and would undermine the cherished protections of freedom of association so carefully nurtured by the Supreme Court for decades.

2. REQUIRING FAIR TO REVEAL ITS MEMBERSHIP WOULD DETER THE EXERCISE OF FIRST AMENDMENT RIGHTS AND IS UNNECESSARY FOR THIS LAWSUIT TO PROCEED.

The district court properly rejected the government's attempt to dismiss FAIR's challenge to the Solomon Amendment for lack of standing. JA-23-33 (Op.). The district court concluded, inter alia, that FAIR need not disclose its membership list because it had alleged precisely what the plaintiffs in the authorities cited by the government had not: "facts establishing that one or more of its members have suffered an injury sufficient to confer standing in their own right." JA-26 (Op.). Specifically, plaintiffs alleged that FAIR's members had been forced to suspend their non-discrimination policies, at least with respect to recruitment by the military, as a direct result of the Solomon Amendment and in violation of their First Amendment rights. JA-514 (2d Am. Compl. ¶¶ 40-41); see also JA-23 (Op.). Particularly in light of this Court's warning against "exaggerated" associational standing requirements, Hospital Council of Western Pa. v. City of Pittsburgh, 949 F.2d 83, 88 (3d Cir. 1991), the district court correctly rejected the government's attempt to impose "a blanket rule" that associations disclose their members' names in order to bring suit on their behalf. JA-29 (Op.).

Like other organizations that advocate on behalf of unpopular groups and viewpoints, FAIR must preserve the confidentiality of its members to safeguard their First Amendment right of association.[4] FAIR alleged that it promised its members that their names would remain anonymous, and that its members relied on that promise in joining FAIR, because they feared that, if their names were disclosed, they would be retaliated against through adverse funding decisions and public vilification. JA-498 (2d Am. Compl. ¶ 7(b)); JA-533-34 (Greenfield

[4] Nonetheless, plaintiffs may, as they did here, provide sensitive membership information to a court for in camera review. JA-23 (Op.).

Decl.).[5] These fears were heightened as a result of the military's unbridled discretion to determine what actions constitute a failure to comply with the Solomon Amendment and to determine which institutions to target for non-compliance with the statute. JA-517 (2d Am. Compl. ¶¶ 54-55). The inconsistent interpretation and enforcement of the Solomon Amendment further exacerbated the law schools' fear of government retaliation. JA-85 (Op.); see also JA-499 (2d Am. Compl. ¶ 7(d)). Moreover, no school identified by compelled disclosure and subsequently targeted by the government would even receive an opportunity to discuss the loss of federal funds with the bureaucrats who make these decisions, or have an opportunity to challenge the military's assertion of non-compliance. JA-503 (2d Am. Compl. ¶ 7(m)); JA-533 (Greenfield Decl.). At stake were millions of dollars in earmarked government appropriations and contracts, the loss of private donations, the decline of alumni support, the loss of students, and the tarnishing of these institutions' reputations through unfair attacks in the media. JA-533 (Greenfield Decl.); JA-498 (2d Am. Compl. ¶ 7(b)).

In light of these dangers, it is crucial that FAIR's members remain anonymous. If the government can compel disclosure of FAIR's members' names, it may well deal a fatal blow to any legal challenge to the Solomon Amendment and chill the freedom of association of FAIR's members. JA-499 (2d Am. Compl. ¶ 7(c)); JA-534 (Greenfield Decl.). Indeed, the fear of exposure has already caused some would-be members to decline to join FAIR. JA-499 (2d Am. Compl. ¶ 7(c)). In demanding that FAIR identify its members, the government effectively seeks to coerce FAIR to drop its First Amendment challenge. This would not only defeat

[5] Attacks on FAIR have already materialized in mainstream media outlets. JA-498 (2d Am. Compl. ¶ 7(b)).

the principal goal for which FAIR was organized, but also insulate an allegedly unconstitutional statute from the judicial review which it demands.

The government's argument is contrary to the well-established rule that entities may participate anonymously in litigation when, as here, they fear retaliation or harassment were they to participate publicly. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 708 n.4 (1997); Doe v. Bolton, 410 U.S. 179, 184-85 n.6 (1973); Roe v. Wade, 410 U.S. 113, 120 (1973); see also Singleton v. Wulff, 428 U.S. 106, 117 (1976) (noting routine nature of anonymous litigation in context of reproductive freedom cases). It is also contrary, for example, to this Court's recent decision to permit an association to litigate, not only on behalf of its member-psychiatrists, but also on behalf of their unidentified, numerous patients whose fear of stigmatization prevented them from bringing suit directly. Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 290, 293 (3d Cir. 2002); see also id. at 296 (Nygaard, C.J., dissenting) (noting that association brought suit "without the participation of any of its members"). In reaching this decision, this Court relied in part upon Public Citizen v. Federal Trade Commission, 869 F.2d 1541 (D.C. Cir. 1989), in which the Court of Appeals for the District of Columbia Circuit permitted several associations to assert associational standing despite their failure to identify any individuals. Id. at 1551. That court held: "it is not necessary for us to know the names of injured persons in order to be assured beyond any reasonable doubt that they exist, and that the organizations to which they belong may pursue this action on their behalf." Public Citizen, 869 F.2d at 1552. As in Public Citizen, there is no doubt that members of FAIR have alleged injuries resulting from the government's enforcement of the Solomon Amendment and, thus, that FAIR has standing to challenge the Solomon Amendment.

In sum, the district court correctly concluded that FAIR has alleged a concrete injury to the First Amendment rights of its members – the suspension of their chosen non-discrimination policies as a result of threatened enforcement of the Solomon Amendment, JA-24 (Op.) – an injury that FAIR itself was created to redress through legal advocacy. JA-499 (2d Am. Compl. ¶ 7(c)). These allegations are easily sufficient to confer standing. See Operation Rescue, 919 F.2d at 866.

B. THE DISTRICT COURT PROPERLY HELD THAT THE STUDENT AND STUDENT GROUP PLAINTIFFS HAVE STANDING TO CHALLENGE THE SOLOMON AMENDMENT BECAUSE ITS APPLICATION HAS INJURED THEM.

1. INJURIES TO THE ABILITY TO RECEIVE MESSAGES FROM OTHERS AND TO USE AND ENJOY AN ACADEMIC ENVIRONMENT ARE SUFFICIENT TO DEMONSTRATE STANDING TO BRING SUIT.

The student and student group plaintiffs have alleged, for their part, that the government's enforcement of the Solomon Act has injured their protected interests, and specifically their First Amendment right to receive their law schools' messages as well as their right to the continued use and enjoyment of the academic environment of their law schools. The law affords protection to each of these interests and, thus, the district court properly held that the student and student group plaintiffs had standing to sue the government.

The First Amendment to the United States Constitution prohibits Congress from "abridging the freedom of speech." While this freedom most commonly protects speakers against government interference, the Supreme Court has made absolutely clear that the First Amendment provides corresponding protection to a

message's audience. In case after case, the courts have held that individuals and groups wishing to receive the communications of others have standing to challenge limits placed on their access to those messages. Like the student and student group plaintiffs in this case, these courts routinely find that such listeners have standing to press their lawsuits.

In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Supreme Court specifically identified the First Amendment as the source of an individual's "right to receive information and ideas." Id. at 762 (internal quotation omitted). In that matter, a group of citizens, including university professors, challenged the federal government's denial of a visa to an alien which prevented them from "hear[ing] his views and engag[ing] him in a free and open academic exchange." Id. at 759-60. Although the government contended that the plaintiffs were unable even to state a First Amendment claim, the Court held that the government's actions implicated the plaintiffs' First Amendment interests, id. at 765, and accordingly considered the case on the merits.

Thereafter, and in a variety of contexts, the Court has reaffirmed its holding that the targets of messages possess a First Amendment interest in receiving those messages. For example, in Procunier v. Martinez, 416 U.S. 396 (1974), rev'd on other grounds, Thornburgh v. Abbott, 490 U.S. 401 (1981), the Court found that an addressee had a First Amendment interest in receiving a letter:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each.

Procunier, 416 U.S. at 408. See also Lamont v. Postmaster Gen. of U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."). Likewise, in the context of commercial speech, the Court held that to the extent there is a "right to advertise, there is a reciprocal right to receive the advertising." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976). Thus, consumers have standing to challenge a state's restrictions on commercial advertising. Id. And the Court has held on several occasions that the general public has an important interest in receiving information provided by others. See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454, 470 (1995); Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980); Red Lion Broad. Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969); see also Dow Jones & Co. v. Simon, 842 F.2d 603, 607 (2d Cir. 1988) (reviewing Supreme Court cases and concluding that "the First Amendment unwaveringly protects the right to receive information and ideas").

First Amendment protections for listeners are particularly well-established when those listeners are students. For example, in New Jersey-Philadelphia Presbytery of the Bible Presbytery Church v. New Jersey State Board of Higher Education, 654 F.2d 868 (3d Cir. 1981), this Court considered whether college students had standing, distinct from that of their college, to bring a federal lawsuit challenging government interference with the college's operation. Id. at 877-78. Noting the long history of the courts' protection of the rights of students to receive their school's messages, this Court held that "Supreme Court precedent clearly indicates that the students have distinct rights which may be enforced." Id. at 878. Analogously, the Supreme Court has recognized the special First Amendment

protections afforded to recipients of the school instruction. See, e.g., Kleindienst, 408 U.S. at 763 (noting that right to receive information is "nowhere more vital than in our schools and universities"); Meyer v. Nebraska, 262 U.S. 390, 401 (1925) (holding unconstitutional a state law which "attempted materially to interfere with . . . the opportunities of pupils to acquire knowledge").

Beyond the standing accorded recipients of speech to challenge restrictions on their right to listen, it is equally clear that harm to the continuing use and enjoyment of a particular environment – here, the educational environment – also satisfies the injury-in-fact requirement of Article III standing. For example, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000), where the Supreme Court held that citizens who were reluctant to visit an area which they feared had been polluted by a waste treatment facility had standing to sue the facility's owners. Id. at 181-83. Likewise, this Court has held that residents of a neighborhood who feared that governmental development would harm "the environmental and historic quality of their neighborhood" had standing to challenge the government's plans in court. Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 176 (3d Cir. 2000). The harm caused by the government's application of the Solomon Amendment to the educational environment of the students' law schools likewise confers standing on those students.[6] Accordingly, when the government interferes with students' academic

[6] This Court should also reject the government's suggestion that any harm to the interests of the plaintiffs is caused by their schools' decision to receive government money and that the plaintiffs lack standing to sue the government. The Supreme Court ruled in favor of a plaintiff in an identical situation in a recent case, Velazquez v. Legal Services Corporation, 531 U.S. 533 (2001). The lead plaintiff in that lawsuit, Carmen Velazquez, sued the government in order to challenge its imposition of funding restrictions on individual not-for-profit entities, which restrictions caused those entities to deny her representation. There, as here, Velazquez's injuries resulted most immediately from the decision of third party

environment or right to receive messages from their schools, those students have standing to challenge the government action.

2. THE STUDENT AND STUDENT GROUP PLAINTIFFS HAVE STANDING TO BRING SUIT AGAINST THE SOLOMON AMENDMENT BECAUSE THEY HAVE ALLEGED SPECIFIC INJURIES TO PROTECTED INTERESTS.

The specific allegations of the plaintiffs' complaint charge that the government's actions have injured the ability of student and student groups to receive the messages of their law schools and have damaged the academic environment which they had previously enjoyed. Because the complaint alleges that the government has injured them and, thus, that they have standing to challenge the government's actions.

The plaintiffs specifically charge that the law schools adopted their non-discrimination policies in order to provide a message, by word and deed, to their students: "law schools do not simply make a statement that invidious discrimination is a moral wrong and impart that view to their students; they also commit themselves to behave in a manner consistent with their core value of judging people solely on their merits." JA-496 (2d Am. Compl. ¶ 2). The complaint also describes changes implemented by members of FAIR who had previously permitted some military access to campus for recruiting purposes, but had limited that access in some way to signal their opposition to the military's discrimination against homosexuals. Once the military undertook aggressive enforcement of the Solomon Amendment, the schools "abandoned entirely these

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organizations to accept government funding. Nonetheless, both the Court of Appeals for the Second Circuit and the Supreme Court entertained her suit against the government and ultimately entered judgment in her favor. Id.; Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999).

symbolic stances against discrimination." JA-502 (2d Am. Compl. ¶ 7(k)). Likewise, the complaint alleges that the Solomon Amendment's requirement that schools provide assistance to military recruiters "undermines the message it is trying to inculcate in its students." JA-499 (2d Am. Compl. ¶ 7(d)) Thus, the plaintiffs have specifically alleged that the practice adopted by members of FAIR to refuse to provide recruitment assistance to discriminatory recruiters furthered a favored message of those law schools, and that the Solomon Amendment directly impedes the transmission of that message.

The plaintiffs students have also specifically alleged that the government has harmed their ability to receive the messages of their law schools. The student and student group plaintiffs are "beneficiaries of law school policies directed at increasing diversity and inculcating values and fostering an environment in which respectful debate unfolds." JA-506 (2d Am. Compl. ¶¶ 9-10). As a result, because of the Solomon Amendment's interference with the provision of these benefits, the complaint alleges, the government has infringed their rights "to receive the educational messages sent by their respective law schools." Id. These allegations are sufficient for the plaintiffs to go forward with their law suit.

Likewise, the student and student group plaintiffs have alleged in their complaint that the application of the Solomon Amendment to their law schools has caused harm to their use and enjoyment of their law school environments. Specifically, the complaint states that law schools originally adopted their non-discrimination policies, among other reasons, to "nurture[] the sort of environment for free and open discourse that is the hallmark of the academy," JA-510 (2d Am. Compl. ¶ 25), and that the continued adherence to the non-discrimination policy helped maintain an "open, respectful academic environment." JA-510 (2d Am. Compl. ¶ 27). The complaint further states that the student and student group

plaintiffs are "beneficiaries of law school policies . . . fostering an environment in which respectful debate unfolds," and that the Solomon Amendment has adversely affected their access to these benefits. JA-506 (2d Am. Compl. ¶¶ 9-10).

Thus, the student and student group plaintiffs specifically allege that the Solomon Amendment has harmed them by affecting their ability to receive the non-discrimination message of their law schools and to take part in the open, respectful academic environment fostered by these schools. Because each of these injuries is to a legally protected interest of the student and student group plaintiffs, this Court should affirm the holding of the district court that the student and student groups have standing to challenge the Solomon Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the district court that the plaintiffs have standing to litigate the claims advanced in their complaint.

Dated: January 12, 2004

Respectfully submitted,

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Lawrence S. Lustberg (LL1644)
Philip G. Gallagher (PG4874)
Jonathan L. Hafetz (JH0843(
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Pennsylvania Plaza, 37th Floor
New York, NY 10119-3701
(212) 649-4700

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Dated: January 12, 2004

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Attorney for amici curiae

CERTIFICATE OF SERVICE

I certify that on January 12, 2004, I served the within Brief Amici Curiae via Federal Express upon the following:

Scott R. McIntosh
United States Department of Justice
Civil Division, Appellate Staff
601 D Street, NW
Washington, DC 20530
(202) 514-3602

E. Joshua Rosenkranz
Heller, Ehrman, White & McAuliffe, LLP
120 West 45th Street, 20th Floor
New York, NY 10036-4041
(212) 763-7600.

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Attorney for amici curiae