UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT A. BURT, ET AL,	:	CIVIL ACTION NO.
PLAINTIFFS,	:	3-03-cv-1777 (JCH)
v.	:	
	:	
DONALD H. RUMSFELD, IN HIS	:	
OFFICIAL CAPACITY AS U.S.	:	
SECRETARY OF DEFENSE,	:	JANUARY 31, 2005
DEFENDANT.	:	

RULING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DKT.NO. 34] AND DEFENDANT'S MOTION TO DISMISS [DKT. NO. 12]

I. INTRODUCTION

Members of the Yale Law School faculty[1] (hereinafter the "Faculty")[2] together with *pro se* plaintiff YLS Professor Jed Rubenfeld ("Rubenfeld"),[3] have brought this action against Donald H. Rumsfeld, in his official capacity as the United States

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[1]Professors Robert A. Burt, Owen M. Fiss, Harold Hongju Koh, Kenji Yoshino, Bruce Ackerman, Anne L. Alstott, Ian Ayres, Jack M. Balkin, Yochai Benkler, Richard R.W. Brooks, Amy L. Chua, Morris L. Cohen, Dennis E. Curtis, Harlon L. Dalton, Drew S. Days III, Brett Dignam, Steven B. Duke, William N. Eskridge, Jr., Daniel C. Esty, Daniel J. Freed, Robert W. Gordon, Michael J. Graetz, Oona A. Hathaway, Dan M. Kahan, Paul W. Kahn, Jay Katz, S. Blair Kauffman, Alvin K. Klevorick, Anthony T. Kronman, Carroll L. Lucht, Daniel Markovits, Jerry L. Mashaw, Jean Koh Peters, Robert C. Post, J.L. Pottenger, Jr., Judith Resnik, Carol M. Rose, Susan Rose-Ackerman, Vicki Schultz, Reva Siegel, John G. Simon, Robert A. Solomon, Stanton Wheeler, and Stephen Wizner.

[2]According to the Yale University Faculty Handbook, the faculty of each school within the University, including the law school, have the authority to set educational policies within their school. See Burt Decl. at Ex. A. Thus, when the faculty set, amended, and then suspended its Non-Discrimination Policy, it did so as the governing body of the law school. See Burt Decl. at ¶ 5. Therefore, the voting majority of faculty members that make up the plaintiff group are coextensive with the law school itself with regard to the issues in this case. The court will sometimes use the terms "Law School," and "YLS" interchangeably in this Ruling in referring to the plaintiffs.

[3]On May 3, 2004, the court granted the Motion For Withdrawal of Counsel [Dkt. No. 39] allowing the attorneys for the other plaintiff faculty members to withdraw from representing Professor Rubenfeld. He now appears *pro se*.

Secretary of Defense ("DoD" or the "Government"). This action arises out of DoD's application of the Solomon Amendment against Yale University as a result of a YLS non-discrimination policy.[4]

The Faculty, including Professor Rubenfeld, claim that the Law School is not in violation of the Solomon Amendment, codified at 10 U.S.C. § 983 (2004), which requires educational institutions to allow military recruiters access to their campuses and their students as a condition of receipt of most federal funds. They argue that YLS' recruiting programs occur off-campus and are thus beyond the scope of the Solomon Amendment. They also claim that military recruiters have the same opportunity to become eligible for the official recruiting programs, and therefore YLS is neither "effectively preventing" military recruiters from accessing YLS students through the programs, nor treating military recruiters different from non-military recruiters.

Alternatively, even if YLS is in violation of the Solomon Amendment, the Faculty argue that the court should declare the Solomon Amendment as applied unconstitutional because it places unconstitutional conditions on hundreds of millions of dollars of government funding granted to Yale University. By compelling them to officially aid the military's recruiting efforts, the Faculty claim that the Solomon Amendment violates their freedoms of speech and association and violates their substantive due process right of educational autonomy. Specifically, the Faculty argue that forced inclusion of military recruiters in YLS' official recruiting process compels

[4]Several student groups have filed a related civil suit alleging that the Solomon Amendment also violates their constitutional rights. See Student Members of SAME v. Rumsfeld, No. Civ. A. 3:03-cv-1867 (JCH).

them to communicate a significantly different message concerning employment discrimination than they choose to send, and that it forces them to associate with individuals whose publicly acknowledged beliefs are in conflict with those of YLS. Additionally, the Faculty argues that forced inclusion of military recruiters interferes with their substantive due process right to educational autonomy in creating an educational atmosphere at YLS that is free from discrimination and protects all YLS students.

Professor Rubenfeld advances a slightly different constitutional claim. He eschews the Faculty's freedom of association and educational autonomy claims. He presses only a First Amendment compelled speech claim. Unlike the Faculty's claim that inclusion of military recruiters compels them to change their message, Rubenfeld argues that the Government compels him to aid in the dissemination of the Government's speech. Rubenfeld argues that compelling him to help disseminate another's speech is a violation of his First Amendment rights.

DoD opposes the summary judgment motion. It argues first that Yale University, not the Faculty, is the proper party to bring these claims. DoD also claims that, absent final agency action by the proper decision-maker at DoD, the Faculty's claims are not ripe for judicial review. If the suit is not to be dismissed on standing or ripeness grounds, DoD then argues that YLS is in violation of the Solomon Amendment because YLS has a practice which effectively prevents the military from participating in the YLS' official recruiting programs. Finally, DoD claims that the Solomon Amendment is a constitutional assertion of Congress's spending power and violates no constitutional rights.

In January 2004, DoD moved to dismiss YLS' claims for lack of standing and ripeness under FED. R. CIV. P. 12(b)(1) and its constitutional claims for failure to state a claim upon which relief could be granted under FED. R. CIV. P. 12(b)(6). On June 9, 2004, the court denied DoD's Rule 12(b)(1) motion. Burt v. Rumsfeld, 322 F.Supp. 2d 189 (D.Conn. 2004). The court held that the Faculty had suffered a constitutionally cognizable injury-in-fact when they, as the governing body of YLS, were forced to suspend its non-discrimination policy under the threat of government withdrawal of hundreds of millions of dollars of funding for sister schools within Yale University, and that the injury implicated legally protected First and Fifth Amendment rights. Additionally, the court held that the plaintiffs' claims were primarily legal in nature, that the threatened loss of funding constituted concrete and potentially catastrophic harm, and that the years of communications between the parties fleshed out the issue sufficiently for effective judicial review. Refusing to interpret "ripeness" as requiring that YLS live under a perpetual sword of Damocles, the court found the plaintiffs' claims ripe for review.[5] However, the court reserved decision on DoD's Rule 12(b)(6) motion and will address that aspect of DoD's Motion to Dismiss in this Ruling.

The Faculty has now moved for summary judgment on all of their claims, arguing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Professor Rubenfeld joins in that Motion on the claims pressed by him.

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[5]The court notes that at oral argument in December 2004, Government's counsel stated that DoD had yet to make a "final" determination, despite the passage of more than three years since the issue first arose and of nearly a year since Yale University provided the last requested information to DoD.

DoD counters that, to the extent the court does not dismiss the plaintiffs' constitutional claims under DoD's previous Rule 12(b)(6) motion for failure to state a claim, the court cannot grant summary judgment in favor of the plaintiffs because there are material facts in dispute. Specifically, it asserts a claim pursuant to Federal Rule 56(f) that it will become able to create material issues of fact upon the completion of its requested discovery.

II. STANDARD OF REVIEW

A. Rule 56(a) Summary Judgment Standard

The burden is on a party moving for summary judgment to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); White v. ABCO Eng'g Corp., 221 F.3d 293, 300 (2d Cir. 2000). When a motion for summary judgment is supported by documentary evidence and sworn affidavits, the nonmoving party must present significant probative evidence to create a genuine issue of material fact. See Liberty Lobby, 477 U.S. at 249-50. A court must grant summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact . . . .'" Miner v. Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson, 477 U.S. at 248).

The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991); see also Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992). A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements, see Securities & Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978), nor may he rest on the "mere allegations or denials" contained in his pleadings, Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995); see also Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (holding that a party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible). Further, a party may not rely "on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986).

The Local Rules of this court also address the obligation of the parties with regard to a motion for summary judgment: "All material facts set forth in said Local Rule 56(a) statement will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2." Local Rule 56(a) (1) (D.Conn.)

B. DoD's Discovery Requests Pursuant to Rule 56(f)

DoD has asserted repeatedly in its opposition pleadings and at oral argument that DoD requires extensive discovery in order to oppose plaintiffs' summary judgment

motion. DoD requested discovery in the footnotes of its summary judgment opposition brief and in the "Disputed Issues of Material Fact" section of its Local Rule 56(a)(2) filing, in place of the required list of material facts in dispute. See Def's Local Rule 56(a)(2) Statement at 7-9 [Dkt. No. 42] ("Def's Local Rule 56"). DoD also requested discovery in an additional, twenty-three page filing requested by the court in an attempt to bring specificity to DoD's previous requests. See Supplemental Declaration of Alan S. Modlinger [Dkt. No. 66] ("Supp. Modlinger Decl."). However, the court finds that discovery is not warranted.

This court is conscious of the principle that the grant of summary judgment prior to discovery is not to be undertaken lightly. See, e.g., Hellstrom v. U.S. Dept. of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (district court may grant summary judgment without discovery "[o]nly in the rarest of cases"); Trebor Sportswear Co., Inc. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303-04 (2d Cir. 2003). However, when a party "fails to produce any specific facts whatsoever to support [their case], a district court may, in its discretion, refuse to permit discovery and grant summary judgment." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981) (dismissing plaintiff's conspiracy allegation without discovery). "An opposing party's mere hopes that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of [a summary judgment motion]." Id. at 107 (quotation omitted). The object of discovery is not to find out *if* a party has a claim or defense, but to develop a factual basis for its claim or defense. See Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

Also insufficient to justify a denial of summary judgment under Rule 56(f) are "bare assertion[s] that the evidence supporting a [party's] allegation is in the hands of the [other party]." Contemporary Mission, 648 F.2d at 107 (quotation omitted); see also Paddington Partners, 34 F.3d at 1138. A party cannot rely upon Rule 56(f) "where the result of a continuance to obtain further information would be wholly speculative." Contemporary Mission, 648 F.2d at 107. A court may properly deny a discovery request pursuant to Rule 56(f) "if it deems the request to be based on speculation as to what *potentially could be* discovered." Paddington Partners, 34 F.3d at 1138. (emphasis added).

The Second Circuit has developed a four-part test for district courts to use when ruling on a party's request for discovery under Rule 56(f). Sage Realty Corp. v. Ins. Co. of North America, 34 F.3d 124, 128 (2d Cir. 1994).

> Rule 56(f) requires the opponent of a motion for summary judgment who seeks discovery to file an affidavit explaining: (1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful.

Id.; see also Burlington Coat Factory Warehouse Corp. v. Esprit de Corp, 769 F.2d 919, 926 (2d Cir. 1985). "Additionally, the discovery sought must be material to the opposition of the summary judgment motion." Sage Realty, 34 F.3d at 128.

DoD's initial attempts at requesting discovery, found in its opposition to the plaintiffs' summary judgment motion and its Local Rule 56(a)(2) statement, assert no facts at all. See, e.g., Def's Local Rule 56 at 7-9. DoD merely points out the plaintiffs' factual allegations and requests a broad range of discovery to determine to what extent these allegations are true. See, e.g., Def's Local Rule 56(a)(2) Statement at Ex. A, ¶¶

10-14 ("Modlinger Decl."); see also Mem. Opp. Summ. J. at 21 n.7.[6]

During a teleconference on November 29, 2004, the court asked DoD to file another discovery document in an attempt to allow DoD to address more specifically how the requested information was to be obtained and the relationship between its requests and any material facts.

When combined, DoD's Local Rule 56(a)(2) Statement and the Supplemental Modlinger Declaration fail to pass the four-part discovery test laid out by the Second Circuit in Sage Realty and are insufficient to warrant discovery under Rule 56(f). First, DoD's Rule 56(f) Statement and discovery requests fail to explain what *specific*

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[6]For example, paragraph 12 of the Modlinger Declaration reads:

> With respect to the message that plaintiffs intend to send, defendant would require discovery from the plaintiff faculty members to establish whether, among the forty-five individual faculty members in this lawsuit, there is, in fact, any particularized message underlying the treatment of military recruiters at Yale Law School, and if so, what that message is. Plaintiffs here have submitted declarations from only three of the forty-five members who claim injury to their First Amendment rights and whose intent is therefore relevant to this lawsuit. Defendant would require discovery (including depositions) concerning the intended message from a broader sample of the plaintiff group, especially given that in the context of this litigation it has become clear that the faculty members are hardly united; one faculty member has withdrawn from the principal plaintiff group because he disagrees with its positions in this litigation, see Memorandum of Law in Support of Plainitiffs' Motion for Summary Judgment (filed by Plaintiff Jed Rubenfeld) at 1, and another faculty member has now sought to join the litigation several months after the complaint was filed, see Stipulation and Order of April 8, 2004. To the extent that plaintiffs have purported to submit to the Court documentary evidence concerning the faculty's intent with respect to its treatment of military recruiters, see Declaration of Robert A. Burt, Ex. I, defendant would seek to investigate the factual background concerning that document. Specifically, defendant would seek discovery (including document requests and depositions) from Yale University, Yale Law School, and its faculty, concerning meetings and discussions among faculty members and administrators at Yale Law School and Yale University with respect to the intent underlying decisions regarding military recruiters' access to the facilities and services of CDO.

information is sought. Instead, the government either 1) reiterates factual assertions made by the plaintiffs, see, e.g., Modlinger Decl. at ¶ 10, and requests discovery apparently aimed at seeing to what extent these claims are true, or 2) lists broad topic areas the government wishes to explore, many of which are not material facts, see, e.g., Supp. Modlinger Decl. at ¶ 5(g)(v).[7] The court finds these requests to be "based on speculation as to what *potentially could be* discovered." Paddington Partners, 34 F.3d at 1138 (emphasis added). As the Second Circuit has noted, "[w]hile Rule 56(f) discovery is specifically designed to enable a [party] to fill material evidentiary gaps in its case . . . it does not permit a [party] to engage in a 'fishing expedition'." Id. (citation and quotation omitted). DoD apparently seeks to embark on just such an expedition.

Secondly, DoD never alleges *any* material facts that its discovery is likely to support. Again, it relies on the vague concept that it requires discovery to negate the material facts supported by competent evidence submitted by the plaintiffs. Even with regard to these vague requests, DoD does not demonstrate "how a genuine issue of material fact will be raised" by the proposed discovery. See Sage Realty, 34 F.3d at

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[7]Paragraph 5(g)(v) reads:

> Defendant anticipates that it will take deposition of the following (via subpoena where necessary): . . .[w]itnesses from Yale Corporation, Yale University, or Yale Law School who will be able to testify, pursuant to FED.R.CIV.P. 30 (b)(6), concerning the following subjects: . . . the manner in which policies are established and enforced at Yale Law School (including policies concerning non-discrimination and recruitment by legal employers), including the roles of Yale University (including trustees, officers, and administrators); Yale Law School (including trustees, officers, and administrators); the Career Development Office at Yale Law School; the faculty members at Yale Law School; students at Yale Law School; and student organizations at Yale Law School in establishing and enforcing such policies.

128.

For example, in both its original Local Rule 56(a)(2) Statement and in its supplemental statement, DoD requests information related to the issue of coercion involved in the plaintiffs' First Amendment claims. Specifically, DoD requests information concerning whether or not YLS was coerced by DoD's threats into suspending its Non-Discrimination Policy ("NDP") and allowing military recruiters to use YLS' Career Development Office ("CDO"). See, e.g., Supp. Modlinger Decl. at ¶ 5(g)(iv) (requesting deposition testimony regarding "the non-discrimination policy at Yale Law School, including its . . . suspension . . ., [and] the intent underlying its . . . suspension . . . ."); see also Modlinger Decl. at ¶ 10 (requesting "appropriate discovery with respect to plaintiffs' freedom of speech allegations" that "DOD has forced plaintiffs to send a 'very different message'" by "requiring that military recruiters be allowed access to CDO programs"). However, when pressed at oral argument on the need for discovery concerning coercion, counsel for DoD conceded the fact that the YLS involuntarily suspended its NDP because of DoD's threat to cut off funding to Yale University.[8] Tr. at 124.

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[8]Specifically, on at least six occasions at oral argument, the court asked defense counsel what possible information he could expect to elicit through deposition testimony that would put the material fact of coercion at issue. The court repeatedly gave counsel leeway to engage in pure speculation. Defense counsel could not respond with even a single speculative assertion prior to conceding the fact. Tr. at 108-11, 118-20, and 122.

The colloquy ended as follows:

> THE COURT: So the answer to my question is you have not identified any discovery you need on the question of whether there's a forced speech here. Is that fair to say, sir?
>
> MR. MODLINGER (ATTORNEY FOR DEFENDANT): Let me look at my --

DoD does not satisfy the first and second prongs of Sage Realty when it seeks discovery unrelated to material facts or requests a fishing expedition in the speculative hope that the facts put forth by the plaintiffs might be shown to be untrue.

With respect to prongs three and four of the Sage Realty test, it is important to note that while discovery was not stayed by order of the court, the court does not find DoD unreasonably failed to make efforts to obtain discovery. The court's posture regarding discovery could reasonably have been interpreted as a *de facto* stay. However, that does not now justify unwarranted discovery or excuse DoD's failure to come forward with evidence within its own control.

Much of what DoD requests through discovery concerns information reasonably within its own control. For example, DoD asks to depose no fewer than 23 witnesses concerning such topics as what facilities, services, and accommodations YLS made available to military recruiters, see Supp. Modlinger Decl. at ¶ 5(g)(I); how military recruiters were treated differently than non-military recruiters, see id. at ¶ 5(g)(iii); and

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> THE COURT: That calls for a yes or no answer to my question.
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> MR. MODLINGER: Your Honor, we indicated that we required discovery that doesn't fit with relationship to the narrow tailoring point.
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> THE COURT: Sir, that isn't my question. My question is, is the discovery on the sole fact of whether there is force applied here by governmental action causing the plaintiff to act in the way it doesn't want to act with respect to its First Amendment rights. I'm not on the other elements.
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> MR. MODLINGER: I did not understand that before. I apologize. With respect to that claim, I believe I'm not aware of any discovery that we would need with respect to that particular claim.

Tr. at 123-24.

what contracts the federal government gave to Yale, and how that money was used, see id. at ¶ 5(g)(viii). Presumably military personnel who recruited at YLS know what they were and were not allowed to do, where they were and were not allowed to go, and what services, if any, YLS provided for them. Further, military recruiters know how they were treated when they visited YLS, and know if that treatment differed from what was afforded to other recruiters.[9] Finally, the United States Government, the provider of grants to universities across the nation, knows how much money it provides to Yale University and what programs are funded with that money. Surely, DoD can obtain this information from the other agencies and departments of the federal government, of which it is a part.

DoD also failed to come forward with knowledge within its control when it denied the Faculty's Statement of Material Facts. For example, DoD stated that it "lacked sufficient knowledge or information to admit or deny" whether a student hired by the military as an intern in 2003 initiated contact with the military, or whether military recruiters contacted the student. Def's Local Rule 56 at 6, ¶ 49. An employer has access to information concerning how it hired an employee. As a member of the Armed Forces, the recruiter works for DoD, and it is within DoD's control to ask the recruiter who hired the employee for this information.

DoD also claimed that it "lacked sufficient knowledge or information to admit or deny" whether, prior to 2002, military recruiters were: denied access to the CDO

[9]The court does not mean to suggest DoD might not obtain, through discovery of YLS, further evidence on this subject. However, it is indisputable that DoD has evidence on these subjects which it could have brought forth in response to the plaintiffs' summary judgment motion and did not.

because they would not sign the NDP, see id. at 3, ¶ 18 and 5, ¶ 38; permitted to appear on the CDO website without signing the NDP, see id. at 3, ¶ 22; or permitted to meet with students or student groups on campus at the invitation of students or student groups, regardless of whether the military recruiters had signed the NDP, see id. at 4, ¶ 27. Additionally, DoD claimed it lacked sufficient knowledge to admit or deny whether, beginning in 2002, military recruiters were permitted to participate in the Fall Interview Program ("FIP") and Spring Interview Program ("SIP") because the NDP had been suspended. See id. at 6, ¶ 45. This is all information that military recruiters would have to have, based on their personal experiences with YLS. Even a *de facto* stay of discovery does not excuse a party from coming forward, in response to a motion for summary judgment, with information within its control.

DoD has thus failed to satisfy the Sage Realty test. DoD's request for discovery pursuant to Rule 56(f) is therefore denied.

The Government's refusal to come forward with information within its control or its denial of facts without supporting evidence has consequences under this District's Local Rule 56. The court will treat as fact for the purposes of this motion for summary judgment the following: 1) any Local Rule 56(a)(1) fact that is admitted or conceded by the defendant; and 2) any Local Rule 56(a)(1) fact offered by the plaintiffs that DoD failed to rebut or claimed insufficient knowledge of, despite information being within its control.[10]

[10]When the court refers to a fact that falls into the second category, it will mark it with a parenthetical: "(deem. adm'd)"

III. BACKGROUND

A. Yale Law School's Non-Discrimination Policy

Yale Law School enacted a non-discrimination policy in 1972. That policy barred discrimination on the basis of religion, race, sex, and national origin. See Plaintiffs' Local Rule 56(a)(1) Statement of Material Facts at ¶ 7 ("Pls' Local Rule 56"); Defendant's Local Rule 56(a)(2) at ¶ 7 (deem. adm'd). Since 1978, YLS has also prohibited discrimination on the basis of sexual orientation. See Pls' Local Rule 56 at ¶ 8; Def's Local Rule 56 at ¶ 8 (deem. adm'd). YLS' NDP, which applies to all aspects of YLS life, provides that YLS is committed to opposing:

> discrimination on the grounds of age; color; handicap or disability; ethnic or national origin; race; religion; religious creed; gender (including discrimination taking the form of sexual harassment); marital, parental or veteran status; sexual orientation; or the prejudice of clients.

See Pls' Local Rule 56 at ¶ 9; Def's Local Rule 56 at ¶ 9. Prior to the suspension of the NDP in 2002, employers who refused to certify their compliance with it were barred from school-sponsored recruiting services offered through the CDO. See Pls' Local Rule 56 at ¶ 17; Def's Local Rule 56 at ¶ 17 (deem. adm'd).

The CDO is located on-campus. See Bryant Decl. at Ex. A.[11] Prospective employers seeking to participate in YLS' official recruiting program must register with the CDO. See id. at ¶ 6. Once registered, employers send pertinent information to the CDO, and CDO employees communicate that information to YLS students via the Law School website. See Pls' Local Rule 56 at ¶¶ 21-22; Def's Local Rule 56 at ¶¶ 21-22

[11]DoD agrees that the CDO is located on-campus. See Def's Mem. Further Opp. Summ. J. at 5 n.6 [Dkt. No. 63] ("Def's Amendment Mem.").

(deem. adm'd). Law students review these communications, sign up for interviews with employers of their choice, and submit resumes online. See Pls' Local Rule 56 at ¶ 23; Def's Local Rule 56 at ¶ 23 (deem. adm'd). Registered employers can also post job listings online through the CDO and download student resumes from the CDO database. See Pls' Local Rule 56 at ¶ 24; Def's Local Rule 56 at ¶ 24 (deem. adm'd). (DoD admits that employers can download student resumes).[12] DoD claims that in the last few years, between 79 to 100% of YLS students used the CDO for job searches. See Def's Amendment Mem. at 4.

B. The Solomon Amendment

According to DoD, "[s]ince the Vietnam War . . . Congress has confronted 'disaffection' with regard to the military among some students and faculty at institutions of higher learning that impairs the ability of the military to recruit." Mem. Opp. Summ. J. at 3. In response, the Congress has passed numerous pieces of legislation over the years "[t]o encourage educational institutions to open their campuses to military recruiters" by prohibiting the "distribution of certain federal funds to institutions of higher learning that barred military recruiters from their campuses." Id. In 1995, in light of policies like the YLS NDP, and controversies over the presence of ROTC programs on university campuses, Congress enacted the Solomon Amendment, now codified at 10 U.S.C. § 983. Among other things, the Solomon Amendment denies certain categories of federal funding to institutions of higher education that prevent military recruitment on

[12]DoD appears to adopt without dispute all of these CDO-related facts. See Def's Amendment Mem. at 3.

campus. 10 U.S.C. § 983(b). On October 28, 2004, Congress amended the Solomon Amendment. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811 ("NDAA") (2004). The Amendment currently provides as follows:

> **(b) Denial of funds for preventing military recruiting on campus.**--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--
>
> (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or
>
> (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):
>
> (A) Names, addresses, and telephone listings.
>
> (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

10 U.S.C. § 983(b).

DoD's original interpretive regulations limited loss of funding to the particular part of the university ("subelement") found not to be in compliance. See 61 Fed. Reg. 7739, 7740 (Feb. 29, 1996). In other words, if a subelement of a university, like a law school, denied access to military recruiters, then only that subelement would lose funding, not the entire institution. Further, the Amendment initially implicated only Defense Department funding. See Mem. Opp. Summ. J. at 4. Law schools, unlike other

subelements of a university, are not typically recipients of large amounts of federal funding.

In 1997, Congress extended the rule denying federal funds to apply to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation, as well as Defense. Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified at 10 U.S.C. § 983(d)(1). This extension threatened certain types of student aid, including Perkins Loans and work study funds.[13] However, the applicable regulations continued to cabin the consequences of a subelement's failure to grant access to military recruiters to that subelement itself, such that non-compliance did not affect the university as a whole. See id.

In 1999, Congress also modified the statute's language to extend its applicability to any "institution of higher education (including any subelement of such institution)." 10 U.S.C. § 983(c)(2), as modified by Pub. L. No. 106-65, § 549(a)(1) (1999). Following this change, DoD adopted interim regulations, effective immediately, that defined an "institution of higher education" to include "all sub-elements of such an institution." Defense Federal Acquisition Regulation Supplement: Institutions of Higher Education, 65 Fed. Reg. 2056 (Jan. 13, 2000). The effect of this redefinition was that a violation in any part of the university would put federal funding for the entire university in jeopardy. 48 C.F.R. § 252.209-7005.

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[13]In the fall of 1999, Congress enacted further revisions to the Solomon Amendment protecting students of non-compliant university subelements. Funds "available solely for student financial assistance or related administrative costs" are now exempt from the Solomon Amendment. Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999).

A 2004 amendment to the Solomon Amendment recently added, *inter alia*, the phrase "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer" to the end of subsection (b)(1), a phrase that had previously existed only as a safe harbor provision in the regulations. See, e.g., 32 C.F.R. § 216.4(c)(3). This provision makes equal treatment of military recruiters an affirmative duty, instead of a safe harbor, for educational institutions. DoD argued that the 2004 amendment required the plaintiffs to amend their complaint and required the court to allow DoD to file a motion to dismiss this second amended complaint.[14] However, there is no good reason to do so, and DoD offers none. The court requested and received additional briefing on the ramifications of the 2004 amendment. See Dkt. Nos. 63-65. Although the 2004 amendment undercuts some of the plaintiffs' statutory arguments,[15] the court finds that the issues remain essentially the same. See, e.g., Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219, 230 n.10 (3d Cir. 2004) ("FAIR").[16] The issues have

[14]DoD asserted the right to file a new motion to dismiss based on the 2004 amendment during a teleconference on November 29, 2004.

[15]The plaintiffs have not taken the position that the 2004 amendment in any way inhibits the court's ability to decide the pending motions.

[16]As the Third Circuit pointed out in FAIR, the court does not return to square one simply because a statute as amended disadvantages one of the parties in the same fundamental way as before. See 390 F.3d at 230 n.10 (quoting Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993)) (holding that several of FAIR's challenges to the Solomon Amendment were not mooted by the 2004 amendment merely because it disadvantaged the appellant in the same fundamental way). The basic issue has not changed, and the parties have had the opportunity to submit supplemental briefs on the 2004 Amendment. The 2004 Amendment alters the statute to add language previously found in the regulations, bringing it into line with DoD's original arguments. From the start, DoD has argued that YLS has an affirmative duty to provide access to military recruiters at least equal in quality and scope to that provided to non-military recruiters prior to the 2004 Amendment. See

been fully briefed. The court will proceed to decide the pending motions.

C. Military Recruiting at YLS and the Suspension of the NDP

In light of Congress's policy concerning homosexual conduct in the Armed Forces, popularly known as the "Don't Ask, Don't Tell" policy, DoD has refused to certify its compliance with the Law School's NDP. As a result, under the NDP, DoD has been denied use of the CDO since 1978. Mem. Opp. Summ. J. at 6-7; see also Safriet Decl. at ¶ 6. Instead, the Law School has offered military recruiters open access to classrooms and other meeting spaces on campus for informational sessions and other recruiting activities, including interviews, at the invitation of a student organization; and open access to any student or student group to reserve a classroom or other meeting space for such a meeting at any time. See Pls' Local Rule 56 at ¶ 27; Def's Local Rule 56 at ¶ 27 (deem. adm'd); see also Safriet Decl. at ¶¶ 7-9. Additionally, the Law School makes contact information available to DoD, including students' names, hometowns and states, academic majors, and degrees received. See Pls' Local Rule 56 at ¶ 28; Def's Local Rule 56 at ¶ 28.

The current conflict between YLS and DoD began in 2001 when a DoD official fired the opening salvo of a several-year-long series of written exchanges between Yale and various DoD officials regarding the NDP. On December 17, 2001, Colonel Clyde J. Tate, III, U.S. Army, advised Yale University President Richard Levin that, "I understand that military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information at Yale University by a policy

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Supp. Mem. Opp. Summ. J. at 5.

or practice of the Yale Law School." Robinson Decl. at Ex. A. Colonel Tate advised Levin that "current statutes deny the use of certain federal funds" to institutions of higher education with a policy or practice of denying military recruiting personnel entry to campuses, and stated that, "[t]his letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of Yale University as well as Yale Law School." Id. Finally, Colonel Tate advised that, "based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract." Id.

A series of letters and meetings ensued, with military officials repeatedly categorizing the YLS NDP as not in compliance with the Solomon Amendment. On May 29, 2002, Colonel Tate informed President Levin, "Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial." Robinson Decl. at Ex. C; see also Pls' Local Rule 56 at ¶ 40; Def's Local Rule 56 at ¶ 40. To avoid this $300 million funding loss to Yale University, the YLS faculty voted in 2002 to approve a "temporary" suspension of the NDP.[17] See Pls' Local Rule 56 at ¶¶ 42-43; Def's Local Rule 56 at ¶¶ 42-43 (deem. adm'd); see also Burt Decl. at 21 and at Ex. I; Robinson Decl. at Ex. D.

[17]By the 2003 recruiting season, it appears that every law school that is part of a university receiving federal funding had suspended their non-discrimination policy as applied to military recruiters in order to avoid losing that federal funding. FAIR, 390 F.3d at 228.

Following the Faculty's suspension of the NDP requirement, YLS permitted military recruiters to use the CDO and participate in the Law School's formal recruiting programs, the Fall Interview Program ("FIP") and Spring Interview Program ("SIP"). See Pls' Local Rule 56 at ¶ 45; Def's Local Rule 56 at ¶ 45. The military gained access to the CDO website. See Pls' Local Rule 56 at ¶ 46; Def's Local Rule 56 at ¶ 46. During the 2002 FIP, one YLS student interviewed with a military recruiter. See Pls' Local Rule 56 at ¶ 47; Def's Local Rule 56 at ¶ 47. During the 2003 SIP, no students interviewed with a military recruiter. See Pls' Local Rule 56 at ¶ 48; Def's Local Rule 56 at ¶ 48. One student did secure a summer 2003 internship with the Army, though not through the FIP or SIP. See Pls' Local Rule 56 at ¶ 49; Def's Local Rule 56 at ¶ 49. During the FIP and SIP for 2003-2004, a total of five Law School students interviewed with military recruiters. See Pls' Local Rule 56 at ¶¶ 51-52; Def's Local Rule 56 at ¶¶ 51-52. To date, none has accepted employment with the military. See id.

Conflict between YLS and the military continued, however. In early 2003, the Army referred the controversy to the Department of Defense. On May 29, 2003, the Office of the Under Secretary of Defense issued a letter signed by William J. Carr, Acting Deputy Undersecretary for Military Personnel Policy, opining that YLS and, by implication, Yale University, are in violation of the Solomon Amendment. See Pls' Local Rule 56 at ¶ 50 (set forth in the Robinson Decl. at Ex. K (hereinafter referred to as the "Carr Letter")); Def's Local Rule 56 at ¶ 50. In this letter, Acting Deputy Undersecretary Carr specifically declared that the Law School, through its recruiting policy requiring that military recruiters sign the NDP or be excluded from the CDO, "sends the message that employment in the Armed Forces of the United States is less honorable or desirable

than employment with the other organizations that [YLS] permits to participate in its CDO programs." Id.

After setting forth the applicable law and regulations and DoD's interpretation, the Carr Letter explained that YLS was not complying with DoD regulations and was "in effect" preventing military recruiting on campus. Id. Carr further informed Yale that the NDP, despite its temporary suspension, "remains an obstacle to military recruiters and their ability to plan for, schedule, and gain access to Yale Law School students for the purpose of military recruiting." Id. As such, Carr concluded, "Yale's policy is in violation of federal law," and advised Levin, "it is my duty under law to recommend to the Principal Deputy Under Secretary of Defense for Personnel and Readiness that Yale University be determined ineligible for Department of Defense funding." Id. Carr gave notice that he would so recommend on June 29, 2003, "unless you advise me before that date of a change in policy sufficient to overcome the deficiencies outlined above." Id.

On October 16, 2003, forty-five YLS faculty members, constituting a voting majority of the YLS faculty, see Pls' Local Rule 56(a)(1) at ¶ 2; Def's Local Rule 56(a)(2) at ¶ 2 (deem. adm'd), filed the instant suit.

On December 23, 2003, the decision-maker for the Department of Defense for purposes of enforcement of the Solomon Amendment, Principal Deputy Under Secretary of Defense for Personnel and Readiness Charles S. Abell, see Am. Supp. Mem. Opp. Summ. J. at 1 [Dkt. No. 54], wrote to President Levin stating that, despite more than two years of correspondence, meetings, and negotiations, he still did not have enough information to make his decision. See Robinson Decl. at Ex. N. Principal

Deputy Under Secretary Abell requested detailed answers to a series of questions to allow him to "assess [Yale's] proposal properly." Id. President Levin responded in detail by letter on January 16, 2004. See id. at Ex. O.

At oral argument on December 9, 2004, the Government reported that Principal Deputy Under Secretary Abell had not yet made his decision concerning Yale's compliance with the Solomon Amendment.

IV. DISCUSSION

A. Parties' Claims

The claims brought by the Faculty and those brought by Professor Rubenfeld are not coextensive. Both the Faculty and Professor Rubenfeld assert that YLS is in compliance with the Solomon Amendment, as amended. They argue that because the FIP and SIP occur off-campus, YLS' refusal to permit military recruiters access to CDO-run programs does not constitute denying military recruiters "access to campus" or "access to students on campus." Furthermore, the Faculty and Rubenfeld argue that, because the military is subject to the same YLS policy requiring employers to subscribe to the NDP in order to participate in the CDO recruiting program as every other employer, YLS is offering access to military recruiters that is "equal in quality and scope" to that granted to non-military recruiters because the military is welcome to sign the NDP and access the CDO.

Even if YLS does violate the Solomon Amendment, the Faculty then argue that the Solomon Amendment places an unconstitutional condition on hundreds of millions of dollars of federal funding given to Yale University. The Faculty argue that, because

enforcement of the Solomon Amendment will cut off federal funding not reasonably related to military recruiting, it penalizes them for exercising their First Amendment rights. Such a penalty constitutes an unconstitutional condition on receipt of federal funds.

The Faculty claim the Solomon Amendment violates their First Amendment rights in two ways. First, the Faculty argue that, because the Solomon Amendment has compelled them to suspend the NDP and include military recruiters in the CDO recruiting process, they are being prevented from sending their chosen message - - that discrimination will not be tolerated - - and forced to convey a very different message - - that discrimination will be tolerated in certain circumstances. Additionally, the Faculty claim that the Solomon Amendment violates their First Amendment right to freedom of association by interfering with their right to disassociate from an entity, the United States military, whose explicit policies conflict with the institutional beliefs of YLS, as expressed in the NDP.

The Faculty also claim that the Solomon Amendment violates their substantive due process right to educational autonomy under the Fifth Amendment. They describe this right as the right "to banish discriminatory conduct from all of the Law School's activities in order to protect their students and to create the environment necessary to carry out the Faculty Members' educational mission." Faculty Mem. Supp. Summ. J. at 29 [Dkt. No. 35] ("Mem. Supp. Summ. J."). The Faculty argue that the caselaw recognizes "a faculty's autonomous governance of the [university's] educational environment," as a right implicit in the concept of ordered liberty. Id. at 30.

Professor Rubenfeld does not press a substantive due process claim and does not press freedom of association as a basis for his First Amendment claim. His compelled speech claim is slightly different from that of the Faculty. Professor Rubenfeld argues that DoD is violating the Faculty's First Amendment rights not by forcing the Faculty to send a message the Faculty does not want to send, but rather by compelling them to help disseminate DoD's recruiting message, a message with which Professor Rubenfeld and the rest of the Faculty disagree.

DoD opposes all of the plaintiffs' claims. It continues to argue that Yale University, and not YLS, is the proper party to bring suit and that, therefore, the plaintiffs lack standing to maintain this action.[18] Additionally, DoD again claims that because, after three years, it still has not made a "final" decision concerning Yale's status, the claims are not ripe. The court has already addressed DoD's standing and ripeness defenses, see Burt, 322 F.Supp.2d at 196-203, and it will not revisit those issues: it adheres to its prior decision.[19]

To the extent the plaintiffs' claims are justiciable, DoD next argues that YLS is in violation of the Solomon Amendment because the NDP acts as a barrier, keeping military recruiters from receiving access to YLS students equal in quality and scope to that given to other recruiters. DoD further argues that the Solomon Amendment does

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[18]The court notes that the Solomon Amendment treats universities and their sub-elements as the same. See 10 U.S.C. § 983(b).

[19]Indeed, the passage of nearly eight more months without a "final" decision causes this court to consider whether DoD ever intends to reach that decision. Having obtained its objective by threatening to cut-off funds, there may be no reason for it to reach a final, and in its view only then justiciable, decision.

not impose an unconstitutional condition that violates the plaintiffs' First and Fifth Amendment rights, but is simply an exercise of Congress's power under the Spending Clause. See U.S. CONST. art. 1, § 8, cl. 1.

B. YLS NDP Does Not Comply With the Solomon Amendment

The Faculty contend that YLS is in compliance with the terms of the Solomon Amendment, even in the Amendment's most-recently-amended form. In their Supplemental Memorandum concerning the effect of the October 2004 amendment on YLS' statutory compliance, the Faculty contend that the access granted to military recruiters is "equal in quality and scope" to that granted to non-military recruiters. See Mem. Further Supp. Summ. J. at 3 [Dkt. No. 64] ("Pls' Amendment Mem."). The Faculty argue that, because the military is merely subject to the same YLS policy as every other employer, YLS is offering "equal access." See Pls' Amendment Mem. at 3. First the Faculty contend that, "military recruiters are granted 'equal' access when nondiscrimination policies are equally applied to military and civilian employers."[20] Id. (citing Gay and Lesbian Law Student Ass'n v. Bd. of Trs., 673 A.2d 484 (Conn. 1996) and Lloyd v. Grella, 83 N.Y.2d 537 (1994)). They further contend that the NDP does not "prohibit, or in effect prevent" the military from gaining access to YLS students, because the system in place prior to the NDP's suspension, *i.e.*, the *status quo ante*, provided the military with pertinent student information; access to students via letter, phone, and email; the ability to book rooms at the off-campus recruiting venue; and the ability to meet with students on campus by invitation of any student. See id. at 4.

[20]YLS points out that in the 1990s, when the Christian Legal Society failed to subscribe to the NDP, it was not permitted to use CDO services. See Pls' Amendment Mem. at 3.

Additionally, Professor Rubenfeld asserts that at no time has YLS instituted a policy or practice that restricts "'military recruiters' 'access to campuses' or 'access to students on campus.'" Rubenfeld Mem. Further Supp. Summ. J. at 2 [Dkt. No. 65] ("Rubenfeld Amendment Mem."). Recruiting interviews arranged through the CDO are held off campus at a local hotel, and therefore, according to Rubenfeld, YLS' refusal to permit military recruiters to participate in CDO programs without signing the NDP cannot violate the Solomon Amendment. See Rubenfeld Amendment Mem. at 2.

In response, DoD argues that the October 2004 amendment clarifies that YLS must grant military recruiters access to the CDO recruiting programs, or else its policy in effect prevents military recruiters from gaining access to students that is equal in quality and scope to that granted to other recruiters. See Def's Amendment Mem. at 4. DoD further argues that the "equal opportunity" to subscribe to the NDP does not meet the Solomon Amendment's requirement for equal "access." See id. Congress meant actual, substantive access, and military recruiters' inability to sign the NDP "'in effect' prevents" them from gaining equal access to students.[21] Id. at 4-5. Finally, DoD argues that Congress's repeated reference to "campuses" is merely meant to specify students who are enrolled at a given institution, not place a geographic boundary on the access afforded to military recruiters.

[21]The court questioned at oral argument why DoD could not sign the NDP since its "Don't Ask, Don't Tell" policy concerns conduct, see Able v. United States, 155 F.3d 628, 635 (2d Cir. 1998) (distinguishing Romer v. Evans, 517 U.S. 620 (1996) and City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), as involving status-based restrictions, instead of the conduct restrictions reviewed in Able)), not "sexual orientation." DoD demurred to this suggestion, and neither plaintiffs nor the defendant press any argument on this basis.