

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALLIANCE OF LESBIAN, GAY,)
BISEXUAL, TRANSGENDERED,)
AND STRAIGHT STUDENTS, et al.,)
)
Plaintiffs,)
)
v.)
)
WILLIAM S. COHEN, as Secretary)
of Defense, et al.,)
)
Defendants.)
_____)

Civil Action No. 2:99-CV-34

**Plaintiffs' Memorandum in Opposition
to Defendants' Motion to Dismiss**

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PRELIMINARY STATEMENT

The Solomon-Pombo Amendment¹ requires that student members of the plaintiff organizations be subjected to discrimination and discriminatory attitudes in violation of the policies of the law school they have chosen to attend and the law of the state in which they have chosen to live. It does so by coercing Vermont Law School to abandon its policy of non-discrimination on the basis of sex and sexual orientation, in violation of state law, and to act as the employment agent of military recruiters. No other employer that avowedly discriminates on the basis of sex or sexual orientation is allowed to recruit on campus. If Vermont Law School does not violate state law and its own policies at the defendants' behest, the SPA's sanctions will be imposed, and as a result members of the plaintiff organizations will lose critical federal financial aid they have already been awarded. Holding student financial aid hostage, in order to compel this behavior by the law school, is a form of coercion that is not authorized by the Constitution. The purpose of defendants' administration of SPA is to enforce the restrictions on civil rights policies mandated by the Congress, but there is no rational basis for denying students rights to which they are entitled under Vermont law.

BACKGROUND

This case concerns students at Vermont Law School ("the law school"), students who are members of three plaintiff organizations (hereinafter "the students") and have been injured by invidious discrimination. The discrimination of which they complain is caused by defendants'

¹Omnibus Consolidated Appropriations Act for 1997, Pub. L. 104-208, Title V, § 514, 110 Stat. 3009-270-1; reprinted 10 U.S.C.A. § 503 note.

enforcement of the Solomon-Pombo Amendment (“SPA”).

The defendants attempt to characterize this suit as an indirect attack on military recruiting activities, but this is incorrect and misleading. Neither the SPA nor this suit challenging its constitutionality are centrally concerned with military policies. Rather, SPA is an effort to restrict school policies defining student rights, an area of private relations reserved for state regulation by the Constitution, except insofar as the federal government may vindicate or enlarge such rights.

I. The Students Whose Rights are Asserted Have Been Injured

The plaintiffs are three organizations of faculty, staff and students at Vermont Law School acting on behalf of their student members. Complaint ¶¶ 4-6 The source of the students’ injuries is not seriously in dispute. The Defense Department discriminates against women and gay men, and the law school is acting in the circumstances of this case as an agent of the Defense Department. Complaint ¶¶ 17, 30-31. The law school, when acting as defendants’ agent, has subjected all of its students, including those who are members of the plaintiff organizations, to invidious discrimination based on sex and sexual orientation, discrimination that would be actionable if the defendants and their agents were subject to state law. *See United States v. City of Philadelphia*, 798 F.2d 81, 89 (3d Cir. 1986) (Temple University’s decision to allow military recruiters on campus violated city ordinance prohibiting discrimination on basis of sexual orientation; held, however, that federal supremacy protected Temple from local law enforcement.)

A. The Injuries Caused by Acts of Discrimination Against the Students

The injuries alleged in the complaint are as follows:

On January 30, 1998, the law school announced that its nondiscrimination policy would be suspended in part, to allow the law school to provide recruiting services and facilities to the Judge Advocate General Corps, United States Army. Complaint ¶ 30. This suspension of the law

school's civil rights policies remains in effect. The law school's dean recently explained that this continuing suspension of the law school's civil rights policy was coerced by defendants:

In continuing the suspension of the VLS policy, I recognize that I am suspending a principled position long held by VLS and of great importance to the VLS community. I take this step only because I do not feel that VLS should hold the serious financial need of a large number of our students hostage to preservation of that position. I remain deeply disturbed that the Solomon-Pombo amendment forces that choice upon us. . . [T]he Solomon-Pombo provisions remain in effect. We will continue to seek ways to challenge those provisions. (Appendix A, "Memorandum from Dean L. Kinvin Wroth to the Vermont Law School Community.")

The suspension of the law school's policy was promptly followed by the affirmative acts of discrimination of which plaintiffs complain. The law school offered on-campus facilities for interviews, informed students of the availability of positions in the military services, and otherwise acted as employment agent for defendants. Complaint ¶¶ 17-19. Because the positions thus offered to all students are not fully available to women and gay men as they are to heterosexual men, the law school discriminated against its female and gay male students. The students have a right of action against such employers and their agents under Vermont law, as well as against the law school as a public accommodation, Complaint ¶¶ 15-18.

Discrimination by the law school against its students while acting as an agent of defendants is an injury in itself, and causes further injuries, including emotional distress, creation of hostile environment, and the monetary injury caused by the diversion of law school resources to which they are entitled, Complaint ¶ 36. All of these injuries, which certainly vary in severity,

were caused by defendants' administration of the SPA, which coerced the law school into acting as the agent of discrimination against its own students.

II. The Solomon-Pombo Amendment Addresses Law School Policies Toward Students

The change in law school policy coerced by SPA is the principal purpose of the SPA; the pretense of gaining access for military recruiters is simply an effort to shelter the political agenda of SPA under the military's aegis. Before SPA, the military services had not requested access to the law school campus in at least ten years, Complaint ¶ 32. They had received applicants from the law school and were not suffering any loss of qualified candidates, Complaint ¶ 34.

Compelling the access through coercive legislation serves no military purpose, Complaint ¶ 25.

The text of the Solomon-Pombo Amendment in pertinent part is as follows:

Sec. 514 (a). DENIAL OF FUNDS FOR PREVENTING ROTC ACCESS TO CAMPUS. . . .

Sec. 514 (b). DENIAL OF FUNDS FOR PREVENTING FEDERAL MILITARY RECRUITING ON CAMPUS — (1) No funds available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for any fiscal year may be provided by contract or by grant (*including a grant of funds to be used for student aid*) to a covered educational entity if the Secretary of Defense determines that *the covered educational entity has a policy or practice* (regardless of when implemented) that either prohibits, or in effect prevents —

(1) entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of Federal military recruiting; or

(2) access by military recruiters for purposes of Federal military recruiting to the following information pertaining to students

(c) EXCEPTIONS. — The limitation established in subsection (a) or (b) shall not apply to a covered educational entity if the Secretary of Defense determines that —

(1) *the covered educational entity has ceased the policy or practice* described in such subsection;

(2) the institution of higher education involved is prohibited by the law of any State, or by the order of any State court, from allowing Senior Reserve Officer Training Corps activities or Federal military recruiting on campus, except that this paragraph shall apply only during the one-year period beginning on the effective date of this section. (Pub. L. 104-208, The Omnibus Consolidated Appropriations Act of 1997, Title V, Section 514, reprinted at 10 U.S.C.A. § 503 note (emphasis added)).

The pertinent portions of SPA are aimed at vaguely defined school policies. Despite the captions which suggest otherwise, the SPA is not addressed primarily to schools who have barred military recruiters. Indeed, as the *City of Philadelphia* case (above) and the legislative history show (see below), universities to which the Defense Department sought access had already opened their doors to avoid loss of Defense Department grants and contracts, under legislation dating back to 1971. The SPA penalizes, by withholding non-Defense funds, schools who have “policies” that might in future bar military recruiters from their campuses, regardless of whether such access is in fact desired or sought. This is particularly relevant to VLS since the military had not even sought access to the campus for the ten years prior to enactment of the SPA. Complaint ¶ 32. In other words, without SPA, VLS’s policies did not affect military recruiting.

The device of using student financial aid to coerce policy changes was authored by Rep. Richard W. Pombo, and first introduced by him in H.R. 1118, the “ROTC Campus Access Act”, 141 Cong. Rec. H2584 (1995). That bill provided that universities with “anti-ROTC policies” would lose federal funds, “including a grant of funds to be available as student aid,” *id.* § 2 (a) This is the language subsequently carried into SPA.

The ROTC Campus Access Act was strenuously opposed, and the House took no action on it after it was referred to committee. Rep. Pombo then proposed the same language in an amendment to the military appropriations bill for Fiscal 1996, see 141 Cong. Rec. H5962, 5965 (June 14, 1995), but it again failed of enactment, presumably because of its use of unrelated student financial aid funds to coerce compliance with discriminatory military policies. A bill containing the requirement that universities give access to ROTC and military recruiters had been attached to a military appropriations bill as a condition on defense contract and grants, and in this form passed into law. National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-

337, Title V, § 558, codified at 10 U.S.C. § 503 note.) That law was limited to Defense Department Funds, and is not challenged here.

After failing to enact his politics as separate legislation, Rep. Pombo turned to appending his views to appropriations bills. His first try was with the predecessor to the act under challenge here, an amendment known as the Pombo-Solomon Amendment. The legislative history of the SPA begins with that Amendment:

MR. POMBO. I, along with my good friend, the gentleman from New York, Gerry Solomon, am offering this amendment today because I believe some of our institutions of higher education need to be put on notice that their policies of ambivalence or hostility toward our Nation's armed forces do not go unnoticed by this House. . . . Colleges and universities need to know that starry-eyed idealism comes with a price.

. . . .

MR. KINGSTON. Mr. Chairman . . . at Yale in order to take ROTC [a student] has to travel 65 miles twice a week during his junior and senior year to get to an ROTC room, because Yale University will not let them teach it on campus. Although if he wants to take a course called 'The Story of Incest' he can take that on campus.

MR. SOLOMON. Mr. Chairman, this Pombo-Solomon Amendment, this important amendment, would put an end to the hypocrisy that is running rampant on our Nation's college campuses. . . . Harvard and Yale blatantly discriminate against students willing to serve their country, and it is so aggravating to this Member. . . . We are not going to take this nonsense from academia. *They are going to let these ROTC students on their campuses* or they are not going to get a nickel from this Federal Government (141 Cong. Rec. 5962 et seq., June 14, 1995; see Complaint ¶ 25(b)) (emphasis added).

Rep Buyer, quoted in defendants' memorandum (Def. Mem. at 10), was speaking in favor of the Pombo-Solomon bill requiring universities to offer ROTC courses. Rep. Buyer furthermore made plain that the purpose of the Pombo-Solomon Amendment was to impose the policies of the new Republican majority in the House:

MR. BUYER. Mr. Chairman, I would say to my good friend from California

[Rep. Dellums], you did not fall asleep and wake up in a different country. We woke up to a new majority, I guess, here in the Congress.

MR. DORNAN. . . . [Agreeing with Rep Buyer:]I have had in my office fine young men and women, just what you were describing, the best young minds in our country, that have said to me, ‘Congressman, can you not make this university where my dad graduated, my grandfather, my mother, they have the major that I want to participate in, but I want ROTC available to me.’

If you look at it from the standpoint of students who are saying, why am I being denied this opportunity, I think quite honestly it cancels out the two-way fiduciary relationship that teachers and students have. (*Id.* at 5964.)

There is no mention of military recruiting, or access by military personnel to campuses, in the discussion of this bill. It was, in part, merely an affirmative action program for students who had chosen military careers, and who had allegedly suffered discrimination at the hands of elite universities. University policies that, instead of favoring such students, prohibited discrimination against female or openly gay students, were the impediment. Rep. Dellums said opposing the bill,

Let us also be aware that this is about compelling universities to respect the Department of Defense position that does not allow gay men and lesbians to serve openly in the service. This is also one of the targets of this amendment. (*Id.* at 5962.)

The target of the bill, in short, was university policies that protected students from discrimination based on sex and sexual orientation; in their place it was to substitute a policy of affirmative action for prospective service personnel. Any need for increased military access was disavowed by its co-sponsor, Rep. Solomon, who insisted that previous legislation cutting off defense funds to universities that in fact barred military recruiters — the “legislative background” that defendants repeatedly cite — had already solved the problem of access:

MR. SOLOMON. . . . When we passed the law several years ago that said military recruiters will be allowed on the campuses or they do not get any defense grants, do my colleagues know what they did? The colleges threw open their doors again. These recruiters are now on campuses. (141 Cong. Rec. 5964 (1995).)

Rep. Pombo's bill failed of enactment, and in the following session Rep. Solomon introduced it himself, considerably enlarged. It became the Solomon-Pombo Amendment, the act under challenge here; but Solomon's contribution to SPA is quite different from that portrayed by the defendants. Rep. Solomon made the coercive provisions of Pombo's bill, tying student financial aid to a change in school policy, applicable to all institutions of higher education, even including law schools and other institutions where ROTC programs were not possible. The demand became that all campuses must have policies friendly to military recruiters, even where recruiters had never sought access and where they had no need of access. Instead of seeking by lawful means to influence state and university policies, the sponsors of the Pombo-Solomon Amendment and its successor the SPA used the lever of student aid to coerce schools into restricting their protections for the civil rights of women and gay men, and offering affirmative action programs for prospective service members.

ARGUMENT

I. The Complaint States a Claim of the SPA's Invalidity

Whether considered as a "condition" on student financial aid programs, or more frankly and correctly as a regulatory measure which uses student aid as an enforcement tool, the Constitution provides no authority for the SPA as applied in this case. It is not properly a "condition" to a federal spending program that falls within Congress's spending power. Further, the SPA itself violates the due process and equal protection clauses of the Constitution.

A. The SPA is Not a "Condition" Attached to a Federal Spending Program, and So is Not an Exercise of the Spending Power

Congress has the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative

directives.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). This is known as the spending power. The general policy behind it is that government is not required to subsidize any particular activity it does not choose to. *Rust v. Sullivan*, 500 U.S. 172, 201 (1991). Presumably because the SPA does not fall within any of the government’s enumerated legislative powers, see below, the defendants seek to bring it within the capacious shelter of the spending power. Def. Mem. At 17. But there are limits on this power.

To qualify as a valid condition on a spending measure, the SPA must meet a stringent five-part test recently stated by the Supreme Court: (1) the spending measure it purports to qualify must itself be valid; (2) the condition must be unambiguous; (3) it must be related to the federal interest in the spending program; (4) no constitutional provision provides an “independent bar” to the condition; and (5) the alleged condition must not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’” *South Dakota v. Dole*, 483 U.S. 203, 206, 211.

According to defendants, “each of these elements [of the *Dole* test] is easily met here,” but they arrive at their conclusion without specifying the spending “program” that is said to be conditioned by SPA, and they conveniently omit to discuss the fifth criterion — that SPA may not be coercive. Only the first criterion in fact is met — the student financial aid programs that SPA targets are themselves valid spending programs which the plaintiffs wish to preserve, not contest. The remaining criteria are not met.

1. The SPA is Impermissibly Vague.

As to the second criterion for lawful conditions, the SPA is too vague to meet the *Dole* requirement that it be “unambiguous.” It threatens to cut off student aid when a school has a “policy” that would bar military recruiters in the future. Although as we have seen the true object here is campus nondiscrimination policies, the sponsors of the amendment evidently were

reluctant to say so, and left this vague provision. Defendants' regulations do not clear up the matter, but instead require the institution receiving aid to declare whether it has such a policy, 32 C.F.R. § 216.4(e)(3) (1998).

2. The SPA is Not Rationally Related to the Purpose of Student Financial Aid Programs.

The third criterion is still more widely missed. If SPA is a condition on a spending program, to what spending program is it supposed to bear a rational relation? The defendants make the vague assertion that SPA constitutes a condition imposed on "federal grants to institutions of higher learning," Def. Mem. at 19, but "federal grants to institutions of higher learning" generally are not a single program with definable purposes. If SPA is a valid exercise of the spending power, it can only be because it imposes a lawful condition on student financial aid funds appropriated to the Department of Education, the "grants of funds to be used for student aid" targeted by SPA § 514 (b).

SPA sanctions affect three such statutory aid programs, two of which are implicated in this suit: the Perkins Loan Program and the Federal Work Study Program. See Complaint ¶ 26; Def. Mem. at 5, Appendix A. The purposes of these two student aid programs are given in the statutes, and are generally to provide financial assistance to needy students:

[Federal Perkins Loan Program:] The Secretary [of Education] shall carry out a program of stimulating and assisting in the establishment and maintenance of funds at institutions of higher education for the making of low-interest loans to students in need thereof to pursue their courses of study in such institutions or while engaged in programs of study abroad for credit by such institutions. (20 U.S.C. § 1087aa.)

[Federal Work Study Program:] The purpose of this part is to stimulate and promote the part-time employment of students who are enrolled as undergraduate, graduate, or professional students and who are in need of earnings from employment to pursue courses of study at eligible institutions, and to encourage students receiving Federal financial assistance to participate in community service activities that will benefit the Nation and engender in the students a sense of social

responsibility and commitment to the community. (42 U.S.C. § 2751)²

The principal purpose of both programs is to benefit students who are in financial need by providing low-cost loans or local community-service employment. See *Student Government Assoc. v. Wilberforce Univ.*, 578 F. Supp. 935, 936 (S.D.Ohio 1983). The Federal Work Study Program moreover prohibits colleges from cutting off federal payments for community service work during the school year, for any reason other than that a student ceases to meet the financial need test; see *Wilberforce Univ.*, 578 F. Supp. At 937. SPA would require such cutoffs and, whenever the sponsoring school was unable to replace the lost funds, the student would be unable to pursue a course of study. Far from being rationally related to the purposes of the aid programs, to assist financially needy students, SPA seems designed to defeat them if necessary as a means of coercing schools into compliance.

The fundamental difficulty in finding a reasonable relation between the SPA and student aid programs is that the behavior required of schools has no relation to the benefit that the spending program seeks to bring to the students; nor can the students who are the object of the aid programs themselves comply with SPA. There is no real relation between the two, except that one is used to coerce behavior under the other. It is as if Congress were to condition student aid on a dean's making child support payments. The purpose is within Congress' spending power, and might be advanced by such legislation; but the means employed would nevertheless be beyond the power of Congress to enact.

²Military service is not among the forms of "community service" employment envisioned by the Work Study Program, as federal employers are barred from participating in the program.

The Supreme Court has allowed Congress to further its own political agenda only in those cases where the spending program is directly related to the political issue. In the hotly contested case of *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court allowed Congress to prohibit the use of family planning funds for programs in which abortion was a method of family planning. The Court made clear, however, that in *Rust*, “the government is not denying a benefit to anyone but is instead simply insisting that public funds be spent for the purposes for which they are authorized.” *Id.* at 196. In other words, the funds were to be used to solve the problem of family planning using methods other than abortion.

In contrast, the SPA has nothing to do with ensuring that public funds are spent as they were intended. It does exactly what the *Rust* court tried to avoid — denies a benefit to citizens to encourage compliance with an unrelated policy. It is, in essence, a penalty rather than a choice of expenditure.

In another abortion case, *Harris v. McRae*, 448 U.S. 197 (1980), the Supreme Court made the distinction even clearer. Congress, it said, could choose not to fund abortions; it could not choose to deny all federal money to those who had them: “A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion.” *Id.* at n.19. The SPA takes that extra step — instead of just withholding Department of Defense funds, it denies unrelated Department of Education need-based student financial aid.

The case concerning direct student loans, on which defendants principally rely, *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), is not to the contrary or even to the point. *Selective Service* was not a spending-power case. The statute in

question was part of the Selective Service law, and was treated by the Court as a regulatory measure, not a condition on spending, to encourage draft registration. It provided among other things that students who failed to register for the draft were barred from receiving direct federal Title IV loans. The Court held that this was a reasonable enforcement measure. The principal contention in the case was that the challenged statute was a bill of attainder, which cut off aid to students because of past behavior. The Supreme Court held that the statute was saved by a feature which is notably lacking in SPA — a student whose aid was threatened could come into compliance with the statute’s requirements, by registering for the draft. 468 U.S. at 850. With this feature in place the sanction — ineligibility for student loans — was held to be a rational means of encouraging draft registration. *Id.* SPA fails the third criterion, and is not rationally related to the purposes of student financial aid programs, for precisely the reason given in *Selective Service v. MPIRG*. Under SPA, aid designed for the benefit of needy students may be cut off without any reference to the student’s need and without the student having any opportunity to come into compliance with the “conditions” imposed on the aid.

3. The SPA is Not a Voluntary “Condition” But a Coercive Regulation

In truth, SPA is not a condition on funds given to schools to be expended in student aid programs; it is a thinly-disguised regulatory measure which holds student aid hostage in order to coerce certain behavior by Vermont Law School and others. The uncontroverted allegations of the complaint are that Vermont Law School has been coerced into complying with SPA. Ninety percent of its students require financial aid, and the aid of some needy students would be cut off during the present academic year if the school were to fail to comply with SPA, Complaint ¶ 11. The school is unable to replace the federal funds in question, and almost entirely depends on the tuition paid to it by the students who receive federal aid. A threat to such aid is plainly coercion

— and such coercion puts the statute outside the spending power. The statute therefore flunks the fifth and last criterion for a lawful condition: it applies compulsion, not the gentle pressure of a financial inducement. *Dole, supra*, 483 U.S. at 211.

Although the defendants fail even to mention that an alleged “condition” may not be coercive, they address the question of coercion in another setting, arguing that because the law school has *not* been coerced into compliance, its supposedly “free choice” to act as employment agent for defendants breaks the chain of causation between SPA and the injuries to the students that it causes. Def. Mem. ¶ 13 n. Whether the law school has been coerced is a question of fact, but defendants attempt to make it a rule of law that “coercion” consists of “substantial civil and criminal penalties, including imprisonment,” citing *Bennett v. Spear*, 520 U.S. 154 (1997). This begs the question whether a loss of \$400,000 per year in student aid funds amounts to a “substantial civil penalty” and is therefore coercion.

A case more closely on point is *Dole*, where highway funds were to be withheld unless the state raised the drinking age to 21. In this case only 5% of the funds in a single state highway program, an infinitesimal fraction of the state’s overall budget, were threatened. The Chief Justice held for the Court that the statute was constitutional partly because the conditioning of funds was in this case only a “mild encouragement” to the states and accordingly a valid use of the spending power. 483 U.S. at 212. SPA evidently falls somewhere between these two cases; whether it exerts coercion cannot be decided as a matter of law. The facts alleged by plaintiffs, however, would constitute coercion even judging by the standard of *Bennett*.

B. The SPA is Unconstitutional as a Regulatory Measure

The central difficulty of the SPA is that it uses student aid to coerce law school behavior. The students who are affected are themselves helpless to comply — it is the law school which

may allow or bar recruiters, a decision in which students have no direct role. Yet as the defendants' memorandum makes clear, the students will be subject either to discrimination or a loss of funds, depending upon what the law school does. This Hobson's choice is what makes the SPA coercive; as implemented by defendants it also denies the students who will be injured any procedural safeguards. The same fundamental flaw deprives the statute of the rationality required for the guarantees of due process and equal protection of the laws.

1. The SPA Deprives Students of Procedural Due Process

When defendant Department of Defense determines that a school has one of the disfavored "policies," the appropriate Assistant Secretary of Defense notifies the Department of Education of the determination, which in turn notifies the educational institution. The effect of this notice is as follows:

Federal Perkins Loan Program - An affected institution may not disburse to its students . . . any of its Federal Capital Contribution (FCC) or required institutional matching funds for the award year in which the effective date falls . . .

FWS Program - Generally, an affected institution may not pay any of its students . . . with any of the FWS allocation for the award year in which the effective date falls. . .³ ("Dear Colleague Letters," Def. Mem. App. A, p. 3.)

This appears to require that funds already awarded to students by the school may not be paid out, if the school's policies have failed of approval, and the funds have not yet been paid or earned. Perkins Loan and Work-Study funds may, of course, be replaced from other sources; but the allegations of the complaint are that the school cannot replace these funds, Complaint ¶ 28, and the affected students will be deprived of financial aid to which they are presently entitled and on which they depend.

³Omitted at the ellipses are provisions applying the fund cut-off to a unit of a university such as a law school which has a disfavored policy.

The defendants' regulations provide a mechanism for the school to challenge a determination to cut off aid funds by arguing that its policies comply with SPA; 32 C.F.R. § 216.5(b); but there is no comparable procedure for schools or affected students to seek exemption on the basis of need. The SPA, as administered, therefore deprives the students of procedural due process, for their existing benefits would be terminated without notice or an opportunity for hearing, *Goldberg v. Kelly* 397 U.S. 254 (1970); at worst, depending on circumstances, the SPA may be shown to be a Bill of Attainder. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984)(aid cut-off not bill of attainder because students could comply with registration requirement, become eligible for aid).

2. The SPA Lacks the Rational Basis Required for Due Process.

The Fifth Amendment provides that the federal government may not deprive any person of life, liberty or property without due process of law. U.S. Const., amend V. Subject to the restraints imposed by the Fourteenth Amendment, state law defines what is “liberty” or “property” and so is protected from federal invasion:

Because the Constitution protects rather than creates property interests, the presence of a property interest is determined by reference to “existing rules and understandings that stem from an independent source such as state law.” (*Philips v. Washington Legal Foundation*, 524 U.S. 156, ___, 1998 Lexis 4003, 12-13, (1998) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).)

The principal is the same with regard to liberty interests, which, like property are defined by state law, and which the states are responsible for protecting. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The authority given Congress by the Fourteenth Amendment is limited to remedial measures — Congress may expand liberties defined by state law, but may not contract them:

Such [federal] legislation [prohibiting discrimination by private parties] cannot

properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. (*In re Civil Rights Cases*, 109 U.S. 3, 13 (1883).)

The Supreme Court recently reviewed the principle of *The Civil Rights Cases*, in *City of Boerne v. Flores*, 521 U.S. 507, ___ (1997) Lexis 4035, 29-30 (1997). “Although the specific holdings of these early cases might have been superseded or modified,” the Court reaffirmed the principle that liberties are defined by state law, subject to constitutional minimums; the federal government may protect liberties but may not abrogate them, absent a grant of legislative authority in the constitution. 521 U.S. ____, 1997 Lexis 4035, 31. See also *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1995) (power of Congress to subject states to citizen suit limited to that granted in Fourteenth Amendment); *Brzonkala v. Virginia*, 1999 U.S. App. LEXIS 3457 (5th Cir. 1999) (Congress has no power to regulate purely private, non-commercial intrastate crime). The Tenth Amendment is no more than a reminder that liberty and property interests are primarily defined by state law, and that the federal government is not to meddle with them except in the necessary and proper exercise of its enumerated legislative powers.

The Tenth Amendment likewise restrains the power of Congress, but this is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the federal government is subject to limits that may, in a given instance, reserve power to the states. (*New York v. United States*, 505 U.S. 144, 156 (1992)) (provisions of Low-Level Radioactive Waste Amendments violate Tenth Amendment reserved powers; statute also coercive and hence not within spending or commerce power.)

The plaintiffs do not claim any “right” is created by the Tenth Amendment, as defendants argue; the plaintiffs do strongly urge that SPA is not within any of the enumerated legislative powers, because as applied in this case it does no more than force a restriction of civil rights

practices at a school. The Constitution nowhere gives the Congress the power to do this. The Congress has authority under the Fourteenth Amendment to enlarge civil liberties, but not to contract them. It has no authority to coerce schools to favor students who are considering a military career, or to discriminate against women and gay men in their employment services.

As the statute lacks any legitimate purpose or basis in the Constitution, this Court need not even consider whether the means employed bear any rational relation to its purposes, or whether some heightened level of scrutiny would be appropriate.

3. The SPA Denies the Female and Gay Male Students the Equal Protection of the Laws

Even if there were no substantive or procedural rights abridged by the SPA, it seeks to subject women and openly gay men to discrimination by their law school, and so deprives them of the equal protection of the law. While the courts have upheld the power of the military services to discriminate on the basis of sexual orientation within their own ranks, *Able v. United States*, 155 F.3d 628 (2d Cir. 1998), the Congress has no power to extend such discrimination into civilian life, against the laws and policies of the state, without adequate justification

The Due Process Clause of the Fifth Amendment contains an equal protection component which imposes limitations on Congress equivalent to those that the Fourteenth Amendment imposes on the states. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The principles involved are familiar: “The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike. . .” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). If a class of persons is subjected to governmental discrimination, the measures taken must be rationally related to a legitimate governmental purpose. *Id.* at 446.

In *City of Cleburne*, a city agency required a special use permit for a home for the

“mentally retarded,” and the Supreme Court found this application of the city’s zoning ordinance unconstitutional. Although the ordinance on its face might have had a number of legitimate purposes, the differential application of the ordinance to a home for the mentally retarded was unconstitutional:

Because in our view the record does not reveal any rational basis for believing that the Featherstone home would pose any special threat to the city’s legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case. (*Id.* at 448.)

In the present case, plaintiffs allege that there is no rational relation between the administration of SPA in their case and any legitimate government purpose. The allegations of the complaint are that the SPA has no effect on military recruitment at the law school, and that in these circumstances the SPA — like the ordinance in *Cleburne* — is based merely on private prejudice and hence lacks a rational basis. “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” *Id.* at 446, quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Once again, however, even if the SPA were found as a matter of fact to be a recruitment measure, the aid cut-off used to enforce it penalizes all students, even those who plan military careers, and none of the students can effectuate its purpose; there is hence no rational relation between the administration of the statute and its alleged purposes.

II. The Plaintiffs Have Standing to Assert the Invalidity of SPA on Behalf of Their Student Members

The central question in this case is whether the defendants had sufficient justification for causing the injuries described in the complaint, and accordingly was addressed first.

The defendants’ claim that the plaintiff organizations lack standing to seek redress for the students’ injuries requires little discussion; the defendants’ argument is supported by unwarranted assertions of fact, and by boilerplate arguments not relevant to this case.

A. Plaintiffs Have Standing to Assert the Rights of their Student Members

The three plaintiff organizations have standing to assert the rights of their student members who have been injured, *Automobile Workers v. Brock*, 477 U.S. 274, 282-282 (1986) (labor union had standing to challenge employer guidelines for workers' benefits), as the injuries stemming from invidious discrimination fall within the alleged area of interest of the organization, Complaint ¶¶ 4-6; 477 U.S. at 282. It is not clear from defendants' memorandum in what respect they believe the allegations of the complaint are deficient; it should not be necessary to allege that some of the members of the Women's Law Group are women, or that some of the members of the Alliance of Lesbian, Gay, Bisexual, Transgendered, and Straight Students are lesbians and gay. The defendants imply that an individual plaintiff should have been named, but the plaintiffs seek a declaration that the SPA is invalid, and an injunction against defendants; neither the claim stated nor the relief sought requires an individual plaintiff, and accordingly no individual need be named in the complaint to secure standing for the organization; *United Food & Commercial Workers Union v. Brown Group*, 517 U.S. 544, 556-558 (1996). If individual witnesses are required at trial, of course, they will be offered, but the proper method to obtain their names is through discovery, not a motion to dismiss.

B. The Students' Injuries are Concrete and Particularized

The stigmatism of discrimination is a cognizable injury, in itself, and persons who are "personally denied equal treatment" — as the students are — have standing to challenge the legislation which causes the injury. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984)). In *Abington v. Schempp*, the Supreme Court held that schoolchildren had standing to challenge laws requiring Bible reading in the public schools because they were "directly affected by the laws and practices against which their complaints are

directed. These interests surely suffice to give the parties standing to complain.” 374 U.S. 203, 224 n.9 (1963).

The student members of plaintiff organizations have suffered other concrete and particularized injuries because of the diversion of law school resources. Complaint ¶ 36(c). A drain on an organization’s resources is a sufficient injury to confer standing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In *Havens* a counseling and referral service had standing to challenge a landlord’s discrimination against potential tenants, because of the drain on the counseling service’s resources. The drain of resources was more than a simple setback to abstract interests, it was a concrete and demonstrable injury that conferred standing. *Id.* The draining of law school resources to which the students were entitled, in order to act as defendants’ employment agent, not simply to comply with generally applicable statutory regulations, similarly gives the students in this case standing to challenge the SPA. *Gay and Lesbian Law Students Assoc. v. Board of Trustees*, 256 Conn. 453, 673 A.2d 484 (1996). In the latter case, a student organization complained of injuries resulting from the presence of JAG recruiters on the University of Connecticut campus. Applying the federal test for standing established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) the Court held that the plaintiff organization had standing:

The infringement of the rights of the plaintiff’s members under the Gay Rights Law was concrete and particularized as well as actual and imminent. The members had been denied equal placement opportunities because the career services office had allocated resources to the military, which could not, regardless of their abilities and talents, hire them. . . . 236 Conn. 453, 466-7, 673 A.2d 484, 491.

It might be said here, as the Court stated in *Gay and Lesbian Law Students*, “This case is a far cry from the attenuated claim in *Lujan*. . . upon which the defendants exclusively rely.” *Id.* at 467, 673 A.2d 484, 492.

Finally, Vermont civil rights law gives the students a right of action if they suffer discrimination in the law school, whether it is acting in its capacity as a place of public accommodation, or whether the school is acting as defendants' employment agent. 9 V.S.A. §§ 4501(1), 4502(a); 21 V.S.A. § 495(a); Complaint ¶¶ 15-18.

Persons subject to Vermont jurisdiction have a right to be free from the interventions of third parties, like the defendants, into private contracts where the intervention results in employment discrimination that is contrary to a strong state policy. *Payne v. Rosendahl*, 147 Vt. 488, 520 A.2d 586 (1986). Unless protected by some defense, therefore, defendants have violated a legally cognizable right of students to be free from discrimination against them by the law school.

C. Plaintiffs' Injuries are Cognizable in Federal Law

The unjustified injuries to the liberty and property interests of the students summarized above are forbidden by the Fifth Amendment, unless the SPA provides an adequate legal justification, which plaintiffs claim that it does not. U.S. Const., amend. V; *Davis v. Passman*, 442 U.S. 228, 242 (1979) (sex discrimination in federal employment violates Fifth Amendment; Court will "presume that justifiable constitutional rights are to be enforced through the courts").

The right to be free from invidious sex discrimination in a place of higher education, moreover, is recognized by the Education Amendments of 1972, Title IX, 20 U.S.C. §§ 1691 et seq. Schools supported by federal funds, as Vermont Law School is (Complaint ¶ 27), may not create a learning environment that is made hostile to plaintiffs by reason of their sex. See Dep't of Educ., Office of Civil Rights, "Sexual Harassment Guidance," 62 Fed. Reg. 12034 (1998).

D. The Students' Injuries are Fairly Traceable to Defendants' Administration of SPA

Defendants do not deny that the law school is acting as their agent. At their request the school plays host to their recruiters, provides other services and notifies the students of the availability of military employment opportunities, as alleged in the complaint. Complaint ¶ 17. Defendants' claim that the law school's acts, and the injuries they cause, are not fairly traceable to the defendants therefore verges on the frivolous. Defendants do not and cannot cite any case that immunizes the federal government from the acts of its agents. Whether or not the law school is acting voluntarily or under compulsion is irrelevant to the plaintiffs' standing. The cases cited to the contrary by defendants concern situations in which injuries were caused by institutions following the general requirements of statute law. Def. Mem. 12-13. Even in such situations — not relevant to the present case — plaintiffs were held to have standing to challenge federal administration of a federal law, if the behavior of a third party that stood last in the line of causation was not voluntary but coerced. *Bennett v. Spear*, 520 U.S. 154 (1997). As the law school's behavior was coerced, Complaint ¶ 30, the plaintiffs clearly have standing to bring an action directly against federal defendants, and are under no obligation to bring a futile suit against the law school.

E. Plaintiffs Do Not Assert Vermont Law School's Rights

Defendants claim that the subject of this suit is the law school's supposed right to be free of coercion. This is not correct. Whatever rights the law school may have under the First Amendment need not be explored here; we do not doubt that Vermont Law School is amply able to assert them. This challenge narrowly addresses the rights of the students — separate and distinct from those of the law school. The defendants evidently wish to draw some implication from the law school's failure until now to join the suit as a party plaintiff. Aside from its

irrelevance, the implication is unwarranted; attached as Appendix A is the law school's statement of support for the position taken in this court by the plaintiffs.

F. The Plaintiffs Have Standing to Assert the SPA is Invalid Under the Tenth Amendment

The Second Circuit and other courts of appeal have recently addressed on their merits Tenth Amendment claims brought by individual plaintiffs. Contrary to the defendants' repeated assertions, the courts have not questioned standing in cases like the present suit, in which plaintiffs assert that a statute lacks constitutional authority, and that hence its application to them deprives them of due process of law. *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998) (due process and Tenth Amendment challenge to enforcement of federal Violence Against Women Act of 1994); *United States v. Stephan Paul Doll von Foelkel*, 136 F.3d 339 (2d Cir. 1998)(same); *United States v. Wright*, 128 F.3d 1274 (8th Cir. 1997)(same).

III. Factual Questions Cannot be Decided by a Motion to Dismiss

This challenge has been brought as a motion to dismiss the complaint, presumably under Fed. R. Civ. P. 12(b)(6). This Court must deny the motion unless "it appears beyond doubt that the plaintiff can prove a set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) (quotations omitted). In deciding whether such facts exist, the court must take "as true the facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994).

As the foregoing makes clear, essentially all of the questions in this case are factual — the students' injury in fact, the purpose and effect of the SPA as applied in this case, its validity in these circumstances. These questions may not be foreclosed by the defendants' bald assertions or the citation of general principles of law. In fact, unless the defendants are able to disprove the

facts asserted by the plaintiffs, the plaintiffs should prevail in their contentions that the SPA is invalid and unconstitutionally infringes on their rights.

CONCLUSION

The SPA's purpose is to alter school civil rights policies. The SPA induces and compels Vermont Law School to discriminate against its female and gay male students in the provision of career services, to the injury of the student members of the plaintiff organizations. Student financial aid is used to coerce the school's compliance, but the students whose aid is threatened cannot themselves comply with the statute. This fundamental irrationality fatally mars the SPA. SPA accordingly is not a valid "condition" on federal spending, but a regulatory measure that lacks any rational basis, barred by the Fifth and Tenth Amendments to the Constitution. The plaintiffs have standing to assert the rights of their injured student members, and the invalidity of the SPA which is the source of the injuries. The defendants' motion to dismiss therefore must be denied.

Dated at Burlington, Vermont, this 14th day of May, 1999.

ALLIANCE OF LESBIAN, GAY, BISEXUAL AND TRANSGENDERED STUDENT; THE WOMEN'S LAW GROUP; AND THE EQUAL JUSTICE FOUNDATION.

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