No. 04-1152

In the Supreme Court of the United States

Donald H. Rumsfeld, *et al.*

Petitioners,

v.

Forum for Academic and
Institutional Rights, Inc., *et al.*,

Respondents

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

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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SUMMARY OF ARGUMENT

Cognizant of the level of briefing the Court will be offered in this matter, *amicus* National Lawyers Guild writes separately for a limited purpose. This brief attempts to underscore the significance of the message that is communicated when a school chooses either to abide by or to abandon its non-discrimination policy. It further seeks to provide an appropriate context for evaluating this form of speech.

Law schools are involved in an historic effort to improve the profession's understanding of equality and what it means to conduct oneself in an ethical and responsible manner. Most have concluded that discrimination on the basis of sexual orientation is an unacceptable form of bigotry, and that the school should not associate with anyone who discriminates on that basis. The government must not be permitted to aggressively insert itself into that important debate by forcing law schools either to regress their understanding of the meaning of non-discrimination or to fail to live up to those principles.

INTERESTS OF *AMICUS CURIAE* [1]

The National Lawyers Guild has student chapters at over one hundred law schools, as well as thousands of members who are law professors and legal practitioners. The Guild represents the progressive arm of the profession, and has been advocating for a broader understanding of equality since it was founded in 1937 as the nation's first racially integrated national voluntary bar association. When the Guild formed its Lesbian, Gay,

[1] All parties consent to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution for the preparation or submission of this brief.

Bisexual and Transgender Committee many decades ago, this was an unusual step in professional associations, and allowed the Guild to publish some of the first treatises on legal issues related to sexual orientation and to continue its work in advancement of a more open and equitable society. The NLG frequently represents LGBT activists and people who have been subjected to unlawful discrimination, and it includes among its members LGBT law students, lawyers, and other legal professionals.

ARGUMENT

I. INTRODUCTION

This case strikes at the heart of some of the most significant ethical challenges presently facing law schools and the profession generally. Lawyers play a critical role in a society that is reevaluating conceptions of equality including its prejudices concerning who is worthy of holding some of the most powerful positions within it, such as lawyers and jurists, who hold a share of the monopoly on the official means for the administration of justice.

The law school experience offers opportunities for the profession to go beyond practical preparation of students for the practice of law, in order to explore and declare not only what the law is but what principles are important to this profession. These principles include an abiding commitment to using law for social good, expansion of opportunities to all, elimination of prejudice, and a dedication to acting ethically and in accordance with one's word.

Through the Solomon Amendment, the government seeks to dictate to academics and legal scholars what they must proclaim to stand for, as well as what law students will experience as they embark on this profession. The Solomon Amendment requires schools to

demonstrate a lack of commitment to principles of non-discrimination or to suffer a loss of vast sums that most schools need in order to carry out their mission. As a practical matter, all but at most a handful of students would have no choice but to attend a law school that does not apply its non-discrimination policy uniformly.[2]

II. THE HISTORIC IMPORTANCE OF NON-DISCRIMINATION POLICIES AND PRACTICES

The gradual incorporation of people who are lesbian, gay, bisexual or transgender (LGBT) into law schools and the legal profession is not occurring in an historical vacuum. Society and the profession now

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[2] If student expenses were to increase to replace federal funding to the school, countless students would find the tuition and fee portion of a university's operating budget to be beyond their means. *See* College Board, *Trends in College Pricing* (2003) at 3, *available on* http://www.collegeboard.com/prod_downloads/press/cost03/cb_trends_pricing_2003.pdf (noting that colleges increase tuition and student fees to replace reductions in governmental funding). The National Institute of Health alone awards billions of dollars each year to universities, with fifty-two schools receiving more than $100,000,000 each last year. *See* National Institute of Health, "NIH Awards to Domestic Institutions of Higher Education by Rank, FY 2004," *available on* <http://grants1.nih.gov/grants/award/trends/dheallinst04 .htm>. The Solomon Amendment would of course forbid funding from other federal agencies as well. "When the Air Force informed the University of Southern California (USC) in May 2002 that USC was not in compliance with the Solomon Amendment, the Air Force stated that 'denial of funding would result in the loss of approximately 300 to 500 million dollars in federal funding to the University.' Yale was told it would lose $350 million. The University of Pennsylvania could have lost $800 million. Harvard estimated a loss of $328 million. For the 2002-2003 academic year, the University of California, Santa Barbara received approximately $91 million, roughly seventy percent of its research budget, from federal funding. A Boston Globe article in November 2002 estimated that the threat of loss to Columbia, Harvard and Yale combined was $1 billion." Lindsay Gayle Stevenson, *Note & Comment: Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 Loy. L.A. L. Rev. 1331, 1354-55 (2004) (footnotes omitted).

celebrate the expansion of opportunities, including the ability to practice law, to various historically underrepresented groups including women and people of color. This, of course, was not always the case, and the legal profession was not always on the right side of history.

We need not look far back in history to find different attitudes concerning both critical social issues and the law's relationship to them. As this Court has observed:

> There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. . . . Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 896-97; 112 S. Ct. 2791, 2830-31; 120 L. Ed. 2d 674 (1992).

Until relatively recently, law schools reflected the then-prevailing societal attitude that women should remain in the home, and the fear that their entry into the profession would undermine traditional roles:

> When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common

> Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said . . . .
>
> A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although
>
> > "[t]he faculty . . . never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" *The Nation*, Feb. 18, 1925, p. 173.

United States v. Virginia, 518 U.S. 515, 543-44 (1996) (all except first alteration in original).

Law schools did not readily open their doors to African Americans, either. In this respect, major "firsts" important in professional development did not happen until well into the 20th Century. "In 1921, three men simultaneously became the first African-Americans to serve on law reviews: Jasper Alson Atkins (Yale), Charles Hamilton Houston (Harvard), and William Edwin Taylor (Iowa). In 1924, Clara Burrill Bruce became the first African-American woman on a law review (Boston University)." Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 Stan. L. Rev. 161, 166 (1994). Moreover, while a select few enjoyed a legal education at the most prestigious and progressive schools, as late as "1939, many law schools set the quota for blacks at zero.

Thirty-four of the eighty-eight accredited law schools had policies excluding blacks." *Id.* at 167.

This history discomforts us. We wish our history were otherwise, that enlightened minds had always carried the day in learned professions. Nevertheless, we take pride in the development of the profession's views, which is as much a result of social change as legal analysis.

As described next, attitudes concerning the role and place of LGBT law students likewise are undergoing development in a very significant way at this time. The government should not be allowed to hold back that development.

III. SEXUAL ORIENTATION DISCRIMINATION AND THE CHANGING NON-DISCRIMINATION POLICIES

In his dissent in *Romer*, Justice Scalia referred to a "lawyer class" and a "law-school view of what 'prejudices' must be stamped out." *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (citations omitted). He accused the Court of improperly imposing upon other parts of society its view of what was unacceptable discrimination. Here, however, the government seeks to impose upon the law schools its views regarding acceptable prejudices. The law school community is entitled to develop its own views on this matter and determine that certain prejudices are not acceptable on the law school campus, without coercive interference by the government.

Law schools, in conjunction with both incoming and established members of the profession (including *amicus*), remain in the process of confronting their relationship to and involvement in discrimination against various groups. The discussion above concerning race

and sex discrimination is a history repeated with regard to LGBT lawyers and law students.

For example, in 1972 the Lambda Legal Defense and Education Fund sought approval as a legal assistance corporation in New York. "[T]he Appellate Division denied and dismissed the application." *In re Thom*, 33 N.Y.2d 609, 612; 301 N.E.2d 542, 544; 347 N.Y.S.2d 571, 573 (N.Y. 1973). The New York Court of Appeals reversed. *Id.* Still, on remand the Appellate Division struck one of the organization's stated purposes, which is particularly noteworthy for purposes of the issue under consideration:

> We do not deem it appropriate to lend our approval to paragraph (g) [of Lambda's charter]: "to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing assistance to such students after admission to law school."

Id. at 42 A.D.2d 353, 354; 350 N.Y.S.2d 1, 2 (N.Y. App. Div. 1973).

Such resistance to openly gay law students was commonplace and persistent, but attitudes gradually changed. Various professional associations began to include sexual orientation as a prohibited basis for discrimination – and they considered that their association with anyone who failed to do so reflected poorly upon them. *See e.g.* Executive Committee of the Association of the Bar of the City of New York, *Discriminatory Admission Policies*, *available on* <http://www.abcny.org/AssociationGovernance/SelectedResolutions.htm) (declaring "the policy of the Association that none of its meetings and no meetings of its officers, committees or staff be held at clubs whose admission policies are known, or are publicly acknowledged, to be

discriminatory on the basis of sex, color, race, religion or national origin, disability, age, marital status or sexual preference.")

Law schools, of course, came to similar conclusions. Today, essentially all law schools prohibit sexual orientation discrimination by school officials and by anyone receiving the benefits of school-sponsored programs. *See* Bylaws of the Association of American Law Schools, § 6-3, *available on* <http://www.aals.org/bylaws.html> (requiring all member schools to adopt policies prohibiting discrimination on the basis of sexual orientation); Executive Committee Regulations of the Association of American Law Schools, § 6-3.2, *available on* <http://www.aals.org/ecr> (requiring member schools to extend placement assistance or use of school facilities only to employers that comply with such nondiscrimination policies).

Considerable scholarship exists today discussing the continuing challenge to law schools (and other educational institutions) that wish to take seriously a commitment to rooting out prejudices against LGBT members of the community. *See e.g.* Michael R. Siebecke, *To be or Not To Be ... Out in the Academy*, 22 Law & Ineq. J. 141 (2004); Kristian Miccio, *Closing My Eyes and Remembering Myself: Reflections of a Lesbian Law Professor*, 7 Colum. J. Gender & L. 167 (1997); Scott Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students*, 14 Law & Ineq. J. 555 (1996); *see also* Lisa W. Loutzenheiser and Lori B. MacIntosh, *Citizenships, Sexualities, and Education*, 43 Theory Into Prac. 151 (2004); K. Kumashiro, *Troubling Intersections of Race and Sexuality: Queer Students of Color and Anti-Oppressive Education* (2001); Barbara C. Wallace, *A Call for Change in Multicultural Training at Graduate Schools of Education*, 102 Tchrs. College Rec. 1086 (2000).

In short, many members of the legal profession have concluded that discrimination on the basis of sexual orientation is an unacceptable form of bigotry. They further have concluded that it is unseemly to associate with organizations that discriminate against LGBT students, specifically by offering discriminatory employers use of law school facilities and access to school-sponsored recruitment programs. This is consonant with the profession's ongoing efforts to define and practice principles of equality, and is in the finest tradition of protected political expression.

Through the Solomon Amendment, the government seeks to insert itself into this process and coerce the law school community into either regressing its understanding of the principle of "non-discrimination" or failing to put those principles into practice. This brief next addresses the communicative nature and free speech implications of such a change or abandonment of non-discrimination policies.

IV. A SCHOOL'S COMMITMENT TO NONDISCRIMINATION IS JUDGED ACCORDING TO ACTION MORE THAN EMPTY STATEMENTS.

The response of students and other members of the law school community is instructive when considering the consequence of a school's decision to enforce or not enforce its stated non-discrimination policy.

As one law professor publicly noted, "students may justifiably question the institution's commitment to non-discrimination when they observe it violating its own policy." Shannon P. Duffy, *Law Professors, Students Sue Defense Department,* The Legal Intelligencer, Oct. 2, 2003 (quoting University of Pennsylvania Law Professor Stephen Burbank).

A law student wrote in her law review note that, "[t]he government requires the university to convey a message of partial nondiscrimination by forcing the school to choose its policy or hundreds of millions of dollars in federal funding. . . . The statement 'non-discrimination usually' is quite different from the statement 'non-discrimination always.'" Lindsay Gayle Stevenson, *Note & Comment: Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 Loy. L.A. L. Rev. 1331, 1366-67 (2004).

Amicus National Lawyers Guild includes among its members students in organized chapters at over one hundred law schools, as well as law professors and others actively involved in the law school community. Law students today are extremely interested in their schools' commitment to principles of equality and non-discrimination.

Law students infer a troubling message when a discriminatory employer is permitted to recruit through a school-sponsored program. This can lead to confusion, a sense of anger or duplicity, or a desire to counter the message that has been sent by the administration. As a result, law school campuses are the sites of frequent demonstrations by students, faculty and staff who oppose administration policies and practices designed to comply with the Solomon Amendment. *Amicus* offers a few brief selected examples: [3]

- On March 24, 2005, students at the University of the District of Columbia School of Law held a demonstration against military recruitment on campus. Literature circulated in support of the event declared that "[t]he presence at [this school]

[3] The following relates actions by *amicus* itself, documentation of which is on file with counsel.

of recruiters from the Armed Forces is . . . an affront to the principles that the institution holds dear."

- Students at Northeastern School of Law protested during military recruitment and wore buttons supporting full enforcement of the school's non-discrimination policy in 2003. In February 2005, they gagged themselves and distributed flyers in opposition to military recruiting on campus.

- Students at Oklahoma City University Law School issued a statement in 2005 calling upon the administration to take a number of actions, and expressly "recognizing the conflicting interests that Oklahoma City University faces in providing affordable education to students of limited means (through federal financial aid that is contingent on compliance with Solomon) and its stated desire to provide a non-discriminatory equal-opportunity environment."

Although some have suggested that the Solomon Amendment does not implicate free speech concerns because a school is free to "say" whatever it wishes even as it lets discriminatory employers on campus, that third-party-constructed tidy characterization of a school's actions simply does not ring true.

First, as a practical matter, it is inaccurate. The law students' protests against their schools and against the Solomon Amendment represent a visceral reaction to seeing their schools facilitate the goals of a discriminatory employer, which undermines any proclamations of commitment to equality that the schools may offer. Today one might summon the cliché that actions speak louder than words, while the celebrated statesman-philosopher Salon was fond of saying that "speech is the mirror of action." Diogenes Laertius, *Lives*

of Eminent Philosophers 59 (R.D. Hicks, trans., Harv. Univ. Press 1991) (c. 594 B.C.). A cliché and an ancient reference are appropriate here because what is at issue is a simple truth: one communicates through action, and is judged by others accordingly. To say that compelling a school to suspend its non-discrimination policy is not a form of compelled speech is to ignore both the wisdom of the ages and basic common sense.

Second, it is inconsistent with legal principle to suggest that freedom of speech is not offended by the Solomon Amendment because others will know that it is not the schools' true views that are being communicated when it welcomes a discriminatory employer on campus. The irrelevance of such an argument has been plain from the first development of the compelled speech doctrine, when the Court considered a compulsory flag salute:

> It is not clear whether the regulation contemplates that pupils forgo any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by gesture barren of meaning. . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left open to public authorities to compel him to utter what is not in his mind.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943).

Likewise, this Court held that newspapers cannot be compelled to publish replies of political candidates, even though obviously the public would know that it was the newspaper's first editorial, and not the one submitted by the opposing candidate that the paper would be legally

required to publish, that reflected its true views. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Of course, this Court also struck down, on First Amendment grounds, a law that required only "the passive act of carrying the state motto on a license plate." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

The non-discrimination policies at issue here declare that the school does not discriminate on the basis of sexual orientation and does not associate with or facilitate employer recruiting by those who do so discriminate. The Solomon Amendment requires schools to send a contrary message; to fail to comply with its own policies. By all logical and legal reasoning, and especially in the context of the historic importance of developing attitudes and practices concerning discrimination, this constitutes extremely significant expressive communication.

V. THE GOVERNMENT MUST NOT BE PERMITTED TO INTERFERE WITH LAW SCHOOLS THAT ARE ENGAGED IN THIS HISTORIC EXPANSION OF OPPORTUNITIES AND REEVALUATION OF THEIR UNDERSTANDING OF AND COMMITMENT TO PRINCIPLES OF EQUALITY.

We are "a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state." *Alexander v. United States*, 509 U.S. 544, 575 (1993) (Kennedy, J., dissenting). As discussed above, law professors, school administrators, and other members of the law school community are in the process of rethinking not only the predominant conceptions of equality but what actions a professional ought to take when confronting a situation that she or he believes is inconsistent with principles of equality. This process is at the core of what the First Amendment protects.

The Court has long recognized that the importance of allowing thoughts to develop and to be acted upon without governmental interference is most acute in an academic setting. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. '[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.'" *Shelton v. Tucker*, 364 U.S. 479 , 487 (1960) (*quoting Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

This is so because schools provide cherished opportunities to reflect upon what has become orthodox and, through thought and action, progress beyond notions that properly should be abandoned. Social progress is slow and difficult, and venues incubating its development are not places for the heavy hand of government. "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (interpreting the right of privacy in light of cases establishing "the right to educate one's children as one chooses," and the "freedom of inquiry, freedom of thought, and freedom to teach – indeed, the freedom of the entire university community") (*citing Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959), 112; *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964)).[4]

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[4] *Amicus* notes that cases upholding non-discrimination laws do not help the government's case here. The Civil Rights Act and similar statutes exist because of the freedom on the campus and elsewhere to challenge then-prevailing views of the meaning of equality, as discussed above. Legislation codifying these new understandings and efforts to eliminate discrimination are of course compelling governmental interests. *See e.g. Grutter v. Bollinger*, 539 U.S. 306 (2003). The Solomon Amendment is at direct odds with this process.

VI. CONCLUSION

Law school non-discrimination policies that include sexual orientation represent an important expansion of opportunities as well as serious intellectual and practical exposition on the foundational principle of equality. In requiring schools to abandon their non-discrimination policies, the Solomon Amendment imposes government into this historic process. It would require that schools either pull back from this important social development or, perhaps worse still, act inconsistently with those avowed principles. Either is an extremely dangerous proposition, and inconsistent with the First Amendment. This Court should affirm the holding of the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

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