IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN B. BURBANK, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 03-5497 JF
	)	
DONALD H. RUMSFELD, Secretary of Defense In his Official Capacity,	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of the consent motion of the American Association of University Professors for leave to file a brief *amicus curiae* in support of plaintiffs in the above-captioned case, it is hereby **ORDERED**, that the motion is **GRANTED.** The clerk is hereby directed to file the brief.

_____
United States District Judge

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DONALD H. RUMSFELD, Secretary of Defense In his Official Capacity,	)	
	)	
Defendant.	)	
	)	

CONSENT MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

The American Association of University Professors ("AAUP") hereby moves this Court for leave to participate as *amicus curiae* in support of the plaintiffs in this case and to file the attached brief in this action. In support of this motion, AAUP states as follows:

1. AAUP is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines, including law, dedicated to advancing the interests of higher education. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work.

2. The Association's members include both faculty members and academic administrators on the campuses of public and private law schools and other institutions of higher education throughout the country, including Pennsylvania.

3. One of AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of university life. The *1940 Statement of Principles on Academic Freedom and Tenure* ("*1940 Statement*") was developed by AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by over 180 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents & Reports 3 (2001 ed.).

4. AAUP seeks to participate as *amicus* solely to address the issues of First Amendment academic freedom that may arise in this case. AAUP recognizes that the parties to this case have argued other issues, such as whether or not the law school is currently in compliance with the requirements imposed by the Department of Defense under the Solomon Amendment. AAUP takes no position on those issues.

5. This case raises important issues of First Amendment academic freedom, and AAUP respectfully submits that its brief will assist this Court should it find it necessary to decide these issues.

6. All parties have consented to AAUP's submission of this *amicus* brief.

7. No party will be prejudiced by AAUP's participation as *amicus,* and AAUP's submission of this brief will not delay resolution of this action.

WHEREFORE, AAUP respectfully requests that this Court grant it leave to participate as *amicus curiae* in support of the plaintiffs and to file the attached brief.

Respectfully submitted,

Laura A. Biancke
Piper Rudnick LLP
3400 Two Logan Square
18th and Arch Streets
34th Floor
Philadelphia, PA 19103-2762
(215) 656-3301

John L. Moore, Jr.
Piper Rudnick LLP
1200 Nineteenth Street, NW
Washington, DC 20036
Office: (202) 861-3953
Fax: (202) 223-2085

Ann D. Springer
American Association of University Professors
1012 Fourteenth Street, NW
Washington, D.C. 20005
(202) 737-5900

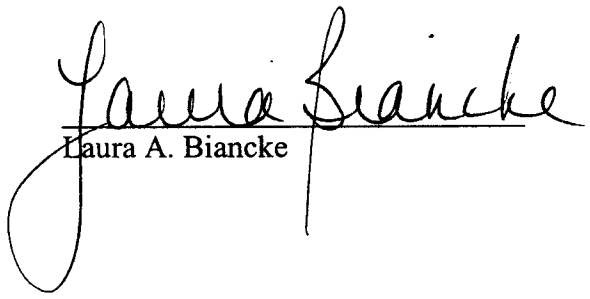
CERTIFICATE OF SERVICE

I, Laura A. Biancke, hereby certify that on February 2, 2004, I caused a copy of the foregoing Brief of Amicus Curiae American Association of University Professors to be served, via first-class mail postage prepaid, upon:

Peter D. Keisler
Patrick L. Meehan
Vincent M. Garvey
Cedric Bullock
Mark T. Quinlivan
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7128
Washington, DC 20530

David Rudovsky
Kairys, Rudovsky, Epstein & Messing
924 Cherry Street, Suite 500
Philadelphia, PA 19107

Kermit Roosevelt
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104



Laura A. Biancke

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Ann D. Springer
Donna R. Euben
American Association of
University Professors
1012 Fourteenth Street, N.W.
Suite 500
Washington, DC 20005
(202) 737-5900

Laura A. Biancke
PIPER RUDNICK LLP
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

John L. Moore, Jr.
PIPER RUDNICK LLP
1200 Nineteenth Street NW
Washington, DC 20036
(202) 861-3900

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Washington, DC 20005
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PIPER RUDNICK LLP
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John L. Moore, Jr.
PIPER RUDNICK LLP
1200 Nineteenth Street NW
Washington, DC 20036
(202) 861-3900

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INTEREST OF AMICUS CURIAE

The American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines, including law, dedicated to advancing the interests of higher education. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. AAUP has participated before the U.S. Supreme Court and the U.S. Court of Appeals for the Third Circuit in cases raising important legal issues in higher education. *See, e.g., Grutter v. Bollinger,* 123 S. Ct. 2325 (2003); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins,* 389 U.S. 54 (1967); *Skehan v. Bd. of Trustees of Bloomsburg*, 75 F.2d 72 (3d Cir. 1982); *Kunda v. Muhlenberg College,* 621 F.2d 532 (3d Cir. 1980). The Association's members include both faculty members and academic administrators on the campuses of public and private law schools and other institutions of higher education throughout the country, including Pennsylvania.

One of AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of university life. The *1940 Statement of Principles on Academic Freedom and Tenure* ("*1940 Statement*") was

developed by AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by over 180 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents & Reports 3 (2001 ed.) (hereafter "AAUP Policy Documents"). The *1940 Statement* is the country's fundamental, most widely-accepted description of the basic attributes of academic freedom and tenure, and has been cited by the Supreme Court. *See, e.g, Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). The *1940 Statement* makes clear the importance of academic freedom in furthering the common good and reminds those in academia that our profession and our institutions are judged by our actions as well as our utterances. It recognizes both the importance of individual academic freedom for the faculty in research, scholarship and teaching, and the importance of the faculty's role in constructing an appropriate educational environment as both "citizens, members of a learned profession, and officers of an educational institution." *1940 Statement* at 4. AAUP's statement *On the Relationship of Faculty Governance to Academic Freedom* elaborates on these issues, noting both that "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked," and that "the faculty should have primary

authority over decisions about such matters [as] . . . the maintenance of a suitable environment for learning . . . ." AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, AAUP Policy Documents 224, 225, 227. It is these central tenets, in addition to the AAUP's 28-year adherence to its 1976 policy *On Discrimination* — which commits "[t]he Association to . . . take measures . . . against . . . discrimination including, but not limited to, [discrimination on the basis of] sexual orientation" — that are the basis for AAUP's interest in this case. AAUP, *On Discrimination,* AAUP Policy Documents 185.[1]

ARGUMENT

I. THE SUPREME COURT RECOGNIZES THAT ACADEMIC FREEDOM IS PROTECTED BY THE FIRST AMENDMENT.

The Supreme Court has long treated academic freedom as a matter of constitutional importance. *See Board of Regents v. Southworth,* 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring) (citing cases). From the Court's first explicit recognition of the distinctive right to academic freedom in *Sweezy v. New Hampshire,* 354 U.S. 234 (1957) to its opinion only last Term in *Grutter v.*

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[1] In this brief, AAUP addresses only the academic freedom issues raised by this case. AAUP hopes that its views will assist the Court should it find it necessary to

(footnote continued to next page)

Bollinger, 123 S. Ct. 2325 (2003), the Supreme Court has consistently acknowledged that institutions of higher learning "occupy a special niche in our constitutional tradition." *Id.* at 2339. Because of "the vital role in a democracy that is played by those who guide and train our youth," *Sweezy*, 354 U.S. at 250, academic freedom is "a special concern of the First Amendment[.]" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

AAUP recognizes that the right to academic freedom is not absolute.[2] Nevertheless, at its core, the constitutional right of academic freedom includes the

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(footnote continued from previous page)
reach those issues. AAUP takes no position on the statutory questions raised by the parties to this case.

[2]

> There is, of course, nothing . . . that assumes the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, in* THE CONCEPT OF ACADEMIC FREEDOM 59, 78 (Edmond L. Pincoffs ed. 1972).

right of an academic institution and its faculty to make decisions affecting the education of their students. The Solomon Amendment threatens this basic First Amendment right. As AAUP explains below, the right of academic freedom includes the right to determine — free from government interference — what to teach and how it will be taught. AAUP submits that the Solomon Amendment places an excessive and unconstitutional burden on the academic freedom of law schools and their faculties to choose the manner in which they establish an academic environment free from discrimination and teach important concepts of legal ethics and justice. In this case the law school and its faculty have worked together to craft and adopt polices barring sexual orientation discrimination, both to create the environment they have determined to be the most conducive to learning and to teach a lesson of ethics and civil justice. *See, e.g.,* Complaint ¶¶ 15, 16 (describing adoption of nondiscrimination policy and policy's purpose of "ensur[ing] full recognition of the worth and individual dignity of all law students"). Part of this educational judgment was a conclusion by the faculty that it was necessary "to educate future lawyers about the importance of carrying on their professional work in a manner that does not deny or undermine the equal dignity and respect owed to clients and others[.]" Complaint ¶ 16. The faculty made a conscious decision to convey to their students the law school's commitment to "the education and training of professionals who do not engage in

invidious discrimination" by adopting and implementing a policy of nondiscrimination based on sexual orientation. *Id.*

The law school and its faculty have thus made the important pedagogical decision to impart a lesson in legal ethics through their adherence to a policy of refusing to facilitate the recruitment efforts of employers, such as the Department of Defense ("DOD"), that discriminate on the basis of sexual orientation. The Solomon Amendment interferes directly with the right of the law school and its faculty to determine a nondiscrimination policy and to "teach it by example." The Solomon Amendment thus does more than merely interfere with law school recruiting policies. By conditioning an entire institution's receipt of federal funds upon the surrender of its right to determine for itself how to teach issues of ethics and justice, the Solomon Amendment strikes at the very heart of the right of academic freedom protected by AAUP policy and the First Amendment.

A. The Adoption and Enforcement of the Law School's Nondiscrimination Policy Is a Pedagogical Decision Protected by Academic Freedom.

Under the Supreme Court's precedents, First Amendment principles of academic freedom protect the ability of an educational institution, with its faculty, to make decisions that affect the institution's academic environment, whether those decisions concern the setting of academic standards, *Regents of the Univ. of Mich.*

v. Ewing, 474 U.S. 214, 225-26 (1985), the importance of diversity in admissions, *Grutter,* 123 S. Ct. at 2339, or the availability of varied extracurricular student activities. *Southworth,* 529 U.S. at 233.

These Supreme Court decisions compliment and reinforce AAUP policy. AAUP policies provide that academic freedom is implicated in campus decisionmaking that involves the professional judgment of faculty on academic matters. AAUP's policy on governance of colleges and universities, jointly formulated by the AAUP and other higher education organizations, holds that "[t]he faculty has primary responsibility for such fundamental [educational] areas as curriculum, subject matter and methods of instruction, . . . and those aspects of student life which relate to the educational process." *Statement on Government of Colleges and Universities*, AAUP Policy Documents 217, 221. Another AAUP Statement states that "[t]he maintenance of a suitable environment for learning . . . bear[s] directly on the teaching and research conducted in the institution, [and] the faculty should have primary authority over decisions about such matters." *On the Relationship of Faculty Governance to Academic Freedom*, AAUP Policy Documents at 225. For academic freedom to thrive, faculty "must be free to bring to bear on the issues at hand not merely their disciplinary competencies, but also

their first-hand understanding of what constitutes good teaching and research generally, and of the climate in which those endeavors can best be conducted." *Id.*

In this case, the law school and its faculty have made the reasonable educational choice that providing an atmosphere of nondiscrimination is an important part of the educational environment on their campuses. The policy at issue in this appeal was set as a result of considered deliberation by the law school's faculty and was adopted by the governing body of the institution. The adoption of the nondiscrimination policy at issue represents an exercise of academic judgment on the part of the faculty of the law school, and is therefore a decision protected by both AAUP policy and the First Amendment right to academic freedom.

B. Development of the Constitutional Right of Academic Freedom

The constitutional right of academic freedom has evolved in a series of Supreme Court cases stretching back almost fifty years. The Supreme Court's first cases on academic freedom dealt with the First Amendment rights of individual university scholars. The Court has continued to recognize that right, expanding it to include the right of an institution and its faculty to make decisions about the educational environment and structure of the university.

In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court ruled that Sweezy, a lecturer at the University of New Hampshire, could not be held in contempt for refusing to answer questions regarding alleged "subversive activities," including questions about his lectures at the university. The Court explained:

> We believe that there unquestionably was an invasion of petitioner's liberties in the areas of *academic freedom* and political expression—areas in which government should be extremely reticent to tread. ***The essentiality of freedom in the community of American universities is almost self-evident.*** No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250 (emphasis added).

In his concurring opinion in *Sweezy*, Justice Frankfurter further described the principle of academic freedom, focusing on the right of the university to be free from government control. "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring). Justice Frankfurter recognized that a "free society" depends on "free universities," meaning "the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262.

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'

Id. at 263.

In *Keyishian v. Board of Regents,* the Court again relied upon academic freedom in holding unconstitutional New York state loyalty oath requirements for university professors. 385 U.S. 589 (1967). The Court noted the importance of "safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian,* 385 U.S. at 603. In the Court's view, the importance of academic freedom made "[t]hat freedom . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Relying on *Sweezy* and *Keyishian,* numerous subsequent decisions of the federal courts have applied this individual right of academic freedom to speak and to teach free from unreasonable government interference. *See, e.g., Hardy v. Jefferson Community College,* 260 F.3d 671, 682-83 (6th Cir. 2001), *cert. denied,* 535 U.S. 970 (2002) (professor's right to academic freedom protected his use of

offensive language in the classroom); *Bonnell v. Lorenzo,* 241 F.3d 800, 823-24 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001) (weighing professor's right to academic freedom against student's right to learn "in a hostile-free environment"); *Burnham v. Ianni,* 119 F.3d 668, 680 n.19 (8th Cir. 1997) (finding academic freedom protected right of professors to display photographs of themselves in military dress for scholarly purposes); *Dube v. State Univ.,* 900 F.2d 587, 597-98 (2d Cir. 1990) (academic freedom permitted professor to discuss controversial topics in the classroom).[3]

Following *Sweezy* and *Keyishian*, the Court continued to recognize academic freedom as a "special concern" of the First Amendment, "though not a specifically enumerated constitutional right." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). In *Bakke,* Justice Powell relied upon Justice Frankfurter's concurring opinion in *Sweezy* for the proposition that a

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[3] The Third Circuit's decision in *Edwards v. California Univ. of Pa.,* 156 F.3d 488 (3d Cir. 1998) upheld a university's decision to prohibit a professor from teaching a syllabus different from the one approved by the relevant faculty department. The *Edwards* case must be read narrowly, however, as it involves the unusual situation of a conflict between the will of an individual professor and the collective professional judgment of his colleagues. "It is important to note that in *Edwards* the court faced a situation in which an entire department had come together to reinstate [a particular] syllabus. Thus, at some level the decision reflects deference to (collective) academic judgment." STEVEN PROSKANZER, HIGHER EDUCATION LAW: THE FACULTY 89 (The Johns Hopkins University Press 2002).

university's "four essential freedoms" included the right of the university "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Bakke,* 438 U.S. at 312 (quoting *Sweezy,* 354 U.S. at 263 (Frankfurter, J., concurring)). Thus, according to Justice Powell, academic freedom gave a university the right "to make its own judgments as to education" including "the selection of its student body." *Bakke,* 438 U.S. at 312.

Cases subsequent to *Bakke* demonstrate that the Supreme Court's understanding of academic freedom includes a healthy respect for the right of academic institutions and their faculties to make their own decisions on academic matters and an unwillingness by the Court to second guess judgments in those areas. Citing First Amendment concerns, the Supreme Court has consistently deferred to the judgment of institutions and faculties in the educational domain. Thus, the Court has evinced "great respect for the faculty's professional judgment" on questions such as whether a student should be dismissed from an educational program. *Ewing,* 474 U.S. at 225. Indeed, the Court has refused to "override [the faculty's judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* Similarly, the Court has declined to

intervene in a university's decision about what extracurricular student speech "is or is not germane to the ideas to be pursued in an institution of higher learning." *Board of Regents v. Southworth*, 529 U.S. 217, 232 (2000). In the Supreme Court's view, such judgments are the province of the university and its faculty. *Id.* at 233 (the university determines whether its mission is "well-served" by a given policy); *see also id.* at 237 (Souter, J., concurring) (academic freedom includes "the idea that universities and schools should have the freedom to make decisions about how and what to teach"); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

Most recently, in *Grutter v. Bollinger*, the Court reviewed the University of Michigan Law School's admissions policy — a policy drafted by a faculty committee and intended to enhance the diversity of the law school's student body, *see Grutter*, 123 S. Ct. at 2334 — against a challenge that the policy unlawfully discriminated on the basis of race. In accordance with its conviction that there is "a constitutional dimension, grounded in the First Amendment, of educational

autonomy," the Supreme Court explained that "[t]he Law School's *educational judgment* that such diversity is *essential to its educational mission* is one to which we defer." 123 S. Ct. at 2339 (emphasis added). In upholding the Law School's admissions policy, the Supreme Court invoked its "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* Once again, the Court noted that academic freedom implicates core First Amendment values. "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.*

At the root of the Supreme Court's deference to academic judgment "is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Ewing,* 474 U.S. at 226. (quoting *Keyishian*, 385 U.S. at 603). The Court's reluctance to interfere in academic decisionmaking arises out of the conviction that the danger of limiting First Amendment rights is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and

philosophic tradition." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995).[4]

C. The Solomon Amendment Unconstitutionally Burdens Academic Freedom By Interfering With the Law School's Chosen Method of Teaching Ethics and Justice.

Although AAUP policy and the Supreme Court's decisions on academic freedom make plain that government may not infringe upon the right of educational institutions to determine how and what they will teach, the Solomon Amendment does just that. It conditions the receipt of funding from several federal agencies upon the law school's betrayal of its policy of nondiscrimination. The law school and its faculty have chosen to teach legal ethics not only by classroom instruction, but also by setting an example of what they have determined to be proper ethical behavior. In accordance with that educational decision, the law school has made the reasonable decision to refuse to assist military recruiters. *Cf. Nomi v. Regents for the Univ. of Minn.*, 796 F. Supp. 412, 419 (D. Minn. 1992)

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[4] Similarly, concern for First Amendment rights of academic freedom has led lower federal courts to defer to the academic judgment of educational institutions and their faculty. *E.g., Linnemeir v. Board of Trustees of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001) (in deferring to the decision of a faculty committee, supported by the administration, approving the production of a play as the senior project of a drama student, the court noted that "academic freedom . . . demand[s] deference to educational judgments that are not invidious").

("the university's decision to promote equal opportunity in employment by forbidding discriminating employers to use its recruitment services . . . is a reasonable one"), *vacated as moot,* 5 F.3d 332 (8th Cir. 1993). The Solomon Amendment directly interferes with what is unquestionably an "educational judgment." *See Grutter,* 123 S. Ct. at 2339 (policy of achieving diversity in admissions is an educational judgment). The Solomon Amendment thus unconstitutionally burdens the law school's "ability to define its own mission." *Southworth,* 529 U.S. at 238 (Souter, J., concurring).

II. THE ACADEMIC FREEDOM OF THE LAW SCHOOL AND ITS FACULTY INCLUDES THE TEACHING OF LEGAL ETHICS THROUGH THE MODELING OF ETHICAL MODES OF BEHAVIOR.

The government suggests that law schools can deal with the Solomon Amendment's burden on expressive conduct by disclaiming DOD's recruiting message and distancing themselves from military recruiters. *See* Mem. In Supp. of Def's Mot. to Dismiss at 32. This "solution" misconceives the role of law schools and faculty members as institutional teachers of professional ethics, and it underestimates the importance of modeling ethical norms of behavior.

Consistent adherence to the stated policy of nondiscrimination on the basis of sexual orientation is particularly important for law schools, which exist in no small part to inculcate in their students principles of ethics and justice. A law

school is not merely an institution in which students learn a collection of rules and norms. The Supreme Court recognized only last Term that law schools have a higher mission, for they "represent the training ground for a large number of our Nation's leaders." *Grutter,* 123 S. Ct. at 2341 (citing *Sweatt v. Painter,* 339 U.S. 629, 634 (1950) (a law school is a "proving ground for legal learning and practice")). If the study of law is to produce professionals who are "important features of the system by which society claims an ability to deliver justice," CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1, at 49 (West 1986), then legal education must be much more than mere technical instruction. *See* Norman Redlich, *Law Schools as Institutional Teachers of Professional Responsibility,* 34 J. LEGAL EDUC. 215, 216 (1984) ("law schools are training students to practice a profession, and that mission carries with it a responsibility to train them to practice in accordance with certain professional standards").

As the ABA's Commission on Professionalism has admonished, "[l]aw professors can . . . positively influence the values and ethics of students by example and through creative teaching." ABA COMMISSION ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR REKINDLING OF LAWYER PROFESSIONALISM (1986), *reprinted in* 112 F.R.D. 243, 266 (1987) (hereinafter "SPIRIT OF PUBLIC SERVICE"). That law schools and their faculties should serve as

role models for their students is nothing more than a practical recognition that ethical behavior must not only be learned, it must be embodied. The legal profession embraces this concept in a number of ways. Thus, for example, lawyers are exhorted to provide free legal services to those unable to pay for them. ABA MODEL R. PROF'L CONDUCT 6.1. It is not enough for lawyers to have knowledge of ethical principles; lawyers must live them.

The inculcation of concepts of justice and ethics in young lawyers, therefore, necessarily involves much more than the rote memorization of rules. *See* SPIRIT OF PUBLIC SERVICE, 112 F.R.D. at 266 ("A law school's impact on the professional development of its students should extend beyond simply teaching legal rules."). As one commentator has noted, "'[t]here is much more to it than rules of ethics. There is a whole atmosphere of life's behavior.'" RONALD D. ROTUNDA, LEGAL ETHICS — THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-6.1, at 21 (2002) (quoting John H. Wigmore, *Introduction* xxiv, *in* O. CARTER, ETHICS OF THE LEGAL PROFESSION (1915)). This is simply a recognition that the educational environment of a law school, including its nondiscrimination policy, forms an important part of the educational experience of its students. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom,* 29 J. LEGAL EDUC.

247, 253 (1978) (in addition to law school's formal curriculum, "the total learning environment influences what students learn").

To instill notions of ethics and justice in their students, law schools must be free not only to *profess* a policy of nondiscrimination, they must also *act* in conformity with that message. "Ethics, in particular, is primarily taught by example." Cramton, *supra,* 29 J. LEGAL EDUC. at 253. The law school's adherence to its nondiscrimination policy performs an important pedagogical function. By refusing to facilitate the activities of military recruiters, the law school is doing more than following its chosen policy. It is providing its students with a model of ethical behavior and serving as an "institutional teacher[] of professional responsibility." Redlich, *supra,* 34 J. LEGAL EDUC. at 216. As the ABA's Commission on Professionalism explained, the law school experience provides students their first exposure to their chosen profession, and thus "an important mission of law schools must be . . . *the setting of proper role models for law students*." SPIRIT OF PUBLIC SERVICE, 112 F.R.D. at 269 (emphasis added).

Compelling a law school to act in a manner that is inconsistent with its stated policy of nondiscrimination greatly undermines the school's effort to provide an example of proper ethical behavior. The "[u]nwillingness of an institution to take a moral stand communicates a powerful lesson that it is risky to

stand up for moral principle." Cramton, *supra,* 29 J. LEGAL EDUC. at 253. Just as a law school and its faculty can set a positive example for their students by providing consistent models of ethical behavior, so too can they "transmit the wrong message through their manner and conduct both inside and outside the classroom." SPIRIT OF PUBLIC SERVICE, 112 F.R.D. at 268. If, as Dean Cramton argues, the development of law students' ethical attitudes is more affected by the schools' total learning environment (the "hidden curriculum," in his words) than by the institutions' formal curriculum, Cramton, *supra,* 29 J. LEGAL EDUC. at 253, forcing a law school to facilitate DOD recruiting despite its professed abhorrence for DOD's articulated policy of discrimination is a profound interference with the law school's attempt to lead their students by example.

III. THE LAW SCHOOL'S NONDISCRIMINATION POLICY EMBODIES THE STANDARDS OF CONDUCT TO WHICH PRACTICING LAWYERS MUST ADHERE.

The law school's efforts to instill in its students the ideal of nondiscrimination against gays and lesbians is of more than academic interest. In fact, the law school is doing nothing more than teaching and exemplifying standards of behavior to which its graduates will be required to adhere once they enter practice. The rules adopted by the highest courts of a number of jurisdictions specifically provide that it is professional misconduct for a lawyer to discriminate

in employment on the basis of sexual orientation.[5] Other states prohibit lawyers from engaging in conduct involving discrimination or manifesting bias on the basis of sexual orientation either in their professional capacities or in the conduct of adjudicatory proceedings.[6] In a number of other jurisdictions, a prohibition on discrimination on the basis of sexual orientation is part of the commentary to the rules of professional conduct.[7] In addition, the codes of judicial conduct of more than thirty states expressly prohibit judges from manifesting bias or prejudice based on sexual orientation in the performance of their duties.[8] Thus, the law

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[5] *See* CAL. R. PROF'L CONDUCT 2-400(B); D.C. R. PROF'L CONDUCT 9.1; ILL. R. PROF'L CONDUCT 8.4(a)(9)(A); 22 N.Y. COMP. CODES R. & REGS. § 1200.3(A)(6) (DR 1-102); OHIO CODE PROF'L RESPONSIBILITY DR 1-102(B); VT. R. PROF'L CONDUCT 8.4(g); WASH. R. PROF'L CONDUCT 8.4(g).

[6] FLA. R. PROF'L CONDUCT 4-8.4(d); IND. R. PROF'L CONDUCT 8.4(g); MASS. R. PROF'L CONDUCT 3.4; MINN. R. PROF'L CONDUCT 8.4(g); N.J. R. PROF'L CONDUCT 8.4(g); N.M. R. PROF'L CONDUCT 16-300; N.D. R. PROF'L CONDUCT 8.4(d); TEX. R. PROF. CONDUCT 5.08(a).

[7] ARIZ. R. PROF'L CONDUCT 8 cmt. ("A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, . . . sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."); DEL. R. PROF'L CONDUCT 8.4(d) cmt. 3 (same); TENN. R. PROF'L CONDUCT 8.4(d) cmt. 2 ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, . . . sexual orientation,. . . . may violate paragraph (d) if such actions are prejudicial to the administration of justice. . .").

[8] *See, e.g.*, FLA. C.J.C. Canon 3B(5)-(6); IDAHO C.J.C. Canon 2(C); ILL. C.J.C. Rule 63, Canon 3(A)(8); KAN. SUP. CT. R. 601A Canon 3(B)(5); MINN. C.J.C. Canon 3(A)(5); MISS. C.J.C. Canon 3(B)(5); NEB. C.J.C. Canon 3(B)(6); Okla. Stat. Tit. 5, APP. 4, Canon 3(B)(4); TEX. C.J.C. Canon 3(B)(6); UTAH C.J. ADMIN.

(footnote continued to next page)

school's efforts to implement, practice, and teach a policy of nondiscrimination is more than an "academic" exercise; it is a concrete attempt to instill in law students the ethical norms that will apply to them as practicing lawyers.

CONCLUSION

The Solomon Amendment represents an impermissible and unconstitutional infringement upon the right of the law schools and their faculties to determine the manner in which they will teach important principles of legal ethics and justice. Because the Solomon Amendment cannot be squared with the Supreme Court's cases on First Amendment academic freedom, AAUP respectfully submits that the government's motion to dismiss should be denied and the case allowed to proceed to trial on the merits.

Respectfully submitted,

Laura A. Biancke
Piper Rudnick LLP
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

(footnote continued from previous page)
Canon 3(B)(5); W. VA. C.J.C. Canon 3(B)(5); *see also* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 53 (3d ed. 2001).

John L. Moore, Jr.
Piper Rudnick LLP
1200 Nineteenth Street, NW
Washington, DC 20036
Office: (202) 861-3953
Fax: (202) 223-2085

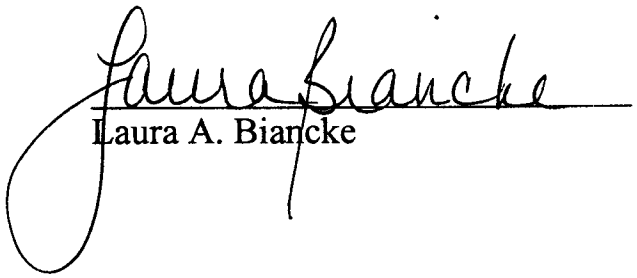
CERTIFICATE OF SERVICE

I, Laura A. Biancke, hereby certify that on February 2, 2004, I caused a copy of the foregoing Brief of Amicus Curiae American Association of University Professors to be served, via first-class mail postage prepaid, upon:

Peter D. Keisler
Patrick L. Meehan
Vincent M. Garvey
Cedric Bullock
Mark T. Quinlivan
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7128
Washington, DC 20530

David Rudovsky
Kairys, Rudovsky, Epstein & Messing
924 Cherry Street, Suite 500
Philadelphia, PA 19107

Kermit Roosevelt
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104



Laura A. Biancke