
United States Court of Appeals
for the
Third Circuit

Case No. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAM NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Appellants,

- against -

SECRETARY OF DEFENSE; SECRETARY OF EDUCATION; SECRETARY OF LABOR;
SECRETARY, HEALTH & HUMAN SERVICES; SECRETARY OF TRANSPORTATION;
SECRETARY OF DEPARTMENT OF HOMELAND SECURITY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

**BRIEF OF *AMICUS CURIAE* ASSOCIATION OF
AMERICAN LAW SCHOOLS IN SUPPORT OF APPELLANTS**

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INTEREST OF *AMICUS CURIAE*¹

The Association of American Law Schools, Inc. (AALS) is a non-profit educational organization that has as its purpose “the improvement of the legal profession through legal education.” AALS Bylaw 1-2. The AALS was formed in 1900 as an organization of law schools that agreed to meet specified membership standards. Of the 188 law schools accredited by the American Bar Association in this country, 166 currently meet AALS standards of membership and have become members of the organization. The AALS serves the legal community as a learned society of law teachers. It is legal education’s principal representative to the federal government and to other higher education organizations and learned societies.

Only rarely does the AALS seek to become involved in litigation as *amicus curiae*, and then only in matters involving issues with far-reaching impact on fundamental aspects of legal education. The issue presented in this case is, without question, such an issue. The AALS is deeply troubled by the provisions of federal law challenged in this case, which conflict with AALS policy and the non-discrimination obligations of AALS member law schools. The AALS also has grave concerns about the district court’s misinterpretation of the AALS

¹All parties have consented to the filing of this *amicus curiae* brief.

“amelioration policy,” a policy the district court erroneously viewed as an adequate substitute for a true non-discrimination requirement.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over a century, the AALS has sought to maintain the highest standards for the educational environment of member law schools. An optimal educational environment, of course, must include the proper physical plant, classrooms, and library facilities, but it also must transcend these tangible assets to provide a supportive, nurturing, and positive learning atmosphere in which students and professors can feel free to interact without discrimination or segregation. As a factor in providing a diverse, non-discriminatory learning environment, the AALS requires member schools to make available their placement facilities and resources only to those prospective employers who do not discriminate. The AALS and its member schools believe so strongly in the value of non-discrimination that they have adopted a rule that failure to comply with this mandate, absent any exemptions, results in a loss of AALS membership. This strict rule lies at the heart of the law school mission, and ensures that AALS member schools convey the message that discrimination in the law school community is unacceptable.

Throughout the past decade, the federal government has enacted a statute and adopted regulations and unwritten interpretations – collectively referred to

here as the “Solomon Amendment” – that restrict funds to any school that denies military personnel “entry to campuses, or access to students . . . for purposes of military recruiting.” 10 U.S.C. § 983(b). Because the military openly discriminates on the basis of sexual orientation – one of the categories of invidious discrimination prohibited by the AALS policy – the Solomon Amendment presents AALS member schools with a Hobson’s choice: The schools must either forsake millions of dollars in federal funds, or violate AALS policy and be stripped of membership. By coercing law schools into assisting military recruiters and thus abandoning the schools’ message of diversity, tolerance, and non-discrimination, the Solomon Amendment violates the associational and expressive rights of the law schools that are the AALS’s members.

To minimize the damage inflicted on law schools and their communities by the Solomon Amendment, the AALS adopted an “amelioration policy.” Under that policy, member schools are excused from noncompliance with the AALS’s non-discrimination mandate if the schools take certain ameliorative steps – including, for example, posting signs explaining the military’s policy and the Solomon Amendment, hosting public discussions on sexual orientation and discrimination, etc. – to help restore an atmosphere of tolerance and respect.

In denying the plaintiffs’ preliminary injunction motion, the district court

relied heavily on the AALS’s amelioration policy as a supposed antidote to the constitutional infirmities of the Solomon Amendment, citing the amelioration policy in nearly every section of its substantive analysis. In the district court’s view, “there is no realistic danger, given the AALS’ recommended ameliorative measures, that [the Solomon Amendment] will significantly compromise the law schools’ ability to disseminate their message.” JA-60 (Dist. Ct. Op.). That conclusion, however, is inconsistent both with the practical realities of the amelioration policy and with the First Amendment principles at issue in this case. The amelioration policy was adopted in response to the Solomon Amendment and was never meant to be – and, indeed, is not – an adequate substitute for the AALS’s non-discrimination policy. The First Amendment grants the law schools – not the government or the district court – the authority not only to craft their message, but also to choose the most effective means of disseminating that message. Because the district court’s opinion deprives law schools of that constitutional prerogative, its decision must be reversed.

STATEMENT OF FACTS

A. Non-Discrimination and the Law Schools’ Mission

Law schools play a vital role in ensuring that students not only learn the law, but also appreciate and pursue fairness and social justice. In furtherance of

this broad mission, law schools across the country have sought to create supportive, inclusive, and tolerant learning environments for their students.

Given the far-reaching, harmful effects of a discriminatory learning environment, the AALS seeks to eliminate discrimination in all aspects of legal education. To that end, the AALS has required member schools to prohibit discrimination on the basis of race or color since 1951, and on the basis of sex since 1970. These requirements promote not only diverse student bodies, but also non-discriminatory placement and career opportunities at AALS member schools. As noted by the district court, law schools' non-discriminatory recruiting policies "serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse." JA-13 (Dist. Ct. Op.).

In the late 1970s, law schools began to add sexual orientation to the list of prohibited categories of discrimination. Reflecting this trend, the AALS House of Representatives voted unanimously to amend the AALS Bylaws in 1990 to include sexual orientation in the non-discrimination policy. That policy, Bylaw 6-4, now provides in relevant part:

A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national

origin, sex, age, handicap or disability, *or sexual orientation*. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.

JA-349 (AALS Bylaw 6-4(b)) (emphasis added).

Section 6.19 of the AALS Executive Committee Regulations implements Bylaw 6-4(b) in the following language:

The Obligation to Provide an Equal Opportunity to Obtain Employment Without Discrimination. A member school shall inform employers of its obligation under Bylaw 6-4(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-4(b).

JA-353 (AALS Executive Committee Regulations, § 6.19). By the end of 1990, all of AALS's members – more than 160 member schools at the time – had adopted non-discrimination recruiting policies covering sexual orientation.

B. The Solomon Amendment and the AALS Response

In various forms over the years, the United States Armed Forces have imposed a ban on lesbian, gay, and bisexual service members. *See* 10 U.S.C. § 654. As a result, the U.S. military could not confirm its compliance with the

AALS non-discrimination mandate, as required by AALS Executive Committee Regulation 6.19. Notwithstanding the apparent absence of any adverse impact on military recruiting,² Congress in 1994 passed the first version of the so-called “Solomon Amendment” (named for former Rep. Gerald Solomon), which denied Department of Defense funds “to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses.” National Defense Authorization Act for FY 1995, § 558, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

In its initial iteration, the Solomon Amendment had little effect on law schools because it restricted only federal funds provided through the Department of Defense, a grant source largely irrelevant to law schools. Addressing the Solomon Amendment in 1996, the AALS therefore reaffirmed its policy, noting again that “non-discrimination is necessary in order to create an inclusive and supportive educational environment that will benefit all students and prepare them for their future role as lawyers in a diverse society.” AALS Memorandum 96-15, AALS Executive Director Carl Monk to Deans of Member Schools and Members

²*See, e.g.*, JA-10 n.2 (Dist. Ct. Op.) (quoting 140 Cong. Rec. H3863 (1994)) (Department of Defense initially opposed the Solomon Amendment as “unnecessary, duplicative, and potentially harmful to defense research”).

of the AALS House of Representatives, May 28, 1996, *Executive Committee Regulation (ECR) 6.19: The Obligation to Provide an Equal Opportunity to Obtain Employment Without Discrimination*, at 1 (attached hereto) (hereinafter “AALS Mem. 96-15”).³ Absent dire consequences to member schools, the AALS saw no need to depart from its vital non-discrimination policy.⁴

One year later, however, Congress amended the Solomon Amendment to restrict funds not only from the Department of Defense, but also from the Departments of Labor, Health and Human Services, Education, and related agencies. Omnibus Consolidated Appropriation Act, 1997, § 514, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (presently codified at 10 U.S.C. § 983(d)(2)). In response, the AALS’s Executive Committee was forced to address the conflict between its non-discrimination policy and the latest version of the Solomon Amendment, which threatened to deprive member schools of millions of dollars in federal funding. Carl C. Monk, Executive Vice President and Executive Director

³See AALS Mem. 96-15, at 5 (“Member schools should not . . . schedule on-campus interviews, assist in scheduling interviews, include military job opportunities in lists of employers who solicit resumes, or forward law students’ resumes to such employers.”).

⁴The AALS did, however, discuss amelioration in the limited context of requirements of a “higher authority” (state law or a law school’s parent university) that conflict with AALS policy with respect to military recruiters. See AALS Mem. 96-15, at 5-6.

of AALS, advised Deans of Member and Fee-Paid Schools of the AALS's policy shift:

Because the Executive Committee concluded that some schools would find it extremely difficult to forgo these funds, it has decided to excuse non-compliance with Executive Committee Regulation 6.19 only for military recruiters, as long as a school provides "amelioration" in a form that both expresses publicly the law school's disapproval of the discrimination against gays and lesbians by the military and provides a safe and protective atmosphere for gay and lesbian students.

JA-354 (AALS Memorandum 97-46, Aug. 13, 1997). The Monk memorandum offered several examples of amelioration steps, including: informing students that the military discriminates in a manner that violates the school's established policy, and that the school would lose valuable federal funds if it barred military recruiters; hosting forums for the discussion of military policy or, more generally, sexual orientation-based discrimination; and encouraging and promoting the presence of active lesbian and gay student organizations and the presence of openly gay faculty and staff. JA-355 (AALS Mem. 97-46).

Contrary to the district court's assumptions in this case, the AALS's amelioration policy does not and cannot replace a non-discrimination requirement because, simply stated, it permits actual discrimination facilitated by the law school. Nor was the amelioration policy ever intended to serve as an adequate substitute for the AALS's non-discrimination requirements. As its name suggests,

the policy attempts merely “to ameliorate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students.” JA-355 (AALS Mem. 97-46). The limited exemption from compliance is applicable only in the context of military recruiters, and only because of the harsh consequences that would flow from adherence to the AALS’s otherwise-strict policy.

The inherent limitations of the amelioration policy are evident from the AALS’s responses to subsequent changes in the Solomon Amendment and its implementing regulations. In 1999, Congress removed student aid funds from ambit of the Solomon Amendment. Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-97, 113 Stat. 1212 (1999). Because fewer than five AALS member law schools received funding that might be affected by the remaining statute, the AALS subsequently determined that non-compliance with the non-discrimination mandate would no longer be excused. *See* AALS Memorandum 00-2, AALS Executive Director Carl Monk to Deans of Member and Fee-Paid Schools, Jan. 24, 2000, *Executive Committee Policy Regarding “Solomon Amendment,”* at 1-2, available at <http://www.aals.org/00-2.html> (hereinafter “AALS Mem. 00-2”).

A week after that action, however, the Department of Defense adopted

interim regulations that threatened to deny all federal funds to a law school's parent university, even if only the law school (or another "subelement" of the university) actually barred military recruiters. *See* 65 Fed. Reg. 2056 (Jan. 2000). This signaled a departure from prior federal requirements, again prompting the AALS to reinstate its fallback amelioration policy. *See* AALS Memorandum 00-6, AALS Executive Director Carl Monk to Deans of Member and Fee-Paid Schools, Feb. 9, 2000, *Suspension of Recent Executive Committee Policy Regarding "Solomon Amendment,"* at 1-2, available at <http://www.aals.org/00-6.html> (hereinafter "AALS Mem. 00-6"). Although the current regulations of the Department of Defense provide that a parent institution loses only DoD funds (but not other federal funds) if a law school violates the Solomon Amendment, *see* 32 C.F.R. § 216.3(b)(1), the federal government has threatened the denial of all federal funds to a parent institution in such circumstances. *See, e.g.,* JA-130-31 (Chemerinsky Decl. ¶ 21); JA-203-04 (Gerken Decl. ¶¶ 15-16).

In the face of a continuing "conflict about the destructive effects of discrimination" and the threatened loss of hundreds of millions of dollars in federal funding, the AALS has maintained the limited exception to its non-discrimination policy, excusing noncompliance where a member school takes steps to ameliorate the negative consequences of military recruitment. *See* AALS

Memorandum 02-03, AALS Executive Director Carl Monk to Deans of Member and Fee-Paid Schools, Jan. 18, 2002, *Amelioration*, available at <http://www.aals.org/02-03.html> (hereinafter “AALS Mem. 02-03”). Although the amelioration policy helps to soften the blow of coerced discrimination on law school campuses, it is no substitute for a fully enforced non-discrimination policy and the expressive power such a policy conveys. This issue has become increasingly problematic in recent years, as the military apparently has adopted an unwritten and dangerously expansive view of the affirmative recruiting assistance required by the Solomon Amendment. *See, e.g.*, JA-130-31 (Chemerinsky Decl. ¶¶ 20-23); JA-153-57 (Eskridge Decl. ¶¶ 39-52); JA-203 (Gerken Decl. ¶ 15); JA-299 (Minuskin Decl. ¶¶ 28-30); JA-339-43 (Rosenkranz Decl. ¶¶ 21-27).

ARGUMENT

LAW SCHOOLS’ AMELIORATION POLICIES DO NOT CURE THE CONSTITUTIONAL INFIRMITIES OF THE SOLOMON AMENDMENT.

The First Amendment protects the associational and expressive rights of law schools, reflected in, among other things, their recruiting policies. Although the district court acknowledged, at least in part, that the Solomon Amendment implicates those rights, the court failed to recognize the serious and irreparable harm inflicted by federally mandated compelled assistance to military recruiters.

In denying the plaintiffs' preliminary injunction motion, the district court relied heavily on the AALS's amelioration policy, erroneously treating that policy as an acceptable substitute for the law schools' non-discrimination policies. Contrary to the court's assumptions, however, the amelioration policy is merely a stopgap measure that cannot cure the constitutional flaws of the Solomon Amendment.

A. The Solomon Amendment Interferes With the Right of Expressive Association.

The district court properly recognized that, although law schools serve a variety of functions, there is “no doubt that the law schools qualify as expressive associations entitled to constitutional protection.” JA-56 (Dist. Ct. Op.). In addition to training students in the law, AALS member schools plainly “seek to inculcate a certain set of values and principles in their students.” *Id.* As the Supreme Court recognized in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it is “indisputable that an association that seeks to transmit such a system of values engages in expressive activity.” *Dale*, 530 U.S. at 650.

Indeed, because of the heightened constitutional value and importance of academic freedom, *see, e.g., Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Keyishian v. Board of Regents of University of the State of New York*, 385 U.S.

589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring), law schools' associational expression is entitled to even greater protection than that accorded the Boy Scouts in *Dale*. The associational message at issue in *Dale*, moreover, was far less explicit than the non-discrimination principle expressly and unequivocally conveyed in the policies of the AALS and its member schools. See *Dale*, 530 U.S. at 651-52; see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 562 (1995) (parade organizers, asserting First Amendment right to exclude certain speakers, "had no written criteria and employed no particular procedures for admission" to parade).

Recruiting policies lie at the heart of the AALS member law schools' expressive mission. By denying access to recruiters that discriminate, law schools give substance to the pedagogical message that bigotry and intolerance will not be permitted on campus. Even the district court acknowledged that the schools' recruiting policies "are a means of inculcating the law schools' value system," JA-59-60 (Dist. Ct. Op.), although it failed to recognize the full constitutional significance of those policies.

The Solomon Amendment interferes with the schools' expressive efforts in

two related ways. First, it dilutes their message by requiring federally funded schools not only to permit, but actually to facilitate, activities the schools seek to condemn. As the AALS has explained to its members, “[t]he fundamental policy condemning discrimination with respect to the admission of applicants and the hiring of faculty and staff would be seriously undermined if those non-discrimination principles were abandoned when law students seek employment in the legal profession.” AALS Mem. 96-15, at 2. Law schools, as any entities, often are judged more by their actions than by their words. However much a school touts its commitment to diversity and tolerance, the presence of military recruiters on campus “send[s] a message” that the law school accepts discrimination “as a legitimate form of behavior.” *Dale*, 530 U.S. at 653. This distorts – and indeed contradicts – the message of non-discrimination the AALS and its members strive to convey. Just as the Courts must “give deference to an association’s assertions regarding the nature of its expression, [it] must also give deference to an association’s view of what would impair its expression.” *Id.*; see also, e.g., *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). The Court must therefore defer to the law schools’ reasoned, experienced judgments about the ill effects of the Solomon Amendment on their associational expression.

Second, the Solomon Amendment effectuates a system of compelled speech, under which law schools must assist military recruiters in disseminating their discriminatory message. It is axiomatic that “the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.” *Hurley*, 515 U.S. at 575. Yet that is precisely what the Solomon Amendment mandates through its funding restriction. As in *Hurley*, “[t]he message [law schools] disfavor[] is not difficult to identify.” *Id.* at 574. Here, the message law schools find repugnant is that discrimination is perfectly acceptable behavior. In effect, the Solomon Amendment requires law schools to express that message, by providing time, space, and support for a recruiter that discriminates among members of the law school community. “Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.” *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 9 (1986).

B. Amelioration Measures Are Factually and Legally Insufficient Substitutes for Non-Discrimination Policies.

At numerous points throughout its opinion, the district court resolved the serious constitutional questions about the Solomon Amendment by relying on the

AALS's amelioration policy. Addressing the potential interference with law schools' expression, for example, the court reasoned that "there is no realistic danger, given the AALS' recommended ameliorative measures, that [the Solomon Amendment] will significantly compromise the law schools' ability to disseminate their message." JA-60 (Dist. Ct. Op.). Similarly, the district court rejected the plaintiffs' compelled speech claim after concluding that "law schools can effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters." JA-64-65. *See also, e.g.*, JA-74 (relying on amelioration in "balancing of interests" analysis); JA-76 (citing amelioration in rejecting viewpoint discrimination claim). In its heavy reliance on the AALS's amelioration policy, however, the district court misperceived the purpose, practical effect, and legal significance of amelioration, which cannot possibly cure constitutional flaws in the Solomon Amendment.

Were the district court's analysis correct, grave intrusions on associations' First Amendment rights would be rectified simply by the associations' ability to express disagreement with the government's compelled message. But that is not the law. The constitutional harm in *Dale*, for example, was not cured simply by the Boy Scouts' ability to, say, issue a press release condemning their openly gay assistant scoutmaster. Nor were the parade organizers' First Amendment interests

in *Hurley* protected merely because they could counter the inclusion of an unwanted gay, lesbian, and bisexual marching group by displaying signs and banners denouncing homosexuality. So, too, the AALS's amelioration policy cannot remedy the First Amendment injury inflicted by the Solomon Amendment.

1. Amelioration Was Never Intended, and Cannot Serve, as an Adequate Substitute for the Law Schools' Message and Policy of Non-Discrimination.

Through a strict policy of non-discrimination – applicable to all aspects of the law school experience – the AALS and its member schools have demonstrated a clear, unequivocal desire to create an open, tolerant learning environment, and to send the message that discrimination in any form will not be permitted. The presence of, and compelled assistance to, recruiters that discriminate (whether it is the military, or any other prospective employer) necessarily frustrates that purpose. While law schools surely can and should take steps to minimize the harmful effects of compelled discriminatory recruiting on campus, amelioration does not cure the constitutional problem.

As is evident from the history of the AALS's amelioration policy, it was never intended to serve as satisfactory replacement for the policy of non-discrimination. Amelioration arose in response to the Solomon Amendment, and even then, only where the AALS member schools (and their parent institutions)

faced the potential loss of millions of dollars in federal funding. As the Solomon Amendment and its implementing regulations – both official and unwritten – evolved over the past decade, the AALS permitted amelioration as an excuse for noncompliance with its non-discrimination mandate only when it was absolutely necessary. *Compare* JA-355 (AALS Mem. 97-46) (setting forth amelioration policy), *with* AALS Mem. 00-2 (repealing amelioration as excuse for noncompliance), *with* AALS Mem. 00-6 (reinstating amelioration policy).

Nor does amelioration in fact operate as an adequate substitute for a true policy of non-discrimination. The activities suggested by the AALS serve only “to ameliorate the negative effect on the law school’s environment of the military’s discriminatory practices.” AALS Mem. 02-03, at 3. Posting signs or hosting public discussions hardly remedies the fact that, because of the Solomon Amendment, law schools must actively assist recruiters who convey a discriminatory message – and engage in conduct – that the schools deem abhorrent.

It is simply not the case, as the district court assumed, that because of the law schools’ amelioration measures, their message of tolerance and openness “is being disseminated, loudly and clearly, as suggested by the AALS.” JA-60 (Dist. Ct. Op.). The law schools cannot effectively convey their view that discrimination

is immoral when they are forced to facilitate not just the verbal articulation of opposing views, but the actual conduct they seek to condemn. As the undisputed evidence in the district court confirms, the law schools' message of equality and tolerance is seriously diluted (and often rings hollow) in a law school community aware of the schools' active support of recruiters that unabashedly discriminate. *See, e.g.*, JA-553-54 (Smolik Decl. ¶ 12); JA-312-13 (Neuborne Decl. ¶¶ 9-10); JA-382 (Seidman Decl. ¶¶ 20-21); JA-231-32 (Law Decl. ¶¶ 22-23); JA-399 (Sweeney Decl. ¶ 15); JA-301 (Minuskin Decl. ¶ 36); JA-106-08 (Appleton Decl. ¶¶ 17, 22-25); JA-347 (Rosenkranz Decl. ¶¶ 38-39).

2. The First Amendment Protects the Law Schools' Right to Choose Their Preferred Means of Expressing the Message of Non-Discrimination.

The practical insufficiency of the AALS's amelioration policy illustrates a fundamental First Amendment precept ignored by the district court, namely, that it is the speaker – and not the government – that has the constitutional right to determine *for itself* the appropriate means or method of expression. “The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *see also, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 641-42 (9th Cir. 1998) (“Government may regulate the *manner* of

speech in a content- neutral way but may not infringe on an individual's right to select the *means* of speech.”). As the Supreme Court explained in *Dale*, “the First Amendment protects [an association’s] *method* of expression.” *Dale*, 530 U.S. at 655 (emphasis added).

To convey their message of tolerance and equality, the AALS and its members have chosen to prohibit discriminatory recruiting, a practice that falls squarely within the time-honored tradition of “nonviolent, politically motivated boycott designed to force governmental and economic change.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982). That expressive choice must be honored. The availability of other, less effective avenues of communicating the schools’ non-discrimination message cannot supplant the schools’ preferred method of expression. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (internal quotation marks and citation omitted); *see also, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. N.J.*, 308 U.S. 147, 163 (1939).

Even if, contrary to logic and the record below, the amelioration measures suggested by the AALS were adequate substitutes for the law schools’ chosen means of expression, they would not suffice. Impermissible compelled speech and

interference with associational expression are not cured simply by the ability of a speaker to pursue secondary or tertiary means of communication, however effective a judge might deem it to be. *See, e.g., Pacific Gas*, 475 U.S. at 15-17 & n.11; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255-58 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). And the constitutional flaws in the district court's reliance on the amelioration policy are magnified exponentially by the inherent limitations of the amelioration policy discussed above.

CONCLUSION

The AALS's amelioration policy cannot cure the serious constitutional harms inflicted by the Solomon Amendment. The Court therefore should reverse the decision of the district court denying plaintiffs' motion for a preliminary injunction.

Respectively submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this brief contains 4845 words, excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January 2004, two copies of the Brief of *Amicus Curiae* Association of American Law Schools were sent via Federal Express overnight delivery, to:

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