

No. 25-1002

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**In the Supreme Court of the United States**

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RAJEH A. SAADEH,

*Petitioner,*

v.

NEW JERSEY STATE BAR ASSOCIATION,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF NEW JERSEY,  
APPELLATE DIVISION

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**BRIEF OF *AMICI CURIAE*  
STATE OF WEST VIRGINIA  
AND 17 OTHER STATES  
IN SUPPORT OF PETITIONER**

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## TABLE OF CONTENTS

Introduction and Interests of <i>Amici Curiae</i> .....	1
Summary of Argument .....	3
Argument .....	5
I.    Race discrimination receives no First Amendment protection—no matter what “message” it sends about diversity.....	5
II.   The decision below threatens real, damaging consequences.....	16
Conclusion .....	22

II

TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023) .....	5, 6, 7, 14, 16, 17, 18, 21
<i>Adarand Constructors, Inc. v. Peña</i> , 515 U.S. 200 (1995) .....	1
<i>Alevy v. Downstate Med. Ctr.</i> , 348 N.E.2d 537 (N.Y. 1976) .....	19
<i>Altonen v. City of Minneapolis</i> , 487 F.3d 554 (8th Cir. 2007).....	13
<i>Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC</i> , 103 F.4th 765 (11th Cir. 2024) .....	1, 3, 11, 19, 20
<i>Associated Gen. Contractors of Mass., Inc. v. Altshuler</i> , 490 F.2d 9 (1st Cir. 1973) .....	19
<i>Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987) .....	12
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000) .....	5, 6, 7, 9, 10, 13, 14, 15, 16, 21
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014) .....	20
<i>City of Dallas v. Stanglin</i> , 490 U.S. 19 (1989) .....	7, 13

III

*Cuffley v. Mickes*,  
208 F.3d 702 (8th Cir. 2000)..... 15

*Donovan v. Ill. Ed. Ass’n*,  
667 F.2d 638 (7th Cir. 1982)..... 21

*Drummond v. Acree*,  
409 U.S. 1228 (1972) ..... 2

*Emilee Carpenter, LLC v. James*,  
107 F.4th 92 (2d Cir. 2024)..... 14

*Hishon v. King & Spalding*,  
467 U.S. 69 (1984) ..... 8, 12

*Hurley v. Irish-Am. GLB Grp. of Bos.*,  
515 U.S. 557 (1995) ..... 5, 6, 14

*Jones v. N.J. State Bar Ass’n*,  
No. CIV.A. 06-0823, 2007 WL 1723446  
(D.N.J. June 12, 2007)..... 11

*Loper Bright Enters. v. Raimondo*,  
603 U.S. 369 (2024) ..... 7, 13

*Nat’l Ass’n of Diversity Officers in Higher  
Educ. v. Trump*,  
No. 25-1189, 2026 WL 321433  
(4th Cir. Feb. 6, 2026)..... 20

*Nat’l Urb. League v. Trump*,  
783 F. Supp. 3d 61 (D.D.C. 2025) ..... 20

*Norwood v. Harrison*,  
413 U.S. 455 (1973) ..... 9, 10

IV

*R.A.V. v. City of St. Paul*,  
505 U.S. 377 (1992) ..... 8, 14

*Roberts v. U.S. Jaycees*,  
468 U.S. 609 (1984) .....1, 9, 10, 11, 12, 13, 15

*Rumsfeld v. FAIR*,  
547 U.S. 47 (2006) ..... 10, 16

*Runyon v. McCrary*,  
427 U.S. 160 (1976) ..... 8, 12, 15

*San Fran. A.I.D.S. Found. v. Trump*,  
786 F. Supp. 3d 1184 (N.D. Cal. 2025)..... 20

*SFFA v. Harvard*,  
600 U.S. 181 (2023) ..... 1, 17, 22

*Wisconsin v. Mitchell*,  
508 U.S. 476 (1993) ..... 7, 13

**Statutes**

N.J. REV. STAT. § 10:5-4 ..... 10, 20

N.J. REV. STAT. § 10:5-5 ..... 10

**Other Authorities**

- Alexander Volokh,  
*Expressive Discrimination:  
 Universities' First Amendment Right  
 to Affirmative Action*,  
 77 FLA. L. REV. 75 (2025) ..... 17
- Br. of Oklahoma et al. as Amici Curiae in  
 Supp. of Pet'r,  
*SFFA v. Harvard*, 600 U.S. 181 (2023)  
 (No. 20-1199), 2021 WL 1255536..... 21
- Br. of West Virginia et al. as Amici Curiae  
 in Supp. of Pet'rs,  
*St. Mary v. Roy*, No. 25-581  
 (U.S. Dec. 17, 2025), 2025 WL 3723319 ..... 1
- Christopher Lucas & Vanessa Huber,  
*Using the First Amendment to Uphold  
 DEI Initiatives*,  
 CLARK HILL PLC (Feb. 7, 2025),  
<https://perma.cc/3NKW-XF7U>..... 17
- Compl.,  
*Am. Fed'n of Tchrs. v. U.S. Dep't of  
 Educ.*,  
 No. 1:25-cv-00628  
 (D. Md. Feb. 25, 2025), ECF No. 1 ..... 18
- Dale Carpenter,  
*Expressive Association and Anti-  
 Discrimination Law After Dale: A  
 Tripartite Approach*,  
 85 MINN. L. REV. 1515 (2001)..... 8

VI

David E. Bernstein,  
*The Right of Expressive Association  
and Private Universities' Racial  
Preferences and Speech Codes*,  
9 WM. & MARY BILL RTS. J. 619 (2001)..... 16

David Schraub,  
*The Jurisprudence of Constitutional  
Entitlement*,  
34 WM. & MARY BILL RTS. J. 97 (2025)..... 18

Def.'s Mot. to Dismiss,  
*Roberts v. Progressive Preferred Ins.  
Co.*, No. 1:23-cv-01597  
(N.D. Ohio Dec. 13, 2023), ECF No. 15..... 18

Erwin Chemerinsky & Catherine Fisk,  
*The Expressive Interest of  
Associations*,  
9 WM. & MARY BILL RTS. J. 595 (2001)..... 15

G.S. Hans,  
*Companies Killing Their DEI  
Programs Are Taking the Coward's  
Way Out*,  
BALLS AND STRIKES (Feb. 24, 2025)  
<https://tinyurl.com/372wx6n2>..... 18

Joint Br. Regarding Defs.' Mot. for Summ.  
J.,  
*Vaughn v. CBS Broadcasting, Inc.*,  
No. 2:24-cv-05570 (C.D. Cal. Oct. 31,  
2025), ECF No. 59 ..... 18

VII

Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*,  
4 AM. J. L. & EQUAL. 201 (2024)..... 17

Mem. of Law in Supp. of Def.’s Mot. to Dismiss,  
*Am. All. for Equal Rts. v. ABA*,  
No. 1:25-cv-03980 (N.D. Ill. June 15, 2025), ECF No. 17-1 ..... 18

Neal Troum,  
*Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*,  
35 CREIGHTON L. REV. 641 (2002) ..... 15

**INTRODUCTION**  
**AND INTERESTS OF *AMICI CURIAE***\*

The New Jersey State Bar Association exists to uphold the law. Yet it now claims that the Constitution licenses it to violate one of the law’s most basic commands: don’t discriminate based on race. The Association sets aside leadership seats for certain preferred racial groups—and calls that exclusion First-Amendment-protected activity. But antidiscrimination laws can rightly preclude facial discrimination like the Bar Association’s. Antidiscrimination laws reflect that a person should “be treated based on his or her experiences as an individual—not on the basis of race.” *SFFA v. Harvard*, 600 U.S. 181, 231 (2023). And “[e]liminating racial discrimination means eliminating all of it.” *Id.* at 206.

Antidiscrimination laws shouldn’t be cast aside simply because discrimination comes shrouded in more palatable language like “equity” or “diversity.” After all, “[t]wo discriminatory wrongs cannot make a right.” *Id.* at 232 (Thomas, J., concurring). Serious perils arise from so-called “benign’ discrimination,” too. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., dissenting).

The Amici States believe in eradicating *all* discrimination. And the States here have a “compelling interest in eradicating” all status-based discrimination against their citizens. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). To be sure, the First Amendment sometimes requires antidiscrimination laws to yield. See generally *Br. of West Virginia et al. as Amici Curiae in*

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\* Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

Supp. of Pet'rs, *St. Mary v. Roy*, No. 25-581 (U.S. Dec. 17, 2025), 2025 WL 3723319. Yet the First Amendment demands no exception for discrimination alone, even if it's dressed up as protected speech or association.

The Bar Association insists otherwise. The Association admits all good-standing State Bar members, irrespective of viewpoint. App.4a. But the Association claims First Amendment protection for establishing its desired “[balance in racial, ethnic, [and] gender representation” through express quotas on its board. App.25a. That's an odd choice, seeing as how courts have long expressed “disapproval of the wooden resort to racial quotas or racial balance” to rectify even serious social ills. *Drummond v. Acree*, 409 U.S. 1228, 1230 (1972).

The decision below wrongly endorsed the Association's approach, affording free speech protection to race (and sex) discrimination. It stretched this Court's associational precedents beyond recognition—constitutionalizing under the *First* Amendment discrimination this Court just held unconstitutional under the *Fourteenth* Amendment (and here, rendered unlawful by statute).

The lower court contorted genuine free speech and association rights into a blanket shield for racial quotas and balancing—which it euphemistically relabeled “reserving” seats, “guaranteeing ... participation,” and preserving “demographic diversity.” App.26a-27a. But “[t]he casualty at a minimum is [not only] Mr. Saadeh but also ... all other members of the [bar association] who are not eligible to be considered for ... 13 at-large seats” because of their race or sex. App.55a.

In truth, this case will have effects far beyond New Jersey. For some, race and sex discrimination are still in vogue. And in a post-*SFFA* world, it's no surprise that

they would look for new routes to the same discriminatory destination. The decision below wrongly paves that path. Groups can weaponize this logic to assert constitutional protection for all types of status-based discrimination. Indeed, this rationale “risks sowing the seeds of antidiscrimination law’s demise.” *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 779 (11th Cir. 2024).

At bottom, fuzzy “diversity” interests do not justify what antidiscrimination law forbids. And while antidiscrimination provisions must respect constitutional rights, no one has an affirmative constitutional right to practice race discrimination. The Court should grant the petition and reverse.

### SUMMARY OF ARGUMENT

I. The Free Speech Clause protects speech and expressive association. But not all conduct is “speech,” and not all association is expressive. Time and again, this Court has rejected the idea that discrimination qualifies as speech. And a group’s association lacks any protected, expressive character if the group requires *no* ideological alignment.

Those doctrinal points decide this case. The court wrongly held that the Bar Association “engage[d] in expressive activity” when it ensured its leadership board met certain race- and sex-based quotas. App.24a. Whether viewed under an associational or speech lens, that conclusion is wrong. Applying the antidiscrimination provision to bar the Association’s status-based quotas presents no constitutional concern.

First, the group’s associational rights are not implicated. The Bar Association does not seek to transmit

or require members to hold any specific viewpoint. And even if it did, associational rights protected by the First Amendment provide no shield against public accommodation laws for bare discrimination based on race or sex.

Second, the Association has no free speech right to discriminate, either. Whatever “symbolic message” racial preferencing sends is not one protected by the First Amendment. And in truth, such conduct is not a First Amendment “message” at all. The lower court could defer to the Association on its message and what may impair it only if the court first made the *legal* determination that the Association’s discrimination itself was speech. This Court’s precedents foreclose that outcome here.

The First Amendment provides the Bar Association no affirmative protection to discriminate based on race or sex.

**II.** The lower court’s misguided analysis threatens real, deleterious consequences. The decision provides a roadmap for those who want to discriminate based on race. Scholars, activists, and now lower courts have taken note.

And the decision below contains no limiting principle. Any group can claim First Amendment protection to engage in status-based discrimination, as the quota or exclusion itself will become the only “message” needed to inoculate an otherwise prohibited practice. Antidiscrimination provisions can remain on the books, but discrimination based on race, sex, national origin, and disability status will all be fair game. The First Amendment mandates no such result.

States hold a compelling interest in stopping race and other discrimination. Although antidiscrimination laws

are not the cure for all evils, they remain the cure for prototypical status-based, non-expressive discrimination. The lower court was wrong to pump the brakes on a straightforward application of an antidiscrimination statute below.

## ARGUMENT

### **I. Race discrimination receives no First Amendment protection—no matter what “message” it sends about diversity.**

A. The Free Speech Clause protects a person’s right to control the messages they do and do not speak. The Clause limits how an antidiscrimination law applies only when applying the law would coerce or change protected expression.

“[T]he principle that the government may not interfere with an uninhibited marketplace of ideas” is a “fixed star in our constitutional constellation.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 584-85 (2023) (cleaned up). Naturally, the freedom of speech includes the right to choose “what not to say.” *Hurley v. Irish-Am. GLB Grp. of Bos.*, 515 U.S. 557, 573 (1995) (cleaned up). So the government violates the First Amendment when it “compel[s] affirmance of a belief with which the speaker disagrees.” *Id.* Some “severe intrusion[s] on ... rights to freedom of expressive association,” as opposed to pure speech, may also be unconstitutional. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

Start with cases involving pure speech.

Take *Hurley*. The St. Patrick’s Day parade at issue there was “a form of expression,” and “every participating unit affect[ed] the message conveyed by the private

organizers.” 515 U.S. at 568, 572. Parade organizers did not exclude anyone based on their status; instead, they objected to a group’s participation based on its message. *Id.* at 561, 572. Because “application of the [antidiscrimination] statute ... essentially require[d] petitioners to alter the expressive content of their parade,” it violated the First Amendment. *Id.* at 572-73.

*303 Creative* recently addressed the same issue. The plaintiff made wedding websites and creating those websites qualified as “pure speech.” *303 Creative*, 600 U.S. at 587. The website designer remained willing to serve any person regardless of status, but she was unwilling to communicate a message that would “violate her beliefs.” *Id.* at 594-95. The State’s antidiscrimination law “swe[pt] too broadly” when it was “deployed to compel speech,” so it could not constitutionally be applied in that way. *Id.* at 592.

The First Amendment also extends protections to some expressive association. In *Dale*, the Boy Scouts were “engag[ing] in expressive activity” by seeking to “transmit ... a system of values” to its youth members. 530 U.S. at 649-50. The Boy Scouts found “homosexual conduct [to be] inconsistent with the values it [sought] to instill.” *Id.* at 654. Dale was openly gay and a gay rights activist, so retaining him “as an assistant scoutmaster would ... interfere with the [organization’s] choice not to propound a point of view contrary to its beliefs.” *Id.* Because the scoutmaster’s “forced inclusion” “would significantly burden” the organization’s expression, the antidiscrimination law could not be applied to require it. *Id.* at 656, 659. It would create a significant contradiction for Dale to serve as a mouthpiece for the organization when he supported and lived a lifestyle that the organization thought was antithetical to its mission.

In sum, the government may not compel one to speak a message with which he disagrees; nor may it force a group to include someone whose inclusion would modify the group’s protected expression. “When a state public accommodations law and the Constitution collide, there can be no question which must prevail.” *303 Creative*, 600 U.S. at 592.

**B.** Most often, however, antidiscrimination laws and the First Amendment do not conflict. Because the Free Speech Clause generally does not protect the act of status-based discrimination itself, the Clause provides no safe harbor for unlawful conduct to those who go beyond *expressing views* about race discrimination to *practicing* it.

Although pure speech receives First Amendment protection, much conduct does not qualify as “speech.” Indeed, this Court’s “cases reject the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (cleaned up). Because “[i]t is possible to find some kernel of expression in almost every activity a person undertakes[,] ... such a kernel [alone] is not sufficient to bring the activity within the protection of the First Amendment.” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Even if courts give some “deference” to a group’s understanding of its “expression” and “what would impair its expression,” *Dale*, 530 U.S. at 653, judicial review of the legal question requires much more than a rubberstamp, *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

So “[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a

discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

Similar limits apply to associational freedom claims. Not “all human association with an expressive component” “fall[s] within the purview of the right.” Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1537 (2001). Those who discriminate based on race or sex have long tried to avoid antidiscrimination laws by recasting their discrimination as constitutionally protected association. This Court has long rejected that approach.

Three key cases show these principles in action.

*First*, in *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), a segregated school tried to claim First Amendment protection to practice race discrimination. The school argued that Section 1981, a federal statute banning race discrimination in contracting, could not be constitutionally applied to them because doing so would violate their freedom of association rights. *Id.* This Court disagreed. Although the schools could “promote the belief that racial segregation [was] desirable,” they had no affirmative First Amendment right to engage in racial segregation itself. *Id.*

*Second*, in *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), the Court rejected the same argument about sex discrimination. There, a law firm claimed their “expression or association” rights shielded them from Title VII liability for discriminating against a female employee based on her sex. *Id.* Again, the argument failed. *Id.* Although “invidious private discrimination may be characterized as a form of exercising freedom of association ... [,] it has never been accorded affirmative

constitutional protections.” *Id.* (cleaned up) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

*Third*, *Roberts v. United States Jaycees* confirmed that the “right to associate for expressive purposes is not ... absolute.” 468 U.S. at 623. *Roberts* laid out a standard to determine when a regulation may constitutionally compel association: Infringements on associational rights “may be justified” if the regulation was “adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* One way a regulation meets the last prong is if it does not “impose[] any serious burdens” on expressive association at all. *Id.* at 626.

Applying that standard, the law in *Roberts* proved to be constitutionally permissible. Unlike the Boy Scouts in *Dale*, the Jaycees were primarily a professional, not values-based group. *Roberts*, 468 U.S. at 612-13. The Jaycees advocated for a few central causes, but the group did not exclude anyone because they held different views on those causes. *Id.* at 627. Women were thus excluded solely based on their sex. *Id.* at 621. And because the Jaycees “already invite[d] women to share the group’s views” and “participate in much of its training and ... activities,” including them as full-fledged members would not change the group’s message. *Id.* at 627.

*Roberts* also established that status-based discrimination alone is not a protected “message.” 468 U.S. at 629. Non-expressive exclusion therefore receives “no constitutional protection” when supported only by an “attenuated” claim that the act of discrimination itself sends a “symbolic message.” *Id.* at 627-28. Because including women would not “impede the organization’s ability to engage in ... protected activities or to

disseminate its preferred views,” the Jaycees could not escape the commands of the antidiscrimination law. *Id.* at 627.

At bottom, the Constitution “places no value on discrimination.” *Norwood*, 413 U.S. at 469. “[J]ust as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot ‘erect a shield’ against laws requiring access simply by asserting that mere association would impair its message.” *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006) (cleaned up) (quoting *Dale*, 530 U.S. at 653). Antidiscrimination laws raise no constitutional concern when they reach status-based discrimination untethered to any protected message or association.

C. These fundamental free speech principles draw the line between protected expression and expressive association on one hand, and unprotected conduct and non-expressive association on the other. The decision below wrongly ignores that line—extending affirmative constitutional protection to non-expressive race and sex discrimination. The Bar Association’s status-based allocation of leadership seats falls far outside the scope of association or conduct protected by the First Amendment.

*Roberts* decides this case. To start, the Bar Association’s asserted associational interests receive no First Amendment protection.

New Jersey’s public accommodations law meets the standard *Roberts* sets out. See N.J. REV. STAT. § 10:5-4. The law is an ordinary, albeit “broad,” *Dale*, 530 U.S. at 657, antidiscrimination provision, see N.J. REV. STAT. § 10:5-4, § 10:5-5; see *Roberts*, 468 U.S. at 615 (a similar statute). And such antidiscrimination statutes “serve

compelling state interests[] unrelated to the suppression of ideas.” *Roberts*, 468 U.S. at 623; see *id.* at 624.

As in *Roberts*, the law here also does not “impose[] *any* serious burdens” on the Bar Association’s expressive association. 468 U.S. at 626 (emphasis added). Like the Jaycees, the Association’s core purposes are civic and professional, not philosophical. See *id.* at 612-13. It largely “provides educational opportunities to members as well as the general public, and serves as the voice of its members”—that is, *all* its members. *Jones v. N.J. State Bar Ass’n*, No. CIV.A. 06-0823, 2007 WL 1723446, at \*2 (D.N.J. June 12, 2007); see also App.4a (stating the Association’s purposes are to “maintain the honor and dignity of the profession of the law,” “cultivate social relations among its members,” and “urge reforms in the laws and ... aid in the administration of justice”).

Yes, the Association engages in some protected expression. But as in *Roberts*, the Association “imposes no [philosophical] restrictions” on membership. 468 U.S. at 627. The requirements are *professional*, not *ideological*. App.4a (admitting all who are “good standing” members of the state bar or who “hold[] a limited license to practice” there). When it comes to leadership, though, the Association prefers women over men; LGBTQ individuals instead of straight people; and black, Hispanic, and Asian people over other races. App.9a.

The Association’s race and sex preferences—and nothing else—render Saadeh ineligible for the set-aside seats. App.9a. Because the Association “already invites” Saadeh (and other individuals from disfavored groups) “to participate in ... its training and community activities,” allowing him to run for any at-large seat would not change its message. *Roberts*, 468 U.S. at 621, 627. That view

proves especially true because the Association’s asserted message about “the importance of diversity within the legal profession” could only be *strengthened* by removing all barriers to Saadeh—a Muslim, Palestinian attorney—serving in a leadership position. App.4a, App.11a; see also, e.g., *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987) (“[B]y opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.”).

*Runyon* and *Hishon* confirm that the Bar Association’s associational rights are not in play. The Association may have the right to “promote the belief that racial [preferences] [are] desirable,” but it lacks any constitutional right to engage in racial preferencing itself. *Runyon*, 427 U.S. at 176. And although the Association may characterize its “invidious private discrimination” as an exercise of its associational freedoms, the First Amendment provides no immunity to engage in unlawful racial balancing. *Hishon*, 467 U.S. at 78.

So the Bar Association clings to the bare assertion that discrimination *itself* sends a “symbolic message.” *Roberts*, 468 U.S. at 627; see App.25a-28a. The Association believes establishing quotas for its preferred race- and sex-based groups communicates its “vision of diversity and inclusion.” App.25a. Indeed, the Association asserts a constitutional right to maintain its desired “[b]alance in racial, ethnic, [and] gender representation.” App.25a.

But this Court’s precedents foreclose that argument. *Roberts*, 468 U.S. at 627.

The Association’s racially discriminatory conduct is not “speech.” The Bar Association’s claim—that

discriminating implicitly carries a “kernel of expression” about diversity—cannot transform its discrimination into a “message” “protect[ed] [by] the First Amendment.” *Stanglin*, 490 U.S. at 25; see *Mitchell*, 508 U.S. at 484. It seems especially unlikely that the composition of the Board—if the Association complied with the antidiscrimination law— would carry any “message” at all, given the Board’s many *explicit* messages about how diversity in the law is important.

Judicial respect for the Association’s understanding of its own expression can extend only so far. A court may give some “deference” to what a group understands its message to be. *Dale*, 530 U.S. at 653. But that deference does not extend to the threshold *legal* question of whether First Amendment “speech” exists at all, see, *e.g.*, *Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir. 2007); courts decide those questions, *cf. Loper Bright*, 603 U.S. at 412; *contra* App.26a. Yet the court below skipped that step entirely. It found that the Bar Association “engages in expressive activity” (with little discussion of whether the board composition is expressive) and then immediately deferred to the Association’s own assertion that altering its quota system would impair that expression. App.24a-26a. And even if setting racial and sex quotas sent some “message,” it would not be one protected by the First Amendment. *Roberts*, 468 U.S. at 627.

So the Free Speech Clause does not give the Bar Association a hall pass to violate the New Jersey public accommodations law. The statute furthers the “compelling interest” of stopping “invidious discrimination,” like the race and sex discrimination the Association engaged in, here. *Roberts*, 468 U.S. at 628. The State has “not target[ed] conduct on the basis of its

expressive content.” *R.A.V.*, 505 U.S. at 390. And the Bar Association’s claim lacks any real expressive component at all—because its association hinges on credentials not creed, and its discrimination is not speech. So the First Amendment does not “shield” the Association from any antidiscrimination provision. *Id.*

This Court’s cases that fall on the *protected* speech side of the line confirm this conclusion. Unlike in *Hurley*, the Association seeks to exclude Saadeh based on his status, not his ideas. App.9a; see *Hurley*, 515 U.S. at 561, 572. And unlike in *303 Creative*, stopping the Association’s exclusion of Saadeh would not compel it to speak a message contrary to its beliefs; the discrimination here rests on pure status, not expression. App.4a, App.9a; see *303 Creative*, 600 U.S. at 594-95. So applying the state statute to forbid the Association’s race and sex quotas won’t “requir[e] [it] to alter” its message. *Hurley*, 515 U.S. at 572-73; see *303 Creative*, 600 U.S. at 592. A “fundamental feature of the Free Speech Clause”—that it “does *not* protect status-based discrimination unrelated to expression”—controls here. *303 Creative*, 600 U.S. at 595 n.3.

*Dale*’s associational freedom analysis does not dictate otherwise. The Association does not seek to transmit any “system of values” through membership. *Dale*, 530 U.S. at 649-50; see App.4a. And it’s primarily a professional, not social group. App.4a. The Association also can’t claim Saadeh’s “forced inclusion” for consideration on its leadership board “would significantly burden” its expression, *Dale*, 530 U.S. at 653-54, because it already welcomes Saadeh as a member, App.11a. See *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 108 (2d Cir. 2024) (rejecting *Dale*’s applicability in First Amendment challenge to non-discrimination statute because the law

did not “compel [the challenger] to accept [disfavored persons] as members of her business”). And it seems unlikely that the Association can show—or would even *want* to show—that “racism is ... integral to the expressive message of the” organization, such that Saadeh’s inclusion as a member of a disfavored race is inconsistent. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 616 (2001). Yet that’s just the position it would need to take to invoke *Dale*’s rationale. See Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 679 (2002). In other words, merely including Saadeh on the board would not undermine the Association’s message by requiring it to include someone fundamentally repugnant to a central tenet of the organization. Contrast with *Cuffley v. Mickes*, 208 F.3d 702, 708 (8th Cir. 2000) (finding that the forced inclusion of non-Aryans in the Ku Klux Klan would alter the Klan’s message of “racial superiority and segregation”).

The lower court got the analysis all wrong. It did not acknowledge *Roberts* or *Runyon* as controlling precedent. See App.17a-26a. And it recognized that the First Amendment has never been used “to excuse discrimination.” App.32a.

The court attempted to justify its innovative holding by relying on dicta in *Dale* about the expansion of antidiscrimination laws and the increased “potential for conflict” between such laws and the First Amendment. App.32a (quoting *Dale*, 530 U.S. at 657). The twenty-five-year-old dicta provides no basis for such a novel holding. And the version of *Dale* the court claimed to apply bore little resemblance to *Dale* itself. The court found that the

Bar Association “engages in expressive activity” when it establishes a desirable “balance” of racial and sexual groups on its leadership board. App.24a-25a. And the court gave “deference” to the Association’s legal opinion that eliminating its racial quotas “would unconstitutionally infringe its ability to advocate the value of diversity.” App.24a, App.26a. *Dale* provides no support for those holdings.

\* \* \*

The Bar Association lacks any First Amendment associational or speech right to discriminate based on race. And it cannot use the First Amendment as a “shield” against antidiscrimination laws “simply by asserting” that not discriminating would infringe upon its rights. *Rumsfeld*, 547 U.S. at 69 (quoting *Dale*, 530 U.S. at 653).

## **II. The decision below threatens real, damaging consequences.**

**A.** The court’s decision creates a roadmap to circumvent *SFFA*. And it goes much further: the same logic would grant affirmative constitutional protection to all types of status-based discrimination.

Scholars since *Dale* have warned that some may try to exploit it to continue racially discriminating. See, e.g., David E. Bernstein, *The Right of Expressive Association and Private Universities’ Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 642 (2001) (“[T]o save their own preferred version of discrimination from legal attack, [groups criticizing *Dale*] may ultimately need to rely on the same constitutional doctrine of expressive association.”). Unfortunately, that day has come.

This Court’s recent cases rightly confirm that First Amendment rights receive broad protection. See 303

*Creative*, 600 U.S. at 603. They also correctly establish that race discrimination violates the Fourteenth Amendment. *SFFA*, 600 U.S. at 231. Antidiscrimination laws that target race discrimination—like those in New Jersey—are consistent with those holdings.

But those who dislike these constitutional holdings have now found a way to weaponize the First Amendment against the Fourteenth. Academics acknowledge that groups may manipulate “the line of doctrine culminating in *303 Creative*” to “avoid the new colorblindness mandate.” Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 AM. J. L. & EQUAL. 201, 201-02 (2024). In fact, “a First Amendment claim may be the *only* way to save race-conscious admissions in the United States.” *Id.* at 250 (emphasis added). And “[o]nce the battleground changes to the First Amendment context,” the test is “much easier ... to meet.” *Id.* at 238; see also, e.g., Alexander Volokh, *Expressive Discrimination: Universities’ First Amendment Right to Affirmative Action*, 77 FLA. L. REV. 75, 84 (2025) (“Now that Equal Protection/Title VI doctrine has come down strongly for colorblindness, the First Amendment theory has the potential (at least in some private universities) to convert affirmative action from a grudgingly allowed concession to a strongly protected right.”).

This exploitation won’t stop with race or with university admissions. The decision below “provide[s] a roadmap to [any] organization[] seeking to uphold their diversity initiatives.” Christopher Lucas & Vanessa Huber, *Using the First Amendment to Uphold DEI Initiatives*, CLARK HILL PLC (Feb. 7, 2025), <https://perma.cc/3NKKW-XF7U>. Medical associations, engineering societies, corporate boards, and others could all seek shelter. Altogether, decisions like the one below

“illuminate an intriguing path not taken” to justify these discriminatory efforts. David Schraub, *The Jurisprudence of Constitutional Entitlement*, 34 WM. & MARY BILL RTS. J. 97, 150 (2025).

Organizations across the country have already started down this misguided path. Mem. of Law in Supp. of Def.’s Mot. to Dismiss at 12-14, *Am. All. for Equal Rts. v. ABA*, No. 1:25-cv-03980 (N.D. Ill. June 15, 2025), ECF No. 17-1 (ABA defending its racially discriminatory scholarship program as First Amendment protected speech because it communicates its message of “enhancing diversity in the legal profession”; relying largely on *Saadeh* to support this argument); Joint Br. Regarding Defs.’ Mot. for Summ. J. at 18, *Vaughn v. CBS Broadcasting, Inc.*, No. 2:24-cv-05570 (C.D. Cal. Oct. 31, 2025), ECF No. 59 (CBS defending against a claim of race discrimination, arguing that even if the station had fired the employee because it had a “white problem,” “that choice would be protected by the First Amendment”); Compl. at 32, *Am. Fed’n of Tchrs. v. U.S. Dep’t of Educ.*, No. 1:25-cv-00628 (D. Md. Feb. 25, 2025), ECF No. 1 (teachers’ groups claiming a First Amendment right to “conduct[] diversity, equity, and inclusion activities or programs”); Def.’s Mot. to Dismiss at 14, *Roberts v. Progressive Preferred Ins. Co.*, No. 1:23-cv-01597 (N.D. Ohio Dec. 13, 2023), ECF No. 15 (grant program administrators arguing that, under *303 Creative*, the program can engage in racial discrimination to “convey[] its message about existing racial inequalities”); G.S. Hans, *Companies Killing Their DEI Programs Are Taking the Coward’s Way Out*, BALLS AND STRIKES (Feb. 24, 2025) <https://tinyurl.com/372wx6n2> (encouraging companies to defend unlawful DEI programs under the First Amendment, even though such programs “might not intuitively feel like a form of ‘speech’”).

The state trial court recognized how accepting the Association's argument could nullify all public accommodations law. To "accept [the Bar Association's First Amendment] argument would be tantamount to giving [it] carte blanche [to] formulate *any* diversity program." App.59a (emphasis added). That's because "regardless of whether that program violated the [antidiscrimination law], ... [the] defendant's First Amendment right would always trump the [antidiscrimination provision]." App.59a. This erroneous First Amendment theory would render all public accommodation laws "meaningless." App.59a. And nullifying those laws would have painful consequences. Even when it's thought that racial discrimination is serving some salutary benefit of increasing "representation," quotas and preferences can "encourage[] polarization of the races," "perpetuate[] thinking in racial terms," "undermine the incentive among ... the discriminated group to ... improve their lot," "lower esteem" for those preferred, and "require extremely difficult racial determinations." *Alevy v. Downstate Med. Ctr.*, 348 N.E.2d 537, 545 (N.Y. 1976); accord *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 17 (1st Cir. 1973). So a State can rightly pass statutes that say "no" to such efforts.

Some federal courts have also identified how improperly extending free speech protection would erode the very foundation of antidiscrimination law. The Eleventh Circuit, for example, correctly recognized that the same argument advanced by the Bar Association here seeks to erase the "critical distinction between *advocating* race discrimination and *practicing* it." *Fearless Fund*, 103 F.4th at 778. On that theory, "every act of race discrimination" would be constitutionally protected. *Id.* at 779. The Fourth Circuit has also recently recognized that

the “First Amendment doesn’t confer a right to violate” antidiscrimination laws. *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189, 2026 WL 321433, at \*10 (4th Cir. Feb. 6, 2026); see also, e.g., *San Fran. A.I.D.S. Found. v. Trump*, 786 F. Supp. 3d 1184, 1222 (N.D. Cal. 2025) (“[W]hile the First Amendment may protect speech that advocates for violation of law, it does not protect activities that directly violate antidiscrimination law.”); *Nat’l Urb. League v. Trump*, 783 F. Supp. 3d 61, 102 (D.D.C. 2025) (“[T]here is no constitutional right to operate DEI programs that violate federal antidiscrimination law.”). That makes sense. Otherwise, “the more blatant and rampant the discrimination, the clearer the message.” *Fearless Fund*, 103 F.4th at 779. So ironically, under this erroneous constitutional theory, the most odious race and sex discrimination would stand on the surest legal footing.

Taken to its logical conclusion, the decision below would swallow antidiscrimination law whole. These provisions would become dead letter—all thanks to a newfound constitutional right to discriminate based on race and sex. No need to stop there, either. Antidiscrimination laws could also become too neutered to prevent discrimination based on “national origin, ancestry, age, marital status, ... sexual orientation, familial status, [or] disability.” N.J. REV. STAT. §10:5-4.

This Court should not allow lower courts to continue entertaining this “logic.”

**B.** Ultimately, the decision below undermines States’ compelling interest in ending status-based discrimination. First Amendment protections have always taken account of that compelling interest, and “prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Burwell v. Hobby Lobby Stores, Inc.*, 573

U.S. 682, 733 (2014). Quotas and reserved leadership seats like these are a “threat to democratic values” that the State can rightly forbid. *Donovan v. Ill. Ed. Ass’n*, 667 F.2d 638, 641 (7th Cir. 1982) (addressing union elections).

The lower court gave the New Jersey Bar Association a constitutional license to discriminate based on race and sex. But public accommodations laws play a “vital role ... in realizing the civil rights of all Americans.” *303 Creative*, 600 U.S. at 590. And those laws should be able to continue fulfilling that role. Without this Court’s correction, the state court’s decision sets a roadmap others are sure to follow. It charts the path for any entity, from universities to classic public accommodations, to pursue any type of status-based discrimination—from race to sex to age discrimination—all under the banner of the First Amendment. If that path’s taken, then it could set back the decades of racial progress that America has made.

The Court need not settle every application of *Dale* to resolve this case. It need only clarify what courts below persistently get wrong: that the First Amendment does not convert the act of racial discrimination into protected expression simply because the discriminator articulates a viewpoint that the discrimination purports to advance. That clarification—modest in scope, decisive in effect—is precisely what States need most to enforce their own antidiscrimination laws effectively (and with appropriate respect for constitutional limits).

\* \* \*

“[E]nding racial discrimination” might cause some “difficult” growing pains. Br. of Oklahoma et al. as Amici Curiae in Supp. of Pet’r at 9, *SFFA*, 600 U.S. 181 (No. 20-1199), 2021 WL 1255536. Such pains include learning to tolerate an “unwanted imbalance in racial, ethnic, or

gender representation.” App.17a. But “diversity” goals provide no constitutionally “coherent” reason to engage in otherwise unlawful race and sex discrimination. *SFFA*, 600 U.S. at 214.

**CONCLUSION**

The Court should grant the petition and reverse.

Respectfully submitted.

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