

No. 25-1002

---

---

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

RAJEH A. SAADEH,

*Petitioner,*

*v.*

NEW JERSEY STATE BAR ASSOCIATION,

*Respondent.*

*On Petition for a Writ of Certiorari to the  
Superior Court of New Jersey, Appellate Division*

**BRIEF OF THE MANHATTAN INSTITUTE  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

Ilya Shapiro

*Counsel of Record*

Trevor Burrus

MANHATTAN INSTITUTE

52 Vanderbilt Ave.

New York, NY 10017

(212) 599-7000

ishapiro@manhattan.institute

March 24, 2026

---

---

**QUESTION PRESENTED**

Whether the First Amendment overrides antidiscrimination laws when the discrimination furthers the defendant's views about "diversity," "equity," or "inclusion."

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i  
TABLE OF AUTHORITIES ..... iii  
INTEREST OF *AMICUS CURIAE* ..... 1  
SUMMARY OF ARGUMENT ..... 1  
ARGUMENT ..... 6  
    I. THE BAR ASSOCIATION’S SYSTEM  
       OF DEMOGRAPHIC QUOTAS FOR  
       BOARD MEMBERS IS CONDUCT,  
       NOT SPEECH ..... 6  
    II. DEMOGRAPHIC QUOTAS ARE  
       INSUFFICIENTLY COMMUNICATIVE  
       TO ALLOW STATUS-BASED  
       DISCRIMINATION ..... 9  
CONCLUSION ..... 15

## TABLE OF AUTHORITIES

	<b>Pages</b>
 <b>Cases</b>	
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023) .....	5, 13–14
<i>Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC</i> , 103 F.4th 765 (11th Cir. 2024). .....	4
<i>Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987).....	14
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000) .....	5, 11
<i>Hishon v. King &amp; Spalding</i> , 467 U.S. 69 (1984) .....	5, 7
<i>Hurley v. Irish-Am. GLB Group of Boston</i> , 515 U.S. 557 (1995) .....	10
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964).....	3
<i>N.Y. State Club Ass’n v. City of New York</i> , 487 U.S. 1 (1988) .....	14
<i>Newman v. Piggie Park Enterprises, Inc.</i> , 256 F. Supp. 941 (D.S.C. 1966).....	3
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973) .....	7
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1</i> , 551 U.S. 701 (2007).....	1
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992) .....	7
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	5, 14
<i>Rumsfeld v. FAIR</i> , 547 U.S. 47 (2006) .....	5, 8, 9
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)....	5, 6, 10, 13
<i>SFFA v. Harvard</i> , 600 U.S. 181 (2023).....	9

*United States v. O'Brien*, 391 U.S. 367 (1968)..... 7  
*Wisconsin v. Mitchell*, 508 U.S. 476 (1993)..... 7

**Other Authorities**

George Lewis, *Massive Resistance: The White  
Response to the Civil Rights Movement* (2006) ..... 3

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice, individual responsibility, and human flourishing. To that end, MI has long advanced the idea of a truly colorblind society in legal briefs, research, and public advocacy—while also supporting the full breadth of First Amendment protections.

This case interests *amicus* because it involves the disingenuous invocation of the First Amendment to engage in invidious racial (and other) discrimination. MI believes that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

**SUMMARY OF ARGUMENT**

The fundamental question here is simple: if a private organization is allowed to practice facially status-based (including race-based) discrimination because it maintains “diversity” as a purported First Amendment-protected organizational goal, could another private organization choose “white supremacy” as an organizational goal and then also be protected from antidiscrimination laws by the First Amendment?

If there’s a legal difference between those two examples—the “diversity organization” and the “white-supremacy organization”—is there a way to recognize

---

<sup>1</sup> Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel, and no person or entity other than *amicus* funded its preparation or submission.

that difference without relying on viewpoint (on which basis the government can't act without running afoul of the First Amendment)? The Court should take this case to clarify the interaction between antidiscrimination laws and the right to expressive association.

That's not a mischaracterization of the decision below. The court below held that

the Bar Association has a First Amendment right of expressive association that permits it to select the membership of its governing bodies through intentional inclusion of specified underrepresented groups, in furtherance of the ideological position it expresses in numerous ways: that it is necessary and beneficial to promote diversity and inclusion in New Jersey's legal profession.

App.32a. This reasoning is applicable to more traditional forms of discrimination by exclusion. Discrimination is usually practiced by groups as an "ideological position [they] express[] in numerous ways." White supremacist groups believe expressive association is "necessary and beneficial to promote" their values. Whether characterized as "intentional inclusion" or exclusion, it's two sides of the same coin. The Bar Association here wishes to intentionally include by intentionally excluding Mr. Saadeh from consideration.

The decision below is a dangerous expansion of an old concept that this Court has rejected many times: litigants arguing that the First Amendment allows them to discriminate based on the purported harms of mere association rather than actual speech or expressive activity. It's also a theory without any limiting

principle that could threaten the application of important civil-rights laws in innumerable contexts.

When the Civil Rights Act of 1964 was passed, lawmakers understood that a campaign of “massive resistance” would result. *See generally* George Lewis, *Massive Resistance: The White Response to the Civil Rights Movement* (2006). There were of course constitutional challenges to the law based on the Commerce Clause, *Katzenbach v. McClung*, 379 U.S. 294 (1964), but there were also arguments that being compelled to serve blacks violated religious beliefs and freedom of association. That was one argument of Maurice Bessinger, the owner of South Carolina’s Piggie Park BBQ restaurants, who claimed that serving blacks violated “his religious beliefs [that] compel him to oppose any integration of the races whatever.” *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966). The courts rejected that argument, with the district court writing, “[u]ndoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.” *Id.* at 945.

The same reasoning should apply here. Like Mr. Bessinger, the New Jersey State Bar Association wants to exclude some people based on race (and sex, and other protected categories). Nevertheless, the lower court held that the First Amendment protects status-based discrimination. The idea that the “values” of the Bar Association allow it to correct an “imbalance” in “racial, ethnic, or gender representation

within its leadership” is remarkably similar to Mr. Bessinger’s failed creedal arguments. App.17a.

To be sure, the First Amendment can create exceptions to civil-rights laws, but this Court has been clear that these are narrow and well-defined. Otherwise, discrimination could run rampant as “values”-based expressive association: racially exclusive businesses and organizations. This Court has of course held that single-race organizations are not okay, including by allowing the IRS to deny 501(c)(3) status to an explicitly religious educational institution that used racially discriminatory admission policies. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Although that case concerned the tax code rather than public-accommodations or employment law, an explicitly religious institution still find no safe harbor for its discriminatory behavior in the Free Exercise Clause, which is at least as jurisprudentially robust as the Free Speech Clause.

As the Eleventh Circuit recently commented while deciding a similar case, “surely a business owner who summarily fires all his black employees while retaining all the white ones has at the very least telegraphed his perspective on racial equality. For better or worse, the First Amendment protects the owner’s right to harbor bigoted views, but it does *not* protect his mass firing.” *Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 779 (11th Cir. 2024).

The decision below thus rests on a category error. It treats demographic eligibility rules for group leadership—rules governing who may hold positions—as protected speech based solely on asserted symbolic meaning. Yet this Court distinguishes between laws that regulate expression and laws that regulate

employment and other opportunities. Only the former ordinarily garner First Amendment protection.

That approach conflicts with this Court's precedents. Status-based discrimination can be prohibited even when motivated by expressive commitments. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). And regulations governing access to institutional opportunities regulate conduct, not speech. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). Leadership eligibility rules fall squarely within that framework: they allocate institutional authority; they do not compel speech or endorsement of speech.

*Dale* and *303 Creative* likewise provide no support for the lower court's ruling. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648–59 (2000); *303 Creative LLC v. Elenis*, 600 U.S. 570, 586–92 (2023). Those cases address distinct harms not present here: compelled speech and compelled message attribution. The governing framework instead remains *U.S. Jaycees*, which permits the application of antidiscrimination laws absent a significant burden on expressive advocacy. The Bar Association's board quotas aren't sufficiently communicative to overcome antidiscrimination laws, so its actions aren't constitutionally protected.

The decision below extends First Amendment protection to status-based allocation of institutional opportunities without identifying any cognizable burden on expression. Extending immunity to such decisions invites similar defenses to racial and other discrimination across hiring and promotions decisions. That departure from this Court's precedents warrants review.

## ARGUMENT

### I. THE BAR ASSOCIATION'S SYSTEM OF DEMOGRAPHIC QUOTAS FOR BOARD MEMBERS IS CONDUCT, NOT SPEECH

This Court's First Amendment cases draw a clear line. Laws that regulate speech trigger constitutional scrutiny, but laws that regulate access to opportunities regulate conduct, not speech. The decision below crosses that line. It treats status-based discrimination for organizational leadership as protected speech based solely on the asserted expressive meaning. That approach conflicts with this Court's precedents.

In *Runyon v. McCrary*, the Court rejected a First Amendment challenge to §1981 liability for racially discriminatory school admissions. 427 U.S. at 175–76. The schools argued that their exclusion of black students reflected expressive commitments about segregation and therefore fell within the protection of the First Amendment's guarantees of speech and association. *Id.* The Court disagreed. While it assumed that parents and schools remain free to advocate their views—including the belief that racial segregation is desirable—the Court held that “the practice of excluding racial minorities from such institutions” is not protected. *Id.* To the contrary, the Constitution “places no value on discrimination,” and although discriminatory exclusion may sometimes be characterized as associational conduct, “it has never been accorded affirmative constitutional protections.” *Id.* at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 469–70 (1973)). Section 1981 regulates conduct—the refusal to enter contractual relationships for educational services on equal terms—not the schools' expression or advocacy. *Id.* at 172–73. In other words, expressive motivation

did not convert discriminatory allocation of institutional opportunities into protected speech.

*Hishon v. King & Spalding* also confirms this rule, interestingly also in a case that was about lawyers' possible rights of expressive association. 467 U.S. 69 (1984). There, a female associate at a law firm alleged that the firm violated Title VII when it refused to invite her to become a partner after promising that associates would be considered for partnership on a fair and equal basis. 467 U.S. at 72–74. The Court held that Title VII applies and therefore must be administered “without regard to her sex.” *Id.* at 75–76.

The Court rejected the firm's argument that partnership selection was expressive association protected by the First Amendment. Antidiscrimination law regulates discriminatory conduct even when it occurs within private organizations. The Court also remarked on the slippery slope problem, observing that all forms of invidious “private discrimination may be characterized as a form of exercising freedom of association.” *Id.* at 78 (quoting *Norwood*, 413 U.S. at 470). Yet that sort of discrimination “has never been accorded affirmative constitutional protections.” *Id.*

The Court's broader doctrine points the same way. Conduct does not become immune from regulation because it conveys a discriminatory meaning. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Neutral laws aimed at non-expressive interests can remain valid even when they incidentally affect expression. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (holding that the communicative content of burning a draft card was not sufficient to overcome the government's interests). There may be some communicative and

expressive value in the racial and gendered makeup of the Bar Association’s leadership—just as there was some expressive and religious value in Bob Jones University’s maintaining a student body free from interracial dating—but that doesn’t mean that those policies overcome the significant governmental interest in preventing status-based discrimination.

*Rumsfeld v. FAIR* makes the boundary explicit. There, law schools argued that providing access to military recruiters forced them to endorse military policies they opposed. The Court rejected that claim, explaining that the law regulated conduct—providing access to recruiters—not speech. *Rumsfeld*, 547 U.S. at 60. The statute “affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.” *Id.* Schools therefore “remain free under the statute to express whatever views they may have” about military policy. *Id.* at 60–61.

Nor did the schools’ compliance imply endorsement. Allowing recruiters on campus did not make the schools responsible for the recruiters’ message, because “nothing about recruiting suggests that law schools agree with any speech by recruiters.” *Id.* at 65. Hosting interviews and recruiting events was not inherently expressive activity, and any school communications—such as sending scheduling emails—was “plainly incidental to the Solomon Amendment’s regulation of conduct.” *Id.* at 62.

The Court underscored the broader doctrinal point by invoking antidiscrimination law. Congress may prohibit discriminatory hiring even though doing so might inhibit speech by requiring the removal of a sign reading, “White Applicants Only.” *Id.* at 62. Such laws

still regulate discriminatory conduct, not expression. The same principle controls here.

Finally, recent education-admissions cases confirm the same structural principle. Although those cases were decided under the Equal Protection Clause, they reflect a consistent premise across doctrines: status-based allocation of institutional opportunities is invalid even when institutions invoke expressive goals. Universities have described admissions policies in expressive terms—diversity, educational philosophy, or institutional mission. *SFFA v. Harvard*, 600 U.S. 181, 214–18 (2023). And educational institutions are more “expressive” than a bar association. After all, universities’ primary mission relies on expression and they compete against other universities by promoting a public image. Yet this Court still ultimately found that universities cannot justify affirmative action policies by resorting to “diversity.” *Id.* “Classifying and assigning” students based on their race “requires more than . . . an amorphous end to justify it.” *Id.*

## II. DEMOGRAPHIC QUOTAS ARE INSUFFICIENTLY COMMUNICATIVE TO ALLOW STATUS-BASED DISCRIMINATION

Given that almost any discriminatory act can be considered an expression of associational freedom, the Court has looked closely at where the line should be drawn. *Rumsfeld* established part of the limit on whether conduct is “inherently expressive.” 547 U.S. at 66. Other cases look at discriminatory conduct that is more related to expression.

The Bar Association’s leadership-eligibility rules fall on the *Rumsfeld* side of the line. They regulate access to institutional authority, not speech. Opening

positions to all members does not compel speech, endorsement, or dissemination of any message; nor does it ordinarily communicate agreement with a viewpoint. *See id.* at 65. Symbolic meaning alone cannot transform conduct into protected expression. Otherwise, any discriminatory policy could claim constitutional immunity simply by asserting expressive intent.

*Hurley*, by contrast, concerned a parade—by definition an expressive activity—not access to leadership positions. Massachusetts applied a public-accommodations law to require parade organizers to include a group whose message they did not wish to convey. *Hurley v. Irish-Am. GLB Group of Boston*, 515 U.S. 557, 561–64 (1995). The Court held that this requirement violated the First Amendment because it forced the organizers to incorporate another speaker’s message, thereby altering “the expressive content of [the] parade.” *Id.* at 572–73. “Parades are . . . a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.” *Id.* at 568. The gay, lesbian, and bisexual group in *Hurley* wished not just to march in the parade, but to march under a banner. Thus, “it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Id.* at 575. Allowing military recruiters in schools as in *Rumsfeld* is not analogous—and neither is allocating leadership roles for a bar association.

The court below rested its decision primarily on *Dale*. But that case addressed a similar First Amendment harm as *Hurley*: compelled message-alteration. In *Dale*, the Court held that the First Amendment bars application of a public-accommodations law when

compelled inclusion of a particular individual would alter an organization's message. 530 U.S. at 648–59. The Court emphasized that expressive association is infringed only when forced inclusion “affects in a significant way the group’s ability to advocate public or private viewpoints.” *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623). Applying that standard, the Court concluded that requiring the Boy Scouts to retain an openly gay scoutmaster would interfere with the organization’s message because the scoutmaster served as a leader responsible for transmitting the group’s moral teachings. *Id.* at 650–53.

Crucially, the Court in *Dale* noted that the Boy Scouts’s exclusion of the scoutmaster was not just based on his homosexual status but also on his outspoken advocacy. “Dale, by his own admission, is one of a group of gay Scouts who have ‘become leaders in their community and are open and honest about their sexual orientation.’” *Id.* at 653. The Court also noted that “Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist.” *Id.* at 653. The constitutional injury in *Dale* therefore arose from compelled inclusion of a specific spokesperson whose presence would alter the organization’s message. *Id.* at 653–59. The *Dale* Court compared it to *Hurley*, where it “the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner.” *Id.* at 653

Nothing comparable exists here. The Bar Association seeks to preserve its message of diversity by merely checking certain status-based boxes. Pet. at 5. There is no banner to march under, and no issue with Mr. Saadeh (or anyone else) being an “anti-diversity

advocate.” In fact, there are no relevant facts concerning who the Bar Association wants to put on its board, just any hypothetical candidate’s race/gender/sexual orientation status. It’s just a quota.

Unlike the gay scoutmaster in *Dale*, Mr. Saadeh doesn’t speak out against diversity in a way that would contradict any organizational message. The purported expressive association here derives solely from the board’s demographics: “the Bar Association contends it has a First Amendment right of expressive association to select a governing body of leaders that is consistent with the Association’s values” App.17a. As the state appeals court held below, requiring leadership positions to be open to all members would “significantly burden” the Bar Association’s expression by risking an “unwanted imbalance” in demographic representation and thereby sending an undesired message about the organization’s priorities. App.30a. The Bar Association is not concerned with who specifically is on the board or what they say. It’s concerned with status-based balancing of demographic identifiers.

Moreover, opening leadership positions to all members wouldn’t compel the Bar Association to include anyone alleged to contradict *any* message, nor to require the organization to endorse or repudiate any viewpoint. Nor would it forbid the organization from using many other methods to promote diversity, from demonstrations and press releases to organizing CLE sessions—or even soliciting board applications from minority groups (while not reserving seats for them). The court below noted that “[t]he Association also has in place a diversity policy in connection with its continuing legal education program that expresses a ‘goal . . . to increase diversity on CLE panels and

presentations, so as to better reflect the diversity of the legal profession and our membership.” App.6a. Organizations often have policies requiring a search for different kinds of voices to participate on panels. That is one of the many methods they can use to advocate for demographic diversity while not violating federal law.

All this comports with the decisions in *Runyon* and *Bob Jones University*, as well as the *Piggie Park* BBQ case, where the courts emphasized that the parties were still free to speak out about their views on racial segregation, just not to act on it in a way that violates the law. *Rumsfeld* also emphasized that there is a distinct difference between what the plaintiffs are allowed to say versus what they’re allowed to do. Thus, the law school and professors could strongly object to military recruiters on campus. The school in *Runyon* could “promote the belief that racial segregation is desirable.” *Runyon*, 427 U.S. at 176. *Piggie Park* and its owner could vociferously advocate for a segregated society, but they couldn’t refuse to serve blacks.

Finally, *303 Creative* likewise goes against the Bar Association’s arguments, which might be one reason it was not cited by the lower court. There, the Court held that Colorado could not require a website designer to create wedding websites conveying a message she rejected. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586–92 (2023). The decision turned on the government’s attempt to compel the creation of expressive content, which is a distinct First Amendment harm. *Id.* at 587–88. The Court was careful to say that while the Free Speech Clause “does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker’s right to control her own message—even when we may disapprove of the speaker’s motive

or the message itself.” *Id.* at 595 (emphasis original). To compel the design of a website is to compel a creative act. In contrast, the makeup of an organizational board is *not* a creative act. It certainly could show something to observers, but no more or less than the makeup of a white-supremacist board.

The governing framework thus remains *Roberts*. There the Court upheld the application of a state public-accommodations law requiring the Jaycees to admit women as full voting members—even though those members could participate in leadership decisions and influence organizational policy. *Roberts*, 468 U.S. at 626–29. Because the law imposed no “serious burden” on the organization’s advocacy, the First Amendment was no barrier to enforcement. *Id.* at 626.

The Court has reaffirmed these principles in other cases less famous than those already discussed. *See, e.g., Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548–49 (1987) (holding California’s civil-right law applied to Rotary Clubs “does not violate the right of expressive association afforded by the First Amendment”); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 13–14 (1988) (“This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.”).

Those decisions confirm that membership and participation rules remain subject to antidiscrimination law unless they materially interfere with expressive advocacy. The makeup of the Bar Association’s board doesn’t count as sufficiently expressive to warrant an override of antidiscrimination principles.

## CONCLUSION

By treating the allocation of leadership positions as protected expression based solely on its asserted symbolic meaning, the decision below collapses the distinction between expression and discriminatory conduct. That rule cannot be reconciled with this Court's precedents and warrants review.

Respectfully submitted,

Ilya Shapiro

*Counsel of Record*

Trevor Burrus

MANHATTAN INSTITUTE

52 Vanderbilt Ave.

New York, NY 10017

(212) 599-7000

ishapiro@manhattan.institute

March 24, 2026