No. _____

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

PETITION FOR WRIT OF CERTIORARI

Lindsay A. McKillop
THE LAW OFFICE OF
RAJEH A. SAADEH, LLC
1200 Route 22 East,
Suite 2000
Bridgewater, NJ 08807
(908) 864-7884
lmckillop@rajehsaadeh.com

Thomas R. McCarthy
Cameron T. Norris
Counsel of Record
R. Gabriel Anderson*
Nicholas B. Venable*
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

**Supervised by principals of the firm admitted to practice in Virginia*

February 13, 2026 *Attorneys for Petitioner*

QUESTION PRESENTED

A bar association reserves leadership positions for members of specific minority groups. These set-asides violate the State's antidiscrimination law. But below, the court deemed this otherwise illegal discrimination protected by the First Amendment because the set-asides help "express" the bar association's commitment to "diversity."

The question presented is:

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

RELATED PROCEEDINGS

The related proceedings below are:

1. *Saadeh v. N.J. State Bar Association*, No. L-6023-21 (Superior Court of New Jersey, Law Division, Middlesex County): motion for summary judgment granted as to liability on November 9, 2022, from which leave to appeal was granted on March 31, 2023.

2. *Saadeh v. N.J. State Bar Association*, No. A-2201-22 (Superior Court of New Jersey, Appellate Division): judgment entered on December 20, 2024.

3. *Saadeh v. N.J. State Bar Association*, No. 090242 (New Jersey Supreme Court): petition for certification denied on September 19, 2025.

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JURISDICTION

The Appellate Division's judgment was entered on December 20, 2024. The New Jersey Supreme Court denied Petitioner's timely petition for certification on September 19, 2025. This Court has jurisdiction under 28 U.S.C. §1257(a) to review a final judgment rendered by the "highest court of the State in which a decision could be had." *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). On January 9, 2026, Justice Alito granted Petitioner's application to extend the time for the filing of this petition to February 16, 2026.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states, in relevant part:

> Congress shall make no law … abridging the freedom of speech ….

Section 1 of the Fourteenth Amendment states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law ….

INTRODUCTION

Theories that would make it easier to discriminate in favor of certain minorities are "not new." *SFFA v. Harvard*, 600 U.S. 181, 226 (2023). This Court has "long rejected" them. *Id.* Most recently, a unanimous Court reaffirmed that federal antidiscrimination law "draws no distinctions between majority-group plaintiffs and minority-group plaintiffs." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 309 (2025).

The latest, and perhaps last, version of this theory has found a new doctrinal home: the First Amendment. In case after case, defendants who are sued for discrimination in their "diversity, equity, and inclusion" programs have invoked the First Amendment as a defense. Contorting cases like *303 Creative*, *Hurley*, and *Dale*, these defendants claim that antidiscrimination laws cannot reach their programs because their discriminatory preferences are how they express their commitment to DEI. This defense has been widely embraced, even by the American Bar Association.

Most courts have rejected this radical theory. In one major case, the Eleventh Circuit explained that this Court's precedents "clearly h[o]ld that the First Amendment does *not* protect the very act of discriminating on the basis of race." *AAER v. Fearless Fund*, 103 F.4th 765, 777 (11th Cir. 2024). Far from contradicting that principle, cases like *303 Creative* take pains to uphold "the critical distinction" between discrimination based on "'status and message.'" *Id.* at 778. While antidiscrimination laws cannot force individuals to produce speech, they can force speakers to

"'serve'" people regardless of race, sex, and other statuses. *Id.* Treating status-based discrimination itself as protected expression "risks sowing the seeds of antidiscrimination law's demise." *Id.* at 779.

Unfortunately, the decision below embraced this radical theory and gave it new life. The New Jersey State Bar association uses blatant race, sex, and other status-based quotas when choosing its leaders. The trial court found that those quotas violate the text of the State's public-accommodation law. But when the bar association invoked the First Amendment, the appellate court accepted that defense. Forbidding the association's set-asides would violate the First Amendment, according to the court, because it would "require the Association 'to allow an unwanted imbalance in racial, ethnic, or gender representation within its leadership'" and would "infringe its ability to advocate the value of diversity and inclusivity." App.17a, 24a. Never mind that the quotas were excluding petitioner, who previously served on the board and, as a Palestinian and Muslim, is plenty "diverse."

This radical decision cries out for this Court's review. The New Jersey courts seem to appreciate that fact, as the intermediate court refused to publish its decision and the state supreme court quietly declined review. This Court should not reward that tactic. The decision below badly departs from this Court's precedents, splits from other courts, and has already become a cause célèbre for the proponents of illegal discrimination under the guise of "diversity." This Court should grant certiorari and reverse, either summarily or on full briefing and argument.

STATEMENT OF THE CASE

The New Jersey State Bar Association, a private organization, sets aside seats on its board for specific demographics: Black/African American, Hispanic/Latino/a/x, Asian Pacific American, women, and LGBTQ+. Petitioner is a Palestinian and Muslim leader in the state bar, but he is ineligible for any of these seats. He sued the bar association for discrimination and won. But the appellate court agreed that the association's set-asides were shielded by the First Amendment because they "express" a commitment to "diversity."

A. The New Jersey State Bar Association is a private organization. App.4a. About one in six attorneys in New Jersey are members. App.5a. Among other duties, the association helps the governor evaluate potential judges, justices, and prosecutors. App.10a.

The association is led by a board of trustees. App.5a. The board includes eight at-large seats reserved for "underrepresented" groups. App.8-9a. In the ten years before this case, the board reserved one seat each for lawyers who are "Black/African American; Hispanic/Latino/a/x; Asian Pacific American; women; and LGBTQ+." COA.App.102; App.9a. The three remaining seats are set aside for lawyers who are "diverse," defined as the groups above plus lawyers "over the age of 70," lawyers "with disabilities/differing abilities," and lawyers who are "members of a diversity bar association." COA.App.102; App.9a.

B. Petitioner, Rajeh Saadeh, is a Palestinian and Muslim attorney. He has been licensed to practice in

New Jersey since 2010. App.11a; COA.App.13. He has been a member of the bar association since law school, has served on multiple committees, and previously served on the board as a representative of the association's young lawyers' division. App.11a.

Saadeh wants to serve on the board again. Though someone like him is hardly "overrepresented" among New Jersey lawyers, he could not run for one of the association's set-aside seats. He is not black, Hispanic, Asian, a woman, or LGBTQ+. App.43-44a; COA.App.27-29. So his race and sex barred him from competing for any of these seats. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

Saadeh sued the bar association under New Jersey's public-accommodation law, which bars "discrimination because of" race and sex. N.J. Rev. Stat. §10:5-4. Saadeh claimed that the association's set asides discriminated against him based on race, sex, and more. App.12a; COA.App.26-58. For each count, he sought damages, declaratory relief, and injunctive relief—including an order vacating the positions that were filled in a discriminatory manner. App.12a; COA.App.30-31.

In 2022, the trial court ruled for Saadeh on liability. It held that the set-asides were an illegal quota. App.44-49a. Though the bar association raised the First Amendment, the trial court rejected that defense. App.58-60a. It disagreed that the case involved any "forced inclusion," since the association does not generally "exclude Palestinian Muslim lawyers" from its "leadership." App.58-59a. If the First Amendment

were a defense to setting certain seats aside based solely on demographics, then the State's antidiscrimination law would be "meaningless." App.59a. The trial court granted summary judgment to Saadeh on liability and held that the issue of damages should proceed to trial. App.60a.

The state appellate court reversed based solely on the First Amendment. "Compelling the Association to alter or eliminate its program to ensure diversity in its leadership," the court reasoned, "would significantly burden the expression of its views." App.4a. The court thought antidiscrimination laws cannot "require the Association 'to allow an unwanted imbalance in racial, ethnic, or gender representation within its leadership'" because "'that imbalance expresses a message that is contrary to the [Association's] values.'" App.17a. The court relied entirely on this Court's decision in *Dale*, which held that the Boy Scouts could not be forced to accept a gay scout leader. *Dale* controls, the court reasoned, because compelling the bar association to end its set-asides would "unconstitutionally infringe its ability to advocate the value of diversity and inclusivity." App.24a. And in terms of means-end scrutiny, the State's "compelling interest in eliminating discrimination" did not justify "the 'severe intrusion' of prohibiting the Association from expressing views protected by the First Amendment." App.27a.

Saadeh petitioned the New Jersey Supreme Court for discretionary review. But after seven months, the court denied review on September 19, 2025. App.1a. Saadeh immediately said he would seek certiorari.

Toutant, *Bar Association's DEI Measures Survive After Justices Decline to Hear Case,* law.com (Sept. 22, 2025), perma.cc/G6JE-WDSB. After hiring new counsel for this Court and receiving a few extensions from Justice Alito, Saadeh now files this timely petition.

REASONS FOR GRANTING THE PETITION

Illegal discrimination does not become a constitutional right when the discriminator discriminates in the name of "diversity." That should have gone without saying. But now that a court has held the opposite, the question cries out for this Court's review.

The decision below contradicts this Court's precedents. Most civil-rights laws have been challenged under the First Amendment, and this Court has consistently rejected those challenges. Under a line of precedent that starts in the desegregation era, this Court holds that status-based discrimination is conduct, not speech. It receives no First Amendment protection, even when it stems from a discriminatory viewpoint. Though the First Amendment tempers antidiscrimination laws when their application would compel or alter speech, it never protects the act of status-based discrimination itself. In upholding the bar association's blatant quotas, the court below missed this distinction. And its reasoning creates a federal constitutional defense to all discrimination done in the name of "diversity."

Whether the First Amendment shields otherwise illegal "diversity" programs is an important question. The decision below creates discord in the caselaw, contradicting several recent decisions from other circuits.

The Eleventh Circuit rejected the very same argument because it "risks sowing the seeds of antidiscrimination law's demise." *Fearless Fund*, 103 F.4th at 779. Many hope the decision below does just that for discrimination in the name of diversity. Private defendants, their lawyers, and many commentators are citing the decision below as a roadmap for upholding otherwise-illegal affirmative action and DEI. Some even call it a roadmap for private universities to reintroduce race-based admissions after *SFFA v. Harvard*.

This case is an ideal vehicle for heading off this dangerous new defense. The First Amendment was the sole basis for the decision below. That decision is final. And the fact that the court tried to bury its radical reasoning in an unpublished opinion only heightens the need for this Court's review. No obstacle will prevent this Court from reaching the merits of the First Amendment defense. Saadeh satisfies Article III, including because he seeks damages for his past inability to compete for these positions. And if this Court wants another important perspective before ruling on this petition, it should call for the views of the Solicitor General.

I. By holding that the First Amendment protects discrimination that furthers "diversity," the decision below conflicts with this Court's precedents.

This Court has never held that racial discrimination is a form of expression protected by the First Amendment. It has repeatedly held the opposite. By using this Court's cases to shield discrimination that

furthers "diversity," the court below "decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct.R.10(c).

A. The act of discrimination is not protected by the Free Speech Clause.

Laws banning racial discrimination are not new, and neither are challenges to those laws under the First Amendment. When this Court sees that defense, it always rejects it. The decision below flouts that governing precedent.

Section 1981: Section 1981, an 1866 statute that predates the Fourteenth Amendment, bans racial discrimination in contracting. 42 U.S.C. §1981. In *Runyon v. McCrary*, segregated private schools tried to escape liability by claiming that §1981 infringed their First Amendment right of expressive association. 427 U.S. 160, 175 (1976). This Court disagreed. The First Amendment, it explained, does not protect "the Practice of excluding racial minorities." *Id.* at 176. Indeed, "'the Constitution ... places no value on discrimination'"—conduct that "has never been accorded affirmative constitutional protections." *Id.*

Title VII: Since 1964, Title VII has banned race, sex, and other status-based discrimination in employment. 42 U.S.C. §2000e *et seq*. In *Hishon v. King & Spalding*, a law firm argued that its failure to promote a female associate was protected speech and association. This Court again disagreed. It repeated that "'private discrimination … has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). And it denied

any "constitutional right" to discriminate in "the selection" of people based on their status. *Id.*

Public-Accommodation Laws: Title II of the Civil Rights Act of 1964 bans public accommodations from discriminating "on the ground of race, color, religion, or national origin." 42 U.S.C. §2000a(a). So do the public-accommodation laws of many States. In *Roberts v. U.S. Jaycees*, a private group that banned female members challenged one of those laws under the First Amendment. This Court rejected the challenge. It denied that the State's public-accommodation law "imposes any serious burdens on the male members' freedom of expressive association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626-27 (1984). Because acts of discrimination "produce special harms distinct from their communicative impact," discriminatory "practices are entitled to no constitutional protection." *Id.* at 628.

After these seminal cases, the Court reaffirmed that the act of status-based discrimination is not protected expression. Laws that ban it are "directed at conduct rather than speech," and those nonexpressive "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul*, 505 U.S. 377, 389-90 (1992). Laws like Title VII, 18 U.S.C. §242, and 42 U.S.C. §§1981-82 each provide "an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Same for state public-accommodation laws, which "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. GLB Grp. of Bos.*, 515 U.S. 557, 572 (1995).

B. The Free Speech Clause limits antidiscrimination laws only when they would compel or alter expression.

While this Court has applied the First Amendment to antidiscrimination laws, those cases all involve a specific fact pattern. The defendants in those cases were engaged in protected expression. And the application of the antidiscrimination laws to their expression would have altered that expression. None of these cases suggest that the act of discrimination itself is shielded by the First Amendment. They all deny that suggestion.

303 Creative and *Hurley* involved the use of antidiscrimination laws to compel or alter pure speech. The plaintiff in *303 Creative* designed custom wedding websites. *303 Creative LLC v. Elenis*, 600 U.S. 570, 579 (2023). And the defendant in *Hurley* was putting on a parade. 515 U.S. at 560-61. Antidiscrimination laws could not compel the designer to create a website celebrating a same-sex wedding, 600 U.S. at 590-92, or make the parade let a group march with a gay-pride banner, 515 U.S. 572-73, because it would compel or alter their expression.

In both cases, this Court rejected the notion that the First Amendment protects the act of discrimination itself. It stressed "the distinction between status and message," explaining that "the Free Speech Clause … does *not* protect status-based discrimination unrelated to expression." *303 Creative*, 600 U.S. at 595 n.3. Understanding this point, the designer in *303 Creative* denied any right to refuse service to people because of their sexual orientation. *Id.* at 582, 598.

And the parade in *Hurley* denied any right to "exclude homosexuals" from marching under one of the approved banners. 515 U.S. at 572.

Similarly, this Court's decision in *Dale* involved the use of an antidiscrimination law to alter "expressive association." *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000). "The forced inclusion of an unwanted person" infringes a group's First Amendment rights, this Court explained, "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. At the time, the Boy Scouts taught that homosexual conduct was immoral. *Id.* at 651-52. Letting the plaintiff in *Dale* be a scoutmaster would significantly affect the Boy Scouts' ability to advocate that viewpoint because that plaintiff was a "gay rights activist." *Id.* at 653. The Court denied that being gay alone would have justified his exclusion. Otherwise an association could "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.*

C. The decision below ignores this crucial distinction and shields the act of discrimination itself.

The decision below does not cite this Court's precedents in *Runyon* and *Roberts*. The court acknowledged that it was breaking new ground by concluding that "'affirmative action plans … excuse discrimination committed by places of public accommodation.'" App.32a. But it justified this departure by pointing to the observation in *Dale* that the expanding scope of public-accommodation laws increases the "'potential

for conflict'" with "'the First Amendment.'" App.32a. According to the decision below, this now 25-year-old language from *Dale* revamps everything this Court held previously about status-based discrimination not being protected by the First Amendment.

The decision below contradicts this Court's precedents—badly, dangerously so. Making the bar association end its discriminatory set-asides for five seats on its board would not "'forc[e] the group to accept members it does not desire.'" *Dale*, 530 U.S. at 648. The bar association already accepts members from outside these five groups. And the bar association even lets members from outside these groups serve on its board. Saadeh himself *is* a member and *has served* on the board. While the bar association "*say[s]*" that eliminating its quotas would affect its expression, "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). The association remains "free to associate to voice" its support for diversity and inclusion. *Id.* at 69-70. And nothing prevents it from choosing leaders who support that goal through non-discriminatory elections. Flatly barring certain members from holding certain seats is just "status-based discrimination" in vacuo, conduct that the First Amendment "does *not* protect." *303 Creative*, 600 U.S. at 595 n.3.

By accepting the association's assertion that "'an unwanted imbalance in racial, ethnic, or gender representation … would impair its ... voice,'" App.25-26a, the court below made the same error that this Court

corrected in *Roberts*. There, the Eighth Circuit held that forcing the Jaycees to accept women "would produce a 'direct and substantial' interference" with its right to association. 468 U.S. at 617. This Court reversed, holding that including women would not substantially infringe the Jaycee's expression because the organization could still select members based on viewpoint. *Id.* at 627-28. So too here.

II. The question presented is important.

Whether the First Amendment shields illegal DEI is exceptionally important. According to the decision below, private defendants have a federal constitutional defense to all laws that ban discrimination when that discrimination furthers "diversity" or "inclusion." Whether precedents like *Runyon*, *Hishon*, and *Roberts* have an exception for DEI is "an important question of federal law" that should be "settled by this Court." S.Ct.R.10(c). The decision below conflicts with other courts and creates a roadmap for broader mischief.

A. The decision below conflicts with other courts.

Though the court below didn't cite it, the Eleventh Circuit reached a contrary result just six months earlier in *Fearless Fund*. In that case, the defendant was a nonprofit that ran a contest "open only to businesses owned by black women." 103 F.4th at 769. Because the contest was contractual in nature, the plaintiff challenged this racially discriminatory program under 42 U.S.C. §1981. *Id.* In defense, the defendant raised the First Amendment. *Id.*

Like the appellate court here, the district court in *Fearless Fund* accepted the defendant's First Amendment defense. Though it cited this Court's decision in *Runyon*, it said that no precedent "'has addressed the relationship between anti-discrimination laws and the First Amendment'" in the context of programs "for minority groups." 2023 WL 6295121, at *5 (N.D. Ga. Sept. 27). And the court found *Runyon* "difficult to square" with this Court's more "recen[t]" decision in *303 Creative*. *Id.* at *6. Purporting to follow *303 Creative*, the court held that §1981 could not force the defendant to open its grant contest to non-black businesses. Doing so would "impermissibly modify" the group's "message" that "Black women-owned businesses are vital to our economy." *Id.* (cleaned up); *accord* Yoshino, *Rights of First Refusal*, 137 Harv. L. Rev. 244, 269 (2023) ("In the wake of *303 Creative*, *Dale* squarely raises the question of whether *Runyon*—which was also an expressive association case—would be decided differently today.").

Though one appellate judge agreed with that First Amendment holding, *see* 2023 WL 6520763, at *2 n.2 (11th Cir. Sept. 30) (Wilson, J., dissenting), a panel of the Eleventh Circuit reversed. In an opinion by Judge Newsom, the court reaffirmed that "the First Amendment does *not* protect the very act of discriminating on the basis of race." 103 F.4th at 777. It reviewed this Court's holdings in *Runyon* and *Hishon* and concluded that "prohibitions on race discrimination are uniquely resistant to First Amendment challenges." *Id.* at 779 n.7. And it stressed "the critical distinction between *advocating* race discrimination and *practicing* it." *Id.*

at 778. Cases like *303 Creative* and *Hurley* do not recognize any First Amendment "'right to refuse to serve members of a protected class.'" *Id.*

The Eleventh Circuit rightly held that this Court's precedents rejecting First Amendment defenses to antidiscrimination laws do not turn on the race of the victims. In a powerful passage that's worth quoting in full:

> Fearless simply—and flatly—refuses to entertain applications from business owners who aren't "black females." If that refusal were deemed sufficiently "expressive" to warrant protection under the Free Speech Clause, then so would be *every* act of race discrimination, no matter at whom it was directed. And on Fearless's theory, the more blatant and rampant the discrimination, the clearer the message: To take just one particularly offensive example, 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. Fearless's position—that the First Amendment protects a similarly categorial race-based exclusion—risks sowing the seeds of antidiscrimination law's demise.

Id. at 779.

The Fourth Circuit, in a decision issued last week, reiterated this important conclusion. In that case, an

organization of "diversity officers" challenged an executive order requiring every recipient of federal funding to certify "that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." *NADOHE v. Trump*, 2026 WL 321433, at *1 (4th Cir. Feb. 6). After the district court agreed that this provision likely violated the First Amendment, the Fourth Circuit unanimously reversed. This provision "requires only that plaintiffs certify compliance with federal antidiscrimination laws," and "the First Amendment doesn't confer a right to violate" those laws. *Id.* at *10. Putting a finer point on it, the Fourth Circuit held that "plaintiffs have no protectable speech interest in operating … DEI programs that violate federal antidiscrimination law." *Id.* (cleaned up). That principle is plainly right, but it is plainly irreconcilable with the decision below.

B. Many have seized on the decision below to defend illegal "diversity" programs.

Beyond "risks," the court's decision below does "so[w] the seeds of antidiscrimination law's demise." *Fearless Fund*, 103 F.4th at 779. Its reasoning allows any private organization to discriminate in its programs, including through blatant racial quotas, so long as it can tie that discrimination to its public advocacy. The ramifications of that decision are sweeping—and have not gone unnoticed by those who favor discrimination in the name of "diversity."

Proponents of these programs stress that "*Saadeh* could provide a roadmap to organizations seeking to uphold their diversity initiatives." *Using the First Amendment to Uphold DEI Initiatives*, Clark Hill PLC

(Feb. 7, 2025), perma.cc/3NKW-XF7U. Consider race-based admissions. This Court's decision in *Harvard* applies to private universities that accept federal funding under Title VI. But it does not explicitly address the First Amendment. And accepting federal funds might not waive First Amendment rights. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006). Citing the decision below, commentators have urged private universities to escape *Harvard* by "assert[ing] an expressive association right … to choose their … students." Volokh, *Expressive Discrimination: Universities' First Amendment Right to Affirmative Action*, 77 Fla. L. Rev. 75 (2025). This First Amendment defense, they recognize, would let private universities "run any affirmative action program [they] like, even one that would have been illegal under *Grutter*," including "quotas," "outright racial balancing," or "try[ing] to remedy societal discrimination." *Id.* at 80-81 & n.22, n.198.

Other private organizations are using the decision below to defend their facially discriminatory policies under the First Amendment. The most prominent (and discouraging) example is the American Bar Association. The ABA was sued for a contract-based scholarship that lets all races apply except for whites. That outright ban on white students, the ABA argued, is intended to convey a message of "enhancing diversity in the legal profession." ABA-MTD, *AAER v. ABA*, 2025 WL 2838346 & n.7 (N.D. Ill. Jul. 30). To support this defense, the ABA relied heavily on the decision below, claiming it establishes that "the state's interest in eliminating discrimination" does not "justify a 'se-

vere intrusion' of 'prohibiting the Association from expressing views protected by the First Amendment,' including 'the value of demographic diversity in the legal profession.'" *Id.*

These examples are not isolated. Programs that facially discriminate based on race and other immutable characteristics are illegal, and their illegality has become only harder to defend after this Court's decision in *Harvard*. So as many defendants and commentators recognize, the First Amendment has become the last line of defense. And as the decision below and the proceedings in *Fearless Fund* highlight, courts are willing to follow defendants down this path. This Court should grant certiorari to end this troubling theory once and for all.

III. This case is a good vehicle for reaching the question presented.

The decision below presents a clean vehicle for resolving the question presented. The bar association's discrimination appears on the face of its policies, and whether the First Amendment shields these discriminatory set-asides is a pure question of law. The First Amendment was also the sole basis for the decision below. App.30-32a. And the decision is final. The appellate court not only reversed the summary judgment to Saadeh but also ordered that Saadeh's complaint be dismissed with prejudice. App.32-33a.

Though this case originated in state court, Saadeh satisfies the requirements of Article III. As an active New Jersey lawyer with a history of serving the bar

association, including on its board, Saadeh was and is "able and ready" to apply as soon as a court orders the bar association to stop discriminating. *Ne. Fla. AGCA v. Jacksonville*, 508 U.S. 656, 666 (1993). As the trial court found, his past inability to apply entitles him to at least nominal damages. *See* App.60a. And in this federal court, that request for damages gives Saadeh standing, *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021), and prevents any possible mootness, *Mission Prod. Holdings, Inc. v. Tempnology*, 587 U.S. 370, 377 (2019).

Though the decision below was unpublished, that attempt to limit further review is only more reason to grant certiorari. This Court tells practitioners that the "unpublished" nature of a decision "carries no weight in our decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). Nonpublication here is "yet another reason to grant review," since unpublished decisions should not be used to shield suspect reasoning in the hopes it will continue to persuade without being reviewed. *Plumley v. Austin*, 135 S.Ct. 828, 831 (2015) (Thomas, J., dissenting from the denial of certiorari). While the decision here comes from an intermediate state court, the state supreme court chose to let it stand. This Court often grants certiorari in this posture, including when the intermediate court's decision is unpublished. *See, e.g.*, *Grady v. North Carolina*, 575 U.S. 306, 308 (2015); *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Clark v. Arizona*, 548 U.S. 735, 747 (2006). It should do so here, especially since the decision below—despite being unpublished—is being celebrated and cited to defend illegal DEI policies across the country.

IV. The Court should consider calling for the views of the Solicitor General.

If this Court does not grant certiorari based on the petition alone, it should at least call for the views of the Solicitor General. The United States' perspective on this petition would be uniquely helpful for a few reasons.

First, the federal government enforces and defends many antidiscrimination laws. Those laws include Title II, Title VI, Title VII, Title IX, and section 1981. Because constitutional challenges to state laws directly undermine their federal analogs, the United States consistently participates in cases raising First Amendment defenses to state public-accommodation laws. *E.g.*, U.S.-Amicus-Br., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 2017 WL 4004530 (Sept. 7, 2017); U.S.-Amicus-Br., *303 Creative*, 2022 WL 3648194 (Aug. 2022). During the first Trump administration, the United States filed a brief in *Masterpiece Cakeshop*, where it appeared to draw the same line that Saadeh draws here. "Public accommodations laws generally" regulate only "discriminatory" conduct, it explained, and implicate the First Amendment only when their application "would fundamentally alter 'speech itself.'" U.S.-*Masterpiece*-Br.13-14. Five years later in *303 Creative*, the Biden administration took an even narrower view of when the First Amendment protects discrimination that violates state public-accommodation laws. *See* U.S.-*303*-Br.9 n.* (retreating from the "broader view" it took "in *Masterpiece*"). Getting the United States' current view, now that the Court has decided *303 Creative*, could help evaluate whether to grant this petition.

Second, the federal government has been embroiled in litigation over its own efforts to combat illegal "diversity" programs. Executive orders and agency guidance have targeted diversity efforts that violate federal antidiscrimination law. *E.g.*, E.O. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025); E.O. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025). Several associations have challenged those executive actions and obtained preliminary injunctions against their enforcement. In these cases, some district courts have agreed that the government's efforts to police illegal DEI programs violate the First Amendment. *E.g.*, *NADOHE v. Trump*, 767 F. Supp. 3d 243, 291-92 (D. Md. 2025), *rev'd*, 2026 WL 321433 (4th Cir. Feb. 6, 2026); *Chi. Women in Trades v. Trump*, 778 F. Supp. 3d 959, 994, 983-84 (N.D. Ill. 2025). Given this ongoing litigation, the United States likely has unique insights on the prevalence of the First Amendment issue presented here and the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lindsay A. McKillop
THE LAW OFFICE OF
RAJEH A. SAADEH, LLC
1200 Route 22 East,
Ste. 2000
Bridgewater, NJ 08807
(908) 864-7884
lmckillop@rajehsaa-
deh.com

Thomas R. McCarthy
Cameron T. Norris
Counsel of Record
R. Gabriel Anderson*
Nicholas B. Venable*
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

*Supervised by principals of the firm admitted to practice in Virginia

February 13, 2026

Attorneys for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY, FILED SEPTEMBER 19, 2025

SUPREME COURT OF NEW JERSEY

C-37 September Term 2025
090242

RAJEH A. SAADEH,

Plaintiff-Petitioner,

v.

NEW JERSEY STATE BAR ASSOCIATION,

Defendant-Respondent.

Filed September 19, 2025

ORDER

A petition for certification of the judgment in A-00220 1-22 having been submitted to thi s Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 16th day of September, 2025.

/s/_____
CLERK OF THE SUPREME COURT

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED DECEMBER 20, 2024

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

DOCKET NO. A-2201-22

RAJEH A. SAADEH,

Plaintiff-Respondent,

v.

NEW JERSEY STATE BAR ASSOCIATION,

Defendant-Appellant.

Argued January 18, 2024—Decided December 20, 2024

OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6023-21.

Before Judges Accurso, Gummer and Walcott-Henderson.

Appendix B

The opinion of the court was delivered by ACCURSO, P.J.A.D.

The New Jersey State Bar Association appeals on our leave from an order granting partial summary judgment on liability to plaintiff Rajeh A. Saadeh, a fifteen-year member of the Association and former member of its Board of Trustees, on his claim that the Bar Association has discriminated against him in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50, by setting aside at-large seats on its Board, Nominating Committee, and Judicial and Prosecutorial Appointments Committee (JPAC) to be filled by individuals from demographic groups traditionally underrepresented in leadership positions in the Association.

The trial court found the Association was either a public accommodation or a private club or association as defined in the LAD, and its reservation of thirteen out of the total of ninety-four seats available on the Board, the Nominating Committee, and JPAC for attorneys from underrepresented groups was an impermissible quota system that violated the statute and unlawfully discriminated against Saadeh. The court rejected the Association's claim that the addition of at-large seats to its leadership bodies constitutes a bona fide affirmative action program and disallowing it would impermissibly infringe on the Association's First Amendment expressive associational right to advocate its support of diversity in the legal profession.

We reverse. Even were we to conclude the Bar Association's method of filling at-large seats on its Board of

Trustees, Nominating Committee, and JPAC constituted unlawful discrimination in a place of public accommodation, N.J.S.A. 10:5-12(f)(1), or private association, N.J.S.A. 10:5-12(f)(2), in violation of the LAD—an issue we expressly do not reach—the undisputed facts in the record establish the Association has long been committed to promoting the importance of diversity within the legal profession, a value it expresses, among other ways, by ensuring its leadership reflects its vision of diversity and inclusion. Compelling the Association to alter or eliminate its program to ensure diversity in its leadership to comply with the LAD would significantly burden the expression of its views, thus running afoul of the Association's First Amendment right of expressive association. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000).

The essential facts are undisputed. The Bar Association is a not-for-profit corporation maintaining its principal place of business at the Law Center in New Brunswick. As set forth in its by-laws, its stated purpose is "to maintain the honor and dignity of the profession of the law; to cultivate social relations among its members; [and] to suggest and urge reforms in the laws and to aid in the administration of justice." "Any person who is a member in good standing of the Bar of New Jersey or who holds a limited license to practice" here is eligible for general membership.

In pursuing its purposes, the Bar Association regularly engages in a broad range of activities including professional and personal support of New Jersey's lawyers through continuing legal education programming as

well as networking and career services; and advocacy efforts before the New Jersey Legislature and the courts, including tracking and developing positions on pending state legislation, regularly reviewing and commenting on proposed changes to the court rules, and participating as amicus curiae in litigation.

The Association maintains its efforts to increase diversity in the legal profession and more generally address racial equity in the law are wide-ranging and affect both the legal community and the public. Among the issues the Bar Association brings to our attention as its having addressed are implicit bias in jury selection, landlord-tenant matters, right to counsel, public access to name change proceedings, First Amendment issues, local civilian review boards, same-sex marriage, implementation of marijuana reform legislation, criminal justice reform, diversity training for judges, attorneys and law clerks, access to the courts, and anti-bullying proposals in schools. The Association publicly reports on these various activities.

Of the State's approximately 98,000 lawyers, some 16,000 are members of the Association. The Association manages its affairs through its Board of Trustees, which is also responsible for establishing the Association's official policies and positions. The forty-nine-member Board is made up of a cross-section of the general membership with seats reserved for officers, county bar associations, section and committee representatives and members of demographic groups underrepresented in the leadership of the Association. Specifically, the Board consists of the

Officers (President, President-Elect, First Vice President, Second Vice President, Treasurer, Secretary and Immediate Past President); two Trustees from the Young Lawyers Division; nine Trustees from the Association's various Sections and Committees; eight at-large Trustees; a designee of the State Bar Foundation; and one Trustee from each county except Essex, which has two.

The Bar Association holds itself out as "promoting and fostering a diverse and inclusive bar association," which it defines as including "race, ethnicity, gender, gender identity, sexual orientation, religion, age, and disability." And it engages in efforts to promote diversity and inclusion within its ranks. It employs a Director of Diversity, Inclusion and Community Engagement who "serves as the staff liaison for the Diversity Committee and New Jersey diverse/affinity bar associations," working to develop strategies "for increasing participation of diverse lawyers" with the Association. Its Diversity Committee is a standing committee, which "[f]acilitates the NJSBA's goal of fostering and promoting an inclusive environment that values the unique contributions of diverse individuals and organizations in all aspects of the Association." The 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."

The Association began its efforts to promote diversity in its leadership in 1989 by creating two at-large seats on its then thirty-one-member Board of Trustees, filled on

an informal, rotating basis by Hispanic, Asian-Pacific, and African American members. In 1999, the Association ended the need for rotating by establishing a third at-large seat on the Board, thus reserving an at-large seat for a member from each of these three demographic groups.

In 2005, based upon a recommendation from the Diversity Committee, the Association membership approved a by-law amendment adding two more at-large seats on the Board of Trustees, to include other groups besides Hispanic, Asian-Pacific, and African American members. The stated purpose of the amendment was to "permit broader representation on the Board of Trustees that can include other groups besides those that have historically filled the current three seats." In 2006, the Board identified two other underrepresented segments of the membership to be included for consideration of the additional two seats: lawyers in the LGBT community and "senior lawyers" over the age of seventy.

In 2010, the membership approved three additional at-large seats on the Board of Trustees and determined the Board would annually designate the underrepresented segments of the organization that could fill those seats. The Association also adopted by-law language stating the purpose of the at-large trustee positions was to promote inclusion of as many underrepresented segments of the membership on the Board of Trustees as possible.

Thus, the most recent by-law language in the record (2020) provides:

Appendix B

> Every At-Large Trustee shall be elected from, among and by the general members of the Association to represent segments of the membership not adequately represented on the Board of Trustees. The designation of these underrepresented segments of the membership to be considered when nominating candidates for the At-Large Trustee seats shall be made by the Board of Trustees prior to September 30 each year. If no designation is made, the designations in place for the prior year shall remain. Nothing in this section shall be construed to mean that a member from any underrepresented segment can be prohibited from serving on the Board of Trustees because another member from that same underrepresented group is already serving as a Trustee. The purpose of the At-Large Trustee positions is to promote inclusion of as many underrepresented segments of the membership on the Board of Trustees as possible. Any interpretation of this section of the Bylaws shall be consistent with that purpose.

In September 2021, the Association added members of a "diversity bar association" to the underrepresented groups to be considered for the three open at-large trustee seats.[1] At the time suit was filed, the approved

1. The Bar Association defines a "diversity bar association" as "those bar associations representing discrete underrepresented segments of the legal profession." The Association policy manual recognizes the following diversity bar associations: the Asian Pacific

designations for at-large seats were, as expressed by the Bar Association: one seat each for members who are Hispanic/Latino/a/x, Asian/Pacific American, Black/African American, members of the LGBTQ+ community, or women; and three non-designated seats open to members from any of the following groups: Hispanic/Latino/a/x, Asian/Pacific American, Black/African American, members of the LGBTQ+ community, senior lawyers over seventy, women, attorneys with disabilities, or attorneys who are members of a diversity bar association recognized by the Association.

At-large members are also selected for the Bar Association's Nominating Committee and JPAC. The Nominating Committee is responsible for qualifying candidates for positions on the Board of Trustees and Nominating Committee, and delegates to the American Bar Association. The Association's by-laws provide:

> The Nominating Committee shall, in its nomination of candidates, consider all appropriate factors, including but not limited to, service to the Association and its constituent parts, service to County and/or Diversity

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Lawyers of New Jersey, the Association of Black Women Lawyers of New Jersey, the Association of Portuguese Speaking Attorneys of New Jersey, the Caribbean Bar Association of New Jersey, the Garden State Bar Association, the Haitian American Lawyers of New Jersey, the Hispanic Bar Association of New Jersey, the Korean Bar Association of New Jersey, the New Jersey Women Lawyers Association, the New Jersey Muslim Lawyers Association, and the South Asian Bar Association of New Jersey.

> Bar Associations, the extent of practice in the State of New Jersey, including but not limited to government and corporate service, geographical balance, and the goal of bringing into the Association's leadership broad and diverse representation of all segments of the Bar. Before nominating a candidate to any respective position, the Nominating Committee shall consult with the groups outlined elsewhere in these Bylaws, but shall not accept endorsements for any candidate from any group.

The Nominating Committee consists of fifteen members: one presidential appointee; the immediate past president; the chair of the young lawyers division; four section chairs, not to include the women in the profession and minorities in the profession sections, two from the larger sections and one each from the mid-size and smaller sections; two county trustees from among those serving on the Board; the chair of the women in the profession section or the chair of the minorities in the profession section, alternating; two from underrepresented groups; and three elected by the general membership.

JPAC is responsible for conducting "a confidential review of prospective judicial and county prosecutor candidates and advises the Governor whether the prospective candidates are qualified for appointment for those offices" pursuant to a compact "established with the Governor." Members of JPAC are appointed by the president of the Association, who "shall consider the goal

of broad diverse representation of all segments of the Bar." There are thirty members of JPAC: one from each county; the president, the president-elect and the immediate past president; one chairperson; two vice-chairpersons, one from South Jersey and one from North Jersey; and three at-large from underrepresented groups.

Saadeh is an attorney licensed to practice law in New Jersey since 2010. He maintains a general practice in Somerset County. He has been a member of the Bar Association since he was in law school. Saadeh has been appointed to serve on five different committees[2] and has been a member of twelve different sections.[3] In addition, between 2019 and 2021, he served on the Board of Trustees as the designated representative of the young lawyers' division. Since his term of service ended, Saadeh has not pursued any other positions potentially available to him on the Board of Trustees, the Nominating Committee, or JPAC. Saadeh is a current member and past president of the New Jersey Muslim Lawyers Association, one of the diversity bar associations recognized by the Association. He describes himself as a Palestinian Muslim American.

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2. Saadeh has served on two standing committees: the diversity and amicus committees, and three special committees: the equity jurisprudence, appellate practice, and continuing legal education committees.

3. Saadeh has been a member of the young lawyers' division, and the family law, real property trust and estate, solo and small firm, minorities in the profession, business law, criminal law, entertainment and arts law, federal practice, intellectual property, international law, and labor and employment law sections.

Appendix B

In his operative complaint filed in November 2021, Saadeh asserted causes of action for unlawful discrimination and violation of his civil rights based on race, color, national origin, age, sex, gender identity or expression, affectional or sexual orientation, and disability, contrary to the LAD with respect to the Bar Association's selection of at-large members of its Board of Trustees, Nominating Committee, and JPAC.[4] Saadeh sought compensatory and punitive damages; interest; costs of suit and investigation; attorney fees; a declaration that the Bar Association has unlawfully discriminated against him in violation of the LAD; and injunctive relief "restraining and enjoining current, continued, and future violations" of the LAD, including: the vacating of all "at-large" Trustee seats, as well as Nominating Committee and JPAC positions filled in violation of the LAD, and prohibiting the Association from filling those seats until it does so in compliance with the LAD; and compelling the Bar Association to revise its designation of underrepresented groups so as not to be in violation of the LAD.

The parties made early cross-motions for summary judgment, which were denied by the court. In a written statement of reasons, the court found there were material issues of fact precluding any finding that the Bar Association was a place of public accommodation, that the Association's designation of at-large seats on its Board of Trustees, Nominating Committee and JPAC constituted

4. Saadeh filed his original complaint with a proposed order to show cause seeking temporary restraints. The court signed the order to show cause but denied temporary restraints. We denied Saadeh's motion for leave to appeal as did our Supreme Court.

an illegal quota system, and if so, whether reordering those reserved seats in a manner Saadeh might find preferable would violate the Association's "constitutionally protected right to freedom of expressive association."

The Bar Association moved for reconsideration, and Saadeh sought leave to appeal the denial of his summary judgment motion. Following our denial of leave to appeal, Saadeh filed a cross-motion for reconsideration in the trial court. The motion judge's retirement required the parties' cross-motions for reconsideration to be heard by a different judge.

Reviewing the prior ruling, the new judge noted the prior judge's statement that he agreed with Saadeh's

> position that "if the 'women only' label were removed from the 'women only' Board of Trustees seat, women would still be eligible to obtain said seat without excluding others due to sex or gender, and all consistent with the [Bar Association's] abstract, foggy concept of diversity." This suggestion would likely solve a lot of the issues that [Saadeh] alleges are present within the [the Association], however it will also violate [the Association's] constitutionally protected right to freedom of expressive association.

The judge on reconsideration found that

> [n]otwithstanding [that] finding, the original judge in this matter, anomalously, denied the

> defendant's motion for summary judgment. If this court finds that the [prior orders on the summary judgment motions] reflected erroneous rulings, then it is this court's responsibility to correct that error. . . . As noted in *Lawson [v. Dewar,* 468 N.J. Super. 128, 135 (App. Div. 2021)], "[t]he polestar is always what is best for the pending suit; it is better to risk giving offense to a colleague than to allow a case to veer off course."

The new judge decided there were no fact issues in dispute and that Saadeh was entitled to judgment as a matter of law. The judge found there was no need to decide whether the Bar Association was a public accommodation under N.J.S.A. 10:5-12(f)(1) because the LAD extends to private clubs and associations under N.J.S.A. 10:5-12(f)(2), making it illegal for a "private club or association to directly or indirectly . . . deny to any . . . club member . . . any of the . . . advantages . . . or privileges thereof, or to discriminate against any member in the furnishing thereof" based on the member's "race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person."

The judge concluded the Association's "program which has evolved into the creation of 13 'at-large' leadership seats reserved exclusively for members of underrepresented groups is [an illegal] quota system" because Saadeh, "a

Palestinian Muslim American attorney, [is] foreclosed from obtaining" any one of the five seats on the Board of Trustees reserved for members of specific identity groups and is not eligible for one of the other eight at-large seats on the Board of Trustees, as well as one of the two at-large seats on the Nominating Committee and the three at-large seats on JPAC without the prerequisite of membership in a diversity bar association not required of African American, Hispanic or Asian Pacific members, members of the LGBTQ+ community, women, members over the age of 70, or disabled members.

The judge accepted Saadeh's position "that it is of no moment that 41 seats on the [Board of Trustees], 13 seats on the [Nominating Committee], and 27 seats on JPAC are not discriminatory," finding Saadeh "has been unlawfully discriminated against by being excluded from eligibility (or 'automatic' eligibility) for the 13 at-large leadership seats of the [Bar Association]." The judge found "the issues in this case are centered only around those 13 at-large seats, not the entire composition" of the Board of Trustees, the Nominating Committee, and JPAC.

The judge rejected the Bar Association's claim that it has a First Amendment right of expressive association to select a governing body of leaders that is consistent with the Association's values based on the United States Supreme Court's opinion in *Dale,* and, as a constitutional matter, the LAD cannot be read to require the Association "to allow an unwanted imbalance in racial, ethnic, or gender representation within its leadership bodies where that imbalance expresses a message that is contrary to the

[Association's] values." The judge found *Dale* "inapposite . . . for the simple reason that *Dale* was about forced inclusion and this case is about forced exclusion."

The judge further found that to adopt the Bar Association's argument on the constitutional issue "would be tantamount to giving [it] carte blanche in formulating any diversity program, because, regardless of whether that program violated the NJLAD, it would be permissible because the [Bar Association's] First Amendment right would always trump the NJLAD." "In other words, to accept the [Association's] . . . argument would render the NJLAD meaningless."

The judge denied the Bar Association's motion for summary judgment and granted Saadeh's cross-motion for summary judgment on liability and ordered the case to trial on damages. Although denying immediate injunctive relief, the judge granted prospective relief, ordering that as any of the thirteen at-large seats on the Board of Trustees, the Nominating Committee or JPAC became vacant, or were to be filled or re-filled by the Bar Association, "every member in good standing . . . shall be eligible to apply."

The Bar Association moved for a stay, and Saadeh moved for reconsideration of the judge's denial of immediate injunctive relief. Following argument, the judge rendered an oral opinion and issued an order denying both motions. We granted the Association's motion for leave to appeal and denied Saadeh's motion for leave to appeal from the order denying him immediate injunctive relief.

The Supreme Court likewise denied Saadeh's motion for leave to appeal.

We review summary judgment using the same standard that governs the trial court. *C.V. by & through C.V. v. Waterford Twp. Bd. of Educ.,* 255 N.J. 289, 305 (2023). As the parties agreed on the material facts for purposes of the motion, our task is limited to determining whether the trial court's ruling on the law was correct. *R.* 4:46-2(c). Our review of legal issues is, of course, de novo; we owe no deference to the trial court's interpretation of the law or its application of the law to established facts. *Sipko v. Koger, Inc.,* 251 N.J. 162, 179-80 (2022); *Jeter v. Sam's Club,* 250 N.J. 240, 251 (2022); *Manalapan Realty, LP v. Twp. Comm. of Manalapan,* 140 N.J. 366, 378 (1995).

Relying on the United States Supreme Court's decision in *Dale,* 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. Therefore, as a constitutional matter the LAD cannot be read to require the Association "to allow an unwanted imbalance in racial, ethnic, or gender representation within its leadership bodies where that imbalance expresses a message that is contrary to the [Association's] values."

Saadeh responds that "stopping the [Association] from discriminating does not violate its freedom of expressive association." He argues the Bar Association has not identified any viewpoint it espouses, that enjoining the Association from discriminating would not significantly

burden its ability to advocate its viewpoints, and that enjoining it from engaging in invidious discrimination outweighs any burden imposed on its alleged associational expression.

We granted leave to the Asian Pacific American Lawyers Association of New Jersey, the Garden State Bar Association, the Hispanic Bar Association of New Jersey, the New Jersey Women Lawyers Association, and the South Asian Bar Association of New Jersey to appear and participate as amici curiae.[5] *See R.* 1:13-9(a). Although amici did not weigh in on the constitutional issue, they argue generally that the Bar Association's "affirmative action plan" is necessary, effective, and lawful. They note that although New Jersey is one of the most diverse states in the country, until 2010 the Association's leadership "was white, straight, and male" and has become significantly less so in recent years, "clearly evidencing the value and benefit of the program."

Amici argue that racial and ethnic diversity in the legal profession is critically important in demonstrating our laws are made and justice administered for the benefit of all persons. They contend that "[w]ithout an emphasis

5. Amici contend they "comprise and represent thousands of attorneys within the State that identify as a member of a minority group" and that their "organizations represent attorneys from backgrounds that have historically been underrepresented in the legal profession, based upon gender, race, background, language, and other similar characteristics." They represent that their members "are actively engaged in the [Bar Association] as members and as leaders, as well as within the broader legal community."

on diversity and inclusion, particularly among state bar associations, it is unlikely . . . within any reasonable time frame" that the legal profession will become more diverse. Amici maintain "ensuring the diversity of the State Bar is critical to ensuring the legal community represents the experiences of its members and meets the needs of New Jersey's citizens." Thus, they argue, notwithstanding that the legal profession as a whole lags behind other professions in minority representation, the Association's affirmative action program "has resulted in greater leadership participation from underrepresented groups and created a more representative bar association."

The First Amendment, *U.S. Const.* amend. I, applicable to the States through the Fourteenth Amendment, *U.S. Const.* amend. XIV, prohibits the States from making any law "abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment also protects conduct that is inherently expressive. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.,* 547 U.S. 47, 66 (2006).

The United States Supreme Court has held "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). "Consequently . . . implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate

with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Ibid.*

The Court has made clear that the freedom of association also implies a freedom not to associate. *Ibid.* That is, "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale,* 530 U.S. at 648.

The Court has recognized that "intrusion into the internal structure or affairs of an association" can unconstitutionally burden its expressive associational right. *Ibid.; Roberts,* 468 U.S. at 622-23. It has also acknowledged, however, that "the freedom of expressive association . . . is not absolute" and can "be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale,* 530 U.S. at 648 (quoting *Roberts,* 468 U.S. at 623).

In *Dale,* our Supreme Court held the Boy Scouts of America is a place of public accommodation under N.J.S.A. 10:5-12(f)(1); found its expulsion of James Dale as an adult member and assistant scout master, after he had been identified in the *Star Ledger* as "co-president of the Rutgers University Lesbian/Gay Alliance," based on the Boy Scouts' policy of excluding openly gay men and boys as members violated the LAD; and affirmed our holding that although "the First Amendment protects Boy Scouts'

goals and activities, . . . the relationship between Boy Scouts' stated goals and Boy Scouts' exclusionary practice was not significant enough to overcome the compelling state interest in eradicating invidious discrimination." *Dale v. Boy Scouts of Am.,* 160 N.J. 562, 570-71, 578, 582 (1999), *rev'd and remanded sub nom. Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000).

Specifically, our Supreme Court held the LAD's public accommodation provision did "not violate Boy Scouts' freedom of expressive association" because it didn't "have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views." The Court found "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral." *Id.* at 612. Moreover, the Court found the "Boy Scouts' litigation stance on homosexuality appear[ed] antithetical" to its commitment "to a diverse and 'representative' membership." *Id.* at 617-18. The Court concluded "that Dale's membership [did] not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts'] existing members' ability to carry out their various purposes.'" *Id.* at 615 (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 548 (1987)).

In reversing our Supreme Court, the United States Supreme Court, although noting "New Jersey's statutory definition of '[a] place of public accommodation' is extremely broad," expressed no opinion on our Court's

finding that the Boy Scouts qualified as such.[6] *Dale,* 530 U.S. at 656-57. It simply observed that "[a]s the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Id.* at 657.

The Court had no hesitation in concluding the Boy Scouts "engages in 'expressive association,'" as "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* at 648. The Court found the Boy Scouts' general mission of instilling values in its youth members "by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing" rendered it "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 649-50.

It disagreed with our Supreme Court that including Dale as an assistant scoutmaster would have no significant impact on the Boy Scouts' ability to express its "members' shared expressive purpose," 160 N.J. at 615, which the high Court termed the Boy Scouts' "desire to not 'promote

6. Although an obvious state law question, the Supreme Court noted that "[f]our State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation" and "[n]o federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result." Dale, 530 U.S. at 657 n.3.

homosexual conduct as a legitimate form of behavior.'" 530 U.S. at 653. It held "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. And it rejected our Supreme Court's criticism of the inconsistency in the Boy Scouts' exclusion of Dale based on his sexual orientation and its professed commitment "to a diverse and 'representative' membership," noting it's "not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 650-51.

The Court instead instructed that the same deference courts give "to an association's assertions regarding the nature of its expression," must also be accorded "an association's view of what would impair its expression." *Id.* at 653. The Court found "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Ibid.* Putting the Boy Scouts' associational interest in freedom of expression "on one side of the scale" and the State's interest in ending discrimination based on sexual orientation on the other, the Court concluded "a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct," and "[t]he state interests embodied in New Jersey's public accommodations law

do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 658-59.

Applying *Dale* to the undisputed facts in this record establishes beyond peradventure that the Bar Association qualifies as an expressive association, and that compelling it to end its practice of ensuring the presence of designated underrepresented groups in its leadership would unconstitutionally infringe its ability to advocate the value of diversity and inclusivity in the Association and more broadly in the legal profession.

The record reflects the Association's many forms of public expression and advocacy on matters of public concern, including the importance of diversity within the Association, in the legal community, and in continuing legal education. *See Roberts,* 468 U.S. at 626-27 (finding Jaycees' public positions on diverse issues and regular engagement in variety of civic activities "worthy of constitutional protection under the First Amendment"). Contrary to Saadah's argument, the Bar Association also engages in expressive activity in determining the composition of its governing Board of Trustees and other leadership bodies.

The Association's by-laws are explicit in requiring representation of a cross-section of its membership on the Board of Trustees, the Nominating Committee and JPAC. In addition to allocating slots to members representing the county bar associations and a mix of sections, the by-laws also reserve slots for members representing demographic groups historically underrepresented in the Association's leadership, a consciously deliberate choice expressing

the Association's vision of diversity and inclusion in the Association and in the broader legal community.

Given the Bar Association engages in expressive activity and that it does so through its method for filling at-large seats on its Board of Trustees, Nominating Committee and JPAC, we next consider whether compelling the Association to alter or eliminate its inclusion program "would significantly affect" the Association's "ability to advocate" its viewpoints. *See Dale,* 530 U.S. at 650.

As the Bar Association argues in its brief, its "message is clear"; it "deeply values diversity in the legal profession," and it expresses that value in the "intentional makeup" of the Board and Committees that lead the Association. The Bar Association's decades-long commitment to diversifying its leadership, as established in the record, leaves no doubt about the sincerity of its commitment. *See id.* at 651-53.

The Association maintains that forcing it to end its long-standing practice for filling at-large seats runs "the risk, borne out by history," that "underrepresented groups will not be guaranteed a seat at the table." It contends that would undermine the Association's "expression of commitment to promoting equal participation" within the Association and interfere with its efforts "to maintain a leadership that models the very diversity it champions publicly."

The Association argues "an unwanted imbalance in racial, ethnic, or gender representation within its

leadership bodies" would impair its effectiveness as "a collective voice in matters of concern to the legal profession" and force it "to send the undesired message that it no longer cares, or cares as much, about diversity in general or about assuring access to leadership positions for underrepresented groups in particular." As the Supreme Court has commanded, we are obliged to "give deference to an association's view of what would impair its expression." *Id.* at 653. "[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

As the Bar Association's commitment to the importance of diversity in the legal profession has been much more a fixture of its private and public expressions than the Boy Scouts' former views on homosexuality were in its private and public messaging, we are satisfied the Association has established that forcing it to alter its method of filling at-large positions in its leadership would significantly burden its ability to express its views.

Having determined the Bar Association is an expressive organization and that forcing it to end its method of guaranteeing the participation of underrepresented demographic groups in its leadership "would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require" that the Association end its method of filling at-large seats on the Board of Trustees, Nominating Committee and JPAC "runs afoul of [the Association's] freedom

of expressive association." *See Dale,* 530 U.S. at 656. The Third Circuit has characterized this analysis as a weighing of the State's interests in applying its law against the association's interests in freedom of expression. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh,* 229 F.3d 435, 442 (3d Cir. 2000).

There is no question but that New Jersey has a compelling interest in eliminating discrimination on the basis of race, color, national origin, sex, gender identity or expression, affectional or sexual orientation, and disability under its public accommodation and private association law.[7] *See Dale,* 530 U.S. at 659. But, as in *Dale,* that interest—an interest the Association believes it is vindicating—does not justify the "severe intrusion" of prohibiting the Association from expressing views protected by the First Amendment—here, the value of demographic diversity in the legal profession and in its own leadership. The Association cannot be forced to send the message "that it no longer cares, or cares as much, about diversity in general or about assuring access to leadership positions for underrepresented groups in particular" by ending its practice of reserving thirteen of the ninety-four seats on its Board of Trustees, Nominating Committee and JPAC for members who are Hispanic/

7. That is, all those bases for Saadeh's claims of discrimination with the exception of age, which is not included in our public accommodation laws. See C.V., 255 N.J. at 320 ("Although the LAD makes it 'unlawful' for an employer to discriminate 'because of . . . age in employment,' N.J.S.A. 10:5-12(a), there is no comparable prohibition on places of public accommodation."); N.J.S.A. 10: 5-12(f) (1) and (2).

Latino/a/x, Asian/Pacific American, Black/African American, members of the LGBTQ+ community, women, senior lawyers over seventy, attorneys with disabilities, or attorneys who are members of a diversity bar association recognized by the Association. *See Hurley,* 515 U.S. at 575.

The judge on reconsideration deemed *Dale* inapposite, because "*Dale* was about forced inclusion and this case is about forced exclusion." But Saadeh, like Dale, is complaining about exclusion—Dale from membership in the Boy Scouts and Saadeh from leadership in the Bar Association. As Saadeh writes in his brief, he "is not eligible or automatically eligible for the 13 seats at issue" based on his identity, just as Dale was not eligible for membership in the Boy Scouts based on his. *Dale* is, without question, controlling here, and Saadeh's—and the trial court's—efforts to distinguish it are indistinguishable from the arguments the Supreme Court rejected in that case and we've rejected in this one.

Saadeh has a different vision of a diverse leadership for the Association, and he objects to the Association's vision because, among other reasons, it does not take him, someone "indisputably diverse" into account. Although arguing that "[a]ffirmative action plans have never been found to excuse discrimination committed by places of public accommodation, nor could they," he claims "[w]here the [Association] has gone awry is [in] refusing to address its historically discriminatory seats." He maintains the Association "must examine why those seats have historically been discriminatory, address the causes of the problem, and implement and execute a plan

to solve it considering the causes." Doing so, he maintains, would enable the Association "to determine an actual factual predicate to underpin an actual affirmative action" program.

In ascertaining the groups it believes are underrepresented in its leadership, the Association does not consider members from the Middle East generally or members of Palestinian origin specifically, nor does it consider religion, notwithstanding that national origin and religion are both protected categories under the LAD. The Association is selective as to the categories it considers to be underrepresented in its leadership and values for inclusion in its at-large seats. Thus, although the Association refers to its program as one of expressive inclusion, it is, by design, also a form of expressive exclusion recognized in *Dale*.

As both Saadeh and the judge on reconsideration concede, expressive exclusion is not the Association's intent.[8] It is, however, the inevitable effect of how the Association defines underrepresentation and inclusion,

8. In his opinion on reconsideration, the judge stated "no one suggests, and it would be absurd for anyone to even intimate on this record, that the Association took steps to expressly exclude Palestinian Muslim lawyers from leadership seats." And Saadeh acknowledges that the Association "never expressed that [he] is unwanted in the 13 seats at issue even though he is not eligible or automatically eligible for them while others are." He also maintains that "[w]ithout such an expression [of intentional exclusion], allowing [him] to obtain said 13 seats cannot violate the [Association's] freedom of expressive association," a statement with which we disagree.

at least for its at-large seats. And it is the expression to which Saadeh objects.

Whether viewed as a policy of inclusion or exclusion, however, through its "intentional makeup" of its Board of Trustees, Nominating Committee and JPAC, the Association is expressing its view as to the meaning of the diversity and inclusion it champions. Applying the public accommodations provision of the LAD to compel the Association to abandon its method of selecting its at-large seats significantly burdens its right to oppose a leadership that doesn't guarantee underrepresented groups, as it defines them, "a seat at the table."

It is not for this court to approve or disapprove of the Association's view of diversity or how best to attain it within its leadership. *See Dale*, 530 U.S. at 661. "[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's efforts to compel the organization to accept members where such expression would derogate from the Association's expressive message." *Ibid.* As the Supreme Court has unequivocally held, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Ibid.* (quoting *Hurley,* 515 U.S. at 579).

We close with a word as to why we have elected not to address whether the Association's method for filling at-large seats in its leadership is a valid affirmative action

program under the LAD as the Association asserts, or an illegal quota system in violation of the LAD as Saadeh maintains, in favor of resolving this case based on First Amendment grounds. *See Facebook, Inc. v. State,* 254 N.J. 329, 362 (2023) (noting the general rule of avoiding constitutional questions if a case can be resolved on another basis). We've resolved the case on the constitutional question because we can do so based on well-established precedent whereas the LAD issue is novel with little to guide our inquiry.

As the first judge to address this matter in the trial court noted, there is very little law in the area of affirmative action programs involving private, not-for-profit associations such as the Bar Association, in contrast to the well-established precedent in employment under Title VII, *see United Steelworkers v. Weber,* 443 U.S. 193, 197, 208 (1979), and the evolving precedent in higher education under the Equal Protection Clause of the Fourteenth Amendment, *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard College,* 600 U.S. 181 (2023), neither, in our view, a particularly good fit for analyzing the Association's program in this case. *Cf. Sauter v. Colts Neck Volunteer Fire Co. No. 2,* 451 N.J. Super. 581, 583 (App. Div. 2017) (holding firefighter voted out of membership in volunteer fire company not entitled to the protections of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14).

Indeed, the only case the parties cited to us, *Doe v. Kamehameha Schools,* 470 F.3d 827 (9th Cir. 2006), involving an affirmative action plan employed by a purely

private non-profit entity, albeit a school, was written almost twenty years ago and resulted in six separate opinions from the Ninth Circuit sitting en banc. Saadeh's claim that "[a]ffirmative action plans have never been found to excuse discrimination committed by places of public accommodation, nor could they," ignores Chief Justice Rehnquist's observation in *Dale* that "[a]s the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." 530 U.S. at 657.

We conclude that notwithstanding the LAD's prohibitions against discrimination in places of public accommodation and private associations, 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. An exploration of the contours of a valid affirmative action program in a purely private, non-profit organization under the LAD will have to await a case in which applying the LAD will not trench on the organization's First Amendment expressive associational rights.

We reverse the order entering partial summary judgment on liability for Saadeh, dissolve the prospective

injunction entered against the Bar Association, and remand for entry of summary judgment in favor of the Association dismissing the complaint in its entirety with prejudice. We do not retain jurisdiction.

Reversed and remanded.

/s/_____
CLERK OF THE APPELLATE DIVISION

APPENDIX C — MEMORANDUM OF DECISION OF THE SUPERIOR COURT OF NEW JERSEY, MIDDLESEX COUNTY, LAW DIVISION, FILED NOVEMBER 9, 2022

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY
LAW DIVISION

Docket No. MID-L-6023-21

RAJAH SAADEH,

Plaintiff,

v.

NEW JERSEY STATE BAR ASSOCIATION,

Defendant.

CIVIL ACTION

MEMORANDUM OF DECISION

Decided: November 9, 2022

Rea, J.S.C.

PROCEDURAL HISTORY

The plaintiff, Rajeh Saadeh, is a Palestinian Muslim American attorney and a member of the defendant, the

New Jersey State Bar Association (hereinafter NJSBA or defendant). He brings this lawsuit against the defendant pursuant to the New Jersey Law Against Discrimination. (NJLAD or LAD) N.J.S.A. 10:5-1 et seq. This matter began on October 15, 2021, by way of the filing of a verified complaint together with a request for the entry of an order to show cause seeking temporary restraints (TRO). That application was denied by the trial court on November 29, 2021. On that same day the plaintiff filed a first amended complaint which was essentially identical to the original verified complaint. Both pleadings contained the same eight counts. On December 3, 2021, the plaintiff filed an emergent motion before the appellate division in order to appeal the trial court's denial of plaintiff's TRO. That application was denied by the appellate division on that same day. Later that day plaintiff brought the same application for urgent relief before the New Jersey Supreme Court. That application was likewise denied on December 7, 2021. Thereafter, on December 20, 2021, plaintiff filed a motion for leave to appeal the November 29, 2021 denial of his request for a TRO and on January 10, 2022, the appellate division denied that application as well. The defendant filed its answer on January 3, 2022, and on January 7, 2022, the defendant filed its notice of motion for summary judgment. On January 25, 2022, the plaintiff filed opposition to the defendant's motion for summary judgment as well as a cross motion for summary judgment. On January 31, 2022, the defendant filed opposition to plaintiff's cross motion for summary judgment and reply to plaintiff's opposition to defendant's motion for summary judgment. On March 11, 2022, the trial court heard oral argument on both the defendant's motion for summary judgment as well as the

plaintiff's cross motion for summary judgment. On June 30, 2022, the trial court entered two orders denying both motions for summary judgment. On July 20, 2022, the defendant filed a motion for reconsideration of the June 30, 2022 order which denied the NJSBA's motion for summary judgment. Also on July 20, 2022, the plaintiff sought leave to appeal the trial court's order of June 30, 2022 denying plaintiff's motion for summary judgment. That application was denied on August 15, 2022. On September 1, 2022, the plaintiff filed a cross motion for reconsideration of the June 30, 2022 order which denied the plaintiff's summary judgment motion. The motions for reconsideration are currently before this court.

FACTUAL BACKGROUND

The undisputed facts in this case are as follows. Regarding its Board of Trustees (BoT), the defendant, in 1989 began creating at-large seats which were reserved exclusively for members of underrepresented groups. That year, two at large seats were added to the BoT. These seats could only be filled by state bar members who were Hispanic, Asian Pacific, or African American. Members of these three groups were rotated annually through the two specified at-large seats until 1999 when a third at-large seat was created by the defendant thereby eliminating the need to rotate members of these three groups through the two designated seats. So as of 1999, there were three at-large seats on the BoT dedicated exclusively to members of certain underrepresented groups: namely, one for a Hispanic NJSBA member, one for an African American NJSBA member, and one for an Asian Pacific NJSBA

member. In 2005, the defendant added two more at-large trustee seats dedicated specifically for underrepresented groups raising the number of at-large seats to five. The two new at-large seats were reserved exclusively for one member of the NJSBA who was also a member of the LGBTQ+ community and for one member of the NJSBA over the age of 70. In September of 2008, the defendant examined the status quo of its composition of at-large seats reserved specifically for underrepresented groups and determined that the designations should remain unchanged but should be subject to periodic review. In November of 2010, the defendant created three additional at-large trustee seats (raising the total to eight) and amended its bylaws as follows:

> "This will permit underrepresented segments of the NJSBA that otherwise would not be represented on the board of trustees to be eligible for such representation. It will help provide diversity on the board of trustees to ensure that the board is truly representative of the entire NJSBA membership. The proposed amendments also require the board of trustees to determine annually which groups should be designated as underrepresented and therefore eligible to be considered for filling any vacant at-large seats that year. Currently, the bylaws permit the board of trustees to make such designations "periodically"."

Also, in November 2010 the defendant designated the following groups as being underrepresented for purposes

of filling the three new seats: Hispanic, Asian Pacific, African American, members of the LGBTQ+ community, lawyers over age 70, and women. In June of 2011, the defendant voted to reconfirm the existing designations for underrepresented groups with the proviso that additional statistical information be gathered for the defendant to determine if further amendments were appropriate. One month later, after obtaining additional information, the defendant decided to specifically designate one of the three most recently created at-large seats for a member of the NJSBA who was a woman. That left two open at-large seats which were to be filled by a member of any one of the designated underrepresented groups; namely, members who are Hispanic, African American, Asian Pacific, a member of the LGBTQ+ community, lawyers over age 70, and women. In June of 2012, 2013, 2014, and 2015 the defendant voted to maintain the status quo regarding at-large seats on the BoT. In June 2016, defendant again made some changes. At that time the specifically designated seat for lawyers over age 70 was eliminated but that category was retained as a non-designated underrepresented group. Also, a category of attorneys with disabilities was added to the underrepresented groups to be considered for the, then two, non-designated, at-large trustee seats. All other existing designations were retained. So at that time the posture of the eight at-large seats on the BoT was as follows: one seat each for NJSBA members who are Hispanic, Asian Pacific, African American, members of the LBGTQ+ community, and a woman and three non-designated at-large seats open to individuals from any of the following groups: Hispanic, Asian Pacific, African American, members of the LGBTQ+ community, women,

lawyers over age 70, and attorneys with disabilities. The years 2017, 2018, 2019 and 2020 saw no additional changes regarding the eight at-large seats of the BoT reserved for underrepresented groups. Then, on September 17, 2021, the defendant added members of any diversity bar association as recognized in the defendant's policy manual to the underrepresented groups to be considered for the three non-designated (or non-specific) at-large trustee seats. The defendant retained all other existing designations. Therefore, the final and now current approved designations are: one seat each for members of the NJSBA who are Hispanic, African American, Asian Pacific, a woman, a member of the LGBTQ+ community and 3 non-designated at-large seats open to individuals from any of the following groups: Hispanic, Asian Pacific, African American, a member of the LGBTQ+ community, women, lawyers over the age of 70, lawyers with disabilities, and lawyers who are members of a diversity bar association recognized in the defendant's policy manual. That policy manual defines diversity bar association to include: Asian Pacific Lawyers of New Jersey, The Association of Black Women Lawyers of New Jersey, The Association of Portuguese Speaking Attorneys of New Jersey, The Caribbean Bar Association of New Jersey, The Garden State Bar Association, The Haitian American Lawyers of New Jersey, The Hispanic Bar Association of New Jersey, The Korean Bar Association of New Jersey, The New Jersey Women Lawyers Association, the New Jersey Muslim Lawyers Association, and the South Asian Bar Association of New Jersey.

There are two at-large seats on the defendant's Nominating Committee (NC) and three at-large seats on

the defendant's Judicial and Prosecutorial Appointments Committee (JPAC). The eligibility criteria for these five seats have mirrored, and continue to mirror, the eligibility criteria of the three non-designated at-large seats on the BoT reserved specifically for underrepresented groups as that term was/is defined by the defendant. The NC consists of a total of 15 seats, the JPAC consists of a total of 30 members, and the BoT consists of a total of 49 members.

PROCEDURAL CONTENTIONS OF THE PARTIES

Defendant maintains that R. 4:49-2 applies to these motions for reconsideration. Indeed, the defendant filed its motion for reconsideration on the 20th day after the trial court's orders, i.e., July 20, 2022. On that same day the plaintiff filed for leave to appeal the trial court's decision with the Appellate Division. The plaintiff's position is that R. 4:42-2 applies essentially because the June 30, 2022 orders are interlocutory, not final. Plaintiff further contends that because the trial court's orders are interlocutory, they are subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. R. 4:42-2(b). In support of this position, plaintiff cites to Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021).

LEGAL STANDARD TO BE APPLIED TO THESE RECONSIDERATION MOTIONS

In the present matter, the rule governing these motions for reconsideration is R. 4:42-2(b) as opposed to R. 4:49-2 given that the June 30, 2022 orders are not

final orders but rather interlocutory orders. See Lawson v. Dewar, 128 N.J. Super. 128, 133-136 (App. Div. 2021). An interlocutory order is any order or form of decision which adjudicates fewer than all the claims as to all parties. Clearly, the trial court's orders of June 30, 2022 denying both the defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment did not adjudicate all the claims as to all parties. In fact, those orders did not adjudicate any claims, therefore they were, by definition, interlocutory orders, not final orders.[1] Even if R. 4:49-2 applied in this matter, this court would not view the plaintiff's cross motion out of time, particularly given that at that relevant point in time, the plaintiff was preparing an application for leave to appeal to the Appellate Division. Fairness would require such a finding. R. 1:1-2(a). Another Superior Court judge who is now retired presided over this case up to June 30, 2022 when he entered the two orders denying both parties' summary judgment motions. It is not possible for that judge to preside over these reconsideration motions, which of course, would be preferred. R. 4:42(b). This court certainly has respect for my colleague's June 30, 2022 orders and his rulings contained therein; however, this court owes no deference to those decisions. Lawson, at 135. My predecessor states the following toward the end of his June 30, 2022 decision: "Lastly, this Court agrees with Plaintiff's position that if the 'women only' label were removed from the 'women only' . . . seat, women would still be eligible to obtain said seat without excluding

1. In its papers, defendant, in arguing that the June 30, 2022 orders were final orders, compares R. 4:49-2 to R. 4:42-2(a). Defendant overlooks that it is R. 4:42-2(b) that applies here.

others . . . This suggestion would likely solve a lot of the issues that Plaintiff alleges are present with the NJSBA, however it will also violate Defendant's constitutionally protected right to freedom of expressive association . . . ." Notwithstanding this finding, the original judge in this matter, anomalously, denied the defendant's motion for summary judgment. If this court finds that the June 30, 2022 orders/decision reflected erroneous rulings, then it is this court's responsibility to correct that error. Id. As noted in Lawson, "The polestar is always what is best for the pending suit; it is better to risk offense to a colleague than to allow a case to veer off course." Id.

Plaintiff in his reconsideration brief correctly notes that regarding liability, no factual issue exists for a jury to determine and there only exists a question of law. At page two of plaintiff's counsel's September 1, 2022 brief she states:

> "On liability, there is no factual issue for a jury to determine. The only question as to liability is one of law: is the NJSBA violating the Law Against Discrimination by depriving Plaintiff, but not others, of automatic eligibility to obtain [at-large] seats based on identity?"

The defendant is obviously in accord with this notion as it states at page 5 of its brief dated July 20, 2022:

> "Here, the parties conceded that there are no issues of fact that, at a trial, would require submission of the issue to the trier of fact. In

> those circumstances and particularly in light of the discussion that follows, the Court likewise should have concluded that there are no genuine issues of material fact here and thus should have proceeded to render its conclusions of law."

This court agrees that the issue of liability was ripe for determination immediately after the March 11, 2022 oral argument. Because this court believes that one of the summary judgment motions heard on March 11, 2022, should have been granted and the other denied, this court is rehearing the original motions for summary judgment filed in this matter *ab initio*.

SUBSTANTIVE CONTENTIONS OF THE PARTIES

The plaintiff, a Palestinian Muslim American attorney who is also a member of the NJSBA, contends that prior to September 17, 2021, he was excluded from eligibility for thirteen leadership seats of the defendant: namely, the eight at-large seats on the BoT, the two at-large seats on the NC, and the three at-large seats on the JPAC. The plaintiff further contends that as of September 17, 2021, he is still ineligible for the five at-large seats reserved specifically for NJSBA members who belong to certain designated groups. He also contends that as of September 17, 2021, he is eligible for one of the three non-designated at-large seats on the BoT and for one of the two corresponding seats on the NC and for one of the three corresponding seats on the JPAC but only if he first belongs to a designated diversity bar association. In this regard, the plaintiff points out that unlike any other

member of an underrepresented group (specifically: Hispanic, African American, Asian Pacific, a member of the LGBTQ+ community, women, lawyers over age 70, and lawyers with disabilities) he must first complete a prerequisite; namely, be a member of a diversity bar association before being eligible for one of the three post-September 17, 2021 non-designated at-large seats reserved for underrepresented groups as that term is defined by the defendant.

The defendant's position is multi-faceted. First, defendant contends that it is not a place of public accommodation and therefore not subject to the LAD. Second, defendant contends that even if it is subject to the LAD, the NJSBA did not engage in unlawful discrimination. Third, the defendant contends that even if it is subject to the LAD, and even if it has engaged in otherwise prohibited unlawful discrimination under the LAD, its program constitutes a bona fide affirmative action program exempt from the LAD's reach. And fourth, the defendant contends that plaintiff's claims are foreclosed by the NJSBA's federal constitutional right to freedom of expressive association.

LEGAL ANALYSIS

First question: Is the NJSBA's program a quota system or is it a bona fide affirmative action plan?

The answer to this question is that the defendant's program which has evolved into the creation of 13 "at large" leadership seats reserved exclusively for members of underrepresented groups is a quota system.

Appendix C

Plaintiff's position is that the NJSBA's creation of 13 at-large seats reserved exclusively for members of underrepresented groups constitutes an illegal quota system. The defendant maintains that its program in this regard amounts to a bona fide affirmative action plan. A quota system is just that. It is a system wherein a certain number of spots are created or set aside to be filled ONLY by members of certain groups, to the exclusion of all others who are not members of the designated groups. A bona fide affirmative action plan contains as its premise a finding of imbalance to the detriment of (an) underrepresented group(s) and specifies the basis for that finding. Further, a legitimate affirmative action plan must set forth a goal for remediating the imbalance, and the affirmative action plan must prescribe some form of standards by which that goal will be achieved. Klawitter v. City of Trenton, 395 NJ Super. 302, 328 (App. Div. 2007). Provided a bona fide affirmative action plan is in place, then membership in an underrepresented group can be properly considered as a "plus factor" in the determination of whether a member of an underrepresented class should be chosen for an elevated position rather than an equally qualified person who is not a member of the subject underrepresented group. Id. Plaintiff takes the position that bona fide affirmative action plans have only been applied in the context of employment, education, and government. While reported caselaw may be limited to the examination of affirmative action plans in those three arenas, nothing in the caselaw specifically limits the implementation of affirmative action plans to only situations involving employment, government or education. In other words, as a matter of common sense, if the NJSBA had a bona fide

affirmative action plan in place it could use membership in an underrepresented group as a "plus factor" in choosing a member of said group over a non-member of said group for some elevated or positive position within the organization.

Plaintiff's counsel, in her brief, relies heavily upon Lige v Montclair, 72 NJ 5 (1976) and Taylor v. Leonard, 30 NJ Super 116 (Ch Div. 1954). Defendant argues that the quota systems involved in both Lige and Taylor are distinguishable from the alleged quota system in this case. Defendant points out that its program provides a floor for underrepresented groups but not a ceiling. Defendant's position is that both cases relied upon by the plaintiff involve a "ceiling", in other words, a limit on how many spots a member of an underrepresented group would be eligible for. In Taylor, African Americans were only eligible for a total of 72 public housing apartments out of a total of 828 units. In Taylor, there was a "ceiling", and it was 72 housing units. In that portion of Lige which deals with firefighters, at issue was a program that required the hiring of one qualified minority applicant for every one qualified white applicant until the total number of minority firefighters on the Montclair Fire Department equals **at least** 15 persons. Lige, at 14 (emphasis added). In Lige, there was no cap on the number of minorities that could be hired by the Montclair Fire Department. There simply had to be at least 15. Likewise, in Lige, regarding the Montclair Police Department, there was a minimum, but no maximum, of African American police officers that could be promoted in that agency. Thus, defendant's

position that Lige involved a ceiling is erroneous.[2]

As plaintiff points out, his claim is limited to the criteria used by the NJSBA for filling 13 at-large seats, and only those 13 seats. Plaintiff is correct in his observation that it is of no moment that 41 seats on the BoT, 13 seats on the NC, and 27 seats on JPAC are not discriminatory. Regarding those 13 at-large seats, one hundred percent of them can only be filled by members of underrepresented groups as that term is defined by the defendant. No member of the NJSBA who is not: African American, Hispanic, Asian Pacific, a member of the LGBTQ+ community, a woman, a lawyer over the age of 70, a disabled lawyer, or a member of a designated diversity bar association is eligible to be considered for the 8 at-large seats on the BoT, the 2 at-large seats on the NC, and the 3 at-large seats on JPAC. The inclusion of members of diversity bar associations in the defendant's definition of underrepresented group occurred on September 17, 2021. Prior to that date, the plaintiff, a Palestinian Muslim American attorney, was

2. In response to the Plaintiff citing Lige in support of the proposition that what the NJSBA has in place is an illegitimate quota system, the defense states the following in its reply: "Plaintiff conveniently ignores Lige's caveat: that it does not provide an appropriate forum for evaluating the relative merits of different remedial devices, or general policy objectives such as equal employment opportunity and a qualified work force. Nevertheless, the narrow question posed by this case is of fundamental importance – the authority of the State Division on Civil Rights to utilize certain remedial devices in enforcing the constitutional proscription against invidious discrimination. [Id. at 28 (emphasis supplied)]". What defense counsel fails to point out is that this quote from Lige is part of the dissenting opinion.

foreclosed from obtaining any of the 13 at-large seats. After September 17, 2021, the plaintiff was eligible for consideration of the 2 at-large seats on the NC, the 3 at-large seats on JPAC, and the 3 at-large seats on the BoT that were reserved for non-specific but identified members of underrepresented groups. The problem, however, is that the plaintiff's eligibility for these seats requires him to first secure a prerequisite, i.e., membership in a specifically identified diversity bar association. The point being that if, like the plaintiff, a member's only way of securing one of these 8 (3 BoT + 2 NC + 3 JPAC) seats is to first join a diversity bar association then that member is being treated disparately because this extra step of being a member of a diversity bar association is not required of any member of the following groups: African Americans, Hispanics, members who are Asian Pacific, a member of the LGBTQ+ community, women, lawyers over the age of 70, or disabled lawyers. Regarding the remaining 5 seats on the BoT, i.e., the seats reserved exclusively for one African American, one Hispanic, one member who is Asian Pacific, one member of the LGBTQ+ community, and one woman; the plaintiff, again a Palestinian Muslim American, never was and currently is still not eligible for any of them.

One hundred percent of the members of the NJSBA who do not fit the criteria set by the defendant for the 13 at-large seats at issue are per se excluded from eligibility for those seats. Those excluded members have a zero percent chance of securing one of those 13 at-large seats. Considering that the LAD applies to everyone, those excluded members, like the plaintiff, have both a "floor"

and a "ceiling", both of which is zero percent. That being said, the question of whether a diversity program amounts to a quota system does not turn on whether the program has a "floor" and/or a "ceiling". Rather, the dispositive question is whether seats are reserved for members of certain groups to the exclusion of members of other groups. To label the defendant's program pertaining to the 13 at-large seats at issue as anything but a quota system would be disingenuous for the simple reason that only certain people can occupy those 13 at-large seats to the exclusion of everyone else.

Second question: If the defendant's program is a quota system, does it matter if the defendant is a place of public accommodation?

The answer to this question is "No".

The LAD as originally enacted in 1945 applied only to "places of public accommodation" and not to private entities. Both sides argue vociferously about whether the NJSBA is a place of public accommodation and both sides put forth very good arguments in favor of their respective positions. As Chief Justice Rehnquist notes in Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000), at footnote 3, "Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. (Citations omitted). No federal appellate court or state supreme court -- except the New Jersey Supreme Court in this case – has reached a contrary result." Given this division in jurisprudence, obviously the question of whether an organization is a

"place of public accommodation" is a difficult one that does not need to be answered in this case. Plaintiff correctly points out that even if the NJSBA is not a place of public accommodation, it is subject to the LAD as applied to its own members. Plaintiff's counsel accurately states in her brief:

> "NJSA 10:5-12(f) was specifically amended in 1997 to add subsection 2, to account for the loophole in the LAD whereby distinctly private clubs were not subject to the LAD, which allowed such a private club to discriminate against its own members after their admission. If the NJSBA is not a place of public accommodation, then it is a private club that offers advantages, accommodations, facilities, and privileges to said members, including the ability to sit on the BoT, NC, and JPAC. If the NJSBA is not deemed a place of public accommodation, then under NJSA 10:5-12(f), it cannot withhold or deny privileges to its members based on protected categories, including race, color, national origin, age, sex, gender identity or expression, affectional or sexual orientation, and disability."

The 1997 amendment reads as follows: "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

> Notwithstanding the definition of a "place of public accommodation" as set forth in subsection l. of section 5 of P.L. 1945, c. 169

> (C. 10:5-5), for any owner, lessee, proprietor, manager, superintendent, agent, or employee of any private club or association to directly or indirectly refuse, withhold from or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person."

N.J.S.A. 10:5-12(f)2.

Defendant's retort to this argument is to just reiterate its position that the plaintiff was not discriminated against and therefore the 1997 amendment to the LAD, that is, NJSA 10:5-12(f)(2) does not help plaintiff's cause. If that were true, then the inescapable logical conclusion would be that whether the defendant is a place of public accommodation would be of no moment. Defendant argues that the plaintiff cannot claim he was discriminated against because he was treated the same as all other NJSBA members who were/are not eligible for those 13 at-large seats. Defendant misconstrues the Plaintiff's

argument, which is, that all other members of the NJSBA similarly situated to him as far as eligibility for those 13 at-large seats, are likewise victims of discrimination.

The above-noted 1997 amendment to the LAD renders the issue of whether the defendant is a place of public accommodation immaterial.

Third question: Is a quota system always unlawful?

The answer to this question is "No", however in this case, it is.

In an artfully written dissenting opinion, Justice Mosk of the California Supreme Court wrote the following about quota systems:

> "As professor Alexander Bickel pointed out in The Morality of Consent (1975) pages 132-133: 'A quota is a two-edged device: for every one it includes it cuts someone else out . . . a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes . . . for every person quota-ed in, another is quota-ed out. There is no way in

> which a numerical quota can be benign. If it favors one, it necessarily rejects another."

Price v. Civil Service Commission, 26 Cal. 3d 257 (1980) (Justice Mosk dissenting).

As plaintiff correctly points out, the LAD applies to everyone. See N.J.S.A. 10:5-4 which refers to "all persons" and N.J.S.A. 10:5-12(f)(2) which refers to "any individual". As noted in plaintiff's papers, if there was a white person only seat or a straight man only seat on the BoT, same would be violative of the LAD; and logically the same applies for the black person only, the Hispanic person only, the Asian Pacific person only, the LGBTQ+ community member only, and the woman only seats. The LAD applies to all, irrespective of whether an individual is a member of an underrepresented group.

In answering this question about whether a quota system is lawful, it is helpful to consider Federal authority. As Judge Lisa wrote in Klawitter:

> "In addition to the New Jersey authorities we have cited, our conclusion that the adoption of a bona fide affirmative action is a prerequisite to the use of race as a plus factor is bolstered by a review of the federal jurisprudence on this subject. The New Jersey Supreme Court typically looks to federal cases involving analogous anti-discrimination provisions in interpreting state anti-discrimination laws. See Bergen Commercial Bank, *supra*, 157 N.J.

> at 200 ("To the extent the federal standards are useful and fair, they will be applied in the interest of achieving a degree of uniformity in the discrimination laws.") (internal quotations omitted); Shaner v. Horizon Bancorp., 116 N.J. 433, 437 ("[The LAD] standards have been influenced markedly by the experience derived from litigation under federal anti-discrimination statutes.").

Klawitter v. City of Trenton, 395 N.J. Super., at 328.

In Kirkland v. New York State Department of Correctional Services, 520 F. 2d 420, 427 (2d Cir., reh. en banc den., 531 F. 2d 5 (2d Cir. 1975) the Second Circuit limited the use of quotas to situations where there has been 1) a "clearcut pattern of long-continued and egregious racial discrimination" and 2) the effect of the reverse discrimination must not be "identifiable", namely, that it may not be concentrated on a relatively small group of non-minority persons. As noted by Judge Van Graafeiland writing for the United States Court of Appeals for the Second Circuit:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited"

Kirkland, at 427 citing Blumrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675 (1974). Judge

Van Graafeiland observes that "commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." Id.

The Lige panel applied the Kirkland two-prong test in finding that the quota system in that case was unlawful. Lige, at 19. Applying the two-prong Kirkland test in this case leads to the conclusion that the quota system in this case is unlawful. If the defendant could prevail on the first prong, i.e., that there has been a "clearcut pattern of long-continued and egregious racial discrimination", as a matter of law, the defendant's program pertaining to the 13 at-large seats cannot survive the second Kirkland prong, to wit, that the effect of the reverse discrimination must not be identifiable, namely, that it may not be concentrated on a relatively small group of non-minority persons. The effect of the reverse discrimination in this case is obviously identifiable. The casualty at a minimum is Mr. Saadeh but also includes all other members of the NJSBA who are not eligible to be considered for the 13 at-large seats at issue in this case. Therefore, the defendant's program involving the 13 at-large violates the Law Against Discrimination and the plaintiff's civil rights. The following quote from Lige is particularly applicable in this case: "As a matter of wisdom no one can quarrel with the [NJSBA's] overall purpose. It is the method which is pernicious." Lige, at 23.[3]

3. Lige speaks in terms of "racial discrimination" and "non-minority persons". In the case *sub judice*, the defendant's program was intended to cure more than racial discrimination and, as such, was tailored to encompass in a broader sense certain identified "underrepresented groups". Notwithstanding this distinction, the logic espoused in Lige applies equally in this case. Also, at issue

Appendix C

In the interest of completeness, it should be noted that the LAD does sanction certain quota-based discrimination. N.J.SA. 10:5-31 to 38. This portion of the NJ LAD, which was added in 1975, permits quota-based discrimination in the context of public works contracts. See e.g., United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317 (1982), reversed and remanded, 465 U.S. 208 (1984). In that case, the City of Camden, New Jersey enacted an ordinance mandating affirmative action by private construction companies awarded public works contracts by the city government. At issue were two provisions of that ordinance: first, that there be a 25% minority hiring goal for contracts with the City of Camden; second, that 40% of the labor force in Camden public works projects be city residents. Pursuant to N.J.S.A. 10:5-36, the State Treasurer approved these requirements. The New Jersey Supreme Court unanimously held that the Treasurer's approval of these quotas was proper under the LAD. Id. The case was reversed and remanded by the United States Supreme Court, but that Court's decision dealt only with the 40% residency requirement and whether that particular ordinance violated the Privileges and Immunities Clause, Art. IV, sec. 2, cl. 1 of the United States Constitution. The New Jersey Supreme Court upheld the first ordinance regarding the 25% minority hiring goal and that ruling was not appealed to the United States Supreme Court.

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in Lige were non-minority persons (namely white people). In this case at issue is a Palestinian Muslim American attorney and all other members of the NJSBA who are similarly excluded by the defendant's program, be they minority persons or non-minority persons. Again, the rationale of Lige is on all fours with the facts of this case.

United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317 (1982), reversed and remanded, 465 U.S. 208 (1984). See also, Fullilove v. Klutznick, 448 US 448 (1980) (upholding federal affirmative action quotas for minority contractors).

The plaintiff has been unlawfully discriminated against by being excluded from eligibility (or "automatic" eligibility) for the 13 at-large leadership seats of the NJSBA. To reiterate, the issues in this case are centered only around those 13 at-large seats, not the entire composition of the BoT, the NC, and the JPAC. Plaintiff's counsel, in her brief provides a very helpful illustrative example to make the point that the remaining 41 seats on the BoT, the remaining 13 seats on the NC, and the remaining 27 seats on the JPAC are irrelevant and immaterial. As she writes:

> "The availability of non-discriminatory, alternative seats for plaintiff is not an excuse or defense. If a restaurant designated certain tables as "white only" even if there are other tables available for non-whites, it would violate the LAD; the same principle applies to the pertinent eight seats on the BoT, two seats on the NC, and three seats on JPAC, as plaintiff is not automatically (at minimum) eligible for them, because of his identity, while others are. Just like the restaurant, the NJSBA is discriminating based on identity and violating the LAD."

Plaintiff's counsel is correct.

Appendix C

Fourth question: Are the plaintiff's claims foreclosed by the NJSBA's Federal constitutional right to freedom of expressive association?

The answer to this question is "No".

The defendant relies on the United States Supreme Court opinion, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) for the proposition that the plaintiff's claims in this case fly in the face of the defendant's First Amendment right of freedom of expressive association. The Dale case involved an openly gay assistant scoutmaster who was ousted by the Boy Scouts of America (BSA) because he was homosexual. The BSA's position being that homosexuality was inconsistent with its message or viewpoint. Dale brought suit in New Jersey. His case went to the New Jersey Supreme Court. That court ruled that Dale must be included as a scoutmaster in the BSA. The BSA appealed to the United States Supreme Court which ruled that forcing the inclusion of Dale into the BSA's organization violated the BSA's First Amendment right of freedom of expressive association.

The Dale decision is inapposite to this case for the simple reason that Dale was about forced inclusion and this case is about forced exclusion. The case at bar centers on the plaintiff's complaint that he is not eligible for (or being treated disparately for) certain at-large leadership seats on the defendant's BoT, NC, and JPAC. In Dale, the BSA expressly rejected and expelled Dale because of his homosexuality. In this case no one suggests, and it would be absurd for anyone to even intimate on this record, that

the NJSBA took steps to expressly exclude Palestinian Muslim lawyers from certain leadership seats.

The defense centers its argument on the notion that the plaintiff's claim unconstitutionally interferes with how it expresses itself in terms of achieving diversity in creating the 13 at-large seats. This argument mischaracterizes the factual backdrop and rationale of Dale. Dale alleged that he was discriminated against in violation of the NJLAD by the BSA. Likewise, Mr. Saadeh alleges that he was/is being discriminated against in violation of the NJLAD by the NJSBA. In Dale, as in this case, the focus is on the person who is alleging unlawful discrimination; not on other members of the organization who are being treated favorably to the detriment of the complaining witness. There exists no logical corollary between Dale who was fighting to be included in the BSA and Mr. Saadeh who is fighting to stop the NJSBA from excluding himself and other members of the NJSBA from certain at-large seats.

To accept defendant's Dale argument would be tantamount to giving the NJSBA carte blanche in formulating any diversity program, because, regardless of whether that program violated the NJLAD, it would be permissible because the defendant's First Amendment right would always trump the NJLAD. In other words, to accept the defendant's Dale argument would render the NJLAD meaningless. Again, it is crucial to note that Dale was about forced inclusion while this case is about forced exclusion. Notwithstanding my colleague's finding to the contrary on June 30, 2022, this court finds that there is no First Amendment impediment to the plaintiff's claims.

Appendix C

Summary judgment on the issue of liability is granted in favor of the plaintiff. The defendant's motion for summary judgment is correspondingly denied.

This matter shall proceed to trial on the issue of damages with a trial date to be determined by the Civil Assignment Office.

With regard to plaintiff's request for injunctive relief, same is granted but not immediately as sought by plaintiff. Plaintiff seeks an order to compel the NJSBA to immediately vacate the 13 at-large seats at issue given that they were filled in a manner violative of the LAD. While this court agrees that the defendant's program involving the 13 at-large seats is illegal, this court finds that an order entered compelling the defendant to immediately vacate those seats would unfairly put the defendant in a position of chaos. In other words, an order to immediately cease and desist would wreak havoc among the members of the NJSBA in positions of leadership and generally put the organization in a state of turmoil. Therefore, this court shall grant the requested injunctive relief prospectively. As such, as any of these 13 at-large seats become vacant or are otherwise eligible to be filled or refilled, and the defendant wishes to fill or refill these seats, then the defendant shall only do so in a manner that does not violate the LAD.

Dated: November 9, 2022 /s/ Joseph L. Rea
Hon. Joseph L. Rea, J.S.C.