

No. 25-1002

In the Supreme Court of the United States

RAJEH A. SAADEH,
Petitioner,

v.

NEW JERSEY STATE BAR ASSOCIATION,
Respondent.

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

**BRIEF FOR AMERICA FIRST LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed by law. America First Legal has a substantial interest in this case because it has filed dozens of complaints with the EEOC or lawsuits against companies, including CBS, IBM, Macy's, Starbucks, Kellogg's, Activision, and Major League Baseball, for unlawful race and sex-based discrimination in employment. See, e.g., *Beneker v. CBS*, No. 2:24-cv-01659 (C.D. Cal. filed Feb. 29, 2024); *Dill v. Int'l Bus. Mach. Corp.*, No. 1:24-cv-852 (W.D. Mich. filed Aug. 20, 2024); *Vaughn v. CBS Broad., Inc.*, No. 2:24-cv-05570 (C.D. Cal. filed July 1, 2024); *Smith v. Ally Fin.*, No. 3:24-cv-00529 (W.D.N.C. filed June 6, 2024); *Wood v. Red Hat*, No. 2:24-cv-00237 (D. Idaho filed May 8, 2024); *Kascsak v. Expedia*, No. 23-cv-01373-DII (W.D. Tex. filed Nov. 9, 2023); *Harker v. META Platforms, Inc.*, No. 23-cv-07865 (S.D.N.Y. filed Sept. 5, 2023). These companies have illegally awarded jobs, benefits, bonuses, and other career opportunities to minorities while openly excluding whites (and sometimes Asians), heterosexuals, and males. Many of these and other defendants seek to use the First Amendment as a shield against liability for their discriminatory conduct. Thus, AFL has a significant interest in this case.*

* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Over the last half-century, American companies and organizations have been increasingly “obsessed with ‘diversity, equity, and inclusion’ initiatives and affirmative action plans.” *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 319 n.3 (2025) (Thomas, J., concurring) (citation modified). “Initiatives of this kind have often led to overt discrimination against those perceived to be in the majority.” *Ibid.* Indeed, such plans almost always rely on discrimination based on status—most often race—that is “by [its] very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208 (2023). Too many American organizations have “concluded, wrongly, that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned but the color of their skin.” *Id.* at 231.

DEI discriminators, however, have a problem: racial discrimination in employment, contracting, and public accommodations is generally illegal, under both state laws and federal laws enacted after the Reconstruction Amendments. Thus, they need to find a way around the prohibitions on racial discrimination that cover most facets of modern life. And their efforts took on new urgency after this Court reiterated in *Students for Admissions* that “[e]liminating racial discrimination means eliminating all of it.” *Id.* at 206.

So today’s segregationists now trot out what is both a new and very old excuse for racial exclusion: a purported First Amendment right to “express” support for discrimination—not by advocating for it, but by

effecting it. In essence, large American companies and other organizations want to be treated as equivalent to the KKK, whose “main” “message”—“that blacks and whites should not mix”—meant that they could exclude black citizens from marching with them in a parade. *Invisible Empire of the Knights of the Ku Klux Klan, Maryland Chapter v. Mayor*, 700 F. Supp. 281, 289 (D. Md. 1988).

But despite some similarities, modern DEI discriminators are not the KKK. They do not exclude *every* person of disfavored races. They do not have an overriding message of exclusion, instead offering a hazy stew of diversity, inclusion, performance, merit, monetary, and innumerable other “holistic” considerations. They usually are not formed for primarily expressive purposes, and their discrimination occurs not as part of advocacy, but in ordinary business and contracting. Even to the extent they intend to send a message about DEI via their discrimination, reasonable observers would not receive that message *if not for* other speech—hence the near-ubiquitous DEI virtue signaling. All this means that modern DEI discrimination is not “expressive conduct” or protected by the First Amendment.

This Court has long rejected claims that the Free Speech Clause gives organizations the right to ignore antidiscrimination laws and exclude persons based on the color of their skin. Unfortunately, the Court needs to reject this claim again. *Amicus* regularly encounters this borderline frivolous defense when advocating for victims of race discrimination, as giant corporations pretend to be modern-day KKK parades. The court

below cast the New Jersey State Bar Association in this role, even though there is no possibility that any observer would understand any coherent DEI message simply from the bar’s exclusion of a Palestinian Muslim from its leadership (but not membership).

Because the decision below egregiously erred by adopting a theory that would turn antidiscrimination law upside down—and is already being used to that end—this Court should grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

I. Employers and others are using the First Amendment as a post hoc justification for unlawful discriminatory conduct.

“[A] number of this Nation’s largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups.” *Ames*, 605 U.S. at 319 n.3 (Thomas, J., concurring). And it is not just employment discrimination: universities, law firms, nonprofits, and (as here) bar associations routinely make admissions, financial, scholarship, and other decisions based on race and other protected characteristics. By 2021, “[m]ore than eight in 10 (83%) U.S. organizations” were already “implementing diversity, equity and inclusion initiatives,” with “human resources policies” being “the most prevalent (74%) DEI activity.”¹ More than half of organizations with a DEI policy have quantitative “metrics in place to measure DEI results”²—metrics that almost always

¹ *Majority of U.S. Employers Have Implemented DEI Initiatives in 2021*, L.A. Times (Dec. 15, 2021), <https://perma.cc/8RR6-5Y9E>.

² *Ibid.*

measure people by their demographic group membership.

“[D]iversity has increasingly become a code word for discrimination.” *Price v. Valvoline, LLC*, 88 F.4th 1062, 1068 (CA5 2023) (Ho, J., concurring). “[I]t is not at all unusual for major segments of society to base their actions on a person’s membership in certain demographic groups, often to the detriment of the ‘majority’ and certain ‘minority’ persons sometimes deemed to be ‘majority-adjacent.’” *Smyer v. Kroger Ltd. P’ship I*, No. 22-3692, 2024 WL 1007116, at *7 (CA6 Mar. 8, 2024) (Boggs, J., concurring). Many companies are “imbued with belief in ‘diversity’” or otherwise “under pressure from affirmative action plans” to discriminate in favor of supposed “minority” employees. *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 542 (CA7 2005) (Posner, J.). Favoring those employees “necessarily means disfavoring” employees in other groups. *Price*, 88 F.4th at 1068 (Ho, J., concurring).

That is the point. According to one prominent DEI advocate, “The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”³ This means, for instance, “treating, considering, or making a distinction in favor or against an individual based on that person’s race”—including by “advancing non-White Americans.”⁴

Amicus’s cases show this reality. See *supra* p. 1. For instance, Brian Beneker is a white, heterosexual

³ I. Kendi, *How To Be an Antiracist* 19 (2019).

⁴ *Id.* at 19–20.

male script coordinator and freelance scriptwriter who regularly wrote episodes for CBS's "Seal Team" television series. CBS's CEO "set a goal that all writers rooms on the network's primetime series be staffed 40 percent BIPOC [Black, Indigenous, and people of color] in the 2021-22 season."⁵ The next year, the goal increased to 50%.⁶

Unsurprisingly, Beneker—a white male—was repeatedly denied a staff writer position with the show, while CBS hired and promoted individuals who lacked experience and screenwriting credits but were part of the favored hiring groups; that is, they were nonwhite, LGBTQ, or female. Beneker witnessed CBS hire several staff writers without experience who met their DEI qualifications, despite telling Beneker that they could not hire him because the show had too many writers just months prior. CBS explained that these new writers "checked diversity boxes that Beneker did not." At one point, CBS even asked him whether another writer was Asian. Despite Beneker's success in writing for the series, he soon realized that he was ineligible for hiring in the writers' room because of the illegal, discriminatory sex and race requirements enforced by CBS.⁷

After Beneker sued, CBS argued that the First Amendment "displaces" "anti-discrimination laws"

⁵ L. Rice, *Altered Reality*, Entertainment Weekly (Feb. 2, 2022), <https://perma.cc/CT7Q-9GF5>.

⁶ C. D'Zurilla, *CBS Announces Diversity Overhaul of Writers Rooms and Script-Development Program*, L.A. Times (July 13, 2020), <https://perma.cc/29BK-YX43>.

⁷ Third Am. Compl., *Beneker v. CBS Studios, Inc.*, No. 2:24-cv-01659, Doc. 45 (C.D. Cal. June 10, 2024).

against its discriminatory conduct, on the ground that CBS is entitled to “hir[e] the storytellers whom CBS believes are best suited to tell the stories CBS wants to produce and broadcast.”⁸ According to CBS, “[t]he First Amendment rule of speaker’s autonomy gives CBS, and CBS alone, the right to decide what stories to tell in its television programming”—“[a]nd CBS has the corresponding right to select which writers are best suited to tell those stories.”⁹ CBS also demanded “deference” to “the decision[s] it makes in assembling the writers’ room.”¹⁰ CBS even claimed that it “is *solely* entitled to decide” “what associations might advance or impair” its goals.¹¹

Yet CBS could never articulate what message that it sought to convey that turned solely on a show writer’s race (or sex). It simply said that “a writer’s experience affects the show’s storytelling,” and that it wanted more “stories focused on or related to underrepresented groups and issues.”¹² CBS invoked the importance of writers’ “lived experiences”—a term commonly deployed by discriminators as code for skin color, with scant attention given to the person’s actual “experiences.”¹³

Indeed, CBS could not explain why a person’s skin color is the determinant of their ability to tell stories.

⁸ Motion to Dismiss 1, *Beneker v. CBS Studios, Inc.*, No. 2:24-cv-01659, Doc. 48 (C.D. Cal. June 24, 2024).

⁹ *Id.* at 9.

¹⁰ *Ibid.*

¹¹ *Id.* at 13.

¹² *Id.* at 11.

¹³ Reply in Support of Motion to Dismiss 3, *Beneker v. CBS Studios, Inc.*, No. 2:24-cv-01659, Doc. 54 (C.D. Cal. July 29, 2024).

Much less could CBS explain how the hiring of a writer who is not seen at all by audiences could *itself* convey any coherent message via the show about race (or any other protected characteristic). At the end of the day, CBS’s assertion boiled down to the claim that it needed to discriminate because it has an interest in discriminating for “diversity.”¹⁴

Every entity that discriminates in hiring could make much the same claim: it wanted to appear to be “more diverse and inclusive,” and courts must simply “defer[] about what decisions will” lead to the right racial mixture—and about whether the entity’s action is in service of that mixture.¹⁵

Yet even as CBS argued that it had a First Amendment right to racially discriminate, it denied that it actually “use[d] racial quotas in hiring for its writers’ rooms.”¹⁶ But this poses a conundrum: if CBS itself disclaims that it is using racial discrimination to send any message, how could that non-existent message be protected by the First Amendment? If CBS does not intend to send a message favoring discrimination, how likely is it that any viewer would somehow perceive CBS’s behind-the-scenes hiring (or not) of a writer to send any message? And how can CBS be entitled to “deference” about its intended messages if it will not even admit to sending such messages?

¹⁴ *E.g., id.* at 6.

¹⁵ *Id.* at 1, 7.

¹⁶ *E.g.,* Answer ¶ 17, *Beneker v. CBS Studios, Inc.*, No. 2:24-cv-01659, Doc. 61 (C.D. Cal. Aug. 28, 2024).

Fortunately, the district court in Beneker’s case declined to let CBS preempt the entire case with a motion-to-dismiss stage invocation of expressive conduct.¹⁷ But other defendants routinely make similar claims in efforts to avoid liability at any stage.

CBS’s claims were functionally identical to the New Jersey State Bar Association’s in this case. The court below noted the Association’s generalized “commitment to the importance of diversity in the legal profession.” Pet. 26a. Then, to cover the great gap between expressing that general view and outright racial exclusion from a particular position, the court simply deferred to the Association’s say-so that it needed to discriminate—but only on its leadership and “for its at-large seats.” Pet. 30a. The court said that “[i]t 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.” *Ibid.*

But it *is* a court’s job to decide whether the First Amendment applies to begin with. The First Amendment “has no application when what is restricted is not protected speech.” *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011). And as discussed next, when an employer or organization has a mere business practice of DEI discrimination, that is not enough to show a limitation on expressive conduct.

¹⁷ Order, *Beneker v. CBS Studios, Inc.*, No. 2:24-cv-01659, Doc. 60 (C.D. Cal. Aug. 14, 2024).

II. This routine use of the First Amendment to shield odious discrimination should fail.

This Court “ha[s] extended First Amendment protection only to conduct that is inherently expressive.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006). And it has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). “[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Routine claims that DEI discriminatory selection is protected by the First Amendment should fail. Drawing on the facts of the New Jersey case and *amicus’s* case above, the following discussion shows several reasons that these claims should fail. *First*, discriminatory selection generally will not be inherently expressive. An organization’s generalized commitment to broad DEI principles does not make the act of discrimination in selection inherently expressive. *Second*, discrimination based on status is not the same as discrimination based on message—and status-based discrimination is normally unprotected. *Third*, antidiscrimination laws do not significantly impair most organizations’ expressive conduct, which is required for a First Amendment claim. *Fourth*, demands for total deference to the organization’s litigation position otherwise are misplaced, as this Court has repeatedly viewed far-

fetches claims of expression impairment with skepticism.

A. Discrimination is not usually inherently expressive.

“First Amendment protection” extends “only to conduct that is inherently expressive.” *Rumsfeld*, 547 U.S. at 66. Conduct cannot “be labeled ‘speech’” simply because “the person engaging in the conduct intends thereby to express an idea.” *Id.* at 65–66 (citation modified). To decide “whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,” this Court has “asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation modified).

Modern DEI discriminators will generally be unable to satisfy this test. When a large corporation (like CBS) or organization (like bar associations) selects an employee or leader, the public will generally not even be aware of the selection, much less take that individual selection to express any message. That is true even if the organization expresses a generalized support of DEI, given that these organizations still at least sometimes hire persons of all races. Thus, any particular selection could not send any coherent message about the organization’s view of race, for an outside “observer” of the selection “has no way of knowing” why it was made. *Rumsfeld*, 547 U.S. at 66.

What’s more, most DEI discriminators lack “an intent to convey a particularized message” in the first

place. *Johnson*, 491 U.S. at 404 (citation modified). As noted, many will not even fess up to having engaged in discrimination, so they can hardly claim that they intentionally wanted to send any message via their supposedly non-existent discrimination. In the New Jersey case below, for example, the court said that “expressive exclusion is not the Association’s intent.” Pet. 29a. This distinguishes these cases from *Boy Scouts of America v. Dale*, in which the Boy Scouts was upfront about the reason for Dale’s membership rejection: the organization “specifically forb[ade] membership to homosexuals.” 530 U.S. 640, 645 (2000).

All this is true even when the corporation or organization engages in some type of expressive conduct generally. After all, that is presumably true of nearly all organizations. What matters is “the nature of the act, not the nature of the organization.” A. Volokh, *Expressive Discrimination: Universities’ First Amendment Right to Affirmative Action*, 77 Fla. L. Rev. 75, 98 (2025).

For these reasons, modern DEI discriminators like CBS and the New Jersey State Bar Association usually try to bolster their discrimination argument by referring to their generalized statements supporting DEI. But this only undermines their First Amendment argument. As this Court has explained, “that such explanatory speech is necessary is strong evidence that the conduct . . . is not so inherently expressive that it warrants protection.” *Rumsfeld*, 547 U.S. at 66. “If combining speech and conduct were enough to create expressive conduct, a [defendant] could always transform conduct into ‘speech’ simply by

talking about it.” *Ibid.* That has never been the law, and it would not help modern DEI discriminators even if it were—as most of them even when “talking about” their discrimination deny that it existed.

As the Eleventh Circuit explained, holding that “the very act of discrimination” can be deemed expressive—of the discriminator’s intent to discriminate—would free “every act of race discrimination” from statutory restraint. *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 779 (CA11 2024) (citation modified). “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.” *Ibid.* But calling that discrimination therefore “expressive” would “sow[] the seeds of antidiscrimination law’s demise.” *Ibid.*

In sum, “acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Mere business policies or generalized DEI commitments do not make a particular act of discrimination expressive conduct protected by the Free Speech Clause.

B. Discrimination based on status is unprotected.

Though the court below relied on this Court’s decisions in *Dale* and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), it missed the critical distinction between status-based and message-based discrimination. In *Dale*, the Court

held that the Boy Scouts could exclude a gay activist because his presence “would significantly affect its expression.” 530 U.S. at 656. The issue was not “mere acceptance of a member from a particular group.” *Id.* at 653.

Likewise, in *Hurley*, the Court held that a gay activist group could be excluded from the Boston St. Patrick’s Day Parade because the group sought to deliver a *message* the parade organizers did not wish to deliver. 515 U.S. at 572–75. As explained by *Dale*, “the parade organizers did not wish to exclude the [group] members because of their sexual orientations, but because they wanted to march behind a [group] banner.” *Dale*, 530 U.S. at 653; see also *Hurley*, 515 U.S. at 572 (noting that “Petitioners disclaim any intent to exclude homosexuals as such”).

Thus, “the speech burdens in those cases were not incidental to prohibitions on status-based discrimination because the associations did not assert that mere acceptance of a member from a particular group would impair the association’s message.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 634–35 (2023) (Sotomayor, J., dissenting) (citation modified). That is why it is important to “distinguish[] status-based discrimination (forbidden) from the right of a speaker to control his own message (protected).” *Id.* at 595 n.3 (majority opinion). The Free Speech Clause “does *not* protect status-based discrimination unrelated to expression.” *Ibid.*

All this explains this Court’s repeated rejections of claims by private entities that their status-based discrimination receives First Amendment protection. See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)

(law firm discriminating based on sex); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (private schools discriminating based on race); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (same). Once again, the mere act of status-based discrimination generally should not receive Free Speech Clause protection.

C. Antidiscrimination laws generally do not substantially impair expressive conduct.

Next, this Court's decisions make clear that it should be an unusual case when antidiscrimination laws work a sufficient burden on expression to be negated by the First Amendment. "[I]ncidental abridgment" of protected speech or association is not enough. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Generally, antidiscrimination laws will not "impede [an] organization's ability to engage in . . . protected activities or to disseminate its preferred views." *Id.* at 627. Organizations retain the "ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Ibid.*; see *Rumsfeld*, 547 U.S. at 60 ("Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . .").

"It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). But that is more likely with smaller

groups with few “strangers,” and those organized around non-commercial interests. See *id.* at 12–14.

Again, modern DEI discriminators like CBS and the New Jersey State Bar Association lack these indicia. They are large, undifferentiated groups organized for commercial purposes that generally do not limit selection based on race or sex, and do not take any firm position tied to those characteristics. Thus again, the ordinary DEI defendant should not be able to avoid antidiscrimination laws by invoking the First Amendment.

D. Deference to a defendant’s post hoc claims is limited.

The court below considered itself “obliged to ‘give deference to an association’s view of what would impair its expression.’” Pet. 26a (quoting *Dale*, 530 U.S. at 653). Though some deference toward the association’s beliefs may be appropriate, the court below appeared to abdicate its responsibility to determine whether the Free Speech Clause applies in the first place.

When courts defer, they “suspend their own judgment in favor of the judgment of some other party,” requiring them to set aside “their own independent judgment of the case.” P. Horwitz, *Universities As First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. Rev. 1497, 1509 (2007). Though this Court has sometimes “deferred” in some sense to an association’s expression of its own beliefs, that deference has been limited.

For instance, the Court in *Dale* deferred to the Boy Scouts’ explanation of its own beliefs—particularly,

that “the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members.” 530 U.S. at 654. But the Court still considered “the record” for “written evidence of the Boy Scouts’ viewpoint,” and it emphasized that “an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” *Id.* at 651, 653 (citation modified).

In other cases, this Court has adjudicated similar cases with no suggestion of deference. In *Rumsfeld*, the Court noted that “[t]he law schools say that allowing military recruiters equal access impairs their own expression,” but held that merely “saying” this was not enough. 547 U.S. at 69. Likewise, in *Roberts*, “the Court did not defer to the group’s own view of whether the inclusion of women as full members would burden its interests.” K. Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 Am. J. L. & Equal. 201, 216 (2024); see *Roberts*, 468 U.S. at 627 (“There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”); *id.* at 628 (“In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee’s contention”); see also *New York State Club Ass’n*, 487 U.S. at 14 (looking for “specific evidence” “on the record”); *Runyon*, 427 U.S. at 176 (“[T]here is no showing that discontinuance of the discriminatory admission practices would inhibit in any way the

teaching in these schools of any ideas or dogma.” (citation modified)).

Thus, there is no rule of total deference to post hoc litigation claims about impairment of expression. It remains the obligation of the entity invoking the First Amendment “to demonstrate that the First Amendment even applies.” *Clark*, 468 U.S. at 293 n.5. Courts should not set aside their independent judgment. For instance, when an organization “already invites” members of a group “to share the [organization’s] views and philosophy and to participate in much of its . . . activities,” it is hard to credit “any claim” that treating those members equally “will impair a symbolic message.” *Roberts*, 468 U.S. at 627.

That rule bars the commonplace assertion by DEI discriminators of a First Amendment shield to their racial discrimination. It is not as if the New Jersey State Bar Association generally excludes Palestinian Muslims like Petitioner, just as CBS does not categorically exclude white people (indeed, much of its leadership appears to be white). So there is no reason to credit these organizations’ claim that they *needed* to racially discriminate in particular selections—or to think that those selections alone are inherently expressive. Indeed, these organizations generally cannot even say what viewpoint they wish to protect from the presence of a person in the disfavored group. And when they deny any intent of “expressive exclusion” in the first place, *e.g.*, Pet. 29a, there is no cognizable claim of a viewpoint impairment to which courts could defer.

* * *

In sum, the status-based act of discrimination generally cannot be shielded by the First Amendment in the mine-run of DEI cases, including this one. Such discrimination is not inherently expressive and does not impair any coherent message sent by the large corporations and organizations offering vague DEI excuses. Of course, none of this is to say that a First Amendment defense never exists. It does—but only when the discrimination is itself expressive. So perhaps “racist and racialist groups have a right to exclude members of other races.” D. Bernstein, *The Right of Expressive Association and Private Universities’ Racial Preferences and Speech Codes*, 9 Wm. & Mary Bill Rts. J. 619, 621 (2001). But your everyday corporation, university, or organization (like the bar association here)—not infused with any KKK-style overarching message of discrimination—cannot use the First Amendment as a shield to avoid liability for “odious” race discrimination. *Students for Fair Admissions*, 600 U.S. at 208.

CONCLUSION

For these reasons, the Court should grant certiorari and reverse.

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