

No. 25-1002

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IN THE  
**Supreme Court of the United States**

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RAJEH A. SAADEH,

*Petitioner,*

*v.*

NEW JERSEY STATE BAR ASSOCIATION,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

The New Jersey State Bar Association is a voluntary association of New Jersey attorneys. It advocates on behalf of its members, including by supporting diversity in the legal profession—a position it has long held and publicly championed. Believing that it cannot credibly advocate for a diverse bar without itself having a diverse leadership, the Association has adopted a selection process designed to provide members of underrepresented groups with opportunities to obtain leadership roles. That process has changed over the years, including in November 2025 when the Association expanded the groups eligible for those roles.

Petitioner is an Association member who once served on the Board, but though eligible to join it for many years, has not sought to do so. Instead, he sued the Association in state court, arguing that its selection process violates New Jersey’s antidiscrimination law. The intermediate appellate court did not decide that claim. Rather, it held that the First Amendment’s protection of expressive association would shield the Association’s leadership selection process against the violation of state antidiscrimination law alleged by Petitioner—a straightforward application of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The question presented is:

Whether this Court should review an unpublished, nonprecedential state-court decision applying *Dale* to a voluntary bar association’s selection of its own leaders, where the petitioner did not apply, or say that he would apply, for any leadership position; where reversal on the federal question would not resolve the undecided state-law claim regarding the legality of the selection process; and where the process litigated below has now changed.

**CORPORATE DISCLOSURE**

Respondent New Jersey State Bar Association, a non-profit corporation, has no parent or publicly held company owning 10% or more of its stock and does not have a stock ticker symbol.

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## INTRODUCTION

The New Jersey State Bar Association serves as “a collective voice in matters of concern to the legal profession.” It is a private, voluntary association of New Jersey attorneys, about one in six of whom join it. The Association has long voiced its views on the importance of diversity in the bar. That commitment to diversity shapes how the Association fills a small portion of, for example, its Board of Trustees—eight of forty-nine seats, designated as at-large positions open to members of a variety of otherwise underrepresented groups.

Petitioner—an Association member—disagrees with that leadership-selection process. He sued in state court, asserting violations of the New Jersey Law Against Discrimination. In an unpublished, nonprecedential opinion, New Jersey’s intermediate appellate court did not decide whether the Association’s selection methods violated state law. It held only that, if they did, the Association’s First Amendment rights would shield it from liability under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Petitioner now seeks review by this Court. Four reasons counsel the denial of certiorari.

The first is the threshold issue of Article III standing. This case was litigated in state court, so the parties never addressed that jurisdictional issue below. But Petitioner has never alleged, let alone shown, that he would have applied for any of the seats he challenges, or for any other position on the Board or its committees for which he has long been eligible. Confronted below with the argument

that he could not make out a prima facie case without showing he would have applied, Petitioner said only that he did not need to make such a showing. And given the opportunity to apply, including when the state trial court initially struck down the program, Petitioner failed to do so.

Second, there is no conflict among the lower courts. Of the two decided cases Petitioner cites, one applied the same doctrinal framework to materially different facts and the other does not address expressive association at all. The other cases Petitioner relies on are pending suits and pre-judgment settlements that have not produced holdings in conflict with the one below. How this Court's recent jurisprudence on diversity programs—from the very different context of higher education—interacts with its expressive-association cases is a question lower courts have barely begun to answer, much less disagree about. And the pending lawsuits illustrate that there will be many opportunities for those disputes to percolate up to this Court if its review is later warranted.

Third, even if the Question Presented warranted review, this case would be a poor vehicle for it. The petition's premise—that the Association “reserves” seats for “specific minority groups”—is wrong. The Association's leadership-selection process has changed. Now, every at-large seat is open through multiple paths, including membership in affinity bar associations that include lawyers of any background. Petitioner himself belongs to one of them. And because the decision below did not address whether the Association's program violated New Jersey law, this Court's review could be advisory only.

Finally, the decision below is correct. The Appellate Division found that the Association is an expressive organization with a documented commitment to diversity in the profession, that forcing it to abandon its leadership-selection criteria would materially burden its expression, and that the State's interests do not justify the burden. That straightforward application of *Dale* to this particular set of facts does not warrant further review.

This Court should not use its discretionary jurisdiction to hear an appeal from an unpublished, nonprecedential opinion of an intermediate state appellate court applying this Court's established precedent to a specific factual scenario involving a policy that no longer exists and that may not violate state antidiscrimination law, all from a Petitioner who lacks Article III standing. The petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

The New Jersey State Bar Association is a private association of New Jersey attorneys. Of the roughly 98,000 lawyers in New Jersey, around 16,000 belong to the Association. Pet. App. 5a. Membership is open to “[a]ny person who is a member in good standing of the Bar of New Jersey or who holds a limited license to practice” in New Jersey. Pet. App. 4a. Unlike bar associations in many other states, membership in New Jersey's Association is voluntary, not mandatory. The Association performs no licensing, disciplinary, or governmental functions—those are done by the New Jersey Supreme Court, through its Office of Attorney Ethics, District Ethics Committees, and Disciplinary Review Board. *See generally* N.J. Ct. R. 1:20.

For its members, the Association serves as “a collective voice in matters of concern to the legal profession.” Pet. App. 26a. It speaks for them on issues affecting the bar, advances “the honor and dignity of the profession,” and fosters social and professional connection among lawyers. Pet. App. 4a.

***The Association’s commitment to diversity.*** The Association has publicly committed itself to “promoting and fostering a diverse and inclusive bar association.” Pet. App. 6a. It maintains a standing Diversity Committee whose mission is to “[f]acilitate[ ] the [Association’s] goal of fostering and promoting an inclusive environment that values the unique contributions of diverse individuals and organizations.” *Id.* It employs a full-time Associate Executive Director for Community Engagement and Diversity, who develops strategies for increasing the participation of diverse lawyers in the Association’s work. *Id.* And it maintains a diversity policy for its continuing legal education program, with the stated goal “to increase diversity on CLE panels and presentations, so as to better reflect the diversity of the legal profession and our membership.” *Id.*

That commitment has long been in tension with the demographics of the Association’s leadership. The trial court record revealed that between 1989 and 1999, the Association’s Board never had more than two non-white members. By 2010, it had never had more than four. Against that background, and consistent with its mission to “promote full and equal participation in the association, our profession, and the justice system by all persons,”<sup>1</sup>

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1. N.J. State Bar Ass’n, *Diversity, Equity and Inclusion at the NJSBA*, <https://njsba.com/dei-initiatives/> (last visited May 20, 2026).

the Association sought leadership that better reflected the bar it represents.

***The selection process.*** The Association’s effort to diversify its leadership has evolved over more than thirty years. It began in 1989, when the Association created two at-large Board seats reserved for lawyers from underrepresented groups. Pet. App. 6a–7a. In 1999, the Board added a third seat, with each of those seats reserved for a member of a specific underrepresented demographic group. Pet. App. 7a. By 2010, that practice had grown to five seats. *Id.* That year, the Board amended its bylaws to formalize the program, increasing the number of at-large seats to eight and directing the Board to designate annually the groups eligible to fill each one. *Id.* In 2021, members of recognized “diversity bar associations” became eligible for three of the at-large seats, with five other seats designated for particular demographic groups. Pet. App. 8a–9a.

Because of an injunction issued by the trial court in this case, the Association suspended the program from 2022 to 2025. All at-large seats during that period were open to “every member in good standing.” Pet. App. 16a.

The Association reinstated a revised version of the program in November 2025, after the New Jersey Supreme Court denied review of the Appellate Division’s decision. Today, the eight at-large seats of the total forty-nine seats are available to members of groups designated annually by the Board.<sup>2</sup> Those recognized groups are:

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2. See N.J. State Bar Ass’n, *NJSBA Nominating Committee Seeks Candidates for Leadership Positions* (Oct. 31, 2025), <https://community.njsba.com/blogs/njsba-staff/2025/10/31/njsba-nominating-committee-seeks-candidates-for-le>.

“Hispanic/Latino/a/x; Asian/Pacific American; Black/African America; LGBTQ+; women; lawyers over the age of 70; attorneys with disabilities/differing abilities; and attorneys who are members of a diversity bar association as recognized in the [Association] Policy Manual.” The recognized diversity bar associations are the Asian Pacific American Lawyers Association of New Jersey; Association of Black Women Lawyers of New Jersey; Association of Portuguese Speaking Attorneys of New Jersey; Caribbean Bar Association of New Jersey; Garden State Bar Association; Haitian American Lawyers Association of New Jersey; Hispanic Bar Association of New Jersey; Jewish Bar Association of New Jersey; Korean Bar Association of New Jersey; New Jersey Women Lawyers Association; New Jersey Muslim Lawyers Association; Q Law NJ, Inc.; and South Asian Bar Association of New Jersey.

Each of these affinity organizations is open to any member in good standing of the New Jersey bar who is employed or domiciled within New Jersey, or to professors or law students at any ABA-accredited law school, without regard to race, gender, or any other demographic characteristic.<sup>3</sup> So in practice, every at-large seat on the Board of Trustees—as well as the Nominating Committee and the Judicial and Prosecutorial Appointments Committee (JPAC), also at issue in this case—could be filled by a white man.<sup>4</sup>

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3. Some diversity bar associations also have membership options for out-of-state attorneys and other legal professionals.

4. The Nominating Committee vets candidates from the general membership for positions on the Board; the JPAC reviews candidates for positions in the New Jersey judiciary and as county

**Petitioner.** Petitioner has been a member of the Association for over 15 years. Pet. App. 3a. He has served on five Association committees—Diversity; Equity Jurisprudence; Appellate Practice; Continuing Legal Education Advisory; and Amicus—and belonged to twelve of the Association’s substantive sections, including the Minorities in the Profession Section. Pet. App. 11a nn.2–3. He is a former president, and current member, of the New Jersey Muslim Lawyers Association, one of the diversity bar associations the Association recognizes as qualifying its members for the at-large seats.<sup>5</sup>

In February 2019, Petitioner was elected to the Young Lawyers Division seat on the Board to complete an unfinished term. Pet. App. 11a. He then served a full two-year term in that seat from May 2019 to May 2021, after which he aged out of the Young Lawyers position. Since then, he has not sought any other position on the Board, the Nominating Committee, or the JPAC. *Id.*

From May 2021 forward, Petitioner has always been eligible for a broad range of positions, including the seat on the Board reserved for lawyers practicing in Somerset County; at least five other Section/Committee Board seats; and several seats on the JPAC. He also has been eligible for the at-large seats reserved for members of recognized diversity bar associations through his membership in the New Jersey Muslim Lawyers Association. He applied for

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prosecutors. Pet. App. 9a–10a. Like the Board, some seats on these committees are reserved for any member of the underrepresented groups eligible for at-large Board seats.

5. Indeed, two of the Board’s eight at-large seats currently are held by members of the Muslim Lawyers Association.

none of these positions. Between 2022 and 2025, when the Association’s program was suspended, Petitioner (like all other Association members) was eligible to apply for any seat. He did not. And today, by virtue of his membership in an affinity bar association, Petitioner remains eligible to apply for every seat he challenges. He still has not done so.

The petition asserts that Petitioner “wants to serve on the board again.” Pet. 6. His conduct does not support that assertion.

## **B. Procedural History**

In 2021, Petitioner filed this action in the Superior Court of New Jersey, Law Division, alleging that the Association’s selection processes for the Board, Nominating Committee, and JPAC violated the New Jersey Law Against Discrimination. Pet. App. 12a. The parties cross-moved for summary judgment. Both motions were initially denied, but on reconsideration, the trial court granted Petitioner’s motion and denied the Association’s.

The Association sought and was granted leave to file an interlocutory appeal. Following briefing and argument, the Superior Court of New Jersey, Appellate Division, reversed in an unpublished, nonprecedential opinion. Declining to decide the state statutory question of whether the leadership-selection program constituted unlawful discrimination under state law, Pet. App. 31a–32a, the court reversed on federal constitutional grounds, holding that the Association had a First Amendment right to select a governing body of leaders that reflected an expression of its commitment to diversity in the profession. Pet. App. 32a.

The New Jersey Supreme Court denied review on September 16, 2025. Pet. App. 1a. Petitioner now seeks certiorari to review the unpublished decision of New Jersey’s intermediate appellate court.

## REASONS FOR DENYING THE PETITION

### I. Petitioner Lacks Article III Standing.

The petition should be denied because Petitioner cannot invoke this Court’s jurisdiction. Article III requires concrete and particularized injury—and in cases challenging an allegedly discriminatory selection process, it requires evidence that the plaintiff was able and ready to participate in that process but for the challenged practices. Petitioner offered no such evidence below. He never applied for any of the positions he challenges—not even during the three years when the Association suspended the program and every seat was open to him. And when the Association argued below that he could not make out a prima facie case without evidence he would have applied for a challenged seat absent the program, Petitioner did not offer it. Without evidence he actually would apply, what remains is Petitioner’s generalized disagreement with the program. That does not confer standing.

Article III limits this Court’s jurisdiction to “Cases” and “Controversies.” U.S. Const. art. III, § 2. That limit applies with full force to this Court’s review of state-court judgments under 28 U.S.C. § 1257. Indeed, this Court must satisfy itself of jurisdiction even when the courts below did not. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95 (1998)).

That, of course, is the case here, because New Jersey courts do not require plaintiffs to meet Article III's requirements. *See N.J. Coal. of Auto. Retailers, Inc. v. Ford Motor Co.*, 339 A.3d 245, 251 (N.J. 2025) (“Unlike the Federal Constitution, there is no express language in New Jersey’s Constitution which confines the exercise of our judicial power to actual cases and controversies.”) (citation modified). The issue therefore was not litigated below. But a petitioner seeking review in this Court must establish constitutional standing regardless of what the state courts required. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623–24 (1989); *Waller v. Georgia*, 467 U.S. 39, 43 n.3 (1984).

To establish standing, a plaintiff must “have a personal stake in the case.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citation modified). That requires “an injury in fact that is [1] concrete, particularized, and actual or imminent,” “[2] was likely caused by the defendant,” and “[3] would likely be redressed by judicial relief.” *Id.* In a case challenging an allegedly discriminatory application process, those requirements demand more than a disagreement with the process. The plaintiff must “introduce[] at least some evidence that, e.g., [he] had applied in the past, there were regular opportunities available with relevant frequency, and [he was] ‘able and ready’ to apply for them.” *Carney v. Adams*, 592 U.S. 53, 65–66 (2020); *accord Ne. Fla. AGCA v. Jacksonville*, 508 U.S. 656, 668 (1993) (plaintiff “alleged that it[] regularly” availed itself of the process and “would” do so absent any purported discrimination); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (plaintiff showed “at least a ‘substantial probability’” that he was individually harmed (quoting *Warth v. Seldin*, 422

U.S. 490, 504 (1976))). Where the plaintiff offers no such evidence, what remains is a “generalized grievance[,],” which is insufficient under Article III. *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *see also Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024).

Petitioner did not even seek to meet this fact-specific standard. Since leaving the Board in May 2021, he has not applied for any of the Board, Nominating Committee, or JPAC positions for which he has long been eligible. Pet. App. 11a. That includes the three-year period, from 2022 through 2025, when the Association suspended the program during this litigation and every seat was open to any general member of the Association. If Petitioner was able and ready to serve, he could certainly have done so then. He did not.

Petitioner’s litigation conduct resolves any remaining doubt. His 63-page Amended Complaint says 48 different times that the Association’s program was “particularly egregious and outrageous,” *e.g.*, Am. Compl. 27, but never once alleges that he was ready to apply. When the Association argued that Petitioner’s statutory claim failed because he could not carry his “burden of proving that he would have applied” for the Board “had it not been for th[e] practices” to which he objects, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368 (1977), Petitioner did not respond with evidence that he would have. He instead took the position, in his briefs below, that he did not have to. *See Saadeh App Div Br. 10*. Indeed, he went so far as to argue that he “d[id] not need to do *anything*, including desire or express interest in any of the . . . seats at issue.” *Id.* at 15 (emphasis added).

The petition belatedly, albeit vaguely, reverses course. But its assertions—that Petitioner “wants to serve on the board again,” Pet. 6, and “is ‘able and ready’ to apply,” Pet. 21 (quoting *Ne. Fla. AGCA*, 508 U.S. at 666)—are bare legal conclusions that cannot substitute for the absence of a factual record. Indeed, they are belied by his actions and his legal position below. Instead, as the Appellate Division recognized, Petitioner’s complaint was based not on any concrete injury, but on his “different vision of a diverse leadership for the Association.” Pet. App. 28a.

Article III “screens out plaintiffs,” like Petitioner, “who might have only a general legal, moral, ideological, or policy objection to a particular government action.” *All. for Hippocratic Med.*, 602 U.S. at 381. He objects that the program exists, not that it has hurt him. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 14 (2023) (Thomas, J., concurring) (“Standing ensures that courts decide disputes over violations of a person’s rights, not a defendant’s compliance with the law in the abstract.”). That objection does not create the “real controversy with real impact on real persons” that Article III requires. *TransUnion*, 594 U.S. at 424 (citation modified). Without this “direct, specific, and concrete injury,” Petitioner cannot invoke this Court’s jurisdiction to review the state-court judgment. *ASARCO*, 490 U.S. at 623–24.

Petitioner also cannot succeed in asserting standing deriving from his claim for nominal damages under New Jersey antidiscrimination law. *See* Pet. 21. A state statutory violation, by itself, does not confer standing in a federal court. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (“Article III standing requires a concrete injury even in the context of a statutory violation.”). And

a request for nominal damages also does not “guarantee[] entry to court.” *Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021). Were it otherwise, a party with no Article III harm could get into federal court merely by seeking nominal damages. Instead, this Court has made clear, a plaintiff must “establish the other elements of standing,” including “a particularized injury.” *Id.* at 293. Petitioner has not and cannot do so.

Because Petitioner lacks standing, this Court has no jurisdiction to reach the merits. At the very least, the Court would need to confront this fact-bound issue on a record without factual development, legal argument, and judicial decision on Article III standing. *Cf. Gratz v. Bollinger*, 539 U.S. 244, 261 (2003) (concluding that challenger had standing based on “the finding of fact entered by the District Court” that he intended to apply in the absence of a racial discriminatory policy). It should therefore deny the petition. *See, e.g., Lab. Corp. of Am. Hldgs. v. Davis*, 605 U.S. 327 (2025) (Mem.) (dismissing writ as improvidently granted because Court would have needed to resolve standing issue before reaching the merits); *Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring) (concurring in dismissal of writ of certiorari because “neither party has standing to invoke the jurisdiction of the federal courts”).

## **II. There Is No Split Among Lower Courts.**

This Court grants certiorari to resolve genuine conflicts of authority among the lower courts. Sup. Ct. R. 10(a); *see Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019) (per curiam) (“We follow our ordinary practice of denying petitions insofar as they raise

legal issues that have not been considered by additional Courts of Appeals.”). But when “[o]nly a few Courts of Appeals have weighed in on” a legal issue, certiorari is inappropriate because the issue “would benefit from further percolation in the lower courts prior to this Court’s intervention.” *Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024) (Sotomayor, J., concurring). Petitioner identifies no conflict warranting review, and the issues he raises are in the early stages of consideration by the lower courts.

Neither case Petitioner cites as part of his “split” conflicts with the decision below. In *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, 103 F.4th 765 (11th Cir. 2024), the Eleventh Circuit held that a venture capital fund’s grant competition restricted to Black women-owned businesses was non-expressive conduct unprotected by the First Amendment. *Id.* at 779. The court reached that holding by concluding, on the facts before it, that the fund’s grant-making was not expressive activity at all. *Id.* That is a threshold determination *Dale* itself requires. 530 U.S. at 648. But the Appellate Division here made the opposite determination on a different record: the Association *is* an expressive organization with a documented history of advocacy on diversity in the legal profession, and its leadership-selection process *is* part of how it speaks. Pet. App. 24a–26a. Two courts applying the same doctrinal framework to different facts, and thus reaching different conclusions, is not a conflict.

*National Ass’n of Diversity Officers in Higher Education v. Trump*, 167 F.4th 86 (4th Cir. 2026), is even further afield. *The Fourth Circuit* rejected a First Amendment challenge to an executive order conditioning federal funding on a certification of compliance with

antidiscrimination law, holding only that “the First Amendment doesn’t confer a right to violate” such laws. *Id.* at 98. It also emphasized that the case arose in the “funding context,” where the government has “wide latitude to set spending priorities.” *Id.* at 103. Nothing in *that decision* addresses the question presented here—whether a private, voluntary expressive association may choose its own leaders consistent with the message it speaks.<sup>6</sup>

The rest of Petitioner’s (and his *amici*’s) authorities do not suffice either. Some are pending cases that have not produced decisions, let alone conflicting ones. *AAER v. The Women, LLC*, 3:25-cv-00441, ECF Nos. 37, 39 (E.D. Tenn.) (cross-motions for summary judgment pending); *AAER v. Hispanic Scholarship Fund*, 1:25-cv-04207, ECF No. 19 (D.D.C.) (motion to dismiss pending). Others settled before judgment and produced no rulings on the merits. *See Do No Harm v. AAUW*, 1:24-cv-01782, ECF No. 31 (D.D.C.); *Do No Harm v. NAEMT*, 3:24-cv-00011, ECF No. 34 (D.D.C.); *AAER v. Buckfire & Buckfire, P.C.*, 2:25-cv-13617, ECF No. 12 (E.D. Mich.); *Do No Harm v. Health Affairs*, 1:22-cv-02670, ECF No. 31 (D.D.C.); *AAER v. ABA*, 1:25-cv-03890, ECF No. 50 (N.D. Ill.).

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6. Likewise, the cases cited by *amicus* Students For Fair Admissions (“SFFA”) create no conflict. As SFFA admits, “[t]hese case arise in diverse settings.” SFFA Amicus Br. 5. For example, *AAER v. The Women, LLC* concerns the provision of low-interest loans to black-owned businesses. And the rest of the cases cited by SFFA concern the provision of scholarships for certain categories of minority students. None of these cases remotely concern selection of individuals for leadership positions within an organization, or the First Amendment concerns with interfering with such selection.

If anything, this body of pending litigation confirms why review is premature. The intersection of *Dale* and the Court’s recent antidiscrimination jurisprudence is at the earliest stages of consideration in the lower courts. The questions Petitioner asks this Court to answer—under what circumstances a selection process constitutes protected organizational expression, and when antidiscrimination law impermissibly burdens such expression—are precisely the kinds of questions that benefit from sustained engagement across multiple courts before this Court considers them. *Boxx*, 139 S. Ct. at 1784 (Thomas, J., concurring) (“[F]urther percolation may assist our review of this issue of first impression.”); *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring) (“[T]he experience of our thoughtful colleagues on the district and circuit benches could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.”). This Court generally waits for such a process to play out before resolving any disagreements; here, the process has barely begun.

### **III. This Case Is An Exceptionally Poor Vehicle For Resolving The Question Presented.**

To whatever extent the Court will need to clarify the intersection between the *Dale* line of expressive association cases and its more recent antidiscrimination decisions, this is not an appropriate case in which to do so. The decision below is unpublished and nonprecedential. The program it addressed no longer exists. The Association is voluntary, unlike mandatory bar associations in other states whose conduct the question would ordinarily reach. And reversal on the federal question would not resolve the case, because the state appellate courts never determined whether the Association violated state law.

*First*, the decision below is an unpublished, nonprecedential opinion of a state intermediate appellate court. Under New Jersey court rules, it “shall [not] constitute precedent or be binding upon any court,” and may not even be cited except as required for *res judicata* or related doctrines. N.J. Ct. R. 1:36-3; *see also* Pet. App. 2a. And the New Jersey Supreme Court’s decision not to hear the case “does not constitute approval of the opinion or judgment below.” *State v. Hodge*, 523 A.2d 163 (N.J. 1986) (Mem.); *see also W. Point Island Civic Ass’n v. Dover Twp. Comm.*, 255 A.2d 237, 239 (N.J. 1969). This Court ordinarily declines to grant certiorari in that posture. *Huber v. N.J. Dep’t of Env’t Prot.*, 562 U.S. 1302, 1302 (2011) (Alito, J., concurring in denial of certiorari) (“denial of certiorari is appropriate” where review is sought “of a decision by a state intermediate appellate court”); *see* Stephen Shapiro et al., *Supreme Court Practice* 180 n.50 (10th ed. 2013). Petitioner claims that the unpublished disposition and denial of discretionary review reflect a “tactic” to “shield suspect reasoning” from this Court’s review. Pet. 4, 21. Not only does the record lack any support for that charge, but if the courts below had wanted to insulate the case from review here, they could have done so straightforwardly by resting on the state-law ground they left open. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

*Second*, the legality of the Association’s current selection process was not litigated below. The petition asserts that the Association “reserves leadership positions for members of specific minority groups.” Pet. 4. It does not, and the allegation is based upon a policy that was in place when this case was filed over four years ago. Now, of the forty-nine Board seats, eight are

at-large seats available to all members of diversity bar associations designated annually by the Board. *See supra* n.2. Recognized diversity bar associations are open to all comers—a white attorney may join the Asian Pacific American Lawyers Association of New Jersey, a man may join the New Jersey Women Lawyers Association, and so on. Every at-large seat could, in theory, be filled by a white man. The current program does not engage in any form of racial discrimination, and the record does not contain the factual development that would be necessary to challenge the policy. Petitioner’s argument that his claim for nominal damages “prevents any possible mootness,” Pet. 21, thus misses the point. Even if the case is not formally moot, whatever rule this Court might announce about programs that reserve seats for specific groups would have no application to the program now in effect. This Court has dismissed writs in just such circumstances, where changed program design has reduced the dispute to “only a bare remnant of the original controversy.” *Taggart v. Weinacker’s, Inc.*, 397 U.S. 223, 226 (1970); *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 502 (1971) (Harlan, J., concurring).

*Third*, although Petitioner’s Question Presented relies on Respondent’s status as “[a] bar association,” Pet. i., the Association is unlike many other bar associations. As were the Boy Scouts in *Dale*, the Association is a private, voluntary organization. *Dale*, 530 U.S. at 644. New Jersey lawyers are not required to join—only about one in six do, Pet. 5—and the Association performs no licensing, disciplinary, or other governmental function. That distinguishes it from the bars of twelve of the eighteen States that have joined West Virginia’s amicus

brief in support of certiorari, *see* States’ Amicus Br. 23–24, and a substantial majority nationwide, which license attorneys, discipline them, and compel their membership.<sup>7</sup> Whatever rule this Court might one day announce for bar associations more broadly, the Association is not typical of them, again making this case a poor vehicle for resolving the Question Presented.

*Fourth*, and fundamentally, reversal on the federal question would not resolve this litigation. The Association argued at every stage of the proceedings below that its program did not violate the New Jersey Law Against Discrimination. The Appellate Division skipped over that argument and held only that, if it did, the First Amendment would shield the Association from liability. Pet. App. 31a. That order of decision is the inverse of the ordinary one: courts usually resolve cases on statutory grounds before reaching constitutional ones. *Clinton v. Jones*, 520 U.S. 681, 690 (1997); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The consequence here is that the state-law question remains open. Accordingly, if this Court reversed, the Appellate Division could conclude on remand that the program, particularly now that it has changed, does not violate state law—an adequate and independent state ground that this Court could not then review. Any merits ruling from this Court would thus “amount to nothing more than an advisory opinion.”

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7. *See* Am. Bar Ass’n, *Bars By Type*, <https://www.americanbar.org/groups/bar-leadership/resources/resourcepages/barworldbasics/barsbytype/> (last visited May 20, 2026) (listing Alabama, Georgia, Idaho, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia as among the 35 bar associations that require licensed attorneys to be members).

*Long*, 463 U.S. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)). That this matter may be resolved under state law counsels against granting the petition. See *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring) (concluding that certiorari was not warranted because the petitioner’s claims were “independently subject” to a state court defense).

#### **IV. The Decision Below Is Correct.**

The standing and vehicle problems described above are reason enough to deny the petition. But on the merits as well, the Appellate Division’s decision is a straightforward and correct application of this Court’s expressive-association jurisprudence.

This Court “has ‘long understood’” that the First Amendment encompasses a “‘right to associate with others’” alongside its enumerated protections. *First Choice Women’s Res. Ctrs. v. Davenport*, 608 U.S. \_\_\_\_, \_\_\_ (2026) (slip op. at 6) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021)). Associational freedom is critical because “[t]he right to speak is often exercised most effectively by combining one’s voice with the voices of others.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 68 (2006). And the First Amendment protects such expression “regardless of whether the government considers [the] speech sensible and well intentioned or deeply ‘misguided.’” *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995)).

This Court in *Dale* applied those principles to a private group’s membership and leadership decisions. An

organization that “engage[s] in some form of expression, whether it be public or private,” is protected from state action that would “significantly affect [its] ability to advocate public or private viewpoints.” 530 U.S. at 648, 650. Thus, compliance with state antidiscrimination law that compels association with members or leaders whose presence “would . . . materially interfere with the ideas that the organization s[eeks] to express” violates the First Amendment. *Id.* at 657.

The Appellate Division applied that framework to the specific facts here. The court found that the Association engages in “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.” Pet. App. 24a (citing *Roberts*, 468 U.S. at 626–27). Its commitment to “diversity in the legal profession” is longstanding, public, and well-documented—from its standing Diversity Committee to its dedicated executive staff position to its CLE policy. Pet. App. 5a. The court then found that requiring the Association to abandon its diversity-conscious leadership-selection process would force it “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.’” Pet. App. 27a. As in *Dale*, “[t]he state interest” in applying its antidiscrimination statute “do[es] not justify such a severe intrusion on [the Association’s] rights to freedom of expressive association.” *Dale*, 530 U.S. at 659.

Petitioner does not ask this Court to overturn *Dale*. He instead argues that *Dale* does not apply, on two grounds. Neither one succeeds.

*First*, Petitioner argues that ending the program would not burden the Association’s expression because it “remains ‘free to associate to voice’ its support for diversity and inclusion” and “choos[e] leaders who support that goal through non-discriminatory elections.” Pet. 14 (quoting *FAIR*, 547 U.S. at 69). *Roberts*, he argues, controls: the Court explained that forcing the Jaycees to admit women “would not substantially infringe the Jaycee’s expression because the organization could still select members based on viewpoint.” *Id.* 15; *see also* States’ Amicus Br. 9–10; Manhattan Inst. Amicus Br. 8; Am. First Legal Amicus Br. 15. But *Roberts* turned on the lack of evidence that admitting women would impair the Jaycees’ expression—there was “no basis in the record for concluding” that admitting women would “impede the organization’s ability to engage in . . . protected activities or to disseminate its preferred views.” 468 U.S. at 627; *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (“[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”). *Dale* distinguished *Roberts* and *Duarte* on that basis, explaining that those rulings did not govern a case in which the record showed an actual burden on expression. 530 U.S. at 656.

This case is like *Dale*, and unlike *Roberts* and *Duarte*. Here, the Appellate Division had before it specific evidence of how the Association’s message of supporting diversity would be affected if its leadership-selection process were invalidated and concluded—applying *Dale*’s standard of “deference to an association’s view of what would impair its expression,” 530 U.S. at 653—that the burden was real. *See* Pet. App. 26a–27a. Petitioner’s

reliance on *Roberts* does not undermine that fact-bound conclusion.<sup>8</sup>

*Second*, Petitioner argues that his suit targets the Association’s conduct, not its speech. Pet. 10–11. He points to *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Hishon v. King & Spalding*, 467 U.S. 69 (1984), as foreclosing any First Amendment defense to his claims. *See also* States’ Amicus Br. 8–9; Manhattan Inst. Amicus Br. 6–7; SFFA Amicus Br. 15–18; Am. First Legal Amicus Br. 14–15. As a threshold matter, this argument was “not pressed or passed upon” below, and the Court should decline to consider it. *Illinois v. Gates*, 462 U.S. 213, 220–22 (1983). Petitioner’s criticism of the Appellate Division for not citing *Runyon*, Pet. 13, is a problem of his own making—he never cited *Runyon* in his appellate (or trial court) briefing.

In any event, though, this argument was squarely considered and rejected in *Dale*. The *Dale* dissent invoked *Runyon* and *Hishon* for the proposition that “the right to associate in the selection of members” could not “prevail in the face of a State’s antidiscrimination

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8. Petitioner claims that the theory articulated below lacks a limiting principle that would prevent its application in other, inappropriate circumstances. Pet. 20; *see also* States’ Amicus Br. 16–20; Manhattan Inst. Amicus Br. 5; SFFA Amicus Br. 21–23; Am. First Legal Amicus Br. 19. But as *Dale* explains, each case turns on its facts: courts must consider whether exclusion “would significantly burden” the group’s expression. 530 U.S. at 653. The Appellate Division’s fact-driven opinion faithfully undertook this analysis. Whether other organizations can prevail on similar grounds is subject to individualized judicial review of the factual record in the case.

law.” *Dale*, 530 U.S. at 679–80 (Stevens, J., dissenting). But the majority disagreed, holding that requiring the Boy Scouts to retain “an assistant scoutmaster” whose presence would “force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior” was an unconstitutional interference with expression, not a valid regulation of conduct. *Id.* at 653 (majority opinion). *303 Creative*, on which the petition heavily relies, reinforced the point. There, again, the dissent cited *Runyon* to argue that Colorado’s nondiscrimination law was a valid regulation of conduct instead of speech. 600 U.S. at 629 (Sotomayor, J., dissenting). The majority countered that “context matters” and “very different considerations come into play when a law is used to force individuals to toe the government’s preferred line when speaking (or associating to express themselves) on matters of significance.” 600 U.S. at 600 n.6 (citing *Dale*, 530 U.S. at 648–53).

*Runyon* and *Hishon* permit state action regulating non-expressive conduct, such as a school’s enrollment decisions or a law firm’s partnership decisions. *Cf. Fearless Fund*, 103 F.4th at 778–79 (permitting the same). *Dale*, on the other hand, prohibits state action interfering with an expressive organization’s communication of its message. Because the Association’s rules for selection of its leadership are part of its expression, they are protected by *Dale*.<sup>9</sup>

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9. The trial court suggested a third distinction—between forced inclusion (the question in *Dale*) and forced exclusion (the question, on its view, here). The Appellate Division correctly rejected that framing, and Petitioner does not press it on review. *Dale*’s holding does not turn on whether the antidiscrimination claim is characterized as compelled acceptance of an unwanted

At bottom, Petitioner’s argument is that the appellate court made an “error” when it ruled that holding the Association’s leadership selection process to be unlawful would impair its expression. Pet. 14. But this is “not a court of error correction,” *Martin v. Blessing*, 571 U.S. 1040 (2013) (statement of Alito, J., respecting the denial of certiorari), and certiorari “is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law,” Sup. Ct. R. 10.

The Appellate Division’s decision rests on settled doctrine as applied to a developed record, and it reaches a fact-bound conclusion. Further review is not warranted.

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member or compelled abandonment of selection criteria that produce the desired composition. The injury to expression is the same. As *Roberts* put it, “[f]reedom of association . . . plainly presupposes a freedom not to associate.” 468 U.S. at 623.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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