No. 25-1002

IN THE
SUPREME COURT OF THE UNITED STATES

RAJEH A. SAADEH,

Petitioner,

v.

NEW JERSEY STATE BAR ASSOCIATION,

Respondent.

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

REPLY BRIEF OF PETITIONER

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REPLY

The decision below holds that illegal racial discrimination, when done in the name of "diversity," is shielded by the First Amendment. That extreme departure from precedent requires this Court's review—under any test. Respondent doesn't deny the sweeping implications of this defense. Respondent doesn't deny the growing prominence of this defense. And though this defense was used to uphold blatant racial set-asides below, respondent calls it "a straightforward application of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)." BIO.i, 3, 20. That a bar association would say that in court only highlights the dire need for course correction. A decision from this Court holding that "diversity" does not turn illegal discrimination into protected expression is not mere "'error correction.'" BIO.25. Even if it were, some errors badly need correcting. *See* S.Ct.R.10(c).

Other than generic "vehicle" arguments, the association raises no obstacle to this Court's review, including Article III. Saadeh has standing because he wants to apply for a seat on the board yet cannot equally compete. He was and is "'able and ready'" to apply. BIO.9-10. When he sued, he had *just finished* serving on the board; he has held many other leadership roles with the bar; and the trial court found that he "has been unlawfully discriminated against by being excluded." App.57a. Though the association says it just changed its discriminatory policy, that alleged change moots nothing. Saadeh seeks damages for past discrimination under the old policy, and the new policy discriminates against him in all the same ways.

The association's strategy—defend a discriminatory policy as protected expression and then change the policy at the first sign of trouble—only bolsters the need for certiorari. For one, it illustrates how defendants with illegal "diversity" programs try to avoid adverse decisions by pulling the rug out from under plaintiffs. *See Roberts v. Progressive Preferred Ins.*, 2026 WL 1396783, at *6 (6th Cir. May 19) (Thapar, J., dissental); *id*. at *8 (Hermandorfer, J., dissental). This common tactic limits the number of vehicles that reach this Court. So because this Court now has a chance to reject this flawed First Amendment defense, it should not hesitate to grant review. For another, the association's supposed willingness to now let "[e]very at-large seat … be filled by a white man" fatally undermines its own First Amendment defense. BIO.18. The association insisted below that status-based discrimination was core to its protected expression and association. Apparently not, just as Saadeh argued all along. *See* App.29a n.8.

This Court should grant certiorari, hold that the First Amendment does not protect status-based discrimination that supposedly promotes "diversity," and reverse. At a minimum, it should call for the views of the Solicitor General—a course Saadeh proposed and the association never opposes. *See* Pet.22-23.

I. Saadeh satisfies Article III.

Like many respondents with discriminatory programs, the bar association tries to avoid certiorari by questioning standing and mootness. *E.g.*, BIO, *SFFA v. Harvard*, 2021 WL 2004129 at *36-38; BIO, *Fisher v. Univ. of Tex.*, 2015 WL 1731446 at *26-30 & n.4.

But losing jurisdictional arguments are not a reason to deny certiorari. And both arguments are losers.

1. Saadeh has Article III standing. His inability to equally compete for seats on the board is an injury. *Ne. Fla. AGCA v. Jacksonville*, 508 U.S. 656, 666 (1993). He suffers that injury if he is "able and ready" to apply once a court ends the discrimination. *Id.* And because the association's racial set-asides make his application futile, Pet.6; App.43-44a; Am.-Compl.27-29, Saadeh needn't first apply and get rejected. *See Gratz v. Bollinger*, 539 U.S. 244, 261 (2003) (collecting cases).

Saadeh easily meets the able-and-ready test. *See* Pet.20-21. When he sued, he had just finished serving on the board. App.35a; COA.App.219. He served from 2019 to 2021 as a member of the young lawyers' division. COA.App.219. When that role ended, he testified in his verified complaint that he "suffer[ed] damages" and ongoing harms because he was not "eligible" to apply for all open seats. Am.-Compl.26-27. Like Allan Bakke, Saadeh was "totally excluded from a specific percentage of the seats." *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 319 (1978) (op. of Powell, J.). His inability to "compete" for "all" seats on the board is an "injury," and so "the constitutional requirements of Article III were met." *Id.* at 280 n.14.

The association's attempts to question Saadeh's intent to serve on the board are bizarre. The association is right that Saadeh's "statutory claim" required

him to prove discrimination—meaning the association's policy is what stopped him from applying. BIO.11. But the association omits that the trial court *found in Saadeh's favor*. Rejecting the association's argument, the trial court found the "effect" of the association's discriminatory policy "obviously identifiable" because "[t]he casualty … is Mr. Saadeh." App.55a. His "civil rights" were violated. App.55a. And he "has been unlawfully discriminated against by being excluded … for the 13 at-large leadership seats." App.57a; *accord, e.g.*, App.56a n.3 (plaintiff was "excluded by the defendant's program"); App.48a (plaintiff was "foreclosed" from applying and "never was and currently is still not eligible"); App.59a ("Saadeh … is fighting to stop the NJSBA from excluding hi[m]"). Indeed, the trial court deemed the material facts "undisputed," App.36a, and the appellate court overturned none of these factual findings. The trial court also granted Saadeh an injunction and ordered the case to "proceed to trial on the issue of damages." App.60a. Because the appellate court overturned that decision on First Amendment grounds, Saadeh has standing to ask this Court to vacate that adverse decision and reinstate the favorable decision and relief.

This case is nothing like *Carney v. Adams*, where the plaintiff said he wanted to be a judge but failed to apply for any prior openings, abruptly came out of retirement and switched parties to sue, and said he got the idea from a law-review article. 592 U.S. 53, 61-62 (2020). Saadeh has served on the board before. COA.App.219. Saadeh is an active member of the association, has served in many leadership positions, and brought this suit (and even sought a TRO) so he

can run for leadership again on equal terms. App.11-12a. His intent is beyond reproach. And it's bolstered by the fact that his complaint asked the court to "[v]acat[e]" the current seats, Am.-Compl.30, letting Saadeh compete for all of them anew. *Cf. Gratz*, 539 U.S. at 261 n.14.

The association tries to muddy the facts and confuse the Court. The association says Saadeh has not applied for a leadership position "[s]ince leaving the Board in May 2021." BIO.11. That timeframe is arbitrary, since the association knows Saadeh unsuccessfully applied for the board in 2016, successfully joined the board in 2019, and unsuccessfully applied for the nominating committee in 2020. *See* Rule 32.3 Ltr.; App.11a. Nothing in Article III required Saadeh to apply a *fourth* time before challenging this facially discriminatory regime. *Gratz*, 539 U.S. at 260-61. The association also faults Saadeh for not applying "from 2022 through 2025," after he temporarily beat the association in court. BIO.11. But the association was *actively appealing* that decision (and ultimately got it reversed). App.2-3a. Nothing in Article III required Saadeh to seek a leadership position while the association was actively fighting his right to apply in court. *See West Virginia v. EPA*, 597 U.S. 697, 720 (2022). Until the trial court's decision became final, Saadeh could not truly apply, win, or serve with any confidence.

2. Nor is this case "moot." *Cf.* BIO.18. The association claims that, after the state-court proceedings became final, it changed its policy to no longer set aside five seats on the board—one for African Americans, one for Hispanics, one for Asian Americans, one for

women, and one for LGBTQ+ lawyers. Now the at-large seats are allegedly open to lawyers who are "Hispanic/Latino/a/x; Asian/Pacific American; Black/African American; LGBTQ+; women; lawyers over the age of 70; attorneys with disabilities/differing abilities; and attorneys who are members of a diversity bar association." *NJSBA Nominating Committee Seeks Candidates for Leadership Positions* (Oct. 31, 2025) perma.cc/VNQ3-KXLV. Because anyone can supposedly join "a diversity bar association," the association says its new policy "does not engage in any form of racial discrimination." BIO.18. Not relevant or true.

This new representation cannot moot Saadeh's request for backward-looking damages. Because he was able and ready to apply when the set-asides were in force, he can seek damages for the association's past discrimination. *See Fisher v. Univ. of Tex.*, 758 F.3d 633, 662-63 (5th Cir. 2014) (Garza, J., dissenting). Saadeh's request for "damages … is sufficient to preserve [this Court's] ability to consider" the question presented. *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). And this Court's need to consider that question remains high, BIO.16, given the growing popularity of this First Amendment defense, *see* Pet.18-20; SFFA-Amicus-Br.6-14; AFL-Amicus-Br.5-9; States-Amicus-Br.16-18.

The association's voluntary change cannot moot Saadeh's request for forward-looking relief either. The association would badly fail this Court's precedents on voluntary cessation—including because it discriminated for a decade, changed course only on the eve of certiorari, and continues to defend the old policy as

not just legal but constitutionally protected. *See Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 189 (2000). But the association has ceased nothing. Its new policy "disadvantages [Saadeh] in the same fundamental way." *Ne. Fla.*, 508 U.S. at 662. The policy deems certain races automatically eligible, while requiring all other races to first join a "diversity bar association." Requiring lawyers of certain identities to take that additional step violates the State's antidiscrimination law all the same, as the trial court ruled below. App.47-48a. The appellate court assumed the same when analyzing the First Amendment. App.14-15a. And as the association knows, Saadeh is no longer a member of any diversity bar association. So he cannot apply or equally compete under the new policy either. As a Palestinian man, the notion that he could join the "Association of Black Women Lawyers" or "Association of Portuguese Speaking Attorneys" and then win a seat on the board as a member of that organization is disingenuous, purely "theor[etical]," and practically unrealistic. BIO.18; App.39a.[1]

II. This Court's review is sorely needed.

The association's shift in policy, though not case-mooting, eviscerates its First Amendment defense on the merits. Today, the association says "[e]very" seat on its board "could, in theory, be filled by a white man." BIO.18. But below, it won that anything less

[1] To remove all doubt on jurisdiction, Saadeh is also asking the Court for leave to lodge a sworn declaration under Rule 32.3. *See, e.g.*, Rule 32.3 Ltr. (May 2, 2022), *SFFA v. Harvard*, No. 20-1199, perma.cc/G473-P6H9 (proposing to lodge declarations proving SFFA still has members who are "ready and able to apply to transfer" to Harvard).

than the "guarantee[d]" exclusion of its nonpreferred demographics would "significantly burde[n]" its First Amendment rights. App.30a. The appellate court likewise "disagree[d]" with Saadeh's argument that, because the bar association does not outright exclude Palestinian Muslims, an order letting him compete "'cannot violate the Association's freedom of expressive association.'" App.29a n.8 (cleaned up). The association cannot now argue the exact opposite. If it disclaims the need to "engage in any form of racial discrimination," BIO.18, then it has no First Amendment interest in that discrimination, *see* Pet.12-15. The decision below should be swiftly vacated. *Cf. Massachusetts v. Oakes*, 491 U.S. 576, 585 (1989).

While retreating from its convictions, the association doesn't retreat from its First Amendment defense: It even calls the decision below "a straightforward and correct application" of this Court's precedents. BIO.20; *accord, e.g.*, BIO.3 ("straightforward application of *Dale*"); BIO.i (same). Suffice it to say, there is nothing straightforward about using precedents like *Dale* to uphold blatant racial quotas. The decision below does not apply *Dale*; it eviscerates this Court's line between discrimination based on status (unprotected conduct) and discrimination based on message (protected speech). *See* Pet.10-13; MI-Amicus-Br.10-13. *Dale* makes clear that the First Amendment does not create a right to avoid "the mere acceptance of a member from a particular group." 530 U.S. at 653. Similar boundaries appear in this Court's

landmark decisions in *Runyon*, *Hishon*, and *303 Creative*. Pet.10-12.[2]

The lower courts are also divided. The association's attempt to distinguish the Eleventh Circuit's decision in *AAER v. Fearless Fund* is particularly flimsy. The association says *Fearless Fund* involved "different facts." BIO.14. Not really: Both cases involve a private actor creating opportunities for only one race and then defending that otherwise illegal discrimination under the First Amendment. 103 F.4th 765, 769-71 (11th Cir. 2024). More to the point, this Court resolves conflicts "concerning the meaning of provisions of federal law," *Braxton v. United States*, 500 U.S. 344, 347 (1991), not just conflicts that turn on the selfsame facts. The association ignores the Eleventh Circuit's *legal* reasoning, which squarely rejects the same First Amendment defense it won on below. Per Judge Newsom's majority opinion, "the First Amendment does not protect the very act of discriminating on the basis of race." 103 F.4th at 777.

The association never denies that the question presented is important. Nor could it, since the First

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[2] Puzzlingly, the association faults Saadeh for not "citing" certain precedents of this Court, like *Runyon* and *Hishon*, below. BIO.23. But case citations are not something parties can forfeit or waive. *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Glob. Health Council v. Trump*, 153 F.4th 1, 13 (D.C. Cir. 2025). The association doesn't claim that the question presented—whether its discrimination is protected by the First Amendment—is forfeited or waived. That question was decided below, and Saadeh can cite any precedent to support his claim that the discrimination is not protected.

Amendment was its only successful defense for outright racial quotas. Eighteen States, as well as all the major organizations that challenge diversity-based discrimination, agree that this Court's review is critical. *See* States-Amicus-Br.3-5; SFFA-Amicus-Br.3-4; AFL-Amicus-Br.2-4; MI-Amicus-Br.1-5.

III. No obstacles prevent this Court's review.

The association doesn't dispute many features that make this case a strong vehicle. The decision below is final and not interlocutory, addresses the First Amendment at length, and rules *solely* on that pure question of federal law. Pet.7. Aside from those advantages, the association's second extension request identifies one more: It's apparently "working with co-counsel expert in Supreme Court litigation." Resp't's 2d Ext. (Apr. 29, 2026), perma.cc/K8TZ-DPKB. Those co-counsel will surely appear for merits briefing and oral argument, ensuring the issues are fulsomely presented.

The association nevertheless resists certiorari. It says it could have (but didn't) win on a state-law defense below. It says the bar association in New Jersey is private, unlike some other state bars. And it says the decision below is unpublished. These arguments are not good reasons to deny certiorari, let alone impediments to reaching the question presented.

1. The question presented—whether intentional discrimination itself is protected by the First Amendment—could not be more squarely presented. As the bar association never denies, the decision below ruled *exclusively* on that federal question. Pet.7. This Court

does not refuse to review federal questions that are "actually" decided based on state-law questions that "the state court does not decide." *Ind. ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). And reversing a state-court decision that relies exclusively on federal law is not an "advisory opinion," even if the respondent could prevail on some other state-law ground. *Cf.* BIO.19; *e.g.*, *Lewis v. Clarke*, 581 U.S. 155 (2017). This Court's opinion would be binding precedent in this case and every other case where a private discriminator considers this defense.

But even if it mattered who will likely win on remand, the answer is Saadeh. The trial court *rejected* all the association's state-law defenses. App.49-57a. And far from suggesting they had merit, the appellate court "elected not to address" those defense—precisely because they were "novel" and doubtful under recent precedent. App.30-32a.

2. Nor does it matter that, unlike some state bar associations, the New Jersey association is private. *Cf.* BIO.18. The association's status as a private organization is what *tees up* the question presented. (Bar associations that are state actors have no First Amendment rights.) The question presented is not important because it involves a bar association, but because it involves a private actor that claims its otherwise illegal "diversity" program is shielded by the First Amendment. Pet.18-20. Many private actors are raising this defense. *See* SFFA-Amicus-Br.6-14; AFL-Amicus-Br.5-9. In the eyes of the Constitution, all these private actors are materially the same—meaning this Court's decision will have broad applicability.

3. As already explained, this Court should not deny certiorari just because the decision below is unpublished. *See* Pet.21. As the association admits, the decision is binding on the parties. BIO.17. And as the association never denies, the decision has been widely cited in defense of illegal diversity programs. Pet.18-20. This Court often grants certiorari to reverse unpublished decisions in these circumstances. *E.g.*, *First Choice Women's Res. Ctrs. v. Davenport*, 146 S.Ct. 1114, 1121 (2026); *see* Pet.21 (collecting cases). Whether *this Court* should grant review turns on the effect of *this Court's* decision. And far from unpublished or nonprecedential, this Court's decision will create binding precedent for the whole country.

This Court also has an institutional interest in not letting the "unpublished" label insulate radical misinterpretations of its precedents from its review. The association insists that no such abuse happened here, since the lower courts could have just relied on state-law grounds if they wanted to escape this Court's review. BIO.17. But the trial court ruled against the association under state law, and the appellate court did not think it could reverse on state-law grounds. What remains is a decision holding that *the act of racial discrimination itself* is protected by the First Amendment. This Court should give a decision like that no quarter, not even as persuasive precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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