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 STUDENTS FOR FAIR ADMISSIONS, AMERICAN ALLIANCE FOR EQUAL RIGHTS, AND DO NO HARM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Students for Fair Admissions is a nonprofit dedicated to defending human and civil rights secured by law, including the right to be free from discrimination on the basis of race in higher-education admissions. SFFA is a membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional. SFFA was the plaintiff in the landmark case challenging the use of race in admissions by Harvard College and the University of North Carolina. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).*

Students for Fair Admissions is one of the most important civil rights cases in the Supreme Court's history. It reaffirmed one of our country's "foundational principle[s]—the absolute equality of all citizens of the United States politically and civilly before their own laws." *Id.* at 201 (citation modified). The Court recognized that all "racial discrimination in public education"—including race-based admissions programs practiced at many universities—is illegal under the Constitution and Title VI. *Id.* at 204, 230–31; *see id.* at 198 n.2. As the Court explained, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the

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* 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 *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

doctrine of equality." *Id.* at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). There is thus no room for "benign" racial preferences: "Eliminating racial discrimination means eliminating all of it." *Id.* at 206.

The American Alliance for Equal Rights is a nonprofit membership organization founded in 2021. AAER is dedicated to protecting Americans of every race from the poison of racial classifications. Consistent with that focus, AAER often seeks to vindicate the rights of individuals who have been injured by racially discriminatory programs. *E.g.*, *American Alliance for Equal Rights v. Fearless Fund*, 103 F.4th 765 (11th Cir. 2024); *American Alliance for Equal Rights v. Southwest Airlines Co.*, 2025 WL 1397513 (N.D. Tex. May 14, 2025); *American Alliance for Equal Rights v. Founders First Cmty. Dev. Corp.*, 2024 WL 3625684 (N.D. Tex. July 31, 2024).

Do No Harm is a public-interest, nonprofit membership association with over 50,000 members from every corner of the medical field: physicians, nurses, medical students, patients, and policymakers. DNH is dedicated to ensuring that medicine is driven by scientific evidence rather than ideology and that professional opportunities are allocated based on merit rather than identity politics, such as race and gender. To that end, DNH opposes the spread of so-called "DEI" policies in medical education, research, and clinical practice. The association engages policymakers to encourage legislation and regulations that limit such practices and, when necessary, files lawsuits against universities, employers, and others whose DEI practices violate antidiscrimination laws.

Amici have a strong interest in this case. They are plaintiffs in many cases involving unlawful racial discrimination. The defendants in these cases—like the bar association here—now regularly seek to evade racial nondiscrimination laws and decisions of this Court by invoking a purported Free Speech Clause right to discriminate based on race as their "expression." That "expression" is nothing more than the bare act of racial discrimination. Because the First Amendment does not protect the bare, status-based conduct of racial discrimination—and holding otherwise would eviscerate antidiscrimination laws—*amici* have a significant interest here.

SUMMARY OF THE ARGUMENT

The past few years have seen an explosion of defendants trying to evade antidiscrimination laws by asserting that their racial discrimination is "expressive conduct" supporting DEI principles. *Amici* have filed many of these cases, which follow the same pattern. An entity operates some racially exclusionary program in violation of state or federal antidiscrimination law. When sued, the entity says that it is off the hook because the First Amendment's Free Speech Clause protects expressive conduct—and that the plain act of excluding persons based on their race supposedly "expresses" the entity's view of diversity, equity, and inclusion. In case after case, organizations operating race- or sex-exclusive scholarships, grants, fellowships, and professional programs contend that distributing money or opportunities on a discriminatory basis is itself "expressive conduct" or "expressive association" and thus constitutionally immune from ordinary liability. *Amici*'s cases,

collected in Part I below and drawn from courts across the country, reveal a consistent and accelerating pattern: open status-based exclusion coupled with far-reaching claims that the Constitution affirmatively protects that exclusion. This proliferation of defenses identical to the one recognized by the New Jersey court below highlights the need for this Court's review.

That need is also underscored by the contradiction between this defense and precedent. This Court has repeatedly rejected speech and association defenses to racial segregation. The First Amendment protects speech and association; it does not constitutionalize a general right to discriminate. For decades, this Court has rejected precisely these kinds of attempts to convert bare discrimination into speech or association. The logic of the decision below—that any discrimination can be "expressive conduct" supporting that discrimination—has no end point and would eviscerate state and federal antidiscrimination laws. This Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. Defendants are increasingly invoking a supposed Free Speech Clause right to engage in status-based discrimination.

This Court's decision in *Students for Fair Admissions* led to an overdue reckoning for racial decisionmaking garbed as "diversity, equity, and inclusion." Though universities, employers, and other entities have long disclaimed race-based selection decisions—all evidence to the contrary—now they have started to shift tactics. Though some continue to dispute that race-conscious decisions discriminate

based on race, many now simultaneously argue that they have a First Amendment right to discriminate based on race or sex. In their telling, discrimination is part of their expressive speech or association and is thus protected by the Free Speech Clause.

These cases arise in diverse settings—professional associations, charitable foundations, grantmaking organizations, fellowship programs, and employment—but they share the same basic structure. The defendant operates a program expressly limited by race, or sometimes sex. When challenged under state or federal antidiscrimination laws, the defendant concocts the rationale that the program communicates an exclusionary message about diversity, equity, or inclusion; argues that selecting people by race or sex is integral to that newly-discovered message; and contends that applying antidiscrimination statutes would therefore impermissibly interfere with the defendant's expressive conduct or association.

The following cases brought by *amici* illustrate this pattern: the often-explicit nature of the underlying discrimination, the novel claim of a "message" apart from the discrimination itself, and the extraordinary breadth of the claimed constitutional exemption. The "expression" supposedly found in DEI programs—at bottom, the economic or social advancement of certain racial groups and the exclusion of others—merely restates the fact of race discrimination. Allowing that "expression" to serve as the basis for evading antidiscrimination laws would nullify those laws, for every entity that discriminates could claim the same interest in conveying support for such discrimination.

This Court should make clear now—as it has in many precedents—that this gambit will not work and that antidiscrimination laws cannot be so easily negated.

A. Fearless Fund

In *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, 103 F.4th 765 (11th Cir. 2024), the Eleventh Circuit rejected the same First Amendment theory adopted by the court below. Fearless Fund operated the "Fearless Strivers Grant Contest," which was open only to businesses majority-owned by black women. Fearless Fund argued that both the grant money and the accompanying mentorship constituted protected expressive activity and association because they "serve the Foundation's associational interest in 'deepen[ing]' its 'relationships with the community of women-of-color entrepreneurs.'"[1]

Fearless Fund's arguments follow the same basic roadmap as arguments made by other defendants in *amici*'s cases. Fearless Fund asserted that donating money, including its expenditure of donated money, constituted "expressive conduct."[2] Then, it argued that any change to its distribution of funds would impermissibly interfere with its expressive donative conduct, violating its First Amendment rights.[3] And it

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[1] Br. for Appellees 18–19, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 8596169 (11th Cir. Dec. 6, 2023).
[2] *Id.* at 17.
[3] *Id.* at 24–25.

made the same argument in defense of its exclusive mentorship under the right of association.[4]

The Eleventh Circuit rejected this theory. While recognizing that the First Amendment protects expressive conduct, it explained that this Court has never extended that protection to bare racial discrimination. *Fearless Fund,* 103 F.4th at 777. The Eleventh Circuit found this Court's holding in *Runyon v. McCrary* dispositive, as it rejected the argument that the First Amendment protects private racial exclusion.

In *Runyon*, private schools denied black children admission because of their race. 427 U.S. 160, 168 (1976). The schools asserted a First Amendment right to discriminate, arguing that the right of association allowed it to deny entry to students with whom it did not want to associate. This Court held that while the First Amendment protected parents' and schools' right to associate with others and "promote the belief that racial segregation is desirable," "it does not follow that the [p]ractice of excluding racial minorities from such institutions is also protected." *Id.* at 176.

The Eleventh Circuit held that the same reasoning applied to Fearless Fund's claimed right to discriminate. 103 F.4th at 778–79. Though Fearless Fund tried to rely on *303 Creative LLC v. Elenis*, the Eleventh Circuit distinguished that case. There, a website designer challenged Colorado's anti-discrimination statute, arguing that its provisions violated her First Amendment rights by compelling speech—celebrating a same-sex marriage—that she

[4] *See id.* at 18.

disagreed with. 600 U.S. 570, 580 (2023). This Court agreed that the statute impermissibly restricted her First Amendment rights. *Id.* at 603. The Court differentiated between discrimination based on status and discrimination based on message. *Id.* at 595 n.3.

The Eleventh Circuit reasoned that Fearless Fund's policies discriminated based on status rather than message. *See* 103 F.4th at 779. Rather than deny applicants who disagreed with Fearless Fund's message of supporting black female entrepreneurs, Fearless Fund prevented any individual who did not identify as a black female from participating. *Id.* Because Fearless Fund discriminated based on applicants' race, not their views about Fearless Fund's message, the Eleventh Circuit held that First Amendment speech protections did not apply. *Id.* The Eleventh Circuit cautioned that if refusing to consider applicants based on their race "were deemed sufficiently 'expressive' to warrant protection under the Free Speech Clause, then so would be every act of race discrimination, no matter at whom it was directed." *Id.*

B. American Bar Association

In *American Alliance for Equal Rights v. American Bar Association*, AAER has challenged the American Bar Association's Legal Opportunity Scholarship Fund, which awarded scholarships each year to 20–25 first-year law students from "an underrepresented racial and/or ethnic minority." 2026 WL 161596, at *1 (N.D. Ill. Jan. 21, 2026). Relying on the New Jersey decision here, the ABA argues that its criteria are constitutionally protected because it "strives to convey a message": "that it seeks to encourage students from

traditionally underrepresented backgrounds to apply to law school, and to provide financial assistance for them to do so."[5] Thus, the ABA argues, applying antidiscrimination law to a race-exclusive scholarship would unconstitutionally compel the organization to alter its expressive message.

In short, the ABA's theory is that race-based exclusion becomes constitutionally protected whenever the discriminator says that it advances an expressive mission. And apparently, courts are simply supposed to accept the discriminator's assertion that discrimination was part of the message, no matter how implausible that may be. After all, in 2025, the ABA repealed its race-based leadership requirements, purportedly making board seats "open to candidates who are committed to 'advancing the values of diversity, equity, and inclusion,' regardless of their demographic backgrounds."[6] The ABA did not suggest that this change would undermine its advocacy for diversity. And the ABA does not condition membership or general participation in other programs on race. Plus, the ABA's own "Action Plan for Equity and Fairness" says that "DEI is about ensuring fairness for all. It is not a weapon to take anything away from anyone. It is not a 'pie' with a finite amount to share."[7]

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[5] Mem. of Law in Supp. of Def.'s Mot. to Dismiss 14, *Am. All. for Equal Rts. v. Am. Bar Ass'n*, No. 25-cv-3980, 2025 WL 2838346 (N.D. Ill. July 30, 2025).

[6] Karen Sloan, *ABA Ends Diversity Requirements for Governing Board Seats*, Reuters (Aug. 12, 2025), https://bit.ly/4rPwNrN.

[7] ABA, *Action Plan for Equity and Fairness* (Feb. 5, 2024), https://perma.cc/T9W4-F8Y6.

These acknowledgments undermine any claim that the ABA *needs* to engage in racial exclusion to convey some distinct expressive message; the ABA's exclusion is simply discrimination.

C. The Women

Next, in *American Alliance for Equal Rights v. The Women, LLC*, the defendant operated a program that gave black-owned businesses low-interest loans. No. 3:25-cv-441 (E.D. Tenn. filed Sept. 12, 2025). The defendant claimed a constitutional immunity from antidiscrimination challenge because its program allegedly "furthers [its] speech and association" related to "concern[s] about poverty rates in the Black community" "by investing in the community disproportionately affected by poverty."[8] Because the loan application determined how the organization spent its charitable donations, the defendant argued that discrimination was "part and parcel" of its "expressive conduct" and covered by the First Amendment.[9]

Thus, this defendant too framed the First Amendment not as a shield against compelled speech or forced association, but as a right to distribute financial benefits on a race-exclusive basis as part of supposed "expressive conduct." Yet the defendant could not identify any *message* that it was sending via discrimination; its generalized societal goals could be advanced or advocated without discriminating based

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[8] Def.'s Resp. in Opp'n to Pl.'s Mot. for Summ. J. 20, *Am. All. for Equal Rts. v. The Women, LLC*, No. 3:25-cv-441, 2025 WL 4093305 (E.D. Tenn. Oct. 28, 2025).

[9] *Id.*

on race in the application process. Its discrimination was just that: discrimination.

D. Hispanic Scholarship Fund

In *American Alliance for Equal Rights v. Hispanic Scholarship Fund*, the defendant runs a scholarship limited to those who are at least one-quarter Hispanic/Latino. No. 1:25-cv-4207 (D.D.C. filed Dec. 3, 2025). Like the others, this defendant argues that "[a]warding scholarships and conferring program benefits *is* expressive conduct."[10] But the discriminatory selection alone is not expressive. And the defendant admitted that some of its "programs are available to students without Hispanic heritage."[11] Under this Court's precedents, the need to "accompan[y]" "conduct with speech explaining it" means that the conduct alone is not "expressive." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).

What's more, the defendant claims that its mission is "supporting Hispanic American higher education."[12] But the defendant prohibits applicants from applying for this scholarship because they are not Hispanic, regardless of their views on Hispanic American higher education. Such discrimination is based on an applicant's status as a non-Hispanic individual and receives no protection under the Free Speech Clause.

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[10] Def. Hisp. Scholarship Fund's Mem. of P. & A. in Supp. of Its Mot. to Dismiss Pl.'s Am. Compl. 22, *Am. All. For Equal Rts. v. Hisp. Scholarship Fund*, No. 1:25-cv-4207, Doc. 19 (D.D.C. Jan. 20, 2026).

[11] *Id.* at 4.

[12] *Id.*

E. Association of University Women

In *Do No Harm v. American Association of University Women*, the defendant earmarked an award within its fellowships for "women of color" pursuing advanced professional degrees. No. 1:24-cv-1782 (D.D.C. filed Jun. 20, 2024). The defendant argued that it "engages in expressive conduct when it decides which individuals to support."[13] And the defendant said that being required to use race-neutral criteria would "compel [it] to subsidize speech" that it "does not support" "by awarding fellowships to white women."[14]

Once again, the defendant's position was essentially that the very act of discrimination conveyed a message of support for discrimination. That position would detonate antidiscrimination laws. And the act of selecting fellowship recipients is not inherently expressive in the constitutional sense: observers do not witness the selection process, and even public announcements of recipients do not convey a particularized message attributable to the defendant—much less one that would necessarily be substantially burdened by adherence to race-neutral criteria.

F. Health Affairs & Project HOPE

In *Do No Harm v. Health Affairs & Project HOPE*, the defendants operated a fellowship requiring applicants to be certain races. No. 1:22-cv-2670

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[13] Opp'n to Mot. for TRO & Prelim. Inj. 15 n.4, *Do No Harm v. Am. Ass'n of Univ. Women*, No. 1:24-cv-1782, Doc. 14 (D.D.C. Aug. 2, 2024).
[14] *Id.* at 15.

(D.D.C. filed Sept. 6, 2022). The defendants argued that their racial selection criteria "cannot be separated from the overall expressive goals" of the program—to increase scholarship about "racial equity in health policy."[15] But the expression at issue was scholarship on racial equity, and that scholarship can be advanced by persons regardless of race. If anything, racially restricting the fellowship barred individuals committed to advancing the program's message. The defendants' discrimination, by contrast, was separate conduct that was not inherently expressive.

G. National Association of Emergency Medical Technicians

In *Do No Harm v. National Association of Emergency Medical Technicians*, the defendant operated a "diversity scholarship" excluding white students from consideration. No. 3:24-cv-11 (S.D. Miss. filed Jan. 10, 2024). The defendant argued that its "decision to provide a scholarship award to a person who meets all the application criteria and is preferably a person of color is protected expressive conduct because [it] intends to convey the importance of diversity in the EMS workforce."[16] This theory is implausible on its face, both because the application purportedly did not include a racial requirement and because no one would understand a particular selection to convey this message. And again, accepting this type of theory would bulldoze antidiscrimination

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[15] Opp'n to Mot. for Prelim. Inj. 9–10, *Do No Harm v. Health Affs. & Project HOPE*, No. 1:22-cv-2670, Doc. 16 (D.D.C. Sept. 30, 2022).

[16] Def.'s Reply in Supp. of Mot. to Dismiss 9, *Do No Harm v. NAEMT*, No. 3:24-cv-11, Doc. 27 (S.D. Miss. Apr. 15, 2024).

laws, as anyone who wanted to discriminate could claim that the discrimination expressed their support for discrimination.

H. Buckfire & Buckfire, P.C.

In *American Alliance for Equal Rights & Do No Harm v. Buckfire & Buckfire, P.C.*, the defendant law firm operated a scholarship program that imposed added requirements on white applicants—and never awarded a white applicant a scholarship. No. 2:25-cv-13617 (E.D. Mich. filed Nov. 13, 2025). Denying the allegations, the law firm simultaneously argued that "[a]ll applicants, regardless of race, ethnicity, or skin color had the same requirements for the scholarships," and that the firm "is protected by its First Amendment rights to define scholarship program objectives, which include essays focused on diversity."[17] But the mere fact that speech is involved in some respect in the program does not mean that the actual discriminatory act of excluding persons based on race is itself protected expression. And that exclusion certainly could not be protected expression if the defendant denies that it is expressing such a message in the first place.

* * *

As these cases show, defendants across a variety of contexts and industries are invoking the same novel First Amendment theory accepted by the court below to perpetuate unlawful racial discrimination. This defense could even be used by private universities to

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[17] Def.'s Answer to Am. Compl. 14, 16, *Am. All. for Equal Rts. v. Buckfire & Buckfire, P.C.*, No. 2:25-cv-13617, Doc. 6 (E.D. Mich. Jan. 30, 2026).

evade this Court's clear holding in *Students for Fair Admissions* that they may not "make admissions decisions that turn on an applicant's race." 600 U.S. at 208; *see id.* at 198 n.2. This Court's intervention is critical, for defenses like these show no sign of slowing. And there is nothing new or novel about them: boiled down, they all amount to the claim that the very act of discrimination is protected expression. This Court should again reject this theory's latest incarnation.

II. The First Amendment does not create a general right to racially discriminate.

The Free Speech Clause theory advanced in these cases and recognized below is not merely novel. It is also incompatible with decades of this Court's precedent and the decisions of most other courts. And it has no logical stopping point, for every entity that discriminates could claim the same "expressive" interest in the bare act of discrimination.

A. This Court has long held that the Free Speech Clause does not protect status-based discrimination.

Since well before *Students for Fair Admissions*, this Court has held there is no First Amendment right to discriminate based on protected characteristics.

First, in *Railway Mail Association v. Corsi*, a union argued that a New York law prohibiting labor organizations from discriminating based on race "offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership." 326 U.S. 88, 93 (1945). The Court saw "no constitutional basis for the contention that a state cannot protect workers from exclusion

solely on the basis of race, color or creed by an organization . . . [that] holds itself out to represent the general business needs of employees." *Id.* at 94. Plus, the Court emphasized, "[a] judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Id.* at 93–94.

In *Norwood v. Harrison*, the Court said that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." 413 U.S. 455, 470 (1973). There, the plaintiffs alleged that the state-run Mississippi textbook lending program supported racially segregated education and impeded the desegregation of public schools by supplying textbooks to students attending segregated private schools. *Id.* at 457. The Court reasoned "although the Constitution does not proscribe private bias, it places no value on discrimination." *Id*. at 469.

Next, in *Runyon v. McCrary*, the Court held that 42 U.S.C. § 1981 prohibits private schools from excluding students based on race, rejecting the argument that such exclusion was protected by the schools' associational rights. 427 U.S. 160, 176–79 (1976). There, the plaintiffs alleged that they had been prevented from attending the defendants' private schools due to the schools' exclusionary policies. *Id.* at 164. The schools were segregated. *Id.* at 165. Citing *Norwood*, the Court held that while "it may be

assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," "it does not follow that the practice of excluding racial minorities from such institutions is also protected." *Id.* at 176. The Court also noted that "there 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." *Id.* (citation modified).

In *Hishon v. King & Spalding*, the Court rejected a law firm's claim that Title VII interfered with its associational rights and reaffirmed its holdings in *Norwood* and *Runyon*. 467 U.S. 69, 78–79 (1984). The plaintiff was a female associate at King & Spalding, a general partnership law firm, and alleged that she was discriminated against when she was not invited to become a partner. At the time, King & Spalding had never elevated a woman partner, and once an associate was out of partnership consideration, she would be asked to leave. *Id.* at 72. The plaintiff's employment was terminated shortly after she was passed over for partner. *Id.*

The Court reversed the dismissal of the plaintiff's case. *Id.* at 78. As relevant, King & Spalding argued "that application of Title VII in this case would infringe constitutional rights of expression or association." *Id.* But citing *Runyon* and *Norwood*, the Court said that such "private discrimination" "has never been accorded affirmative constitutional protections," and "[t]here is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union." *Id.* Nor

did the Court think that King & Spalding had "shown how its ability to fulfill [expression or association] would be inhibited by a requirement that it consider petitioner for partnership on her merits." *Id.*

The Court's reasoning in *Hishon* is consistent with later decisions distinguishing between compelled expression and the application of generally applicable antidiscrimination laws to status-based discrimination. In *303 Creative*, the Court held that Colorado could not compel a website designer to create custom expressive content conveying messages that she did not wish to express. 600 U.S. at 586–88. The Court emphasized that the issue was compelled speech, not a general right to engage in discrimination. *Id.* at 589–90. Indeed, the Court noted that antidiscrimination laws ordinarily regulate status-based conduct rather than speech and remain constitutional when they do not require "compel[led] expressive activity." *Id.* at 589 n.6. The Court repeatedly emphasized "the distinction between status and message," explaining that the Free Speech Clause "does *not* protect status-based discrimination unrelated to expression." *Id.* at 595 n.3.

Together, these cases confirm that the Free Speech Clause does not transform status-based exclusion into protected expression. That exclusion cannot be transmogrified into expression simply by asserting a circular interest in "expressing" support for the exclusion.

B. The decision below splits from other courts.

Despite the long line of Supreme Court precedents rejecting a broad Free Speech Clause right to racially discriminate, lower courts have split on recent cases involving DEI programs. Most disagree with the New Jersey decision below, and the existence of a split on this important issue warrants the Court's review.

In *Fearless Fund*, as described above, the Eleventh Circuit expressly rejected the argument that discriminatory conduct is protected as expressive speech. Citing *Runyon*, *Norwood*, and *303 Creative*, the court held that the defendant's exclusion of business owners who are not black females from its program was not protected by the First Amendment. 103 F.4th at 777–79. The discrimination was anchored in the status of the individuals—their race and sex—rather than any message. *Id.* at 779. The court noted the "critical distinction between *advocating* race discrimination and *practicing* it," and warned that the defendant's "position—that the First Amendment protects" "categorial race-based exclusion—risks sowing the seeds of antidiscrimination law's demise." *Id*. at 778–79.

Likewise, a district court considering a private school's admissions policy preferring students of Native Hawaiian ancestry swept aside an argument based on a First Amendment "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est.*, 295 F. Supp. 2d 1141, 1160–61 & n.18 (D. Haw. 2003) (emphases omitted), *aff'd*, 470 F.3d 827 (9th Cir.

2006). Quoting *Runyon*, the court said that "[t]he application of a statute, such as § 1981, to eradicate 'invidious' discrimination does not violate the First Amendment" because "'the Constitution places no value on discrimination.'" *Id.* at 1160 n.18 (citation modified).

Similarly, responding to a series of challenges to recent executive orders addressing DEI programs, federal district courts have largely rejected the argument that labeling unlawful discrimination as "DEI" confers First Amendment immunity. In *National Urban League v. Trump*, advocacy groups challenged executive orders and agency actions restricting the use of federal funds for certain diversity-related initiatives, contending that enforcement of antidiscrimination requirements impermissibly burdened their expressive missions and advocacy efforts. 783 F. Supp. 3d 61, 70–75, 96–99 (D.D.C. 2025). The court rejected that theory, emphasizing that "neither Plaintiffs nor anyone else have a First Amendment right to violate federal antidiscrimination law," and explaining that the challenged policies regulated conduct rather than protected expression. *Id.* at 102.

The Northern District of California reached the same conclusion in *San Francisco AIDS Foundation v. Trump*, in which nonprofit plaintiffs argued that restrictions on DEI-related practices interfered with their missions and expressive activities. 786 F. Supp. 3d 1184, 1217–21 (N.D. Cal. 2025). The court acknowledged that the First Amendment protects advocacy and speech supporting DEI viewpoints but held that it does *not* protect activities that directly

violate antidiscrimination law. *Id.* at 1222. As the court explained, "while the First Amendment may protect speech that advocates for violation of law, it does not protect activities that directly violate antidiscrimination law." *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

Thus, most courts follow this Court's lead in declining to recognize a Free Speech Clause defense when plaintiffs seek to recharacterize discriminatory conduct as protected expression or ideology. The mere invocation of DEI does not transform conduct subject to antidiscrimination law into constitutionally protected speech. But the New Jersey court below disagreed, and other judges have supported its view. *See Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 2023 WL 6295121, at *6 (N.D. Ga. Sept. 27, 2023) (district court holding that Fearless's race- and sex-based exclusion "clearly intends to convey a particular message" that "Black women-owned businesses are vital to our economy"), *aff'd in part, rev'd in part and remanded*, 103 F.4th 765 (11th Cir. 2024).

This Court's review is needed.

C. The theory below has no limiting principle.

As the Eleventh Circuit recognized in *Fearless Fund*, if operating on a race-exclusive basis is deemed sufficient expression of some vague DEI message to warrant First Amendment protection, "then so would be every act of race discrimination, no matter at whom it was directed." 103 F.4th at 779. "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." *Id.*

As one district court similarly put it, "if the mere decision whether or not to enter into a contract—separated out from a later, more traditional, expressive activity—is entitled to First Amendment protection such that contracting decisions can never be challenged as being improperly race-based," "how would 42 U.S.C. § 1981 ever be enforceable?" *Nat'l Ass'n of Afr.-Am. Owned Media v. Charter Commc'ns, Inc.*, 2016 WL 10647193, at *3 n.4 (C.D. Cal. Dec. 12, 2016). The same is true for other federal and state prohibitions on race-based discrimination.

That observation reflects a central concern of free speech doctrine, reflected throughout this Court's decisions: constitutional protection must be confined to genuine expressive activity, or else it risks becoming a vehicle for exempting odious discrimination from generally applicable law. Under the theory adopted below, any race-based exclusion could be insulated from legal scrutiny simply by asserting that it reflects an expressive support for the exclusion. There would be no principled way to distinguish protected discrimination from unlawful discrimination, because the asserted "message" would consist entirely of the discriminatory act itself.

Below, the court treated race-based eligibility rules as inherently expressive because they were said to advance a message of racial equity. But that reasoning collapses expression into exclusion. It identifies no independent expressive activity—no speech, publication, performance, or communicative forum—

that would be altered by compliance with antidiscrimination law. *Compare Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568–70 (1995) (First Amendment violation where compelled inclusion altered the expressive content of a parade).

Instead, the decision below treats discrimination itself as the message. Ironically, the decision treats "expressive exclusion" as the bar association's message even though the association says this is *not* its intent and that its program is merely "one of expressive inclusion." Pet. 29a. Thus, the court below allowed the defendant to disclaim any exclusionary message—yet use the First Amendment to shield its racial discrimination based on the precise "message" that it said it did *not* intend to send.

This reasoning sends a wrecking ball through this Court's precedents and antidiscrimination laws nationwide. Every defendant who unlawfully discriminates could claim that its conduct sends a message—even an unintended one—and thus that conduct is subject to near-total constitutional protection under the Free Speech Clause. The court below had no response to this fundamental defect in its reasoning, but that defect explains why this Court has repeatedly rejected the proposition that the mere act of discrimination sends a sufficient message to trigger First Amendment protection. The First Amendment does not transform racial exclusion into protected expression.

CONCLUSION

To preserve this nation's laws—developed through centuries of struggle—protecting individuals from public and private race-based discrimination, this Court should grant certiorari and reverse.

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