

# Expressive Association as Shield, not Sword: A Constitutional Defense of DEI

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*The current Administration has diversity, equity, and inclusion (DEI) in its crosshairs, finger on the trigger. But expressive association could shield DEI from a fatal blow. Expressive association is a constitutional protection expressive groups have that guards against government involvement. While much of the expressive association doctrine has been built on a group’s attempts to exclude a marginalized demographic—take *Boy Scouts of America v. Dale* for example—this Note proposes using expressive association to protect organizations’ purposeful inclusion of marginalized groups.*

*Employing expressive association could save organizations’ DEI initiatives, like the American Bar Association’s (ABA). This Note uses a potential Equal Employment Opportunity Commission (EEOC) investigation into the ABA’s diversity clerkship and fellowship programs as a case study for this assertion. Despite its risks, this Note contends that expressive association is perhaps the best shot to protect DEI from the legal challenges hurled its way.*

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## Introduction

Diversity, equity, and inclusion (DEI)—an effort aimed at remedying historic inequality in opportunities—faces the chopping block. Its opposition claims it commits the very sin it aimed to rid: discrimination. DEI’s opposition has mobilized and attacked on all fronts, already taking down arguably the largest DEI effort—affirmative action, at least as it pertains to race.<sup>1</sup>

Now, with the second Trump Administration’s aim also set on DEI, the anti-DEI movement has gained allies. The anti-DEI movement no longer has to rely on private suits to chip away at DEI and allege discrimination—it can pass the baton off to the Administration to pick up where it left off. And so, it has.

Government investigations into DEI initiatives have begun, in part by targeting the legal field. The Equal Employment Opportunity Commission (EEOC) is investigating Big Law firms for discrimination due to their DEI efforts.<sup>2</sup> The Department of Education is investigating the Harvard Law Review’s article selection process for racial discrimination also due to DEI values.<sup>3</sup> And President Trump and the Department of Education have threatened law schools with investigation, alleging discrimination for complying with the American Bar Association’s (ABA) DEI mandate for accreditation—which the ABA suspended in response.<sup>4</sup>

The ABA may also face investigation by the EEOC instigated by a recently filed complaint.<sup>5</sup> The ABA currently operates judicial internships for law students and fellowships for attorneys who are a member of an underrepresented demographic in the legal field.<sup>6</sup> The complaint, however, does not look kindly on this initiative: The complaint alleges that the

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1. *See generally* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (holding that the use of race-based factors in university admissions processes is a violation of the Equal Protection Clause of the Fourteenth Amendment).

2. Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Acting Chair Andrea Lucas Sends Letters to 20 Law Firms Requesting Information About DEI-Related Employment Practices (Mar. 17, 2025), <https://content.govdelivery.com/accounts/USEEOC/bulletins/3d759de> [<https://perma.cc/GN29-ZUPW>].

3. Janet Lorin, *Harvard Probed by US Agencies for Law Review Discrimination*, BLOOMBERG L. (Apr. 28, 2025), <https://tinyurl.com/yejdhwms> [<https://perma.cc/9Y5R-B23S>].

4. Tatyana Monnay, *ABA Bows to Trump, Delays Law School Diversity Rule Again*, BLOOMBERG L. (May 9, 2025), <https://tinyurl.com/2tmpwn9d> [<https://perma.cc/KN86-H737>].

5. *See* Letter from Am. C.R. Project to EEOC, Title VII Violations Through Diversity Clerkship Program and Related Programs 5 (Feb. 10, 2025), <https://www.americancivilrightsproject.org/blog/the-acr-project-fasorp-will-and-ceo-file-wide-sweeping-title-vii-charge-against-the-aba/> [<https://perma.cc/25DZ-MJXQ>] (asking the EEOC to “formally investigate the ABA’s liability under Title VII”). As of January 2026, the EEOC has not acted on this complaint.

6. *Id.* at 3.

clerkship and fellowship programs are discriminatory on the basis of race, national origin, sex, and sexual orientation, and therefore violate Title VII.<sup>7</sup>

This Note chooses this complaint as a case study and advocates that the ABA should use an expressive association claim under the First Amendment in defense of its clerkship and fellowship programs. Expressive association grants expressive groups certain protections from government interference, including the right to dictate group membership, even, at times, in spite of antidiscrimination law.<sup>8</sup> More specifically, this Note will advocate for the ABA's use of expressive association to give preference to LGBTQ+ clerks and fellows. This proposal is particularly ripe, since one of the most notable successful expressive association claims was to *exclude* LGBTQ+ members from an organization.<sup>9</sup> Turned on its head, expressive association can also be a potent vehicle for *inclusion*.

The ABA is an ideal candidate to advance an expressive association claim to protect its DEI initiatives because it is a non-profit, membership organization—the kind of group that is traditionally granted expressive association protection.<sup>10</sup> Further, the ABA is an expressive group: It expresses views on the legal system's functionality, development in the law, and the demographic makeup of our legal system.<sup>11</sup> Using Title VII to pry open the ABA's clerkship and fellowship programs to those overrepresented in the legal field substantially burdens the ABA's expression. The law would drain the programs of their meaning and force the ABA to send the message that diversity is not as important to the organization as it once was. This doctrine is a strong defense for the ABA's programs and could aid other organizations facing investigation for valuing diversity.

Part I of this Note recounts the current campaign against DEI measures, with specific focus on litigation against law firms, law schools, law reviews, and bar associations. It identifies the EEOC's potential investigation into the ABA—and the ABA's potential expressive association defense, specifically in defense of a sexual orientation discrimination claim—as a case study for this Note. Part II gives a crash course in expressive association doctrine through case illustrations of both *Roberts v. United States Jaycees*<sup>12</sup> and *Boy Scouts of America v. Dale*.<sup>13</sup> Part II highlights the evolution of and

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7. *Id.* at 3 exh. A, 4.

8. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (finding the forced inclusion of James Dale, a gay man, into the Boy Scouts by law to be an unconstitutional infringement of an expressive association).

9. *Id.* at 647, 661.

10. *See* Elizabeth Sepper, *The Return of Boy Scouts of America v. Dale*, 68 ST. LOUIS UNIV. L.J. 803, 806–07 (2024) (acknowledging expressive association's "foundation[] in the membership of non-commercial, non-profit groups").

11. *See* discussion *infra* subpart III(A).

12. 468 U.S. 609 (1984).

13. 530 U.S. 640 (2000).

ambiguities in the doctrine following *Dale*. Part III applies this doctrine to the ABA's case, concentrating on the use of expressive association to include LGBTQ+ interns and fellows. Part IV acknowledges the concern of applying expressive association against Title VII, and it assures that the employ of expressive association in this instance does not risk a snowballing effect that results in Title VII's depletion.

### I. The Assault on DEI

Momentum has developed in opposition to DEI efforts. The second Trump Administration seems resolved to obliterate DEI, full stop.<sup>14</sup> Closer to home, the legal field faces persistent challenges to DEI. In the last two years alone, law firms have been sued for their summer associate diversity positions,<sup>15</sup> a law school has been sued for considering diversity in hiring,<sup>16</sup> law reviews have been sued for considering diversity when offering publication,<sup>17</sup> and at least one state bar association has been sued for promoting diversity within their leadership positions.<sup>18</sup> The suits allege violations of various antidiscrimination laws, including Title VII of the Civil Rights Act.<sup>19</sup>

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14. See Exec. Order No. 14,173, § 4(b)(iii), 90 Fed. Reg. 8633, 8635 (Jan. 21, 2025) (calling for a report that outlines a “plan of specific steps or measures to deter DEI programs or principles . . . that constitute illegal discrimination or preferences.”).

15. See Sam Skolnik, *King & Spalding Sued Over Diverse Law Student Hiring Program*, BLOOMBERG L. (May 10, 2024), <https://news.bloomberglaw.com/business-and-practice/king-spalding-sued-over-diverse-law-student-hiring-program> [<https://perma.cc/C2VP-NT2K>] (reporting suits against Big Law firms for diversity summer associate programs).

16. See Karen Sloan, *Northwestern Law School Sued for Discrimination Against White Men in Faculty Hiring*, REUTERS (July 3, 2024), <https://www.reuters.com/legal/legalindustry/northwestern-law-school-sued-discrimination-against-white-men-faculty-hiring-2024-07-02/> [<https://perma.cc/7BEA-WV99>] (reporting a lawsuit alleging discriminatory hiring practices through preference of candidates who are underrepresented in the legal field).

17. See *id.* (discussing a lawsuit alleging Northwestern Law Review discriminates against white men in its selection of articles and two additional identical, unsuccessful suits against NYU Law Review and Harvard Law Review).

18. *Saadeh v. N.J. State Bar Ass'n*, No. A-2201-22, 2024 WL 5182533, at \*1 (N.J. Super. Ct. App. Div. Dec. 20, 2024). The Supreme Court has granted two applications to extend the time to file a cert petition. The petition is due February 16, 2026. *Saadeh* Application for Extension of Time to File Petition for Writ of Certiorari, *Saadeh v. N.J. State Bar Ass'n*, No. 25A626 (U.S. Jan. 9, 2026) (application filed Jan. 6, 2026).

19. See Complaint and Demand for Jury Trial at 25–30, *Spitalnick v. King & Spalding, LLP*, No. 1:24-CV-01367, 2025 WL 1474835 (D. Md. May 22, 2025) (alleging violation of Title VII for a law firm's DEI hiring practices); Complaint at 77, 83, 89, *Faculty v. Northwestern Univ.*, No. 1:24-cv-05558 (N.D. Ill. July 2, 2024) (alleging violations of Title VI, Title IX, and 42 U.S.C. § 1981 in faculty hiring processes); *Faculty v. N.Y. Univ.*, 11 F.4th 68, 72, 78 (2d. Cir. 2021) (affirming dismissal of claims under Title VI and Title IX for racial discrimination in law review article selection); *Saadeh*, 2024 WL 5182533, at \*1, \*13 (holding that the bar association had a First Amendment right of expressive association to practice “intentional inclusion” in response to plaintiff's claims of violation of New Jersey antidiscrimination law).

The second Trump Administration has added arrows to the quiver of the anti-DEI movement through the issuance and enforcement of an executive order: Ending Illegal Discrimination and Restoring Merit-Based Opportunity.<sup>20</sup> The “Ending Illegal Discrimination” Executive Order broadly declares that DEI efforts are illegal discrimination under the Civil Rights Act of 1964.<sup>21</sup> Of note, the order takes aim at bar associations.<sup>22</sup> The order requires the Attorney General and agency heads to submit a report recommending the enforcement of civil-rights laws against the private use of DEI.<sup>23</sup> Specifically, each agency is required to “identify up to nine potential civil compliance investigations” in which state and local bar associations are listed as organizations subject to investigation.<sup>24</sup>

Civil compliance efforts have already begun in the legal field. The EEOC has launched an investigation into twenty Big Law firms regarding their DEI efforts both internal to the firm—think affinity groups within firms, like a woman’s group, or Middle Eastern lawyer’s association—and external via hiring practices, such as diversity summer associate positions.<sup>25</sup> The Department of Education has also announced an investigation into the Harvard Law Review’s article selection process, claiming it is racially discriminatory due to diversity, equity, and inclusion values playing a role in the decision of which articles to select for publication.<sup>26</sup>

After the executive order was issued, the American Civil Rights Project in conjunction with the Wisconsin Institute for Law & Liberty filed a complaint with the EEOC against the American Bar Association.<sup>27</sup> The complaint alleged the ABA violated Title VII through student clerkship and attorney fellowship programs reserved for individuals underrepresented in the legal field—that is, people from minority racial and ethnic groups, LGBTQ+ identifying individuals, and women.<sup>28</sup> The clerkship programs offer law students judicial internships with participating judges,<sup>29</sup> while the fellowship programs offer ABA member attorneys mentorship, training, and

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20. Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

21. *Id.* § 1.

22. *Id.* § 4(b)(iii).

23. *Id.* § 4(b).

24. *Id.* § 4(b)(iii).

25. See Press Release, U.S. Equal Emp. Opportunity Comm’n, *supra* note 2 (announcing the investigation into DEI-related employment practices of twenty law firms).

26. Lorin, *supra* note 3. As of January 26, 2026, the EEOC has not acted on this complaint.

27. Letter from Am. C.R. Project to EEOC, *supra* note 5, at 1–2.

28. *Id.* at 2, 4, exh. A. at 3.

29. *Judicial Intern Opportunity Program (JIOP)*, A.B.A., <https://www.americanbar.org/groups/litigation/about/awards-initiatives/jiop/> [<https://perma.cc/T8TH-AYZL>]; *Diversity Clerkship Program*, A.B.A., [https://www.americanbar.org/groups/business\\_law/about/awards-initiatives/diversity/](https://www.americanbar.org/groups/business_law/about/awards-initiatives/diversity/) [<https://perma.cc/FUV6-PU59>].

a pathway to leadership.<sup>30</sup> Specifically, the complaint claims the ABA's Diversity Clerkship Program (DCP), Judicial Intern Opportunity Program (JIOP), Business Law Fellowship (BLF), Diversity Fellows Program (DF), Diversity and Inclusion Fellowship Program (DIFP), and the Loretta Collins Argrett Fellowship (LCAF) all use illegal, discriminatory criteria.<sup>31</sup>

The complaint reasons that Title VII of the Civil Rights Act, which is aimed at prohibiting employment discrimination, applies to the ABA's clerkship and fellowship programs despite the ABA not employing the clerks or fellows in the programs.<sup>32</sup> The ABA's clerkship programs are subject to Title VII, the complaint asserts, because the ABA is functioning as an "employment agent of . . . judges, in selecting both those to be compensated for work and trained for work."<sup>33</sup> As for the fellowship programs, the complaint claims they are subject to Title VII because they dispense employment training.<sup>34</sup> While the argument is a stretch, it is at least colorable, since Title VII both prohibits discrimination in employment referrals and in apprenticeship and training programs.<sup>35</sup> As such, this Note will presume that Title VII is applicable to the ABA's clerkship and fellowship programs.

This complaint, and the ABA's potential expressive association defense, will be the focus of this Note. This Note will advocate for an expressive association defense as it pertains in particular to a discrimination claim based on sexual orientation. In other words, I will argue that the ABA has an expressive association right to give preference to LGBTQ+ individuals in its law student clerkship and attorney fellowship programs that are reserved for those who are underrepresented in the legal field.

This Note, however, does not address the use of expressive association to advocate for giving preference to women or racial minorities due to the complex and unfavorable case law underlying the argument.<sup>36</sup> The focus on

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30. See, e.g., *Business Law Fellows*, A.B.A., [https://www.americanbar.org/groups/business\\_law/about/awards-initiatives/fellows/](https://www.americanbar.org/groups/business_law/about/awards-initiatives/fellows/) [<https://perma.cc/WK52-YMUM>] (detailing leadership experience, mentorship, and meeting reimbursement as benefits of the program).

31. Letter from Am. C.R. Project to EEOC, *supra* note 5, at 3–4.

32. Letter from Am. C.R. Project to EEOC, *supra* note 5, at 4.

33. *Id.* (citing 42 U.S.C. § 2000e-2(a), (b), (d)).

34. *Id.* (citing 42 U.S.C. § 2000e-2(d)).

35. 42 U.S.C. § 2000e-2(b) ("It shall be an unlawful employment practice for an employment agency to fail or *refuse to refer for employment* . . . any individual because of his race, color, religion, sex, or national origin . . .") (emphasis added); 42 U.S.C. § 2000e-2(d) ("[It's] an unlawful employment practice for any employer, labor organization . . . controlling apprenticeship or other training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to . . . any program established to provide apprenticeship or other training.").

36. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621, 626–27 (1984) (declining to recognize an expressive association right to exclude women). Even though *Jaycees* dealt with a failed justification for excluding women under expressive association and not the purposeful inclusion of women—like the ABA's programs do—the case's holding makes it difficult to argue that

LGBTQ+ inclusion with expressive association is largely inspired by expressive association precedent. Many successful expressive association claims—including the pivotal case *Boy Scouts of America v. Dale* discussed in Part II—concerned groups’ exclusion of LGBTQ+ individuals. This Note aims to flip the script.

## II. An Introduction to Expressive Association Doctrine

Before setting out the case for expressive association on behalf of the ABA, we first must understand the intricacies of the doctrine. Expressive association is the right “to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>37</sup> Protecting groups’ right to associate preserves “political and cultural diversity” and ensures minority views are not snuffed out by the majority.<sup>38</sup> Without the right to associate for the purpose of exercising First Amendment rights, “[a]n individual’s freedom . . . could not be vigorously protected from interference by the State.”<sup>39</sup>

The two most pivotal cases to expressive association doctrine, and most on point for this argument, are *Roberts v. United States Jaycees* and *Boy Scouts v. Dale*. Below, I discuss both cases in depth to illuminate the doctrine and subsequently highlight some changes and ambiguities in the doctrine after *Dale*.

### A. *The Jaycees’ Contribution to Expressive Association Doctrine*

The first case decided by the Supreme Court that laid the foundation of expressive association doctrine was *Roberts v. United States Jaycees*.<sup>40</sup> The Jaycees are a nonprofit membership organization, formed for the purpose of:

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expressive association can successfully guard against sex discrimination claims. There is not a Supreme Court case explicitly denying expressive association’s application against a racial discrimination claim; however, there are a series of cases that make the argument likely unsuccessful. See *Runyon v. McCary*, 427 U.S. 160, 175–76 (1976) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (recognizing an associational right to engage in organizations ““for the advancement of beliefs and ideas”” that gives rise to the “right to send . . . children to educational institutions that promote the belief that racial segregation is desirable”; however, “the practice of excluding racial minorities from such institutions is [not] protected by the same principle”)); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2207 (2023) (holding affirmative action in college admissions—the practice of considering and perhaps preferring students of racial minority backgrounds—unconstitutional).

37. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

38. *Id.* at 622.

39. *Id.*

40. See Hans Allhoff, *Membership and Messages: The (Il)logic of Expressive Association Doctrine*, 15 U. PA. J. CONST. L. 1455, 1467 (2013) (claiming that most agree that expressive association doctrine was first articulated in *Roberts v. U.S. Jaycees*).

[P]romot[ing] and foster[ing] the growth and development of young men's civic organization in the United States . . . and . . . to provide [young men] with the opportunity for personal development and achievement and an avenue for intelligent participation . . . in the affairs of their community, state[,] and nation, and to develop true friendship and understanding among young men of all nations.<sup>41</sup>

The Jaycees had several tiers of membership, with regular membership being “limited to young men between the ages of 18 and 35,” and associate membership being available “to individuals or groups ineligible for regular membership, principally women and older men.”<sup>42</sup> Associate members could not vote, hold office in the organization, participate in leadership training, or receive awards.<sup>43</sup>

Two chapters of the Jaycees, both in Minnesota, began admitting women as regular members in defiance of the national organization's bylaws.<sup>44</sup> In response, the national organization imposed a series of sanctions on these chapters, even threatening to revoke their charters.<sup>45</sup> The two local chapters filed discrimination charges with Minnesota's Department of Human Rights, claiming the exclusion of women from full membership—as was required by the national organization's bylaws and forced onto the chapters through sanctions—violated Minnesota's public accommodations law.<sup>46</sup> Minnesota's public accommodation law echoes Title II of the Civil Rights Act, which prohibits discrimination in places of public accommodation,<sup>47</sup> however, Minnesota adds a prohibition against sex discrimination.<sup>48</sup>

The Minnesota Supreme Court determined the Jaycees were a public accommodation that had committed illegal discrimination through excluding women from regular membership.<sup>49</sup> The Eighth Circuit, after the Jaycees filed a complaint in the District Court and subsequently appealed the verdict, found that the Jaycees were an expressive organization that had a First Amendment right to select its membership—even if that meant denying women regular membership.<sup>50</sup> As such, the Eighth Circuit held Minnesota's public accommodations statute inapplicable to the Jaycees since “the State's

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41. *U.S. Jaycees*, 468 U.S. at 612–13 (quoting Brief of Appellee at 2, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237, at \*5).

42. *Id.* at 613.

43. *Id.*

44. *Id.* at 614.

45. *Id.*

46. *Id.*

47. 42 U.S.C. § 2000a.

48. *U.S. Jaycees*, 468 U.S. at 615 (citing MINN. STAT. § 363A.11 subd.3(1) (2024)).

49. *Id.* at 616.

50. *Id.* at 616–17.

interest in eradicating discrimination [was] not sufficiently compelling to outweigh this interference with the Jaycees' constitutional rights."<sup>51</sup>

In reviewing the Eighth Circuit's decision, the Supreme Court first distinguished between two types of protected associational rights: the right to "enter into and maintain certain intimate human relationships" and the "right to associate for the purpose of engaging in those activities protected by the First Amendment."<sup>52</sup> The intimate-relationship associational right primarily concerns family relationships—for instance, the decision of whom to marry—and can be characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."<sup>53</sup> The Court found the Jaycees to be "neither small nor selective" and therefore disqualified from the intimate-relationship associational right.<sup>54</sup>

However, the Court determined the Jaycees' conduct did implicate the First Amendment by taking public political stances as an organization, lobbying, promoting civic engagement, and fundraising.<sup>55</sup> The expressive associational right can be impinged by the government in a variety of ways: The government may "seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, . . . attempt to require disclosure of the fact of membership in a group seeking anonymity," or "try to interfere with the internal organization or affairs of the group."<sup>56</sup> Minnesota's public accommodation law, by requiring the Jaycees to admit women as full members, infringed on the Jaycees' associational rights by "interfer[ing] with the internal organization . . . of the group."<sup>57</sup>

Infringement of expressive association may be permitted, however, if the law that interferes with the right passes strict scrutiny.<sup>58</sup> That is, if the regulation is "adopted to serve compelling state interests, unrelated to the suppression of ideas, [and] cannot be achieved through means significantly less restrictive of associational freedoms," then the regulation may stand despite its transgression on expressive association.<sup>59</sup> In effect, infringement on an expressive association is presumed unconstitutional unless the offending law survives strict scrutiny.

This is a deviation from traditional free speech precedent. Under free speech doctrine, laws can infringe on speech and not be subject to strict

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51. *Id.* at 617.

52. *Id.* at 617–18.

53. *Id.* at 619–20.

54. *Id.* at 621.

55. *Id.* at 622, 626–27.

56. *Id.* at 622–23.

57. *Id.* at 623.

58. *Id.*

59. *Id.*

scrutiny;<sup>60</sup> however, when a law creates a content-based distinction, meaning the law “target[s] speech based on its communicative content,” *then* the law must undergo strict scrutiny.<sup>61</sup> Despite expressive association and free speech protections being rooted in similar concerns, the Court seems to hold laws that interfere with expressive associations to a higher standard: *All* must survive strict scrutiny, regardless of the *degree* to which they target speech or expressive associations.

Applying strict scrutiny to Minnesota’s public accommodations law, the Court determined it was not aimed at the suppression of speech but rather at ending discrimination against women.<sup>62</sup> Ending discrimination against women, the court explained, is a “compelling state interest[] of the highest order.”<sup>63</sup> Requiring the Jaycees to admit women as full members of their organization was the least restrictive means to achieve the goal of “[a]ssuring women equal access to . . . goods, privileges, and advantages.”<sup>64</sup> In fact, requiring the admission of women as full members was unlikely to “impede the [Jaycees’] ability to engage in . . . protected activit[y] or to disseminate its preferred views.”<sup>65</sup> The inclusion of women did not prevent the Jaycees from advancing the interests of young men or excluding those with differing ideologies from its membership.<sup>66</sup> Consequently, the Court held that the Minnesota public accommodations law survived strict scrutiny and justified any infringement on the Jaycees’ expression.<sup>67</sup>

#### B. *The Boy Scouts’ Contribution to Expressive Association Doctrine*

The Supreme Court also significantly added to the expressive association doctrine in *Boy Scouts of America v. Dale*. James Dale participated in the Boy Scouts as a child, became an Eagle Scout, and held adult membership as an assistant scoutmaster leading a troop.<sup>68</sup> Contemporaneously, Dale came out as gay and began to lead the Lesbian/Gay Alliance at his university.<sup>69</sup> Dale was interviewed by a newspaper while attending an event focused on the mental health needs of

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60. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569–74 (1968) (introducing a balancing test to weigh the efficient administration of government against an individual’s constitutional rights for free speech claims where the government is the employer, rather than employing strict scrutiny); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509–11 (1969) (recognizing students’ free speech rights in school, though declining to apply strict scrutiny).

61. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

62. *U.S. Jaycees*, 468 U.S. at 623–24.

63. *Id.* at 624.

64. *Id.* at 626.

65. *Id.* at 627.

66. *Id.*

67. *Id.* at 623.

68. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

69. *Id.* at 644–45.

gay and lesbian teenagers.<sup>70</sup> When the interview was published, it included a picture of Dale and identified him as the co-president of the Lesbian/Gay Alliance.<sup>71</sup> Later that same month, the Boy Scouts revoked Dale's membership.<sup>72</sup> When Dale inquired as to why his membership had been revoked, he was notified that the Boy Scouts "specifically forbid membership to homosexuals."<sup>73</sup>

Dale initiated litigation, alleging the Boy Scouts had violated New Jersey's public accommodations law, which prohibits discrimination on the basis of sexual orientation, by revoking his membership.<sup>74</sup> The New Jersey Supreme Court determined that public accommodations law did apply to the Boy Scouts and expressive association rights did not require an exemption for the Boy Scouts, therefore holding that the Boy Scouts had clearly violated the law by revoking Dale's membership due to his sexual orientation.<sup>75</sup>

In assessing whether the Boy Scouts had an expressive association right that shielded them from complying with New Jersey's public accommodations law, the United States Supreme Court identified three elements required for expressive association claims to be successful against antidiscrimination law: (1) the group must be an expressive association; (2) the law must "significantly burden" the group's ability to express its message; and (3) the government cannot satisfy constitutional scrutiny in justifying the burden imposed on the group's expression.<sup>76</sup>

The Court proceeded to apply this test to the facts. First, they considered whether the Boy Scouts is an expressive organization.<sup>77</sup> In its analysis, the Court considered the Boy Scouts' mission statement, the Scout Oath, and Scout Law.<sup>78</sup> The Court concluded that the organization is expressive, as its purpose is "[t]o instill values in young people" through mentorship from scoutmasters and by teaching skills like "camping, archery, and fishing."<sup>79</sup> Since these activities are, at least in part, for the "develop[ment of] good morals, reverence, patriotism, and a desire for self-improvement"—in other words, instilling values—they advance the Boy Scouts' expression.<sup>80</sup>

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70. *Id.* at 645.

71. *Id.*

72. *Id.*

73. *Id.* (quoting Letter from James W. Kay, Council Executive to Boy Scouts of America, to James R. Dale (Aug. 10, 1990), reprinted in Appendix at 137, *Dale* (No. 99-699)).

74. *Id.*

75. *Id.* at 646–47.

76. *Id.* at 648, 650, 653, 656.

77. *Id.* at 648.

78. *Id.* at 649.

79. *Id.* (quoting Boy Scouts of America Mission Statement, reprinted in Appendix at 184, *Dale* (No. 99-699)).

80. *Id.* at 650 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring)).

The fact that the Boy Scouts “do not associate for the purpose of disseminating the belief that homosexuality is immoral” did not discount the group’s qualification as an expressive association for the purpose of excluding LGBTQ+ persons.<sup>81</sup> An association is not required to “associate for the purpose of disseminating a certain message in order to be entitled to the protections of the First Amendment.”<sup>82</sup> That is, the expressive activity an association engages in that entitles it to First Amendment protection does not have to concern the same belief that is now allegedly burdened by the government.<sup>83</sup> In fact, the organization is not even required to publicly express its views or have unanimous approval from its members on a view it espouses in order to be granted First Amendment protections.<sup>84</sup> Accordingly, the Court considered the Boy Scouts an expressive association.<sup>85</sup>

Second, the Court analyzed whether the forced inclusion of Dale “significantly affect[ed] the Boy Scouts’ ability to advocate public or private viewpoints.”<sup>86</sup> As part of this element, the Court considered the sincerity of the Boy Scouts’ asserted beliefs on homosexuality<sup>87</sup>—if the belief is not sincere then the law cannot significantly burden the organization’s expression of it.<sup>88</sup> The Court cautioned, although, that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent”;<sup>89</sup> thus courts must give deference to an organization’s “assertions regarding the nature of its expression.”<sup>90</sup> As such, courts may not reject the sincerity of the Boy Scouts’ belief that homosexuality is at odds with the values it seeks to instill just because the court may perceive that to be inconsistent with another belief the

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81. *Id.* at 654 (quoting *Dale v. Boy Scouts of Am.*, 160 N.J. 562, 612 (1999)).

82. *Id.* at 655 (internal quotations omitted).

83. *See id.* The Court held that the Boy Scouts did not have to specifically proclaim its anti-LGTBQ+ views, stating that:

An association must merely engage in expressive activity that could be impaired in order to be protect[ed] . . . . [T]he purpose of the . . . parade in *Hurley* was not to espouse views about sexual orientation, but we held that the organizers had a right to exclude [a gay rights group].”

*Id.*

84. *Id.* at 655–56.

85. *Id.* at 656.

86. *Id.* at 650.

87. *Id.* at 650–53.

88. While not explicit in the expressive association cases, this sentiment is apparent in the Court’s logic in *Dale* and flows from First Amendment principles. *See Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833 (1989) (discussing Free Exercise protection being triggered when a plaintiff holds a sincere belief).

89. *Id.* at 651.

90. *Id.* at 653.

organization holds—in this case, the Boy Scouts’ commitment to a diverse membership.<sup>91</sup>

Following suit, the Court accepted the Boy Scouts’ belief that homosexuality is at odds with the values “embodied in the Scout Oath and Law, particularly with the values represented by the terms ‘morally straight’ and ‘clean,’” as sincere.<sup>92</sup> In support of this sincerity the Court pointed to three statements made by the Boy Scouts: the first only made internally and over a decade before Dale came out as gay, the second made publicly and after Dale’s membership was revoked, and the third also made publicly and after litigation had commenced.<sup>93</sup> The statements asserted that homosexuality is inconsistent with the Boy Scouts’ values and that scoutmasters may not be homosexual.<sup>94</sup>

Only after establishing that the Boy Scouts’ belief against homosexuality was sincere did the Court begin to evaluate if Dale’s “presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”<sup>95</sup> The Court noted that deference is owed to “an association’s view of what would impair its expression”; however, an association cannot “erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”<sup>96</sup> However, the forced acceptance of an unwanted person “infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”<sup>97</sup>

The Court concluded that the acceptance of Dale would actually impair the Boy Scouts’ message because Dale was a leader within the Scouts who was trusted by the organization to instill values into young boys, and Dale’s values were contradictory to those the Boy Scouts wished to express.<sup>98</sup> Further, Dale was openly gay and outspoken about his support of gay rights, so his “presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>99</sup>

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91. *Id.* at 650–51.

92. *Id.* at 650–51.

93. *Id.* at 644–45, 651–52.

94. *Id.* at 651–52.

95. *Id.* at 653 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 432367, at \*5).

96. *Id.*

97. *Id.* at 648.

98. *Id.* at 653.

99. *Id.*

Third, the Court considered whether the interest backing New Jersey's public accommodations law justified its interference with the Boy Scouts' expressive association.<sup>100</sup> The Court did not go through the standard strict scrutiny analysis of determining if there is a compelling state interest achieved by the least restrictive means, like it did in *Jaycees*.<sup>101</sup> Rather, the *Dale* Court seems to merge strict scrutiny with a balancing test.<sup>102</sup> The Court first considered compelling state interests driving New Jersey's law, just as one would do under strict scrutiny.<sup>103</sup> The Court acknowledged that there is a compelling state interest in quelling discrimination against women in places of public accommodation, citing *Jaycees*; although, the Court remained silent concerning whether eliminating discrimination on the basis of sexual orientation is a compelling state interest.<sup>104</sup>

However, rather than applying strict scrutiny and turning to the question of whether the law is narrowly tailored, the Court set "the associational interest in freedom of expression . . . on one side of the scale, and the State's interest on the other."<sup>105</sup> The Court, though, did not assess the weight of the interests. The Court merely restated that the New Jersey law substantially burdened the Boy Scouts' ability to express its message and concluded that the state's interest in ending discrimination based on sexual orientation did not justify "such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>106</sup>

It is important to note that this balancing test, while seemingly a lower standard than the strict scrutiny utilized in *Jaycees*, is not intermediate scrutiny. The Court rejected the applicability of intermediate scrutiny—employed in *United States v. O'Brien*<sup>107</sup> for expressive conduct suffering incidental effects by the law—finding that New Jersey's public accommodations law "directly and immediately affects associational rights."<sup>108</sup>

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100. *Id.* at 656–59.

101. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

102. *See id.* at 658–59 (balancing New Jersey's governmental interest against the intrusion on the First Amendment right of expressive association).

103. *Id.* at 656–57.

104. *Id.* at 657–58 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)). The Court has since recognized a compelling interest in ending discrimination against LGBTQ+ individuals. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727–28 (2018) (acknowledging that denial of service to all same-sex couples stigmatizes gay individuals and likely violates the Fourteenth Amendment); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2314 (2023) (noting how many states have recognized eliminating discrimination based on sexual orientation as a compelling interest).

105. *Dale*, 530 U.S. at 658–59.

106. *Id.* at 659.

107. 391 U.S. 367 (1968).

108. *Dale*, 530 U.S. at 659 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)).

C. *Expressive Association After Dale*

Since *Dale*, the parameters of expressive association doctrine remain ambiguous in several ways. Perhaps most importantly, parties have begun to advance expressive association claims against antidiscrimination employment law, a departure from the traditional application of expressive association.<sup>109</sup> The doctrine also remains vague as to the degree of deference courts grant to associations' claims of a substantial burden imposed by the law and as to the different tests courts employ in conducting the meat of the expressive association analysis—a mix between standard strict scrutiny and the *Dale* balancing test.

First, courts have begun to inch away from applying expressive association only to non-profit membership organizations. In *Dale* and *Jaycees*, expressive association was a right attributable to expressive, non-profit, membership organizations.<sup>110</sup> Justice O'Connor, in her *Jaycees* concurrence, drew distinctions between groups who garnered expressive association claims and commercial for-profit organizations: Where a membership group with expressive association rights may have the ability to select its members in spite of antidiscrimination law, commercial for-profit groups do not have similar rights to select employees without interference from the State.<sup>111</sup>

In fact, in the same year as *Jaycees*, the Court refused to recognize an association right that superseded the employment protections of Title VII in *Hishon v. King & Spalding*.<sup>112</sup> Plaintiff in that case, Elizabeth Hishon, worked as an associate at the law firm King & Spalding.<sup>113</sup> Hishon sought partnership at the firm, was turned down twice, and as a result, her employment was terminated.<sup>114</sup> Hishon accordingly filed a sex-discrimination suit under Title VII.<sup>115</sup> The firm attempted to claim that Title VII, in meddling with who they select for partnership, “infringe[d] constitutional rights of expression or association.”<sup>116</sup> However, the Court assured that Title VII does not infringe on constitutional rights of expression

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109. See Sepper, *supra* note 10, at 815–21 (surveying recent cases advancing expressive association claims in the employment context).

110. *Dale*, 530 U.S. at 649 (finding the Boy Scouts to be a non-profit organization that aims to “instill values in young people”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612, 622, 638 (1984) (finding the Jaycees to also be a non-profit group with expressive association rights based on their goal to increase civic engagement among its members).

111. See *U.S. Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring) (“The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.”).

112. 467 U.S. 69, 78 (1984).

113. *Id.* at 71.

114. *Id.* at 72.

115. *Id.*

116. *Id.* at 78.

or association because there is no constitutional right to engage in invidious discrimination.<sup>117</sup>

The Court in recent years has begun to dissolve the barrier constructed between commercial and non-commercial associations.<sup>118</sup> In the religious liberty space, the Court has “determined that a for-profit corporation could exercise religion under the Religious Freedom Restoration Act”<sup>119</sup> and “extended the right to free exercise under the Constitution to a for-profit retail business.”<sup>120</sup> Similarly, in the compelled-speech space, the Court determined that a public accommodations law requiring a “for-profit website designer . . . to create a wedding website for a same-sex couple would compel her to speak a message in favor of same-sex marriage,” thus violating the First Amendment.<sup>121</sup> The majority in that case cited *Dale* and rejected the claim that “constitutional precedent endorsed limits on First Amendment protection for commercial or for-profit entities.”<sup>122</sup>

This declaration is likely to embolden commercial and for-profit entities to bring expressive association claims against both public accommodations and employment antidiscrimination law. In fact, employers have already begun to use expressive association against antidiscrimination laws to avoid hiring LGBTQ+ persons—this development inspires the focus of this Note on the ABA’s right to give preference to LGBTQ+ people in its clerkship and fellowship programs.<sup>123</sup> Courts, accordingly, will have to confront the ambiguity of how expressive association interacts with employment law, like Title VII—a problem this Note also addresses.

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117. *Id.* (“[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.” (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))).

118. *See* *Sepper*, *supra* note 10, at 827 (“[T]he Supreme Court has largely erased the lines between public and private, secular and religious, and non-profit and for-profit.”).

119. *Id.* (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690 (2014)).

120. *Id.* (citing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018)).

121. *Id.* at 830 (citing *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023)).

122. *Id.* (citing *303 Creative*, 143 S. Ct. at 2320).

123. *See* *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 615–16 (N.D. Tex. 2021) (granting an expressive association claim against Title VII to a for-profit company that refused to hire LGBTQ+ people), *rev’d sub nom.*, *aff’d in part, rev’d in part, vacated in part by*, *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 940–41 (5th Cir. 2023) (exercising constitutional avoidance by vacating the constitutional exemptions to Title VII not on the merits—including expressive association—in favor of a purely statutory resolution; however, placing no restrictions on the “matters that the district court may address on remand”); *see also* *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1171, 1184–85 (D. Colo. 2023) (finding a likelihood of success on the merits for an expressive association claim against an antidiscrimination condition of a voluntary universal preschool program to a for-profit Christian school who refused to hire those who did not adhere to “lifestyle requirements, including abstinence from sexual activity outside of the context of a marriage between a man and woman”).

Second, courts have taken disparate approaches with respect to the substantial burden prong of an expressive association claim. Some courts conduct an analysis similar to *Dale* by analyzing the effect the forced inclusion or exclusion will have on an association's expression. For example, in *Our Lady's Inn v. City of St. Louis*<sup>124</sup>—in which an expressive association claim was successful in the employment context against a law barring discrimination based on reproductive health decisions—the court determined that requiring Catholic crisis pregnancy centers to hire employees who are pro-choice “would significantly affect the ability of [the pregnancy center] to advocate for its services and encourage women to forgo abortion.”<sup>125</sup>

Other courts, however, have abandoned this analysis and determined a substantial burden exists solely based on the association's assertion that such a burden exists. For instance, in *Darren Patterson Christian Academy v. Roy*,<sup>126</sup> the court agreed that an antidiscrimination law likely violated a school's expressive association rights, and therefore substantially burdened their expression, by requiring the school to hire individuals who may not share the same religious beliefs or act in accordance with certain “lifestyle requirements, including abstinence from sexual activity outside of the context of a marriage between a man and woman.”<sup>127</sup> The court did not, however, consider whether it would be a substantial burden on the school's expression if the religion, sexuality, or lifestyle of an employee was kept private, if the employee was not in a leadership position, if the employee was teaching a class where his religion, sexuality, or lifestyle was not invoked, or if the employee was not a teacher but another staff member, like a janitor.<sup>128</sup>

Lastly, after the *Dale* Court conducted a balancing test, it was unclear whether courts should use *Dale*'s balancing test or use strict scrutiny like the *Jaycees* Court. The Court has somewhat remedied the ambiguity, however, by applying strict scrutiny in an expressive association claim against public accommodation law nearly a decade after *Dale*.<sup>129</sup> But the Court did not overturn or otherwise state that *Dale*'s balancing test was not good law, and

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124. 349 F. Supp. 3d 805 (E.D. Mo. 2018).

125. *Id.* at 821.

126. 699 F. Supp. 3d 1163 (D. Colo. 2023).

127. *Id.* at 1171, 1184–87.

128. Compare *id.* at 1184–85, with *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45, 653 (2000) (looking to the leadership position of Dale, the publicized nature of his sexuality, and his beliefs regarding gay rights infiltrating the inculcation of values the Boy Scouts aim to impart).

129. See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez*, 561 U.S. 661, 680 (2010) (“In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve ‘compelling state interests’ that are ‘unrelated to the suppression of ideas’—interests that cannot be advanced ‘through . . . significantly less restrictive [means].’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

so two options remain open to courts: strict scrutiny and *Dale*'s balancing test.

### III. Expressive Association in the ABA's Case

As the ABA faces a possible EEOC investigation into discriminatory employment referral and training practices under Title VII for its clerkship and fellowship programs, an expressive association defense may be its strongest argument. If the EEOC acts on the complaint, the ABA will be investigated for whether its clerkship and fellowship programs reserved solely for those underrepresented in the legal field violate Title VII.<sup>130</sup> The programs at issue for law students include the Judicial Intern Opportunity Program (JIOP) and the Diversity Clerkship Program (DCP).<sup>131</sup> Both offer judicial internships to students of underrepresented backgrounds—people of color, women, LGBTQ+ people, those with disabilities, economically disadvantaged students, and veterans.<sup>132</sup>

For lawyers, the programs at issue are the Business Law Fellowship (BLF), the Diversity Fellowship Program (DF), the Diversity and Inclusion Fellowship Program (DIFP), and the Loretta Collins Argrett Fellowship (LCAF).<sup>133</sup> Each fellowship lies in a different division of the ABA and grants membership to that division plus benefits, like mentorship and a leadership pathway.<sup>134</sup> Each fellowship program is reserved mainly for underrepresented groups in the legal field.<sup>135</sup> While these fellowships are not employment, they could fall under Title VII's ambit if they are considered training programs.<sup>136</sup>

Intersectionality must be discussed when considering these programs. Because most of the programs are open to multiple underrepresented groups, they do not simply discriminate along a singular line of race, gender, sexual orientation, etc. One can be a white man—not a historically underrepresented group in the legal field—and still be eligible for many of these programs

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130. Letter from Am. C.R. Project to EEOC, *supra* note 5, at 1–2. As of August 3, 2025, the EEOC has not taken action on the complaint.

131. *Id.* at 4.

132. *Judicial Intern Opportunity Program (JIOP)*, *supra* note 29; *Diversity Clerkship Program*, *supra* note 29.

133. Letter from Am. C.R. Project to EEOC, *supra* note 5, at 4.

134. *See, e.g., Business Law Fellows*, *supra* note 30 (detailing membership, leadership experience, mentorship, and meeting reimbursement as benefits of the program).

135. *Id.*; *Diversity Fellowship Program*, A.B.A., <https://www.americanbar.org/groups/gpsolo/about/awards-initiatives/diversity-fellowship/> [https://perma.cc/RKP5-5UG6]; *Diversity and Inclusion Fellowship Program*, A.B.A., [https://www.americanbar.org/groups/criminal\\_justice/about/initiatives/fellowship/](https://www.americanbar.org/groups/criminal_justice/about/initiatives/fellowship/) [https://perma.cc/RK9W-5ZD9]; *The Loretta Collins Argrett Fellowship*, A.B.A., <https://www.americanbar.org/groups/taxation/about/awards-initiatives/loretta-argrett-fellowship/> [https://perma.cc/2A5J-EVUB].

136. *See supra* text accompanying notes 32–35.

based on sexuality, disability, veteran status, or even economic disadvantage. Accordingly, there is only one group that these programs all exclude: straight, cis, white men who are not economically disadvantaged, not disabled, and have no prior military service.

In pursuing legal action against the ABA—a case that would be similar to a current EEOC investigation against big law firms<sup>137</sup>—the EEOC would need to interpret Title VII such that excluding straight, cis, white men from eligibility violates Title VII. The ABA’s best defense is claiming an expressive associational right. Although *Dale* involved a right to *exclude* LGBTQ+ people from organizations, the inverse of this claim—the right to *include* LGBTQ+ people—is made ripe by the law that allows exclusion. This Note’s argument focuses on the ABA’s expressive association claim to include LGBTQ+ people in the ABA’s programs.

Even though the ABA’s expressive association claim would be advanced against Title VII—which may invoke hesitation due to Title VII’s close connection to commercial relationships that are antithetical to traditional expressive association claims—the ABA would nonetheless have a strong claim. The ABA is uniquely positioned to advance an expressive association claim against Title VII because it is an organization that would traditionally receive protection: a non-profit, membership organization. The ABA also engages in expressive activity as an organization and through its membership, thus it is an expressive association. Title VII substantially burdens the ABA’s expression because it robs the diversity positions of their intended meaning, thereby preventing the ABA from expressing a message in its desired way. Lastly, the claim can survive both *Dale*’s balancing test and strict scrutiny. The interest in ending sexual orientation discrimination is outweighed by the significant burden on the ABA’s expression—as in *Dale*—and Title VII’s application in this instance is overinclusive.

#### A. *The ABA Is an Expressive Association*

Establishing that the ABA qualifies as an expressive organization is the easiest element to meet. Even though the ABA would be utilizing expressive association against employment law—a somewhat novel application of the doctrine—the ABA meets the traditional requirements of an expressive organization.

Like the Jaycees and the Boy Scouts, the ABA is a non-profit, membership organization.<sup>138</sup> The ABA publicly conveys its views on the legal system and mission. The ABA’s mission is “[t]o serve equally [its]

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137. See U.S. Equal Emp. Opportunity Comm’n, *supra* note 2 (describing the EEOC’s requests for hiring information from major Big Law firms).

138. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

members, [the legal] profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”<sup>139</sup> The ABA effectuates their mission through four goals, including the goal of “Eliminate[ing] Bias and Enhance[ing] Diversity.”<sup>140</sup> Specifically, the ABA seeks to “[p]romote full and equal participation in the association, [the legal] profession, and the justice system by all persons[]” and to “[e]liminate bias in the legal profession and the justice system.”<sup>141</sup>

Not only does the ABA publicly express its beliefs on diversity, but it also uses its clerkship and fellowship positions, which would be at issue in a case against the ABA, as an extension of and means of achieving its values. By reserving clerkship and fellowship positions to those underrepresented in the legal field, the ABA expresses its belief on the importance of taking affirmative steps to promote equal participation in the legal profession. Applicants and recipients of the ABA’s clerkship and fellowship positions, which are advertised as part of an effort to enhance diversity,<sup>142</sup> are presumably also expressing their support for the group’s diversity values by participating in the program and achieving more diversity in the ABA. The association between the ABA and its clerkship and fellowship recipients is not just simply a vocational one but also an expressive one. Thereby, it is deserving of expressive association protection.

Finding a bar association to be an expressive association is not novel. Recently, the Appellate Court of New Jersey recognized the New Jersey Bar Association as an expressive association, particularly because of their expression related to diversity.<sup>143</sup> The New Jersey Bar Association publicly expressed their views on the importance of diversity in the legal field and subsequently reserved seats on their Board of Trustees for underrepresented groups.<sup>144</sup> At the time of the suit, the bar association reserved “one seat each for members who are Hispanic[], Asian/Pacific American, Black/African American, members of the LGBTQ+ community, or women; and three non-designated seats open to” the aforementioned minority groups and “senior lawyers over seventy, . . . attorneys with disabilities, or attorneys who are

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139. *ABA Mission and Goals*, A.B.A., [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [<https://perma.cc/66LB-S92X>].

140. *Id.*

141. *Id.*

142. *See, e.g., Judicial Intern Opportunity Program (JIOP)*, *supra* note 29 (“The Judicial Intern Opportunity Program provides opportunities to students who are members of groups that are traditionally underrepresented in the profession, including students from minority racial and ethnic groups, students with disabilities, veterans, students who are economically disadvantaged, students who identify as LGBTQ+, women, and others.”).

143. *Saadeh v. N.J. State Bar Ass’n*, No. A-2201-22, 2024 WL 5182533, at \*9–10 (N.J. Super. Ct. App. Div. Dec. 20, 2024).

144. *Id.* at \*2.

members of a diversity bar association recognized by the Association.”<sup>145</sup> The court found that the choice of reserving positions for diverse members is itself an expression of the association’s beliefs on the importance of diversity.<sup>146</sup> So too in the case of the ABA should a court find the act of reserving positions for diverse members an act of expression. Since the ABA engages in expressive conduct, it should easily be deemed an expressive association.

*B. Title VII Substantially Burdens the ABA’s Expression*

Following *Dale*, a court may first consider the sincerity of the expression that an association claims is burdened by the law.<sup>147</sup> The ABA’s expression about the integral role diversity plays in the legal field is indisputable and consistent.<sup>148</sup> A court should, therefore, find the ABA’s belief regarding diversity sincere.<sup>149</sup>

After considering sincerity, a court would then evaluate whether Title VII’s effect on the ABA’s programs—e.g., forcing the programs to open up to applicants who are not underrepresented in the legal field—significantly burdens the ABA’s expression that diversity in the legal field is of the utmost importance.<sup>150</sup> In both *Jaycees* and *Dale*, the Court emphasized that the forced inclusion of an unwanted person “infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”<sup>151</sup>

Here, Title VII would require the inclusion of unwanted people by the ABA in their programs—candidates who are not underrepresented. The ABA’s diverse clerkship and fellowship programs are an extension of its expression. The forced inclusion of a non-underrepresented person rids the positions of their meaning, thereby directly and substantially affecting the ABA’s ability to advocate its viewpoint on diversity.

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145. *Id.* at \*3.

146. *Id.* at \*9.

147. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650–53 (2000).

148. *See supra* subpart III(A).

149. *See Dale*, 530 U.S. at 651–53 (quoting Brief for Petitioners at 39, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228616, at \*39) (deeming the Boy Scouts beliefs that homosexuality is “not morally straight” and its wish to not promote homosexuality is sincere based on an internal statement made over a decade before *Dale* came out as gay, a public statement made after *Dale*’s membership was revoked, and a third statement also made publicly and after litigation had commenced).

150. *See id.* at 653 (considering whether the public accommodations law prohibiting *Dale*’s dismissal as a scoutmaster on account of his sexual orientation burdened the Boy Scouts’ wish to not promote homosexual conduct).

151. *Id.* at 648; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”).

The ABA has a First Amendment right to both its message and to its “method of expression.”<sup>152</sup> Its clerkship and fellowship programs are its chosen method of expression. The fact that there may be alternative methods of expression would not undermine the burden imposed on the ABA.<sup>153</sup> Enforcement of Title VII in this way would prohibit the ABA from expressing its message the way it prefers and force them “to send the undesired message that it no longer cares, or cares as much, about diversity.”<sup>154</sup> The Court has already made itself clear that “the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.”<sup>155</sup> Here, Title VII would breach that veil.

Further, the ABA’s fellowship programs contribute to the composition of the organization. At least three of the four fellowship programs offer fellows pathways to leadership positions in the section sponsoring the program.<sup>156</sup> So, the ABA uses the fellowship programs as a way to sponsor diversity in leadership positions within the association. Applying Title VII to the fellowship programs would, in effect, require the ABA to change the composition of its leadership. And the “intrusion into the internal structure or affairs of an association” can constitute a substantial burden to the right of expressive association.<sup>157</sup> The effect of Title VII here is exactly that: an intrusion into the ABA’s internal structure. Just as prohibiting the New Jersey Bar Association from reserving positions on its board for those who are underrepresented in the legal field is also an unconstitutional intrusion.<sup>158</sup>

*Jaycees* is the largest hurdle for the ABA. However, the exclusion of straight, cis men from consideration for clerkship and fellowship programs is not like the exclusion of women as full voting members in the Jaycees. The Jaycees did not permit women to have the same membership type as men, essentially granting women a second-class membership.<sup>159</sup> The Jaycees justified this dichotomy by reference to its mission to develop “young *men*’s

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152. See *Dale*, 530 U.S. at 655 (finding that the Boy Scouts had a First Amendment right to select its method of expressing its mission and aims).

153. See *U.S. Jaycees*, 468 U.S. at 623 (holding that a right to associate, though absolute, requires a freedom not to associate and does not mandate that the exhaustion of alternative methods when an organization has chosen to enforce their expressive message in this way); *Dale*, 530 U.S. at 648 (finding that the freedom of expressive association and the ability to advocate for that expression overrode any governmental right of forced inclusion).

154. *Saadeh v. N.J. State Bar Ass’n*, No. A-2201-22, 2024 WL 5182533, at \*10 (N.J. Super. Ct. App. Div. Dec. 20, 2024).

155. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 575 (1995).

156. *Business Law Fellows*, *supra* note 30; *Diversity and Inclusion Fellowship Program*, *supra* note 135; *The Loretta Collins Argrett Fellowship*, *supra* note 135.

157. *U.S. Jaycees*, 468 U.S. at 622–23.

158. *Saadeh*, 2024 WL 5182533, at \*13.

159. *U.S. Jaycees*, 468 U.S. at 613.

civic organizations.”<sup>160</sup> While the Jaycees did participate in expressive activities, there was “no basis in the record for concluding that admission of women as full voting members w[ould] impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”<sup>161</sup> In other words, the Jaycees could still develop “young men’s civic organization” with women as full members—one did not threaten the other. The Court did not recognize the assertion that the “admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote.”<sup>162</sup>

The ABA, however, does not distinguish between sex, race, sexual orientation, or other identities when accepting members. Leadership positions on the boards of ABA sections that host fellowships are not categorically cut off to straight, cis men—only one specific means in which to obtain the leadership position differs. Unlike the Jaycees, the ABA opening up diverse clerkships and fellowships to those who are overrepresented in the legal field—straight, cis, economically advantaged, non-veteran white men—does in fact “impede” its “ability to engage in . . . protected activities or to disseminate its preferred views” because it deprives the positions of their expressive content.<sup>163</sup>

The Jaycees’ full voting position was not created in order to convey the message of the importance of men’s civic engagement.<sup>164</sup> Rather, the organization was created to advance that message, and membership was offered to those who agreed to further that message.<sup>165</sup> So, the inclusion of women in membership, then, did not impede the expression of the importance of men’s civic engagement since subscription to that message is a prerequisite for membership.<sup>166</sup> In contrast, the ABA’s diversity clerkship and fellowship programs were created to advance the message that affirmative steps are needed to promote diversity in the legal field.<sup>167</sup> Opening up these positions to those who are overrepresented in the legal field deprives the positions of their intended meaning, directly impeding the

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160. *Id.* at 612, 627–28 (emphasis added) (quoting Brief of Appellee at 2, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), 1984 S. Ct. Briefs LEXIS 237, at \*5).

161. *Id.* at 627.

162. *Id.*

163. *Id.*

164. *See id.* at 627 (“[A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.”).

165. *Id.*

166. *Id.*

167. *See, e.g.,* *Judicial Intern Opportunity Program (JIOP)*, *supra* note 29; *Diversity Clerkship Program*, *supra* note 29; *Business Law Fellows*, *supra* note 30; *Diversity and Inclusion Fellowship Program*, *supra* note 135; *The Loretta Collins Argrett Fellowship*, *supra* note 135.

ABA's expression. The positions are no longer advancing diversity in the legal field when they are open to overrepresented populations.

While it is true that the ABA could continue to *claim* it is dedicated to increasing diversity in the legal field without providing any positions that work toward that aim, opening up these positions to non-underrepresented groups would nonetheless be a substantial burden on the ABA's expression. Indeed, it would substantially burden the ABA's expression by undermining their expression, dictating the method of expression the ABA is permitted to use, and compelling the ABA to "send the undesired message that it no longer cares, or cares as much, about diversity."<sup>168</sup>

C. *Title VII's Application to the ABA Fails Dale's Weighing Test and Does Not Survive Strict Scrutiny*

Keeping to the focus of this Note, the application of constitutional scrutiny will be conducted through the lens of sexual orientation discrimination in the ABA's clerkship and fellowship programs, which give preference to LGBTQ+ applicants.

Whether conducting a *Dale*-like balancing test or strict scrutiny, the analysis starts with identifying a compelling state interest that may justify the law—here, ending sexual orientation discrimination through Title VII. The EEOC will likely assert a compelling interest in ending sexual orientation discrimination.<sup>169</sup> In this instance, the sexual orientation discrimination would be perpetrated by the ABA against straight individuals. While the Court hasn't recognized a compelling interest to end discrimination against straight people,<sup>170</sup> the Court has appreciated the interest in ending discrimination against LGBTQ+ identifying people. That sentiment may be absent in *Dale*,<sup>171</sup> but the Court has included strong language in *Masterpiece Cakeshop*,<sup>172</sup> which was reaffirmed in *303 Creative*,<sup>173</sup> that legitimizes a compelling state interest to end discrimination against the LGBTQ+ community.

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168. *See Saadeh v. N.J. State Bar Ass'n*, No. A-2201-22, 2024 WL 5182533, at \*10 (N.J. Super. Ct. App. Div. Dec. 20, 2024) (finding the same with regard to the New Jersey Bar Association).

169. The statutory interpretation of *Bostock* holds up in this application, as, in theory, discrimination would not occur against a straight man with a female romantic partner if not for the man's sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that, under Title VII, an employer discriminates on the basis of sex "if changing the employee's sex would have yielded a different choice by the employer").

170. *But see Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 1540, 1544, 1548 (2025) (finding that Title VII protects majority groups from discrimination, including discrimination on the basis of sexual orientation, and that a higher prima facie burden is not required for majority groups).

171. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657–59 (2000).

172. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727–28 (2018).

173. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2305–06 (2023).

Further, recognized compelling interests in ending discrimination on the basis of sex and race have evolved to protect against both discrimination against marginalized groups and nonmarginalized groups.<sup>174</sup> Following that trend, the Court is likely to recognize ending sexual orientation discrimination against heterosexual people as a compelling interest after legitimizing the interest of ending LGBTQ+ discrimination.

Nonetheless, the ABA is likely to succeed under the *Dale* balancing test. The *Dale* Court weighed the interest of the state in ending sexual orientation discrimination against “the associational interest in freedom of expression.”<sup>175</sup> The Court relied almost exclusively on the fact that the anti-discrimination law substantially burdened the Boy Scouts’ expression.<sup>176</sup> If a court employs the *Dale* weighing test to the ABA’s case, there is no reason to believe the same result would not occur.

The ABA’s expression would be substantially burdened by the imposition of the law.<sup>177</sup> In fact, it would be more burdened than the Boy Scouts’ expression was in *Dale*. The ABA’s “commitment to the importance of diversity in the legal profession has been much more a fixture of its private and public expressions than the Boy Scouts’ former views on homosexuality were in its private and public messaging.”<sup>178</sup> As a result, Title VII’s application burdens the ABA’s expression more substantially than the public accommodations law did the Boy Scouts. If the substantial burden to the Boy Scouts’ expression was sufficient to override the state interest of ending sexual orientation discrimination, so too here would the burden on the ABA be sufficient to override the state interest of ending sexual orientation discrimination.

A court may choose to forgo *Dale*’s weighing test and turn to the more traditional strict scrutiny analysis when assessing the ABA’s claim. Legislation falling to strict scrutiny is a tale as old as time (or at least as old as strict scrutiny itself)—its review is “strict in theory, but fatal in fact.”<sup>179</sup> Importantly, though, it remains unclear whether strict scrutiny is applicable when expressive association is applied against employment law, like Title VII. Ten years after *Dale*, the Court in *Christian Legal Society v.*

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174. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (holding Title VII protects men as well as women from sexual harassment in the workplace, including same-sex harassment); *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161–62 (2023) (concluding that both majority and minority races are protected against discrimination—“[e]liminating racial discrimination means eliminating all of it”).

175. *Dale*, 530 U.S. at 658–59.

176. *Id.* at 659.

177. See *supra* subpart III(B).

178. See *Saadeh v. N.J. State Bar Ass’n*, No. A-2201-22, 2024 WL 5182533, at \*10 (N.J. Super. Ct. App. Div. Dec. 20, 2024) (discussing the New Jersey Bar Association’s commitment to diversity as opposed to the Boy Scouts’ expression).

179. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring).

*Martinez*<sup>180</sup> recounted the established law of expressive association. Specifically there, the Court may have cabined the application of strict scrutiny in expressive association to “the context of public accommodations.”<sup>181</sup>

Assuming that strict scrutiny is applicable to expressive association claims challenging employment law, and since we have already ascertained the compelling state interest, the next step is to determine whether Title VII is narrowly tailored. Title VII’s application to the ABA’s clerkship and fellowship programs is not narrowly tailored because it is not the least restrictive means of effectuating the compelling state interest of the statute.

A statute is narrowly tailored if its compelling state interest “cannot be achieved through . . . significantly less restrictive [means].”<sup>182</sup> The relevant compelling state interest of Title VII is to end sexual orientation discrimination in the workplace. With that in mind, it’s clear that the application of Title VII to the ABA’s clerkship and fellowship programs is not the least restrictive means available. A less restrictive alternative is readily apparent: applying Title VII to its traditional wheelhouse and not expanding it to apply to expressive relationships.

Title VII traditionally applies to commercial relationships, and the ABA’s clerkship and fellowship positions are held out to be expressive relationships.<sup>183</sup> Applying Title VII here would not be applying it in its ordinary manner. Further, while it’s true that an organization can be deemed an expressive association and simultaneously engage in traditional employment that is not an extension of the groups’ expression, and therefore regulated by Title VII,<sup>184</sup> that is not the case here. The ABA’s clerkship and fellowship programs are not employment and are deeply intertwined with the ABA’s expression. Applying Title VII to the ABA’s clerkship and fellowship programs would be bordering on the governmental regulation of expression and would have a constitutionally impermissible end.

Nevertheless, many courts in practice neither assess the weight of interests under the *Dale* balancing test nor analyze strict scrutiny completely. It is not uncommon for courts, following *Dale*’s example, to conclude that a law fails strict scrutiny based solely on the substantial burden suffered by the

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180. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661 (2010).

181. *Id.* at 680 (describing the application of strict scrutiny to “restrictions on [associational] freedom” to occur in “the context of public accommodations,” rather than always applying when associational freedom is impinged).

182. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

183. *See supra* subpart III(B).

184. *See McMahon v. World Vision, Inc.*, 704 F. Supp. 3d 1121, 1145 (W.D. Wash. 2023) (declining an expressive association claim against Title VII and emphasizing the distance between the organization’s expressive mission and the role of a customer service agent), *rev’d*, 147 F.4th 959 (9th Cir. 2025) (reversed on other grounds).

expressive association.<sup>185</sup> The ABA may be successful solely because their expression is substantially burdened. In any event, the ABA's arguments can surmount opposition—sketching in a constitutional defense to attacks on DEI measures.

#### IV. Addressing Concerns of Applying Expressive Association to Title VII

This approach to ward off anti-DEI measures is unlikely to prevail in all circumstances. The ABA has unique advantages in advancing an expressive association claim that Big Law firms and others under legal attack for diversity positions do not have because of its position as a non-profit, membership organization. Expressive association is not the messiah that can deliver *all* DEI measures to the promised land, but for some institutions like the ABA, it can be a saving grace.

Advocating for expressive association's use against Title VII, in any circumstance, is likely to result in vehement opposition. The primary concern of courts and critics of expressive association's application in the commercial context is twofold: (1) expressive relationships are different from commercial ones, and (2) treating commercial relationships as expressive gravely weakens Title VII.<sup>186</sup> Those concerns are valid.

To permit companies to pick and choose who they wish to employ free of discrimination law is dangerous, and an acceptance of a broad application of expressive association to employment could pave the way for this reality. In the logical extreme, it endorses a segregated society, the result of a snowball effect initiated by prejudice and shielded by expressive association, causing excluded groups to respond with mutual exclusion of their own until society becomes islands of identity.

This concern, however, is not provoked by this proposal. This Note does not advocate for a broad application of expressive association against Title VII. Rather, this Note has identified a sliver of space where expressive association could be used against a Title VII claim—a scenario where the

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185. See *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 615–16 (N.D. Tex. 2021) (describing strict scrutiny, including narrow tailoring, to be the appropriate test for expressive association, yet nevertheless failing to analyze whether Title VII is aimed towards a compelling state interest or whether it is narrowly tailored and instead focusing on the perceived burden on religious employers when employing gay individuals); *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821–22 (E.D. Mo. 2018) (focusing heavily on the burden to the pregnancy center of employing someone who is pro-abortion, while failing to consider both interests provided by the government for the ordinance at issue and merely stating speech related provisions—not associational related provisions—were not narrowly tailored without further explanation).

186. See Elizabeth Sepper, James D. Nelson & Charlotte Garden, *Expressive Association at Work*, 124 MICH. L. REV. (forthcoming 2026) (manuscript at 49–50, 59–63), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5176842](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5176842) [<https://perma.cc/7D89-5YKH>] (noting the legally relevant distinctions between expressive and commercial relationships and discussing the likely effects of such an elision between the two in ways that would materially undercut the purposes of Title VII).

association is a non-profit, membership organization and the positions at issue are not ones of employment. It is because of these special circumstances that a successful use of expressive association in the ABA's case does not greenlight its use in traditional areas of employment.

The doctrine of expressive association gatekeeps itself from the vast majority of employers. An employer must qualify themselves as expressive, which while this element may seem easily met for membership groups, is harder for employers to meet. After all, groups with expressive association protections “associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>187</sup> The association between employers and employees is one born out of profit—a paid quid pro quo—not the exercise of the First Amendment.

Title VII's interference with employment relationships does not raise the same concerns that necessitate expressive association protections. The rationale behind expressive association protections is intertwined with the protection of speech. The worry that minority views might be snuffed out by the majority through interference with associations and the protections the First Amendment guarantees are the foundation of the expressive association right.<sup>188</sup> Permitting expressive associations to choose their membership ensures the survival of their expression, and requiring associations to retain a member can threaten the desired expression.

The role of employers on the other hand, is not so intertwined with the First Amendment. The government's regulation of employment generally does not instigate the same concerns about stifling minority views or interfering with the expression of First Amendment rights because the association between employee and employer is typically not expressive. The government's prohibiting an employer from discriminating against an employee or prospective employee due to race, religion, sex, or sexual orientation does not chip away at the employer's First Amendment rights. Further, the Supreme Court has declined to find that Title VII burdens constitutional association rights of employers.<sup>189</sup> This holding is already acting as a barrier protecting Title VII from expressive association claims.<sup>190</sup>

While the destruction of Title VII at the hands of expressive association is unlikely, groups are already successfully using expressive association against anti-discrimination employment law at the state level. The organizations in these cases are arguably expressive because of their religious

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187. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

188. *Id.* at 622.

189. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

190. *McMahon v. World Vision, Inc.*, 704 F. Supp. 3d 1121, 1144 (W.D. Wash. 2023) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)), *rev'd*, 147 F.4th 959 (9th Cir. 2025) (reversed on other grounds).

beliefs and missions, though the positions at issue are traditional employment positions.<sup>191</sup> These groups are using expressive association to rid themselves of diverse viewpoints and people—LGBTQ+ people, people of different religions, and people with pro-choice beliefs or those who have had an abortion or who support abortion.<sup>192</sup> Fear of ill effects should not dissuade DEI proponents from utilizing expressive association because the doctrine will continue to be used to the detriment of diversity regardless of whether DEI proponents add it to their tool box of litigation strategies.<sup>193</sup>

### Conclusion

The ABA's position as a non-profit, membership organization sets it up for a unique advantage in defeating the EEOC's attempt to pry open the ABA's diversity clerkship and fellowship programs: the accessibility of expressive association. While some courts are expanding the use of expressive association to the untraditional context of employment, this Note does not advocate for that expansion despite the ABA's right being invoked against Title VII in this case. This Note has aimed to differentiate the ABA's clerkship and fellowship programs from typical commercial employment where expressive association would traditionally not apply.

The ABA's clerkship and fellowship programs diverge from commercial activity because they are an extension of the ABA's expression. The very offering of diverse clerkship and fellowship positions advances the ABA's beliefs it holds dear—that the legal field should become as diverse as the people it serves. Applying Title VII to the ABA's clerkships and fellowships in this way strips the positions of any and all expression. Requiring these positions to be open to those who are not underrepresented corrupts and weakens the expression the ABA wishes to promulgate.

Advocating for expressive association's application here may also inspire other relevant uses to protect inclusion that do not live in the realm of Title VII and employment. For instance, restrictions on transwomen's participation in sports could perhaps have a potent expressive association

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191. See, e.g., *Slattery v. Hochul*, 61 F.4th 278, 284, 286 (2d Cir. 2023); *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 812 (E.D. Mo. 2018); *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1169 (D. Colo. 2023); *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 586–88 (N.D. Tex. 2021).

192. See, e.g., *Slattery*, 61 F.4th at 284, 291; *Our Lady's Inn*, 349 F. Supp. 3d at 812, 823; *Darren Patterson Christian Acad.*, 699 F. Supp. 3d at 1169, 1184; *Bear Creek Bible Church*, 571 F. Supp. 3d at 586–88.

193. See Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 L. & SOC. INQUIRY 880, 881 (2015) (“[I]f . . . social movement actors abandon litigation,” it would be wrong to think “courts will play a lesser role in settling the . . . conflict . . . [T]hose actors’ . . . opponents will likely continue litigating the issue, with the result that the conflict is still resolved . . . by courts, and on terms . . . framed to the detriment of the original set of advocates.”).

claim. Take the Long Island Roller Rebels for example. The group is an amateur women's roller derby team who, with one transgender teammate, is currently denied use of their county's parks and fields.<sup>194</sup> The law gives the group a choice: Either drop your transgender teammate, or don't compete. That ultimatum could very well be ripe for an expressive association claim.<sup>195</sup> Nevertheless, this Note and its approach to expressive association hopes, above all, to inspire others to begin to utilize expressive association to advocate for the inclusion of marginalized and underrepresented groups in all contexts.

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194. Philip Marcelo, *New York Roller Derby League Loses Bid to Temporarily Block Ban on Trans Athletes*, ASSOC. PRESS (Jan. 21, 2025, at 6:44 PM CDT), <https://apnews.com/article/new-york-transgender-sports-nassau-roller-derby-f9556237da30d81d1ed3a8d2b14bfc3b> [<https://perma.cc/U6S5-9ZD8>].

195. A potential hurdle to this claim is the question of whether membership in a sports team is expressive.