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STATE OF WISCONSIN
IN SUPREME COURT

No. 2022AP2026

KONKANOK RABIEBNA, RICHARD A.
FREIHOEFER, DOROTHY M. BORCHARDT,
RICHARD HEIDEL and NORMAN C. SANNES,

Plaintiffs-Appellants,

v.

HIGHER EDUCATIONAL AIDS BOARD and
TAMMIE DEVOOGHT-BLANEY,
Defendants-Respondents-Petitioners.

APPEAL FROM A FINAL ORDER OF THE
JEFFERSON COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM F. HUE, PRESIDING

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

INTRODUCTION	6
ARGUMENT	6
I. Wisconsin Stat. § 39.44 is constitutional.....	6
A. The statute complies with equal protection, both before and after <i>SFFA</i>	6
1. Wisconsin Stat. § 39.44 passes muster under strict scrutiny.	7
a. Race-based classifications must have a compelling interest and be narrowly tailored to address it.	7
b. Wisconsin Stat. § 39.44 addresses compelling interests and is narrowly tailored to meet its goals.	9
2. The statute does not use race as a negative or a stereotype.....	12
3. The statute’s continued need is quantifiable, and it must be affirmatively continued through regular lawmaking.....	13
B. Respondents failed to show the statute is facially unconstitutional.	13
II. Respondents lack standing.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)	8
<i>City of Appleton v. Town of Menasha</i> , 142 Wis. 2d 870, 419 N.W.2d 249 (1988)	14, 15
<i>Cornwell Pers. Assocs., Ltd. v. DILHR.</i> , 92 Wis. 2d 53, 284 N.W.2d 706 (Ct. App. 1979).....	16
<i>Coyne v. Walker</i> , 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606	15
<i>Evers v. Marklein</i> , 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395.....	15
<i>Fabick v. Evers</i> , 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856.....	16
<i>Fisher v. Univ. of Tex. at Austin</i> , 570 U.S. 297 (2013)	7, 9
<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2023)	7, 11
<i>Johnson Controls, Inc. v. Emps. Ins. of Wausau</i> , 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.....	16
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No., 1</i> , 551 U.S. 701 (2007)	7, 8
<i>Regents v. Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978)	7, 12
<i>S.D. Realty v. Sewerage Comm’n</i> , 15 Wis. 2d 15, 112 N.W.2d 177 (1961)	14, 15
<i>Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.</i> , 600 U.S. 181 (2023)	6, <i>passim</i>

<i>Teigen v. WEC</i> , 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.....	15
<i>Thompson v. Kenosha County</i> , 64 Wis. 2d 673, 221 N.W.2d 845 (1974)	15
<i>Tooley v. O’Connell</i> , 77 Wis. 2d 422, 253 N.W.2d 335 (1977)	15
<i>Wagner v. City of Milwaukee</i> , 196 Wis. 328, 220 N.W. 207 (1928)	14–15
Statutes	
Wis. Stat. § 36.34	10
Wis. Stat. § 39.44	6, <i>passim</i>

INTRODUCTION

Wisconsin Stat. § 39.44 complies with equal protection. The program has compelling, measurable interests, and is narrowly tailored to address them; creates no zero-sum system where others lose out on a finite, competed-for benefit; does not use race as a proxy for diversity; and has been biennially re-funded by successive Legislatures and Governors through the democratic process.

Respondents' arguments to the contrary are unavailing. They misread *SFFA*; their reliance on concurrences illustrates their desire to stretch the case beyond its holding. Their assertions about the facts of the case contradict their own concessions and the extensive factual record.

Respondents also lack standing. Without an injury personal to them, taxpayers have standing to bring claims only about the government's compliance with taxing or spending restrictions, not to challenge the validity of a law for any reason.

ARGUMENT

I. Wisconsin Stat. § 39.44 is constitutional.

Wisconsin Stat. § 39.44 is constitutional. Under strict scrutiny, the statute's goal of reducing disproportionate attrition furthers the compelling interests of diversity and equal educational opportunity, and it is narrowly tailored to address them. And to the extent the detailed test for college admissions in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) ("*SFFA*"), applies, it is a test the Wisconsin law satisfies.

A. The statute complies with equal protection, both before and after *SFFA*.

Laws may make distinctions based on race and still comply with the guarantee of equal protection. They must comply with strict scrutiny, but "[s]trict scrutiny must not be

‘strict in theory, but fatal in fact.’” *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013) (citation omitted). *SFFA*’s test does not categorically prohibit consideration of race or eliminate compelling interests the Court had previously recognized.

1. Wisconsin Stat. § 39.44 passes muster under strict scrutiny.

Under strict scrutiny, a race-based classification must have a compelling government interest and be narrowly tailored to address that interest. *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003). “Context matters when reviewing race-based governmental action under the Equal Protection Clause.” *Grutter*, 539 U.S. at 327.

a. Race-based classifications must have a compelling interest and be narrowly tailored to address it.

The Supreme Court has recognized multiple interests as compelling, and *SFFA* did not eliminate any. Instead, it required that the articulated interests be measurable, and thus reviewable by a court. *SFFA*, 600 U.S. at 213–17.

Diversity. The Court has repeatedly treated diversity in higher education as a compelling interest. *See Fisher*, 570 U.S. at 309; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007); *Regents v. Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., concurring). The interest is grounded in principles of “academic freedom,” which “long has been viewed as a special concern of the First Amendment.” *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 312).

SFFA did not overrule this precedent. Rather, the Court applied its measurability test to conclude that the interests articulated by the defendant universities—like “training future leaders,” preparing graduates to “adapt to an increasingly pluralistic society,” “better educating its

students through diversity,” and “producing new knowledge stemming from diverse outlooks”—were not “sufficiently coherent” because they were not measurable by a reviewing court. *SFFA*, 600 U.S. at 214–15.

Respondents read *SFFA* as categorically prohibiting all race-based programs, repeatedly quoting the Court’s sentence that “[e]liminating racial discrimination means eliminating all of it.” (Resp. Br. 20 n.5, 26, 27). But immediately after the paragraph Respondents cite, the Court went on to apply the traditional strict scrutiny test rather than the type of blanket ban Respondents seek here. *SFFA*, 600 U.S. at 206–07. Respondents also say that diversity categorically can no longer be a compelling interest (Resp. Br. 17), but they point to nothing in the majority opinion so holding.

Had the Court wanted to categorically prohibit any use of race, or even exclude diversity as a compelling interest, it would have said so, not created a detailed test for the context of college admissions. Justice Thomas would have done what Respondents desire: his concurrence argued that all affirmative action should be prohibited, and criticized entities like minority student organizations, *SFFA*, 600 U.S. at 231, 274–75 (Thomas, J., concurring), which Respondents here seem to think are unconstitutional, too. (Resp. Br. 25.) But no other Justice joined that concurrence, and it is not the law.

Educational opportunity. The Court has also recognized that where the State undertakes to provide education, educational opportunity can be a compelling interest. *Parents Involved in Cmty. Sch.*, 551 U.S. at 787–88 (Kennedy, J., concurring and concurring in the judgment); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[Educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”). Equal educational opportunity was not at issue in *SFFA*, and the Court did not cast doubt on it as a compelling interest.

Respondents ignore the Board's arguments about this compelling interest. They substitute a different interest—racial balancing in college admissions—and attack that straw man. (Resp. Br. 21, 27). But “racial balancing,” creating a student body with a “specified percentage of a particular group merely because of its race or ethnic origin,” *Fisher*, 570 U.S. at 319, is a distinct interest from ensuring that students have an equal opportunity to participate in the educational programming offered by the state by helping them remain in school.

As to narrow tailoring, *SFFA* created no new test. Based on the facts presented, the Court concluded that the defendant universities failed to show how measuring the diversity of applicants based on the six “racial” categories they identified promoted goals like training future leaders. *SFFA*, 600 U.S. at 216–17.

b. Wisconsin Stat. § 39.44 addresses compelling interests and is narrowly tailored to meet its goals.

Wisconsin Stat. § 39.44 advances the compelling interests of diversity and equal educational opportunity, and it is narrowly tailored to address them.

Reducing disparity in retention furthers diversity by helping the colleges retain more of the students from the incoming classes they composed. And it furthers educational opportunity by ensuring that students have equal access to the benefits of state-funded aid and the technical college system.

Unlike the generalized goals found unreviewable in *SFFA*, like training future leaders and helping students prepare for a diverse society, Wis. Stat. § 39.44 seeks to improve retention rates for specific groups, a measurable goal that a court can review.

The statute also satisfies *SFFA*'s means-to-ends test. It targets students in the groups experiencing disproportionately high attrition and creates very small, need-based scholarships to address that problem. It achieves significantly improved rates of retention and graduation for those who receive a grant.

Respondents assert that the Board failed to show disproportionate attrition for these groups. (Resp. Br. 22–24.) That is contrary to their concessions below. The circuit court found that the evidence of disparate attrition was “undisputed and uncontroverted.” (R. 61:30.) Respondents’ briefing to the court of appeals recognized those facts. (Appellants’ Ct. App. Br. 7 (“Then, as now, statistics bear out a disparity between the percentage of students in these groups who graduate with a two- or four-year college degree and those of other racial groups.”); Appellants’ Ct. App. Br. 21 (“the question is not whether statistical disparities in retention and graduation rates exist (and persist). They do.”); Appellants’ Ct. App. Reply 6 (“the Grant program is an effort to cure what is by all accounts an unfortunate racial disparity between the graduation rates of students of certain racial backgrounds.”).)

Those concessions were for good reason. As Petitioners explained in their principal brief, the Board presented evidence of disproportionate attrition from when the statute was initially enacted through the present. The original Commission heard testimony from people across the education spectrum, including “high school and university students, parents, counselors, community organizers, public school teachers, university faculty and staff, and other concerned citizens.” (R. 55:3.) While some of the statistical evidence before the Committee focused on UW (it was also considering a program for UW students, enacted as Wis. Stat. § 36.34), there was no indication that anything unique to UW made it harder to stay enrolled.

The Board also showed why race-neutral financial aid does not suffice. Students in the four groups do not benefit equally from that aid compared to White students, who receive need-based aid disproportionate to their numbers, (R. 54 ¶ 3), and contrary to the groups' relative poverty levels, (R. 38 Ex. 1 ¶¶ 17–18). The distribution of merit-based aid is even more lopsided. (R. 54 ¶¶ 15, 22, 28.) Loans pose greater risks for students in the targeted groups. (R. 38 Ex. 1 ¶¶ 23, 24.) And families in the targeted groups receive undercounted assistance because of lower homeownership rates and home equity value. (R. 38 Ex. 1 ¶¶ 26–28.)

Respondents argue that other efforts should have been tried before implementing Wis. Stat. § 39.44. (Resp. Br. 25–26.) They were. The Committee considered how existing race-neutral alternatives like the Wisconsin Grant, the largest race-neutral source of aid for eligible schools, and nonfinancial aid retention efforts operating at numerous UW campuses had proved unsuccessful in addressing the problem. (R. 49:10 (LFB report).) The Committee saw a model for success in UW's Advanced Opportunity Program, a scholarship program that produced a retention/graduation rate of approximately 80%. (R. 55:17.) Wisconsin Stat. § 39.44 has matched that retention rate, with graduation and retention rates of 85% in 2016–17 and comparably high in other years. (R. 47:13, 21, 29, 37.)

Respondents also argue that the statute runs afoul of *Gratz v. Bollinger*, 539 U.S. 244 (2003), but they read the case out of context. *Gratz* required a college admissions program's assessment of an individual's "diversity" to be individualized. 539 U.S. at 279. It made no broad ruling about the permissibility of race-based categories in all settings. And as to the scholarships here, the individual colleges' selection of recipients is "individualized and flexible . . . based on each student's individual situation," "background," "special circumstances," and previous grants, with the overall goal of

giving students with “the greatest financial need” the tools “to remain in school and graduate.” (R. 51 ¶¶ 7–8.)

2. The statute does not use race as a negative or a stereotype.

In addition to its strict scrutiny prong, *SFFA* also required that admissions programs not use race as a “negative” or “stereotype.” *SFFA*, 600 U.S. at 218–20. The Wisconsin statute violates neither prohibition.

As to the “negative” factor, in the college admissions arena, a spot going to one student means that another student is not admitted. *Id.* at 218–19 (pointing to drop-offs in admission for Asian-American applicants). The programs were purely zero sum. As Justice Powell observed, such programs require an innocent person to pay the price for that benefit. *Bakke*, 438 U.S. at 307, 308–309 (Powell, J.). In contrast, here the State has dedicated an almost imperceptible amount of aid to groups of students disproportionately leaving college. Others continue to receive the aid they otherwise would; they are not excluded from a finite benefit like a student admission spot or government contract. Respondents note that other students are not candidates for this particular pot of money, (Resp. Br. 27–28), but they do not even suggest that those students are harmed in any measurable way.

As to stereotype, *SFFA*’s concerns involved the universities’ use of race as a proxy for a diverse student. Here, Wis. Stat. § 39.44 seeks to retain as many as possible of the schools’ original students, with all the types of diversity each student brought to the table. And Respondents offer no explanation of how seeking to provide equal educational opportunity to all students would run afoul of *SFFA*’s stereotyping concern.

3. The statute's continued need is quantifiable, and it must be affirmatively continued through regular lawmaking.

SFFA also held that race-based admissions must have a “logical end point.” 600 U.S. at 221 (citation omitted). The universities’ admissions programs failed that metric because there was no way for a court to determine when “meaningful representation and meaningful diversity” on campuses was achieved. *Id.*

Wisconsin Stat. § 39.44 does not suffer from that infirmity. Its quantifiable goals are simple for the Legislature and Governor to measure and for courts to review. If the data reveals that attrition among the groups is no longer a significant problem, or that the program no longer succeeds in addressing it, the State can repeal the statute.

B. Respondents failed to show the statute is facially unconstitutional.

For a facial challenge, Respondents had to show that the statute was unconstitutional in every category of application. Even if Respondents had shown that the statute discriminated in one of its categories, they did not attempt to make that showing as to all.

Wisconsin Stat. § 39.44 advances compelling interests and is narrowly tailored to address them in a way that race-neutral measures do not. The statute satisfies *SFFA*’s additional criteria, too: it does not treat race as a negative or stereotype, and it has a measurable ending point. It complies with equal protection.

II. Respondents lack standing.

This Court should also reverse because Respondents lack standing as taxpayers.

To have standing, a plaintiff must have an injury that is direct and personal to him, and different from the interests of the general public. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). Taxpayers have such an interest in two situations, neither of which is presented here.

In the first category, the plaintiff alleges that, whatever the legal basis for his claim, the defendants cause him to pay more taxes. *See City of Appleton*, 142 Wis. 2d at 874, 883–84 (plaintiffs' taxes were increased). Claims of standing are effectively indistinguishable from standing in non-taxpayer cases: direct, pecuniary injury. Respondents assert no such loss here.

In the second category, a special type of case sometimes called a “taxpayer action,” plaintiffs seek to compel the government to comply with specific taxing or spending requirements. “Pecuniary loss” is deemed because plaintiffs seek to vindicate the rights of all taxpayers to have the government spend money according to law. *See S.D. Realty v. Sewerage Comm’n*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961).

For example, in *Wagner v. City of Milwaukee*, 196 Wis. 328, 220 N.W. 207, 208 (1928), the taxpayer alleged that the city violated competitive bidding requirements, and the Court held that “[e]very taxpayer . . . has an interest in the disposition of the funds belonging to the city.” In *S.D. Realty*, the taxpayer asserted that a city was spending money for a private, not a public, purpose. The Court held that “[a]ny illegal expenditure of public funds directly affects taxpayers

and causes them to sustain a pecuniary loss.” 15 Wis. 2d at 22.¹

Respondents invoke cases from the second category, saying that pecuniary loss is a given because there is an “illegal expenditure.” Their assumption is that “illegal expenditure” does not just mean the government’s violation of a particular taxing or spending law, but also its administration of any law or practice that is invalid for any reason. (Resp. Br. 31–33.)

That is incorrect. The Court has utilized the “illegal expenditure” theory, where no personal injury is needed, only in the context of taxing and spending laws.² *Wagner* distinguished taxpayer actions from cases to “restrain the irregular exercise of power by public officials when its exercise in no way jeopardizes the private rights of the taxpayer.” 220 N.W. at 208. And in *Teigen v. WEC*, four members of the Court opined that the plaintiffs, who sought to challenge an agency’s construction of election statutes, had no taxpayer standing. 2022 WI 64, ¶ 163, (Hagedorn, J., concurring), ¶¶ 212–13 (A. Bradley, J., dissenting), 403 Wis. 2d 607, 976 N.W.2d 519, *overruled on other grounds by Priorities v. WEC*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.2d 429.

¹ Other cited cases are consistent. *Tooley v. O’Connell*, 77 Wis. 2d 422, 427, 253 N.W.2d 335 (1977) (taxation scheme); *Thompson v. Kenosha County*, 64 Wis. 2d 673, 676, 221 N.W.2d 845 (1974) (property tax assessment).

² In *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606, the court of appeals espoused the theory Respondents urge here. This Court should not follow it. *See Evers v. Marklein*, 2024 WI 31, ¶ 25, 412 Wis. 2d 525, 8 N.W.3d 395 (Court not bound by court of appeals decisions, which may be overruled without special justification).

The potential outlier could be *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, where the Court found taxpayer standing to challenge an emergency declaration, based on the possibility that the State would incur National Guard deployment costs. *Id.* ¶ 11. But the theory was not briefed or argued, *id.* ¶ 75 (A. Bradley, J., dissenting), and the Court said that it found standing “under the circumstances of this case.” *Id.* ¶ 11 n.5.³

Respondents’ theory would wipe away much of Wisconsin’s standing doctrine, particularly the longstanding principle that “generalized grievances” about the administration of government are insufficient to support standing. *See Cornwell Pers. Assocs., Ltd. v. DILHR.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979). This Court should decline that invitation.

CONCLUSION

Petitioners ask this Court to reverse the court of appeals.

Dated this 12th day of January 2026.

Respectfully submitted,

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³ If this Court believes that *Fabick* would require ruling for Respondents here, the Board asks the Court to overrule it or limit it to its facts as incorrectly decided and unsound in principle. *See Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2971 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 12th day of January 2026.

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