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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT 2

Case No. 2022AP2026

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

Plaintiffs-Appellants,

v.

HIGHER EDUCATIONAL
AIDS BOARD and CONNIE
HUTCHINSON,

Defendants-Respondents.

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

**RESPONDENTS' POST-ORAL ARGUMENT
SUPPLEMENTAL BRIEF**

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TABLE OF AUTHORITIES

There were no cases, statutes, or regulations cited to within this supplemental brief.

The Court invited supplemental briefing on three questions discussed at oral argument: First, what evidence in the record showed that the retention and graduation disparities for racial minorities at the University of Wisconsin system also existed at non-UW schools serviced by the Grant Program? Second, what evidence in the record showed that those retention and graduation disparities still exist today? Third, does the Grant Program make more race-neutral aid dollars available for students ineligible for a grant award, and does that affect the narrow-tailoring analysis?

I. The record evidence showed that the retention and graduation problem transcended every facet of the state and nation's educational system; carving out the schools served by the Grant Program would be arbitrary.

This Court has first asked the parties to address what evidence in the record establishes that retention and graduation disparities existing for racial minorities at the UW System also existed at the schools serviced by the Grant program.

When the state first studied the issue in 1985, it noted that the problem of providing equal educational opportunities to the state's minority students, which included lags in retention and graduation compared to their peers, was not a problem unique to the UW System. On the contrary, the problem transcended the entire educational system from K-12 through post-secondary education. The joint taskforce that convened to study the problem noted that there had already been numerous state and federal reports related to "special problems and issues related to the education of minority students." (R. 55:11.) They noted that, in a recent book, minority high school students in 1980 had graduation rates much lower than white students. (R. 55:11.) This "failure to education every young person to his or her full potential threatens the nation's social and economic health."

(R. 55:11.) The taskforce noted that it agreed “with those who seek excellence in education, and . . . with those who recognize that a nation cannot ever truly have excellence without extending that excellence *to all its children.*” (R. 55:11 (emphasis added).)

To study the problem, the state gave the taskforce a broad mission: “to study cooperative ways of eliminating or reducing causes leading to under-enrollment of minority students and to study factors affecting retention *in post-secondary education.*” (R. 55:30 (emphasis added).) The taskforce’s focus was thus not limited to an issue at the UW System.

Consistent with this broad mission, the taskforce met with people all across the state. (R. 55:3.) It 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.) The taskforce made clear that its recommendations, including as to retention, were “essential not only for *the educational system* but for the maintenance of the fabric of our state and national society.” (R. 55:3 (emphasis added).) The taskforce added, “It is time for Wisconsin to assume the premier position in the quest for equality of educational opportunity *for all minorities* underrepresented *in the educational system.*” (R. 55:3 (emphasis added).)

These statements leave no doubt that the taskforce’s focus was much broader than the UW System. The issues faced by minorities, including graduation and retention, pervaded the entire “educational system” in Wisconsin. (R. 55-3.) It is not surprising, then, that their report included a broad spectrum of recommendations to improve different aspects of the problem of minority educational attainment from high school through college graduation. (R. 55:4–7.) Consistent with their holistic approach to addressing the

crisis of lagging minority education, they even specifically recommended creating a “cooperative data gathering process on minority students” for “all two and four-year Wisconsin colleges and universities (public and private).” (R. 55:6.)

The taskforce’s joint report thus recognized the reality that the problems minority students faced obtaining an education were not limited to the UW System. These problems existed, statewide and nationwide, from K-12 through post-secondary education. Period. To hold otherwise would be contrary to this record evidence.

The record evidence thus demonstrates that this problem affected all higher education in Wisconsin, and this Court should not read the examples of UW system data in the report as somehow demonstrating a lack of problem elsewhere.

Even the legislative history acknowledged that this was a national problem. (R. 49:20–21.) Indeed, a legislative report noted that black student enrollment had declined nationwide, including in Wisconsin. (R. 49:21.) In fact, the decline in Wisconsin was worse than the national average. (R. 49:21.) Although these numbers were for enrollment, which is not the same as retention, students cannot stay in school and graduate if they are not enrolled. The legislature recognized this obvious connection as well. The decline in black student enrollment “translated into a 14.2% decrease in degrees conferred to blacks.” (R. 49:20.) In other words, the legislature realized that all aspects of the problem were connected, from enrollment to retention to graduation. Together, as the 1985 report recognized, the UW System numbers simply confirmed what other studies had already concluded: minority students were not on an equal footing in higher education. That is why both the report and the legislature discussed different aspects of the problem and recommended different solutions to address some of those issues.

In short, the record evidence showed that the retention and graduation disparities faced by minority students were part of a bigger, national problem minorities faced in educational opportunities. Although the taskforce and legislature relied primarily on UW System statistics, that does not mean that the problem was limited to UW System schools. To hold otherwise would be to unfairly view the record evidence far too narrowly and disregard the bigger picture that evidence presented.

II. The record contains ample evidence that the retention problem persists today.

Next, the Court has asked for additional briefing on the record evidence showing that the problem of retention and graduation inequalities still exists today. The record contains ample evidence showing that the problems targeted by the program persist today, notwithstanding the program's success for those students who receive grant assistance.

To start, both of the Board's unrefuted experts testified to it. Professor Goodman testified that a 2020 Education Trust Report found that White students had higher graduation rates than Black students across all incomes. (R. 25:5.) She also cited a 2007 study of the UW System minority retention grant (the Lawton grant) and concluded that that study showed both that the retention problem exists but that the grant program works for those who receive it. (R. 25:7, 9.)

Likewise, Dr. Alford, who is a financial aid expert at a Wisconsin technical college served by the grant, *repeatedly* testified that the retention disparities between white and minority students is a nationwide problem that still exists today. "Nationally, minority students are retained and persist at lower rates than their White counterparts." (R. 26:3.) He traced the history of trying to solve this problem back to the civil rights movement in the 1960s and the creation

of the federal financial aid programs in 1965. (R. 26:3.) “[M]inority students continuously fell behind White students academically due to reasons such as college culture acclimation, underpreparedness, first-generation status, and most importantly – economic or financial [in]stability This challenge impacts minority persistence still today.” (R. 26:3.)

Further, he testified, “Retention rates between minorities and non-minorities have remained constant for decades. Because White students succeed at higher rates than minority students, strategies and programs are needed to improve their success in higher education.” (R. 26:3.) Thus, “[t]here is a positive correlation of persistence for minority students when connected to financial assistance.” (R. 26:3.)

Moreover, citing another study, Dr. Alford reiterated, “[p]revious research addresses that minority students graduate at lower rates than their White peers.” (R. 26:12.) He opined that targeted aid programs like the Grant Program were still necessary to address the retention and graduation problem that still exists to this day. “The reason for having need-based programs for minority students *has not changed today as significant equity gaps still exist* and recruiting and retaining minorities *is still a challenge in Wisconsin public and private colleges and universities.*” (R. 26:17.) This unrefuted expert opinion rebuts any assertion of a lack of evidence in the undisputed record about the existence of the retention and graduation gap.

Dr. Alford concluded that, most troubling of all, in his expert opinion, “[t]he elimination of the [Grant Program]—or the elimination of its minority requirement—would be detrimental to the success of minority students in Wisconsin.” (R. 26:12.)

Dr. Alford is uniquely qualified to dispel any question about whether the retention and graduation disparities are limited to four-year colleges. He worked in financial aid for the UW System for 14 years before moving to the Madison Area Technical College. (R. 26:4.) In any event, such a distinction between four-year colleges and others would be arbitrary because the Grant Program, too, serves many four-year institutions, such as Marquette University and other private colleges and universities. Indeed, it serves more of these four-year institutions than technical colleges. (*E.g.* R. 47: 30–32; 37–40.) In fact, these private institutions were the *original* target recipients of the Grant Program. (R. 47:44; 49:17.) Technical colleges were added later. (R. 37:11 n.2.)

In addition to expert evidence, graduation data for Wisconsin technical colleges from 2011–2021 shows both that the graduation gap persists and that, for those few who receive a grant award, the program helps overcome that gap. (R. 41:1–2.) For example, over those 10 years, just 21.4% of Black students who did not receive a grant award graduated, as compared to 64% who did. (R. 41:1.) This rate is significantly lower than the overall graduation rate for the overall pool of students in the “All Races” column, which includes White and Asian students. (R. 41:1 n.5.) That overall “All Races” graduation rate during this 10-year period was 44%. (R. 41:1.) In other words, the overall rate was double the graduation rate of Black students. That gap is the biggest, but there were statistically significant gaps for each minority group relative to the overall graduation rate of 44%. (R. 41:1.) Although the table does not show the graduation rates for White students or Asian students specifically, their rates must be much higher than 44% for the total rate to be 44%, as no minority group has a graduation rate that high. Thus, basic math further confirms the unrefuted testimony of the

Board's expert: these gaps in retention and graduation rates exist to this day.

Recent, nationwide data in the record also demonstrates the persistence of retention and graduation gaps for minority students. (R. 49:67–69.) That data showed statistically significant disparities in the graduation rates of minority students compared to both White students and Asian students. (R. 49:68–69.) As one would expect based upon the totality of this problem, data confirms that the same troubling disparities exist at four-year institutions. (R. 49:70.) “Over one-third of Black students (36.5 percent), and over one-quarter of Hispanic students (27.9 percent) had not completed a degree and were no longer enrolled in the sixth year—the highest rates of all groups.” (R. 49:70.) Nor is the data any different for private, four-year colleges. (R. 49:72.) Other recent reports in the record confirm that these disparities still exist. (R. 50:9.) This recent data thus confirms what the 1985 report recognized all along—the problem of minority retention and graduation knows no arbitrary boundaries. It unfortunately transcends all educational settings.

Given all of this evidence, it is not surprising that Appellants chose to concede that these disparities existed then and exist now. “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.” (App. Br. 7.) “[A]gain[,] the question is not whether statistical disparities in retention and graduation rates exist (and persist). They do.” (App. Br. 21.). “[T]he 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.” (App. Reply Br. 6.) Appellants were right to concede this and focus their arguments elsewhere.

III. Whether the Grant Program makes more race-neutral dollars available does not challenge the narrow tailoring analysis because the tiny program *unduly* burdens no one.

The Court lastly inquired into whether grant program dollars truly “opened up” other, non-restricted aid dollars, as the Board’s experts testified. The only evidence in the record on this point—the Board’s experts’ testimony—is that they may very well do that.

In any event, even if the funds are only “bonus” funds as this Court suggested at oral argument, that is of no consequence for the analysis of the particular program at hand, because the grant does not “unduly burden” noneligible students. There is no dispute that the funds, which totaled a mere \$819,000 in the last budget cycle, represent a tiny fraction of available state aid—less than one-half of one percent—and that over 95% of such aid is available to anyone regardless of race. (R. 26:10.) And that is just state aid—a very small percentage of total aid available to any student with financial need. (R. 26:7 (Table 2).) This holistic approach, in which any particular financial aid program is scrutinized not in isolation but as part of the entire financial aid picture, is the proper context in which to scrutinize any financial aid program.

Unlike a college’s single admissions policy, which determines who gets in and who gets rejected, financial aid is not a zero sum game. Financial aid consists of numerous state, federal, and private programs that all work together to assist students. The Department of Education recognized as much when it scrutinized a race-based scholarship administered by the University of Missouri. It cited with approval that university’s argument that a scholarship must be viewed holistically, the context of all available aid: “The proper level for analysis is the University’s financial aid system as a whole, not each individual scholarship viewed in

isolation.” (R. 50:14.) The Department found this holistic approach “consistent with what [the Department] said on this point in its 1994 Guidance.” (R. 50:14.) That is the context in which the grant program, and any burden it has on noneligible students, must be evaluated.

When viewed in this holistic way, as strict scrutiny requires, the grant program does not unduly burden anybody even if the grants do not make additional race-neutral dollars available.

Dated this 2nd day of August 2024.

Respectfully submitted,

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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 2,411 words.

Dated this 2nd day of August 2024.

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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 2nd day of August 2024.

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