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.

PETITION FOR REVIEW

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INTRODUCTION

A model of good government in action, Wis. Stat. § 39.44 offers small, need-based grants to college students from four groups—Black, Native American, Hispanic, and Southeast Asian—who, statistically, experience attrition rates far above their college peers. The program succeeds. Grant recipients have graduation rates of at least twice the rates of those in those targeted groups who do not receive them. The program supplements the financial aid already available to all students and represents less than one-half of one percent of total aid dollars available. While the program dates to the mid-1980s, annual reports evaluate its continued efficacy, and funding relies on the biennial budget process.

The four plaintiffs here, not students themselves and people conceding they'd lack standing to bring their claims in federal court, brought a federal and state equal protection challenge in the Jefferson County Circuit Court, arguing that the statute was unconstitutional. The Higher Educational Aids Board and its Administrator presented the court with expert reports, social science data, and statistics to demonstrate that the program passed muster under strict scrutiny, and the circuit court agreed that it did.

But the court of appeals reversed. It broadly announced determinations based on race-based classifications in the law are always unconstitutional, not just subject to strict scrutiny, and that the evidence failed to support the statute's constitutionality in all applications. In so doing, the court overread the U.S. Supreme Court's precedents, misunderstood the evidence presented to the circuit court, and lost sight of its task in a facial challenge.

No such departures were needed or justified. Wisconsin Stat. § 39.44 is constitutional. Unnecessarily discarding it

would work a profound harm for grant recipients and the colleges they attend.

ISSUES PRESENTED

1. The U.S. Supreme Court has held that programs using racial classifications are constitutional if they have a measurable compelling interest, narrow tailoring designed to address that interest, a lack of substantial harm to other groups, and a way to measure an appropriate end.

Wisconsin Stat. § 39.44, currently funded at less than one percent of state aid, addresses disproportionate attrition rates among students in specific racial groups by awarding grants, beginning sophomore year, through the private colleges and Wisconsin technical colleges the students attend. The grants help those schools retain the classes they matriculated and promote equal opportunity for all students. They dramatically reduce attrition for grant recipients, far more than race neutral financial aid. Annual reports keep public officials apprised of the program's performance, and the Legislature chooses how to fund the program biennially.

Did the respondents show that the statute is unconstitutional in all applications?

The circuit court said no.

The court of appeals said yes.

2. For a plaintiff to have standing, this Court's precedent requires the plaintiff to have suffered a real and immediate injury and to have a legally protectable interest. In turn, to establish taxpayer standing, a plaintiff must suffer a personal, pecuniary injury. Mere disagreement with a law is insufficient to afford taxpayer standing.

Here, Respondents are not students seeking financial assistance. Instead, as taxpayers, they challenged some of the

criteria governing the Retention Grant but did not seek to have fewer taxpayer dollars spent.

Did Respondents satisfy the requirements for taxpayer standing by demonstrating a personal pecuniary loss?

The circuit court said yes.

The court of appeals said yes.

STATEMENT OF THE CASE

This case is a facial challenge to a financial-aid grant program, Wis. Stat. § 39.44, called the minority undergraduate retention grant (Retention Grant). It addresses a retention problem among certain groups in higher education: on average, Black American, Native American, Hispanic, and certain Southeast Asian students[1] drop out of school or fail to graduate at substantially higher rates than their peers. Petitioner Wisconsin Higher Educational Aids Board oversees the statute's administration.

I. Students in groups targeted by the statute face disproportionately low retention, a problem not fixed by race-neutral financial aid.

A. The statute addresses severe retention problems for the targeted populations, problems race-neutral aid does not solve.

In May 1983, the Superintendent of Public Instruction and University of Wisconsin System President established a joint committee "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. 55:3.) The joint committee held

[1] The statute defines this group as a former citizen or descendent of a citizen of Laos, Vietnam, or Cambodia. Wis. Stat. § 39.44.

meetings across the state, heard testimony, received comments from many stakeholders, and reviewed projects and studied papers relevant to their mission. (R. 55:3.) They compiled their findings and recommendations into a report issued in May 1984. (R. 55:3.)

The May 1984 report found that Black, Hispanic, and Native American students were not only greatly underrepresented on Wisconsin's campuses but also "perhaps more significantly, retention rates for [these groups of] minority students were below those of White students." (R. 55:13.) Similarly, "[g]raduation was also less likely for minority students than for non-minority students." (R. 55:13.) Thus, "[t]he result is a dwindling pool of talented and educated minority people moving up the educational ladder and preparing for the world of work." (R. 55:13.)

To address this problem, the committee recommended a statutory retention grant. (R. 55:17.) "The program would be designed to help improve the retention and graduation rates of minority students." (R. 55:17.) The committee modeled the program after a similar aid program for graduate students called the Advanced Opportunity Program, (R. 55:17), a program that had improved minority retention and graduation rates of "approximately 80%." The report concluded that it "demonstrate[d] that retention and graduation can be significantly improved through specially designed financial aid programs." (R. 55:17.)

Following that recommendation, the Governor asked the Legislature to create such a grant in his 1985–87 biennial budget proposal. (R. 49:4.) The Legislature independently studied Wisconsin enrollment data for minority groups showing that Hispanic, Black, and Native American students had greater problems staying in school and graduating than white and Asian student populations. Black student enrollment had more recently decreased further. (R. 49:6.)

The Legislature noted that race-neutral state and federal programs aimed at improving minority retention and graduation had proved ineffective. (R. 49:7, 10–11, 13.) In fact, "minority degrees as a percentage of all degrees granted declined from 2.8% to 2.4%" from 1976 to 1983. (R. 49:13.)

Wisconsin Stat. § 39.44 was enacted in 1985 Wis. Act 29. The Legislative Fiscal Bureau described the goal as "encourag[ing] minority undergraduate students to remain in the University by providing financial support." (R. 49:4.) Act 29 created two grant programs: the Retention Grant for private, nonprofit schools and technical colleges, to be administered by the Board; and a sister program for the University of Wisconsin System, codified at Wis. Stat. § 35.25(17), to be administered by the Board of Regents. Consistent with the empirical data, the law made the grant available to "Black, Hispanic[,] and American Indian undergraduates." 1985 Wisconsin Act 29. It considered including Asian students, but the data showed that they "generally have a higher retention and degree completion rate than nonminorities." (R. 49:7.)

In 1987, the Legislature amended Wis. Stat. § 39.44 to expand eligibility to Southeast Asian students from Laos, Vietnam, and Cambodia, whose families had immigrated as Vietnam-War refugees. 1987 Wisconsin Act 27 § 683s; (R. 49:17.)

B. Retention differences persist today.

The retention differences between the four groups and overall student population persist today. At two-year institutions, about half of all Asian and white students have completed a degree within six years, compared to only about one-third of Hispanic students and only one-quarter of Black students. (R. 49:67–68.) For four-year institutions, on average, Asian and white students complete their degrees at

a significantly higher rate than Black, Hispanic, or Native American students. (R. 49:70; 50:10.) "Compared with White students, Black students had 43 percent lower odds and Hispanic students had 25 percent lower odds of attaining an associate's or bachelor's degree, after accounting for other factors." (R. 50:6.)

The same holds true for Southeast Asian students, who have "glaringly lower rates of educational attainment compared to Whites and Asian Americans as a whole." (R. 49:75.) Compared to other Asian Americans, Southeast Asian students are "twice as likely" to transfer out of their institution for non-academic reasons and often do so because they "exhaust financial resources." (R. 49:88.)

II. The Retention Grant achieves measurable, improved retention and does not reduce the aid otherwise available to all students.

A. Retention Grants are awarded by colleges.

Retention Grants are awarded by participating private colleges, tribal colleges, and Wisconsin technical colleges. Wis. Stat. § 39.44(3); (R. 46:2–3). Each school's financial aid office determines eligibility based on the applicant's overall need picture and nominates eligible sophomores, juniors, or seniors. (R. 46:2–3.) Individual awards vary based upon financial need, with a minimum grant of $250 and a maximum grant of $2,500. (R. 46:3.)

B. The Retention Grant achieves measurable, improved retention for recipients.

The Retention Grant is highly effective at improving retention among recipients. In 2015–16, 80% of Retention Grant recipients either completed their degree or certificate or were continuing toward degree or certificate completion. (R. 47:5.) Similarly, student graduation or retention rates

were 85% in 2016–17, 77% in 2017–18, and 80% in 2018–19. (R. 47:13, 21, 29.)

Recipients explained the importance of the Retention Grant to their remaining in school. The Board's 2019–20 annual report stated that 85% of grant recipients reported that, without it, they either would not have been able to attend school, or it would have been difficult to attend school. (R. 47:42.) Survey results from prior years yielded similar results. (R. 47:10; 18; 26; 34.)

Enrollment and graduation data at Wisconsin technical colleges demonstrate that receipt of a Retention Grant at least doubles graduation rates. From 2011–21, receipt of an award tripled the graduation rates for Black students who received an award—from 21.4% to 64.4%. (R. 41:1–2.)

C. The Retention Grant supplements existing aid and is a miniscule addition to the overall aid picture.

Wisconsin Stat. § 39.44 is a tiny piece of the overall financial aid picture. By law, Retention Grants may not replace institutional aid available to students. Wis. Stat. § 39.44(3)(b).

The Board oversees multiple financial aid programs for students enrolled at higher educational institutions in Wisconsin other than the University of Wisconsin system, including technical colleges, independent colleges, and tribal colleges. Wis. Stat. § 39.28(1); (R. 46:2). The largest among them, the Wisconsin Grant, Wis. Stat. § 39.30, accounts for nearly 94% of all aid dollars administered by the Board, and it is available to all students regardless of race, ethnicity, or national origin. (R. 54:8.) Wisconsin Stat. § 39.44, in contrast, represents less than one-half of one percent of total aid dollars administered by the Board.

Specifically, for 2023 and 2024, the Legislature set aside $819,000 for Retention Grants for each fiscal year. 2023 Act 19; Wis. Stat. § 20.005 (money set aside for § 20.235(1)(fg)). For those same years, the budget bill set aside $141 million for all financial aid programs administered by the Board. *See* Wis. Stat. § 20.005 (amounts set aside for 20.235, GPR program totals for HEAB student support).

That Board-administered aid does not include financial aid available through the federal government and at each institution. It does not include aid administered by the Universities of Wisconsin, including statutory programs that institution administers. State aid is only about 9% of total aid available to students, and the Retention Grant is about one-half of 1% of that. (R. 54:7–8.)

D. The Retention Grant is annually reviewed and funded biennially.

In 2001, the Legislature added a requirement that the Board "report . . . on the effectiveness of the [Grant] program" annually. 2001 Wis. Act 16 § 1383. Since then, the Board annually submits a detailed, data-driven report to the Legislature on the effectiveness of the Retention Grant and its continued necessity. (R. 46:3–4.)

The Board's appropriation for Wis. Stat. § 39.44 appears in Wis. Stat. § 20.235(1)(fg), which authorizes the Board to spend funds on the Retention Grant. *See also* Wis. Stat. § 39.44(2). The amount of funds set aside in that appropriation appear in the schedule in Wis. Stat. § 20.005, which sets aside GPR funds on a year-by-year basis.

III. Procedural history.

A. Respondents brought a facial challenge to Wis. Stat. § 39.44.

Respondents brought suit in the Jefferson County Circuit Court to challenge the constitutionality of Wis. Stat. § 39.44, claiming it unlawfully discriminates in violation of state and federal equal protection principles. (R. 21:1–2.) They conceded that they would lack standing under Article III to bring suit in federal court. (R. 21:3.) The Complaint asked to amend the law so that it was available to all students. (R. 21:12.)

The parties filed cross-motions for summary judgment. The Board supported its motion with the opinions of two expert witnesses, explaining why the Retention Grant is necessary, effective, and narrowly tailored. (R. 39; 55.) Respondents did not retain experts, depose the Board's experts, or otherwise attempt to rebut their reports. The Board also supported its motion with hundreds of pages of supporting documents, including historical studies and reports, social science studies, and data. (R. 41; 47; 49–50; 55.) Respondents submitted no evidence to challenge the Board's evidence.

The circuit court (Hue, J.) granted summary judgment in the Board's favor. (R. 61, PFR App. 1–50.) After "reluctantly" concluding that Respondents had standing, it held that the Retention Grant was lawful because the Board's unrefuted evidence showed that the program furthered a compelling interest and was narrowly tailored to that end. (R. 61:25–46, PFR App. 28–49.)

The court first concluded that, under the undisputed evidence, Wis. Stat. § 39.44 furthers the compelling interest of "helping minority students with financial need remain enrolled in school and graduate." (R. 61:25–30, PFR App.

28–33.) The court next evaluated whether the law is narrowly tailored to further its compelling interest. (R. 61:30–46, PFR App. 33–49.) The court observed that there was no precedent applying narrow tailoring to financial aid. But, recognizing that context matters in this arena, the court applied the factors to the undisputed facts. (R. 61:36–38, PFR App. 39–41.)

The court concluded that the unrefuted evidence showed that there were no race-neutral alternatives to the program because race-neutral alternatives did not work nearly as well. (R. 61:38–39, PFR App. 41–42.) The court also noted that the Retention Grant is limited, representing less than 1% of total aid available to needy students. (R. 61:42, PFR App. 45.) The court concluded the evidence showed that the program does not burden non-minority students because it does not take aid dollars away from them. (R. 61:44–45, PFR App. 47–48.) The court also held that the program is subject to multiple levels of review, annually through the Board's statutory reporting and biennially through the budget process. (R. 61:43–44, PFR App. 46–47.)

Respondents appealed. (R. 62.)

B. The court of appeals reversed the circuit court.

On February 26, 2025, in a decision recommended for publication, the court of appeals reversed the circuit court. (PFR App. 51–102 (*Rabiebna v. HEAB,* No. 2022AP2026, 2025 WL 657120 (Wis. Ct. App. Feb. 26, 2025) (publication recommended)).)

Regarding standing, the court held that *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, controlled and conferred taxpayer standing on plaintiffs. (PFR App. 57.) In ruling there was a qualifying "expenditure" under *Fabick*, the court brushed aside the fact that the plaintiffs did not seek to void the Retention Grant altogether but rather only sought to

change the law so the money was spent differently. (R. 21:12 (amended complaint); PFR App. 60.)

On equal protection, the court relied on the U.S. Supreme Court's *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"). (PFR App. 52–53.) Although *SFFA* involved college admissions, not financial aid, the court concluded it was "easily applicable to the financial aid context." (PFR App. 62.)

The court held that retention was not a sufficiently "extraordinary" interest to constitute a compelling governmental interest under strict scrutiny. (PFR App. 76.) Regarding narrow tailoring, the court broadly stated that "[r]ace as a determinative criterion is flatly impermissible under the Equal Protection Clause." (PFR App. 85.)

As to whether the law treats race as a negative, the court held that, despite the undisputed expert testimony, the Retention Grant burdened other students. And the court criticized the statute as having no specific "end point," (PFR App. 97), dismissing the annual reporting and the Legislature's biennial decision about how to set aside funds. (PFR App. 98.)

The court "reverse[ed] the order of the circuit court and remand[ed] for the court to enter an order enjoining HEAB and Hutchinson from further administering the grant program or distributing funds thereunder." (PFR App. 101–02.)

The Board now petitions for review.

REASONS WHY THIS CASE MEETS THE CRITERIA FOR REVIEW

The decision below merits this Court's review because it presents real and significant questions of state and constitutional law, and review will help develop the law and presents novel questions, the resolution of which will have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(a), (c)1.–3.

ARGUMENT

I. Review of the equal protection issue presents a real and significant issue of federal and state constitutional law; review will develop the law and is an issue critical to the people of Wisconsin.

A. The constitutionality of Wis. Stat. § 39.44 presents a real and significant question of federal and state constitutional law.

This case presents a real and significant question of constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a). In reversing the circuit court, the court of appeals relied on a U.S. Supreme Court case about college admissions policies to reject any law providing race-conscious financial aid. The financial aid context has not been addressed by this Court or the U.S. Supreme Court.

This case involves a facial challenge to the validity of Wis. Stat. § 39.44. To succeed in a facial challenge, the challenging party "must show that the statute cannot be enforced under any circumstances." *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). This Court has emphasized that such a task is "no small wall to scale," *id.* ¶ 39, and it has explained that the U.S. Supreme Court has described facial challenges as "disfavored" because of the danger of judicial overreach, *id.* ¶¶ 40–41.

1. Laws like Wis. Stat. § 39.44 must meet strict scrutiny, but that standard considers context and is not fatal in fact.

Laws may make distinctions based on race and still comply with the U.S. and Wisconsin Constitution's 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).

The Equal Protection Clause "guarantees every person the right to be treated equally by the State, without regard to race." *Fisher*, 570 U.S. at 316. Wisconsin's constitution similarly guarantees the right to equal protection. Wis. Const. Art. I § 1. The two constitutional provisions have been "interpreted in an equivalent manner." *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 38 n.12, 235 Wis. 2d 610, 612 N.W.2d 59.

Under the Equal Protection Clause, "racial classifications imposed by government 'must be analyzed by reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted). Not all racial classifications are invalid. *Id.* at 327. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.*

The U.S. Supreme Court has recognized multiple interests as "compelling" for purposes of strict scrutiny. They include diversity in higher education. *See Fisher*, 570 U.S. at 309 (citation omitted); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., concurring). They include equal educational opportunity where the state undertakes to provide public education. *Parents Involved in Cmty. Sch.*, 551 U.S. at 878–88 (Kennedy, J., concurring and concurring in the judgment). State actors

may also seek to "remediat[e] specific, identified instances of past discrimination." *SFFA*, 600 U.S. at 207.

SFFA reflects the U.S. Supreme Court's most recent review of an affirmative action effort, specifically in the context of race-based college admissions policies. The *SFFA* Court did not overrule cases such as *Bakke* that held diversity can be a compelling interest for purposes of strict scrutiny. Rather, it elucidated a three-part test to determine whether diversity-based admissions policies are constitutional.

First, to comply with strict scrutiny, university admissions programs must have a compelling interest and "a meaningful connection between the means they employ and goals they pursue." *SFFA*, 600 U.S. at 215.

To have a compelling interest, a university's admissions program must have goals that are sufficiently coherent to enable judicial review. *Id.* The *SFFA* Court examined two university programs that articulated interests such as "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." *Id.* at 214 (discussing Harvard College's goals). The Court concluded that those goals were not "sufficiently coherent" because they were not measurable by a reviewing court: "[h]ow many fewer leaders Harvard would create without racial preference, or how much poor the education at Harvard would be, are inquiries no court could resolve." *Id.* at 214–15.

The Court contrasted those interests with measurable goals like race-based benefits in the workplace, which make members of the discriminated class "whole for [the] injuries they suffered," or race-based remedial action in schools that produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Id.* (quoting *Franks v. Bowman Transp.*,

424 U.S. 747, 763 (1976), and *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420).

Strict scrutiny also requires narrow tailoring, which the Court held requires an admissions program using racial classifications to have a "meaningful connection between the means [it] employ[s] and the goals [it] pursue[s]." *Id.* at 215. The *SFFA* 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. *Id.* at 216–17.

Second, *SFFA* held that race may never be used as a "negative" or "stereotype." *Id.* at 214, 218. As to the "negative" factor, the Court reasoned that the universities' policies ran afoul of that principle because "[c]ollege admissions are zero-sum. A benefit provided to some applications but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19. The Court pointed to drop-offs in admission for Asian-American applicants, whose race did not count as "diverse," as caused by the admissions policy. *Id.* at 218.

As to the "stereotype" factor, *SFFA* reasoned that a university's treatment of a student as creating diversity based on race alone "engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Id.* at 220–21 (citation omitted).

Third, the Court held that race-based admissions must have a "logical end point." The Court said that 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, so that the program would no longer be needed. *Id.* at 224.

The Supreme Court's formulation of the strict scrutiny test, including its understanding of compelling interests, has

been made in the context of affirmative action programs where a finite set of benefits must be allocated among competing individuals. *SFFA*, 600 U.S. at 218–29; *Parents Involved in Cmty. Sch.*, 551 U.S. at 710 (parents sued over limited spots in desirable schools); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (quota of public contracts gives them to some citizens instead of others). In that context, the Court has held that remedying societal discrimination is not a compelling interest for purposes of strict scrutiny.

In *Bakke,* an affirmative action college admissions case, Justice Powell explained why societal discrimination is insufficiently compelling in a zero-sum setting: "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Bakke*, 438 U.S. at 307 (Powell, J.). Justice Powell reasoned that "it cannot be said that the government has any greater interest in helping one individual *than in refraining from harming another*." *Id.* at 308–09 (emphasis added).

For zero-sum benefit allocation, remedying societal discrimination is not a compelling interest because the program's cost must be borne by people who did not personally participate in the constitutional wrong but now cannot obtain a benefit they otherwise would have obtained. Outside the context zero-sum benefit programs, the Court has not considered the types of harms that may constitute a compelling interest.

2. Plaintiffs failed to show that Wis. Stat. § 39.44 is unconstitutional, much less unconstitutional in every application.

Wisconsin Stat. § 39.44 is constitutional, even assuming that *SFFA*'s test for racial classifications in college

admissions applies to a statute providing financial aid to targeted groups.

First, the statute satisfies strict scrutiny. The statute's purpose in improving retention rates for the four categories of students—students whose retention rates are dramatically lower than those of students outside those categories—is a compelling interest.

The law seeks to retain the population of students at multiple private colleges and Wisconsin technical colleges—matriculating classes selected by those institutions through their own admissions policies. The targeted aid seeks to avoid attrition, or failure of persistence, for groups of students who drop out of their programs at disproportionally high rates. (R. 55:16–18; 39:7, 9) (explaining that the Retention Grant is designed to promote diversity in higher education).) Without retention, the classes that each of the colleges and universities admitted dwindle as more and more students drop off each year.

Campus diversity is meaningless if it exists only among freshman students: "[p]ut simply, if a university has a compelling interest in student body diversity . . . surely it has an equal interest in ensuring that it also can attract and retain those students." Alexander S. Elson, *Disappearing Without a Case—the Constitutionality of Race-Conscious Scholarships in Higher Education*, 86 Wash. U. L. Rev. 975, 1010 (2009) (citation omitted). "Implicit in the goal of *having* a diverse student body is *retaining* a diverse student body after the students are admitted." (R. 39:9–10.)

Beyond diversity, retention also furthers equal educational opportunity and addresses the historical societal discrimination that underly the differentials in retention.

SFFA defined compelling interests not as a set list, but rather based on whether an interest is measurable, and thus reviewable by a court. *SFFA*, 600 U.S. at 213–17. Wisconsin

Stat. § 39.44 has measurable goals. Unlike the generalized goals the Court 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 problem that is quantifiable.

Section 39.44 also satisfies *SFFA*'s means-to-ends test. The statute surgically targets students in the groups experiencing disproportionally high attrition. That targeting achieves significantly improved rates of retention and graduation for those who receive a grant compared to those who do not. Student graduation or retention rates were 85% in 2016–17, 77% in 2017–18, and 81% in 2018–19. (R. 47:13, 21, 29.)

The statute addresses a retention problem that race neutral financial aid does not. As the Board's expert concluded, "in my opinion, and the opinions of other scholars in this field, a mere focus on socioeconomic status and using need as a basis would not provide the results that the schools currently obtain through the use of the [Grant] Program. Often, such a change reduces yield rates of [minority] students." (R. 39:17.)

The statute satisfies strict scrutiny because it has a measurable compelling interest and is narrowly tailored to address that goal.

Second, the statute does not treat race as a "negative." *SFFA*, 600 U.S. at 214, 218. Unlike college admissions or public contracting, where choosing a minority applicant means that another candidate must lose her spot, Wis. Stat. § 39.44 does not deprive others of the opportunity for a finite benefit.

Even before *SFFA*, scholars have recognized the need to examine scholarship programs' impact on students who are ineligible for those programs: "[t]o determine whether a scholarship imposes an undue burden, a court must analyze

the scholarship's place within the context of financial aid distribution at the university." Elson, 86 Wash. U L. Rev. at 1016. "On the one hand, race-exclusive financial aid may impose a burden when it reallocates a fixed resource in order to benefit minorities at the expense of nonminorities." *Id.* But if "there are sufficient opportunities to obtain scholarship dollars through other university programs, a race-exclusive scholarship would shut out students of other races only minimally, because the race-based assistance would represent a relatively minor portion of the entire pot of aid, and therefore would be narrowly tailored enough to withstand legal scrutiny." *Id.* (citations omitted).

Wisconsin Stat. § 39.44 easily satisfies that standard. The statute's appropriated dollars are miniscule in the overall grant picture. The vast majority even of the Board's state aid dollars is available to any student regardless of race. In the most recent biennial budget, the Legislature appropriated $22,971,700 per year to fund Wisconsin Grants under Wis. Stat. § 39.30. *See* Wis. Stat. § 20.005 (GPR amounts for § 20.235(1)(ff)); Wis. Stat. § 20.235(1)(b), (ff). The Talent Incentive Grant, available to any student that is "uniquely needy," Wis. Stat. § 39.435(1); *see also* Wis. Admin. Code HEA §§ 5.04, .05, received an appropriation of $4,458,800 each year in the last budget. *See* Wis. Stat. § 20.005 (GPR amounts for 20.235(1)(fd)); Wis. Stat. § 20.235(1)(fd). There is no capped amount on what the Legislature could choose to set aside for these programs. And total Board aid is itself a tiny percentage of the overall aid picture. The Retention Grant reflects less than 1% of overall aid.

The Legislature's choice to set aside a small amount of additional money under Wis. Stat. § 39.44—money that, by definition, cannot "replace" institutional grant funds, Wis. Stat. § 39.44(3)(b)—does not deprive students outside its scope of financial aid they would otherwise receive.

Section 39.44 also does not run afoul of the "stereotype" factor identified in *SFFA*. "Stereotype" matters in the admissions context when it treats a student's race, standing alone, as how universities achieve diversity. *SFFA,* 600 U.S. at 220–21 (such treatment "engages in the offensive and demeaning assumption that students of a particular race, because of their race." (citation omitted)). The Retention Grant, in contrast, makes no decisions about how universities and technical colleges build their classes—it simply helps them maintain the classes they chose by ameliorating attrition in groups demonstrably and disproportionally affected by drop-out rates.

Third, the program is constantly reviewed to ensure that it is effective and justified by retention rates, and it must be biennially funded. The Legislature receives annual reports from the Board, and if it concludes that the law is not reducing attrition, or that disproportionate attrition is no longer a problem faced by the State, it can change the biennial appropriation or repeal the law.

3. Even if some applications of Wis. Stat. § 39.44 were unconstitutional, it would fall far short of facial invalidation.

In the circuit court, Respondents disputed none of the evidence presented by the Board and offered no conflicting evidence of her own. On appeal, the court of appeals undertook to dissect the Board's evidence, arguing that statistics about University of Wisconsin attrition, for example, did not show that technical college students face similar challenges, or that the Board had insufficient data about Southeast Asian populations. (PFR App. 79–83.)

The court of appeals' understanding of the evidence is wrong, but even if it had been correct, it would have been insufficient to facially invalidate the statute. Respondents had to show that the statute was unconstitutional in every

application, and the court of appeals' quibbling at the margins would fall far short of that standard.

4. The court of appeals misunderstood the U.S. Supreme Court's precedents and the undisputed facts presented to the circuit court.

The court of appeals also misunderstood U.S. Supreme Court precedents, including how they would apply in the context of s state financial aid statute, and ignored or misapplied the evidentiary record.

First, the court of appeals misread the U.S. Supreme Court's precedent, including *SFFA*. The court of appeals understood *SFFA* to have concluded that diversity is no longer a compelling interest in any case. (PFR App. 74–75.) That is incorrect. Had the court wanted to categorically reject the value of diverse student populations as a compelling interest, it could have said so. Instead, it articulated a way to define compelling interest—based on whether the goals were measurable and thus reviewable by courts. *SFFA*, 600 U.S. at 214.

The court of appeals also concluded that the "zero sum" problem with the admissions policies at issue in *SFFA* was "not 'key' to the mission." (PFR App. 86.) That is also incorrect. That issue was the point of the "negative" factor in the Supreme Court's test, not a passing remark: the Court detailed the decrease in Asian-American admissions caused by the universities' policy. And the court of appeals' view is inconsistent with Justice Powell's explanation of compelling interests in *Bakke*, where he identified the zero-sum quality of affirmative action programs as why courts must strictly limit the types of problems affirmative action may seek to remedy. *Bakke*, 438 U.S. at 307 (Powell, J.).

The court of appeals also misunderstood *SFFA*'s discussion of the universities' six racial categories. (PFR

App. 94.) The court of appeals assumed that in crafting Wis. Stat. § 39.44, the State needed to justify why other groups like people with ancestry in the Middle East were ineligible for the financial aid. (PFR App. 94.) But the court took *SFFA*'s discussion of students with such backgrounds out of context.

In the admissions programs at issue in *SFFA*, the universities used students' ancestry as a proxy for diversity, and the Court questioned the rationality of treating only some types of ancestry as diverse. *SFFA*, 600 U.S. at 216. In contrast, Wis. Stat. § 39.44 identifies four groups for a completely different reason: statistically high attrition rates compared to the student population as a whole. Race is not a symbol of a diversity—it is a measurable way to identify student groups with disproportionate attrition who will be assisted by targeted aid.

Second, the court of appeals ignored or dismissed the extensive factual record developed in the circuit court.

The court focused on evidence from the mid-1980s, when the statute was first conceived, about attrition rates among students at the University of Wisconsin. (PFR App. 74–80.) It treated this evidence as irrelevant in the context of Wis. Stat. § 39.44, because unlike that statute's partner statute, Wis. Stat. § 36.25(17), the monies are awarded to students at Wisconsin private schools, tribal colleges, and technical colleges. But the court offered no explanation of why the distinction in school matters, and it ignored the continuing, up-to-date evidence about attrition rates both at two-year and four-year programs.

Similarly, the court of appeals ignored the evidentiary record in concluding that race neutral aid solves attribution, speculating that students with more time to "recreat[e]" and study will naturally stay enrolled. (PFR App. 98 n.25.) Again, that ignored the evidence: the evidence demonstrated that

race neutral financial aid did not have the same benefits for persistence that the Retention Grant does.

B. Review will help clarify the law, and this case presents a novel question, the resolution of which will have statewide impact.

Beyond the critical constitutional issue presented, review will also help develop the law and resolve a novel question, with statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)1., 2.

Respondents and the court of appeals treat this case as controlled by the U.S. Supreme Court's decision in *SFFA*. That case provides guidance, but financial aid presents distinct issues from a university's admissions policies. This Court's review will develop the law and address that novel question.

The resolution of this case will have statewide impact. The undisputed factual record demonstrates the critical, positive impacts on retention for Wis. Stat. § 39.44 scholarship recipients—benefits no race neutral financial aid has been able to replicate. Without the statute's benefits, current and future recipients will face the same attrition risk that existed before the statute was enacted.

II. Review of the standing question presents a real and significant issue of law, review of which will clarify that law.

The question of standing here also merits this Court's review. The standing question here is particularly important because Respondents asserted that they would lack standing in federal court in order to avoid removal, despite their federal claim.

Respondents pled no injury personal to them. They conceded they would not have standing in federal court under

Article III, which they asserted to avoid removal to federal court: "Plaintiffs' taxpayer standing would be insufficient thereby preventing removal by Defendants to federal court." (R. 21:3.) While they asserted taxpayer standing, the relief they sought was not to eliminate the statute but rather to "[e]njoin Defendants from administering [its] race, national origin, and alienage classifications." (R. 21:12.)

Wisconsin's taxpayer standing has not been construed to include situations where a plaintiff simply wants to treat public money in a different way rather than stopping the spending entirely. Wisconsin standing doctrine follows a two-part analysis "similar to the federal test," *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983), including in cases "involving a constitutional challenge." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 46, 333 Wis. 2d 402, 797 N.W.2d 789.

The first step determines whether the complained-of infraction "directly causes injury to the interest of the petitioner." *Fox*, 112 Wis. 2d at 524 (citation omitted). "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 525 (quoting *Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

"The second step is to determine whether the interest asserted is recognized by law." *Id.* at 524 (citation omitted). Courts look to the "provision on which the claim rests" and ask whether it "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 46. Restated, "the complainant 'must have a legal interest in the controversy—that is to say, a legally protectible interest.'" *Id.* ¶ 47 (emphasis and citation omitted).

Taxpayer standing does not negate the requirement that the plaintiff have a legally protectible interest, not just a factual interest in a topic. The U.S. Supreme Court "has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482–83 (1982) (citation omitted).

For taxpayer standing, a plaintiff must have suffered, or will suffer, some actual "pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). In identifying such an expenditure, "the taxpayer must allege and prove *a direct and personal pecuniary loss*, a damage to himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988) (emphasis added).

The court of appeals relied on *Fabick*, but that case did not overrule Wisconsin's standing precedent. To the contrary, the court reiterated *S.D. Realty Co.*'s "pecuniary loss" requirement. *Fabick*, 396 Wis. 2d 231, ¶ 11. *Fabick* concluded the requirement was met in that case because an emergency order caused a costly deployment of national guard troops. *Id.*

Here, there is no proper reading of the complaint that affords Respondents standing. The court of appeals tried to generate standing by treating the Complaint as seeking to negate all spending under the statute, but its job was to evaluate standing based on the Complaint as pled. There, Respondents pointed to no pecuniary loss, much less one special to them.

Particularly in a case where federal claims are at issue and the plaintiffs assert they would have no standing to raise those claims in federal court, this Court should clarify that taxpayer standing requires a particularized monetary injury

to the plaintiff, not just an interest in seeing government carried out in a particular way.

CONCLUSION

Petitioners ask this Court to grant the petition for review.

Dated this 26th day of March 2025.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 6,886 words.

Dated this 26th day of March 2025.

Electronically signed by:

Charlotte Gibson
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

Dated this 26th day of March 2025.

Electronically signed by:

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APPENDIX CERTIFICATION

I hereby certify that filed with this petition or response, either as a separate document or as a part of this petition or response, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and that contains, at a minimum:(1) a table of contents; (2) the decision and opinion of the court of appeals; and (3) the findings or opinion of the circuit court necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of March 2025.

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