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

BRIEF OF PETITIONERS

JOSHUA L. KAUL
Attorney General of Wisconsin

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

MICHAEL D. MORRIS
Assistant Attorney General
State Bar #1112934

AARON J. BIBB
Assistant Attorney General
State Bar #1104662

Attorneys for Plaintiffs-Respondents-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218
(608) 294-2907 (Fax)
charlie.gibson@wisdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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 certain Southeast Asians 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 a tiny fraction 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 created by the Legislature and Governor.

The four respondents here, who are not students themselves and who concede 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 (together, the Board) presented the court with expert reports, social science data, and statistics to demonstrate that the program passed muster under strict scrutiny.

The circuit court agreed that it did. The statute reflects the State's compelling interest in reducing disproportionate attribution in these four groups of college students, and is narrowly tailored to solve that problem.

The court of appeals reversed, but it misunderstood the U.S. Supreme Court's holding in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* 600 U.S. 181 (2023) (*SFFA*), and it ignored the extensive evidence in the record demonstrating the program's efficacy.

SFFA clarified the Court's equal protection test in the context of college admissions programs. And even assuming that the *SFFA* analysis applies to a scholarship program, Wis. Stat. § 39.44 would pass *SFFA*'s test: the program has compelling, measurable interests; it does not create a zero-sum system where others lose out on a finite, competed-for benefit; and it must be affirmatively re-funded every two years through the democratic process. The Supreme Court did not create a test that no program can pass, and Wis. Stat. § 39.44 illustrates that fact.

Respondents' claim also should have been dismissed because they lacked standing. Respondents asserted only taxpayer standing, but the program causes them no pecuniary injury, and the relief they sought in their Complaint would not have even resulted in a difference in government spending.

ISSUES PRESENTED

1. Government programs using racial classifications are constitutional if they have a compelling interest and are narrowly tailored to address that interest. In *SFFA*, the Supreme Court held that college admissions policies that consider race must have a measurable compelling interest, a lack of substantial harm to other groups, and a way to measure an appropriate end.

Wisconsin Stat. § 39.44 addresses disproportionate attrition rates among Black, Hispanic, American Indian, and certain Southeast Asian students by awarding grants, beginning sophomore year, through the Wisconsin technical colleges, private colleges, and tribal colleges the students attend. The grants dramatically reduce attrition rates for their recipients. Annual reports keep public officials apprised of the program's performance, and the Legislature and Governor choose whether and how to fund the program biennially. It is currently funded at less than one-half percent of aid administered by the Board.

Does Wis. Stat. § 39.44 satisfy equal protection?

The circuit court said yes.

The court of appeals said no.

2. For a plaintiff to have standing, a plaintiff must have suffered a real and immediate injury and 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.

Here, Respondents are not students seeking financial assistance. Instead, as taxpayers, their Complaint challenged some of the criteria governing the statute but did not allege any pecuniary loss, or even seek to have fewer taxpayer dollars spent. They asserted that they did *not* have standing to appear in federal court but said that, as taxpayers, all that mattered was their interest in how government funds were spent.

Did Respondents lack taxpayer standing to bring this case?

The circuit court said no.

The court of appeals said no.

STATEMENT OF THE CASE

This case is a challenge to a financial aid grant program, Wis. Stat. § 39.44, called the minority undergraduate retention grant. It addresses a retention problem among certain groups in higher education: on average, Black American, Hispanic, American Indian, and certain Southeast Asian students[1] drop out of school or fail to graduate at

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

substantially higher rates than their peers. The 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 did not solve.

In May 1983, the Superintendent of Public Instruction and the 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 committee expressed its mission as a joint enterprise "undertaken by the committee with the belief that cooperative educational initiatives were needed to improve the educational opportunities of minority-group people." (R. 55:3.) The joint committee held meetings across the State, heard testimony, received comments from a diverse group of stakeholders, and reviewed projects and studied papers relevant to their mission. (R. 55:3.) It compiled its findings and recommendations into a report issued in May 1984. (R. 55:3.)

The report concluded that "[e]quality of educational opportunity is not yet a reality in the State of Wisconsin, and that "our public educational system is not serving minorities as fully as their White counterparts." (R. 55:12.) Specifically, the report found not only that Black, Hispanic, and Native American students were 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.)

Calling for change, the committee concluded that Wisconsin must do more to achieve equal opportunity in its educational system: "[i]t 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.) The committee cautioned that the State "not forget the need for special efforts and programs designed to insure the proper education of Black, Asian, Hispanic, and American Indian students." (R. 55:11.) The committee concluded that "[w]e hope [this report] will produce results that will move Wisconsin closer to the goal of equal educational opportunity for all its citizens." (R. 55:12.)

The committee recommended a statutory retention grant that "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, which had improved minority retention and graduation rates to "approximately 80%." (R. 55:17.) 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.)

In response, 1985 Wis. Act 29 created two statutory programs with the goal, as the Legislative Fiscal Bureau explained, of "encourag[ing] minority undergraduate students to remain in the University by providing financial support." (R. 49:4.) Wisconsin Stat. § 39.44, the retention grant for technical colleges and private schools, is administered by the Board; a sister program for the University of Wisconsin System, codified today at Wis. Stat. § 36.34(1), is administered by the Board of Regents. The law initially made the grant available to "Black, Hispanic[,] and American Indian undergraduates." 1985 Wis. 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 expanded eligibility to Southeast Asian students from Laos, Vietnam, or Cambodia, whose families had immigrated after 1975. 1987 Wis. Act 27 § 683s; (R. 49:17).

The Legislature and Governor have affirmatively chosen to continue the program each biennium since that time, including for the 2026–27 budget cycle. 2025 Wis. Act 15.

B. Retention differences persist today.

Although the retention program has been in place for several decades, the need for its aid persists. The retention differences between the four groups and overall student population continue 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 eligible for the grants, 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.)

C. Today, the program provides need-based grants to undergraduates, awarded by the individual colleges the students attend.

Today, the program provides need-based grants to undergraduates in four groups:

> (1) (a) In this section "minority undergraduate" means an undergraduate student who:
>
> 1. Is a Black American.
>
> 2. Is an American Indian.
>
> 3. Is a Hispanic, as defined in s. 16.287(1)(d).
>
> 4. Is a person who is admitted to the United States after December 31, 1975, and who either is a former citizen of Laos, Vietnam or Cambodia or whose ancestor was or is a citizen of Laos, Vietnam or Cambodia.

Wis. Stat. § 39.44(1)(a). Institutions receiving funds choose grant recipients based on financial aid, without replacing other grants, and provide reports to the Board:

> (3) An institution or school receiving funds under sub. (2) shall:
>
> (a) Award grants to eligible students on the basis of financial need.
>
> (b) Demonstrate to the satisfaction of the board that such funds do not replace institutional grants to the recipients.
>
> (c) Annually report to the board the number of awards made, the amount of each award, the minority status of each recipient, other financial aid awards made to each recipient and the total amount of financial aid made available to the eligible students.

Wis. Stat. § 39.44(3).

The statute is administered by the Board, an executive branch agency established by Wis. Stat. § 15.67. It is responsible for "administer[ing] the programs" in subchapter III of Wis. Stat. chapter 39. Wis. Stat. § 39.28(1). While the Board administers the retention program, awarding half the funds to technical colleges and half to private non-profits, Wis. Stat. § 39.44(2), individual grants are awarded by the participating Wisconsin technical colleges, private colleges, and tribal 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.)

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

A. The retention grant program achieves measurable, improved retention for recipients.

Wisconsin Stat. § 39.44 improves retention among recipients. In 2015–16, 80% of recipients either completed their degree or certificate or were continuing toward degree or certificate completion. (R. 47:5.) Similarly, recipient graduation or retention rates were 85% in 2016–17, 77% in 2017–18, and 80% in 2018–19. (R. 47:13, 21, 29.)

Enrollment and graduation data at Wisconsin technical colleges demonstrate that receipt of a retention grant at least doubles graduation rates at those institutions. From 2011–21, receipt of an award tripled the graduation rates for Black students who received an award—from 21.4% for students not receiving a grant, to 64.4% for those who did. (R. 41:1–2.) Across eligible minority groups, grant recipients graduated at more than double the rate of students who did not receive a grant, 69% to 29%. (R. 41:1–2.)

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 would have faced difficulties in doing so:

- "If I hadn't received the Minority Retention Grant, I would have had no way to fully pay for my schooling."
- "Receiving the Minority Undergraduate Retention Grant was critical in my success this academic year. . . . It allowed me to pursue a higher education without accruing debilitating student loan debt."

- "The Minority Undergraduate Retention Grant has allowed me to continue taking classes by helping me pay for them. Without this grant, I wouldn't have been able to afford my classes and books."
- "Receiving the Minority Undergraduate Retention Grant was important to me because I really wanted to finish school to further my career. As a single mother, I put my education on hold to care for them and, in turn, I still had a lot of loans to pay back. This grant assisted in me completing my financial obligations tie with furthering my education and limited the need for me to add to the loans I already owe."

(R.47:42, 8, 16, 24, 32.)

B. Wisconsin Stat. § 39.44 supplements existing aid and is a minuscule addition to the overall aid picture.

Wisconsin Stat. § 39.44 is a tiny piece of the overall financial aid picture.

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 ¶ 10)[2] For 2025–26 and 2026–27, the Legislature appropriated $26,861,200 and $28,939,700,

[2] Other examples of student aid programs administered by the Board include student loans (Wis. Stat. § 39.32), the Wisconsin health education loan program (Wis. Stat. § 39.325), the guaranteed student loan program (Wis. Stat. § 39.33), Indian student grants (Wis. Stat. § 39.38), tribal college payments (Wis. Stat. § 39.382), and the teacher loan program (Wis. Stat. § 39.399).

respectively, to the Board for Wisconsin grants for technical college students, and $30,394,100 and $32,472,600, respectively, as Wisconsin grants for private college students. 2025 Wis. Act 15, Wis. Stat. § 20.005 (listing appropriations in Wis. Stat. § 20.235(b) and (ff)). The Board's total appropriation for programs in each of these fiscal years is $148,667,200 and $154,902,600. 2025 Wis. Act 15 (discussing § 20.005 summary of § 20.235 appropriation).

Wisconsin Stat. § 39.44 represents less than one-half of one percent of total aid dollars administered by the Board. For 2025–26 and 2026–27, the Legislature set aside $819,000 for retention grants for each fiscal year. 2025 Wis. Act 15; Wis. Stat. § 20.005 (money set aside for § 20.235(1)(fg)).

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. Board-administered aid is about 9% of total aid available to students, and Wis. Stat. § 39.44 represents about one-half of 1% of that. (R. 54 ¶ 8.)

C. The retention grant program is reviewed annually 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 report to the Legislature on the effectiveness of the retention grant program and its continued necessity. (R. 46:12.) As part of assessing the data, the Board conducts an annual survey of the program's effectiveness, including surveying grant recipients and participating institutions. (R. 46 ¶ 12.)

The Board's appropriation for Wis. Stat. § 39.44 appears in Wis. Stat. § 20.235(1)(fg), which authorizes the Board to spend funds appropriated under the statute. *See also* Wis. Stat. § 39.44(2). The amount of funds set aside in that appropriation appears in the schedule in Wis. Stat. § 20.005, which appropriates 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 asserted 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. (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, Pet.-App. 1–50.) After "reluctantly" concluding that Respondents had standing, it held that the program 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, Pet.-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, Pet.-App. 28–33.) The court next evaluated whether the law is narrowly tailored to further its compelling interest. (R. 61:30–46, Pet.-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, Pet.-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, Pet.-App. 41–42.) The court also noted that the program is limited, representing less than 1% of total aid available to needy students. (R. 61:42, Pet.-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, Pet.-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, Pet.-App. 46–47.)

Respondents appealed. (R. 62.)

B. The court of appeals reversed the circuit court.

On February 26, 2025, in a published decision, the court of appeals reversed the circuit court. (Pet.-App. 51–102, *Rabiebna v. HEAB*, 2025 WI App 24, 416 Wis. 2d 44, 20 N.W.3d 742).

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. (Pet.-App. 57,

Rabiebna, 416 Wis. 2d 44, ¶ 10.) In ruling there was a qualifying "expenditure" under *Fabick*, the court said that another remedy, while not sought by Respondents prior to the appellate proceedings, was to eliminate the program. (Pet.-App. 59, *Rabiebna*, 416 Wis. 2d 44, ¶ 15; R. 21:12 (amended complaint).)

On the merits of the equal protection claim, the court relied on *SFFA*, which had been issued after the circuit court's decision and briefing in the court of appeals. (Pet.-App. 52–53, *Rabiebna*, 416 Wis. 2d 44, ¶¶ 2–3.) Although *SFFA* involved college admissions, not financial aid, the court concluded it was "easily applicable to the financial aid context." (Pet.-App. 62, *Rabiebna*, 416 Wis. 2d 44, ¶ 20 n.11.)

The court concluded that the Board failed to show that retention was a sufficiently "extraordinary" interest to constitute a compelling governmental interest under strict scrutiny. (Pet.-App. 74, *Rabiebna*, 416 Wis. 2d 44, ¶ 43.) It said that the Legislature had failed to explain why students of Middle Eastern descent were not included in the program. (Pet.-App. 94, *Rabiebna*, 416 Wis. 2d 44, ¶ 71.) The court did not discuss the record evidence about differences in persistence rates and the distribution of race-neutral aid, but concluded that students with more time to "recreat[e]" and study would naturally stay enrolled. (Pet.-App. 98, *Rabiebna*, 416 Wis. 2d 44, ¶ 79 n.25.)

As to whether Wis. Stat. § 39.44 treats race as a negative, the court concluded that, despite the undisputed expert testimony, the program burdened other students. And the court criticized the statute as having no specific "end point," (Pet.-App. 97, *Rabiebna*, 416 Wis. 2d 44, ¶ 77), dismissing the annual reporting requirements and the Legislature's biennial decision about whether and how to set aside funds. (Pet.-App. 98, *Rabiebna*, 416 Wis. 2d 44, ¶ 79.)

The Board petitioned for review.

STANDARD OF REVIEW

This Court reviews the circuit court and court of appeals decisions regarding summary judgment de novo. *See Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶ 11, 318 Wis. 2d 622, 768 N.W.2d 568.

ARGUMENT

Wisconsin Stat. § 39.44 is constitutional under the U.S. Supreme Court's precedents. Under the Court's traditional strict scrutiny analysis, the statute furthers the compelling interests of diversity and equal educational opportunity, and it is narrowly tailored to address them. *SFFA* created a detailed test specific to college admissions programs, but even if it applied in the context here, it is a test that the Wisconsin law satisfies.

Respondents also lack standing. Their Complaint averred that they lack standing to be in federal court, and they do not satisfy the requirements for taxpayer standing in state court, either.

I. Wisconsin Stat. § 39.44 is constitutional.

Wisconsin Stat. § 39.44 is constitutional under the Supreme Court's precedents. It advances compelling interests and is narrowly tailored to meet them. Even if *SFFA*'s college admissions test applies in a context like this one, Wis. Stat. § 39.44 satisfies those criteria, too: its compelling interests are measurable; it does not treat race as a negative or treat race as a proxy for diversity; and it must be affirmatively re-created every biennium based on annually–collected data.

A. Racial classifications are permissible where they satisfy strict scrutiny.

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* did nothing to exclude interests as compelling or to categorically prohibit racial classifications altogether; rather, it clarified the strict scrutiny analysis in the context of college admissions.

1. Race-based classifications must pass muster under strict scrutiny.

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 315–16. 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.

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

Under the Equal Protection Clause, "racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted). Under the Court's longstanding test, such a classification must have a compelling government interest and be narrowly tailored to address that interest. *Grutter*, 539 U.S. at 326–27. To satisfy strict scrutiny, "a State must show that its purpose is constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest." *Regents v. Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978).

Not all racial classifications are invalid. *Id.* at 327. The Court has cautioned that "[s]trict scrutiny must not be strict in theory, but fatal in fact." *Fisher*, 570 U.S. at 314. And "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327.

b. The Supreme Court has recognized multiple interests as compelling.

The Supreme Court has recognized multiple types of interests as compelling for purposes of strict scrutiny. That is so even in the context of programs like public contracting or college admissions, where a finite benefit must be awarded among competing individuals, necessarily creating winners and losers. *SFFA*, 600 U.S. at 218–29; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710 (2007) (parents sued over limited spots in school choice program); *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).

The Court has repeatedly recognized that diversity in higher education can be a compelling interest. *See Fisher*, 570 U.S. at 309; *Parents Involved in Cmty. Sch.*, 551 U.S. at 722; *Bakke*, 438 U.S. at 315 (Powell, J., concurring). This 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). Justice Powell, the deciding vote in *Bakke*, recognized that student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth 'out of a multitude of tongues' [rather] than through any kind of authoritative selection." *Bakke*, 438 U.S. at 312 (Powell, J., concurring).

Equal educational opportunity, where the State undertakes to provide education, can also be a compelling interest. *Parents Involved in Cmty. Sch.*, 551 U.S. at 878–88 (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.").

The remediation of past discrimination is another compelling interest. In the context of programs where individuals compete for a finite benefit, like college admissions or public contracting, the Court has defined the compelling interest as limited to remedying specific past instances of discrimination. *See Bakke*, 438 U.S. at 307–09 (Powell, J., concurring) (college admissions); *Parents Involved in Cmty. Sch.*, 551 U.S. at 710 (limited spots in desirable schools); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (public contracts awarded among competing contractors).

As Justice Powell explained in *Bakke*, in such contexts, the broader interest of remedying general societal discrimination is insufficient because giving one group a preference for a finite benefit happens "at the expense of other innocent individuals," and "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Id.* at 307, 308–09. The Court has not considered whether remedying past societal discrimination can be a compelling interest outside the context of programs where awarding a benefit to one person necessarily harms someone else.

2. *SFFA* clarified the strict scrutiny standard to evaluate race-based admissions policies, but it did not prohibit race-based classifications.

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 its prior equal protection precedent. Rather, it elucidated a three-part test to determine whether race-based college admissions policies are constitutional.

a. Admissions programs must have a compelling interest and a meaningful connection between means and ends.

In assessing whether the college admissions programs had a compelling interest, the *SFFA* Court did not categorically confine the types of interests the universities could pursue, but rather required that such interests be measurable, and thus reviewable by a court. *SFFA*, 600 U.S. at 213–17. The Court concluded that the interests articulated by the defendant universities—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—did not meet that standard. The Court concluded that they were not "sufficiently coherent" because they were not measurable by a reviewing court: "[h]ow many fewer leaders Harvard would create without racial preferences, or how much poorer 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.* (citation omitted) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (2022))

The Court held that an admissions program using racial classifications must 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.

b. Admissions policies may not result in race being used as a negative or a stereotype for diversity.

The Court next held that the universities could not use race as a "negative" or "stereotype." *Id.* at 218–20.

The "negative" factor flowed from the fact that "[c]ollege admissions are zero-sum. A benefit provided to some applicants 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.

The Court concluded that the universities violated the "stereotype" factor by treating race as a proxy for diversity. The court held 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.

c. Admissions programs must have a measurable way to know when their goals have been accomplished.

The Court finally held that race-based admissions must have a "logical end point." *Id.* at 221 (citation omitted). The Court discussed its past admissions programs precedent, which had forecast that society's need for them would pass within a few decades. *Id.* at 224–25. The Court held that the universities' admissions programs failed the end point 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 221.

*****

In sum, *SFFA* clarified the strict scrutiny test for college admissions programs that consider race with a detailed, three-part test. The test specifically addressed qualities of college admissions programs that had long concerned the Court. But the Court neither rejected all classifications based on race nor limited the interests that may be compelling in a given context.

B. Wisconsin Stat. § 39.44 satisfies equal protection.

Wisconsin Stat. § 39.44 fits comfortably within the longstanding strict scrutiny framework, with recognized compelling interests of diversity and equal educational opportunity and narrow tailoring to address those interests. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. This is because "[n]ot every decision influenced by race

is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* *SFFA*'s three-part test for college admissions, which addressed concerns not at issue in this scholarship context, does not apply.

But even assuming that *SFFA*'s test applies to a statute providing a modest amount of supplemental financial aid to targeted groups, Wis. Stat. § 39.44 satisfies it: its compelling interests are measurable by courts, because attrition can be quantitatively measured; it does not treat race as a negative or rely on stereotypes to define diversity; and it must be biennially re-funded by the Legislature and Governor, based on data the Board annually compiles.

1. The statute satisfies strict scrutiny under the Supreme Court's precedents.

Wisconsin Stat. § 39.44 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—advances compelling interests and is narrowly tailored to address them.

a. Reducing attrition advances compelling interests.

Wisconsin Stat. § 39.44 seeks to avoid attrition, or failure of persistence, for students at Wisconsin technical colleges, private colleges, and tribal colleges who drop out of their programs at disproportionally high rates. The program promotes diversity in higher education and furthers equality of educational opportunity.

First, reducing attrition fosters college diversity by helping the colleges retain more of the students from the incoming classes they composed. Significant attrition causes the diverse classes that each college or university admitted to dwindle as more students drop off each year. The point is not that those students are "diverse" due to their race: instead, attrition removes students who brought various kinds of diversity to the table, and targeting areas with disproportionate student loss maintains those many types of backgrounds and perspectives. The grant program simply helps colleges maintain their initial classes by ameliorating attrition in groups that are disproportionately dropping out after their freshmen year.

As one scholar explained, campus diversity is meaningless if it exists only among first-year 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 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 ¶ 38.)

Second, retention furthers equal educational opportunities. If a State chooses to offer educational opportunities to any of its residents, it must offer that opportunity equally to all. *Brown*, 347 U.S. at 493. Wisconsin has a compelling interest in furthering equality in opportunity to benefit from the educational programs it offers.

The 1984 Committee focused on the goal of equal opportunity, and it understood that equal opportunity includes the ability to *continue* with education. The Committee observed that "[e]quality of educational opportunity is not yet a reality in the State of Wisconsin," and that "our public educational system is not serving minorities

as fully as their White counterparts." (R. 55:12.) Specifically, the 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.) The committee said that Wisconsin must do more to achieve equal opportunity in its educational system: "[i]t 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.) And it expressed its hope that its work would "produce results that will move Wisconsin closer to the goal of equal educational opportunity for all its citizens." (R. 55:12.)

More generally, the goal of providing equal opportunity in education is also consistent with the right to education provided in the Wisconsin Constitution, which provides for a district education to students through age 20.[3]

One way the State has chosen to provide educational opportunity is through financial assistance to attend college. Wisconsin has developed extensive aid programs, appropriating $148,667,200 and $154,902,600 in 2025–26 and 2026–27. 2025 Wis. Act 15 (discussing § 20.005 summary of § 20.235 appropriations). But students in the four groups do not benefit equally as White students. Regarding need-based aid generally, White students receive need-based aid that is disproportionately relative to their numbers: 76% of white students receive need-based aid, but those students make up

[3] Expanding the right to education to people between 16 and 21 was a considered decision of Wisconsin's constitutional framers. The Attainment of Statehood, Journals and Debates, 574–75 (1928). In *Village of West Milwaukee v. Area Board of Vocational, Technical & Adult Education (Dist. 9)*, 51 Wis. 2d 356, 388–89, 187 N.W.2d 387 (1971), the Court treated article X, § 3 as applicable to technical colleges at least as to its requirement of uniform districts.

only 62% of the overall student population. (R. 26 ¶ 3.) That figure runs counter to the relative poverty levels of the groups: while 8.1% of White families have less than $30,000 per year in income, 45.7% of Black families, 46.1% of Hispanic families, and 26% of Native American families do. (R. 25 ¶¶ 17–18.)

The distribution of merit-based aid is even more lopsided. White students receive 75.6% of aid compared to 24.3% for minority students. (R. 54 ¶¶ 15, 28.) Board experts explained that merit-based aid flows primarily to students in high-performing high schools, because underprepared students are much less likely to qualify for that aid. (R. 54 ¶ 22.) As of 2025, Wisconsin's gap between Black and White students in math and reading is currently the largest in the nation among the States.[4]

Loans, the alternative to grants, pose greater risks for students in the targeted groups. One Board expert explained that the "default rate for Black low-income students is 48%, in contrast to 23% for White low-income students." (R. 25 ¶ 23.) Default rates for other groups are "similarly high," with Native Americans at 41% and Hispanics at 36%. (R. 25 ¶ 24.) Overall, the share of student loan holders with student loans in default is more than double among borrowers in communities of color.[5]

---

[4] Megan Carpenter, *Nation's Report Card shows mixed results in Wisconsin*, Jan. 29, 2025, https://spectrumnews1.com/wi/milwaukee/news/2025/01/30/u-s--department-of-education-s-national-assessment-of-educational-progress-2024-wisconsin ("The state, once again, ranked the worst in the nation for racial disparity, with the widest gap in math and reading scores between Black and white students.").

[5] *See also Debt in America: An Interactive Map, Wisconsin*, Urban Institute, https://apps.urban.org/features/debt-interactive-map/?type=overall&variable=totcoll&state=55 (last updated Nov. 20, 2025).

Families in the targeted groups also receive assistance that undercounts their need because of lower homeownership rates and home equity value. (R. 25 ¶¶ 26–27.) The Free Application for Federal Student Aid (FAFSA), used to calculate aid, excludes home equity. That results in a financial aid boost for families with that source of assets relative to families without it. (R. 25 ¶ 28.)

As Justice Jackson explained in her *SFFA* opinion, national home ownership rates for Black Americans lag those of White Americans by 25 percentage points. *SFFA* 600 U.S. at 394 (Jackson, J., dissenting). Wisconsin figures reflect an even greater difference. As of 2021, the State had the largest gap in homeownership in the Nation between White and Black homeowners: just 26% of Black residents owned their own homes, compared to the White homeownership rate of 72%.[6]

These factors illustrate why other aid offered by the State (as well as by the federal government and private sources) has a much lower rate of success in addressing the financial need of students in the targeted groups. The State has a compelling interest in providing equality of educational opportunity, and in the financial assistance sphere, other aid does not achieve that goal.

A second way the State has chosen to provide educational opportunities is through its system of technical colleges. Wisconsin was the first State to adopt a comprehensive system of vocational training. *Vill. of W.*

---

[6] PBS Wisconsin, *Homeownership Gap for People of Color in Wisconsin Is Wide — Communities, Nonprofits Try to Close It,* June 14, 2021, https://pbswisconsin.org/news-item/homeownership-gap-for-people-of-color-in-wisconsin-is-wide-communities-nonprofits-try-to-close-it/#:~:text=Wisconsin%20has%20one%20of%20the,ability%20to%20buy%20a%20home.

Milwaukee v. Area Bd. of Vocational, Tech. & Adult Educ. (Dist. 9), 51 Wis. 2d 356, 366, 187 N.W.2d 387 (1971).

The technical college system's statutory mission includes "provid[ing] services to all members of the public." Wis. Stat. § 38.001(1). And it seeks to

> [p]rovide education and services which address barriers created by stereotyping and discriminating and [to] assist individuals with disabilities, minorities, women, and the disadvantaged to participate in the work force and the full range of technical college programs and activities.

Wis. Stat. § 38.001(3)(e). Those purposes are consistent with the right to a uniform education provided in the Wisconsin Constitution, which provides for a uniform district education to students through age 20.[7] In the K-12 context, this Court has applied this standard with the goal of "equaliz[ing] outcomes, not merely inputs." *Vincent v. Voight*, 2000 WI 93, ¶ 53, 236 Wis. 2d 588, 614 N.W.2d 388 (plurality opinion) (citation omitted).

Wisconsin has compelling interests in reducing attrition in the four groups targeted by Wis. Stat. § 39.44. Reducing attrition at the colleges the students attend preserves the classes those institutions developed when the students began college. It provides aid to help equalize the opportunities for financial assistance to pay for college. And it equalizes the opportunity to complete a credential at a public technical college.

---

[7] Expanding the right to education to people between 16 and 21 was a considered decision of Wisconsin's constitutional framers. The Attainment of Statehood, Journals and Debates, 574–75 (1928). In *Village of West Milwaukee v. Area Board of Vocational, Technical & Adult Education (Dist. 9)*, 51 Wis. 2d 356, 388–89, 187 N.W.2d 387 (1971), the Court treated article X, § 3 as applicable to technical colleges, at least as to its requirement of uniform districts.

b. The statute is narrowly tailored.

Wisconsin Stat. § 39.44 is also narrowly tailored. It identifies specific groups with college attrition rates far above those of White and Asian students and creates very small, need-based scholarships to address that problem. That targeting achieves significantly improved rates of retention and graduation for those who receive a grant compared to members of those groups who do not.

The Board showed that these small grants work in a way that the generally available aid does not. At technical colleges, for example, enrollment and graduation data indicate that receipt of a retention grant at least doubles credential rates. From 2011–21, compared to students in their groups who did not receive a grant, receipt of an award tripled the graduation rates for Black students—from 21.4% to 64.4%; more than doubled the graduation rate for Hispanic (32.4% to 70.6%) and Native American (33.0% to 71.5%) students; and increased the credential rate for Southeast Asian students from 41.4% to 78.0%. (R. 41:1–2.)

Those statistics are consistent with the expert opinion in the case, which concluded that, "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 ¶¶ 57–59.)

The statute is narrowly tailored to address the attrition problem both by focusing on the groups with disproportionate attrition and then by awarding the funds to the students with the greatest financial need within those groups. Its success in reducing attrition is a marker of that tailoring.

2. If *SFFA* applies to a scholarship program like Wis. Stat. § 39.44, the statute satisfies that test, too.

Even if *SFFA* applies to a grant program like Wis. Stat. § 39.44, the statute passes that test, too. Its compelling interests are measurable and reviewable by a court; it does not create "victims" who lose out on aid they would have received; and it must be affirmatively continued each biennium, based on data collected by the Board.

a. The statute's compelling interests are measurable and reviewable by a court.

First, Wis. Stat. § 39.44's compelling interests are measurable and reviewable. 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 interest that a court can review.

Section 39.44 satisfies *SFFA*'s means-to-ends test. *SFFA*, 600 U.S. at 207. The statute 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 in those groups who do not. For example, the technical college system data showed that from 2011–21, compared to students their groups who did not receive a grant, receipt of an award tripled the graduation rates for Black students—from 21.4% to 64.4%. (R. 41:1–2.) A court can review whether that success rate adequately improves retention and the compelling interests it promotes—diversity and equal educational opportunity.

Under *SFFA*, the statute satisfies strict scrutiny because it has measurable, compelling interests.

b. The statute does not result in treating race as a "negative" or rely on stereotypes about diversity.

Second, the statute does not result in reducing race to a negative or people to a stereotype about diversity. *SFFA*, 600 U.S. at 214, 218.

SFFA's "negative" factor addressed the concern that offering a finite benefit to one group necessarily injures others. In the scholarship context, appropriating a small amount of money does not injure others unless they no longer can receive the aid they otherwise would have received. The question is the size of the aid in question relative to the broader financial aid picture; as one scholar explained, "[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. 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.*

Here, Wis. Stat. § 39.44 easily satisfies that standard. The statute's appropriated dollars are minuscule in the overall aid picture: .0009 percent overall, and less than one-half of one percent of Board-administered state aid. The Legislature and Governor's choice to appropriate a tiny amount of money does not deprive students outside its scope of financial aid they would otherwise have received.

Section 39.44 also does not run afoul of *SFFA*'s "stereotype" factor. The Court reasoned that "stereotype" matters in the admissions context when the universities treated a student's race, standing alone, as a proxy for the diversity of their campuses. *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."). Wisconsin Stat. § 39.44, in contrast, makes no decisions about how universities and technical colleges build diverse classes—it simply helps them maintain the classes they chose by ameliorating attrition in groups demonstrably and disproportionally affected by drop-out rates.

c. The program must be affirmatively re-funded every two years.

Third, Wis. Stat. § 39.44 has a built-in structure for ending when its need and efficacy cease. It is annually reviewed by the Board, and it must affirmatively be re-funded by the Legislature every two years. If the Legislature reviews the data and sees that attrition among the groups is no longer a significant problem, or that the program no longer succeeds in addressing that problem for grant recipients, it can simply reduce or eliminate the appropriation.

*****

Wisconsin Stat. § 39.44 satisfies the Supreme Court's traditional strict scrutiny analysis: it advances compelling interests and is narrowly tailored to address them in a way that race-neutral measures do not. *SFFA*'s test specifically addresses college admissions programs, but even assuming that its test for "zero sum" college admissions applies to a scholarship program like this one, Wis. Stat. § 39.44 satisfies that test. Its compelling interests are measurable; it does not treat race as a negative or stereotype; and it must be affirmatively re-created biennially.

C. Even if some subcategories of Wis. Stat. § 39.44 were unconstitutional, Respondents failed to show it is facially unconstitutional.

Respondents had to show that the statute was unconstitutional in every category of application. While a discriminatory statute generally is facially discriminatory as to any specific provision, Wis. Stat. § 39.44 includes discrete categories of recipients and specific types of educational institutions. Even if Respondents could have shown that the statute discriminated as to one of its categories—for example, that the State could not demonstrate that there was a compelling interest as to one of the groups of students—they did not do that work as to each category.

A challenger making a facial challenge to a statute must show that the statute cannot be enforced "under any circumstances." *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302. "Proving a legislative enactment cannot ever be enforced constitutionally 'is the most difficult of constitutional challenges' and an 'uphill endeavor.'" *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 39, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted).

In their response to the Petition for Review, Respondents asserted that where a statute discriminates (whether under equal protection or some other constitutional theory), it generally is necessarily a facial invalidation of the provision. Petition to Review Response 38–39. That is true for a particular discriminatory section or category of a statute. But here, Wis. Stat. § 39.44 has discrete statutory provisions for four groups of students and two types of educational institutions. *See, e.g.,* Wis. Stat. 39.44(2) (requiring that funding be split between technical and private colleges). So, for example, even if the Court concluded that the State showed a compelling interest only for technical college scholarships, Respondents still would not have proved that

the statute is unconstitutional in every category, which is what they must demonstrate for a facial challenge.

D. The court of appeals misunderstood the holding of *SFFA* and substituted the facts in the record with the court's assumptions.

In holding that Wis. Stat. § 39.44 was unconstitutional, the court of appeals misunderstood *SFFA* and misapplied the factual record, substituting unsupported facts of its own.

1. The court of appeals misunderstood *SFFA*.

The court of appeals misunderstood *SFFA* in three ways. It misunderstood it to categorically prohibit race-based classifications; discounted the importance of considering whether a program injures people outside its scope; and misapplied the Court's critique of using racial categories as a proxy for "diversity."

First, the court understood SFFA to have concluded that all racial classifications are invalid (Pet.-App. 74–75, Rabiebna, 416 Wis. 2d 44, ¶ 44 (concluding that diversity can no longer be a compelling interest).) That is incorrect. Had the Supreme Court wanted to categorically overrule past precedent, it would have said so. Instead, the Court articulated a way to define compelling interests in the context of college admissions programs—based on whether the goals were measurable and thus reviewable by courts. SFFA, 600 U.S. at 214.

Second, the court of appeals concluded that the "zero sum" problem with the admissions policies at issue in *SFFA* was "not 'key' to the decision." (Pet.-App. 86, *Rabiebna*, 416 Wis. 2d 44, ¶ 59.) That is also incorrect.

The "negative" factor was a key component of *SFFA*, not a passing remark. The Court pointed to the record's demonstration of injury to people related to the universities'

policies: a decrease in the number of Asian-Americans admitted to those colleges. *SFFA*, 600 U.S. at 218. Quoting *Grutter*, which cited Justice Powell's concern about injured innocent parties in *Bakke*, the *SFFA* Court stated that "all 'race-based governmental action' should 'remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons *competing for* the benefit." *Id.* at 212 (quoting *Grutter,* 539 U.S. at 341) (emphasis added; quotation and elision marks omitted). By ignoring the importance of this factor, the court of appeals failed to consider that record here showed no harm to ineligible students, who still can receive the overwhelming majority of state- and other aid.

Third, the court of appeals misapplied *SFFA*'s discussion of the universities' six racial categories, utilizing it for a very different purpose. (Pet.-App. 94, *Rabiebna*, 416 Wis. 2d 44, ¶ 71.) The court of appeals assumed that in crafting Wis. Stat. § 39.44, the State needed to justify why other groups, like people with Middle Eastern ancestry, were ineligible for the financial aid. (Pet.-App. 94, *Rabiebna*, 416 Wis. 2d 44, ¶ 71.) That 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 specific groups for a different reason: attrition rates far higher than the student population as a whole. The statute does not use race as a proxy for diversity—it uses it in a measurable way to identify specific groups with disproportionate attrition rates, who will be assisted by the statute's targeted aid.

2. The court of appeals ignored or dismissed the extensive factual record developed in the circuit court.

The court of appeals also ignored or dismissed the extensive factual record developed by the Board 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. (Pet.-App. 75–81, *Rabiebna*, 416 Wis. 2d 44, ¶¶ 45–51.) 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 technical colleges, private schools, and tribal colleges. But the court failed to explain persuasively why the distinction matters (private colleges, too, are typically four-year programs), and it ignored the continuing, up-to-date evidence presented to the trial court about attrition rates both at two-year and four-year institutions.

Similarly, the court of appeals ignored the evidentiary record in concluding that race-neutral aid solves attrition, speculating that students with more time to "recreat[e]" and study will naturally stay enrolled. (Pet.-App. 98, *Rabiebna*, 416 Wis. 2d 44, ¶ 79 n.25.) The evidence demonstrated that race-neutral financial aid does not have the same benefits for persistence that Wis. Stat. § 39.44 does, and that Wis. Stat. § 39.44 dramatically reduced attrition for recipient students compared to other students.

*****

Wisconsin Stat. § 39.44 satisfies strict scrutiny under the U.S. Supreme Court's precedents. It advances compelling interests and is narrowly tailored to address those interests. Even assuming that *SFFA* applies, the statute passes that test, too: its compelling interests are measurable by attrition

rates; it does not create individuals who are excluded from college or even aid they otherwise would have received; it does not treat race as a proxy for diversity; and it must be re-funded by the Legislature biennially, based on annually gathered data.

II. Respondents did not have standing to bring this case.

This Court should also reverse because Respondents lack standing. Their Complaint conceded that they had no standing other than taxpayer standing and even affirmatively asserted that they lacked standing under article III of the U.S. Constitution to be in federal court. They recognized that taxpayer standing was insufficient in federal court, and their version of it is insufficient in state court, too.

A. To have standing as a taxpayer in state court, a plaintiff must plead financial loss.

Respondents pled no injury personal to them. They conceded they would not have standing in federal court under article III: "Plaintiffs' taxpayer standing would be insufficient thereby preventing removal by Defendants to federal court." (R. 21:3.) They were correct that they lacked article III standing, and they did not allege an injury sufficient for state-court taxpayer standing, either.

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, 102 (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 (citation omitted). Restated, "the complainant 'must have a legal interest in the controversy—that is to say, a legally protectible interest.'" *Id.* ¶ 47 (citation omitted).

For taxpayer standing, a plaintiff must have suffered, or suffer in the future, 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).

In *City of Appleton*, the court addressed whether the plaintiff had taxpayer standing to challenge a statute governing the apportionment of assets and liabilities between municipalities when one annexed territory from the other. 142 Wis. 2d at 873–74. The arrangement would have required the plaintiff "and other Menasha property owners to pay additional taxes." *Id.* at 874. That effect gave the individual a "a direct and personal pecuniary interest in the apportionment statute." *Id.* at 883.

Similarly, in *McClutchey v. Milwaukee County*, 239 Wis. 139, 300 N.W. 224, 225 (Wis. 1941), a taxpayer challenged the employment of a city employee he said was illegally hired. This Court held that he lacked standing because he did not show that he had sustained some pecuniary loss: "[i]t is

obvious that the taxpayers have not sustained nor will sustain any pecuniary loss by continuance of Boncher in the position he is occupying. . . . Had he not been appointed, some one else would have been appointed to the place, and the same salary." *Id.* at 225. The plaintiff lacked standing because the relief he sought would have resulted in no reduction in government spending.

Fabick relied on by the court of appeals, is not to the contrary. There, the Complaint alleged that the government had illegally expended funds it should not have. 396 Wis. 2d 231, ¶ 11. The Court agreed that the plaintiff must allege that he and other taxpayers "have sustained, or will sustain, some pecuniary loss." *Id.* The Court then pointed out that the deployment of the National Guard required spending additional taxpayer funds (or risked doing so in the future), giving the plaintiff standing. *Id.*

Here, Respondents pled no such facts. Their Complaint did not seek to end the appropriation in Wis. Stat. § 39.44. It sought to remove race-based classifications from Wis. Stat. § 38.44, but did not ask to end the program; instead, it sought to "[e]njoin Defendants from administering [its] national origin, and alienage classifications." (R. 21:12.) This sort of claim—an interest in policing how government money is spent—is not enough for any standing, even the taxpayer variety.

B. Respondents could not cure their lack of standing outside the pleadings.

The court of appeals tried to generate standing by asking Respondents at oral argument if they would be satisfied with eliminating the program instead of changing it. (Pet.-App. 59, *Rabiebna*, 416 Wis. 2d 44, ¶ 15 n.9.) But the court's job was to evaluate standing based on the Complaint as pled, not create a different claim on the fly.

Federal cases describe the redressability prong of standing as measured by the relief sought in the Complaint: "the test assumes that a decision on the merits would be favorable and that the requested relief would be granted; it then goes on to ask whether that relief would be likely to redress the party's injury." *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989). More recently, the U.S. Court of Appeals for the Second Circuit explained that "[a] plaintiff makes this showing when the relief sought would serve to . . . eliminate any effects of the alleged legal violation that produced the injury in fact. *Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023); *see also Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (redressability "examines the causal connection between the alleged injury and the judicial relief requested").

Similarly, in *Coyne v. Walker*, 2015 WI App 21, ¶¶ 12–13, 361 Wis. 2d 225, 862 N.W.2d 606, the court evaluated standing based on the facts pled in the Complaint. The Governor argued that taxpayers lacked standing because the law they challenged ultimately required no spending. The court disagreed with that approach, holding that the Complaint alleged that there would be increased costs, and the pleading established standing unless the Governor disproved it. *Id.* ¶ 13. The opposite is true here: Respondents' Complaint sought no reduction in spending, and the relief it sought would not have changed any taxpayer obligations, even infinitesimally.

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 pleading a particularized monetary injury that will be redressed by the relief sought, not just an abstract, generalized interest in seeing government functions carried out in a particular way.

*****

Wisconsin Stat. § 39.44 satisfies equal protection, whether under the standard strict scrutiny methodology or *SFFA*'s test for college admissions programs. And Respondents had no standing to bring a claim seeking only to use public money in a different way.

CONCLUSION

Petitioners ask this Court to reverse the court of appeals.

Dated this 4th day of December 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

MICHAEL D. MORRIS
Assistant Attorney General
State Bar #1112934

AARON J. BIBB
Assistant Attorney General
State Bar #1104662

Attorneys for Plaintiffs-Respondents-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 CG
(608) 294-3936 MDM
(608) 266-0810 AJB

(608) 294-2907 (Fax)
charlie.gibson@wisdoj.gov
michael.morris@wisdoj.gov
aaron.bibb@wisdoj.gov

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 10,732 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 4th day of December 2025.

Electronically signed by:

Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845