STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT 2

Case No. 2022AP2026

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

Plaintiffs-Appellants,

v.

HIGHER EDUCATIONAL AIDS BOARD AND CONNIE HUTCHINSON,

Defendants-Respondents.

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

RESPONDENTS' BRIEF

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INTRODUCTION

In the mid-1980s, Wisconsin decided to finally confront a crisis it faced in higher education. Black, American Indian, and Hispanic students were dropping out and failing to graduate at alarming rates because they could not afford to remain in school. The state commissioned a taskforce to study the roots of this crisis and how best to address it. After a thorough investigation, the taskforce concluded that the biggest reason was financial. There were race-neutral financial aid programs available, yet the problem persisted. So, they recommended a small grant program specifically targeted at these struggling groups of students to help them stay in school and graduate. The Legislature, after conducting its own research, agreed with the recommendation and created the program, known as the minority undergraduate retention grant, and appropriated a modest sum to fund it. Despite its limited funding, the grant program has had outsized results. The evidence shows that it has helped minority students stay in school and graduate at double the rate, or more, than they otherwise would.

Despite the grant's success in addressing a demonstrated problem in a targeted way, Appellants—who are not even students—sued to effectively end the program by eliminating its consideration of race. As taxpayers with no financial interest at stake, they simply object to the program on principle, claiming it unlawfully discriminates and is unconstitutional. Their summary judgment filing produced no evidence to support their conclusory arguments.

By contrast, the Board produced hundreds of pages of evidence, data, and expert analyses showing that the program addressed a specific, unsolved problem in a targeted way. This unrefuted evidence showed that, prior to the grant's creation, Wisconsin faced this crisis despite the availability of both race-neutral financial aid programs and even special

programs designed specifically to improve minority retention. So, the Legislature, relying on this failure, created a solution recommended by the experts: a small and targeted grant program to help affected minority students bridge the financial gap and stay in school. And the evidence showed that this program did not take a single dollar away from non-minority students; indeed, nearly 96% of all aid was then and remains today available to anyone, regardless of race. And, importantly, the Appellants produced not a shred of evidence showing that these generally available funds are insufficient to meet the financial needs of nonminority students.

On this unrefuted evidence, the circuit court readily concluded that the grant program was constitutional. Applying strict scrutiny, the court held that the program furthered a compelling interest recognized by the Supreme Court decades ago: attaining diversity on college campuses. And it held that the unrefuted evidence showed that the program was narrowly tailored to achieve that end.

On appeal, Appellants offer nothing substantive showing that the circuit court erred. They simply argue in conclusory fashion that the program is unlawful. None of these arguments, which are premised on no evidence at all, shows error. Rather, the circuit court merely applied binding precedent to the undisputed evidence. Then and now, Appellants' total lack of contrary evidence on any of the strict scrutiny factors dooms their case. And not only have Appellants completely failed to rebut the evidence on the merits, but they also lack standing. On either basis, the Court should affirm the circuit court's order granting the Board summary judgment.

STATEMENT OF THE ISSUES PRESENTED

1. A plaintiff seeking to challenge the constitutionality of a statute must come forward with evidence at summary judgment that she is directly harmed in

a non-speculative way. Here, Appellants came forward with no evidence that they were otherwise eligible for the grant but would not receive it but for their race. Do Appellants have standing?

The circuit court "reluctantly" answered yes.

This Court should answer no.

2. Racial classifications are subject to strict scrutiny, which is not "fatal in fact" but rather examines the government interest being served and context of the program at issue under factors related to its necessity and undue burden on others. Here, the unrebutted evidence shows that the grant is necessary for the established compelling purpose of student body diversity and that it burdens no one. Does the grant program satisfy strict scrutiny?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs, taken together, fully present the issues and relevant legal authority.

Publication of this decision is warranted because it will decide a case of substantial and continuing public interest under Wis. Stat. § 809.23(1)(a)4.

STATEMENT OF THE CASE

This case concerns a financial-aid grant program called the minority undergraduate retention grant (Grant Program) that Wisconsin created to address the problem of minority retention in higher education—that is, minority students dropping out of school or failing to graduate. The Respondent Wisconsin Higher Educational Aids Board oversees the program's administration.

I. The Higher Educational Aids Board administers many financial aid programs, including the Grant Program.

The Board administers many financial aid programs available to eligible students enrolled at higher educational institutions in Wisconsin, not including the University of Wisconsin system. Wis. Stat. § 39.28(1). These institutions include technical colleges, independent colleges, and tribal colleges. (R. 46:2.) By far the largest among the numerous aid programs is the Wisconsin Grant.[1] Wis. Stat. § 39.30. That grant 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.)

At the other end—representing less than one-half of one percent of total aid dollars available—the Board also administers the Grant Program, a small aid program reserved for financially needy, minority students. Wis. Stat. § 39.44; (R. 54:8; 49:1–3.) By statute, a minority student is either a Black American, American Indian, Hispanic, or a former citizen or descendent of a citizen of Laos, Vietnam, or Cambodia. Wis. Stat. § 39.44.

II. History of the Grant Program.

In May 1983, State Superintendent of Public Instruction Herbert Grover and University of Wisconsin System President Robert O'Neil established a joint committee "to study cooperative ways of eliminating or reducing causes

[1] Other examples of student aid programs the Board administers 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 grant (Wis. Stat. § 39.38), tribal college payments (Wis. Stat. § 39.382), and the teacher loan program (Wis. Stat. § 39.399).

leading to under-enrollment of minority students and to study factors affecting retention in post-secondary education." (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.) They compiled their findings and recommendations into a report dated May 1984. (R. 55:3.)

The May 1984 report found that Asian, Black, Hispanic, and American Indian 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.)

Financial insecurity was the biggest barrier to minority students remaining in school. (R. 55:16.) Likewise, an incorporated American Council on Education study concluded that "the high proportion of minorities living under the poverty level underscores the importance of financial aid for minorities and suggests that their relatively greater poverty is both a reflection of and a factor affecting their low levels of educational attainment." (R. 55:16 (citation omitted).)

To address this retention problem, the committee recommended an undergraduate retention grant to help minority students stay in school and graduate. (R. 55:17.) "The program would be designed to help improve the retention and graduation rates of minority students." (R. 55:17.) The committee noted that this recommended program was based upon a similar aid program for graduate students called the Advanced Opportunity Program. (R. 55:17.) With improved minority retention and graduation

rates of "approximately 80%," that program had been highly successful, "demonstrat[ing] that retention and graduation can be significantly improved through specially designed financial aid programs." (R. 55:17.)

Following this recommendation, then-Governor Tony Earl requested that the Legislature create such a grant in his 1985–87 biennial budget proposal. (R. 49:4.)

The Legislature took up that request and studied the issue. Not just relying on the 1985 report, the Legislature looked at Wisconsin enrollment data for minority groups. That data showed that Hispanic, Black, and American Indian students all had problems staying in school and graduating, and Black student enrollment had actually decreased recently. (R. 49:5–7.) By contrast, enrollment data showed no such problems for either Asian or white students—Asian student enrollment had actually increased. (R. 49:7.)

The Legislature also noted that there were already various state and federal programs to improve minority retention and graduation, including race-neutral state grants like the Wisconsin Grant, but these efforts were ineffective. (R. 49:7, 10–11.) 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.) From these figures, the Legislature concluded that existing programs and "retention efforts have not met with success and perhaps some other approach related to financial aids might be more successful." (R. 49:13.)

With multiple studies showing that need, the Legislature created the Grant Program in 1985 Wisconsin Act 29.[2] The Grant Program's purpose was "to encourage minority

[2] That Act created two grant programs: the Grant Program for private, nonprofit schools and technical colleges, to be administered by the Board; and a sister program for the University of Wisconsin System.

undergraduate students to remain in the University by providing financial support." (R. 49:4, 13.) Based on the empirical data, the Legislature 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 did not need assistance; in fact, it showed that they "generally have a higher retention and degree completion rate than nonminorities." (R. 49:7.)

The Legislature later expanded eligibility to Southeast Asian students because of a recent influx to Wisconsin of Hmong and other Vietnam-war refugees.[3] 1987 Wisconsin Act 27 § 683s. (R. 49:17, 27–50.) This group, unlike the larger Asian community, faced similar financial and retention problems as those already eligible for the grant. (R. 49:17, 30, 40–58, 74–81.)

III. Administration of the Grant Program.

The Legislature funds the Grant Program annually. Wis. Stat. § 39.44(2). Most recently, it appropriated $819,000 for fiscal years 2022 and 2023. 2021 Act 58; (R. 49:1). In contrast, the Legislature appropriated $142.5 million to the Board for all other financial aid programs. (R. 49:1.) The Grant Program thus represents approximately one-half of one

[3] "The end of the United States' military involvement in Indochina marked the beginning of a tide of refugee immigration from Vietnam, Cambodia, and Laos . . . . Tucked away in this flow of immigrants was a people from Laos . . . who called themselves Hmong." (R. 49:30.) During the period leading up to the 1987 biennial budget process, Hmong refugees, with the aid of local Catholic and Lutheran charities, had begun resettling in Wisconsin in great numbers. By 1988, Wisconsin had the second most Hmong refugees in the United States. (R. 49:44–46.)

percent of the total pool of state financial aid dollars available to students.

The Board distributes 50 percent of the funds to private schools and 50 percent to technical colleges. Wis. Stat. § 39.44(2). Within that allocation, the Board calculates how much to distribute to each school based upon its minority student population, reported to the Board annually. (R. 46:2.) The Board then notifies the schools of the funds available for distribution. (R. 46:2.)

Each school then awards Grant Program funds to students. (R. 46:2–3.) The Board has no role in selecting award recipients. (R. 46:2–3.) Rather, it is up to each school's financial aid office to determine eligibility and nominate eligible students for a grant award. (R. 46:2–3.) In awarding grant funds, schools do not rely on "a mechanical process." (R. 51:2.) Rather, "it is a highly individualized and flexible process that is based upon each student's individual situation." (R. 51:2.) That involves reviewing the "entirety of the students' background," including "whether that student previously funded his or her tuition privately or with loans or with grants"; "special circumstances or need"; and "each student's individual situation" with an eye toward aiding "students with the greatest financial need" to remain in school and graduate. (R. 51:2–3.)

When a school has awarded the allocated grant funds, it submits a "nomination roster" to the Board. (R. 46:3; 47:1; 51:3.) The roster lists the student's name, social security number, residency and citizenship status, year in school, and unmet need without Grant Program funds. (R. 46:3; 47:1.) When the Board receives the nomination roster, it sends payment to the institutions. (R. 46:3.)

Individual awards vary based upon financial need, with a minimum grant of $250 and a maximum grant of $2,500. (R. 46:3.) A student may receive the grant for up to eight

semesters or 12 quarters. (R. 46:3.) Because the grant's purpose is improving retention rates, it is available only to sophomores, juniors, and seniors. (R. 46:3.)

IV. The Board submits detailed reports to the Legislature every year on the effectiveness and continued necessity of the Grant Program.

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 has submitted a detailed report to the Legislature on the effectiveness of the Grant Program and its continued necessity. (R. 46:3–4.)

In this annual report, the Board assesses the annual enrollment, retention, and graduation data for grant recipients. (R. 46:3–4.) The report also includes survey results from the Board's annual survey to grant recipients asking how the grant impacted them and helped them stay in school. (R. 46:3–4.)

V. The Grant Program dramatically improves minority retention and graduation.

The Grant Program is highly successful in achieving its purpose of increasing retention and graduation rates, as shown by both the Board's annual reports to the Legislature and the enrollment data.

The Board's annual reports confirm that the Grant Program is highly effective at improving retention. For example, the Board reported that, in 2015–16, 80% of Grant Program recipients either completed their degree or certificate or were continuing toward degree or certificate completion. (R. 47:5.) The numbers are similarly impressive for subsequent years. Student graduation or retention rates were 85% in 2016–17, 77% in 2017–18, and 81% in 2018–19. (R. 47:13, 21, 29, 37.)

The Board's annual survey results also illustrate the grant's effectiveness. In 2019–20, for example, 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 had similar results. (R. 47:10; 18; 26; 34.)

Comparative enrollment and graduation data likewise shows that the Grant Program continues to be highly successful—in fact, it at least *doubles* graduation rates. From 2011–21, the data shows that Grant Program recipients graduated (completed a credential) from technical colleges at dramatically higher rates than students who did not receive a grant award. (R. 41.) For example, in that period, 64.4% of Black students who received a Grant Program award graduated, while only 21.4% of Black students who did not receive a grant graduated—that is, the rate of graduation *tripled*. (R. 41.) 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.) That is no coincidence: the unrebutted evidence is that the Grant Program "is critical" to that dramatic difference in retention and graduation rates. (R. 54:13.) In other words, the Grant Program, which represents less than 1% of total aid available, has an outsized impact on the students who receive the grant, especially when considering the minuscule size of the fund.

Testimonials from actual grant recipients further confirms this. Again, those recipients overwhelmingly report that the grant is key to their continuation in school. A typical response makes that clear: "If I hadn't received the Minority Retention Grant, I would have had no way to fully pay for my schooling." (R. 47:8.) Another added, "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." (R. 47:24.)

VI. The Grant Program is still needed today because, despite its success, minority retention in higher education remains an issue.

Despite the Grant Program's successes, minority retention remains a problem to this day because the program's limited budget is insufficient to reach every student who would benefit from it.

White and Asian students continue to complete their degrees at much higher rates than the targeted minority students. (R. 39:5.) To illustrate, in recent years, about half of all Asian and white students at two-year institutions completed a degree within six years, compared to only about one-third of mixed race and Hispanic students and only one-quarter of Black students. (R. 49:67.) The data is similar for other types of institutions, like four-year public and private institutions—with Asian and white students completing their degrees at a significantly higher rate than mixed race, Hispanic, or Black students. (R. 49:1, 3–4). "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 is 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.) Indeed, compared to other Asian Americans, Southeast Asian students are "twice as likely" to leave school and often do so because they "exhaust financial resources." (R. 49:88.)

As the 1985 report found, the reason for the retention gap today remains financial. To this day, four out of every five minority students have financial need, a much higher ratio than white students. (R. 39:16.) Not only is the ratio higher, but the financial need per student is significantly greater, too, anywhere from 30% to 100% greater, in fact. (R. 39:16.) In short, more money is needed to address the problem, as even

the limited grant program shows such targeted funds do make a difference.

VII. Appellants sue to effectively eliminate the Grant Program; procedural history.

Appellants are taxpayers, not students. (R. 21:2.) They sued the Board to eliminate the Grant Program's consideration of race because they claim it unlawfully discriminates in violation of state and federal equal protection principles. (R. 21:1–2.) They conceded that, as mere taxpayers, they lacked standing in federal court, but they asserted that they had standing in state court. (R. 21:3.)

The parties filed cross-motions for summary judgment. The Board supported its motion with two experts who filed reports explaining why the Grant Program is necessary, effective, and narrowly tailored. (R. 39; 54.) The Appellants did not retain experts, depose Defendants' experts, or otherwise attempt to rebut the Board's experts. The Board also supported its motion with hundreds of pages of supporting documents, including historical studies and reports that explained the Grant Program's purpose and necessity, social studies that explained the need for retention grants like the program, and data that demonstrated the effectiveness of the program. (R. 41; 47; 49–50; 55.) The Appellants did not submit any evidence to challenge the Board's evidence.

On September 16, 2022, the circuit court granted summary judgment in the Board's favor. (R. 61.) After "reluctantly" concluding that the Appellants had standing, it held that the Grant 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.)

The court first concluded that, under binding Supreme Court precedent and undisputed evidence, the grant program

furthers the compelling interest of attaining diversity in higher education. (R. 61:25–30.) The court rejected the Appellants' argument that the case precedent applied to only admissions, not financial aid, as a misreading of the precedent. (R. 61:27.) The court explained that the compelling interest is attaining a diverse student body, and how the government chooses to attain that end, be it admissions or financial aid here, is to be evaluated separately under the narrow tailoring analysis. (R. 61:27.)

The court next evaluated whether the Grant Program was narrowly tailored to further its compelling interest in diversity. (R. 61:30–46.) The court observed that there was no precedent applying narrow tailoring to financial aid. But, following Supreme Court guidance that context matters, it applied the traditional narrow tailoring factors to the undisputed facts here. (R. 61:36–38.)

Applying this framework, the court concluded that the unrefuted evidence showed that there were no race-neutral alternatives to the program because any race-neutral alternative would not work nearly as well, as shown by the persistence of the problem despite race-neutral alternatives prior to 1985 and as reflected in the data and literature since then. (R. 61:38–39.)

The evidence also showed that the Grant Program was limited in extent and flexible. (R. 61:42.) The program represents less than 1% of total aid available to needy students. (R. 61:42.) And the program is administered in a flexible way by individual schools, which award the grant to students on a variety of factors tied to retention, not solely race. (R. 61:42–43.)

The evidence likewise showed that the program meets whatever durational requirement exists because it is subject to multiple levels of review, annually through the Board's

statutory reporting requirements and biannually through the budget process. (R. 61:43–44.)

Finally, the evidence showed that the program does not burden non-minority students because it does not take aid dollars away from them; the vast majority of aid dollars are available to any student regardless of race. (R. 61:44–45.)

For these reasons, the undisputed evidence showed that the Grant Program was narrowly tailored to serve the compelling end of diversity in higher education and therefore lawful. (R. 61:46.)

The Appellants filed their notice of appeal on November 22, 2022. (R. 62.)

ARGUMENT

The circuit court correctly held that, based on the only evidence in the record, the Grant Program satisfied strict scrutiny review. While this Court may affirm on that basis, there also is a second reason Appellants' case fails: standing. On either basis, the circuit court should be affirmed, as the unrefuted evidence here points to only one conclusion.

I. Appellants lack standing to bring this suit.

Appellants' complaint alleged only one basis for standing—taxpayer standing—and even conceded a lack of standing for their federal claim. They lack it for both claims. Rather, standing (taxpayer or otherwise) requires more than just alleging that a plaintiff believes a law is illegal. Appellants must have non-speculative injury to them, which they lack.

A. Appellants lack standing for their state and federal claims.

1. Standing principles.

Standing law in Wisconsin 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 like the present one "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 is to determine 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). Under that standalone hurdle, 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.* at ¶ 47 (citation omitted).

For both showings, Plaintiffs must support their standing with evidence at summary judgment: standing must be supported with "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Thus, a summary judgment requires evidence of a direct, non-conjectural

injury to an interest protected by the law. *See* Wis. Stat. § 802.08(2)–(3) (governing summary judgment submissions).

2. Plaintiffs lack standing under the established standing principles.

Appellants challenge a program that provides grants for minority students with financial need. However, their complaint alleged no cognizable injury from that program. Rather, Plaintiffs rely on simply being taxpayers, and they "object[ ] to [their] taxes being used to discriminate against individuals based on race, national origin, or alienage." (R. 21:3.) They allege no injury particular to themselves.

That failing is determinative under the binding standing principles. They rely on, at best, an "abstract injury" to their sensibilities, which is not enough. *Fox*, 112 Wis. 2d at 524.

At summary judgment, Appellants Rabiebna and Freihoefer also averred that "we have a teenage child and plan to send him to college one day." (R. 32:1; 34:1.) If Appellants believe that this speculative statement rescues their standing, they would be mistaken. This statement is, for one, speculative: they stated no concrete plans to send their children to college, much less one covered by the Grant Program.

But there also is a second fatal problem with their submission. By statute, the Grant Program is limited to those with financial need: schools "shall" grant the awards to eligible students "on the basis of financial need." Wis. Stat. 39.44(3)(a). Appellants, who bear the burden to support their standing with evidence at summary judgment, completely failed to address that precondition. They supplied no statement, much less evidence, that any of their children would actually be eligible for the Grant Program, if they went to an eligible college, based on financial need. Nothing stated by Rabiebna and Freihoefer satisfies the requirement for an

injury to be non-conjectural—they have come forward with no evidence they are otherwise eligible for the grant but for the race component they challenge—nor are they "immediately in danger of sustaining some direct injury" based upon speculative attendance at an institution covered by the grant. *Fox*, 112 Wis. 2d at 525.

This failure is determinative under the standing requirements. Standing is absent, and the Court should affirm dismissal on this basis alone.[4]

3. Appellants' resort to taxpayer standing does not change the analysis.

Appellants seem to believe that alleging taxpayer standing somehow relieves them of the need to satisfy basic standing principles. If that were the case, then a plaintiff could simply avoid the black-letter standing requirements by alleging that they (like every other law-abiding person) are taxpayers—in other words, it would be no hurdle at all. That has been rejected by both Wisconsin and federal courts.

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). Similarly, in *Lujan*, the Supreme Court ruled that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at

[4] The circuit court did not rule based on standing, but this Court may affirm on alternative grounds. *Glendenning's Limestone & Ready-Mix Co. v. Reimer*, 2006 WI App 161, ¶ 14, 295 Wis. 2d 556, 721 N.W.2d 704.

large—does not state an Article III case or controversy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992).

Although Wisconsin's standing is not based on the U.S. Constitution, these principles also apply to Wisconsin's standing analysis. For example, in *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, the controlling opinion rejected taxpayer standing based on mere allegations that a government actor has acted illegally: "It would mean any taxpayer could challenge almost any government action—as long as a government employee devoted some time and attention to the matter. Since that is nearly always true, this would practically eliminate standing as a consideration in most challenges to government action." *Id.* ¶ 163. (Hagedorn, J., concurring).[5] Rather, the principles stated above remain the law in Wisconsin: there must be an actual injury to a personal, legally-protected interest. *Id.* ¶ 160 (Hagedorn, J., concurring); *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 46.

The fact that taxpayer standing does not supersede the standing rules also is seen in particular applications. For taxpayers to meet this standard, they personally 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). When pointing to 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 other words, a

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[5] The lead opinion in *Teigen* was a plurality opinion. The holding of the court properly is viewed as the position taken by those members of the court who concurred in the judgment on the narrowest grounds. *See Vincent v. Voight*, 2000 WI 93, ¶ 46 n.18, 236 Wis. 2d 588, 614 N.W.2d 388. Thus, Justice Hagedorn's concurrence states the holding of the court on standing.

generalized grievance about government conduct is not enough. A similar dynamic can be found in the other taxpayer standing cases. *See*, *e.g.*, *S.D. Realty Co.*, 15 Wis. 2d at 22 (county landowner's challenge to a county's sewage commission lease that would require "expenditure of public funds" "to construct [a] tunnel"); *Tooley v. O'Connell*, 77 Wis. 2d 422, 431, 438, 253 N.W.2d 335 (1977) ("property owners/taxpayers in the city of Milwaukee" challenged "the financing of the Milwaukee school system and the taxing of the plaintiffs' property," which "require expenditures of public monies for school purposes").

Here, Appellants attempted to read these expenditure requirements and personal injury requirements out of the standard by simply asserting that, as taxpayers, they can challenge what they believe to be an illegal government act. But taxpayer standing requires more. *Teigen*, 403 Wis. 2d 607, ¶ 163 (Hagedorn, J., concurring). First, Appellants' requested relief would result in no difference in expenditures. They seek to remove race-based classifications from the Grant Program, but do not seek to *end* the grant, meaning the money would be spent either way. (R. 21:12.)

Below, Appellants relied on *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, (R. 21:3), but that case did not overrule Wisconsin's standing precedent. On the contrary, the court reiterated the "pecuniary loss" requirement from *S.D. Reality Company*. *Id.* at 240. It concluded it was met there because an emergency order had caused a costly deployment of national guard troops, which otherwise would not have happened. *Id.* at 240–41.

Fabick did not change the analysis and does not confer standing to Appellants. Again, as the subsequently decided *Teigen* confirms, taxpayer standing requires more than simply alleging illegal governmental conduct. *Teigen*, 403 Wis. 2d 607, ¶ 163 (Hagedorn, J., concurring). *Friends of Black River Forest v. Kohler Co.*, which also postdates *Fabick*,

confirms this, as well. There, the Wisconsin Supreme Court reiterated that the traditional two-part standing test applies in Wisconsin courts. 2022 WI 52, ¶ 1, 402 Wis. 2d 587, 977 N.W.2d 342. Far from overruling the precedent in cases like *Foley-Ciccantelli*, the supreme court relied on it as stating the prevailing law. *Id.* ¶ 2.[6]

It remains the case that, to have standing, plaintiffs must come forward with evidence of a direct, non-speculative injury personal to them. The Appellants have not.

B. Appellants' admitted lack of standing in federal court also dooms their federal section 1983 claim.

Appellants' federal section 1983 claim also fails for an additional reason. As they concede, Appellants lack standing to bring that claim in federal court. That concession is fatal to their claim because they cannot bring a federal claim in state court that they could not bring in federal court. Their concession also demonstrates that their claim fails to satisfy the statutory requirement in section 1983 of having an actual "injury."

The Wisconsin Supreme Court applies federal standing rules to federal claims brought in state court. *See State ex rel. First Nat. Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 309 n.5 (1980) (applying "the federal law of standing" to federal claims in state court); *see also Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 17 (stating that "Wisconsin has largely embraced federal standing

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[6] *Friends of Black River Forest* also confirms the general rule that "Wisconsin has largely embraced federal standing requirements, and we 'look to federal case law as persuasive authority regarding standing questions.'" *Id.* ¶ 17 (citation omitted).

requirements"). Those cases teach that a plaintiff's opportunity to litigate a federal claim in state court should be the same as in federal court.

Appellants conceded that in "federal court . . . [their] taxpayer standing would be insufficient." (R. 21:3.) They alleged this in a bald attempt to prevent removal to federal court, which ordinarily is a defendant's right when faced with a federal claim. They cannot have it both ways. Appellants affirmatively alleged they have no standing to bring their federal claim in federal court. Under Wisconsin Supreme Court precedent, this Court should apply the federal standing rules to their claim, which, by their admission, means they lack standing.

Further, Appellants' concession that they lack federal standing also means they have no claim under 42 U.S.C. § 1983. That statute requires an injury: [e]very person who. . . subjects . . . any citizen . . . to the deprivation of any [Constitutional] rights. . . *shall be liable to the party injured* in an action at law . . . ." 42 U.S.C. § 1983. And that injury must be more than just "a mere generalized grievance," *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 869 (9th Cir. 2002), and there is a "necessity for proof that the act or conduct of the defendant was the proximate or legal cause of the injury to the victim," *Daniels v. Gilbreath*, 668 F.2d 477, 488 (10th Cir. 1982).

Appellants have suffered no such injury, but rather assert a general grievance about the Grant Program's application to minority students. They therefore neither have standing nor state a claim under section 1983.

II. The Grant Program satisfies strict scrutiny and so is constitutional.

Even if the Appellants have standing, the Grant Program is constitutional.

Under the Equal Protection clause, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

Considered within the unique context of financial aid, the Grant Program is constitutional under the two-part strict scrutiny test. It furthers a compelling interest recognized by the Supreme Court: diversity in higher education. And the unrebutted evidence is that program is narrowly tailored to further that compelling interest.

A. The program furthers a compelling interest the Supreme Court has long recognized: diversity in higher education.

The Grant Program furthers the compelling interest of having student body diversity by providing financial assistance to minority students who would be unable to remain in school without it.

1. The Grant Program serves the recognized compelling interest of student body diversity.

The government has a compelling interest in adopting policies and programs that use racial classifications in order to achieve student body diversity. Diversity includes "racial" diversity. *Grutter*, 539 U.S. at 328–33. That was the type of diversity at stake in *Grutter*. In that case, a law school crafted an admissions policy specifically designed to "enroll a 'critical mass' of minority students." *Id.* at 329. This policy furthered a compelling interest, the Court held, because the government "has a compelling interest in attaining a diverse student body." *Id.* at 328.

Although *Grutter* involved an admissions policy that sought to admit minority students, its discussion of diversity in higher education covers any program designed to attain that same end, such as financial aid. That is because the admissions policy in *Grutter* was merely the *means* by which the law school sought to "attain[ ] a diverse student body." *Id.* It was this *end*—"attaining a diverse student body"—that was the compelling interest. *Id.* As *Grutter* explains, the means chosen to attain that end, whether admissions, financial aid, or something else, are evaluated separately under narrow tailoring.

"Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue *that end*: [*T*]*he means* chosen to accomplish the [government's] asserted purpose *must be specifically and narrowly framed* to accomplish that purpose.'" *Id.* at 333 (emphasis added) (citation omitted). Put differently, admissions is one way (or means)—the initial way—to attain a diverse student body. Financial aid is another way; it helps the admitted students actually enroll and attend classes, which is, after all, the real benefit to having a diverse student body, as the Court recognized in *Grutter*. 593 U.S. at 330 (discussing the benefits of *classroom* diversity, including "learn[ing] from each other" and "classroom discussion").

In addition to falling within *Grutter*'s holding, the inclusion of financial aid as a way to achieve diversity also makes good sense. While admissions policies are designed to admit a diverse student body to campus, they do not ensure that diverse body remains enrolled. In other words, admissions policies may open the door to students, but they do not ensure their persistence and graduation. Targeted financial aid programs like the Grant Program, on the other hand, do just that. "Put 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. 39:9–10.)

Here, the Grant Program serves the same compelling end as the admissions policy in *Grutter*—a racially-diverse student body. The unrefuted evidence shows that the Grant Program was created to solve a crisis in higher education: minority students were dropping out of school due to financial barriers at greater rates than non-minority students, robbing the schools of the enriching environment a diverse student body brings. As the 1985 report found, "retention rates for minority students were below those of White students." (R. 55:13.) Consequently, an already dire problem—the lack of diversity on campuses—grew worse each year as a higher percentage of minority students dropped out, mainly due to financial barriers. (R. 55:16.) To help address the problem, academic experts recommended the Grant Program. "The program would be designed to help improve the retention and graduation rates of minority students." (R. 55:17.) And that is the stated purpose of the program. "The stated intention of the [Grant] [P]rogram is to encourage minority undergraduate students to remain in the University by providing financial support." (R. 49:4.)

Thus, the Grant Program was created to solve the problem of schools losing their diverse student bodies through financial attrition, which is the same compelling end at issue in *Grutter*: attaining student body diversity.

The Grant Program continues to further that compelling interest today. The program remains "critical" to helping minority students persist and graduate. (R. 54:12.) For example, "the minority retention grant assists Marquette

[University] in retaining its diverse body of students, which is one of Marquette's core values." (R. 51:4.) And it remains a core value at the other grant-eligible institutions. (R. 39:12–13 (collecting diversity mission statements from various Wisconsin institutions administering the Grant Program).

Wisconsin thus has a proper compelling interest in diversity here.

2. Appellants' arguments misread the precedent and fail to rebut the compelling interest here.

Appellants argue that that the circuit court created an unprecedented compelling interest in racial diversity. (App. Br. 20–21.)[7] This argument is meritless. Rather, as discussed, *Grutter* and related cases squarely hold that a diverse student body is a compelling government interest. And the Grant Program here is directed at that same interest by seeking to retain an admitted, diverse student body.

Grutter, for example, recognized diversity in the context of a "Law School's longstanding commitment to '*one particular type of diversity*,' that is, '*racial and ethnic diversity*." 539 U.S. at 316 (emphasis added) (citation omitted). And, if that weren't clear enough, the Supreme Court's analysis in *Grutter* focused entirely on the benefits of *racial* diversity. *Id*. at 330–31. For example, in support of its holding that racial diversity was a compelling interest, the Court cited the military's racial diversity policies and

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[7] The Appellants also argue that the program does not remedy past discrimination, (Pl.'s Br. 17–19), which is a separate way of potentially satisfying the first prong of strict scrutiny. However, as the Appellants acknowledge, Defendants do not base their compelling interest on past discrimination but rather on the separate diversity rationale. (Pl.'s Br. 17.)

reiterated the myriad benefits of those policies, all of which the Court applied equally to higher education. *Id.* In sum, *Grutter* was all about racial diversity in higher education as a compelling interest.[8] The circuit court's conclusion that the Grant Program furthered a compelling interest is entirely consistent with *Grutter*.

Appellants make several related analytical errors. For example, they assert that only "[t]rue diversity" counts or suggest that other groups may be worthy of inclusion. (App. Br. 15–21, 24.) But there is no such concept in *Grutter* or any other case. Rather, it is up to the policy makers to decide what diversity means, not the Appellants or the courts. The Court made that clear in *Grutter*: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." 539 U.S. at 328 (citing cases). And, in crafting such policies, courts must presume that the policymakers enacted the challenged policy in good faith, "'absent' 'a showing to the contrary.'" *Id.* at 329 (citation omitted).

In fact, in a case that Appellants have relied on (R. 57:18)—*Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006)—the court explained that "strict scrutiny has little utility in supervising the government's definition of its chosen categories." *Id.* at 210. Rather, "[t]he purpose of the test is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* "The Equal Protection Clause does not require a state actor to grant preference to all ethnic groups

[8] To the extent that Appellants cite to Justice Powell's plurality opinion in *Bakke* to suggest that racial diversity is not enough, *Bakke* is not binding on the point; *Grutter* is.

solely because it grants preference to one or more groups." *Id.* at 212 (citation omitted).

And, here, there is an evidentiary basis for each of the minority groups eligible for a grant. For example, enrollment data relied on by the Legislature showed that Black, American Indian, and Hispanic students had significantly lower retention rates than both white and Asian students. (R. 49:5–7, 11, 13.) Likewise, Southeast Asian students were added to the Grant Program's coverage in response to real-world need: the mass immigration of those students, particularly the Hmong in Wisconsin, after the fall of Saigon in the Vietnam War in 1975, and the corresponding retention and financial needs of that subset of students. (R. 49:17, 27–30, 40–58, 74–81.) The uncontroverted evidence shows that these groups continue to face lower retention rates than non-minority students today. (R. 39:4, 6, 16; 54:11; 49:17, 68–69, 75, 78–80, 88; 50:7, 9–10.)

Appellants also argue that the Grant Program cannot serve this compelling interest because it is too focused on race, and that this constitutes unlawful racial balancing. (App. Br. 15–17.) But Appellants' argument conflates two separate questions under strict scrutiny: whether there's a compelling interest and whether it is narrowly tailored. *See Grutter,* 539 U.S. at 334. Whether a program is properly carried out to serve a compelling interest is a narrow tailoring question, addressed below. But how it is carried out has no bearing on the first question: whether there is a compelling interest to begin with. Again, here, Plaintiffs have done nothing to rebut the evidence that the Grant Program is in fact aimed at student body diversity, an established compelling interest.

B. The program is narrowly tailored to serve the compelling interest in retaining a diverse student body.

The Grant Program is also narrowly tailored to serve the compelling interest of retaining a diverse student body. The unrebutted evidence shows that the grant dramatically improves the retention of students at high risk for dropping out of school—*doubling* retention or more; that no other option works nearly as well; and that the grant makes that outsized impact through a modest appropriation that burdens no one. This is exactly the kind of program permitted under the narrow tailoring test.

Key when conducting a narrow tailoring inquiry is that "context matters." *Grutter*, 539 U.S. at 327. "Not 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.* at 327 (emphasis added). Restated, strict scrutiny is not "fatal in fact" but rather should be found to be met where, as here, a program is narrowly tailored. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013).

The Court's analysis thus must be guided by the nature of financial aid and the Grant Program at issue here. *Grutter*, 539 U.S. at 327. The proper framework accounts for the nuances and purposes of financial aid, which are very different than admissions policies addressed in cases like *Grutter*. Unlike admissions, the Grant Program closes the classroom doors to no one. It is instead part of a bigger picture of retaining diverse students already lawfully admitted, and it is but a tiny part of a financial picture.

In the financial aid context, narrow tailoring generally asks the following questions:

> (1) whether race-neutral means of achieving that goal have been or would ineffective; (2) whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective; (3) whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner; (4) whether the institution regularly reexamines the continued use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal; and (5) whether the effect of the use of racial or natural origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 FR 8756-01, at 8757. (R. 50:25.) These guidelines "are based on [Justice] Powell's diversity rationale in *Bakke*, which was subsequently affirmed in *Gratz* and *Grutter*." Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 Ind. L.J. 851, 862 (2010). Under this framework, the Grant Program is narrowly tailored.

1. There are no race-neutral alternatives that would work "about as well" as the Grant Program.

The first questions posed by strict scrutiny ask whether there is a race-neutral, less-intrusive alternative that would work about as well in serving the compelling interest. *Grutter*, 539 U.S. at 339. Here, there is striking, unrebutted evidence that there is not. Rather, the Grant Program is critical to retaining the targeted students. (R. 54:12–13.)

a. The Grant Program achieves outsized results--doubling retention or more—with a relatively tiny outlay of funds.

The impressive way in which the Grant works is no small thing. Using a modest amount of funds, it yields outsized results. For example, in 2015–2016, 80% of Grant Program recipients either completed their degree or certificate or were enrolled and continuing toward degree or certificate completion. (R. 47:5.) The numbers are similarly impressive for subsequent years. Student graduation or retention rates were 85% in 2016–17, 77% in 2017–18, and 81% in 2018–19. (R. 47:13, 21, 29.) And, in 2019–20, 85% of Grant Program recipients reported that, without the grant, they either would not have been able to attend school, or it would have been difficult to attend school. (R. 47:37.)

These rates dwarf the rates for those without the grant. For example, from 2011–21, 64.4% of Black students who received a Grant Program award graduated, while only 21.4% of Black students who did not receive a grant graduated—in other words, graduation rates *tripled*. (R. 41:1.) 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.)

This doubling or tripling of graduation rates is achieved with a relative pittance. Overall, state aid is only about 9% of the total aid available to students, and the Grant Program is about one-half of 1% of that. (R. 54:7–8.)

b. Neither a race-neutral nor race-as-a-factor approach would work "about as well."

The unrebutted evidence is that these results cannot be achieved nearly as well via race-neutral or race-as-a-factor alternatives.

Narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. Further, the question posed by narrow tailoring is if the effect can be achieved "about as well" with a non-race-exclusive approach. *Id.* The unrebutted evidence is that it could not. Rather, the Grant Program "is critical" to retaining a diverse student population, and race-neutral or socioeconomic-only approaches would not work nearly as well, or even at all. (R. 54:12–13.) This was true historically and remains true today.

Historically, race-neutral alternatives existed but were not improving minority retention at all, much less about as well as the Grant Program. (R. 55:13.) When the Legislature researched the issue in 1985, it noted that there were existing race-neutral—and much more well-funded—financial aid programs, such as the Wisconsin Grant, which had been established over a decade earlier. 1971 Wisconsin Act 25. And there were also outreach programs specifically designed to improve minority retention. But none of these programs worked. These programs, according to the legislative research, had made "no discernible progress" in improving the low number of minority degrees conferred. (R. 49:13.) In fact, from 1976 to 1983, "minority degrees as a percentage of all degrees granted declined from 2.8% to 2.4%." (R. 49:13.) "From this," the research concluded, "one could conclude that the University's retention efforts have not met with success and perhaps some other approach related to financial aids might be more successful." (R. 49:13.)

Race-neutral alternatives did not work then and would not work now. The unrebutted evidence shows that race-neutral alternatives would actually *hurt* minority retention, not help it about as well. Take one proposed alternative, using race as only one factor. According to the Board's financial aid expert: "Because the [Grant Program awards] are already based on need, using race as one factor in their award would

dilute the effectiveness of the [Grant] program, given the much larger actual numbers of non-minority students with financial need." (R. 39:10.) And diluting those funds would hinder rather than aid retention: "[d]iluting those race-specific funds . . . would also have a negative impact on diversity by reducing retention rates." (R. 39:17.)

Another oft-cited alternative, using socioeconomic status, would likewise fail to help retention. According to the Board's unrebutted expert, "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." (R. 39:17.) Worse still, focusing on socioeconomic status often *worsens* minority presence on campus: often, such a change "reduces yield rates of [minority] students." (R. 39:17.) In other words, focusing on socioeconomic status could have the opposite effect intended by the Grant Program.

That such alternatives simply don't work also is seen in national data: "[r]esearch has suggested that initiatives that focus on economic status alone do an inferior job of helping minority groups, often providing substantial benefits to low-income Whites instead." James, 85 Ind. L.J. at 889 (citing studies); *see also id.* at 888 ("[E]qually effective race-neutral alternatives to minority-targeted aid do not seem to exist. . . ."). For example, when concluding that race-exclusive scholarships were permissible at the University of Missouri, the U.S. Department of Education recognized that data supported "the correlation between changes in race-targeted aid and yield rates":

> For example, in 1999 the University decreased the amounts and numbers of two race-targeted scholarships to meet budget pressures. Immediately after these decreases, the numbers of first time college African-American students who enrolled and their percentage of total enrollments dropped for

> three years. Total underrepresented-minority students also declined for the same period.

(R. 50:18.)

In contrast, "the use of race-targeted aid is associated with improved retention rates. For example, [in Missouri] the year three retention rates for underrepresented minority students who received university-funded race-targeted scholarships were higher than for those who did not receive such race-targeted scholarships and equaled the year three retention rates for non-underrepresented minority students." (R. 50:17.)

The undisputed evidence shows that there are no race-neutral alternatives to the Grant Program that would work nearly as well (if at all), much less "about as well."

c. Appellants fail to come to terms with the evidence and legal standard of "about as well."

Appellants do not meaningfully address the relevant question of whether a race-neutral alternative would work about as well as the Grant Program—likely because the undisputed evidence shows there is not. Appellants instead attempt to change the subject, but their efforts are misguided.

First, Appellants seek to skip over the required multifactor, contextual inquiry and instead attempt to simply import the narrow-tailoring analysis from the admissions line of cases. (Pl.'s Br. 21–24.) Their theory is that, since race could only be plus-factor for admissions in *Grutter*, then it necessarily follows that it can only be a plus-factor for grants. But that premise is fundamentally flawed. The very case they cite makes explicit that narrow-tailoring does not transfer between contexts: "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327.

Rather, the analysis must take "relevant differences into account." *Id.* at 334 (citation omitted). *Grutter* limited its narrow tailoring analysis to the issue presented there regarding admissions: "a race-conscious *admissions* program" cannot "'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Id.* at 334 (citation omitted). That narrow tailoring analysis was for something specific: whether students would be admitted to an institution or not, which is a zero-sum proposition.

Here, the context is fundamentally different. No one is being turned away from an institution. There is no zero-sum, closing-the-doors issue—rather, the Grant Program only applies to students who already have been lawfully admitted under the *Grutter* framework. The Grant Program merely helps ensure students can actually stay in school. In other words, it is a corollary to admissions—it helps effectuate the diversity goals by actually keeping students—but it lacks the all-or-nothing nature of admissions. Nothing in *Grutter* supports importing its narrow tailoring analysis to that separate question, where "relevant differences" must be taken "into account" by actually applying the factors to the facts presented in a given case. *Id.* at 334 (citation omitted). Appellants' argument ignores all differences between admissions and financial aid.

Second, Appellants baldly assert that Wisconsin did not consider race-neutral alternatives (Pl.'s Br. 24–25), but that is simply false. As discussed above, the undisputed evidence shows that the opposite is true. (*E.g.*, R. 55:13, 16–18; 49:13.)

Third, lacking their own evidence, Appellants attempt to criticize the quantity of Defendants' evidence, asserting that the record here is not as thick as in some other cases. (Pl.'s Br. 25.) They fail to acknowledge that was largely driven by Appellants' own litigation approach. They made no effort to rebut Defendants' expert reports or data—Appellants

submitted *nothing*—meaning no rebuttal or supplemental reports were necessary.

Fourth, Appellants also seem to assert that the courts do not properly consider expert evidence under a strict scrutiny analysis (Pl.'s Br. 11), but that is flatly wrong. For example, the record in *Grutter* included consideration of "several expert reports" submitted as part of the litigation. 539 U.S. at 319. It also included expert opinions about what impacts would occur if race were "eliminat[ed] as a factor." *Id.* at 20. The Court expressly relied on the "the expert studies and reports entered into evidence at trial" and also other "studies." *Id.* at 330. The circuit court properly did so here, as well.

Again, the unrebutted evidence is that the Grant Program "is critical" to the documented retention gains and that nothing else would work nearly as well, much less about as well. The Grant Program satisfies these factors.

2. The Grant Program is limited in extent, is flexible and holistic, and has safeguards on duration, including periodic review.

The next questions posed by narrow tailoring are whether the Grant Program is flexible and limited in extent and whether it is periodically reviewed for effectiveness. These factors are all present here: it is a small fraction of the overall aid available to students. And it is flexible, as award amounts vary based on actual need, and individual institutions make case-by-case, holistic assessments when deciding when to give aid to a particular student. And all of this is reviewed annually and biennially.

a. The Grant Program is limited in extent and is flexible, considering students holistically.

The program is limited in extent and is flexible and holistic, consistent with the narrow tailoring factors.

First, the Grant Program is limited by its scarce share of overall aid dollars. The grant represents less than 1% of the overall aid money appropriated to the Board—and even less than that when accounting for the overall aid picture, of which state aid is only 9%. (R. 54:8, 12; 49:1–3.) Rather, the vast majority of state aid dollars—over 95 percent—are available to any student regardless of race. (R. 54:8; 49:1–3.)

Second, the Grant Program is limited in another sense: it does not solely target race. Rather, the grant targets only a subset of certain groups based on other factors: already-admitted students *with financial need*, need that directly dictates whether, and how much, aid is given under the program. (R. 39:10–11, 18.) Thus, grants will vary for selected students from $250 to a maximum grant of $2,500. (R. 46:3.) And, depending on their circumstances, a student may receive the grant for up to eight semesters or 12 quarters. (R. 46:3.)

Third, the Grant Program is administered in a flexible and holistic way by the individual institutions that award the grants. Those institutions consider the candidates holistically: it is not a "mechanical process" but rather is "individualized and flexible . . . based on each student's individual situation," "background," "special circumstances," and previous grants, with the overall goal of giving "students with the greatest financial need" the tools "to remain in school and graduate." (R. 51:2–3.)

Appellants incorrectly argue, without evidence, that the Grant Program is administered with "no consideration of the whole person" and is "entirely statistical." (Pl.'s Br. 16.) But the unrebutted evidence, discussed above, shows that the

opposite is true. Again, the only evidence is that the decision-making takes into account "the entirety of the students' background" and "individual student's circumstances," with the aim of providing the grant to students "with the greatest financial need . . . to remain in school and graduate." (R. 51:2–3.) That unrebutted evidence controls

b. The Grant Program has proper durational safeguards and goes beyond the required periodic review.

Next, the Grant Program has durational safeguards in place. The cases ask whether a race-based program is designed to be terminated "as soon as practicable," which may be achieved through "periodic reviews." *Grutter*, 539 U.S. at 342–43. Assuming that this criterion applies to financial aid, the Grant Program satisfies it.

The Grant Program goes beyond "periodic reviews" by having two different levels of review, one yearly and another biennially.

First, Wisconsin Stat. § 39.44(5) requires the Board to submit a report annually "on the effectiveness of the [Grant] program." And the Board does so. (R. 46:3–4; 47:2–42.) The data in the annual reports show that the program works. (R. 47:2–42.) The reports include testimonials from recipients who make clear that they would not have been able to stay in school without it. (R. 47:21–23, 29–32, 38–40.)

Second, the Legislature reviews the Grant Program as part of its biennial budget process, where it determines what state programs merit continued funding. *See* Wis. Stat. § 39.44(2). Together, these dual review processes go above and beyond the precedent's contemplation of mere "periodic reviews."

Appellants suggest that the program's dual stage review process is not enough, and that the Legislature itself

must independently document its review beyond the yearly reports. (Pls. Br. 26–27.) But there is no such requirement and no logical reason why the Legislature would need to repeat the analysis already provided by the Board. Rather, the continued funding of the grant is entirely consistent with the fact that it works and is still needed.

3. The Grant Program does not unduly burden non-minority students.

Lastly, the Grant Program does not unduly burden non-minority students. This is the case in two respects: (1) it does not take financial aid dollars away from other students, meaning there is no discernable burden and (2) in any event, it represents only a tiny fraction of the overall aid picture so even if there were a burden, there is no evidence it is "undue."

"Narrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. When it comes to burdens, financial aid, unlike admissions, is not a zero-sum game: "the use of race-targeted financial aid . . . does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed." 59 FR 8756-01, at 8762. (R. 50:32; *see* R. 39:12 (recognizing the differences between financial aid and the "almost zero-sum game" of admissions decisions).)

In fact, the evidence shows that the grant may *open up* other funds for non-eligible students, making more aid dollars available to them that otherwise might go to Grant Program recipients. (R. 39:8.) That is true nationally: "Most schools shift their dollars within the maximum award range for each student, so if a student receives a scholarship, most schools will offer that much less from other institutional funds." *Should Higher Education Race-Based Financial Aid Be*

Distinguished from Race-Based Admissions?, 42 B.C. L. Rev. 967, 986 (2001).

Further, the Grant Program is a tiny piece of that calculus. Non-minority students are eligible for the vast majority of aid. For example, the Wisconsin Grant, which accounts for approximately 94% of all aid administered by the Board, is available to any student with financial need. Wis. Stat. § 39.30. In the most recent biennial budget, the Legislature appropriated $51,476,300 per year to fund that grant. (R. 49:1–2); 2021 Act 58; Wis. Stat. § 20.235(1)(b), (ff). There are other race-neutral aid programs, too, such as 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, 5.05. The legislature appropriated $4,458,000 each year to fund that grant. (R. 49:1.) In total, the Legislature appropriated $142.5 million for the Board to administer each year of the current budget. Of this, the Legislature appropriated only $819,000 per year to fund the Grant Program. (R. 49:1.)

In other words, the Grant Program represents less than 1% of total state aid—0.57% to be exact. And it is even less than that when factoring in all aid, of which state aid is only about 9%. (R. 54:7–8.) At such a small fraction of the total aid available, the Grant Program does not *unduly* burden non-minority students (assuming there is *any* burden in the first place). "[I]n light of the small percentage of financial aid constituted by minority-targeted aid, the burden on nonminorities, if any, is minimal." Osmudia, 85 Ind. L.J. at 891. Unlike admissions, financial aid may come in many forms: from the government, from private sources, or from families. The Grant Program's tiny percentage of that bigger picture burdens no one, yet it produces outsized impact for its recipients. It is a win-win.

Appellants have no bona fide burden argument. Instead of actually pointing to evidence of a burden, or the required

undue one, Appellants argue that *any* race-based scholarship is per se illegal because "just a little discrimination" should be illegal no matter what. (Pl.'s Br. 28.) But that is not how strict scrutiny works. To even begin the analysis, it is a given that a race-based line is being drawn. But that does not end the analysis. Rather, strict scrutiny is not "fatal in fact" but rather then applies the factors described above, including undue burden. *Fisher*, 570 U.S. at 314. As with the other factors, Appellants point to no evidence of a burden, much less an "undu[e] burden." *See Grutter*, 539 U.S. at 341 (emphasis added). The case again falters on this factor, where the evidence points in only one direction.

* * * *

The Grant Program serves a compelling interest and is narrowly tailored to serve that interest. It is tiny portion of aid but is an extremely successful means for keeping high-risk students enrolled who would otherwise disproportionally leave school, thus forwarding the recognized compelling interest of diversity in higher education. The program—which burdens no one, but actually may open up funds, and which works where nothing else does nearly as effectively—should be upheld under the established narrow-tailoring test.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's decision and order dismissing this case.

Dated this 22nd day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,824 words.

Dated this 22nd day of February 2023.

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 22nd day of February 2023.

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