No. 2022AP002026

In the Wisconsin Court of Appeals

DISTRICT II

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-APPELLEES

On Appeal from the Jefferson County Circuit Court, The Honorable William F. Hue, Presiding, Case No. 21CV137

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

RICHARD M. ESENBERG
DANIEL P. LENNINGTON
KATHERINE D. SPITZ
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

State Administrative Rules

ISSUES PRESENTED

1. Whether a program that bars applicants of certain races from consideration for a taxpayer-funded grant violates the guarantee of equal protection in the United States and Wisconsin constitutions.

The circuit court answered no.

2. Whether the retention of student body racial diversity from enrollment to graduation is a compelling government interest that can justify discrimination in the provision of a government benefit.

The circuit court answered yes.

3. Whether a taxpayer-funded grant program that excludes applicants of certain races and for which no race-neutral measures were considered is narrowly tailored.

The circuit court answered yes.

INTRODUCTION

This case concerns the constitutionality of taxpayer-funded scholarships available only to students of certain races and ethnicities. The stated purpose of the Minority Undergraduate Retention Grant (the "Grant") is a noble one: financially incentivizing students who have enrolled in eligible institutions to continue their pursuit of a college degree. But the racial qualification for these grants, which presents an absolute bar for many otherwise-deserving students with the same aim, does not comport with the strict requirements the United States Supreme Court imposes upon programs that confer public benefits based on race. The trial court, which held that these race-based scholarships satisfied strict scrutiny, should be reversed.

ORAL ARGUMENT AND PUBLICATION

This case satisfies the criteria for publication because it will necessarily enunciate a new rule of law, namely whether the provision of financial aid based on race to address statistical disparities in graduation rates and student body diversity from enrollment through graduation are compelling government interests for the purposes of equal protection. The case is also one of substantial and continuing public interest. Wis. Stat. § 809.23(1)(a). Because the facts in the record are undisputed, oral argument is not necessary.

STATEMENT OF THE CASE

A. Legal and Factual Background

This case challenges the constitutionality of the Minority Undergraduate Retention Grant (the "Grant"), a taxpayer-funded program authorized by Wis. Stat. § 39.44 and administered by a State entity, the Higher Education Aids Board ("Board"). Defendant Connie Hutchison is the administrator of the Board, which oversees and administers the Grant. Plaintiffs are several Wisconsin taxpayers who

disagree with the disbursement of public funds based on racial restrictions, including a parent of Thai descent whose son will soon attend college and who would be ineligible for the Grant based upon race.

In 1985, the Legislature enacted Section 39.44 to provide grants only to Black Americans, American Indians, and Hispanics attending private, nonprofit higher education institutions and technical colleges. (R.49 at 4). Then, as now, statistics bear out a disparity between the percentage of students in these groups who graduate with a two- or four-year college degree and those of other racial groups. A similar grant exists for the University of Wisconsin system, which is not under direct challenge in this case. In 1987, the Legislature added as eligible students who were "admitted to the United States after December 31, 1975" and who are former citizens of Laos, Vietnam, or Cambodia. Wis. Stat. § 39.44. Students from other Asian countries, including but not limited to the Indian subcontinent as well as any students from the Middle East, and all Caucasian students are ineligible for consideration, even if they meet all other criteria for the Grant. (R.30 at 26-29.) The statute has not been amended in any substantive manner since 1987, and funds are appropriated every two years as part of the budget process. (R.61 at 6-7.)

The Grant is available to sophomore, junior, and senior students enrolled in technical and private colleges throughout the State in an amount ranging from $250 to $2,500 per academic year. A student is eligible for the Grant for up to 8 semesters. Wis. Admin. Code § HEA 12.03(1), (2). In addition to the racial criteria described above, the Board has promulgated administrative regulations pertaining to eligibility, including Wisconsin residency as determined by the Board and status as an American citizen or lawful permanent resident. *Id.*, § 12.02.

The Board verifies the eligibility of students for the Grants, tracks the racial and ethnic information submitted by the institutions, assigns funding based on the institution's percentage share of minority students

eligible for Grant consideration, creates the formula that determines if a student is eligible for a Grant, presents concerns about the Grant from educational institutions to the Legislature, submits budget proposals to the Governor and Legislature, and disburses the funds to eligible institutions to award to the applicants, among other administrative tasks. (R.30 at 24, 50-61.) The Board also compiles a periodic report on the Grant that it submits to the Legislature. (R.61 at 44.) It lists the institutions, the amounts awarded, the races of the recipients, and includes some statistical information and anecdotal quotes from recipients. There is no evidence in the record that members of the Legislature have ever reviewed any of the reports, nor that the Legislature has undertaken any debate concerning the continuing need for the Grant since 1987. There is nothing in the record, from 1985 all the way through today, demonstrating any race-neutral alternatives to the Grant that have been tried to remedy statistical disparities in graduation rates across racial groups.

B. Procedural Background

Appellants filed their Complaint in this matter on April 15, 2021. (R.3.) Respondents answered on June 1, 2021. (R.9.) Appellants filed an amended complaint adding federal claims on August 5, 2021, and Respondents answered on September 20, 2022. (R.21, 22.) Appellants filed a motion for summary judgment on May 11, 2022, arguing that the Grant does not satisfy strict scrutiny under the Equal Protection Clauses of the state and federal constitutions because it does not serve a compelling interest and is not narrowly tailored. (R.28-35.) Respondents cross-moved for summary judgment, arguing that Appellants lacked standing to bring the suit and that, in any event, the Grant served a compelling interest in racial diversity and was narrowly tailored to address that interest. (R.36-51.)

On September 16, 2022, the circuit court issued a memorandum opinion denying Appellants' motion and granting Respondents' motion in part and denying it in part. (R.61.) The circuit court concluded that Plaintiffs had standing, but that the Grant satisfied strict scrutiny. (*Id.*) In particular, the court concluded that the Grant served two compelling interests not previously recognized by other courts, namely (1) a post-admission interest in student body racial diversity and (2) the provision of financial aid to those students who might not otherwise have access to it. (*Id.* at 36.) The circuit court's opinion relied on selected case law from the Supreme Court of the United States concerning student body diversity as a compelling interest at the college admissions stage, as well as the reports of experts retained by Respondents and academic scholarship. (*Id.*) The court also concluded the Grant was narrowly tailored because no race-neutral alternatives would serve these interests and, despite the fact that the Grant has been on the books for over four decades, the periodic updates from the Board to the Legislature meant that the Grant was sufficiently temporary and limited in duration, and was narrowly tailored because it "does not take financial aid dollars from any aid program for which non-minority students are eligible." (R.61 at 44, 45.)

Appellants filed a timely notice of appeal on November 22, 2022. (R.62.)

STANDARD OF REVIEW

This Court reviews a decision to grant summary judgment *de novo*, without deference to the circuit court but benefitting from its analysis. *Christus Lutheran Church of Appleton v. Wis. Dep't of Transp.*, 2021 WI 30, ¶ 50, 396 Wis. 2d 302, 956 N.W.2d 837 (citation omitted).

ARGUMENT

I. The Grant is a race-based government benefit subject to strict scrutiny, and the State bears the burden of clearing this high hurdle.

The trial court correctly noted, and the State conceded, that a challenge to a program like the Grant under the Equal Protection Clause (or its state constitutional equivalent) is subject to strict scrutiny. (R. 61.) The State bears the burden of proving that the reasons for the racial classifications are "clearly identified and unquestionably legitimate." *Id.* at 25 (quoting *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013)). Government programs that explicitly discriminate on the basis of race, including the Grant, are "presumptively invalid." *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 234 (1995). Such programs are "simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

The trial court's decision below cited the stringent nature of the standard it was to apply, but failed to apply it properly. While the court correctly noted that the State bore the burden of proving the Grant's legitimacy, its analysis did not bear that out, instead repeatedly emphasizing that many of the facts the State submitted were undisputed. This is true as far as it goes. Appellants do not dispute that there are statistical disparities in college graduation rates among students of various racial backgrounds in the State of Wisconsin, as well as financial disparities, nor do they dispute that the State's retained experts have submitted opinions supporting the efficacy and need for a race-based program some thirty-plus years after the Grant was instituted. But these facts are largely irrelevant to the court's analysis.

As further described in the following sections, the circuit court was required to assess whether the Grant served a compelling government

interest and, if so, whether the Grant was narrowly tailored to serve that interest. The proper inquiry requires an evaluation of the need and justification for the program (including prior State action, or lack thereof, that contributed to the problem the government wishes to use race-based relief to solve) and the methods for implementing it that the Legislature considered *at its inception*, not based on a post-hoc rationalization written for litigation purposes in 2022. Whether a professor believes the Grant is an effective way of remedying statistical disparities (to which there is no evidence the State contributed) is wholly irrelevant to whether state lawmakers were justified in creating the program in the 1980s or whether their decision to use a racial bar as a qualification at that time (without any documented reconsideration of it since 1987) satisfies strict scrutiny.

Rather than treating the Grant program as "presumptively invalid," the circuit court's analysis selectively ignored pertinent case law and approved the State's categorial exclusion of certain races from the Grant program largely based upon conclusory statements and opinions expressed in law review articles. On review, this Court should consider the existing case law and apply it to this novel issue as courts have applied the exacting strict scrutiny standard in other contexts, rather than relaxing that standard to allow discrimination to continue.

II. The role of Supreme Court precedent in college admissions on this case

As the parties and the circuit court below recognized, this case is one of first impression. (R.61 at 27-28.) The Supreme Court of the United States has taken up the issue of using race as a factor in college

admissions (and is currently doing so again[1]), but has never taken up or recognized a compelling interest in student body diversity beyond the admissions stage, nor has it considered whether race may be considered in the context of financial aid derived from taxpayer funds. As described further in section III, *infra* granting these interests as compelling in the Equal Protection context is incorrect, and the admissions cases do not provide a direct corollary—but even if this Court uses these cases as a guide, it must examine and consider that entire body of case law, rather than cherry picking from it as the circuit court did below.

Left without a roadmap in uncharted territory, it is perhaps understandable that the circuit court began with *Grutter v. Bollinger*, 539 U.S. 306 (2003), a case in which the Supreme Court upheld the University of Michigan Law School's admissions program that considered an applicant's race as a "plus factor" when evaluating his or her application. The *Grutter* case held, based on an extensive record that included a fifteen-day bench trial, that the school had a compelling interest in attaining a diverse student body due to the educational benefits of a diverse class, including promoting cross-racial understanding, breaking down racial stereotypes, and better preparing students for an increasingly diverse workforce. 539 U.S. at 318, 330-31. A majority of the Court concluded that the law school could, consistent with the Equal Protection Clause, include in its application process a "flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them." *Id.* at 315 (internal

---

[1] *Students for Fair Admissions v. President & Fellows of Harvard College*, -- U.S. --, Dkt. 20-1199 (cert. granted Jan. 24, 2022). Because student body diversity is the only interest the State has submitted as a compelling interest, in the event *Students for Fair Admissions* overrules *Grutter*'s holding that student body diversity—as that interested has been articulated by the Court, and not as the racial balancing Respondents and the circuit court endorsed—is a compelling interest, Respondents necessarily lose this case.

quotation marks omitted). One of these flexible criteria was diversity of the incoming class, but while the school was committed to the inclusion of "groups that have been historically discriminated against," such as African-Americans, other types of diversity were also considered and its policy did "not define diversity solely in terms of racial and ethnic status." *Id.* at 316. The Court held that the admissions office's "highly individualized, holistic" consideration of the student's entire application was constitutionally permissible because the program remained "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337. In short, *Grutter* and other precedents never justify strictly "racial diversity" as a compelling government interest—as the State claims here—but instead a "student body diversity" where race is but one factor.

But *Grutter* is not the only opportunity the Court has had to consider race in admissions—in fact, it was not even the only case to do so *that day*. In *Gratz*, the Court struck down the University of Michigan's undergraduate admissions program that awarded applicants a set number of points based upon their race or ethnicity. The university required 100 points to guarantee admission; status in an underrepresented minority group defined by race or ethnicity would automatically provide a student with 20 points, or a fifth of the total required. *Gratz,* 539 U.S. at 255. The 20 points for checking the underrepresented minority box were worth more than six times the points awarded for an outstanding essay and four times the points awarded "for an applicant's personal achievement, leadership or public service." *Id.* at 278 (O'Connor, J., concurring). The Court concluded that, rather than using race as a "plus factor" to be individually considered among many others, the racial component was frequently determinative of whether an applicant would receive a place in the class, was not narrowly tailored, and thus ran afoul of the Equal Protection Clause. *Id.*

at 270. In other words, when race became determinative in the government's decision making, it no longer supported a compelling government interest.

Remarkably, the circuit court eschews any real discussion of *Gratz* in its analysis, other than to say that it, along with *Grutter* and *Bakke*, "are certainly instructive" and "useful but not necessarily binding" in the financial aid context. (R.61 at 37.) Because the circuit court had no cases with a compelling interest analysis of either the retention of a racially diverse student body or race-based financial aid, it was the circuit court's prerogative to examine admissions case law. However, the court erred when it chose to examine in any detail only a case with a starkly different policy and some law review articles rather than the entire body of admissions case law. The court below went to great lengths to emphasize *Grutter*, but the Grant program is nothing like that case. In fact, it is also even more repugnant to principles of equal protection than was the policy struck down in *Gratz*. While the policy in *Gratz* awarding admissions points based on race was frequently determinative of the college's admissions decision, *Gratz*, 539 U.S. at 266 ("virtually all" minority students who are minimally qualified are admitted), a student of a disfavored race could overcome the hurdle with high scores in other areas. Here, it is undisputed that the Grant program excludes large swaths of students from consideration solely based on their race. (R.30 at 26-30.) The barred groups include not only Caucasian students, but students from India, China, Afghanistan, and the Middle East. (*Id.*) A student who is not a member of one of the preferred racial groups selected by the Legislature in the 1980s is ineligible, full stop, no matter the extent of the student's need.

In fact, Appellants have located no policy in higher education or otherwise that provides a complete racial bar and still survives strict scrutiny (see section IV, *infra*). Nothing in the *Grutter* opinion can be

read to greenlight doling out government benefits based on race (or, conversely, prohibiting eligibility for those benefits based on race). The circuit court erred when it concluded otherwise.

III. The circuit court erred when it crafted two new compelling interests not recognized by any court.

A. The Grant's interest in retaining a diverse student body is not a compelling interest because it is solely "discrimination for its own sake."

The State's claim of "racial diversity" in this case is not the type of "diversity" blessed by the Supreme Court in *Grutter* and other cases. It is nothing more than racial balancing—ensuring that certain races are represented in a student body. But at no point has the Supreme Court, or any inferior court, endorsed the position that racial balancing for its own sake can simply be dubbed "diversity" and approved as a compelling state interest; in fact, it has taken care to disclaim this position. *See Grutter*, 539 U.S. at 334 ("universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admission tracks" or "insulate applicants who belong to certain racial or ethnic groups from the competition for admission"); *Fisher v. University of Texas at Austin* ("*Fisher II*"), 579 U.S. 365, 381 (2016) ("the compelling interest that justifies consideration of race [ ] is *not an interest in enrolling a certain number of minority students*") (emphasis added).

True student body diversity, as Justice Powell described in *Bakke* and the Court quoted with approval in *Gratz* and *Grutter*, is not just code for skin color or ancestral lineage. "[D]iversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics in which racial or ethnic origin is but a single though important element." *Grutter,* 539 U.S. at 325 (quoting *Bakke*, (Powell, J.))

The Grant does not promote student body diversity in the sense described in *Bakke* and *Grutter*. It is, instead, an effort to distill a student to a single characteristic—race—and award or withhold taxpayer funds on the basis of that characteristic. There is no consideration of the whole person, no examination of the unique perspective the student might bring to the student body, and no attention paid to why the community is better for making sure this particular student has the funds to graduate rather than another. The interests justifying the Grant, and the results the State and court below relied upon to demonstrate a compelling interest, are entirely statistical. This group graduates at a rate less than that group, so the State will attempt to cure that disparity by providing a race-based grant as a financial incentive.

No party to this lawsuit believes that racial disparities in retention or graduation rates are a good thing. But the fact that the Grant has a laudable goal or a positive intention underlying it is not dispositive of whether it passes constitutional muster. A program like the Grant, which defines an applicant's worthiness for taxpayer aid by the color of the student's skin and measures success purely in percentages by race, requires a compelling interest to justify classifying individuals in this manner.

The facts submitted by the State, and the scholarship relied upon by the court below, do not establish a compelling interest in retaining a diverse student body because the only aspect of "diversity" considered is the sort of racial balancing rejected in by the Supreme Court in other education cases. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) ("the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate"); *Fisher v. University of Texas at Austin ("Fisher I")*, 570 U.S. 297, 311 (2013). Here, barring recipients of the Grant on the basis of race constitutes "discrimination for its own sake" and is not a

compelling interest. *Gratz*, 539 U.S. at 270 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)). As the Supreme Court has pointed out, "[i]ncreasing minority enrollment may be instrumental to these educational benefits, but it is not . . . a goal that can or should be reduced to pure numbers." *Fisher II*, 579 U.S. at 381 The circuit court erred when it elected to ignore this case law in favor of law review articles and the opinions submitted by the State.

Notably, racial diversity is the only interest cited by Respondents as compelling in support of the Grant. (R.37 at 39-42.) For example, Respondents do not contend that the Grant remedies past discrimination by the State or State actors in either the retention of students at these institutions or in the past provision of financial aid by the government. The significance of this limitation is that, should the United States Supreme Court elect to overrule or modify *Grutter* this term in *Students for Fair Admissions v. President & Fellows of Harvard College*, -- S.Ct. --, this Court will be required to follow that ruling and, presumably, terminate the Grant.

Although Respondents have not argued that they have a compelling interest outside of racial diversity in the student body, for the avoidance of doubt and as argued by Appellants below, the record demonstrates that the State also does not have a compelling interest in using race-based relief apart from this interest.

To demonstrate a compelling government interest in a racial classification, the state must meet all three parts of the following test:

First, the program must target a specific episode of past discrimination rather than generalized discrimination or disparities reflected throughout society. Past societal discrimination does not justify race-conscious government action. See, e.g., *Parents Involved*, 551 U.S. at 731 ("The sweep of the mandate claimed by the district is contrary to

our rulings that remedying past societal discrimination does not justify race-conscious government action."); *Shaw v. Hunt*, 517 U.S. 899, 909-910 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Adarand*, 515 U.S. at 226; *City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 498-99 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plurality opinion); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310 (1978).

Importantly, such evidence must be of recent discrimination. *See Wygant*, 476 U.S. at 276 (remedies for past discrimination may not be "ageless in their reach into the past, and timeless in their ability to affect the future"); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("seventeen-year old evidence of discrimination is too remote to support a finding of compelling government interest to justify the affirmative action plan") (quotation omitted). An allegation of generalized societal discrimination is "not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw*, 517 U.S. at 909. Put simply, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.*

Second, the evidence must be evidence of *intentional* discrimination. *Croson*, 488 U.S. at 503. Achieving racial balance is not a compelling interest. *Parents Involved, supra*, at 723; *Croson*, *supra*, at 495 (plurality opinion of O'Connor, J.) "Raw statistical disparities prove little; they certainly do not prove intentional discrimination. … [N]ot all of these disparities are plausibly attributable to intentional, or for that matter unintentional, discrimination." *McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998). Relying on statistical disparities only aims the defendant toward "racial balancing," and this can never be a "compelling end in itself [because it] would effectively assure that race will always be relevant in American life, and that the ultimate goal of

eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730.

Finally, the defendant must have had a role in the discrimination it hopes to remedy. If the defendant "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the defendant can act to undo the discrimination. *Croson*, 488 U.S. at 492 (plurality opinion). The defendant must prove that it "knowingly perpetuated the discrimination," and therefore became "a kind of joint tortfeasor, coconspirator, or aider and abettor." *Builders Ass'n of Greater Chicago v. Cty. of Cook*, 256 F.3d 642, 645 (7th Cir. 2001).

The Grant does not meet any of these criteria. Rather than pointing to specific, intentional episodes of past discrimination, the entire program is premised on the statistical disparity in graduation rates by race, which are periodically reported by the Board and have persisted throughout the entirety of the Grant's existence. Courts have noted that statistical disparities "don't cut it" when it comes to proving a compelling interest. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021). There is nothing in the record, dating either from the 1980s when the Grant was established, all the way through today, that substantiates episodes of past discrimination that gave rise to the disparities in graduation rates at the institutions that receive Grants, much less intentional discrimination in which the State of Wisconsin was an active or even passive participant.

The circuit court erred when it concluded, largely based on the assumption that racial balancing is the measure of student body diversity, that student body diversity is a compelling interest based on this record.

B. The circuit court's decision to craft a compelling interest in race-based financial aid is unprecedented and unsupported.

Similarly, the "compelling interest that justifies consideration of race in college admissions *is not an interest in enrolling a certain number of minority students*." *Fisher II*, 579 U.S. at 381 (emphasis added). But the Grant program is simply that—an effort to boost the number of minority students who graduate with a four-year degree by providing aid only to selected racial groups. The circuit court thus erred when it concluded that the State also has a compelling interest in race-based financial aid. As acknowledged by all parties and the circuit court below, no court has yet recognized a compelling interest in awarding financial aid based upon race. (R.29 at 13; R.37 at 43; R.61 at 36.) Again, relying largely on *Grutter*, ivory tower scholarship, and the State's retained experts, the court lost sight of the high bar that race-based programs must clear to establish a compelling interest.

The list of situations in which courts have sanctioned providing benefits on the basis of race is narrowly circumscribed. They include rectifying past episodes of discrimination by the government itself, *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) (affirming consent decree providing race-based relief for victims of race discrimination by U.S. Department of Agriculture); affirmative action in hiring and promotion where a particular actor has historically worked to keep certain racial groups out, *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998), and student body diversity when used as a "plus factor" in the admissions context. *Grutter*, 539 U.S. at 341. Since *Grutter* in 2003, Appellants' counsel have not located any examples of courts identifying new compelling interests that do not fall into one of the above three categories.

Unfortunately, the circuit court did follow other courts' restraint. Not only is this new compelling interest seemingly unprecedented—Appellants could not locate a court that had recognized it, and based upon the circuit court's opinion Judge Hue could not either (R.61 at 36)—but it is potentially breathtaking in its scope. After all, as the trial court's opinion and the State point out, the data do not bear out that the statistical differences the State uses to justify the Grant's race-based treatment represent an issue unique to Wisconsin. (R.61 at 3, 28; R.39 at ¶¶17-18, 23-25, 27.)

The circuit court's opinion emphasized Appellants' "failure to rebut" the State's experts, but again the question is not whether statistical disparities in retention and graduation rates exist (and persist). They do. The only question is, as a matter of law, whether offering taxpayer-funded scholarships on the basis of race serves a compelling interest and, if so, whether the means the State has selected to address that interest are narrowly tailored. Unfortunately, both the State and the circuit court below disregarded the strict scrutiny that applies to programs like the Grant. *See Gratz*, 539 U.S. at 275 ("Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis").

IV. Even if this Court agrees with the trial court's compelling interest analysis, the Grant is not narrowly tailored.

A. The Grant does not use tailored means to achieve its ends.

Even if this Court accepts that the State has established a compelling interest in the Grant by endorsing the State's strictly "racial diversity" interest, the circuit court erred in concluding that the Grant

program is narrowly tailored.[2] The State bears the burden of proving both prongs. *Adarand*, 515 U.S. at 224. Unlike in the compelling interest analysis, where an institution in the admissions context can be owed a degree of deference after the State has borne its burden, "*no deference is owed* when determining whether the use of race is narrowly tailored to achieve the university's permissible goals." *Fisher II*, 579 U.S. at 377 (emphasis added). When considering narrow tailoring in the admissions context, the Supreme Court has held that a public university bears the burden of proving that a nonracial approach would not promote its interest in the educational benefits of diversity—as the Supreme Court has used that term[3]—about as well and at tolerable administrative expense. *Fisher I*, 570 U.S. at 312. While a university is not required to exhaust every conceivable race-neutral opportunity before turning to race as a consideration, the state bears "the ultimate burden" of proving that "race-neutral alternatives that are both available and workable do not suffice." *Fisher II*, 579 U.S. at 377 (quoting *Fisher I*, 570 U.S. at 312) (emphasis removed).

"[M]eaningful individualized review of applicants"—not just checking a box—is one touchstone of permitting race as a consideration in public opportunities. *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring). This was precisely why the Court permitted the "race as a plus factor" process in *Grutter*, while at the same time rejecting the use of race as an automatic and frequently outcome-determinative consideration in *Gratz*. The *Grutter* program passed muster because the racial consideration was

---

[2] Tellingly, the heading in the circuit court's opinion is simply "tailoring," without the "narrow" modifier. (R.61 at 30.)

[3] As noted in the compelling interest section, *supra*, student body diversity presents a compelling interest based upon the experiences that students bring, and not as a racial-balancing quota system. For the same reasons that the Grant, which uses race as an up-or-down prerequisite, cannot meet the criteria for a compelling interest, it also cannot be considered narrowly tailored.

"flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 336-37. As the *Gratz* Court observed:

> The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*" *Ibid.* (emphasis added).
>
> This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234–235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application.

Gratz, 539 U.S. at 272-73.

Drawing a bright line indicating that whites or Asians need not apply is not permitted, just as it is not permitted to draw a line saying

that African-Americans or Hispanics need not apply. As the *Grutter* Court observed, narrow tailoring does not permit an institution to "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315).

But that is precisely what the Grant does, and the undisputed racial bar does so in a way that offends the Equal Protection Clause even more obviously than the point system struck down in *Gratz*. Under the constitutionally invalid *Gratz* regime, the incredible student artist would have a difficult time amassing enough points to overcome the points awarded for race and ethnicity, but he or she could conceivably do it. The Grant program in this case is different. The Thai applicant or the white applicant doesn't just have a higher hill to climb—it is undisputed that he or she is not eligible to apply, and will not be considered for the Grant, *at all*. (R.30 at 26-30.) It removes from consideration any applicant whose background is European, Thai, or Chinese, among dozens of others, in order to ensure that only those in the racial categories listed in the statute are considered. In fact, the State's own experts, and the trial court's opinion, specifically note the concern that, absent a racial bar, those in the Grant's preferred categories may not be competitive for the funds. (R.37 at 17 (discussing merit-based aid); R.61 at 40 ("Race-neutral alternatives widen the pool of applicants to include non-minority students and that diverts dollars from the targeted groups.") This is precisely the sort of discriminatory program that *Grutter* explicitly rejected.

A second touchstone for considering race is that the government entity must have seriously considered and tried race-neutral alternatives before resorting to race-based relief. The circuit court's opinion simply assumed from the fact that non-race-based relief (such as financial aid and scholarships for impoverished students without a racial

component) was available prior to 1985, but that such aid had not cured racial disparities in graduation rates, that race-based relief was necessary. (R.61 at 38-39.)

Such a cursory analysis does not meet the Supreme Court's application of narrow tailoring. In *Fisher II*, for example, the University of Texas at Austin made documented, race-neutral efforts over many years to try to raise the critical mass of minority students in its admissions process. These efforts included intensifying its outreach efforts to African-American and Hispanic applicants, opening new regional admissions centers, increasing its recruitment budget, organizing over 1,000 recruitment events, and creating a more "holistic" review process in an effort to encourage qualified minority applicants. *Fisher II*, 579 U.S. at 385. It was only because none of these efforts proved workable that the Supreme Court blessed the University's race-conscious admissions program.

The record in this case looks nothing like the extensive efforts Texas undertook in the *Fisher* cases, and it lacks the hallmarks of individual consideration that *Grutter, Gratz*, and *Fisher* demand if race is to be considered in the provision of a public benefit. If Wisconsin courts wish to apply admissions case law to enrollment or financial aid, they should in all fairness consider *all of it*. The circuit court erred when it did not do so.

Additionally, the circuit court cited a Second Circuit case for the proposition that it should not second-guess the racial categories last established for the Grant by the Legislature in 1987 (and, undisputedly, never reconsidered since). But this discussion side-steps the real issue. Lest Appellants' position be unclear, the issue is that there are races—any races—that are deemed ineligible *at all*.

B. The Grant, which has been in existence for thirty-five years without change, is not sufficiently limited in duration.

A "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). "[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Grutter*, 539 U.S. at 342. As the *Grutter* Court itself noted, a "permanent justification for racial preferences" is an affront to equal protection principles. *Id.*

The Grant has been in place since 1985. Its funds are appropriated biannually as part of the State's budget process, but neither Section 39.44 nor the state regulations promulgated by the Board under that statute include any definitive end date, and the statute itself has not changed (other than renumbering) since 1987. As is often the case with congressional spending, there is no evidence in the record of any real debate in the Wisconsin Legislature about individual line items worth "merely" in the high six figures over a two-year span when considered as part of the much larger budget—as the circuit court itself emphasized, the appropriation in the last budget cycle constituted less than one half of one percent of the total budget. (R.61 at 7, 42.)

Despite the longevity of the Grant, the unrestricted use of race as an eligibility criterion, and the insistence by the State's efforts of the Grant's efficacy and necessity, the numbers in the record demonstrate that the Grant has not made any significant dent in the retention and graduation disparities the State claims it was intended to remedy. (R.61 at 3.) It is difficult to comprehend how a program that uses race as a bar—the most draconian type of restriction available—*and* that does not achieve its stated goal can be considered narrowly tailored.

The circuit court's analysis turns largely on two factors: 1) the individual students who receive the Grant benefit from it, often reporting that it was a factor in finishing a degree; and 2) the Board provides periodic reports to the Legislature about the Grant, and so if the Legislature wanted to discontinue it, it has the information available to it to do so. (R.61 at 44.) Neither argument has merit. First, while Appellants again do not dispute the veracity of the Grant recipients' feelings, the conclusion that is drawn from such statements is, not surprisingly, that students who receive more money have an easier time finishing school. Nothing in the reports to the Legislature or the students' testimonials establishes that *providing funds based upon race* makes those students any more likely to finish a degree—presumably, an Indian-American student or a Thai-American student would benefit similarly. The Grant, once again, is distilled to numerical racial balancing. Second, even if there were some evidence that anyone in the Legislature actually read and considered the Board's reports concerning the Grant (rather than simply voting up or down on an omnibus budget package), the fact that policymakers passed legislation does not itself render the law constitutional.

The circuit court itself acknowledged that it did not know what standard to apply when considering an appropriate timeframe, and simply concluded, without analysis, that the Grant satisfies "*whatever durational requirement applies* in the financial aid context." (R.61 at 43) (emphasis added). Apparently, following the circuit court's reasoning, the Grant can continue for the next hundred years—with the same lack of progress toward its goal seen over the last thirty-five—and pass muster so long as the Board keeps submitting periodic reports to the Legislature. But this can't be right, and it is not in keeping with the Supreme Court's decision in *Fisher II*. There, the Court observed that the university had a continuing obligation to ensure that its admissions program was tailored to changes in circumstances over the years. 579

U.S. at 380. That the Board submits statistical summaries and a generic description of the Grant to the Legislature every two years does not evince a "regular evaluation of data and consideration of student experience" or an effort to "tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest." *Id.*

C. The availability of other scholarship opportunities that are not racially exclusionary does not save the Grant.

In its opinion, the circuit court accepts the State's argument that because the Grant only accounts for a small percentage of available taxpayer funds and because other programs do not incorporate a racial bar, it is narrowly tailored. Not surprisingly, the court does not cite any case law sanctioning "just a little" discrimination, and it would be folly for this Court to give cover to that position. Discrimination, in any form and against any group, "demeans us all." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part). No doubt Section 39.44 would be struck down immediately, and rightly so, if the funds were only available to white students.

Section 39.44 is no different. It imposes a racial restriction on who may receive taxpayer funds to finish out a college degree. The harm created by the statute is not just pecuniary, but also dignitary. *Shaw,* 517 U.S. at 908 (discrimination is a "fundamental injury" to the "individual rights of a person"). No students should be made to feel that they are "less than" others due to their racial or ethnic heritage, whether the scholarship funds at issue amount to $1,000 or a full ride. It provides cold comfort to a financially needy Afghan-American or Thai-American applicant that only *some* doors are closed to them based on their race while others are open to everyone. Employers are not permitted to turn applicants down based on race by pointing to other employment options

down the street, nor could a restaurant attempt to justify a "whites only" area by noting that its competitor is willing to seat anyone. The circuit court's analysis could be used to give cover to these and other similarly egregious scenarios.

The Grant may comprise only a small percentage of the State's budget, but there is no dispute that it is a State program, funded by State dollars, and administered in part by State employees. Wis. Stat. § 39.44; Wis. Admin. Code HEA ch. 12; (R.30 at 17:2-9, 19:19-20:1; 66:3-68:14; 74:22-78:6.) The bottom line is that in the most recent biannual budget, the State spent over $800,000 providing the Grant only to selected racial groups. (R.61 at 7, 45.) The circuit court erred when it concluded that the Grant satisfies narrow tailoring because it "does not take financial aid dollars from any aid program for which non-minority students are eligible." (R.61 at 45.) The inquiry is not whether there are other opportunities available without a racial restriction besides the $819,000 pool of funds. The inquiry is whether *this program* meets the stringent criteria for strict scrutiny. For the reasons set forth above, the Grant does not and should be enjoined.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: January 23, 2023.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Katherine D. Spitz
Richard M. Esenberg (WI Bar No. 1005622)
Daniel P. Lennington (WI Bar No. 1088694)
Katherine Spitz (WI Bar No. 1066375)

330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Dan@will-law.org
Kate@will-law.org

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,413 words.

Dated: January 23, 2023.

Electronically signed by Katherine D. Spitz

KATHERINE D. SPITZ