**No. 2022AP2026**

# 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-RESPONDENTS.

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

## REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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### I. Appellants have standing.

The trial court properly concluded that Appellants have standing. (App. 16–26.) The Board's arguments to the contrary are not supported by Wisconsin law, which broadly confers standing on taxpayers.

The Board points to a concurrence from a single Wisconsin Supreme Court justice as support for its position that Appellants cannot assert taxpayer standing. (Resp. Br. 27) (citing *Teigen v. Wis. Elec. Comm'n*, 2022 WI 64, ¶ 163 (Hagedorn, concurring)). But the trial court properly concluded that the current, controlling state of Wisconsin law governing standing was expressed in *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856. In that case, a majority of the Wisconsin Supreme Court concluded that the taxpayer challenging the Governor's pandemic emergency orders and the expenditures associated therewith had standing. The majority noted in that case that even the "imminent threat" of illegal expenditures "is sufficient to confer taxpayer standing." *Id.*, ¶ 11 n.5.

Appellants have alleged that the six-figure sums expended per year on the Grant violate the Equal Protection clauses of both the state and the federal constitutions. This is not a hypothetical dispute; it fully satisfies the *Wisconsin* law requirement permitting taxpayers to challenge illegal spending, and it is Wisconsin law, not federal law, that governs the standing inquiry in this case. *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) (federal standing cases are "not binding on Wisconsin"); *see also* App. 26. This is the case even when such loss to each individual taxpayer is "infinitesimal"; such loss is "sufficient to sustain a taxpayer's suit." *Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974). As set forth by Appellants below and accepted (albeit grudgingly) by the

trial court, (R.57 at 2–4; App. 26 ("The *Fabick* decision establishes Wisconsin law" on this issue), Wisconsin law permits taxpayer challenges in a manner that limited Article III standing in federal courts might otherwise prohibit. That a lawsuit filed in circuit court also includes a federal claim neither defeats taxpayer standing nor transforms the standing inquiry into one governed by federal law. The trial court below correctly found that Appellants had standing to challenge the expenditure as Wisconsin taxpayers.

## II. Racial balancing is not a compelling interest.

Not surprisingly, the Board continues to argue that racial diversity in retention and graduation rates and in financial aid—neither of which has previously been recognized by any court—is a compelling interest. It is also no surprise that the Board relies almost exclusively on cherry-picked language from *Grutter v. Bollinger*, 539 U.S. 306 (2003), the case that permitted race to be considered as a "plus factor" in the admissions context and recognized diversity *in admissions* as a compelling interest if certain criteria were met.

What *is* surprising is the Board's decision not to acknowledge in any detail, much less distinguish, the case law Appellants cited in their opening brief. As Appellants extensively discussed, the Supreme Court has repeatedly differentiated between racial diversity as a plus factor in the admissions context, which is permissible if the State has met a high burden of proof, and pure racial balancing, which is unconstitutional. (App. Br. 11–17.) The Board offers no discussion at all of the Supreme Court cases Appellants cite that discuss *Grutter* (including the companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), released the same day), which also necessarily control on the issue if *Grutter* does. The Board simply decrees Appellants' arguments are "meritless" (Resp. Br. 33) without actually addressing the difference between diversity with race as a component and racial balancing—the latter of which the

Supreme Court has rejected several times, and which the record reveals is the purpose of the Grant at issue. (App. 38–39) (quoting Board's discussion of statistical disparities in aid and loan defaults by race).

The jurisprudence of the use of race in higher education did not start and end with *Grutter*. But even if this Court likewise decides to only read *Grutter*, it will presumably read the entire majority opinion, which itself includes the following statement dooming programs like the Grant:

> The Law School's interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin. *That would amount to outright racial balancing, which is patently unconstitutional.* Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

*Grutter*, 539 U.S. at 329–30 (emphasis added) (internal quotation marks and quoting citations omitted).

The Grant does not serve a compelling interest here because, unlike the law school program in *Grutter*, the Grant program is an effort to cure what is by all accounts an unfortunate racial disparity between the graduation rates of students of certain racial backgrounds. All of the evidence the Board has put forward is focused on the statistics based on race and ethnicity of who graduates from the eligible institutions and who does not. Unlike the law school's showing of a compelling interest in *Grutter*, which examined the particular impacts of racial diversity on classroom discussions of ideas and the promotion of particular learning outcomes, 539 U.S. at 329–31, the Grant is an attempt to bring into balance the graduation rates by only offering a government benefit to students of particular races. Furthermore, as described in Appellants' opening brief and in the next section, the benefit is an outright racial ban

on large groups of otherwise eligible applicants whose only deficiency is their skin color. This is also unlike the situation in *Grutter*, where racial diversity was authorized for use as a "plus factor" to enhance the classroom experience—not a determinative factor. "[D]iversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Grutter*, 539 U.S. at 325, 392 (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.)). In contrast, conditioning a government benefit on race to bring a disparity into balance is discrimination "for its own sake," *Freeman v. Pitts*, 503 U.S. 467, 494 (1992), and has long been recognized as unconstitutional. The State's assertion 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 student body graduation rates in higher numbers. And the case law has made clear that such an interest does not pass constitutional muster. *See Gratz*, 539 U.S. at 271 (proper application of diversity as a compelling interest "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity") (citation omitted).

For these reasons and those set forth in Appellants' opening brief, the trial court erred when it concluded that the Grant is supported by a compelling interest.

## III. Even if this Court concludes that a compelling interest supports the Grant, it is not narrowly tailored and is therefore constitutionally invalid.

"[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. This is why, even if this Court accepts that the State has established a compelling interest in the Grant, the program is constitutionally invalid if it is not narrowly tailored. Both a compelling interest and narrow tailoring are necessary, and the State bears the burden of proving each to sustain a race-based program. *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995).

In its narrow tailoring analysis, the Board once again suffers from a myopic view of *Grutter*. Although Appellants discussed the interplay of several Supreme Court cases on narrow tailoring specific to the education context at length (App. Br. 21–25), these cases are again neither distinguished nor discussed. Apparently, as far as the Board is concerned, these on-point but inconvenient precedents simply do not exist.

Instead, the Board structures its narrow tailoring argument around a federal agency guidance document—without explaining why this document, rather than pertinent case law on racial programs in higher education, controls. The Board argues that the Grant "closes the classroom doors to no one" (Resp. Br. 36), but that is an oversimplification of the issue. If the Board's interpretation is accepted, then the inquiry is simply whether there is another seat in the class or another scholarship dollar out there for which an individual may be eligible. But Supreme Court case law has made clear that this is not the inquiry—if it were, strict scrutiny for race-based programs would not be "strict" at all, absent an institution completely barring students outside the selected groups from enrolling or applying for financial aid. The

Supreme Court has invalidated programs that do far less, including programs that set aside special privileges for selected racial groups while leaving other options open to all. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 289 (1978) (where white applicants could compete for 84 of 100 seats, program struck down as an impermissible "line drawn on the basis of race and ethnic status"); *Gratz*, 539 U.S. at 265, 259, 271–76 (discussing the "problematic" policy of "protected seats" for certain groups and rejecting as unconstitutional the less drastic measure of assigning points based on race). This version of a diversity policy has been off the table for forty-five years. Under the plan rejected in *Bakke*, the university effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats." 438 U.S. at 319 (opinion of Powell, J.). The Court rejected such an approach as one "never before countenanced by this Court." *Id.* at 319. The *Grutter* Court relied on, and did not change, that basic proposition from *Bakke*. *Grutter*, 539 U.S. at 334 (race-based program "cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants") (quoting *Bakke*, 438 U.S. at 315) (internal brackets omitted). The Grant program here completely cuts off from consideration large swaths of the student population based on race, without consideration of any individual factors. It is therefore not narrowly tailored under the applicable case law.

Furthermore, even assuming that a federal guidance document provided the correct authority for the Court's analysis, the Grant cannot satisfy the factors listed in that document in any event. Most significantly, it cannot be fairly said that a taxpayer-funded scholarship program that excludes an individual based on the individual's race and ethnicity is "applied in a flexible manner." The Board admits that an

applicant for the Grant program who does not fall into one of the racial and ethnic categories listed in the statute is not merely disadvantaged, but completely ineligible for the Grant. (R.30 at 26–30.) A racial bar of this sort cannot be described as "flexible."

Additionally, the Board attempts to put onto Appellants the burden of demonstrating that a race-neutral alternative would work as well, but that is wrong as well. (Resp. Br. 41–43.) Strict scrutiny imposes the burden on the *government* to prove that the use of race is both necessary and meets the criteria for narrow tailoring. Appellants explained in their opening brief why the record supporting the Grant's racial bar—primarily, that scholarships not based on race had been available to all but had not fixed the racial disparity—was insufficient to satisfy this standard. (App. Br. 23–25.)

Finally, as a practical matter, the Grant cannot be considered narrowly tailored because it neither takes the least-restrictive route toward accomplishing its goal, nor has it accomplished its purposes even using the most drastic remedy available (a racial condition on the funding stream).

## CONCLUSION

Abraham Maslow once famously said, "To the man who only has a hammer, everything he encounters begins to look like a nail." Unfortunately for the Board, the *Grutter* hammer cannot, by itself, build a constitutional structure sufficient to support the race-based Grant program at issue in this case. Other precedent on point exists, plays an important role in both the compelling interest and narrow tailoring analyses, but has not been addressed (much less discussed or refuted) by the Board in its response. This Court should affirm the trial court's decision that Appellants have standing, and reverse its conclusion that the Grant satisfies strict scrutiny.

Dated: March 9, 2023.

Respectfully submitted,

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## 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 2,109 words.

Dated: March 9, 2023.

*Electronically signed by Katherine D. Spitz*

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