No. 2022AP2026

In the Supreme Court of Wisconsin

KONKANOK RABIEBNA, RICHARD A. FREIHOEFER, DOROTHY M. BORCHARDT, RICHARD HEIDEL and NORMAN C. SANNES,
PLAINTIFFS-APPELLANTS,

v.

HIGHER EDUCATIONAL AIDS BOARD and TAMMIE DEVOOGHT-BLANEY,
DEFENDANTS-RESPONDENTS-PETITIONERS.

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

RESPONSE BRIEF OF PLAINTIFFS-APPELLANTS

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ISSUES PRESENTED

1. Can Wisconsin limit college grants based on race without any connection to remedying past discrimination?

The Circuit Court answered yes, before the Supreme Court's landmark decision in *Students for Fair Admissions* in June 2023. After that decision, the Court of Appeals answered no. This Court should answer no.

2. Do Wisconsin taxpayers have standing to challenge an unlawful, race-based grant program that costs taxpayers almost a million dollars per year?

The Circuit Court and Court of Appeals both answered yes. This Court should answer yes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Konkanok Rabiebna, a Thai American, and other taxpayers sued to stop Wisconsin from doling out educational benefits based on race.[1] Specifically, they challenged the "Minority Undergraduate Retention Grant Program" (the "Program" or "Grant Program"), codified at Wis. Stat. § 39.44. Wisconsin gives taxpayer-funded grants to financially needy undergraduate students—but not all students have access to this public benefit. A student must be black, American Indian, Hispanic, or trace his or her ancestry to Cambodia, Laos, or Vietnam. *Id.* § 39.44(1)(a). Students of other races are ineligible—including Thai, Chinese, Japanese, Indian, North African, Middle Eastern, Native Hawaiian, Pacific Islander, and white students. *See* R.30:8 (deposition pages 26:3–27:13). This Grant Program costs taxpayers nearly one million dollars per year. R.49:1 (specifically, $819,000 per year).

The Taxpayers won at the Court of Appeals, which correctly concluded that the race-based eligibility requirements violate the Equal Protection Clause of the Fourteenth Amendment. App. 52–53, ¶2. As the United States Supreme Court recently held, "no State has any authority … to use race as a factor in affording educational opportunities among its citizens." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 204 (2023) (quoted source omitted). And "[t]hat principle cannot be overridden except in the most extraordinary case." *Id.* at 208.

This Court should affirm. On the merits, *SFFA* squarely controls. At both the trial court and the Court of Appeals (at least until *SFFA* was

[1] Although they did not rely on this for standing (because taxpayer standing is so clear), Plaintiffs Konkanok Rabiebna and Richard Freihoefer have a teenage child that they plan to send to college one day. *See* R.3 ¶5, R.32, ¶2; 34, ¶2. Their child is currently a senior and hopes to attend the Madison Area Technical College (MATC) next year, which is an eligible school under the Grant Program.

decided), the only justification the Board offered for the Program was "promoting diversity in higher education," R.37:39–42,[2] and that was also the trial court's basis for upholding the Program, App. 28–33. In *SFFA*, however, the Court held that "student body diversity" is no longer a sufficient compelling interest to support race discrimination, ending that part of *Grutter v. Bollinger*, 539 U.S. 306 (2003). *SFFA*, 600 U.S. at 211–18; *id*. at 287 (Thomas, J., concurring) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled."); *id*. at 342 (Sotomayor, J., dissenting) ("As Justice Thomas puts it, '*Grutter* is, for all intents and purposes, overruled.'").

The Board acts as though *SFFA* changed nothing at all and/or doesn't apply here. Accordingly, its primary (if not entire) defense is that the Program is justified to promote "diversity" in technical colleges and private universities. Yet *SFFA* does apply, clearly, and it held that "diversity" can no longer be invoked to justify race discrimination in higher education. But even if *SFFA* did not apply here, the Board would still lose. The Supreme Court has never held that "diversity" is sufficient to justify explicit race discrimination in a scholarship program. Nor did pre-*SFFA* cases allow the kind of blunderbuss approach here—race could, at most, be a factor, not the sole requirement for eligibility.

With respect to the supposed "crisis" in "retention and graduation rates," App. 73 ¶41—the Board's post-*SFFA* argument to the Court of Appeals that it now appears to abandon—the Board does not come remotely close to providing any evidentiary basis for such a crisis. And, regardless, the Court has repeatedly held, even pre-*SFFA*, that States cannot use explicit race-discrimination in an attempt to solve statistical disparities. The only relevant compelling interest the Court has recognized is remedying specific instances of past discrimination *by the*

[2] Here and throughout this brief, record citations are to the court-stamped page numbers, not the party's page numbers.

government itself—not society more broadly—and even then, the Program would have to satisfy strict scrutiny. The Board does not, and has never, claimed that the Grant Program is justified to meet that compelling interest.

On standing, this Court has repeatedly held that taxpayers are entitled to sue over "any illegal expenditure" because such an expenditure either increases taxes or "results … in the governmental unit's having less money to spend for legitimate governmental objectives." *E.g.*, *Tooley v. O'Connell*, 77 Wis. 2d 422, 438, 253 N.W.2d 335 (1977) (quoting *S. D. Realty Co. v. Sewerage Comm'n of the City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961)). The Board does not ask this Court to revisit these precedents, nor should it.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The Scholarship Program Favors Certain Races[3] Over Others With Little to No Explanation

Under Wis. Stat. § 39.44, certain minority students who attend private and technical colleges can get a taxpayer-funded grant, based on financial need. Students at public, four-year universities are ineligible. *See* § 39.44(1)(b). These grants range from $250 to $2,500. R.46:3; *see also* Wis. Admin. Code § HEA 12.03(1).

[3] The Taxpayers use "race" as a catch-all for race, alienage, ancestry, ethnicity, and national origin. Each is treated the same as a matter of constitutional law. *E.g.*, *A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, ¶19, 411 Wis. 2d 389, 5 N.W.3d 238, *cert denied*, 145 S. Ct. 1051 (2025).

For context, the Legislature enacted Wis. Stat. § 39.44 in 1985 and amended the Program's racial eligibility criteria once in 1987. The Program was initially open only to students who were black, American Indian, or Hispanic. 1985 Wis. Act 29. Two years later, the Legislature expanded eligibility to some students whose families are from Cambodia, Laos, or Vietnam. 1987 Wis. Act 27. The criteria have not changed since.

B. The Board's Shifting Defense of the Program

The Board's defense of the Program, on the other hand, has changed throughout this case. Before the Circuit Court, the Board argued that the Program's purpose was to "promot[e] diversity in higher education," heavily relying on *Grutter*. R.37:39–42; App. 72, ¶40. That was also the trial court's basis for upholding the Program. App. 28–33. While this case was on appeal, however, the United States Supreme Court decided *Students for Fair Admissions*, holding that "student body diversity" (and nine other variations that derive from having a "diverse" student body) are "not sufficiently coherent" concepts to constitute a compelling interest. 600 U.S. at 211–218. The Court ultimately held that Harvard's and UNC's race-based admissions programs were unconstitutional.

After *SFFA* was issued, the Board abandoned "diversity" as its justification and instead argued that the purpose of the Program was really to remedy a "crisis" in retention and graduation rates among certain preferred minorities. App. 73, ¶41. Given the change of position after the case was on appeal, the Court of Appeals asked the Board to identify the evidence in the record that supported this new interest and even gave the Board an opportunity to file a supplemental brief. The Court then carefully walked through all of the "evidence" the Board pointed to and explained why none of it supported this new argument. App. 73–85, ¶¶42–56. Most significantly, the evidence of graduation and retention rates in the mid 1980s was from *four-year programs in the*

University of Wisconsin system—not technical colleges or private universities. *Id.*

Now, before this Court—and perhaps realizing that the evidence does not support its alternative theory—the Board returns to "diversity" as its primary justification for the program, as though *SFFA* never happened. Opening Br. 25 ("[T]he statute furthers the compelling interest[ ] of diversity."), 27 ("The Court has repeatedly recognized that diversity in higher education can be a compelling interest," citing pre-*SFFA* cases), 31 (arguing that the program "fits comfortably within … recognized compelling interests of diversity"), 33 ("[r]educing attrition fosters college diversity").

C. Background on Plaintiffs

Plaintiffs-Appellants are all Wisconsin residents and taxpayers who object to their tax dollars funding unconstitutional race discrimination. R.31–35. While they did not rely on this for the purpose of standing below, Plaintiffs-Appellants Konkanok Rabiebna and Richard Freihoefer are also the parents of a teenage child that they plan to send to college one day. *See* R.3 ¶5, R.32, ¶2; 34, ¶2. As noted above, their child is now a senior in high school, and hopes to attend the Madison Area Technical College, an eligible school under the Program.

D. Procedural History

The Taxpayers sued over four years ago, in August 2021, claiming that the Program illegally doled out educational benefits based on race. The Taxpayers brought multiple counts, including a violation of the United States Constitution. R.21:9. The Taxpayers claimed standing on the grounds that the expenditures are illegal. R.21:9. In the 2021–22 academic year alone, the Program cost taxpayers $819,000, R.49:1, and

it continues to be funded at the same amount.[4] Since its inception in 1985, it has cost taxpayers millions—and will cost millions more if it continues. App. 58, ¶14.

On cross-motions for summary judgment, the Circuit Court concluded that the Taxpayers had standing but ruled for the Board on the merits. App. 26. Notably, the Court issued its decision in mid-2022, before the United States Supreme Court decided *SFFA*. The Circuit Court relied on "diversity," using the word 43 times in its decision. App. 1–47. As it noted, "[t]here is no evidence that the … Program was proposed, adopted[,] or enacted to remedy past discrimination," but "[d]iversity in higher education has also been determined to be a compelling … interest." App. 28–29.

The United States Supreme Court issued its decision in *SFFA* while the case was on appeal. In addition to ordinary briefing, the Court of Appeals received letter briefs addressing *SFFA*. App. 56, ¶7. After oral argument and, at the Board's urging, it also allowed "post-argument briefing," even though such briefing is "unusual." *Id.*

The Court of Appeals then reversed based on *SFFA*, App. 101–102, ¶87, but agreed with the Circuit Court that the Taxpayers had standing. App. 57–60, ¶¶10–17. On the merits, the Court walked through each of the requirements an affirmative action program must satisfy to meet the high bar outlined in *SFFA*. App. 62–99, ¶¶20–81. It first held that "*SFFA* completely cut[s] the legs out of from under [the Board's] originally asserted government interest of student body diversity." App. 73, ¶42. It was skeptical that the Board could offer a new compelling interest on appeal; however, it ultimately held that addressing purported racial disparities in graduation and retention rates is not a compelling interest.

[4] 2025 Wis. Act 15, § 17, available at https://docs.legis.wisconsin.gov/2025/related/acts/15.pdf (see p. 26).

App. 73–74, ¶¶41, 43. On this point, the Court further noted the Board had admitted at oral argument that it was unaware of any decisional authorities supporting this argument and was "hoping … this [C]ourt issues the first [such] opinion." App. 74, ¶43. Next, the Court concluded that even if this interest could be compelling, the record evidence was insufficient in this action. App. 75–81, ¶¶45–52. Among other problems, the evidence is mainly about public four-year universities, which are significantly different from private and technical colleges. *Id.* Additionally, the evidence does not show relevant racial disparities. *Id.* The Court also concluded that the Program's racial eligibility criteria were not narrowly tailored, had been illegally employed as a negative, and lacked a logical endpoint. App. 85–99, ¶¶57–81.

STANDARD OF REVIEW

This Court reviews constitutional issues de novo. *E.g.*, *Evers v. Marklein*, 2025 WI 36, ¶26, 417 Wis. 2d 453, 22 N.W.3d 789.

ARGUMENT

I. The Program's Race-Based Criteria Fail Every Test Articulated by the Supreme Court in *SFFA*.

This action is indistinguishable from *SFFA* and related precedents from the United States Supreme Court, and this Court is not at liberty to overrule or modify these precedents. *See State v. Metchtel*, 176 Wis. 2d 87, 94–95, 499 N.W.2d 662 (1993). Seemingly, even the Board would agree that, under *SFFA*, Wisconsin cannot use race as a factor in deciding who can attend college. *E.g.*, Opening Br. 30. A logical corollary is that Wisconsin cannot use race as part of a grant program to retain students. The Board has been unable to cite a single decisional authority that construes *SFFA* as irrelevant to financial aid, and before *SFFA* came out, the Board relied almost exclusively on precedents about college admissions. App. 62, ¶¶20 n.11, 40. Even pre-*SFFA*, race could not be

used in a dispositive fashion, as it has been for the Program. App. 74–75, ¶44 n.13.

Indeed, the Program's racial eligibility criteria fail every test articulated by the United States Supreme Court in *SFFA*. In *SFFA*, the United States Supreme Court set forth three independent tests that an affirmative action program must satisfy: "[1] [it] must comply with strict scrutiny, [2] [it] may never use race as a stereotype or negative, and [3] at some point—[it] must end." 600 U.S. at 213. The Court said that the admissions programs at issue were invalid under "each" of these tests. *Id*. It then applied each test in its own section of the opinion. *Id*. at 214–21. The Grant Program here likewise fails each of these tests.

A. The Program's Racial Eligibility Criteria Are Unconstitutional Because They Fail Strict Scrutiny.

The Program's racial eligibility criteria are first unconstitutional because they fail strict scrutiny. "[A]s a general rule," the government cannot consider race at all, "regardless of context." *Parents Involved in Comm. Schs. v. Seattle Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring). Any exception must satisfy a "daunting two-step" test known as "strict scrutiny." *SFFA*, 600 U.S. at 206. This test applies even if the government claims its race-based action is "benign." *Johnson v. California*, 543 U.S. 499, 505 (2005). Race-based statutes "rare[ly]" survive strict scrutiny. *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis. 2d 94, 952 N.W.2d 765.

To survive strict scrutiny, the State must show that the Program furthers a "compelling interest" and that its use of race is "narrowly tailored"—i.e., "necessary"—to achieve that interest. *SFFA*, 600 U.S. at 206–07. The State needs to provide a "strong basis in evidence" for Courts to conclude that strict scrutiny is satisfied, and the State must have that evidence "*before*"—not after—"it embarks on an affirmative-

action program." *Wis. Legislature v. WEC*, 595 U.S. 398, 404 (2022) (per curiam) (quoting *Shaw v. Hunt*, 517 U.S. 899, 910 (1996)).

1. The Board Cannot Identify Any Compelling Interest That Justifies the Race Discrimination.

In *SFFA*, the United States Supreme Court explained that "[o]utside the circumstances of these cases"—i.e., college admissions—"our precedents have identified only two compelling interests that permit resort to race-based government action": (1) "avoiding imminent and serious risks to human safety in prisons, such as a race riot;" and (2) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." 600 U.S. at 207–08. The Board does not claim that the Program's racial criteria further either of these two interests. The criteria obviously have nothing to do with race riots in prison, and the Board has never claimed that the criteria are about remedying past illegal discrimination. No record evidence would support that theory, as the Circuit Court recognized. App. 29.

Before *SFFA*, the Supreme Court had held, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that "student body diversity [was] a compelling state interest that can justify the use of race in university admissions" (in some ways). 600 U.S. at 211. And that was the entire basis for the Board's defense of the Program below. R.37:39–42. But *SFFA* marked the end of *Grutter*, such that "student body diversity" is no longer a compelling interest.

The *SFFA* opinion began with a survey of the history leading up to and following *Grutter*'s holding that "student body diversity" could be a compelling state interest to support some race-based admissions programs. *Id*. at 208–14. Importantly, at the very end of this section, the Court quoted and heavily emphasized *Grutter*'s statement that "25 years from now," "we expect that … the use of racial preferences will no longer

be necessary to further [this] interest." *Id*. at 213. The Court then immediately pivoted to explaining why race-based admissions programs "must end" now, consistent with *Grutter*'s 25-year sunset. *Id*. at 213.

As the Court explained, the problem with invoking "diversity" to justify race discrimination is that "diversity" is not a sufficiently "coherent" or "measurable" concept. *Id*. at 214–17. "[T]he question … is not one of *no* diversity or of *some*: it is a question of degree," which raises "inquiries no court could resolve." *Id*. at 215. Recognizing that *Grutter* was likely going away, and to make "diversity" more concrete, Harvard and UNC attempted to articulate nine different kinds of interests that derive from having a "diverse" student body:

1. "training future leaders in the public and private sectors"
2. "preparing graduates to adapt to an increasingly pluralistic society"
3. "better educating [ ] students through diversity"
4. "producing new knowledge stemming from diverse outlooks"
5. "promoting the robust exchange of ideas"
6. "broadening and refining understanding"
7. "fostering innovation and problem-solving"
8. "preparing engaged and productive citizens and leaders"
9. "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Id. at 214. The Court rejected all of these, reasoning that while these are "commendable goals," none were "sufficiently coherent for purpose of strict scrutiny." *Id*. at 214–15. And at the end of its opinion, in responding to the dissent, the Court emphasized again that *Grutter* and its progeny were "limited … in duration," a "temporary matter." *Id*. at 228.

Given that the Court rejected "diversity" as a compelling governmental interest going forward, *as well as* every derivative interest the lawyers for Harvard and UNC could come up with, it is beyond dispute that *SFFA effectively* overruled *Grutter*, as both Justice Thomas and the dissent recognized in *SFFA* itself. *Id.* at 287 (Thomas, J., concurring) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.); *id.* at 342 (Sotomayor, J., dissenting) ("As Justice Thomas puts it, '*Grutter* is, for all intents and purposes, overruled.'"). Alito, who was in the majority in *SFFA*, has subsequently noted the same. *United States v. Skrmetti*, 605 U.S. 495, 571 (2025) (Alito, J., concurring in part and in the judgment) (characterizing *Grutter* and *Bakke* as "now-overruled" by *SFFA*). No Justice in *SFFA* disagreed with this characterization.

The only reason the majority opinion did not *formally* overrule *Grutter* was because Justice Kavanaugh (who joined the majority and wrote separately to explain this) viewed the holding as "consistent with and follow[ing] from" *Grutter*, given that "various Members of the Court [in *Grutter*] wrote separate opinions explicitly referencing the Court's 25-year limit." 600 U.S. at 311–12 (Kavanaugh, J., concurring). In Justice Kavanaugh's view, *SFFA* was "appropriately respect[ing] and abid[ing] by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education," *id.* at 316, and thus overruling it was unnecessary. But, like the other Justices, he too recognized that *Grutter*'s temporary exception was now over. *Id.* ("I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no.").

Regardless of whether it was formally overruled, it is beyond dispute that "*Grutter* did not survive *Students for Fair Admissions*," as

lower courts have recognized. *Fellowship of Christian Athletes v. D.C.*, 743 F. Supp. 3d 73, 87 (D.D.C. 2024); App. 67, ¶29 ("[T]he *SFFA* Court effectively overruled the *Grutter* Court's holding that educational benefits associated with student body diversity constitute a compelling state interest.").

The Board now acts as if *SFFA* changed nothing at all. *E.g.*, Opening Br. 29 ("The *SFFA* Court did not overrule its prior equal protection precedent"), 43 ("Had the Supreme Court wanted to categorically overrule past precedent, it would have said so."). And, relying on its flawed assumption that *Grutter* somehow survived *SFFA*, the Board's leading argument with respect to the compelling interest prong is that the Grant Program promotes "diversity"—just like it argued at the trial court pre-*SFFA*. Opening Br. 25 ("[T]he statute furthers the compelling interest[ ] of diversity."), 27 ("The Court has repeatedly recognized that diversity in higher education can be a compelling interest," citing pre-*SFFA* cases), 31 (arguing that the program "fits comfortably within … recognized compelling interests of diversity"), 33 ("[r]educing attrition fosters college diversity"). The Board's position is based on a gross misreading of *SFFA*, for the reasons explained above. Again, *SFFA* made clear that "diversity" is no longer a compelling interest to justify race discrimination in higher education, accepting *Grutter*'s "temporary," "limited … duration." 600 U.S. at 228.

Relatedly, the Board repeatedly asserts (without any support) that *SFFA* is limited to the "college admissions" context. On page 25 of its brief, for example, the Board states that *SFFA* "created a detailed test *specific to college admissions programs*" (emphasis added). Similarly, on page 32, it asserts that "*SFFA*'s three-part test for college admissions … does not apply." It hints at the same in many other places. *E.g.*, Opening Br. 12 ("even assuming that the *SFFA* analysis applies …"), 25 ("Even if SFFA's college admissions test applies …").

In the Board's view, apparently, "diversity" *can* still be a compelling interest *outside* the "college admissions" context, because *SFFA* is limited to that context. There are two main problems with this theory.

First, the Supreme Court's opinion does not leave this argument open—as any quick read of the opinion confirms. The Court repeatedly emphasized that the Equal Protection Clause "is universal in its application," that "racial discrimination is invidious in all contexts," that "the core purpose of the Equal Protection Clause[is] doing away with all governmentally imposed discrimination based on race," and that "[e]liminating racial discrimination means eliminating all of it." 600 U.S. at 206, 214 (citations omitted). Similarly, after summarizing the "unmistakably clear" holding from *Brown v. Board of Education*—that "no State has any authority … to use race as a factor in affording educational opportunities among its citizens"—the Court's very next paragraph begins, "So too in other areas of life." *Id*. at 204. "Immediately after *Brown*," the Court emphasized, it "began routinely affirming lower court decisions that invalidated all manner of race-based state action," including in "public beaches and bathhouses," "parks and golf courses," "neighborhoods and businesses," "buses and trains," and "schools and juries." *Id*. at 204–05. All of that would be an odd way to frame a decision limited to the "college admissions" context. *See*, *e.g.*, *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 770 n.8 (E.D. Tenn. 2023) (noting that "[*SFFA*'s] reasoning is not limited to" "college admissions programs"); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 478 (N.D. Tex. 2024) (applying *SFFA* outside the college admissions context).

Second, even if the Board were correct that *SFFA* is limited to "college admissions" (and it is not), that would actually cut against them, not for them, because the same would be true of the pre-*SFFA* cases they

cite (*Grutter*, *Fischer*, *Bakke*, and *Parents Involved*). Opening Br. 27. As *SFFA* explained, those cases only recognized "diversity" as a compelling interest in the *"college admissions"* context. Indeed, *Parents Involved* declined to apply *Grutter* to "elementary and secondary schools," noting the "unique context of higher education," and the Court also rejected the school district's separate arguments based on "racial diversity," *Parents Involved*, 551 U.S. at 725–33 (plurality op.).[5] *SFFA* makes very clear that "[o]utside the circumstances of these cases"—college admissions—"our precedents have identified only two compelling interests that permit resort to race-based government action." 600 U.S. at 207. So, post-*SFFA*, those are the only two compelling interests available, and neither apply here. *Strickland v. United States Dep't of Agric.*, 736 F. Supp. 3d 469, 481 (N.D. Tex. 2024).

In other words, "diversity" has never been recognized as a compelling interest to support a racially discriminatory financial aid scholarship. The Board does not cite any such case. It even admitted below that it was hoping to set a new precedent in this case. *See* App. 74, ¶43. But, as *SFFA* clarifies, equality under the law "cannot be overridden except in the most extraordinary case." 600 U.S. at 208. This is nowhere near such an "extraordinary case" to warrant a new exception to the Equal Protection Clause.

Aside from "diversity," the only other compelling interest the Board offers to this Court is "equal educational opportunity." Opening Br. 28, 31–32, 33–34. That is a bizarre argument, given that the Grant

[5] While Justice Kennedy did not join this part of the opinion, his views are not consistent with *SFFA*. *Compare* 551 U.S. at 78 (Kennedy J., concurring in part) ("The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," ante, at 2767 – 2768, is not sufficient to decide these cases.") *with SFFA*, 600 U.S. at 206 ("Eliminating racial discrimination means eliminating all of it.") (joined by six Justices).

Program is *not* an "equal educational opportunity"—it is limited based on race. How the Board believes an unequal, race-based grant program supports "equal educational opportunity" is hard to understand, much less take seriously.

The Taxpayers' best guess is that the Board believes the racial criteria are justified to reduce some statistical disparities between racial groups. *See* Opening Br. 34–35 (mentioning various statistics but failing to make a connection to a compelling interest). This argument wouldn't fly pre-*SFFA*, and it certainly doesn't work post-*SFFA*. As the Court explained, it "has long rejected the[ ] core thesis" that "the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures." 600 U.S. at 226. Or, to put it differently, "'[o]utright racial balancing' is 'patently unconstitutional.'" *Id*. at 223 (quoting *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 319 (2013)). The Court has said it many different ways over the years. *E.g.*, *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) ("The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination."); *Parents Involved*, 551 U.S. at 732 (plurality op.) ("[R]acial balancing is not permitted."); *see also Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) ("Statistical disparities don't cut it.").

At the Court of Appeals, the Board argued that the racial criteria were justified to solve a "crisis" in retention and graduation rates among certain minority groups. App. 73, ¶41. After that theory was thoroughly rebuffed by the Court of Appeals, App. 73–85, ¶¶42–56, the Board appears to have abandoned it before this Court. While the Board argues

that the statute's "purpose" is "improving retention rates for the four categories of students," it does not argue that equalizing retention rates is, by itself, a compelling interest—because that would be racial balancing and run headlong into all of the cases just cited. Opening Br. 32. Instead, it argues that improving retention rates will, in turn, "promote[ ] diversity in higher education and [ ] equality of educational opportunity," the only two compelling interests it invokes. *Id.*; *see also id.* at 39 ("A court can review whether that success rate adequately improves retention and the compelling interests it promotes—diversity and equal educational opportunity.").

But even if this Court treats their brief as arguing for a compelling interest in fixing a retention and graduation "crisis," and even if that could, theoretically, be a compelling interest, the Board lacks a "strong basis in evidence" to establish that a crisis ever existed. *Wis. Legislature*, 595 U.S. at 404. Among other problems, the evidence the Board relies on is about public four-year universities, which is insufficient because the Program serves students at private and technical colleges. The Court of Appeals explained these evidentiary problems in detail. The Board acknowledged below that technical colleges are a "different animal" (since they are less expensive, two-year programs) and it has cited little evidence about private and technical colleges. App. 80–81, ¶51. And whether the Legislature even considered much of this evidence is unknown. App. 77–78, ¶¶47, 49.

As it did before the Court of Appeals, the Board relies primarily on a 1984 report from the Joint UW System / Department of Public Instruction Committee on Minority Student Affairs. Opening Br. 14–15 (discussing R.55 at length). The committee, in that report, did not discuss private or technical colleges, ultimately recommending a grant program for "junior and senior year minority students enrolled at [UW] System institutions." R.55:4.

The Board next relies on a 1985 memorandum from the Director of the Legislative Fiscal Bureau ("LFB") about two grant programs for UW System universities. Opening Br. 15–16; R.49:4. The Director said, "[s]ome have argued that the grants could be used for minority students in private schools … . It should be noted, however, that there is no formal proposal from independent institutions or [the Board,] and no evaluation of need has been made." R.49:8. He also noted that the memorandum was prepared specifically in response to a request about UW. R.49:8.

Third, the Board relies on a 1987 memorandum from the same LFB Director. Opening Br. 16; R.49:16. The Director referred to a "UW System" audit of minority enrollment data. R.49:20. This data shows that from 1980 to 1985, enrollment for American Indians increased by more than 13 percent and that enrollment for Hispanics similarly increased by over 20 percent. R.49:20. While black enrollment was down for the UW System as a whole, it was up at UW-La Crosse, Stevens Point, Stout, and Whitewater. R.49:20. Two-year public junior colleges (called "Centers" at that time) also experienced an increase in black enrollment. R.49:20; *see* LFB, *University of Wisconsin System Overview* 1 (2003).[6]

In the 1987 memorandum, the Director noted that he was not opining on the cause of any increase or decrease: "Given the complex set of factors determining recruitment and retention efforts, it is difficult to assign specific weights to such factors as societal determinants, financial barriers, minority faculty, institutional efforts[,] or others." R.49:21.

Turning to record evidence of current purported need, much of it is not Wisconsin specific. For example, in its opening brief, the Board relies primarily on an outdated report from the fall 2011 cohort that discusses national racial disparities. R.49:66.

[6] https://tinyurl.com/3vjm4asm.

Finally, the Board cites statistics showing that the grants improve graduation and retention rates. Opening Br. 19–20. But that is not particularly illuminating or relevant to strict scrutiny. It is obviously true that giving students money to pay for college will help them stay in college. But that is true of all students, regardless of race. There is nothing preventing the State from providing needs-based scholarships to all students who have a financial need. But the Supreme Court has been very clear that statistical disparities alone do not provide a compelling interest sufficient for explicit race discrimination in government-provided benefits.

2. The Racial Criteria Are Not Narrowly Tailored.

Additionally, the Program's racial eligibility criteria fail strict scrutiny because they are not narrowly tailored. As explained by the United States Supreme Court, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Comm. Schs.*, 551 U.S. at 720 (majority opinion). The criteria here lack said connection.

First, the Program's racial eligibility criteria are under- and over-inclusive. *See SFFA*, 600 U.S. at 216. If the purported compelling interest is to achieve diversity, why are a plethora of races ineligible? Are students from, e.g., Afghanistan and Gaza unable to contribute to diversity? The criteria also lump together all "Hispanics"—as if a person from Mexico is interchangeable with a person from Chile, a nation thousands of miles away and on a different continent. *See* Wis. Stat. § 16.287(1)(d) (defining who is legally "Hispanic"). If the interest is racial balance, the same problem holds. For example, to quote the Court of Appeals, "the [L]egislature appears to have excluded students from Middle Eastern descent without collecting data as to retention and graduation rates of these students compared to others." App. 95, ¶73. How does the Board know that Middle Eastern students are not

underrepresented at private and technical colleges relative to Wisconsin's demographics?

Second, race is *dispositive*, not just considered. Racial eligibility criteria are not narrowly tailored when they call for race to be used in a "mechanized" fashion. *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring). To quote the Court of Appeals, "[t]he … [P]rogram completely excludes students *solely* on the basis of race." App. 92, ¶68. In fact, even the admissions programs declared unconstitutional in *SFFA* did not use race so broadly: "Under those programs, a student could overcome the fact that he or she is Asian or white with an extraordinary academic record, extracurricular background, or life experience. Here, however, a student's race … is the *determinative* factor." *Id.* If the poorest student at a particular private or technical college is, e.g., white, too bad for him or her. *Id.* While the United States Supreme Court said in *SFFA* that an admissions program could consider how a person's race has shaped his or her life, as part of say, an essay, the Program's criteria do no such thing. 600 U.S. at 230.

Third, and relatedly, the State has not seriously tried race-neutral alternatives. In *Fisher v. University of Texas at Austin*, the United States Supreme Court emphasized that a university had made documented, race-neutral efforts over many years to try to raise the critical mass of minority students. 579 U.S. 365, 385 (2016). These efforts included intensifying its outreach efforts to black and Hispanic communities, opening new regional admissions centers, increasing its recruitment budget, organizing over 1,000 recruitment events, and creating a more "holistic" review process to encourage qualified minorities to apply. *Id.* Only because these efforts failed did the Court bless a race-based admissions program. *Id.* To be clear, the Taxpayers do not endorse race-based outreach efforts and maintain that such efforts are illegal, but even if that were not the case, the record evidence in this action is

nothing like that in *Fisher*. The Board does not claim that in the 1970s and 1980s, Wisconsin did much of anything to help eligible minorities at private and technical colleges.

The Board also repeatedly emphasizes that the Grant Program is "a minuscule addition to the overall aid picture," Opening Br. 20–21,[7] as though a little race discrimination here and there is fine. The problem, of course, is that this suggestion is directly at-odds with the Supreme Court's admonition that "[e]liminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206.

For each of these reasons, the Program's racial eligibility criteria fail strict scrutiny. The criteria lack a compelling interest and are not narrowly tailored.

B. The Program Is Premised on Racial Stereotypes and Employs Race as a Negative.

After explaining why the admissions programs failed strict scrutiny, the United States Supreme Court in *SFFA* gave a first alternative holding: race-based government action can "never" be premised on "stereotypes," and the government can never use race as a "negative." 600 U.S. at 218. The Court labeled these requirements the "twin commands" and concluded that "the race-based admissions systems … also fail to comply with the twin commands." *Id.*

If the purported compelling interest is diversity (and, again, diversity is not a compelling interest), it rests on the same unconstitutional stereotypes discussed in *SFFA*. As the United States Supreme Court said, "we have long held that universities may not operate their admissions programs on the 'belief that minority students

[7] For other examples, *see* Opening Br. 11 ("a tiny fraction"!), 23 ("less than 1% of total aid"!), 40 (".0009 percent overall"!).

always (or even consistently) express some characteristic minority viewpoint on any issue.'" *Id.* at 219 (quoting *Grutter*, 539 U.S. at 333). This is because, among other things, such programs depend on "pernicious stereotype[s]" and wrongfully assume that "race in itself 'says [something] about who you are'" or that a nonwhite student "'can usually bring something that a white person cannot offer.'" *Id.* at 220 (quoted sources omitted).

Similarly, if the purported compelling interest is racial balance, either in the makeup of the class or in graduation and retention rates (and, again, racial balance is *not* a compelling interest), the Program's racial eligibility criteria still rest on stereotypes—e.g., that a Mexican is interchangeable with someone from Chile. *See* Wis. Stat. § 16.287(1)(d).

And, regardless of the compelling interest, race is being employed as a negative. A Palestinian refugee might be able to contribute to diversity and might need financial aid, but for no reason other than his or her race, he or she cannot get a grant. App. 95–96, ¶75. "[R]ace—and race alone" explains why a Palestinian student is ineligible. *SFFA*, 600 U.S. at 219 n.6. "How else but 'negative'" can this student's race be described if in its "absence," the Palestinian student would have been eligible? *Id.* at 219; *see also Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 493 (N.D. Tex. 2024) (quoting *SFFA*, 600 U.S. at 218–19) ("Because the MBDA's stereotypes hinder applicants not from a listed minority, they necessarily use race 'as a negative.'").

The Board argues that, because other financial aid is available without race discrimination, the Grant Program somehow does not treat race as a negative. Opening Br. 40. But the Board has zero authority for this proposition (citing only a 2009 student note) and the idea makes no sense. Students in the preferred racial groups have access to *both* the Grant Program and all of the other kinds of financial aid, whereas students outside those racial groups have access to only the latter. Thus,

some students are worse off—treated negatively—based solely on their race, even when considering the "overall" financial aid picture. And, as explained already, the fact that the Grant Program is relatively small compared to others is irrelevant, because "[e]liminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206.

C. The Program Lacks a Logical Endpoint.

After applying the twin commands, the United States Supreme Court in *SFFA* turned to a third test called "logical end point." *SFFA*, 600 U.S. at 221. At some point, either a program has succeeded (and, therefore, is no longer needed), or it has demonstrated an inability to achieve the proffered interest. *See id.* at 224–25. And in *SFFA,* the Court held that, with respect to *Grutter*'s temporary exception, 20 to 25 years was long enough. *Id.*

Notably, ending criteria are insufficient—just because an affirmative action program will go away when it has achieved its purpose does not mean it has a logical endpoint. *Id.* at 224. Targeting a "numerical commitment," or even "some rough percentage" of parity between racial groups does not work because that is equivalent to "[o]utright racial balancing," which is "patently unconstitutional." 600 U.S. at 222–23 (citation omitted). A State also cannot rely on "periodic review" either. *Id.* at 225. In fact, the Court said that it has "never suggested that periodic review could make unconstitutional conduct constitutional." *Id.* Instead "race-based" programs must "eventually [ ] end—despite whatever periodic review [is] conducted." *Id.*

Here, the Grant Program's racial eligibility criteria also have no logical endpoint. They have been around for 40 years and have not been revised in 38 years. They have no sunset. App. 98, ¶79. As the Court of Appeals noted, "[t]here are not even disparity standards that would trigger the end of the [P]rogram." App. 99, ¶81. While the Board claims

that the Legislature reviews the program "every two years," that argument is nearly identical to the one rejected by the United States Supreme Court in *SFFA*—periodic review is insufficient. Opening Br. 41. And regardless, the Board fails to identify any evidence whatsoever that the Legislature is actually doing any sort of meaningful review, rather than just carrying forward the same appropriation every two years, as it has been doing for 40 years.

II. The Taxpayers Have Standing.

Longstanding precedent confirms that the Taxpayers have standing, as both the Circuit Court and the Court of Appeals correctly recognized. App. 57, ¶10. In the words of the Court of Appeals, "millions of 'unreimbursed' taxpayer funds have been spent on the … [P]rogram since 1985 and millions more would be spent if it continued." *Id.* at 58, ¶14. The Board's standing arguments mischaracterize Wisconsin's standing cases and the Taxpayers' complaint. Opening Br. 46–49.

A. This Court Has Long Held That Taxpayers Have Standing to Challenge "Any Illegal Expenditure."

For over a century, Wisconsin Courts have permitted taxpayers to sue over "any illegal expenditure" of taxpayer funds. *E.g.*, *Tooley*, 77 Wis. 2d at 438; *Wagner v. Milwaukee*, 196 Wis. 328, 220 N.W. 207 (1928). This doctrine was most recently applied in *Fabick v. Evers*, where this Court reaffirmed that taxpayers have a "legal interest … to contest governmental actions leading to an illegal expenditure of taxpayer funds." 2021 WI 28, ¶¶10–11, 396 Wis. 2d 231, 956 N.W.2d 856.[8] This Court has characterized a taxpayer's financial interest in public funds as

[8] The dissent in *Fabick* focused on a recent executive order that committed to "reimburs[ing] [ ] states for National Guard expenses due to COVID-19," "both going forward and retroactively." 2021 WI 28, ¶¶89–105. The dissent reasoned that, because "no state funds at all will be expended for National Guard deployment," there was no "pecuniary loss" to taxpayers. There is no such argument here.

"akin to that of a stockholder" in a private corporation. *S. D. Realty*, 15 Wis. 2d at 22. And just as a stockholder has a personal stake in ensuring that a corporation follows the law, taxpayers have a stake in ensuring that governmental units do the same. *Id.*

This Court has consistently recognized that "'any illegal expenditure of [taxpayer] funds directly affects taxpayers *and causes them to sustain a pecuniary loss*.'" *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 879, 419 N.W.2d 249 (1988) (quoting *Thompson v. Kenosha Cnty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974) (in turn quoting *S.D. Realty*, 15 Wis. 2d at 22)) (emphasis added). In other words, all illegal expenditures *automatically* cause taxpayers to suffer a "pecuniary loss." *Tooley*, 77 Wis. 2d at 438 (quoting *S. D. Realty*, 15 Wis. 2d at 22).

The "pecuniary loss" occurs in one of two ways, both of which are sufficient to confer standing. First, an illegal expenditure can cause "the levy of additional taxes." *Id.* (again quoting *S. D. Realty*). Second, even if an illegal expenditure does not directly result in "additional taxes," it necessarily leaves "less money to spend for legitimate governmental objectives." *Id.* (same). As this Court put it, "[t]he *illegal disbursement* of [the] money would constitute an invasion of the funds … *in which each individual taxpayer has a substantial interest*, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation." *Thompson*, 64 Wis. 2d at 680 (quoting *Wagner*, 220 N.W.2d at 208)). Thus, it is "immaterial whether the illegal expenditures resulted in a net saving." *Id.* at 680 n.9. As with an "illegal contract, the amount to be expended under the contract is the amount that controls, not the difference between that amount and the amount that would be expended under a legal contract." *Id.*

And, consistent with Wisconsin's standing doctrine more generally, the magnitude of a taxpayer's pecuniary loss is also

irrelevant: "The alleged pecuniary loss need not be substantial in amount. Even a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will suffice to sustain a taxpayer suit." *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993). Wisconsin is also far from extraordinary in this regard—most states are quite permissive with taxpayer standing. *E.g.*, Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After Cuno and Winn*, 40 Hastings Const. L.Q. 1, 2 (2012).[9]

The Court of Appeals rightly held that standing is not a difficult question in this case. App. 60 ¶18 (noting the "more meaty question" is the merits). After all, "hundreds of thousands of taxpayer dollars are being spent on the grant program every year." *Id.* ¶17. This easily suffices for taxpayer standing under this Court's precedents.

B. The Board Misconstrues Both Precedent and the Complaint.

The Board argues that the Taxpayers do not have standing because, they say, the Taxpayers did not adequately plead a "pecuniary loss" in their complaint. Opening Br. 46–49. In the Board's view, apparently, the Taxpayers' complaint needed to allege that the Program directly causes *additional taxes* such that winning the lawsuit would "result[ ] in [a] reduction in government spending." Opening Br. 48. This argument loses on both fronts. First, it misrepresents what this Court's

[9] Federal law on standing is not binding in Wisconsin. *E.g., Wis. State Legislature v. Kaul*, 2025 WI App 2, ¶25, 414 Wis. 2d 633, 17 N.W.3d 24, *pet. for rev. granted*. Therefore, and despite the Board's arguments to the contrary, Opening Br. 48–49, whether the Taxpayers could have filed this action in federal court is wholly irrelevant. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution.").

precedents have said about "pecuniary loss," and second, it misrepresents the Taxpayers' complaint.

As just explained, this Court has been very clear, over and over again, that the "pecuniary loss" to taxpayers can *either* come from "additional taxes" *or* the government "having less money to spend for legitimate governmental objectives." *S. D. Realty*, 15 Wis. 2d at 22; *Tooley*, 77 Wis. 2d at 438 (quoting this part of *S. D. Realty*); *Thompson*, 64 Wis. 2d at 680 (same). Thus, it does not matter whether "the payment of [the illegal expenditure] would not necessarily result in increased taxation." *Wagner*, 196 Wis. 328; *S. D. Realty*, 15 Wis. 2d at 22 (quoting this part of *Wagner*); *Thompson*, 64 Wis. 2d at 680 (same). In other words, "*[a]ny* illegal expenditure of public funds," does, in and of itself, "cause[ ] [taxpayers] to sustain a pecuniary loss." *S. D. Realty*, 15 Wis. 2d at 22 (emphasis added).

None of the cases the Board cites are to the contrary. *Coyne v. Walker* recognized that "the expenditure of public funds is treated as a pecuniary loss" sufficient for taxpayer standing. 2015 WI App 21, ¶¶9–13, 361 Wis. 2d 225, 862 N.W.2d 606. *City of Appleton* quoted *Thompson* and *S. D. Realty* for the proposition that "any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss"—and ultimately found taxpayer standing. 142 Wis. 2d at 879. *McClutchey v. Milwaukee County* is irrelevant because it was not a direct challenge to an illegal expenditure; it was a procedural challenge to *how* a person was appointed to a position, not to the position itself. 239 Wis. 139, 300 N.W. 224, 225 (1941). Finally, the Board cites *S. D. Realty* for the proposition that "a plaintiff must have suffered … some actual pecuniary loss," Opening Br. 47, but *S. D. Realty* is the very case stating that "*any* illegal expenditure" does "directly affect[ ] taxpayers and causes them to sustain a pecuniary loss." 15 Wis. 2d at 22.

As for what needs to be in the complaint, the lack of a specific allegation "that the plaintiffs, individually or as a class, have suffered any loss" "is not fatal." *Thompson*, 64 Wis. 2d at 679. All that is required are allegations (1) "that plaintiffs are taxpayers"; (2) "that [the challenged statute] … is unconstitutional"; and (3) that "the statute … require[s] expenditure of public money." *Id*. at 679–80. Taxpayers have standing in such cases because, "if the statute were held unconstitutional, th[e] expenditure would also be illegal," which "sufficiently establishes plaintiffs' pecuniary loss." *Id*. This Court has made this point on more than one occasion. *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385, 387 (1988) ("[W]e need not consider the absence of any specific allegation in the petition that Risser or Loftus, either individually or as a class, have suffered pecuniary loss, to be fatal.").

The Taxpayers' complaint is more than sufficient and tracks these decisions to a "T." It specifically alleges that the Taxpayers are all taxpayers, R.21 ¶¶5–8, that the Grant Program (and statute) is unconstitutional, *id*. ¶¶26–49, and that it results in the expenditure of public funds, *id*. ¶¶16, 23, 38–39, 48–49. Even if it mattered, the Taxpayers' complaint *does* use the words "pecuniary loss," alleging that "Plaintiffs have suffered a pecuniary loss as a result of the Minority Grant Program." *Id*. ¶¶38, 48. Both *Thompson* cases just cited held that this is sufficient.

Relatedly, the Board argues that there is no "pecuniary loss" because the complaint did not explicitly ask to "end the [P]rogram." Opening Br. 48–49. Once again, wrong on two fronts. First, the complaint clearly asked to *end* the unconstitutional race discrimination and sought any relief "the Court may deem appropriate." R.21, Relief ¶¶A–B, E. As with any equal protection violation, there are two ways to remedy it: "level up"—i.e., "extend a benefit to one that has been wrongfully denied

it"—or "level down"—"withdraw[ ] the benefit from those who currently possess it." *E.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920 (M.D. Pa., 2020); *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 569 (2015); *Heckler v. Mathews*, 465 U.S. 728, 738–39 (1984); *Sessions v. Morales-Santana*, 582 U.S. 47, 73–74 (2017). "The choice between these" remedial alternatives is generally "governed by the legislature's intent." *Sessions*, 582 U.S. at 73–74. But that remedial question comes *at the end of the case*. The Taxpayers' complaint did not specify either "leveling up" or "leveling down," but left that question to be resolved later.[10]

The Court of Appeals concluded that "leveling down" (eliminating the program entirely) was more consistent with legislative intent than opening it up to everyone. App. 59, ¶15. Even if this Court disagrees and concludes that the proper remedy is "leveling up" (opening up the program to everyone), it does not affect the Taxpayers' standing, because, as already explained in depth, the "pecuniary loss" to Taxpayers can come in one of two ways: "additional taxes" or "less money to spend for legitimate governmental objectives." *S. D. Realty*, 15 Wis. 2d at 22. If the Grant Program is eliminated, it will result in less taxes overall. If the Grant Program is opened up to everyone, it will mean the "money [being] spen[t] for legitimate government objectives." *Id*. Taxpayers have a direct interest at stake either way. *Compare Heckler* 465 U.S. at 739 ("[W]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class."); *Sessions*, 582 U.S. at 72–76

[10] Even if the Court reads the Complaint as asking for one or the other, relief is not limited to what is requested in the complaint. Wis. Stat. § 806.01(1)(c) ("Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings.").

(finding an equal protection violation but declining to extend the benefit to the plaintiff).

As a final point, the Taxpayers emphasize that, if this Court were to conclude they *lack* standing, it would need to overrule *several precedents* to do so. This Court takes its precedents seriously to ensure stability in the law and generally does not reconsider its precedents without a specific request. *E.g.*, *LeMieux v. Evers*, 2025 WI 12, ¶23, 415 Wis. 2d 422, 19 N.W.3d 76 (lead opinion); *id.* ¶40 (Dallet, J., concurring). And, as far as the Taxpayers can discern, the Board has not made any such request.

C. Even if This Court Concludes That Taxpayers Lack Standing, It Should Still Decide the Merits.

As this Court has long recognized, Wisconsin's standing doctrine is a matter of "judicial policy," not jurisdiction, like it is in federal courts. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. The United States Constitution permits federal courts to hear only "cases" and "controversies," while the Wisconsin Constitution vests its circuit courts with jurisdiction over "all matters civil and criminal," language that this Court has held is exceedingly broad. *Compare* U.S. Const. Art. III, § 2, cl. 1, *with* Wis. Const. Art. VII, § 8; *see also Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190 ("[A] circuit court is never without subject matter jurisdiction.").

The Taxpayers' claim is "fit for adjudication" and clearly satisfies the considerations this Court outlined when deciding to adjudicate the merits in *McConkey v. Van Hollen*. 2010 WI 57, ¶17. First, the Taxpayers have "competently framed the issues and zealously argued [their] case," as is evident from the extensive, four-year history of this action. *Id.* ¶18. Second, if this Court dismisses this case for lack of standing, another

person will likely "bring an identical suit, raising judicial efficiency concerns." *Id*. Third, "the consequences of [this Court's] decision are sufficiently clear[,]" and "a different plaintiff would not enhance [its] understanding of the issues in [the] case." *Id*. Fourth, as Wisconsin's longstanding precedent on taxpayer standing demonstrates, this case is about an *illegal* expenditure of taxpayer funds, and an overly "detailed analysis of the nature of [the] injury here might inappropriately require" an interpretation of "the substance" of the Taxpayers' Complaint at the standing stage. *Id*. Fifth, as a "law development court," it is "prudent that the citizens of Wisconsin have this important issue of constitutional law resolved." *Id*.

Again, this Court has said that "[s]tanding requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey*, 2010 WI 57, ¶16. That burden is more than satisfied here and, at minimum, this Court should adjudicate the merits of the Taxpayers' claim "as a matter of judicial policy" or because the Taxpayers have "at least a trifling interest" in whether their tax dollars are being used to fund unlawful, race-based scholarships. *Id.* ¶17.

CONCLUSION

The decision of the court of appeals should be affirmed.

Dated: December 26, 2025.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 9,357 words.

Dated: December 26, 2025.

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