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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.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Konkanok Rabiabna, 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,” codified at Wis. Stat. § 39.44. Wisconsin gives taxpayer-funded grants to financially needy undergraduate students—but not all students get a shot. A student must be Black American, American Indian, Hispanic, or trace his or her ancestry to Cambodia, Laos, or Vietnam. § 39.44(1)(a). In a deposition, a Program adviser admitted that other races, including Thai, are ineligible. R. 30:3, 8.

The Taxpayers won at the Court of Appeals, which correctly concluded that these expenditures are illegal because they violate the Equal Protection Clause of the Fourteenth Amendment. *Rabiabna v. HEAB*, 2025 WL 657120, ¶2 (Wis. Ct. App. Feb. 26, 2025). As the United States Supreme Court has instructed, “no State has any authority under ... [that] clause 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).

¹ 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).

The Higher Educational Aids Board, which oversees the Program, filed a Petition for Review.² It presents two questions: (1) Whether the Program’s racial eligibility criteria violate the Fourteenth Amendment; and (2) Whether the Taxpayers have standing. The Board presents the questions in this order even though standing is a “threshold” issue. *Brown Cnty. v. DHSS*, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981).

This Court should deny the Petition. On the merits, the Board cannot distinguish precedents from the United States Supreme Court, and this Court has no authority to overrule or modify these precedents. *Verhelst Const. Co. v. Galles*, 204 Wis. 96, 235 N.W. 556 (1931). 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. Reality 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. Accordingly, neither question has law-developing potential. Additionally, this action is a bad vehicle to address these questions. Among other problems, the Board has advanced arguments in its Petition that it did not present to the Court of Appeals. The Board forfeited these arguments. *E.g., A.O. Smith Corp. v. Allstate Ins.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

² The Taxpayers use “the Board” as shorthand for the Board and its Executive Secretary, who is also a party.

STATEMENT OF THE CASE

The Board omitted key background information in its Petition, so the Taxpayers begin by explaining the Program and its history. They then discuss the record evidence the Board has relied on. Lastly, they summarize this action's procedural history.

I. For about four decades, Wisconsin has given small taxpayer-funded grants to some financially needy minorities at private and technical colleges through the Program.

Under Wis. Stat. § 39.44, some financially needy minorities who attend private and technical colleges can get a taxpayer-funded grant. 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).

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, 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.

II. The Board claims that the Program was created to remedy a graduation and retention “crisis” among eligible minorities and that its racial eligibility criteria are currently justified by disparities.

The Board’s position on why the Legislature created the Program has changed. Before the Circuit Court, the Board argued that the Program’s purpose was to increase student body diversity. *Rabiebna*, 2025 WL 657120, ¶40. While this action was on appeal, the United States Supreme Court decided *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, holding that diversity is “not a sufficiently coherent” concept to constitute a compelling interest and declaring race-based admissions programs premised on diversity unconstitutional. 600 U.S. at 214. Since then, the Board has said that the Legislature adopted the Program not to foster diversity but to remedy a “crisis” in retention and graduation rates among eligible minorities. *Rabiebna*, 2025 WL 657120, ¶41.

The Board relies on record evidence about the University of Wisconsin System—public, four-year universities—in attempting to show why Wis. Stat. § 39.44 was enacted, although whether the Legislature considered much of this evidence is unknown. *Id.*, ¶¶47, 49. The Board admitted before the Court of Appeals that it was “rel[ying] primarily on UW System statistics.” Board’s Ct. App. Supp. Br., at 7. It has cited little evidence about private and technical colleges. *Rabiebna*, 2025 WL 657120, ¶51. Technical colleges are often less expensive two-year degree-granting institutions. *Id.* The Board acknowledged below that technical colleges are a “different animal.” *Id.*

The Board first relies on a 1984 report from the Joint UW System / Department of Public Instruction Committee on Minority Student Affairs. R. 55. The committee did not discuss private or technical colleges, ultimately recommending a grant program be created 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 about two grant programs for UW System universities. 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. 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).³

³ <https://tinyurl.com/3vjm4asm>.

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

Lastly, the Board relies on a 1991 report from the Wisconsin Policy Research Institute (a think tank) that discusses Wisconsin’s Hmong community. R. 49:27, 65. This report indicated that Wisconsin experienced an influx of Hmong immigrants from Southeast Asia, including from Thailand, in the years following the Vietnam War. R. 49:44. Additionally, the report explains that while the Hmong were struggling in some regards, education was going well for them: “Hmong children are doing extraordinarily well in school [T]he high school dropout rate is negligible, and the graduation rate is close to 100%, and the share of graduates going on to technical schools and college is also very high.” R. 49:31. The report even indicated concern that “there will not be enough jobs available in the smaller towns for Hmong college graduates.” R. 49:55.

Turning to record evidence of current purported need, much of it is not Wisconsin specific or not about private or technical colleges. For example, the Board relies on an expert report that largely discusses national racial disparities. R. 26:3. The report also contains this chart:

Table 4 – Default Rates by Ethnicity based on Dropouts

Default rates within 12 years of entry of undergraduate borrowers who dropped out
Students who entered college in 2003-04, by race and ethnicity

	Public four-year institution	Private nonprofit four-year institution	Public two-year institution	Private for-profit institution
White	39	33	32	50
Black or African American	64	65	54	75
Hispanic or Latino	50	*	29	63
Overall	44	40	36	62

* Standard error is too high to report an estimate.
Source: Author's analysis of data from National Center for Education Statistics, "2003-04 Beginning Postsecondary Students Longitudinal Study, Second Follow-up (BPS:04/09)," Tables gmbhmkn38, gmbhmpe2, gmbhm4d, and gmbha47, available at <https://nces.ed.gov/datalab/powerstats/default.aspx> (last accessed October 2017).



R. 26:15. This chart indicates that default rates differ between various institutions and that “public two-year institutions” had the lowest overall default rate. Hispanics at “public two-year institutions” also had a three percent lower default rate than whites. *See also* R. 50 (relying on nationwide data).

III. The Taxpayers sued to (in the Board’s words) “effectively end the Program.”

The Taxpayers sued, claiming the Program illegally doled out educational benefits based on race. The Taxpayers alleged multiple counts, including Violation of the United States Constitution. R. 21:9. The Board, before the Court of Appeals, described the action as follows in one header: “**Appellants sue to effectively eliminate the Grant Program.**” Board’s Ct. App. Resp. Br., at 20.

The Taxpayers claimed standing because they argued that the expenditures were illegal. R. 21:9. In the 2021–22 academic year alone, the Program cost taxpayers \$819,000. R. 49:1. Since its inception in 1985, it has cost millions. *Rabiebna*, 2025 WL 657120, ¶14.

A. The Circuit Court concluded that the Taxpayers had standing but sided with the Board on the merits, relying on “diversity” as a purported compelling interest.

On cross-motions for summary judgment, the Circuit Court concluded that the Taxpayers had standing but ruled for the Board on the merits. R. 61:23. 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. R. 61. 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” R. 61:25–26.

B. The Court of Appeals reversed after holding oral argument and receiving supplemental briefing.

The Taxpayers appealed. In addition to ordinary briefing, the Court of Appeals received letter briefs after the United States Supreme Court decided *SFFA. Rabiebna*, 2025 WL 657120, ¶7. It then held oral argument and, at the Board’s urging, allowed for “post-argument briefing,” even though such briefing is “unusual.” *Id.*

The Court of Appeals reversed. *Id.*, ¶87. It first agreed with the Circuit Court that the Taxpayers had standing. *Id.*, ¶¶10–17. On the merits, it walked through each requirement an affirmative action program must satisfy to meet the high bar outlined in *SFFA. Id.*, ¶¶20–81. It first held that “*SFFA* completely cuts the legs out of from under [the Board’s] originally asserted government interest of student body diversity.” *Id.*, ¶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. *Id.*, ¶¶41, 43. The Court 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.” *Id.*, ¶43. Next, the Court concluded that even if this interest could be compelling, the record evidence was insufficient in this action. *Id.*, ¶¶45–52. Among other problems, the evidence is mainly about public four-year universities, which are 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. *Id.*, ¶¶57–81.

The Board filed the Petition.

REASONS TO DENY THE PETITION FOR REVIEW

The Court should deny the Petition. Neither question presented has law-developing potential. The Board cannot distinguish *SFFA* and similar precedents from the United States Supreme Court, and this Court has no authority to disregard these precedents. Similarly, this Court’s taxpayer standing precedents are already clear: under them, the Taxpayers have standing. No one has asked this Court to revisit these precedents, nor should it. Moreover, this action is also a lousy vehicle to address these questions. Among other problems, the Board is advancing arguments it did not make before the Court of Appeals.

I. On the merits, this Court must follow precedents from the United States Supreme Court, and these precedents are clear—educational benefits cannot be doled out based on race; accordingly, the merits question lacks law-developing potential.

On the merits, 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 could not use race as a factor in deciding who can attend college. *E.g.*, Pet. Rev., at 19. 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. *Rabiebna*, 2025 WL 657120, ¶¶20 n.11, 40. Even pre-*SFFA*, race could not be used in a dispositive fashion, as it has been for the Program. *Id.*, ¶44 n.13. The Court of Appeals painstakingly followed *SFFA* and related precedents, which lead to only one reasonable conclusion: The Program is illegal. This Court should not rehash the good work of the Court of Appeals.

A. 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, just like the Court of Appeals did in this action. *Id.* at 214–21.

1. 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, 753 (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). Statutes “rare[ly]” survive strict scrutiny. *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis.2d 94, 952 N.W.2d 765.

Strict scrutiny works as follows: an affirmative action program is unconstitutional unless the State can show that it furthers a “compelling interest” and that its use of race is “narrowly tailored”—i.e., “necessary”—to achieve that interest.⁴ *SFFA*, 600 U.S. at 206–07.

The State needs a “strong basis in evidence” to conclude that strict scrutiny is satisfied “*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)).

⁴ The Board says that “Plaintiffs failed to show that Wis. Stat. § 39.44 is unconstitutional,” inverting the burden. Pet. Rev., at 23. The Board has the burden to show that § 39.44 is constitutional.

The United States Supreme Court explained in *SFFA* that it recognizes only two compelling interests for “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 206–07.

Previously, the United States Supreme Court had indicated that student body diversity could be a compelling interest; however, in *SFFA*, the Court explained that diversity is “not [a] sufficiently coherent” concept, i.e., it cannot be “measure[d],” so the Court held it could not be a compelling interest. *Id.* at 214; *see id.* at 287 (Thomas, J., concurring) (concluding the Court had “for all intents and purposes” overruled previous precedents on diversity); *see also Fellowship of Christian Athletes v. Dist. of Columbia*, 743 F. Supp. 3d 73, 87 (D.D.C. 2024) (explaining previous precedents suggesting diversity could be a compelling interest “did not survive [*SFFA*]”). A court can discern whether “temporary racial segregation of inmates” during a prison riot did (or was at least likely to) prevent violence, but whether a particular mix of races will improve a student body is standardless. *See SFFA*, 600 U.S. at 215 (majority opinion).

The Board does not claim that the Program’s racial eligibility criteria further either of the compelling interests recognized in *SFFA*. The criteria are not about preventing race riots in prison. Additionally, the Board has never claimed that the criteria are about remedying illegal discrimination. No record evidence would support that theory, as the Circuit Court recognized. R. 61:26. *See generally Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (explaining remedying “past societal discrimination” is not a compelling interest, only remedying discrimination at the hand of the government).

Instead, the Board initially said that the Program’s racial eligibility criteria were about student body diversity but later changed positions and argued they are about a “crisis” in retention and graduation rates. *Rabiebna*, 2025 WL 657120, ¶40.

This “crisis” is just a purported lack of racial balance, but as the United States Supreme Court has explained, “[r]acial balance is not to be achieved for its own sake.” *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

For example, the United States Supreme Court condemned a school district’s goal of “attaining a level of diversity within the schools that approximates the district’s overall demographics.” *Parents Involved*, 551 U.S. at 727 (plurality opinion); *see id.* at 766–67 (Thomas, J., concurring); *see also Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1570 (11th Cir. 1994) (“[T]he long-term racial goals are fundamentally flawed. The flaw is that they are designed to create racial parity between the racial compositions of the labor pool and the race of the employees in each job position.”).

At best, the Program’s racial eligibility criteria are similarly designed to achieve some racial balance at private and technical colleges that approximates Wisconsin’s overall demographics, which is not a compelling interest. Moreover, why the State has any interest in who attends private colleges is unclear.

Even if a retention and graduation “crisis” could be a compelling interest, the Board lacks a “strong basis in evidence” to establish that a crisis has ever existed. *Wis. Legislature*, 595 U.S. at 404. Among other problems, the Board relied on evidence about public four-year universities, which is insufficient because the Program is for private and technical colleges.

The Court of Appeals explained these evidentiary problems in detail—even though the Board says the Court did not.⁵ *Compare* Pet. Rev., at 29 (purporting “the [C]ourt [of Appeals] offered no explanation of why the distinction in schools matters”), *with Rabiabna*, 2025 WL 657120, ¶¶50–51 (explaining private universities may have their

⁵ The Board also conflates legislative facts with adjudicative facts. A “legislative fact” is one that has “relevance” to a “lawmaking process,” i.e., such a fact might help explain why a particular law was adopted. *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶10 n.3, 313 Wis. 2d 411, 756 N.W.2d 667 (quoting FRE 201 Note). An adjudicative fact pertains to a “particular case,” e.g., did a criminal defendant actually pull the trigger? *Id.* (quoting FRE 201 Note). While appellate courts generally defer to a circuit court’s understanding of adjudicative facts, they do not defer on legislative facts. The Board complains at length that the Court of Appeals thoroughly reviewed the record evidence in this action, implying it should have deferred to the Circuit Court. Pet. Rev., at 27 (complaining “[o]n appeal, the [C]ourt of [A]ppeals undertook to dissect the Board’s evidence”). Problematically for the Board, the Court of Appeals had every right (if not a duty) to carefully consider said evidence because it all related to legislative facts: Why did the Legislature create the Program’s racial eligibility criteria?

own affirmative action programs, thereby negating the need for a state-sponsored program, and that technical colleges have cheaper tuition and are “generally *two*-year institutions,” making degree completion easier than at a four-year university).

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 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.” *Rabiebna*, 2025 WL 657120, ¶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 merely 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 ...” *Rabiebna*, 2025 WL 657120, ¶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.* The record evidence in this action is nothing like 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.

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.

2. The Program's racial eligibility criteria are unconstitutional because they are premised on racial stereotypes and employ 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 always (or even consistently) express some characteristic minority viewpoint on any issue.'" *Id.* at 219 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

If the purported compelling interest is racial balance (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).

Regardless of the compelling interest, race is being employed as a negative. A poor student from Brazil 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. *Rabiebna*, 2025 WL 657120, ¶75. “[R]ace—and race alone” explains why this Brazilian is ineligible. *SFFA*, 600 U.S. at 219 n.6. “How else but ‘negative’” can this Brazilian’s race be described if in its “absence,” the Brazilian 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.’”).

3. The Program’s racial eligibility criteria are unconstitutional because they lack 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. The Court stated that an affirmative action program should last no more than 20 to 25 years. *Id.* at 224–25. 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.* 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. A State cannot rely upon

“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.*

The Program’s racial eligibility criteria lack a logical endpoint. They have been around for 40 years and have not been revised in 38 years. They have no sunset. *Rabiebna*, 2025 WL 657120, ¶79. As the Court of Appeals noted, “[t]here are not even disparity standards that would trigger the end of the [P]rogram.” *Id.*, ¶81. While the Board claims that they are “constantly reviewed” (which is hyperbole), that argument is nearly identical to the one rejected by the United States Supreme Court in *SFFA*—periodic review is insufficient. Pet. Rev., at 27.

B. *SFFA* is so clear as to remove any law-developing potential.

SFFA is indistinguishable, which removes any law-developing potential. In conclusory fashion, the Board says, “[*SFFA*] provides guidance, but financial aid presents distinct issues from a university’s admissions policies.” Pet. Rev., at 30. It does not explain itself. In fact, this action is a much easier one than *SFFA*, and *SFFA*, by its own terms, is broad. Additionally, the Board relied heavily on admissions policies precedents up until *SFFA* was decided.

First, the Program’s racial eligibility criteria are even more offensive than the use of race was in the *SFFA* admissions programs. *SFFA* involved a dispute about “*how much*” race was being considered. 600 U.S. at 298 (Gorsuch, J., concurring). As summarized in one concurrence, “[b]oth schools insist that they consider race as just one of many factors when making admissions decisions in their self-described ‘holistic’ review of each applicant,” while the plaintiff said that “whatever

label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others.” *Id.* Unlike those programs, the criteria in this action make race dispositive.

Second, *SFFA* is a landmark precedent—it applies broadly by its plain terms. The United States Supreme Court emphasized that “[e]liminating racial discrimination means eliminating all of it. ... [T]he Equal Protection Clause ... is ‘universal in [its] application.’” 600 U.S. at 206 (majority opinion) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). In discussing how strict scrutiny works, the Court said that “race-based government action” (broad language) has “only two compelling interests.” *Id.* at 207. Those interests were preventing race riots in prison and remediating illegal discrimination. *Id.* The Court did not recognize some special interest unique to the college admissions context—quite the opposite. *Id.* The Court also relied on precedents from other contexts, including government contracting and voting. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *id.* at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

Multiple courts have applied *SFFA* in contexts significantly more strained from college admissions than are at issue in this action. *E.g.*, *Mid-Am. Milling Co. v. U.S. DOT*, 2024 WL 4267183, at *7 (E.D. Ky. Sept. 23, 2024) (applying *SFFA* in the context of government contracting); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 492 (N.D. Tex. 2024) (same); *Ultima Servs. Corp. v. U.S. DOA*, 683 F. Supp. 3d 745, 765 (E.D. Tenn. 2023) (same); *Strickland v. U.S. DOA*,

736 F. Supp. 3d 469, 480 (N.D. Tex. 2024) (applying *SFFA* in the context of government relief funds).

To quote one legal scholar: “After any consequential [United States] Supreme Court decision, the losers try to minimize the scope of the decision, and the winners seek to widen the victory. In the less than two years since the decision [in *SFFA*] came down, it is clear that the wideners are correct ...” George R. La Noue, *The Widening Effect of Students for Fair Admissions*, 26 Fed. Soc’y Rev. 95, 96 (2025); see also U.S. DOE, *Dear Colleague Letter*, at 2 (Feb. 14, 2025) (“Although *SFFA* addressed admissions decisions, the ... holding applies more broadly.”).⁶

Lastly, the Board relied heavily upon “admissions policy” precedents until *SFFA*, as the Court of Appeals noted, reinforcing the relevance of *SFFA*. *Rabiebna*, 2025 WL 657120, ¶20 n.11.

C. Even pre-*SFFA* precedents are so clear as to remove any law-developing potential.

Even under pre-*SFFA* precedents, the Program’s racial eligibility criteria are illegal. These precedents prohibit race from being used in a dispositive manner, e.g., a university could not set aside spots in its freshman class for minorities. *Id.*, ¶44 n.13. As the Court of Appeals noted, the criteria functionally create a quota: 100 percent of grant funds are “reserved exclusively” for minorities. *Id.* (quoting *Grutter*, 539 U.S. at 335).

⁶ <https://tinyurl.com/ycxe9s8b>.

II. This Court has repeatedly held that taxpayers have standing to sue over illegal expenditures, and no one has asked it to revisit those precedents; accordingly, the taxpayer standing question lacks law-developing potential.

Turning to standing, this Court's standing precedents are clear: applying them, the Taxpayers have standing. The Board does not ask this Court to revisit any of these precedents nor would doing so be appropriate. The standing question accordingly lacks law-developing potential.

A. As a preliminary matter, this Court has long viewed standing as a matter of judicial policy, not jurisdiction—like it is in federal courts—and said policy is quite permissive.

As a preliminary matter, standing in Wisconsin courts 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,” but 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 judicial policy that illuminates standing doctrine in Wisconsin is a simple one: courts do not want to wade into every possible dispute, only those in which a party has been injured. *See Fabick v. Evers*, 2021 WI 28, ¶11, 396 Wis. 2d 231, 956 N.W.2d 856.

With that being said, this Court has also held that standing is to be “construed liberally” and “even an injury to a trifling interest” may suffice—it does not want the courthouse doors closed arbitrarily. *McConkey*, 326 Wis. 2d 1, ¶15 (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). In its words: “[I]t is not the magnitude of the injury that confers standing, but rather the fact that an injury has occurred.” *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 69, 387 N.W.2d 245 (1986).

B. As a matter of precedent, judicial policy favors hearing actions brought by a taxpayer over “any illegal expenditure” because, at a minimum, a governmental unit is left with less money to spend on legitimate governmental objectives.

Against this backdrop, this Court has allowed taxpayers to sue over “any illegal expenditure.” *E.g.*, *Tooley*, 77 Wis. 2d at 438. A taxpayer is “akin to that of a stockholder” in a private corporation. *S. D. Reality*, 15 Wis. 2d at 22. Just like 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.*

To explain further, all illegal expenditures cause taxpayers to suffer a “pecuniary loss.”⁷ *Tooley*, 77 Wis. 2d at 438 (quoting *S. D. Reality*, 15 Wis. 2d at 22).

⁷ Taxpayer standing is so broad in Wisconsin that, as the Court of Appeals recognized, this Court has sometimes allowed actions to proceed even when no such loss was suffered. *Rabiebna*, 2025 WL 657120, ¶14 n.8 (citing *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 432–36, 424 N.W.2d 385 (1988)).

The pecuniary loss occurs in one of two ways, both of which are sufficient to confer standing. First, an illegal expenditure can cause taxes to go up. *Id.* Second, even if taxes do not increase, this Court has said that any illegal expenditure necessarily leaves “less money to spend for legitimate governmental objectives ...” *Id.* (quoting *S. D. Reality*, 15 Wis. 2d at 15). As it held in one precedent, “[t]he illegal disbursement of this money” affects taxpayers “notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation.” *Thompson v. Kenosha Cnty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974) (quoting *Wagner v. Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207 (1928)). This Court’s jurisprudence on this point has been consistent for nearly a century (maybe longer). *Wagner*, 196 Wis. at 330.

As with standing doctrine generally, the magnitude of a taxpayer’s pecuniary loss is 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).

C. In this action, the Taxpayers have standing because the Board is illegally doling out educational benefits—in the form of grants—to students based on race.

In this action, the Taxpayers have standing, as both the Circuit Court and the Court of Appeals correctly recognized. *Rabiebna*, 2025 WL 657120, ¶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 continued.” *Id.*, ¶14. If

the Program is eliminated, taxes will go down, and if it is opened up to all races, no taxpayer funds will be illegally distributed, i.e., the Board will have more money “to spend on legitimate governmental objectives.”⁸ *Tooley*, 77 Wis. 2d at 438 (quoting *S. D. Reality*, 15 Wis. 2d at 15). The Board appears to think that a pecuniary loss is nothing more than the difference between what a taxpayer would fork over if an expenditure continued and what he or she would fork over if the expenditure stopped, but this Court has consistently rejected this theory.

D. The Board’s primary counterargument wrongly conflates whether a taxpayer has suffered a pecuniary loss with how a court might remedy that loss.

As far as the Taxpayers can discern, the Board’s primary counterargument is that the relief requested by the Taxpayers will not actually save them any money. The Board suggests that the Complaint cannot be read as requesting that the Program be shut down, only that it be opened up to all financially needy students. This argument is factually and legally erroneous. The Taxpayers have no preference on how the use of race is ended, and one way to end the use of race is to end the Program.

First, the Taxpayers broadly asked the Circuit Court to declare that the Program’s racial eligibility criteria are illegal and to stop Wisconsin from doling out educational opportunities based on race. *See, e.g.*, R. 21:12 (seeking any relief “the Court may deem appropriate”). The Board does not even address why declaratory judgment is unavailable,

⁸ If this Court grants the Petition, the Taxpayers reserve the right to argue for both closing down and opening up the Program.

and closing down the Program is one way to stop Wisconsin from illegally expending taxpayer funds. Notably, before the Court of Appeals, the Board had a bolded header in its response brief, stating, “**Appellants sue to effectively eliminate the Grant Program.**” Board’s Ct. App. Resp. Br., at 20. The Board has always known that one possible remedy in this action would be to end the Program.

Second, even if the Taxpayers did not specifically ask for such relief, Wis. Stat. § 806.01(1)(c) declares that “[e]very 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.” *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978) (construing similar language in the Federal Rules of Civil Procedure and instructing federal courts that “although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to a meritorious claim”).

The Board does not address Wis. Stat. § 806.01(1)(c), even though it demonstrates that whether a plaintiff has standing has nothing to do with whether that plaintiff obtained a form of relief different from his or her requested relief. One is a threshold issue; the other comes at the end of an action.

For example, in *Sessions v. Morales-Santana*, a non-citizen son born abroad to an unwed citizen father and non-citizen mother sued, arguing that a federal statute violated the Equal Protection Clause (via inverse incorporation against the federal government) because, under that statute, had the citizenship of his parents been reversed, he would

have inherited citizenship. 582 U.S. 47, 51–52 (2017). The Court agreed that the statute was unconstitutional, but the son never got citizenship. *Id.* at 52. Instead, the Court held that the more favorable terms on which mothers could transmit citizenship were effectively void. *Id.*

Sessions shows that nothing about the remedy in this action is special. Equal protection actions regularly present this so-called “leveling up” v. “leveling down” problem, and plaintiffs often win but do not get their preferred remedy (and again, the Taxpayers have no preference).

E. The Board does not ask this Court to revisit its taxpayer standing precedents, nor should it, and because these precedents are clear, the taxpayer standing question lacks law-developing potential.

At bottom, this Court would need to overrule several precedents if it wanted to entertain the Board’s theory—a concern that the Board does not address. This Court takes its precedents seriously to ensure stability in the law, especially when the issue involved could be remedied by some other body. *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶¶27, 36 n.9, 400 Wis. 2d 50, 968 N.W.2d 684. It generally does not reconsider its precedents without a specific request. *E.g.*, *LeMieux v. Evers*, 2025 WI 12, ¶23 (lead opinion); *id.*, ¶40 (Dallet, J., concurring).

Even if the Board had asked to overturn precedents, its argument would be unpersuasive. First, it would not be asking this Court to overrule a one-off precedent but to disturb a settled body of precedents. *Hennessy*, 400 Wis. 2d 50, ¶33. Taxpayer standing has been around for at least a century, and it is ingrained into the fabric of Wisconsin jurisprudence. Second, if taxpayer standing is so bad, the Legislature

could eliminate it tomorrow. *See id.*, ¶36 n.9. This Court is not the only body that could deal with this purported problem. Third, taxpayer standing has proven an effective way for Wisconsinites to police their own government.

F. The Board’s references to federal taxpayer standing precedents are irrelevant because the taxpayer standing question is governed by Wisconsin precedents.

On a final note about standing, the Board unpersuasively goes on and on about taxpayer standing in federal courts, which is very restrictive. No reasonable jurist seriously believes that taxpayer standing in Wisconsin works the same way. This Court should refer to its century’s worth of precedents, not non-binding federal decisional authorities. *Wis. State Legislature v. Kaul*, 2025 WI App 2, ¶25, 414 Wis. 2d 633, 17 N.W.3d 24, *pet. for rev. granted*.

At bottom, whether the Taxpayers could have filed this action in federal court is irrelevant.⁹ *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”). Notably, Wisconsin is far from extraordinary—most states are quite permissive with taxpayer standing. *E.g.*, Edward A. Zelinsky, *Putting State Courts in the*

⁹ The Taxpayers also argued that the expenditures were illegal under Article I, Section 1 of the Wisconsin Constitution. R. 21:7. The Court of Appeals noted that this section has generally been construed in lockstep with the Fourteenth Amendment, so it did not analyze it separately. *Rabiebna*, 2025 WL 657120, at ¶1 n.3. If the Petition is granted, the Taxpayers reserve the right to argue that this section independently prohibits the Program’s racial eligibility criteria.

Constitutional Driver's Seat: State Taxpayer Standing After Cuno and Winn, 40 Hastings Const. L.Q. 1, 2 (2012).

III. Even if this Court believed that the questions presented had law-developing potential, this action is a lousy vehicle in which to consider them for several reasons.

Even if this Court believes that the questions presented have law-developing potential, this action is a bad vehicle. It has several problems.

First, as should already be clear, the Board changed its purported compelling interest on appeal, which strict scrutiny does not allow. The Board is stuck with the “diversity” argument it made in the Circuit Court.

Second, and similarly, a key theory on which the Board now relies is underdeveloped and was never raised before the Court of Appeals. Generally, this Court declines to consider underdeveloped arguments. *E.g.*, *Papa v. DHS*, 2020 WI 66, ¶42 n.15, 393 Wis. 2d 1, 946 N.W.2d 17. Moreover, arguments not presented to the Court of Appeals are forfeited. *See A.O. Smith*, 222 Wis. 2d at 491. For both reasons, this action is not a good vehicle through which to address this theory.

Specifically, the Board now makes a big deal about the difference between facial and as-applied challenges. *E.g.*, *Pet. Rev.*, at 8 (purporting the Court of Appeals “lost sight of its task in a facial challenge”); *id.* at 10 (“This case is a facial challenge ...”).

Why the Board thinks this distinction matters is unclear—its theory is underdeveloped. Either the State has a compelling interest, or it does not. Either the Program’s racial eligibility criteria are narrowly tailored, or they are not. Either the criteria are premised on racial stereotypes, or they are not. Either the criteria employ race as a

negative, or they do not. Either the criteria have a logical endpoint, or they do not. For these reasons, courts do not typically distinguish between facial and as-applied challenges in equal protection jurisprudence. As one scholar wrote: “The governing tests used in equal protection doctrine focus on the challenged law’s classification ... and the reasons the government offers for those classifications. ... These doctrinal tests lead inexorably to facial review in almost all equal protection challenges; ... the distinction between facial and as-applied adjudication rarely surfaces.” David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1381–82 (2010). The words “facial” and “as-applied” do not appear anywhere in *SFFA* nor a great number of other seminal equal protection precedents. 600 U.S. 181; e.g., *Adarand*, 515 U.S. 200.

Perhaps recognizing that this theory is a loser, the Board did not raise it before the Court of Appeals. Much like many seminal equal protection precedents, the words “facial” and “as-applied” do not appear in their response brief before that court nor in their supplemental brief. They also do not appear in the opinion of the Court of Appeals.

This Court benefits from the legal reasoning of the Court of Appeals, which it cannot rely upon in this action to evaluate the novel facial v. as-applied theory. *State v. Thomas*, 2023 WI 9, ¶10, 405 Wis. 2d 654, 985 N.W.2d 87 (citing *State v. Smith*, 2012 WI 91, ¶25, 342 Wis. 2d 710, 817 N.W.2d 410).

Addressing that theory would, accordingly, be inappropriate. This Court should leave said theory for another day.

CONCLUSION

In summary, this Court should deny the Petition because neither question presented has law-developing potential. Additionally, this action is a bad vehicle for various reasons, including forfeiture issues.

Dated: April 30, 2025

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b), (bm), and (8g) for a response produced with a proportional serif font. The length of this response is 7,971 words (including the words in the image).

Dated: April 30, 2025

Electronically signed by Skylar Croy
SKYLAR CROY