No. 2022AP2026

In the Wisconsin Court of Appeals

DISTRICT II

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

v.

HIGHER EDUCATIONAL AIDS BOARD AND CONNIE HUTCHINSON,
DEFENDANTS-APPELLEES

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

PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANTS-APPELLEES' POST-ORAL ARGUMENT SUPPLEMENTAL BRIEF

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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

Attorneys for Plaintiffs-Appellants

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STATEMENT OF THE ISSUES

The Higher Education Aids Board oversees a "Minority Undergraduate Retention Grant" Program. Through the program, Wisconsin private universities and Wisconsin technical colleges dole out financial aid based on race.

At oral argument, this Court asked the following question:

(1) "[Is] there any evidence in the record that [Wisconsin private universities and] Wisconsin technical colleges had a retention and graduation problem for any of the groups [eligible to receive grants when the program was created]?" Oral Argument at 1:52:39.

The Board responded by relying upon "national data" and asked to submit a supplemental brief addressing the question. *Id.* at 1:53:02. This Court agreed.

After oral argument, this Court issued an order explaining it also wanted the supplemental brief to address the following:

(2) "[W]e would like to see the specific record evidence demonstrating that the problem of disparity in retention and graduation rates still exists between students from groups eligible for the grants and students from groups not eligible, i.e. we are looking for data, studies, or some other evidence from the last 20 years demonstrating that the disparity problem 'still exists.' " Order at 2 (July 22, 2024).

Lastly, at oral argument, the Board requested that it be allowed to address the following:

(3) Whether Wis. Stat. § 39.44(3)(b), which provides that MURG grants shall not "replace institutional grants," means that a

> MURG grant cannot offset other financial aid such that funds are freed up that may then be distributed to students who are not eligible for MURG grants. Oral Argument at 2:03:30.

This Court said that the Board could address this question too.

INTRODUCTION

The record evidence cited by the Board establishes:

(1) The Board lacks evidence that relevant disparities existed when the MURG Program was created;

(2) The Board lacks evidence that relevant disparities presently exist;

(3) The Board is engaged in racial balancing, which is not a compelling interest; and

(4) The Board has no legal argument that the MURG Program can be saved on the theory that it frees up financial aid for students who are not eligible for an MURG grant.

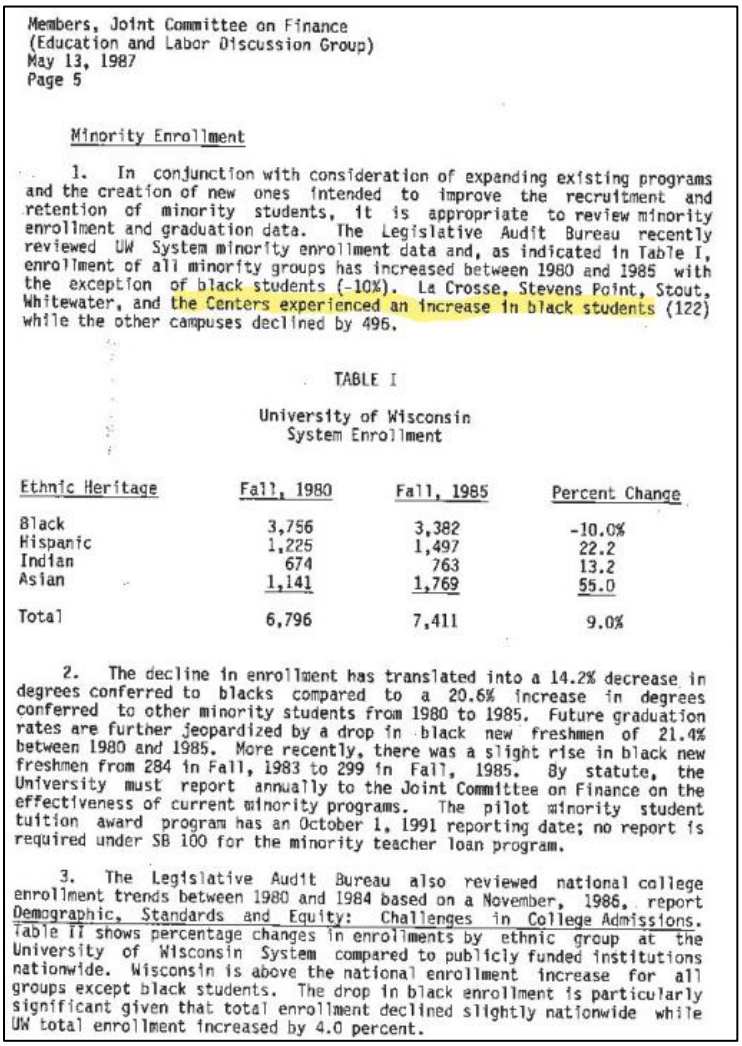
ARGUMENT

I. The Board has not cited record evidence that Wisconsin private universities or Wisconsin technical colleges had relevant disparities in the 1980s when the MURG Program began.

When the MURG Program began, the State lacked evidence of relevant disparities. This fact alone should doom the Board. The government must have a "strong" basis in evidence that affirmative action is necessary "before" it "embarks on an affirmative-action program." *Wis. Legislature v. WEC*, 595 U.S. 398, 404 (2022) (per curiam).

The Board relies only on two records in addressing the first question. Neither helps the Board. If anything, one record strongly cuts against the Board.

First, Record 49 is a memorandum from the legislative history. Below is a screenshot of one page on which the Board relies. Plaintiffs-Appellants have taken the liberty of highlighting a key phrase that appears to have gone unnoticed until now.



Members, Joint Committee on Finance
(Education and Labor Discussion Group)
May 13, 1987
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Minority Enrollment

1. In conjunction with consideration of expanding existing programs and the creation of new ones intended to improve the recruitment and retention of minority students, it is appropriate to review minority enrollment and graduation data. The Legislative Audit Bureau recently reviewed UW System minority enrollment data and, as indicated in Table I, enrollment of all minority groups has increased between 1980 and 1985 with the exception of black students (-10%). La Crosse, Stevens Point, Stout, Whitewater, and the Centers experienced an increase in black students (122) while the other campuses declined by 496.

TABLE I

University of Wisconsin
System Enrollment

Ethnic Heritage	Fall, 1980	Fall, 1985	Percent Change
Black	3,756	3,382	-10.0%
Hispanic	1,225	1,497	22.2
Indian	674	763	13.2
Asian	1,141	1,769	55.0
Total	6,796	7,411	9.0%

2. The decline in enrollment has translated into a 14.2% decrease in degrees conferred to blacks compared to a 20.6% increase in degrees conferred to other minority students from 1980 to 1985. Future graduation rates are further jeopardized by a drop in black new freshmen of 21.4% between 1980 and 1985. More recently, there was a slight rise in black new freshmen from 284 in Fall, 1983 to 299 in Fall, 1985. By statute, the University must report annually to the Joint Committee on Finance on the effectiveness of current minority programs. The pilot minority student tuition award program has an October 1, 1991 reporting date; no report is required under SB 100 for the minority teacher loan program.

3. The Legislative Audit Bureau also reviewed national college enrollment trends between 1980 and 1984 based on a November, 1986, report Demographic, Standards and Equity: Challenges in College Admissions. Table II shows percentage changes in enrollments by ethnic group at the University of Wisconsin System compared to publicly funded institutions nationwide. Wisconsin is above the national enrollment increase for all groups except black students. The drop in black enrollment is particularly significant given that total enrollment declined slightly nationwide while UW total enrollment increased by 4.0 percent.

R. 49:20. Plaintiffs-Appellants ask that this Court take judicial notice that "the Centers" refers to "freshman-sophomore centers," i.e., two-year

junior colleges that some students choose to attend before going on to a public university. *See* Wis. Legislative Fiscal Bureau, *University of Wisconsin System Overview* 1 (2003), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2003/0036_university_of_wisconsin_system_overview_informational_paper_36.pdf. These are not technical colleges, although they are analogous in some ways.

Record 49 has nothing to do with private universities or technical colleges. Instead, it goes on and on about the University of Wisconsin System.

Record 49 also does not provide enrollment, retention, or graduation data about all students or students from non-eligible races. So, it does not show disparities between eligible and non-eligible students.

Most importantly, Record 49 also says that minorities other than blacks experienced a 20.6 percent increase in "degrees conferred." It similarly says that "between 1980 and 1985," i.e., the years preceding the MURG Program, "all minority groups" except blacks had increasing enrollment. Additionally, several campuses—"La Crosse, Stevens Point, Stout, Whitewater, and the Centers"—experienced an increase in black enrollment. Stated differently, several campuses—including the Centers—did not experience any disparities at all. So, when Record 49 says that a "decline in enrollment" translated to a decline in degrees conferred on blacks, it presumably is not talking about these particular schools. Record 49 also notes a "slight rise in black new freshmen" across the University of Wisconsin System in the preceding two years.

The Board also relies on the next page of Record 49. The Board says that this page shows that "black student enrollment had declined

nationwide, including in Wisconsin." Board's Supp. Br. at 6 (citing R. 49:21). Below is a screenshot of part of the page.

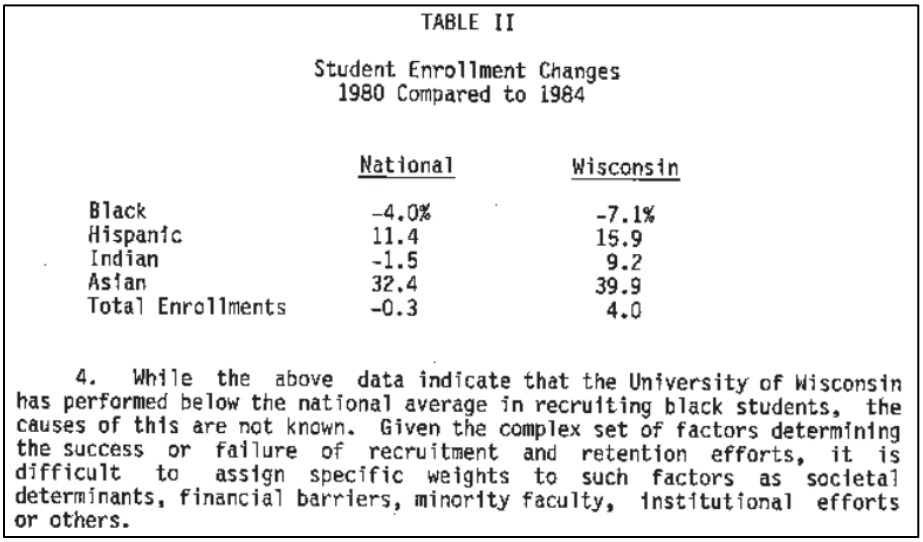


TABLE II

Student Enrollment Changes
1980 Compared to 1984

	National	Wisconsin
Black	-4.0%	-7.1%
Hispanic	11.4	15.9
Indian	-1.5	9.2
Asian	32.4	39.9
Total Enrollments	-0.3	4.0

4. While the above data indicate that the University of Wisconsin has performed below the national average in recruiting black students, the causes of this are not known. Given the complex set of factors determining the success or failure of 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.

Table II is described as follows on the previous page: "Table II shows percentage changes in enrollment by ethnic group at the University of Wisconsin System compared to publicly funded institutions nationwide." R. 49:20. Table II has nothing to do with private universities—nationally or in Wisconsin.

Also, Table II disproves the existence of Wisconsin-specific disparities in enrollment for all minorities except blacks (at least throughout the University of Wisconsin System). While "total enrollment" increased only 4 percent in Wisconsin, enrollment for Hispanics increased by 15.9 percent, for Indians 9.2 percent, and for Asians 39.9 percent (although, the definition of "Asian" is unclear). If anything, white students seemed to be on the receiving end of any "disparity."

Also, except for blacks, Table II indicates that Wisconsin was doing much better than the national average. For example, Indians had a

national enrollment change of −1.5 percent, but in Wisconsin, Indians had +9.2 percent enrollment change.

Similarly, Table II belies that Asians or Hispanics were experiencing any decline in enrollment at all—nationally or in Wisconsin.

Immediately after Table II, the record notes that "[w]hile the above data indicate that the University of Wisconsin has performed below average in recruiting black students, the causes of this are not known." R. 49:21.

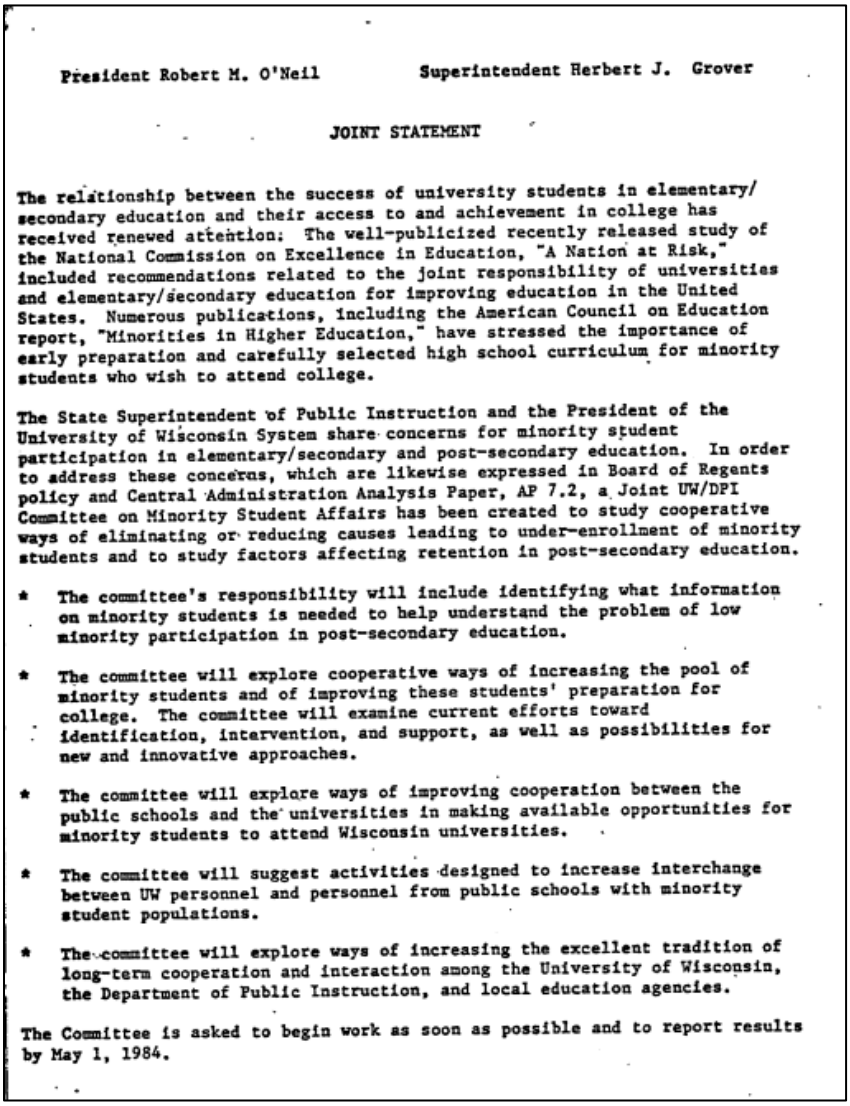
This record is not good for the Board—quite the opposite. It identifies one Wisconsin-specific disparity and then explains the cause of that disparity is "not known." It also says that "the Centers" (and several other campuses) did not experience this disparity at all.

The Board also relies on Record 55, which is a 1984 joint report by the University of Wisconsin System and the Department of Public Instruction. The record is unresponsive to the first question.

Even the portions quoted by the Board are about "K-12 through post-secondary education" generally. Board's Supp. Br. at 4. This Court did not ask to be directed to such evidence—it wanted to see proof of disparities specifically for private universities and technical colleges. Like Record 49, Record 55 goes on and on about the "University of Wisconsin System," but again, this Court could not have been clearer that it was not looking for evidence about public universities. After all, the MURG Program has nothing to do with such schools.

Notably, the Board takes quotes from Record 55 out of context. For example, the Board quotes the record as saying a taskforce was created "to study cooperative ways of eliminating or reducing causes leading to under-enrollment of minority students and to study factors affecting

retention *in post-secondary education*." *Id.* at 5 (quoting R. 55:30). Below is a screenshot of the page.



President Robert M. O'Neil Superintendent Herbert J. Grover

JOINT STATEMENT

The relationship between the success of university students in elementary/secondary education and their access to and achievement in college has received renewed attention. The well-publicized recently released study of the National Commission on Excellence in Education, "A Nation at Risk," included recommendations related to the joint responsibility of universities and elementary/secondary education for improving education in the United States. Numerous publications, including the American Council on Education report, "Minorities in Higher Education," have stressed the importance of early preparation and carefully selected high school curriculum for minority students who wish to attend college.

The State Superintendent of Public Instruction and the President of the University of Wisconsin System share concerns for minority student participation in elementary/secondary and post-secondary education. In order to address these concerns, which are likewise expressed in Board of Regents policy and Central Administration Analysis Paper, AP 7.2, a Joint UW/DPI Committee on Minority Student Affairs has been created to study cooperative ways of eliminating or reducing causes leading to under-enrollment of minority students and to study factors affecting retention in post-secondary education.

* The committee's responsibility will include identifying what information on minority students is needed to help understand the problem of low minority participation in post-secondary education.

* The committee will explore cooperative ways of increasing the pool of minority students and of improving these students' preparation for college. The committee will examine current efforts toward identification, intervention, and support, as well as possibilities for new and innovative approaches.

* The committee will explore ways of improving cooperation between the public schools and the universities in making available opportunities for minority students to attend Wisconsin universities.

* The committee will suggest activities designed to increase interchange between UW personnel and personnel from public schools with minority student populations.

* The committee will explore ways of increasing the excellent tradition of long-term cooperation and interaction among the University of Wisconsin, the Department of Public Instruction, and local education agencies.

The Committee is asked to begin work as soon as possible and to report results by May 1, 1984.

The page is a joint statement by the heads of the University of Wisconsin System and the Department of Public Instruction. The Board omits the words "a Joint UW/DPI Committee" from the quote to insinuate that the taskforce had something to do with private universities or technical colleges—it did not. The self-described goals of the taskforce were improving retention and graduation rates in the University of Wisconsin System and in high schools. R. 55:4.

No other records have been identified by the Board as relevant to the first question. The Board is not even close to establishing a compelling interest.

Indeed, the Board concedes that the legislature "relied primarily on UW System statistics . . . ." Board's Supp. Br. at 7. It now argues that this Court should assume that "the problem" (i.e., purported disparities) was not "limited to UW System schools." *Id.* It states in conclusory fashion that "[t]o hold otherwise would be to unfairly view the record evidence far too narrowly and disregard the bigger picture . . . ." *Id.*

This Court is right to be skeptical that data about purported disparities at one category of schools can be transposed onto another. In fact, as already noted, several campuses within the University of Wisconsin System were not experiencing any decline in black enrollment (let alone a decline for other races). This point calls into question whether data about a category of schools (e.g., all public universities in Wisconsin) could even be constitutionally used for the purpose of implementing a category-wide remedy that takes no account of these differences. The Board wants this Court to go even a step further by using statistics about one category of schools to justify a remedy for a different category. This Court should reject that argument.

For all this Court knows, private universities in the 1980s were implementing their own affirmative action programs. They may not have needed the State's "help" for any number of reasons. The legislature should have—but did not—consider any of these reasons.

Technical colleges are unlike public universities. Most students graduate in two years instead of four (or, these days, five) and tuition is often cheaper. Accordingly, data that purportedly shows retention and graduation disparities at public universities cannot be mapped onto technical colleges. For all this Court knows, the purported decline in

black enrollment at some public universities was caused by an increase in black enrollment at technical colleges—who knows, based on this record.

In fact, if this Court is going to draw analogies at all, it should use data about the Centers for analyzing technical colleges. As already noted, the Centers did not experience any disparities in the 1980s according to Record 49, on which the Board now relies. Technical colleges are much more analogous to the Centers than to public universities.

In summary, the Board has not pointed to any record evidence of relevant disparities at private universities or technical colleges during the 1980s. In fact, Record 49 seems to cut strongly the other way.

II. The Board has not shown that relevant disparities presently exist.

The Board repeats many of the same errors while attempting to answer the second question.

First, the Board relies on Record 25. Record 25 talks about a national 2020 educational report (i.e., not Wisconsin specific), which appears to have only discussed blacks. R. 25:5. The report was about "six-year bachelor completion rates," i.e., it has nothing to do with two-year technical colleges. R. 25:5.

The Board also relies on pages from Record 25 that it admits were about "a 2007 study of the UW System minority retention grant (the Lawton grant) . . . ." Board's Supp. Br. at 7. Again, the Board fails to deliver—this record is not about private universities or technical colleges.

Record 26 is much the same. Again, even the portions quoted by the Board are about purported national disparities. *Id.* (quoting R. 26:3).

The closest this record comes to addressing the second question is one conclusory sentence: "The reason for having need-based programs for minority students has not changed today as significant equity gaps still exist and recruiting and retaining minorities is still a challenge in Wisconsin public and private colleges and universities." R. 26:17. A conclusory statement by a party's expert is a far cry from what this Court wanted.

Record 26 also contains this chart, which the Board disregards in the supplemental brief.

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).

CAP

R. 26:15. This chart indicates that default rates are different between various institutions. In fact, Hispanics at "public two-year institutions," had a three percent lower default rate than whites, according to this chart.

Next, the Board relies on Record 41. This record overviews purported disparities at technical colleges but not private universities.

It also indicates that "Laotian/Asian" (whatever that means)[1] are only a few percentage points behind the Wisconsin average (41.4 percent compared to 44.3 percent).

Lastly, the Board references Records 49 and 50, which even it says are about "nationwide data." Board's Supp. Br. at 10. Record 49 appears to say nothing about private universities for that matter.

Even if this Court believes that these records somehow show the existence of relevant disparities, they also highlight another hurdle for the Board. Race-based programs must have a "logical end point." *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 221 (2023) (quoted source omitted). The United States Supreme Court has stated that an affirmative action program should last no more than twenty to twenty-five 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.* If the disparities did exist when the MURG Program was created and really do still exist, the MURG Program is a failure.

III. Racial balancing is not—and has never been—a compelling interest.

Even if the record evidence cited by the Board established past and present disparities, the Board should still lose. None of the evidence

[1] The record says that "Laotian, Cambodian[,] or Vietnamese" MURG Grant recipients were compared to "Asian" students. R. 41:1 n.3. Seemingly, the technical colleges are admitting that they did not keep data on retention and graduation rates for Laotian, Cambodian, or Vietnamese students who did not receive a grant, instead lumping them together with all "Asians." A similar issue appears to exist for Indians, who seem to have been lumped together with "Alaskan Native" students. R. 41:1 n.3.

suggests that any purported disparities are relevant, i.e., they do not establish a compelling interest.

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). Racial balance is to be sought after only in pursuit of a compelling interest. *Id.* The reason why is simple: The "ultimate goal" of equal protection jurisprudence is to "eliminat[e] entirely from governmental decisionmaking such irrelevant factors as a human being's race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion). For example, the Court has condemned a school district's goal of "attaining a level of diversity within the schools that approximates the district's overall demographics." *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 727 (2007) (plurality opinion); *see also id.* at 766–67 (Thomas, J., concurring).

The record evidence cited by the Board does not indicate that purported past or present disparities were or are caused by intentional discrimination by the government such that the State has a compelling interest in providing a remedy for past discrimination. *See SFFA*, 600 U.S. at 207 (explaining outside the context of racial segregation during a prison riot, the only compelling interest presently recognized by the United States Supreme Court is remedying "specific, identified instances of past discrimination that violated the [United States] Constitution or a statute"); *see also Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (explaining "the government must have had a hand in the past discrimination it now seeks to remedy"). "Societal discrimination" cannot establish a compelling interest because it provides "no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (citation omitted).

In fact, as already noted, Record 49, on which the Board relies, states: "While the above data indicate that the University of Wisconsin

has performed below the national average in recruiting black students, the causes of this are not known." R. 49:21. It goes on to explain, "[g]iven the complex set of factors determining the success or failure of 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.

For all this Court knows, eligible minorities on average have less financial means and, therefore, struggle to graduate. No one is claiming that the State cannot give financial aid to indigent students. If, however, the State wants to help students, it must help all indigent people without regard to race.

Record 41 is problematic for this reason. In some sense, it shows "disparities," i.e., on average, whites presently seem to graduate from technical colleges more often than eligible minorities; however, this Court cannot draw any conclusions from that gap (other than that the MURG Program is not working). Any number of reasons other than discrimination could be at play. Perhaps white students, on average, just have more financial means. *See McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) ("Raw statistical disparities prove little; they certainly do not prove intentional discrimination.").

At bottom, the record evidence on which the Board relies fails to establish past or present disparities, but even if this Court disagrees, at a minimum, the evidence does not indicate that the disparities are relevant. A disparity can exist for many reasons, and unless the reason is intentional discrimination in which the State had a hand in, the State cannot remedy that disparity.

IV. MURG Grants could make a huge difference in the lives of individual non-eligible students.

On a final note, an MURG Grant could make a world of difference in the lives of hundreds of ineligible students. The Board says two contradictory things: (1) these grants are great for individuals who receive them; and (2) these grants are no big deal—a part of a mere $819,000 appropriation that does not "unduly burden" anyone. Board's Supp. Br. at 11. Only in government would $819,000 be considered chump change, but more importantly, the Board cannot have its cake and eat it too. On the one hand, it wants to suggest that *individuals* really benefit from this money; on the other, it wants to suggest that ineligible students are not "unduly burdened." This argument makes no sense.

The Board makes a series of additional wrong statements before concluding its supplemental brief.

First, the Board says that MURG Grants can "open[] up" financial aid for non-eligible students. *Id.* It says that one of its experts so testified, however, what that expert actually said is that "[a]nother benefit of this race-based grant program [i]s that it *potentially* open[s] up more funding for [w]hite students because other financial aid funds that otherwise might have been awarded to minority students are no longer needed by those who were MURG-eligible." R. 25:8 (emphasis added).

If a student is getting race-based financial aid and then the student's race-neutral aid is taken away, the student is in no better position than if the race-based aid had never been offered. This is simple math.

In fact, the Board has an obligation to use "race-neutral alternative[s]" as a part of narrow-tailoring if possible. *See Wis. Legislature*, 595 U.S. at 406. So, if the Board is saying that it is taking

away race-neutral aid in favor of race-based aid, the Board is admitting that the MURG Program has a narrow-tailoring problem.

The Board does not address Wis Stat. § 39.44(3) at all, which was the entire point of the third question. Section 39.44(3) provides that an MURG grant cannot "replace institutional grants to the recipients." Through § 39.44(3), the legislature recognized a basic mathematical principle about the nature of financial aid: 1 – 1 = 0.

Second, the Board claims that financial aid is not "zero-sum." Board's Supp. Br. at 11. An analogous argument was recently rejected by a federal district court applying *SFFA*. *See Nuziard v. Minority Bus. Dev. Agency*, __ F. Supp. 3d __, 2024 WL 965299, at *36 (N.D. Tex. Mar. 5, 2024) ("Absent a theoretical program with boundless coffers, most federal benefits are 'zero sum' to a degree. . . . MBDA Business Centers have finite resources and offer finite services. A Black man or a Hawaiian woman automatically gets in the door; a Romanian man or a Libyan woman does not. . . . And the fact that latter applicants have a backdoor to benefits doesn't change the initial disadvantage conferred by the stereotype."). This Court should as well.

Lastly, where the Board got the "unduly" standard is unclear. In *SFFA*, the United States Supreme Court said that "[e]liminating racial discrimination means eliminating all of it." 600 U.S. at 206. It also said that "race may *never* be used as a 'negative' " or "operate as a stereotype." *Id.* at 218 (emphasis added).

In fact, the use of race in *SFFA* was actually much less offensive than the use of race in the MURG Program. *SFFA* involved a dispute about "*how much*" race was being considered. *Id.* 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 the admissions policies, the MURG Program uses race as a dispositive criterion—not just one of many factors. At least with the admissions policies, an Asian or white student could compete for a spot and potentially get in—and even that was held unconstitutional. Unlike the admissions policies, the MURG Program effectively employs a racial quota: 100 percent.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: August 23, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Skylar Croy
Richard M. Esenberg (WI Bar No. 1005622)
Daniel P. Lennington (WI Bar No. 1088694)
Skylar Croy (WI Bar No. 1117831)
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Dan@will-law.org
Skylar@will-law.org

CERTIFICATIONS

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,501 word, including 3,625 as calculated by Microsoft Word and 876 counted by hand that appear in the screenshots.

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

Dated: August 23, 2024.

Electronically signed by Skylar Croy

SKYLAR CROY