No. 2022AP002026-OA

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.

NON-PARTY BRIEF OF STUDENTS FOR FAIR ADMISSIONS IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTRODUCTION

Virtually everything the state board says about *SFFA v. Harvard*, 600 U.S. 181 (2023)—the landmark case that SFFA filed and won—is exactly backward. *Harvard* outlawed the use of race to pursue diversity in college admissions, one of the Supreme Court's few remaining *exceptions* to the Fourteenth Amendment's prohibition of race-based state action. *Harvard* did "limi[t] the interests that may be compelling" in this area and did "categorically prohibit racial classifications" in higher education. *Contra* Br.26, 31. That's why, after *Harvard*, no university continues to openly use race in admissions and why countless schools and others have abandoned racially discriminatory scholarships. Diversity can no longer justify racial classifications in higher education. And when students of certain races are excluded from opportunities, their race is used as a negative.

What *Harvard* held is also largely beside the point. Well before *Harvard*, the board's scholarship program never could have survived strict scrutiny. It offers no individualized consideration, with race serving as a decisive criterion. It rests on the stereotype that students of certain races are more prone to drop out of college without a little more financial aid. And it has no durational limit. *Harvard* simply confirms the program's illegality.

ARGUMENT

I. *Harvard* eliminated the Supreme Court's exception to the prohibition of racial discrimination for higher education.

A. The Equal Protection Clause guarantees "that all persons, whether colored or white, shall stand equal before the laws of the States." *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

The Supreme Court famously revitalized equal protection in *Brown v. Board of Education*, where it held that racial classifications have "no place" in public education. 347 U.S. 483, 495 (1954). *Brown* rejected "any authority … to use race as a factor in affording educational opportunities." *Parents Involved v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701, 747 (2007). After *Brown*, the Court vindicated racial equality in "all manner of race-based state action." *Harvard*, 600 U.S. at 204. "Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone." *Id.* at 205.

After *Brown*, the Court "struck down nearly every race- or national-origin-based classification that ha[d] come before" it; but in 2003, *Grutter v. Bollinger* created "the exception to the rule." *United States v. Skrmetti*, 605 U.S. 495, 571 (2025) (Alito, J., concurring). In *Grutter*, the Supreme Court let universities narrowly use race in admissions to "secur[e] the educational

benefits of a diverse student body." 539 U.S. 306, 333 (2003). The Court admittedly "deviat[ed] from the norm of equal treatment of all racial and ethnic groups." *Id.* at 342. But it warned that the deviation was only "temporary." *Id.*

Harvard ended *Grutter*'s carve out. Echoing *Grutter*, Harvard and UNC asserted interests in "training future leaders," "preparing graduates" for "an increasingly pluralistic society," "cross-racial understanding," and "breaking down stereotypes." *Harvard*, 600 U.S. at 214. But the *Harvard* Court rejected those interests as "elusive," "inescapably imponderable," "standardless," and "not sufficiently coherent for purposes of strict scrutiny." *Id.* at 214-16.

Harvard further held that no use of race can "achieve the educational benefits of diversity" in a narrowly tailored manner. *Id.* at 215-16. The standard racial categories are too "opaque" and "imprecise." *Id.* at 216-17. And race-based admissions violate the "twin commands of the Equal Protection Clause." *Id.* at 218. They use race "as a 'negative'" because "[a] benefit provided to some applicants but not to others necessarily advantages the

former group at the expense of the latter." *Id.* at 218-19. And they rest on "pernicious stereotype[s]." *Id.* at 220.

B. Per *Harvard*, it's impossible to employ racial preferences in higher education legally. That's why no university continues to openly consider race in admissions and many universities have ended racial preferences in financial aid and scholarship programs.

Universities across the country revamped their admissions processes in response to *Harvard*. The University of Wisconsin-Madison, Yale, Virginia Tech, and others now shield applicants' race from admissions officers. *See The Supreme Court and Admissions*, Univ. Wis.-Madison, perma.cc/XNP7-B82X; *An Update on Yale College's Response to the Supreme Court Ruling on Race in Admissions*, Yale Coll. (Feb. 7, 2023), perma.cc/5SDV-FXAE; *Virginia Tech Implements Changes to Undergraduate Admissions Process for 2023-24 Admissions Cycle*, Va. Tech (July 28, 2023), perma.cc/96SD-SGAF. The University of Virginia, MIT, and Georgia Tech likewise removed indicators of applicants' race. *See* Gard, *UVA Changes Common App After Affirmative Action Ban*, Va. Mag. (Sept. 1, 2023), perma.cc/SV3R-Q5ZP; *Policies*, MIT Admissions (June 2024), perma.cc/5J8B-CAVB; *Admissions and Diversity*, Ga. Tech (July

4, 2023), perma.cc/X4DG-YLUK. And just recently, Harvard banned alumni interviewers from referencing applicants' race. *See* Cheng & Valencia, *Harvard Bans Alumni Interviewers from Writing About Applicants' Race, Ethnicity, or National Origin*, Harv. Crimson (Oct. 27, 2025), perma.cc/5ZQG-7FRJ.

Beyond admissions, numerous states and universities, including the University of Wisconsin, revamped financial-aid and scholarship programs to remove racial classifications. *See* Douglas-Gabriel, *Many Universities Are Abandoning Race-Conscious Scholarships Worth Millions*, Wash. Post (July 9, 2024), archive.ph/EZGsk. Duke ended a scholarship for "top applicants of African descent" and replaced it with a new program "open to all undergraduate students." Penner, *Duke Ends Full-Ride Scholarship Program for Select Black Students in Wake of Affirmative Action Ruling*, Chronicle (Apr. 11, 2024), archive.ph/WznwU. The University of Iowa changed a scholarship for students from "historically underrepresented populations" to an award "for students of all backgrounds." *University Statement on Scholarship Review*, Univ. Iowa (Feb. 6, 2024), perma.cc/3XQE-RVP5. The University of Missouri "discontinued" its practice of "us[ing] race/ethnicity as a factor for … scholarships." *Statement Regarding Recent U.S. Supreme Court Decision*, Univ. Mo.

Sys. (June 29, 2023), perma.cc/NN2L-AZK7. The Illinois and Oregon legislatures ended racial preferences in state-funded scholarship and grant programs. Bilyk, *IL Strips Explicit Racial Criteria from Minority Teacher Scholarship Program*, Legal Newsline (Dec. 5, 2025), archive.ph/i2Hm0; Binford-Ross, *Scholarship to Diversity Oregon's Teacher Ranks Drops Racial Preferences Amid Legal Threats*, OregonLive (June 12, 2025), perma.cc/6M4Q-GSC8. The University of Alabama ended a racially exclusive scholarship program. Maxwell, *UA Discontinuing the National Recognition Scholarship for Incoming Students*, Crimson White (Feb. 7, 2024), perma.cc/S28S-BZ8F. Other examples abound. *See, e.g.*, Basken, *Colleges End Race-Based Scholarships After Affirmative Action Ban*, Times Higher Educ. (Mar. 26, 2024), archive.ph/VKDCE.

C. The board somehow thinks it can maintain a scholarship program that facially classifies students based on race after *Harvard*, stressing its interests in "diversity" and "educational opportunity." Br.32-33; Reply 7-8. It cannot. After *Harvard*, there are now "only two compelling interests that permit resort to race-based government action": "remediating specific, identified instances of past discrimination" and "avoiding imminent and serious

risks to human safety in prisons, such as a race riot." *Harvard*, 600 U.S. at 207.

Harvard squarely rejects the board's asserted interest in diversity. The board cannot on the one hand say that *Harvard* is limited to "college admissions" and so "does not apply" "in this scholarship context," Br.32, and on the other hand rest on *Grutter*'s diversity interest. *Grutter* deemed educational benefits of "student body diversity" compelling only to "justify the use of race *in university admissions*." 539 U.S. at 325 (emphasis added). If *Harvard* does not apply because it concerned admissions, then neither does *Grutter*.

Grutter's diversity interest never applied outside of college admissions. Lower courts had long rejected diversity as a compelling interest in other contexts, from employment to broadcast media. *See Taxman v. Bd. of Educ. of the Twp. of Piscataway*, 91 F.3d 1547, 1567 (3d Cir. 1996) (en banc); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). And the Supreme Court rejected *Grutter*'s diversity interest for "elementary and secondary schools." *Parents Involved*, 551 U.S. at 722-25.

It makes no difference whether *Harvard* "overrule[d]" *Grutter*'s diversity holding explicitly. Reply 7. "[A] later decision in conflict with prior ones ha[s] the effect to overrule them, whether mentioned and commented on or not." *Asher v. Texas*, 128 U.S. 129, 131-32 (1888). No one thought *Plessy* remained good law, even though *Brown* did not explicitly overrule it. *See Harvard*, 600 U.S. at 204-06. A majority of the Supreme Court has recognized that "*Grutter* is, for all intents and purposes, overruled." *Id.* at 287 (Thomas, J., concurring); *id.* at 342 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) (same); *Skrmetti*, 605 U.S. at 571 (Alito, J., concurring). The court of appeals and other lower courts agree that *Harvard* "effectively overruled" *Grutter*'s holding that diversity is a compelling interest. *Rabiebna v. Higher Educ. Aids Bd.*, 2025 WI App 24, ¶29, 416 Wis. 2d 44, 20 N.W.3d 742; *see FCA v. District of Columbia*, 743 F. Supp. 3d 73, 87 (D.D.C. 2024) ("did not survive").

If race cannot be used on the front end to create a diverse student body after *Harvard*, then it cannot be compelling to use it on the back end to "retain" one. *Contra* Br.33. The board has not even attempted to show that Wisconsin's private, tribal, and technical colleges ever pursued diverse

student bodies through admissions in the first place. And because any such attempts would be illegal under *Harvard*, the board's efforts to perpetuate any such racial discrimination would also be unconstitutional. *See, e.g.*, *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232 (1964).

Racial classifications in higher education categorically cannot survive strict scrutiny because they use race "as a 'negative.'" *Harvard*, 600 U.S. at 218. Like admissions, scholarship programs are zero-sum: they provide a benefit "to some applicants but not to others," which "necessarily advantages the former group at the expense of the latter." *Id.* at 218-19.

The board's program categorically excludes white, Middle Eastern, and non-Laotian, non-Cambodian, and non-Vietnamese Asian students solely because of their race. "How else but 'negative' can race be described if, in its absence, members of some racial groups would be" eligible? *Id.* at 219. Those students are "foreclosed from all consideration" simply because they are "not the right color." *Grutter*, 539 U.S. at 341. Because the board uses race in a way that "unduly harm[s]" ineligible students, its program cannot be narrowly tailored. *Harvard*, 600 U.S. at 212.

II. The board's program was unconstitutional long before *Harvard*.

Putting *Harvard* aside, it has never been legal to dole out financial aid based on race. *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994); *Flanagan v. Georgetown Coll.*, 417 F. Supp. 377 (D.D.C. 1976). The board's program fails even under *Grutter* because it treats race as decisive, it rests on stereotypes, and it has no end point.

A. To be narrowly tailored, a race-conscious program must afford "individualized consideration to applicants of all races." *Grutter*, 539 U.S. at 337. The "entire gist" of *Grutter*'s analysis was that the race-conscious program must remain "focused on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722. In other words, "each characteristic of a particular applicant [must] be considered in assessing the applicant's entire application." *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

Under the plain terms of the board's program, an applicant's race or national origin is "the defining feature of his or her application." *Grutter*, 539 U.S. at 337. Only blacks, American Indians, Hispanics, and those whose ancestry traces to Laos, Vietnam, or Cambodia are eligible for these "need-based grants." Br.17-18. No matter how financially needy white, Middle

Eastern, and non-Laotian, non-Cambodian, and non-Vietnamese Asian students may be, they are ineligible. *Rabiebna*, 2025 WI App 24, ¶68. They cannot even compete. The program is a "mechanical, predetermined" exclusion solely "based on race." *Grutter*, 539 U.S. at 337. By turning on "whether an individual is a member of [certain] minority groups," the program impermissibly makes race "decisive." *Gratz*, 539 U.S. at 272.

B. *Grutter*'s requirement of individualized consideration served to guard against "the risk that the use of race will devolve into illegitimate stereotyping." *Harvard*, 600 U.S. at 211 (cleaned up). Stereotypes "treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to" the color of their skin. *Miller v. Johnson*, 515 U.S. 900, 912 (1995). Officials engage in impermissible stereotyping when they assume race conveys information about an individual. *See Grutter*, 539 U.S. at 333; *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Regardless of how it "define[s] diversity," Br.32, the board's program rests on the pernicious stereotype that students of certain races are too cash strapped to complete college. The board claims black, Hispanic, American Indian, Laotian, Vietnamese, and Cambodian students are "demonstrably

and disproportionally affected by drop-out rates." Br.41. The word "disproportiona[te]" gives away the stereotype. The board assumes that, because someone belongs to one of these racial groups, that person is *more likely* to drop out of college.

Because a person's skin color does not dictate whether they will drop out of college, the board's racial stereotypes are backed up with no causal evidence. Reports that black and Hispanic college students drop out at higher rates than whites and Asians, at best, identify a weak correlation. "Within-group variance" and "conditional effects make an[y] understanding of racial and ethnic differences in retention rates difficult" and "almost useless in practice." Reason, *An Examination of Persistence Research Through the Lens of a Comprehensive Conceptual Framework*, 50 J. Coll. Student Dev. 659, 662-63 (2009), perma.cc/2NNC-LXZ7. For example, "[i]n studies in which other important variables are controlled" like socioeconomic status or academic preparation, "racial differences disappear or are reversed, indicating that differences in income or preparation, not race, might be at the root of differences in student persistence." *Id.* at 663. Other studies reveal "that parent and family support are influential in persistence decisions regardless of

student racial or ethnic background." *Id.* at 664; *see* Gloria et al., *An Examination of Academic Nonpersistence Decisions of Latino Undergraduates*, 27 Hisp. J. Behav. Scis. 202, 215 (2005), perma.cc/EWB5-RLQ3 (study finding that "social support and university comfort" were "the strongest predictors" of "academic nonpersistence decisions" for Latinos).

Moreover, finances are not even the leading driver of attrition. According to a 2024 study, two-thirds of enrolled higher education students who considered dropping out cited emotional stress or mental health as the reason—"twice the percentage as those who cite cost." Gallup & Lumina Found., *The State of Higher Education* 18 (2024), perma.cc/V7VM-6HH6. And "caretakers" of children or adult family members and "those struggling to pay their monthly bills" were most likely to be at risk of dropping out over any racial demographic. *Id.* at 17. In a 2023 survey, respondents most cited "family responsibilities" and "wasn't doing as well academically as I expected" for the reason they stopped taking college classes. Swirsky et al., *Reasons Students Consider Leaving or Stopping Out* 3 (2024), perma.cc/2L97-KAL2 (Swirsky). And in a 2021 study, younger respondents (ages 18-22) most cited "Not the Right Fit" as their reason for leaving higher education,

while older respondents most cited financial reasons, "signaling [the younger generation's] priorities aren't tied to financial independence like the older demographics." Straighterline & UPCEA, *Today's Disengaged Learner Is Tomorrow's Adult Learner* 7 (2021), perma.cc/P5RT-HXM7.

By using race and not considering other factors driving attrition, the board's program "furthers 'stereotypes that treat individuals as the product of their race.'" *Harvard*, 600 U.S. at 221. The board assumes that only students of certain races need financial support to stay in school, ignoring that students belonging to ineligible racial groups may leave school for financial reasons too. *See* Swirsky 4. And the "modest amount of supplemental financial aid," Br.32, the board believes will keep certain minority students in school is not even supported by its own surveys. Nearly 60% of respondents said the award was *not* essential to their attendance. Wis. Higher Educ. Aids Bd., *Minority Undergraduate Retention Grant 2023-24 Annual Report* 7 (2024), perma.cc/867L-2WA6. How could it be essential, when the average award for private school students is $1,545, *id.* at 3, and the average attendance costs *after* aid range from $13,519 to $27,728, *see* Wis.'s Private Colls., *Our Colleges and Universities at a Glance*, perma.cc/R8U8-K3F4. Nowhere in its

briefs does the board cite evidence that lower retention rates among students of its preferred races at private, technical, and tribal colleges are due to them being short, what the board calls, "a modest amount of supplemental financial aid." Br.32; *see* Br.14-16.

When the board doles out financial aid "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race," need more money to stay in school. *Miller*, 515 U.S. at 911-12. That stereotyping "cause[s] continued hurt and injury" contrary "to the 'core purpose' of the Equal Protection Clause." *Harvard*, 600 U.S. at 221.

C. *Grutter* also required that "all race-conscious admissions programs have a termination point." 539 U.S. at 342. The Court stressed that because racial classifications are a "deviation from the norm of equal treatment" and "potentially so dangerous," they "must be limited in time" and "must have a logical end point." *Id.* Under *Grutter*, this "durational requirement" could "be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.*

The board's program flunks the durational requirement. The statute has no end point or sunset provision. *See* Wis. Stat. §39.44. The board instead says its annual report to the Legislature and the Legislature's biennial budget process provides a "built-in structure for ending." Br.41. But the program remains "on the books" indefinitely. *Rabiebna*, 2025 WI App 24, ¶79. The board does not claim to be searching for "a race-neutral … formula" to "terminate its race-conscious program as soon as practicable." *Grutter*, 539 U.S. at 343. And even if the biennial appropriation process amounted to a "periodic review," that alone does not cut it. "*Grutter* never suggested that periodic review could make unconstitutional conduct constitutional." *Harvard*, 600 U.S. at 225. *Grutter* instead "made clear" that race-based programs "eventually ha[ve] to end—despite whatever periodic review [is] conducted." *Id.* The board's program has no end in sight.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 21st day of January, 2026.

Respectfully submitted,

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CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c). Excluding the portions of this brief that may be excluded, the length of this brief is 2,993 words as calculated by Microsoft Word.

Dated: January 21, 2026

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