INSTITUTE FOR REFORMING GOVERNMENT

IRG COURT WATCH

EQUAL PROTECTION MEANS WHAT IT SAYS: THE COURT STRIKES DOWN WISCONSIN'S RACE-BASED COLLEGE GRANTS

OVERVIEW

The Wisconsin Supreme Court has struck down a state program that distributes taxpayer-funded financial aid to college students based on their race, national origin, or ancestry. Applying the U.S. Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* ("SFFA"), the Court held that WIS. STAT. § 39.44—the Minority Undergraduate Retention Grant Program—cannot survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Konkanok Rabiebna v. Higher Educational Aids Board*, 2026 WI 20. Every justice agreed the program is unconstitutional and that the challengers had standing to sue—but the agreement stopped there. Only four justices embraced the majority's full equal-protection rationale; three, including Chief Justice Karofsky, concurred in the result on a narrower ground and wrote separately to argue that a better-documented race-based program could still survive. The decision is a real win for color-blind equal protection and for taxpayer oversight of unlawful spending—but a narrower one than the headline suggests.

WHAT YOU SHOULD KNOW

- The Court unanimously held that WIS. STAT. § 39.44—which limits state college-retention grants to specified racial, national-origin, ancestry, and alienage groups—violates the Equal Protection Clause, and affirmed the injunction against the Higher Educational Aids Board ("HEAB").[1]
- The justices split 4–3 on the reasoning. Four (Ziegler, R.G. Bradley, Hagedorn, Protasiewicz) found neither a compelling interest nor narrow tailoring; three concurred only in the result, on a narrower ground.
- Diversity is not a compelling interest. After SFFA, only two interests justify race-conscious laws—prison safety and remedying specific, identified past discrimination—and neither applies here.
- Timing matters: the compelling-interest record must exist when the law was passed. HEAB's data came decades later and covered UW's public campuses, not the colleges the grants fund.
- Taxpayers can challenge unlawful spending. An unconstitutional outlay is itself a pecuniary loss; a plaintiff need not show a lower overall tax bill.[2]

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WHAT HAPPENED

Five Wisconsin taxpayers sued to stop HEAB from administering the Grant Program created by WIS. STAT. § 39.44. The program awards need-based grants of up to $2,500 per year to undergraduates at the state's private nonprofit and technical colleges—but only to students who are Black American, American Indian, Hispanic, or post-1975 immigrants (or their descendants) from Laos, Vietnam, or Cambodia. Students outside those categories are categorically ineligible. The taxpayers argued the race-based eligibility rules violate the Equal Protection Clause. The Jefferson County circuit court upheld the statute under *Grutter v. Bollinger*, reasoning that fostering diversity is a compelling interest and that the program was narrowly tailored.

While the appeal was pending, the U.S. Supreme Court decided SFFA, holding that race-based college admissions violate equal protection and that diversity is not a sufficiently coherent interest to justify them. Bound by SFFA, the court of appeals reversed, held the Grant Program materially indistinguishable from the admissions schemes SFFA invalidated, and ordered HEAB enjoined. HEAB sought review in the Wisconsin Supreme Court.

The Supreme Court affirmed. Writing for the Court, Justice Annette Kingsland Ziegler first held that the taxpayers had standing, then concluded that § 39.44 fails strict scrutiny. HEAB could not show that the Legislature had a compelling interest when it enacted the program, and in any event the program is not narrowly tailored: race is not one factor among many in an individualized review—it is the only factor. A student either belongs to a preferred group or does not. That, the Court held, is fatal.

LEGAL BACKGROUND

Government classifications based on race, national origin, ancestry, or alienage are "inherently suspect" and trigger strict scrutiny: the State must prove the classification serves a compelling interest and is narrowly tailored to achieve it. The U.S. Supreme Court has recognized only two compelling interests sufficient to justify race-conscious laws—preventing racial violence in prisons (*Johnson v. California*) and remedying specific, identified instances of past government discrimination (*City of Richmond v. J.A. Croson Co.*). Generalized appeals to "societal discrimination" or "diversity" do not qualify.[3]

The Court traced the admissions line of cases—*Bakke*, *Grutter*, *Gratz*, and *Fisher*—culminating in SFFA, which held that a university may never use race as a stereotype or a negative, must satisfy strict scrutiny, and must bring race-conscious programs to an end. Applying those principles, the Court stressed two points. First, the compelling-interest analysis focuses on the evidentiary record before the Legislature when the statute was passed; an interest manufactured after the fact, or propped up by data the Legislature never had, cannot save the law. Second, HEAB's evidence concerned retention at the University of Wisconsin's four-year public campuses, not the private and technical colleges the grants fund—so the Legislature never identified the very problem the program purports to remedy.

ZOOM IN

This is a decision about judicial discipline as much as outcome—and the split in reasoning is where the action is. The judgment was unanimous, but the Court fractured 4–3 on how to reach it, and two separate writings reveal a court openly divided over the future of race-conscious policy in Wisconsin.

- **Justice Dallet, joined by Chief Justice Karofsky and Justice Crawford,** concurred only in the result. She would have struck the program on a single narrow ground—HEAB never produced evidence that the eligible students were actually dropping out of Wisconsin's private and technical colleges at disproportionate rates, or that race could not be separated from any such problem—and faulted the majority for subdividing the Board's asserted interest and rejecting the pieces "piecemeal" as unnecessary. Pointedly, she added that the color-blind reading of the Fourteenth Amendment was neither inevitable nor compelled by its text or history, noting the race-conscious statutes the Reconstruction Congress enacted alongside it. Her closing note of "optimism": the result "may be different for other laws with greater factual support."
- **Chief Justice Karofsky, joined by Justice Crawford,** went further. While conceding she is bound by SFFA and concurring in the mandate, she wrote at length that the Fourteenth Amendment was never color-blind, quoted Justice Jackson's SFFA dissent, catalogued Wisconsin's racial disparities in education, and concluded that a program like § 39.44 "could be constitutional under an interpretation of the Fourteenth Amendment that honors its purpose—to combat oppression." She also rejected a suggestion to dismiss the case as improvidently granted and emphasized that the Court's narrow ruling—not the court of appeals' "sweeping conclusions" about SFFA's reach—is now the law of the state.

The lineup itself is worth noting: the majority's full rationale drew Justices Ziegler, R.G. Bradley, Hagedorn, and Protasiewicz—a coalition that does not track the Court's usual divide. For Wisconsin agencies, school systems, and the Legislature, the practical message is direct: a state benefit cannot be handed out, or withheld, on the basis of race absent a compelling, record-based justification of a kind that is almost never satisfied.

WHAT'S NEXT

The win is genuine but bounded. The Court resolved the case on the narrowest ground that commanded a majority and expressly declined to adopt the court of appeals' broader holding that SFFA forbids essentially all race-based government funding or support. That broader principle—which would have reached well beyond financial aid—is no longer the binding rule, leaving the question open for another day. And three justices, including the Chief, have all but invited a future challenge built on a fuller evidentiary record. Expect the door left ajar in the concurrences to be tested: a redrafted program, or a new one supported by Wisconsin-specific data on the precise institutions at issue, would not be foreclosed by today's decision. In the meantime, *Rabiebna* supplies two durable propositions—that race-based eligibility for state benefits triggers, and rarely survives, strict scrutiny, and that Wisconsin taxpayers retain robust standing to challenge unlawful expenditures.

ENDNOTES

1. *Konkanok Rabiebna v. Higher Educational Aids Board*, 2026 WI 20 (decided June 18, 2026), affirming 2025 WI App 24, 416 Wis. 2d 44, 20 N.W.3d 742. Ziegler, J., delivered the opinion of the Court, joined by R.G. Bradley, Hagedorn, and Protasiewicz, JJ., and joined as to ¶¶17–20 (standing) by Karofsky, C.J., and Dallet and Crawford, JJ.; Karofsky, C.J. (joined by Crawford, J.), and Dallet, J. (joined by Karofsky, C.J., and Crawford, J.), concurred separately.
2. On Wisconsin taxpayer standing, see *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15 (1961); *Wagner v. City of Milwaukee*, 196 Wis. 328 (1928); *Fabick v. Evers*, 2021 WI 28. An illegal expenditure of public funds is itself a pecuniary loss, and the minimal size of any individual taxpayer's share does not defeat standing.
3. On the governing framework, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013); *Johnson v. California*, 543 U.S. 499 (2005); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

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