

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

KONKANOK RABIEBNA
[REDACTED]
[REDACTED]

RICHARD A. FREIHOEFER
[REDACTED]

DOROTHY M. BORCHARDT
[REDACTED]

RICHARD HEIDEL
[REDACTED]

NORMAN C. SANNES
[REDACTED]

Plaintiffs,

v.

Case Code: 30701

Case Type: Declaratory Judgment

HIGHER EDUCATIONAL AIDS BOARD

an agency of the State of Wisconsin,

4822 Madison Yards Way

Madison, WI 53705,

CONNIE HUTCHINSON

in her official capacity

4822 Madison Yards Way

Madison, WI 53705,

Defendants.

COMPLAINT

Plaintiffs allege the following as their complaint against Defendants:

Introduction

1. The Wisconsin Constitution guarantees equality under the law, beginning as follows: “All people are born equally free and independent.” Wis. Const. art. I, § 1. Yet the State of Wisconsin ignores this basic guarantee of equal rights by using taxpayer funds to discriminate against college students based on race, national origin, and alienage.

2. Under the Minority Undergraduate Retention Program (“Minority Grant Program” for purposes of this lawsuit), only students meeting the following classifications may receive a taxpayer-funded grant: Black American, American Indian, or Hispanic. The one exception to this rule is that some (not all) Asian students from Laos, Vietnam, or Cambodia may receive a grant. Other students—those who are Thai, Chinese, Japanese, Indian, North African, Native Hawaiian, Pacific Islander, resident aliens from Africa, or white, for example—are ineligible to receive a grant based on their race or ancestry, according to state law.

3. This is discrimination based on race, national origin, and alienage, which is forbidden by the Wisconsin Constitution.

4. Plaintiffs are all State of Wisconsin taxpayers who object to their taxes being used to support unconstitutional discrimination. They seek a declaration from this Court that this program is unconstitutional and an injunction preventing the program’s race-based qualifications.

PARTIES

5. Plaintiffs Konkanok Rabiebna and Richard Freihoefer are a married couple residing in Madison, Wisconsin. Ms. Rabiebna is a native of Thailand and Mr. Freihoefer is white. They have a teenage child and plan to send him to college one day. But because of their race and ancestry, no one in the Rabiebna-Freihoefer family is eligible for the Minority Grant Program. Ms. Rabiebna and Mr. Freihoefer are both taxpayers of the State of Wisconsin and object to their taxes being used to discriminate against individuals based on race, national origin, or alienage.

6. Plaintiff Dorothy Borchardt is an individual residing in Madison, Wisconsin. She is a Wisconsin taxpayer and objects to her taxes being used to discriminate against individuals based on race, national origin, or alienage.

7. Plaintiff Richard Heidel is an individual residing in Hobart, Wisconsin. He is a Wisconsin taxpayer and objects to his taxes being used to discriminate against individuals based on race, national origin, or alienage.

8. Plaintiff Norman Sannes is an individual residing in Madison, Wisconsin. He is a Wisconsin taxpayer and objects to his taxes being used to discriminate against individuals based on race, national origin, or alienage.

9. Defendant Higher Educational Aids Board (the "Board") is a state agency organized under Subchapter II of Chapter 39 of the Wisconsin Statutes. The Board is headquartered in Madison, Wisconsin, and is responsible for administering the Minority Grant Program under Wis. Stat. § 39.44.

10. Defendant Connie Hutchinson is executive secretary of the Board under Wis. Stat. § 39.29. She is headquartered in Madison, Wisconsin, and is responsible for the management and operation of the Board, including the Board's administration of the Minority Grant Program.

JURISDICTION AND VENUE

11. This court has jurisdiction pursuant to Wis. Stat. §§ 753.03 & 806.04.

12. Venue is proper pursuant to Wis. Stat. § 801.50(3)(a).

FACTS

13. The Wisconsin Legislature established the Minority Grant Program in the 1985–87 Biennial Budget. The first award was made in the 1986–87 academic year.

14. The Board administers the Minority Grant Program as provided in Wis. Stat. § 39.44 and Wis. Admin. Code § HEA Ch. 12.

15. The Board distributes taxpayer money, appropriated under Wis. Stat. § 20.235(1)(fg), to eligible schools according to the following formula: 50% distributed to private, nonprofit higher educational institutions in Wisconsin and 50% to Wisconsin technical colleges. In turn, eligible schools award grants to “minority undergraduate” students based on financial need, subject to oversight and audits by the Board, its administrative rules, and Wis. Stat. § 39.44.

16. The Minority Grant Program is only open to “minority undergraduates enrolled in private, nonprofit higher educational institutions in this state or in technical colleges in this state.” Wis. Stat. § 39.44(2).

17. Not all minorities are eligible, however. The statute defines “minority undergraduate” as Black American, American Indian, Hispanic, or “a person who is admitted to the United States after December 31, 1975, and who either is a former citizen of Laos, Vietnam or Cambodia or whose ancestor was or is a citizen of Laos, Vietnam or Cambodia.” Wis. Stat. § 39.44(1).

18. The Minority Grant Program’s definition of “minority undergraduate” students leads to perverse consequences, including the fact that many minorities are *ineligible* for the program based on race, national origin, or alienage. For example:

- a. Students who are Laotian, Vietnamese, or Cambodian are ineligible for the Minority Grant Program, except those who meet the specific requirements in Wis. Stat. § 39.44(1)(a)4, such as being “admitted to the United States after December 31, 1975.”
- b. Other Asian students—those who are Thai, Chinese, Japanese, Korean, or Indian, for example—are ineligible for the Minority Grant Program. In fact, no Asian students are eligible for the Minority Grant Program except those who meet the specific requirements in Wis. Stat. § 39.44(1)(a)4.
- c. Black students who are lawful U.S. resident aliens are ineligible for the Minority Grant Program because they are not “Black American” because lawful resident aliens are not American citizens.

- d. Students who are Native Hawaiian or Pacific Islander are ineligible for the Minority Grant Program because they do not fit within the racial categories established by the Minority Grant Program.
- e. White students and those students whose ancestors are from the Middle East (Iran, Iraq, Syria, and Lebanon, for example) and North Africa (Tunisia, Morocco, Libya, and Egypt, for example) are also ineligible for the Minority Grant Program.

19. Eligible students who meet the racial, national origin, and alienage classifications may receive an award based on financial need, with a minimum grant of \$250 and a maximum grant of \$2,500. The grants are renewable for up to eight semesters or 12 quarters.

20. During the 2019–2020 academic year, Defendants administered the Minority Grant Program and 729 students received a grant.

21. During the 2019–2020 academic year, under Defendants’ supervision, \$796,225 in taxpayer money was spent on the Minority Grant Program.

22. During the 2019–2020 academic year, taxpayer-funded grants were awarded exclusively to students meeting the race, national origin, and alienage qualifications under Wis. Stat. § 39.44(1)(a).

23. Defendants continue to administer the Minority Grant Program for the 2020–2021 academic year.

CAUSE OF ACTION – DECLARATORY JUDGMENT
VIOLATION OF THE WISCONSIN CONSTITUTION’S
GUARANTEE OF EQUAL PROTECTION

24. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

25. “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Wis. Stat. § 806.04.

26. Article I, Section 1 of the Wisconsin Constitution provides: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness....”

27. The Wisconsin Supreme Court interprets this provision as containing a guarantee of equal protection of the laws consistent with the Fourteenth Amendment to the United States Constitution. *Blake v. Jossart*, 2016 WI 57, ¶ 28, 370 Wis. 2d 1, 884 N.W.2d 484.

28. “[A]ll racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted).

29. Classifications based on alienage, ancestry, and national origin are likewise reviewed with strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Oyama v. California*, 332 U.S. 633, 640 (1948).

30. Under the strict scrutiny standard, the government has the burden of proving that the suspect classifications are narrowly tailored measures that further compelling governmental interests.

31. The Minority Grant Program classifies applicants based on race. Only members of certain racial groups are eligible for grants under the program.

32. The Minority Grant Program further classifies applicants based on national origin, ancestry, or alienage. Students belonging to groups with a certain national origin, ancestry, or alienage are eligible, while others are not.

33. The Minority Grant Program is not narrowly tailored to further a compelling government interest and is therefore unconstitutional.

34. “[A] taxpayer has the right to raise, on behalf of himself and other taxpayers, a constitutional issue affecting his and their individual rights.” *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988).

35. As taxpayers, Plaintiffs have suffered a pecuniary loss as a result of the Minority Grant Program because Defendants have used taxpayer money to implement the program. “In order to maintain a taxpayer’s action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss ...” *S.D. Realty Co. v. Sewerage Commission of City of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961). “Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.” *Id.* at 22.

36. Unless the Court declares the race, national origin, and alienage classifications in Minority Grant Program to be unconstitutional, unlawful, and invalid, then Plaintiffs will continue to be forced to financially support this discriminatory program.

REQUEST FOR RELIEF

Plaintiffs request the following relief:

- A. Declare that the race, national origin, and alienage classifications in the Minority Grant Program unconstitutional;
- B. Enjoin Defendants from administering the Minority Grant Program's race, national origin, and alienage classifications;
- C. Award Plaintiffs their costs;
- D. Award such other relief as the Court may deem appropriate.

Respectfully submitted this 15th day of April, 2021.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
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