Constitutional Law

Taxpayer-Funded Grant Program Available Only to Certain Racial and Ethnic Group Students – Constitutionality

***Rabiebna v. Higher Educ. Aids Bd.*, 2025 WI App 24 (filed Feb. 26, 2025) (ordered published April 30, 2025)**

HOLDING: Wis. Stat. section 39.44 and its related grant program violate the Equal Protection Clause and are unconstitutional on their face.

SUMMARY: In 1985, the Wisconsin Legislature enacted Wis. Stat. section 39.44 to provide taxpayer-funded grants for financially needy "Black American," "American Indian," and "Hispanic" undergraduate students enrolled in Wisconsin private, nonprofit higher educational institutions. In 1987, the legislature expanded the grant program to provide grants for eligible students attending Wisconsin technical colleges and to include certain Laotian, Cambodian, and Vietnamese students. Students of a race, national origin, ancestry, or alienage other than those listed above are ineligible for a program grant regardless of whether they would otherwise qualify (*see* ¶ 4). The program is administered by the Higher Educational Aids Board (HEAB).

The taxpayer plaintiffs filed this lawsuit contending that the statute and program violate the Equal Protection Clause of the U.S. Constitution and article I, section 1 of the Wisconsin Constitution because they provide taxpayer-funded college grants for which financially needy students of only certain racial, national origin, ancestry, and alienage groups are eligible (*see* ¶ 2). The circuit court denied the plaintiffs' motion for summary judgment and granted summary judgment to the HEAB. In an opinion authored by Judge Gundrum, the court of appeals reversed.

After concluding that the plaintiffs had taxpayer standing to bring this lawsuit (¶ 10), the court proceeded to the merits of the equal-protection challenge. In doing so, it turned to the U.S. Supreme Court's decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, 600 U.S. 1981 (2023). In *Students for Fair Admissions* (*SFFA*), "the Court stated in the context of that higher education admissions case, that 'the "core purpose" of the Equal Protection Clause' is 'do[ing] away with all governmentally imposed discrimination based on race' and emphasized that '[e]liminating racial discrimination means eliminating all of it.' The Court agreed the clause 'requires equality of treatment before the law for all persons without regard to race or color,' and 'no State has any authority under the [clause] to use race as a factor in affording educational opportunities among its citizens.' The Court reiterated that '"[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." That principle cannot be overridden except in the most extraordinary case'" (¶ 2) (citations omitted). The HEAB contended that the *SFFA* decision is limited to admissions policies and is not applicable to financial aid programs. The court of appeals disagreed and indicated that equal-protection principles articulated in *SFFA* are "easily applicable to the financial aid context" (¶ 20 n.11).

Addressing the constitutionality of the grant program, the court applied strict-scrutiny analysis, which requires *inter alia* demonstration of a compelling governmental interest. After a lengthy discussion, it concluded that the HEAB failed to establish a compelling interest. Said the court: "It has not shown that increasing retention/graduation rates for students of the preferred minority groups and/or mitigating a disparity between students of the preferred and nonpreferred groups constitutes a compelling state interest, has not shown there even was a retention/graduation or disparity 'crisis' at Wisconsin private and technical colleges leading into the establishment of this program, and has not shown that the legislature enacted this grant program based upon a belief there was such a crisis or disparity or for the purpose of mitigating any disparity at private and technical colleges" (¶ 56).

The *SFFA* Court also stressed that one of the "commands" of the Equal Protection Clause is that race must never be used as a "negative" (¶ 74). Addressing this command, the court of appeals questioned how else but negative can race, national original, ancestry, and alienage be described "if students of certain groups are flatly ineligible for grants under Wis. Stat. § 39.44 simply because they are of the 'wrong' race, national origin, ancestry and/or alienage" (¶ 76). Lastly, the court of appeals determined that the grant program failed another requirement emphasized in the *SFFA* decision: even if a race-based program might otherwise pass constitutional muster, it must have a clear end point (*see* ¶ 77).

In sum, the court of appeals concluded that Wis. Stat. section 39.44 and the related grant program are unconstitutional on their face (*see* ¶ 87).

Criminal Procedure

Traffic Stop – Reasonable Suspicion

***State v. Solom*, 2025 WI App 25 (filed March 19, 2025) (ordered published April 30, 2025)**

HOLDING: A police officer had reasonable suspicion to stop the defendant's vehicle.

SUMMARY: Around 5:30 p.m., an officer on patrol received a dispatch relaying the report of a named witness who had observed a red Honda Civic go through a stop sign and hit a snowbank. The witness further reported that the Civic was damaged, had left the scene, and was traveling westbound on Main Street. The officer was traveling eastbound on Main Street.

Approximately two to three minutes after receiving the dispatch, the officer observed a red Honda Civic traveling westbound on Main Street about a mile from where the witness indicated he observed a red Honda Civic hit a snowbank. Traffic at the time was "likely heavy." The Civic was coming from the direction the citizen witness reported, and the officer did not observe any other red Honda Civics in the area.

After making a U-turn and following the Civic, the officer observed that the vehicle's speed was varying (increasing and decreasing) and that the vehicle was

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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weaving within its own lane. Based on the witness's report and the officer's own observations (which, the officer testified at trial, indicated behavior that "would be consistent with somebody who is impaired"), the officer effectuated a traffic stop, during which time he identified the driver as defendant Solom.

In a subsequent prosecution for sixth-offense operating a motor vehicle while intoxicated (OWI), the defendant moved to suppress the evidence derived from the investigative stop. The circuit court denied the motion, and the defendant was convicted. In an opinion authored by Judge Gundrum, the court of appeals affirmed.

The main challenge advanced by the defendant in this case was whether the officer had reasonable suspicion to believe that the red Honda Civic that he stopped was the same vehicle that went through the stop sign and struck the snowbank (*see* ¶ 18 n.4). The court of appeals concluded that he did. Said the court: "[T]he chances of another red Honda Civic being driven in the witness-reported direction (westbound) on the reported road (Main Street) and at the location where the officer spotted it (about a mile from the snowbank) at the time the officer spotted it (approximately two to three minutes after the officer received the dispatch report) and with a noticeable 'control issue' are slim" (¶ 17).

While it is true that the officer did not observe any damage to the front of the vehicle before making the stop, the officer testified that the two directions on Main Street were divided by a median and the front end of the defendant's vehicle had already passed him before he made the observation of the red Honda Civic (*see* ¶¶ 6-7).

The court of appeals devoted much of this opinion to contrasting the facts of this case with those in *State v. Richey*, 2022 WI 106, 405 Wis. 2d 132, 983 N.W.2d 617, in which the supreme court found that an officer lacked reasonable suspicion to stop a driver.

Election Law

Recounts – Ballot Challenges – Frivolous Appeal – Attorney Sanctions

***Gonfiantini v. Rock Cnty. Bd. of Canvassers*, 2025 WI App 26 (filed March 6, 2025) (ordered published April 30, 2025)**

HOLDINGS: 1) Canvassers properly rejected ballot challenges. 2) The challenger's appeal was frivolous, and the court of appeals granted the other candidate's motion for payment of costs, fees, and attorney fees as a sanction for commencing and continuing a frivolous appeal.

SUMMARY: Gonfiantini (hereinafter "the challenger") lost an election for a seat on the county board of supervisors by two votes. The county's board of canvassers denied her challenges to three absentee ballots, which had not been initialed by the appropriate elections official. The circuit court agreed with the board.

The court of appeals affirmed in an opinion authored by Judge Graham. The court carefully reviewed the pertinent statutes that govern how ballots are processed (*see* ¶ 22). It concluded that "even if inspectors determine that an absentee ballot was not properly endorsed by the issuing clerk, the ballot should be deposited in the ballot box and counted in the election" (¶ 24). Under Wis. Stat. section 7.51, "the only reason that a missing endorsement would result in a ballot not being counted in the election-day canvass is if it is necessary to put the unendorsed ballot aside to reconcile the number of ballots with the number of electors who are recorded as having cast ballots in the election" (¶ 27).

Recount procedures are governed by Wis. Stat. section 9.01(b), but the challenger did "not meaningfully address" them in her brief (¶ 29). The court found her argument suggesting that "the facts" warranted a different approach was "not only frivolous, but also deeply troubling" (¶ 34). It also rejected several other arguments, rooted in case law, that raised "the specter of fraud."

Finally, the court of appeals found the challenger's appeal frivolous because the appeal foundered on the "unambiguous language" of the governing statutes. Once the canvassers and the circuit court rejected her challenges, "it was frivolous for Gonfiantini to appeal to this court, unless she could advance a legal argument that the statutes do not mean what the Board and the circuit court said they mean" (¶ 52). The court also held that her attorney was "solely responsible" for paying the sanctions award (¶ 54).

Electronic Ballots – Temporary Injunctions

***Disability Rts. Wis. v. Wisconsin Elections Comm'n*, 2025 WI App 27 (filed March 12, 2025) (ordered published April 30, 2025)**

HOLDING: The circuit court erred in granting a temporary injunction in this voting rights case.

SUMMARY: In 2000, the Wisconsin Legislature permitted certain absentee voters to receive a ballot for an election electronically from their local clerk. "In 2011, the legislature and governor enacted 2011 Wis. Act 75, which limited the privilege of receiving a ballot electronically to military and overseas absentee voters. Other absentee voters voted using paper ballots, as they did before electronic delivery of some ballots began in 2000" (¶ 2). After years of litigation, the U.S. Court of Appeals for the Seventh Circuit upheld 2011 Wis. Act 75, thus limiting electronic absentee ballots to military and overseas absentee voters (*see* ¶ 3).

In 2024, plaintiffs filed this complaint against the Wisconsin Elections Commission (WEC), contending that "Wisconsin's current absentee voting scheme is unlawful to print-disabled absentee voters." The legislature was permitted to intervene. The circuit court granted a temporary injunction. The legislature appealed.

The court of appeals reversed the circuit court in an opinion authored by Judge Gundrum. Essentially, the record failed to support the temporary injunction because the injunction did nothing to preserve the status quo, an essential element of such an injunction. "At this stage, the required legal showing is whether Plaintiffs have 'a reasonable probability of success on the merits.' The circuit court here only determined, also without any analysis, that Plaintiffs made this showing, noting that it had not yet 'ha[d] an opportunity to rule on the merits of Plaintiffs' complaint.' Yet, with its injunction orders, the court invalidated a duly enacted law, doing so on the basis that it might one day determine that the law is invalid. Additionally and disturbingly, as part of granting Plaintiffs a significant portion of the final relief they seek through their complaint, the circuit court ordered a very questionable remedy that simply treats print-disabled voters as if they were military or overseas absentee voters while adding a new requirement that the ballots delivered electronically to print-disabled absentee voters be 'capable of being read and interacted with, including marked, by a voter with a print disability using digital assistive technology'" (¶¶ 12-13).

What the plaintiffs sought was not the "preservation" of the status quo but a "wholesale change" (¶¶ 15, 17). **WL**