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FACTS

Daniel Podberesky, a 22-year-old Hispanic student with a superior high school grade point average, applied for a Benjamin Banneker Scholarship offered at the University of Maryland College Park (UMCP). The scholarship was merit based, and awarded solely to African-Americans attending the University. Because Podberesky was not African-American, he could not compete for this scholarship. Podberesky filed suit against the University, alleging that the scholarship program violated the Equal Protection Clause. Podberesky sought injunctive and compensatory relief, asserting the program violated Title VI and 42 U.S.C. §§ 1981 and 1983.[1]

The program at issue reserved approximately thirty merit scholarships per year for African-American students. The University asserted that the program was remedial in nature, compensating for the present effects of a long history of discrimination against African-Americans.[2] The district court granted summary judgment for the University.

On appeal, the Fourth Circuit Court of Appeals remanded the case to the district court with instructions to determine whether the present effects of past discrimination against African-Americans at the University justified the program.[3] On remand, the district court found the program justifiable given: (1) the University's poor reputation in the black community; (2) the underrepresentation of African-American students at the University; (3) the high attrition rate of these students; (4) and the perception of a hostile climate toward African-Americans at the University.[4]

The district court based its first finding that the University had a poor reputation in the African-American community upon reports about people who influenced decisions made by high school students on which college to attend.[5] The district court also relied on testimony by the University's administration that supported this finding. Podberesky argued that the questions employed by the University were designed to evoke negative responses and that the court overlooked the positive responses.[6] In addition, Podberesky offered studies to the contrary, but the lower court found his studies flawed and rejected his contentions.[7]

The district court based its second finding of underrepresentation of black students at the University on historical data.[8] The court found such evidence sufficient to support this finding despite Podberesky's contentions that the data was inaccurate.[9]

According to the court, one of the most significant present effects of past discrimination at the University is the significantly higher attrition rate for black students.[10] The court determined the cause of this disparity to be remnants of past discrimination, including economic and social factors, and the hostile climate on campus toward African-Americans.[11]

The district court based its finding of a hostile climate toward blacks on campus on the discrimination previously fostered by the University.[12] The court noted the history of discrimination at the University, which included racial segregation, resistance to desegregation, inadequate recruiting and retaining of black students, and continuous oversight by the Office of Civil Rights.[13] The court cited as additional support for this finding the internal disputes which occurred throughout the University's attempts to integrate.[14]

The analysis then turned to determining whether the program was "narrowly tailored."[15] The court applied the four part analysis outlined in *United States v. Paradise*.[16]

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[1] *See Podberesky v. Kirwan*, 764 F.Supp. 364, 366 (D. Md. 1991), *vacated*. The district court examined the program under the equal protection clause because it is coextensive with Title VI. The court rejected Podberesky's Sections 1981 and 1983 claims. *Id.*

[2] The university did not admit black students until 1954. In addition, the University remained under federal civil rights scrutiny through the 1970's.

[3] *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992).

[4] *Podberesky v. Kirwan*, 838 F.Supp. 1075 (D. Md. 1993), *Rev'd.* 956 F.2d 52 (4th Cir. 1992).

[5] *Id.* at 1084-85. Studies included a report of an outside expert evaluating the scholarship program and reports based on focus groups of students and parents of high school students. Over eighty percent of the participants in one focus group said the university's reputation was negative. *Id.*

[6] *Id.* at 1086-87. Podberesky cited only one positive response which related to the athletic environment for black student athletes. *Id.*

[7] *Id.* at 1086.

[8] *Id.* at 1087-91. Data showed fewer than one percent African-Americans attended the University in 1969. This proportionate representation slowly increased to eleven percent by 1990. *Id.*

[9] *Id.* Podberesky argued the reference pool used by the University was inaccurate. Podberesky asserted the pool should include high school students who met University admissions requirements. Podberesky considered the criteria to be a minimum 2.0 average and combined SAT score of 650 or higher. The University argued the criteria were inaccurate because minimum admissions requirements are flexible.

[10] *Id.* at 1091.

[11] *Id.* at 1091-92.

[12] *Id.* at 1092-94.

[13] *Id.* at 1077-82.

[14] *Id.* at 1093.

[15] *Id.* at 1094-97.

[16] *Id.* at 1094 (citing *United States v. Paradise*, 480 U.S. 149 (1987)).

First, the court found race neutral alternatives to the program inadequate.[17] Second, the court emphasized that the University reevaluated the necessity of the program on a regular basis.[18] Third, the court determined that numerical goals of the program were valid because of the few scholarships awarded.[19] Fourth, the court found that the scholarship program did not alter the rights of third parties because they did not effect whether or not students would be admitted to the University.[20] Finally, the court determined that because the program used only one percent of the University's financial aid budget, the goal of the program outweighed the harm to Podberesky or other non-black students. Therefore, the district court upheld the scholarship program.[21]

HOLDING

The Fourth Circuit reversed and remanded for entry of judgment in favor of Podberesky.[22] The United States Supreme Court declined to review this case, letting stand the Fourth Circuit's ruling which invalidated the minority targeted scholarship program at UMCP.[23] The Fourth Circuit held that the University violated the Equal Protection Clause of the Fourteenth Amendment by maintaining a scholarship program solely for African-American students.[24] The court also held that the scholarship program was not "narrowly tailored" to remedy the alleged present effects of past discrimination. In addition, the court instructed the district court to order the University to consider Podberesky for the scholarship program and enjoined the University from enforcing the racial qualification.

APPLICATION/ANALYSIS

I. STRICT SCRUTINY, AFFIRMATIVE ACTION, AND HIGHER EDUCATION

In *Podberesky*, the Fourth Circuit Court of Appeals applied the heightened level of judicial scrutiny later used in *Adarand Constructors, Inc. v. Pena*.[25] The court held that the lower court erred in finding "sufficient evidence of present effects of past discrimination to justify the program" and in finding the program "narrowly tailored" to remedy the alleged present effects of past discrimination.[26] The court of appeals rejected the lower court's reasoning that a strong evidentiary basis of the present effects of past discrimination justified the program.[27] Instead, the circuit court employed a stricter test for showing such present effects: "[T]he party seeking to implement the (race based) program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."[28]

Neither the poor reputation of the University in the black community, nor the perceived hostility towards African-Americans on campus standing alone were sufficient to justify the program according to the Fourth Circuit.[29] The University's poor reputation was based upon a history of discrimination of which African-Americans were aware. The court concluded that mere knowledge of a historical fact is insufficient to justify such a program.[30]

As to "hostile climate," the court of appeals said it was insufficient to justify the Banneker program because the University did not make a sufficient showing that the current climate was linked to past discrimination. Podberesky argued to the district court that universities with no history of *de jure* discrimination faced similar racial problems, thus, he argued, the University's past history of discrimination was not the cause of the present hostile climate. The district court had determined that *de facto* segregation caused racial problems in the northern universities as *de jure* segregation caused problems at UMCP. The Fourth Circuit Court of Appeals disagreed, finding the district court's holding in this regard premised on the assumption that all predominantly white colleges discriminated in the past. Even if this assumption were true, the court noted, it suggests a broad category of societal discrimination which it is not the kind of discrimination a race-based program can remedy.[31]

The court of appeals also rejected the findings of the district court that black students were underrepresented and have a disproportionately high attrition rate.[32] The Fourth Circuit Court of Appeals criticized the lower court's resolution of these factual issues on a summary judgment motion.[33] Additionally, the court found fault in the reference pool used by the lower court.[34]

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[17] *Id.*

[18] *Id.* at 1095-96.

[19] *Id.* at 1096.

[20] *Id.* The University awards scholarships after students are admitted. *Id.*

[21] *Id.* at 1099.

[22] 38 F.3d 147 (4th Cir. 1994). Judges Wilkins and Hamilton joined Judge Widener's opinion.

[23] *Podberesky v. Kirwan*, 115 S.Ct. 2001 (1995).

[24] *Podberesky*, 38 F.3d at 151.

[25] 115 S.Ct. 2097 (1995).

[26] *Podberesky*, 38 F.3d at 151.

[27] *Id.* at 152. The litigants contested the meaning of "strong evidentiary basis" but the Circuit Court did not define it. "Something less than the preponderance of the evidence" was agreed upon at the lower court level. *Podberesky*, 838 F.Supp at 1083 n.49.

[28] *Podberesky*, 38 F.3d at 153 (citing *Croson*, 488 U.S. at 493 (plurality opinion)).

[29] *Id.* at 154.

[30] *Id.* The court noted, "If it were otherwise, as long as there are history books, there will be programs such as this one." *Id.*

[31] *Id.* at 155.

[32] *Id.* at 155-57. The district court rejected Podberesky's argument that the high attrition rate was due to factors such as economics rather than the University's history of discrimination. *Id.*

[33] *Id.* at 155.

[34] *Id.* at 157. The district court did not determine qualifications for the reference pool, and rejected Podberesky's proposed

Having conducted its evaluation of the relationship between present day and past discrimination, the Fourth Circuit then shifted its analysis to whether the scholarship program was "narrowly tailored" to remedy the alleged present effects of past discrimination at the university. The court held it was not "narrowly tailored" for three reasons.

First, the court stressed that high achieving black students "are not the group against which the University discriminated in the past."[35] The court concluded that because high achievers, whether black or white, were not discriminated against in the past, the University could not claim that the program was narrowly tailored to remedy discrimination against them.[36]

Second, all black students meeting the academic requirements could compete for the scholarships, even if they were not residents of Maryland. Therefore the program was not narrowly tailored to increase the number of highly qualified black residents of Maryland, the group which the university identified in the studies it offered to justify the program.[37]

Third, in determining the underrepresentation of black students at the University, the University counted black students who opted not to attend the University for reasons other than race. For example, students who chose not to attend the University because they wanted to wait a year before any further education were included in the study. Therefore, the court of appeals found the reference pool arbitrary and inadequate.[38] Finally, the court of appeals concluded that the University failed to show that there were no race-neutral alternatives to the program.[39]

In concluding that the University's scholarship program was not narrowly tailored, the Fourth Circuit reversed the district court's grant of summary judgment for the University as well as the denial of summary judgment for Podberesky.[40]

II. THE FUTURE OF RACE-BASED SCHOLARSHIP PROGRAMS

The Supreme Court has not ruled on the issue of race-based affirmative action programs at colleges or universities since 1978.[41] According to a General Accounting Office survey, approximately five percent of undergraduate scholarships, and ten percent of professional school scholarships, are reserved for students of a particular race or ethnic origin. The Supreme Court's refusal to review Podberesky casts doubt on the legality of these programs. General affirmative action jurisprudence indicates that governmental affirmative action programs must satisfy "strict scrutiny."[42] In addition, a trend of hostility toward affirmative action programs is growing across the nation.[43]

The *Adarand* decision reflects this trend, perhaps signaling the demise of affirmative action. In *Adarand*, the Supreme Court declared that federally funded race-based programs must satisfy strict judicial scrutiny.[44] The challenged program must serve an "important government interest" and be "narrowly tailored" to further that interest. This strict standard of review is likely to be strict in theory but fatal in fact. Also, throughout the entire opinion, the majority did not mention the term "affirmative action." This suggests the Court's awareness of the hostility which has developed toward affirmative action programs.[45]

It is unclear how *Adarand* will affect state programs designed to remedy present effects of past discrimination at colleges and universities. *Adarand* left open the issue of whether the same level of judicial scrutiny applies to government findings that present effects of past discrimination at colleges and universities are sufficient to warrant race-based remedial programs. The Supreme Court declined to review this issue, which was raised in *Podberesky v. Kirwan*.[46]

In addition, courts will closely scrutinize the use of surveys and studies to show present effects of past discrimination sufficient to justify remedial programs. If race-based scholarship programs are challenged, it will be extremely difficult for colleges and universities to justify them, unless courts break away from the exacting review employed by the Fourth Circuit.

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standards. The court of appeals Court found the pool inadequate stating that the government cannot use the goal of remedying past discrimination to lower the minimum criteria used to determine the reference pool.

[35] *Id.* at 158.

[36] *Id.*

[37] *Id.* at 159.

[38] *Id.* at 159.

[39] *Id.* at 158-61.

[40] *d.* at 161.

[41] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)(Supreme Court invalidated program which reserved sixteen seats in University's medical school for minority students stating race may be used as a positive factor, but may not be dispositive).

[42] See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (Affirmative action must satisfy strict scrutiny like that applied to government action to remedy the effects of racial discrimination that intentionally discriminates against minorities.).

[43] Legislation to eliminate racial preferences has been introduced in Georgia, Michigan, Oregon, Pennsylvania, South Carolina, Texas, and Washington.

[44] *Id.* The original dispute involved a challenge to the federal government's practice of giving general contractors on government projects a financial incentive to hire firms owned by minorities. The Supreme Court struck down the incentive and held that federal race classifications must satisfy strict scrutiny.

[45] *d.* at 2099. Justice O'Conner, in her majority opinion wrote, "Under the Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."

[46] *Podberesky*, 115 S.Ct. 2001 (1995).