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FACTS

In 1990, Nadim Ritchey ("Ritchey") applied to the Ohio Department of Administrative Services ("ODAS") for minority business enterprise ("MBE") certification of Ritchey Produce Company, Inc.[1] On the MBE application, Ritchey indicated on the first page that he was "Oriental," and he indicated on the second page that his country of origin was Lebanon.[2] Ritchey Produce received MBE certification for twelve months beginning August 31, 1991 and was recertified for three succeeding twelve-month periods based on Ritchey's status as a member of a qualified minority group.[3] While certified as an MBE, ODAS awarded Ritchey Produce a state procurement contract under the MBE set-aside program.[4] This contract included the state's orders for fresh fruits and vegetables from July 1995 through September 1997.[5] In 1995, Ritchey refiled for MBE certification.[6] ODAS advised Ritchey of its intent to deny his application because Ritchey Produce was not owned by a member of a qualified minority group.[7] Ohio's Revised Code requires that a certain percentage of the state's construction and procurement contracts be set aside for competitive bidding by MBEs only.[8] MBEs are defined under Ohio Revised Code section 122.71(E)(1) as enterprises owned and controlled by a member of an economically disadvantaged group comprised of "Blacks, American Indians, Hispanics, and Orientals [sic]."[9] At an ODAS hearing, the

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1. Ritchey Produce Co. v. Ohio Dep't of Admin. Serv., 707 N.E.2d 871, 875 (Ohio 1999).
2. *Ritchey*, 707 N.E.2d at 875.
3. 707 N.E.2d at 875-76.
4. *Id.* at 876.
5. *Id.* at 877.
6. *Id.* at 876.
7. *Id.*
8. *Id.* at 874. The Director of Administrative Services "shall select a number of contracts with an aggregate value of approximately five per cent of the total estimated value of contracts to be awarded in the current fiscal year. The director shall set aside the contracts so selected for bidding by minority business enterprises only." OHIO REV. CODE ANN. § 123.151(C)(1) (West 1994). With respect to state procurement contracts, the Director of Administrative Services "shall select a number of [purchases made through competitive selection], the aggregate value of which equals approximately fifteen per cent of the estimated total value of all such purchases to be made in the current fiscal year. The director shall set aside the purchases selected for competition only by minority business enterprises, as defined in division (E)(1) of section 122.71 of the Revised Code." OHIO REV. CODE ANN. § 125.081(A).
9. *Id.* at 875. A "minority business enterprise" is defined as an "individual, partnership, corporation or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals." OHIO REV. CODE ANN. § 122.71(E)(1). "Owned and controlled" is further defined as "at least fifty-one per cent of the business . . . is owned by persons who belong to one or more of the groups set forth in division (E)(1) of this section, and that such owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and

examiner concluded that Ritchey was not "Oriental" and that the company was not minority owned for purposes of the MBE program.[10] Upon Ritchey's appeal, the Court of Common Pleas found that "the ODAS order denying Ritchey Produce's request for recertification violated the equal protection guarantees of the Fifth[11] and Fourteenth[12] Amendments . . .."[13] Upon ODAS's appeal, the Ohio Court of Appeals upheld the Court of Common Pleas finding.[14] The appellate court determined that Ohio's MBE program "appears to be based on the presumption that Caucasians and other minority groups are not disadvantaged, socially or economically, but that all members of the listed minority groups are socially and economically disadvantaged."[15] Relying on *Adarand Constructors, Inc. v. Pena*,[16] the court concluded that "the state's MBE program is a race per se classification which . . . was unconstitutionally applied to deny [Ritchey] MBE certification."[17] The appeals court also concluded that the goal of the MBE program should be to maximize opportunity for all economically or socially disadvantaged Ohioans.[18]

HOLDING

The Ohio Supreme Court held that

> the provisions of [Ohio Revised Code section] 125.081 requiring that approximately fifteen percent of the state's purchasing contracts be set aside for competitive bidding by [MBEs] only and the provisions of [Ohio Revised

losses of the business proportionate to their percentage of ownership . . ." OHIO REV. CODE ANN. § 122.71(E)(2).

10. Ritchey Produce Co. v. Ohio Dep't of Admin. Serv., No. 97APE04-567, 1997 Ohio App. LEXIS 4590, at *1 (Oct. 07, 1997).

11. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

12. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . ." U.S. CONST. amend. XIV, § 1.

13. 707 N.E.2d at 876. In Ohio, a Court of Common Pleas is a court of general jurisdiction that hears appeals from most administrative agencies. The Court of Appeals is the court of general appellate review for lower court decisions. The Supreme Court is the highest court and has final appellate jurisdiction for lower court decisions. WANT'S FEDERAL-STATE COURT DIRECTORY - 2000 EDITION, 191 (Want's Publishing Co. 1999).

14. *See generally* 1997 Ohio App. LEXIS 4590 (affirming judgment of the trial court).

15. *Id.* at *5-6.

16. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that strict scrutiny applied to all governmental classifications based on race).

17. 1997 Ohio App. LEXIS 4590 at *7 (construing *Adarand* to mean "that race may, in some circumstances, create a presumption of disadvantage, but that other races cannot be excluded based solely on statutory presumptions such as the ones in R.C. 122.71(E)(1).").

18. *Id.* at *7.

> Code section] 122.71(E) defining [MBE] with explicit reference to race are constitutional as applied to deny [MBE] status to a business owned and controlled by a person of Lebanese ancestry.[19]

The court further held that "Ohio's [MBE] program as it relates to the state's purchasing contracts is sufficiently narrowly tailored to pass constitutional muster."[20] Accordingly, the court reinstated ODAS's denial of MBE recertification for Ritchey Produce.[21]

ANALYSIS

On appeal, the Ohio Supreme Court narrowed the issue to "whether Ohio's MBE Program, as administratively applied and as written, violates the equal protection guarantees of the Fourteenth Amendment . . .."[22] The court then determined what standard of review is appropriate for this issue.[23] Recognizing that the U.S. Supreme Court has struggled with the tension between the equal protection clause and the use of race-based measures, the court reviewed twenty years' worth of U.S. Supreme Court decisions dealing with benign or race-based governmental action.[24] The court concluded that the U.S. Supreme Court resolved the question of appropriate standard of review by "finding that the standard for all governmental classifications based on race is the strict scrutiny standard of review."[25]

For the MBE set-aside program to survive strict scrutiny, "the state's race-based program must be justified by a compelling governmental interest, and the means chosen by the state to effectuate its purposes must be sufficiently narrowly tailored."[26] The court accepted "that a state has a compelling interest in remedying past and present effects of identified racial discrimination within its jurisdiction where the state itself was involved in the discriminatory practices."[27] To determine whether Ohio established a compelling state interest, the court reviewed the "factual predicate offered in support of the program."[28] This factual predicate consisted of documentation and judicial

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19. 707 N.E.2d at 928.
20. *Id.*
21. *Id.*
22. *Id.* at 879.
23. *Id.* at 885.
24. *Id.* at 885-913 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Adarand*, 515 U.S. 200).
25. *Id.* at 885.
26. *Id.* at 913.
27. *Id.*
28. *Id.*

decisions dating back to 1967 that established Ohio's participation in a pattern of discriminatory practices against minorities in the area of state contracting.[29] The court also reviewed an early form of affirmative action for minority contractors in Ohio,[30] and reviewed the state's interest in adopting the current MBE program that was enacted in 1980.[31] The Court found such evidence sufficient to establish that Ohio's General Assembly had "a 'strong basis' in evidence to support its conclusion that Ohio's program was necessary to redress a pattern of discriminatory exclusion of minorities from state contracting opportunities and, thus, had a compelling governmental interest for adopting the MBE program."[32]

The court then distinguished the evidence relied on by the Richmond City Council in *Richmond v. J.A. Croson Co* from the evidence supporting Ohio's MBE program.[33] In *Croson*, the U.S. Supreme Court found that the city's reliance on statements concerning discrimination in Richmond and in the nation provided little probative value in establishing identified discrimination in the Richmond construction industry.[34] The court also found that Richmond's reliance on statistical disparity between the number of prime contracts awarded to MBEs and the percentage of minorities in the city was misplaced.[35] The U.S. Supreme Court further determined that congressional findings of nationwide discrimination in the construction industry were of "limited value" for supporting the existence of discrimination in Richmond.[36] None of the evidence presented indicated identifiable discrimination in the Richmond construction industry; thus, in *Croson*, the Richmond City Counsel, failed the compelling interest prong of strict scrutiny.[37]

In contrast to *Croson*, Ohio's General Assembly enacted the MBE program based on specific information that indicated identifiable discrimination in Ohio.[38]

> [The evidence included] past judicial decisions confirming the existence of discrimination in state contracting and establishing the state's acquiescence in such discriminatory practices, executive findings of discrimination in state contracting opportunities, administrative findings of the need for affirmative

29. *Id.* at 914-17.
30. The affirmative action program contained a two year "sunset" provision. *Id.* at 915 (part of "a biennial capital-improvement appropriations Act").
31. *Id.* at 915-18.
32. *Id.* at 914.
33. 707 N.E.2d at 919.
34. *Id.* (citing *Croson*, at 488-500).
35. *Id.* (citing *Croson*, at 501-03).
36. *Id.* (citing *Croson*, at 504).
37. *Id.* (citing *Croson*, at 505).
38. *Id.*

> action, testimony of opponents and proponents of minority set-asides, and a host of relevant statistical evidence showing the severe numerical imbalance in the amount of business the state did with minority-owned enterprises.[39]

The court stated that this "evidentiary mosaic . . . is precisely the type of probative evidence of identified racial discrimination found lacking in *Croson*."[40] Based on this evidence, the court found that Ohio's General Assembly had a compelling interest in enacting the MBE program.[41] The court noted that the lower courts had ignored the state's compelling interest in having adopted the MBE program.[42]

The court next addressed Ritchey's challenge that the MBE program was not sufficiently narrowly tailored.[43] Ritchey did not argue that the MBE program was overinclusive, but rather instead argued that the program was underinclusive.[44] As to Ritchey's challenge that the MBE program was underinclusive, the court noted that Ohio's General Assembly, at the time of the program's enactment, considered information concerning the four specific statutorily qualified minority groups.[45] The court stated that "if the General Assembly had decided to randomly pick additional minority groups for inclusion into the MBE program . . . the MBE program would almost certainly fail under strict scrutiny."[46] The court further noted that Ritchey, for example, never challenged the facial validity of the MBE program,[47] but rather Ritchey's "*only objectives* were to be *included* in the program."[48] The program was designed to "ameliorate the effects of past, documented racial discrimination" that detrimentally affected "the racial or ethnic minority groups listed in [Ohio Revised Code section] 122.71(E)(1)."[49] The court emphasized that the MBE program was not designed to benefit all of Ohio's citizenry.[50]

In weighing the general appropriateness of the MBE program, the court made several "general observations."[51] The court observed that: the current

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39. *Id.*
40. *Id.* at 919-20.
41. *Id.* at 920.
42. *Id.*
43. *Id.* at 921-22.
44. *Id.* at 922 (stating ". . . as to the question of overinclusiveness, we do not view appellee's arguments in this case as even challenging the MBE program on that ground.").
45. *Id.*
46. *Id.*
47. *Id.* at 923.
48. *Id.* at 922.
49. *Id.* at 923.
50. *Id.*
51. *Id.* at 923-25.

program was enacted only after several other programs had failed;[52] the program is flexible;[53] "the numerical goals of the program have a direct relationship to Ohio's contracting market;"[54] "[n]onminority contractors are not wholly precluded from participation in contracts set aside for MBEs;"[55] the program "contains administrative definitions and procedures to ensure participation by qualified MBEs only;"and there are "criminal penalties to discourage unjust participation in the MBE program;"[56] the definition of MBE "contains an appropriate geographic limitation for the program" (i.e. "controlled by U.S. citizens, residents of Ohio");[57] the operation of the "program is subject to continuing reassessment and reevaluation;"[58] "finally, the burdens imposed on non-MBEs by virtue of the set-aside requirements are relatively light."[59] The court, guided by these "general observations," found that "Ohio's MBE program is sufficiently narrowly tailored to pass constitutional muster."[60]

After determining that the MBE program met the strict scrutiny test, the court examined "whether a person of Lebanese ancestry is included within the meaning of the term Oriental."[61] The court analyzed the ODAS hearing examiner's determination.[62] The hearing examiner reviewed statutory constructions and definitions considered in *DLZ Corp. v. Department of Administrative Services*,[63] finding that "Oriental" does not include people of Lebanese descent.[64] The court agreed that "the common, ordinary, and everyday meaning of the term 'Orientals,' at least as that term is generally used and understood today, simply does not refer to people of Lebanese ancestry or, geographically, to the country of Lebanon."[65]

Although the court held Ohio's MBE program constitutional, the court limited it holding to "the area of state procurement contracting."[66] The court

52. *Id.* at 923.
53. *Id.* at 924
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 925.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 926.
62. *Id.*
63. DLZ Corp. v. Ohio Dep't of Admin. Serv. 658 N.E.2d 28 (Ohio 1995).
64. 707 N.E.2d at 926-27.
65. *Id.* at 927.
66. *Id.* at 927-28.

limited the holding to avoid a direct conflict with an order previously issued by the United States District Court for the Southern District of Ohio in a separate case that dealt with state construction contracts.[67]

CONCLUSION

This case presents several troubling issues.[68] First, two United States District Courts previously held that the enabling law for the MBE program in state construction contracts, Ohio Revised Code section 123.151, violated the Fourteenth Amendment's Equal Protection Clause.[69] One of the two federal courts, the Southern District of Ohio, expressly denounced the *Ritchey Produce* opinion.[70] In condemning the opinion, U.S. District Judge James L. Graham called Ohio's MBE program "blatantly unconstitutional."[71] Judge Graham opined that if the MBE program survives ". . . non-minority businesses which seek to do business with the state will be harmed by being excluded from the opportunity to bid on state contracts solely because of their race."[72] To avoid "conflict" with the federal court opinion, the Ohio Supreme Court limited the holding in *Ritchey Produce* to "the area of state procurement contracting."[73] Although the state and federal cases deal with different types of contracts (procurement and construction contracts, respectively), Ohio "relied on the same evidence and the same legal arguments to justify both programs."[74] Thus, *Ritchey Produce* has questionable precedential value.

Second, the court avoided a traditional canon of construction in determining the meaning of the term "Orientals." Both the hearing examiner

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67. Associated Gen. Contrs. of Ohio, Inc. v. Drabik, No. C2-98-943, 1998 WL 812241 at *1 (S.D. Ohio Oct. 30, 1998) (determining that "Ohio Revised Code Section 123.151 and all rules, regulations and practices promulgated thereunder, which provide for and implement racial or ethnic preference provisions for the awarding of State construction contracts and State construction subcontracts violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and are therefore, invalid, null and void . . .").

68. One issue not discussed in this note is the political use of the courts to overturn legislative enactments. During the early 1990s Ohio Governor George Voinovich pushed for MBE contract awarding based on economic and social disadvantage, instead of race or ethnicity. Apparently, the Governor was unable to move his agenda in the General Assembly. *See Ohio's Race-Based Incentives 'Unlawful,'* THE PLAIN DEALER, Oct. 31, 1996, at 1A.; The Governor requested ODAS to appeal the Court of Common Pleas' holding in Ritchey in order to have "a clear signal from the courts [of] just what they think of our state statute." *Voinovich Seeks Ruling on Opinion*, THE DAYTON DAILY NEWS, Nov. 2, 1996, at 2B.

69. *See Associated Gen. Contrs. of Ohio*, 1998 WL 812241, at *1-2; F. Buddie Contracting, Ltd. v. Cuyahoga Comm. College Dist., 31 F. Supp. 2d 571, 574, 584 (N.D. Ohio 1998).

70. Associated Gen. Contrs. of Ohio, Drabik, 50 F. Supp. 2d 741, 744-45 (S.D. Ohio 1999).

71. *Id.* at 745.

72. *Id.* at 771.

73. 707 N.E.2d at 928.

74. 50 F. Supp. 2d at 744.

and the court used a modern definition of "Orientals" instead of using the legislature's intended definition. The term "Orientals" used in Ohio Revised Code section 122.71(E)(1) is not defined in the statute.[75] The ODAS hearing examiner based his determination of what "Oriental" means on the Ohio Administrative Code[76] (which was made effective one year after Ohio Revised Code section 122.71(E)(1)), case law clarifying the Administrative Code's definition,[77] and common dictionary[78] definitions.[79] In upholding the hearing examiner's determination, the Ohio Supreme Court discounted another dictionary definition,[80] the opinion of one of the appeals court judges,[81] Mr. Ritchey's own belief,[82] and amici's claim that "Oriental" included individuals of Lebanese descent and geographically, Lebanon.[83] The court did not examine legislative history to determine what Ohio's General Assembly intended the term "Orientals" to mean. Using modern definitions instead of the legislature's intended definition appears to undermine the validity of the state's compelling interest in remedying identified past discrimination.

Finally, the continued use of Ohio's MBE program (without durational limit) may be inappropriate. The Ohio Supreme Court stated that when a statute is challenged as unconstitutional, it is the court's duty to liberally construe the statute to save it from constitutional infirmities.[84] In its effort to find the MBE program constitutional, the court failed to consider whether the program was still necessary. The court should have considered the program's unlimited duration, as well as evidence indicating that the program was outdated, before making a final determination.

Justice Powell stated in *Fullilove* that a race-based remedy must be appropriately limited so it "will not last longer than the discriminatory effects it is designed to eliminate."[85] Ohio's program contains no "sunset" provisions; thus, it has an unlimited duration. Moreover, since enactment in 1980, neither the Ohio legislature nor a state court has substantially altered the

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75. 707 N.E.2d at 926.

76. OHIO ADMIN. CODE § 123:2-15-01(A)(9) (stating that "Orientals" means "all persons having origins in any of the original people of the Far East, including China, Japan and Southeast Asia").

77. 658 N.E.2d at 31 (holding that "Oriental" includes people from India).

78. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 832 (1987), THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1365 (2d Ed. 1987), WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1591 (1976).

79. 707 N.E.2d at 926.

80. *Id.* (citing OXFORD ENGLISH DICTIONARY, 929 (2d Ed. 1989).

81. 1997 Ohio App. LEXIS 4590 at *8-9 (Tyack, J., concurring).

82. 707 N.E.2d at 882.

83. *Id.* at 884.

84. *Id.* at 881.

85. *Fullilove*, 448 U.S. at 514 (Powell, J., concurring); Powell's words are quoted by the majority in *Adarand*. *See Adarand*, 515 U.S. at 238.

MBE program.[86]

The Ohio Supreme Court based its holding on evidence that was at least twenty years old.[87] Federal case law suggests that evidence of discrimination that is 14-years,[88] 18-years,[89] and 19-years-old[90] is too old to be useful.[91] Current evidence suggests that the Ohio MBE program actually discriminates against non-minorities.[92] Moreover, the MBE program benefits only a small number of qualified minorities.[93] Thus, in an attempt to liberally construe the statute, the court upholds the constitutionality of a program that engages in reverse discrimination.

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86. *Cf.* 707 N.E.2d at 925 (discussing continuing reassessment and reevaluation of Ohio Revised Code §123.151) with 50 F. Supp. 2d at 766 (discussing a lack of serious reconsideration of Ohio Revised Code section 123.151).

87. 707 N.E.2d at 914.

88. Brunet v. City of Columbus, 1 F.3d 390, 409 (6th Cir. 1993).

89. Hammon v. Barry, 826 F.2d 73, 76-77 (D.C. Cir. 1987).

90. Detroit Police Officers Ass'n v. Young, 989 F.2d 225, 228 (6th Cir. 1993).

91. 50 F. Supp. 2d at 763.

92. *Id.* at 768-70 (discussing Complaint filed in Henry Painting Co. v. Ohio State Univ., No. C-2-94-0196 (S.D. Ohio).

93. *Id.* at 770 (citing REPORT TO THE GOVERNOR, State Sponsored Equal Opportunity Programs In Ohio (1995) (study showing that 80 percent of funds set-aside for MBEs went to only five percent of eligible MBEs)).