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# Recent Developments: Podberesky v. Kirwan: Proponent of a Race-Conscious Remedial Measure Must Demonstrate a Strong Basis in Evidence That Remedial Action Is Necessary and Narrowly Tailored to Meet Its Goals

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*Podberesky v. Kirwan:*

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In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied* 115 S. Ct. 2001 (1995), the United States Supreme Court let stand a Fourth Circuit Court of Appeals decision holding that a University of Maryland scholarship program for which only African-Americans were eligible violated the Equal Protection Clause of the United States Constitution. Specifically, the court of appeals held that the University failed to show that sufficient present effects of past discrimination existed to justify the program and, further, that the program was not narrowly tailored to achieve its proposed goals.

The University of Maryland at College Park's ("UMCP") Banneker Scholarship was a merit-based program open only to African-American students. Daniel Podberesky was a Hispanic student and, therefore, not eligible for the Banneker Scholarship, even though he met its academic requirements. UMCP offered another merit-based scholarship, the Francis Scott Key program, which was open to all eligible students. Podberesky did not qualify for the Key program either, however, as its academic standards were somewhat higher. Podberesky sued UMCP, claiming that the Banneker program's race restriction violated the Equal Protection Clause.

The case previously came before the Fourth Circuit Court of Appeals and was remanded to the district court for it to

determine whether there were sufficient present effects of past discrimination against African-Americans to justify the single-race scholarship program. *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992) (*Podberesky I*). The district court reasoned that if any of the present effects proposed by UMCP were determined to be supported by a "strong evidentiary basis," then the program would be justified. The district court found such a strong evidentiary basis to exist, supporting UMCP's four claimed present effects: (1) that the University had a poor reputation among African-Americans; (2) that African-Americans were underrepresented in the student population; (3) that African-Americans who enrolled had lower graduation and retention rates; and (4) that the atmosphere on campus was perceived as hostile to African-American students. In addition to its evidentiary findings, the district court held that the program was narrowly tailored to remedy those present effects of past discrimination. Thus, the district court granted UMCP's motion for summary judgment and denied Podberesky's motion for summary judgment, and this appeal followed.

The court began its analysis by recognizing that UMCP's Banneker program would be subject to strict scrutiny, due to its race-based restriction. Hence, UMCP had to rebut a presumption of unconstitutionality. *Podberesky*, 38 F.3d at

152-53. The court rejected the district court's analysis, reciting the proper two-step analysis for evaluating race-conscious remedial measures: (1) "the proponent of the measure must demonstrate a 'strong basis in evidence for its conclusion that remedial action [is] necessary,'" and (2) "the remedial measure must be narrowly tailored to meet the remedial goal." (citations omitted). *Id.* at 153.

The court of appeals then refuted the district court's statement that any present effect of past discrimination found by UMCP would be sufficient to justify the Banneker program. The court of appeals noted that under *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), and *Maryland Troopers Ass'n v. Evans* 993 F.2d 1072 (4th Cir. 1993), a court must also examine the effects themselves to determine whether they justify the remedial measure and were actually caused by the past discrimination. *Podberesky*, 38 F.3d at 153-54.

The court of appeals turned next to UMCP's four alleged present effects of past discrimination. *Id.* at 154. The court summarily rejected both the poor reputation of UMCP in the African-American community, and the campus climate perceived as racially hostile, finding them insufficient to justify the single-race scholarship. *Id.* The court maintained that UMCP's poor reputation in the African-American community stemmed from knowledge that

UMCP discriminated in the past, and "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." *Id.* The court attributed the hostile racial climate at UMCP to general societal discrimination rather than past discrimination by the school. Thus, the court failed to find a sufficient nexus between past discrimination by UMCP and the present hostile climate to warrant such a remedy. *Id.* at 154-55.

In analyzing the remaining claimed present effects of past discrimination, underrepresentation of African-American students at UMCP and lower graduation and retention rates for African-American students, the court of appeals held that the district court erred in granting UMCP's motion for summary judgment because a dispute existed concerning "why African-American students leave the University of Maryland in greater numbers than other students." *Id.* at 155-56.

The court of appeals next emphasized the critical importance of choosing the correct reference pool when determining why underrepresentation or low retention and graduation rates exist. *Id.* at 156. Although the district court had correctly determined that the reference pool should be qualification specific and should not consist of all graduating high school students, it failed to resolve the factual dispute between the parties concerning the proper min-

imum admission criteria. *Id.* at 156-57.

Podberesky had proposed a minimum criteria based upon SAT scores, high school curriculum requirements, and grade point averages, which the district court rejected as "ignoring the variables" in admissions and "the intergenerational effects of segregated education on the applicant pool." *Id.* at 157. The court of appeals disagreed, finding instead that "the goal of the program, remedying any present effects of past discrimination, cannot be used to lower the effective minimum criteria needed to determine the applicant pool." *Id.* Therefore, the court concluded that summary judgment was improper given the significant dispute over the correct minimum admission requirements. *Id.*

The court of appeals turned next to the issue of whether the Banneker Scholarship was narrowly tailored to remedy the proposed present effects of past discrimination. *Id.* at 158. The district court found a nexus between the program's attraction of "high-achieving black students" and achieving a remedy for the claimed present effects of past discrimination. *Id.* The court of appeals failed to find such a nexus, stating that the purpose of attracting high-achieving students was insufficient to justify the program because high-achievers "are not the group against which the University discriminated in the past." *Id.*

In contrast to the district

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court, the court of appeals found merit in Podberesky's claim that the Banneker program was not narrowly tailored because it was open to non-residents of Maryland, as well as residents. *Id.* Since UMCP argued that its program was intended to increase the number of qualified African-American Maryland students, the court of appeals reasoned that UMCP's offering of Banneker Scholarships to non-residents was not narrowly tailored to achieve its stated goal. *Id.* at 158-59.

The court of appeals next held that the district court had used flawed reasoning in concluding that by attracting high-achieving African-American students who would serve as role models, UMCP would ultimately attract other African-American students to the school. *Id.* at 159. In rejecting this theory, the court of appeals noted that such theories were explicitly rejected by the Supreme Court as insufficient to justify race-based remedies. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). Additionally, the court stated that, aside from its use of the defective role-model theory, the district court incorporated possibly "inflated figures regarding the makeup of the reference pool." *Id.* The court of appeals emphasized that application for admission to college is not obligatory, and students are free

to choose where they will attend college. *Id.* Thus, the district court failed to account for several factors, such as those high school graduates choosing not to attend college, those choosing to apply only to out-of-state colleges, those choosing to delay application, and those applying only to historically African-American colleges. *Id.* at 159-60. The court of appeals held that "failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny." *Id.* at 160.

Finally, the court of appeals addressed the district court's finding that the low retention and graduation rates at UMCP would be remedied by an increase in high-achieving African-American students at UMCP. *Id.* at 160-61. The court of appeals held that neither the causes of the low retention rates argued by Podberesky, nor those found by the district court, retained any nexus to the Banneker program. *Id.* Thus, the court stated that "[t]o the extent that the district court's opinion can be read as having found a connection between UMCP's poor reputation and hostile environment and the Banneker program, it is on either a role model theory or a societal discrimination theory, neither of which can be sustained." *Id.* at 161. Even assuming that the proper nexus

did exist, the court of appeals stressed that UMCP had not attempted any race-neutral solutions to remedy the inequity. *Id.* The court of appeals thus reversed the district court's grant of summary judgment to UMCP and reversed the district court's denial of summary judgment to Podberesky. *Id.* The court of appeals next remanded the case to the district court, ordering that Podberesky's motion for summary judgment be granted and that his admission to the Banneker program be reevaluated in light of its opinion. *Id.* at 161-62.

By holding that the University of Maryland at College Park failed to prove sufficient present effects of past discrimination to justify its race-based Banneker Scholarship and by finding that the program is not narrowly tailored to achieve its goals, the court has sent a warning that race-exclusive remedies will be subjected to rigorous standards and race-neutral alternatives are preferable. *Podberesky v. Kirwan* is indicative of the current trend towards curtailing, or even eradicating, affirmative action. This decision may force schools across the country to reconsider their race-exclusive scholarship programs, requiring them to achieve diversity through race-neutral alternatives where possible.

-Victoria Rife Shearer