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Recent Developments: Adarand Constructors, Inc. v. Pena: Racial Classifications Developed to Further a Compelling Governmental Interest Must Be Able to Withstand "Strict Scrutiny"

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Adarand Constructors, Inc. v. Pena:

RACIAL CLASSIFICATIONS DEVELOPED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST MUST BE ABLE TO WITHSTAND "STRICT SCRUTINY."

In a plurality decision, the Supreme Court of the United States in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), held that the federal government may utilize racial classifications to eliminate vestiges of racial discrimination if such classifications further a compelling governmental interest and are narrowly tailored to meet that interest. Additionally, the Court held that strict scrutiny is the appropriate standard of judicial review for all racial classifications, whether instituted by federal, state or local government. In so holding, the Court overruled the use of intermediate scrutiny for federal racial classifications as permitted by *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

In 1989, the Central Federal Lands Highway Division ("CFLHD") awarded the prime contract for a highway construction project to Mountain Gravel and Construction Company ("Mountain"). Adarand Constructors, Inc. ("Adarand") and Gonzales Construction Company ("Gonzales") submitted bids for the guardrail installation portion of the prime contract. The CFLHD contract contained an incentive clause under which Mountain received additional compensation if it hired subcontractors who were certified as small disadvantaged businesses under Section 8(a) of the Small Business Act. Gonzales was certified under the Section 8(a) provisions, while Adarand did not qualify. Consequently, despite Adarand's lower bid, Mountain awarded the guardrail contract to Gonzales to gain the additional compensation yielded by the disadvantaged subcontractor incentive clause.

Subsequently, Adarand sued several federal transportation officials in the United States District Court for the District of Colorado, alleging that the prime contract's race-based incentive clause violated its right to equal protection. The district court granted the government's motion for summary judgment. The Court of Appeals for the Tenth Circuit, applying the intermediate scrutiny standard in *Metro Broadcasting, Inc. v. FCC*, affirmed the district court. The Supreme Court of the United States granted certiorari to determine whether the intermediate scrutiny standard or the strict scrutiny standard should be used during judicial review of federal programs in which race-based preferences are used to further a compelling governmental interest.

In beginning its analysis, the Court first ascertained whether Adarand had standing to request forward-looking injunctive and declaratory relief, as Adarand was required to allege that future use of subcontractor clauses would be "'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Adarand Constructors*, 115 S. Ct. at 2104 (quoting *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The Court found that Adarand made an adequate showing that it would likely compete for future CFLHD construction contracts against companies certified as small disadvantaged businesses, and therefore, had standing to request relief. *Id.* at 2105.

Next, the Court noted that the Fifth Amendment, which gave rise to Adarand's claim, provided a less explicit guarantee of equal protection than the Fourteenth Amendment. *Id.* at 2105-06. The Court acknowledged, however, that equal protection obligations imposed by the Fifth and Fourteenth Amendments have become "indistinguishable." *Id.* at 2107.

Combining precedent, equal protection analysis, and its holding from *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)(Fourteenth Amendment requires strict scrutiny for all race-based state governmental actions), the Court established three general propositions for analyzing governmental racial classifications: 1) skepticism; 2) consistency; and 3) congruence. *Id.* at 2111. The Court believed that skepticism must be an inherent part of any judicial review, as any "'preference based on racial or ethnic criteria must necessarily receive a most searching examination.'" *Id.* (quoting *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 273 (1986)). The consistency proposition strengthened the Court's view that the "'standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Id.* (quoting *Croson*, 488 U.S. at 494). The congruence proposition supported the Court's finding that equal protection analysis was identical under the Fifth and Fourteenth Amendments. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)). Those three propositions, reasoned the Court, allowed any person subjected to unequal treatment because of racial classifications to require a governmental actor to justify those racial classifications under the purview of strict judicial scrutiny. *Id.*

Although the three propositions derive from the concept that the Fifth and Fourteenth Amendments protect individuals and not groups, the Court held that all governmental action based on race should be subjected to searching judicial inquiry to "ensure that the personal right to equal protection of the laws has not been infringed." *Id.* at 2112-13. In so holding, the Court determined that race-based preferences survive only when narrowly tailored to further a compelling governmental interest and analyzed by a reviewing court under strict scrutiny, thus overruling the intermediate scrutiny standard allowed by *Metro Broadcasting*. *Id.* at 2113.

The Court believed that requiring strict scrutiny would ensure that all courts would subject racial classifications to a detailed examination, as utilization of a lesser standard would increase the risk of failure in detecting an illegitimate racial classification. *Id.* at 2117. In dismissing the belief that strict scrutiny is "'strict in theory, but fatal in fact,'" the Court held that race-based governmental action is within constitutional constraints if it satisfies the narrow tailoring requirement of prior cases. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

In concluding that strict scrutiny was the proper standard of review, the Court remanded *Adarand Constructors* to the lower courts for further analysis. Unsolved questions remained concerning whether the subcontractor incentive clause served a compelling interest, and whether the clause was narrowly tailored to meet that interest. *Id.* at 2118. Furthermore, the Court found that the regulatory implementation for determining subcontractor eligibility was unclear and raised unresolved conflicts. *Id.*

In concurring opinions, Justices Scalia and Thomas both articulated the view that government cannot have an interest in racial discrimination whatever the compelling interest. *Id.* at 2118-19. Justice Thomas further stated that "government-sponsored racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice." *Id.* at 2119.

In a dissent which attacked the majority's three-

pronged standard, Justice Stevens held that the consistency proposition would require strict scrutiny of race-based affirmative action, but not of gender-based affirmative action. *Id.* at 2122. Justice Stevens also rejected the congruence proposition, stating that the majority ignored a purposeful incongruence between the Fifth and Fourteenth Amendments that empowered Congress to be the primary defender of minorities. *Id.* at 2126.

The Supreme Court of the United States in *Adarand Constructors, Inc. v. Pena* held that the federal government, when attempting to further a compelling governmental interest through the use of racial classifications, was subject to the same strict scrutiny standard as state governments. Under *Adarand Constructors*, if racial preferences are used to foster the inclusion of minorities, their use is limited to situations were prior discrimination was overt and resistant to change. Given the integration of racial classifications into contemporary society, minorities of all walks of life will surely feel the impact of *Adarand Constructors*, as the government, whether prodded by judicial intervention or on their own initiative, reviews current policies and revises them accordingly. Though discrimination of any sort is odious, gains made by minorities through utilization of racial preferences cannot be discounted and hopefully *Adarand Constructors* has not dealt a telling blow to continued advancement.

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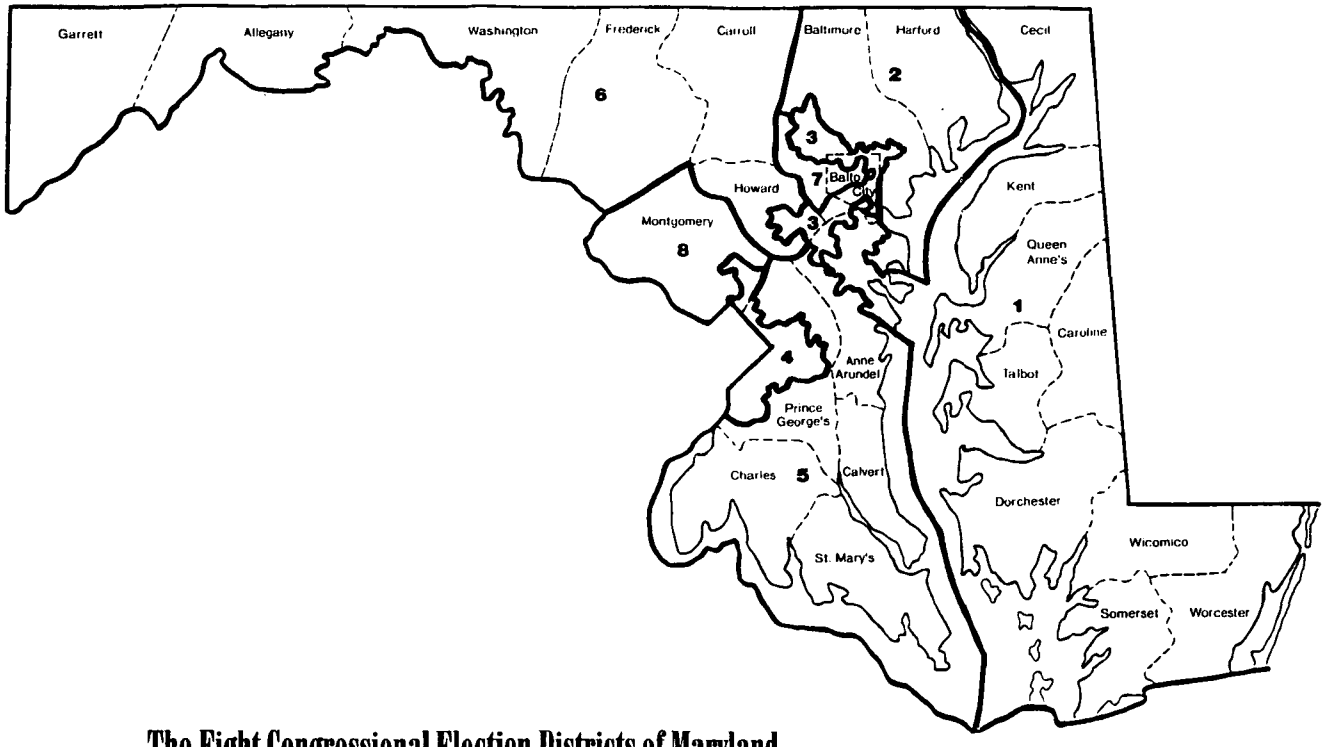

The Eight Congressional Election Districts of Maryland