Constitutionality of Demographic Data Collection

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KEY TAKEAWAY:
Robust data collection by federal agencies and their contractors is a vital – and constitutionally permissible – measure to ensure that those programs fully comply with federal antidiscrimination laws.

Introduction

The National Health Law Program (NHeLP) strongly supports the comprehensive collection of demographic data in all public programs, surveys, and federal activities. This data should include race, ethnicity, preferred language (spoken and written), age, disability, sex, sexual orientation, and gender identity. In our efforts to encourage more robust demographic data collection at the federal level – and particularly in Medicaid, CHIP, Medicare, and marketplaces – questions have arisen about the constitutionality of the collection and use of demographic data. This concern has been attributed to the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena*.[1] **Yet *Adarand* and the cases following it preclude neither the collection of demographic data nor its use in ways that do not result in people being treated differently on account of race.**

This issue brief seeks to dispel certain misconceptions about the constitutionality of data collection and the use of demographic data for purposes of compliance. The brief begins with a discussion of *Adarand* and its inapplicability to governmental data collection. Next, it explores federal courts' recognition that data collection by federal agencies is permissible to ensure compliance with federal antidiscrimination laws.

Before proceeding further, we note that the Supreme Court's forthcoming rulings in affirmative action cases should not disturb longstanding legal support for robust data collection nor its use by federal agencies.[2] Here is a short explanation:

- **Collecting** demographic data does not implicate the Equal Protection Clause so the decision should not affect data collection by federal agencies.
- **Using** demographic data to ensure compliance with federal antidiscrimination laws does not result implicate the Equal Protection Clause.[3]

Nevertheless, once the Supreme Court issues its rulings (expected late June 2023), we will revisit this analysis as necessary.

I. *Adarand* Does Not Prohibit Data Collection by Federal Agencies

This section discusses the Supreme Court's decision in *Adarand*, subsequent federal courts' conclusion that *Adarand* does not apply to governmental data collection, and why that conclusion is sound.

A. *The* Adarand *Decision and its Progeny*

The *Adarand* case focused on whether the U.S. Department of Transportation's (DOT) disadvantaged business enterprise program violated the Equal Protection Clause of the U.S. Constitution. DOT prime contractors would get a financial incentive if they subcontracted with Small Business Administration (SBA) certified socially and economically disadvantaged small businesses.[4] Adarand Constructors, which submitted the low bid on a DOT contract but was not an SBA certified business, sued the Secretary of Transportation. Adarand Constructors claimed that race-based presumptions used in subcontractor compensation clauses violated Adarand's right to equal protection."[5] The Supreme Court decided the legal standard of "strict scrutiny" applied to racial classifications by a government actor but left the lower court the responsibility to apply that standard.[6]

Strict scrutiny is a legal standard in which courts reviewing a governmental classification undertake the most rigorous form of constitutional analysis. Courts examine:

- the ends served by the challenged classification;
- the means chosen to achieve those ends; and
- the relationship between them.

To satisfy strict scrutiny (and thus be constitutional), a classification must "further **compelling** governmental interests" and be "narrowly tailored" to achieve that interest.[7] Determining whether the government's use of the classification is "narrowly tailored" (*i.e.*, whether there narrower or more neutral means to achieve the government's interest), and whether the government's interest in using the classification is "compelling," makes the application of strict scrutiny to any particular classification intensely fact-dependent. As such, **overbroad references to *Adarand*'s holding or progeny are likely to be misguided because the constitutionality of any particular use of any piece of demographic classification necessitates a fact-dependent legal analysis**.[8]

In adopting the strict scrutiny standard and sending the case back to the Circuit Court for further review,[9] the Supreme Court concluded:

- race-based classifications that serve a compelling state interest and are narrowly tailored to further that interest remain constitutionally permissible; and
- even a clear financial incentive might satisfy this standard.

After the Tenth Circuit reconsidered the case, it sustained a modified version of the DOT program.[10]

Cases following *Adarand* addressed various features of strict scrutiny (*e.g.*, the evidence necessary to justify adoption of a remedial program and what narrow tailoring requires).[11] While it remains an extremely exacting standard, racial classifications in programs that are narrowly tailored to advance a compelling interest can pass constitutional muster.[12]

B. Most Demographic Classifications Do Not Trigger Strict Scrutiny Under the Equal Protection Clause

Most demographic classifications need not survive "strict scrutiny" to pass constitutional muster.[13] Other standards apply to other demographic classifications. The following chart provides a short overview of the different standards used for evaluating how the government may use different types of demographic classifications. As discussed below, however, demographic data **collection** is an altogether different matter.

Classification	Constitutional Test/Standard	Explanation
Race, ethnicity, national origin[14]	Strict Scrutiny	Requires a compelling government interest and must be narrowly tailored
Sex[15]	Intermediate Scrutiny	Requires an exceedingly persuasive justification
Sexual Orientation, gender identity[16]	Heightened Scrutiny	Includes both strict and intermediate scrutiny
Disability[17], Age[18]	Rational basis	Advances a legitimate state interest
Other data (*e.g.* social and economic legislation)[19]	Rational basis	Presumed to be valid

C. *Adarand* Does Not Apply to Data Collection

Adarand, and by extension the Supreme Court's post-*Adarand* equal protection cases, does not apply to data collection itself because governmental collection of data **about** protected groups is practically and legally distinct from any **use** of that data by governmental entities. In short, the Equal Protection Clause only governs the **misuse** of demographic classifications.[20] Where governmental activity does not classify anyone or treat people differently based on "suspect" classifications (*i.e.*, protected groups such as race or sex), the activity does not **implicate** constitutional equal protection guarantees.

Because the Equal Protection Clause's inapplicability to data collection eliminates *Adarand*-based objections to data collection, this subsection reviews federal courts' explicit recognition that:

- data and its collection are constitutionally different from the use of data;
- *Adarand* does not apply to data collection; and
- data collection by federal agencies has long been understood to differ from the impermissible use of demographic classifications.

1. Data Collection is Constitutionally Different

The collection and interpretation of neutral statistical data about protected groups is distinct from any positive (or negative) steps that a governmental entity might take as a result of its interpretation of the data.[21] While governmental actions based on data "remain[s] subject to law and judicial scrutiny,"[22] federal agencies may collect or require the collection and reporting of demographic data itself – even where it involves data about protected groups. Other courts

have likewise recognized that governmental collection of statistical data about protected and other groups does not constitute an impermissible **use** of any classification.[23]

Federal court decisions allowing robust data collection through the decennial census illustrate the longstanding distinction between constitutionally permissible data collection and the differential treatment forbidden by the Equal Protection Clause. The Supreme Court has "long assumed" that Congress may use the census for information gathering purposes,[24] and recently recognized the census's role as "a linchpin of the federal statistical system by collecting data" about the demographic characteristics of individuals throughout the country.[25] In 2019, the Supreme Court ruled that the Secretary of Commerce may include a citizenship question on the census.[26] Historically, the census also has included questions about race, sex, age, health, and native tongue.[27] The Supreme Court observed that this data collection was permissible notwithstanding the use of census data "for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies.'"[28]

> "Statistical information. . .is a rather neutral entity which only becomes meaningful when interpreted."

As another example, the federal government has the authority to compel a state to collect and report racial and ethnic data pursuant to EEOC regulations. In a case challenging this collection, a Court of Appeals recognized the neutrality of statistical information and described the required data as "raw statistical data, which, properly interpreted, can provide an intelligent basis for determining whether the state might be guilty of an unlawful employment practice within the purview of Title VII."[29] This same case addressed the potential misuse of demographic data, which does not defeat the permissibility of its collection.[30] The state alleged that the EEOC-required data might be misused in a program improperly relying on quotas or in a program violating Title VII.[31] The court concluded that "possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data."[32]

2. Federal Courts Have Explicitly Recognized that *Adarand* Does Not Apply to Data Collection

Courts rejecting equal protection and related challenges to Census questions involving protected groups have agreed that the Supreme Court's decision in *Adarand* does not forbid data collection. In a case challenging the inclusion of race and citizenship questions on the 2000 Census,[33] a district court credited the government's argument that "*Adarand* held that equal protection guards against government actions based on race, but does not deal with

government collection of data on race."[34] It also rejected plaintiffs' contention that governmental requests for information about suspect classifications must satisfy *Adarand*'s strict scrutiny standard. This contention, the court explained,

> is based upon a misunderstanding of the distinction between **collecting** demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental **use** of suspect classifications without a compelling interest.[35] (emphasis added)

The court acknowledged that many might agree with plaintiffs' argument that compulsory racial and ethnic self-classification will not reduce the societal importance of race and ethnicity, but explained that the issue before the court was not social, moral, or political in nature.[36] Ultimately, the court concluded:

> The issue is whether requiring a person to self-classify racially or ethnically, knowing to what use such classifications have been put in the past, can violate the due process implications of the Fifth Amendment. This court holds that such self-classifications do not.[37]

The district court concluded that *Adarand* does not bar data collection. When collecting data **about** groups, governmental actors take groups as they naturally form and are content-neutral in tracking group membership. For example, data collection about race is itself race-neutral, as is data collection about ethnicity, gender, and other traits. Moreover, this content-neutral data collection does not itself result in any differential treatment. **The collection of demographic data tracks group membership and, having completed that tracking, the task of data collection is complete.**

While *Adarand* does not apply to the collection of data about protected groups, we recognize that care should be taken in devising how data is collected. Where the means of data collection significantly interferes with the exercise of a fundamental right, it "will survive constitutional scrutiny only if it furthers some substantial state interest."[38] For example, an Alabama statute required schools to confirm the citizenship status of Alabama school children. Alabama argued that heightened scrutiny "is not warranted because [the relevant statutory provision] is only a means to collect data, which does not implicate any right protected by the Equal Protection Clause."[39] The court concluded, however, that the **means** chosen by Alabama officials to collect citizenship information triggered heightened scrutiny because it significantly interfered with the exercise of school children's right to an elementary public education.[40] In short, the court's application of heightened scrutiny was based on the **way** data was collected (*i.e.*, the interference with the right to education) and not the fact that the

statute sought to collect citizenship information. Moreover, the state statute at issue involved data collection for reasons that were not connected to any legitimate authority held or exercised by the state, *e.g.*, immigration (immigration enforcement is a federal responsibility). Nor did any interest identified by the state in support of the requirement that schools collect information regarding the citizenship or immigration status of Alabama school children support the burden imposed on the fundamental right to an education.

II. Data Collection by Federal Agencies is Permissible to Ensure Compliance with Federal Antidiscrimination Laws

Because federal courts have recognized the importance of statistical data to the enforcement of federal antidiscrimination laws,[41] and that governmental entities may require the collection and reporting of demographic data for that purpose, this section describes federal agencies ability to collect and interpret demographic data for enforcement purposes.

A. Federal courts have recognized that federal agencies may require the collection and reporting of demographic data for enforcement purposes

Federal agencies may require states to collect and report demographic data necessary to ensure compliance with federal antidiscrimination statutes.[42] Federal agencies also may require state and local governmental entities to collect and report data in the connection with enforcement activity.[43] Agencies' ability to collect demographic data for enforcement purposes is not limited to governmental entities, but extends to recipients of federal funding.[44] Further, federal courts likewise have permitted reporting requirements in consent decrees involving parties who have engaged in historical discrimination.[45]

NHeLP has long encouraged federal agencies to collect demographic data in the operation of federal programs to ensure that people eligible for federal programs can access them. The collection of demographic data to ensure compliance with antidiscrimination law, far from violating the Constitution's equal protection guarantees, helps to realize it.

B. Federal agencies may use demographic data to ensure their own compliance with federal law

Federal agencies often collect demographic data to inform their operations and ensure that public programs comply with federal law.[46] This data collection is vitally important and legally permissible.[47] We think the collection should be standardized and expanded, both in support of

President Biden's Executive Orders on these issues as well as to ensure program administration protects individuals from discrimination and ensures all eligible individuals can enroll in and receive the care to which they are entitled.[48]

Governmental entities do collect and use demographic data to **avoid** discrimination. Jury qualification forms, for example, solicit race and ethnicity data "to avoid discrimination in juror selection" and to "help the federal court check and observe the juror selection process so that discrimination cannot occur."[49] Federal agencies may collect and use demographic data for internal compliance purposes,[50] and where they do so pursuant to law, that data collection will not furnish a basis to sustain discrimination claims against them.[51]

An agency's self-evaluation of its operations to avoid discrimination (rather than remediate past discrimination) can be critical to its compliance with federal antidiscrimination laws. For example, if the Centers for Medicare & Medicaid Services (CMS) discovered an unexpectedly low utilization of a Medicaid program by people with disabilities and explored accessibility barriers to their application for or enrollment in Medicaid, that use of utilization data to avoid violation of the Americans with Disabilities Act and the Rehabilitation Act of 1973 would not result in people with disabilities being treated differently for equal protection purposes. In that instance, any accommodations implemented to ensure access by people with disabilities to Medicaid programs would only level the playing field. To conclude otherwise would require federal agencies to adopt a level of "neutrality" that would countenance discrimination by precluding agencies from recognizing it.

Conclusion

Robust data collection by federal agencies and their contractors is a vital – and constitutionally permissible – measure to ensure that those programs fully comply with federal antidiscrimination laws. While the Equal Protection Clause does not permit government actors to treat people differently who are alike in relevant respects, it does not require federal officials to passively ignore the ways that the operation of federal programs can, in fact, treat people differently in unintended ways. **Robust data collection is a powerful vehicle to ensure that federal agencies are not indifferent to the operation of their programs and, when they act, their actions are evidence-based and constitutionally defensible.**

[1] 515 U.S. 200, 227-28, 235 (1995).

[2] *See Students for Fair Admissions v. President and Fellows of Harvard*, No. 20-1199; *Students for Fair Admissions v. University of North Carolina*, No. 21-707. NHeLP also is monitoring developments in *Colville, et al. v. Becerra, et al.*, No. 1:2022-cv-00113 (S.D. Miss.) (challenging performance measures involving antiracism plans), and will revisit this analysis if necessary.

[3] For purposes of this memorandum, "protected classifications" and "protected groups" refers to classes (*e.g.*, races, ethnicities, sexes) that trigger strict or otherwise heightened scrutiny under the Equal Protection Clause or federal antidiscrimination laws. The "protected" designation reflects the fact that not all classes or groups have the same legal status for all purposes. For example, race, ethnicity, and sex are protected classes under the Constitution's equal protection guarantee and federal antidiscrimination laws. Thus, for example, neither Congress nor states may legislate on the basis of race, ethnicity, or sex without meeting heighted constitutional burdens. But age and disability, for example, are not "suspect classifications" for equal protection purposes, though federal antidiscrimination laws preclude **adverse** action **against** people on the basis of age or disability. So, Congress and states may act to **benefit** older Americans or people with disabilities without having to demonstrate more than a legitimate governmental purpose (*e.g.*, to protect or support a vulnerable population) and that the means of doing so are rationally related to that end. As this issue brief explains, however, data collection and its use for compliance or even-handed outreach implicates neither the Constitution's equal protection guarantee nor federal antidiscrimination laws, even though neutral statistical data is vital to the enforcement of both.

[4] "Most federal agency contracts must contain a subcontractor compensation clause, which give a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to *presume* that such individuals include minorities or other individuals found to be disadvantaged by the Small Business Administration." *Adarand*, 515 U.S. at 200.

[5] *Adarand*, 515 U.S. at 210.

[6] *Adarand*, 515 U.S. at 239.

[7] *Id.* at 227.

[8] *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under the broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts[.]").

[9] Justice Scalia's concurrence in part and in the judgement limited the decision's scope somewhat. He explained that "[i]t is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but . . . le[ft] that to be decided on remand." *Adarand*, 515 U.S. at 239. The *Adarand* majority and later courts observed, however, that "strict scrutiny is not 'strict in theory but fatal in fact.'" *Adarand*, 515 U.S. at 237; *see also Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (citing *Adarand* and noting that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it").

[10] *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000), *cert. granted then dismissed as improvidently granted*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (due to significant changes in program and the race-based preferences at issue).

[11] *See, e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 735 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Midwest Fence Corp. v. U.S.*

Dep't of Transp., 840 F.3d 932, 942 (7th Cir. 2016) (quoting *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001)).

[12] *See e.g., Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932, 935-36 (7th Cir. 2016) (affirming summary judgment for Department in contractors' challenge to DOT disadvantaged business enterprise program for highway construction contracts given compelling interest advanced by and narrow tailoring of program).

[13] *See, e.g., City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440-46 (1985) (recognizing "rational basis" review as default standard and level of review applicable to various classifications).

[14] *See, e.g., City of Cleburne*, 473 U.S. at 440.

[15] *See Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1689 (2017) ("Laws granting or denying benefits 'on the basis of the sex of the qualifying parent' . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee.") (internal citations omitted); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (defender of legislation differentiating on basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."); *see also United States v. Virginia*, 518 U.S. at 533 (sex-based classifications require an "exceedingly persuasive justification").

[16] *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2020) (holding that under Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be denied right to marry but not specifying level of scrutiny applicable to sexual orientation-based classifications); *United States v. Windsor*, 570 U.S. 744, 768-70, 775 (2013) (citing *Romer*, recognizing DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definition of marriages . . . is strong evidence of a law having the purpose and effect of disapproval of the class [of same-sex couples]," and finding that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity"); *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.").

[17] *See City of Cleburne,* 473 U.S. at 441-42 (neither disability nor age classifications trigger heightened scrutiny).

[18] *Id*.

[19] *See, e.g., City of Cleburne*, 473 U.S. at 440-46 (recognizing "rational basis" review as default standard and level of review applicable to various classifications).

[20] *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid all classification. It simply keeps decision makers from treating differently persons who are in all relevant respects alike."); *City of Cleburne,* 473 U.S. at 435, 442-43, 446-7 (holding disability is not a suspect classification).

[21] *U.S. v. N.H.*, 539 F.2d at 280.

[22] *Id*.

[23] *See, e.g.*, *Caulfield v. Bd. of Educ. of the City of New York*, 583 F.2d 605, 611 (2d Cir. 1978) ("the Constitution itself does not condemn the collection of this data," referring to local census of racial and ethnic breakdown of public school employees); *Morales*, 116 F. Supp. 2d at 813 (rejecting plaintiffs' argument that "prohibition against disparate treatment precludes the compilation of demographic data regarding protected groups"); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999) ("Courts have not found requirements to collect data about the racial and

gender make-up of a workforce to violate the Constitution.") (internal citations omitted). *Sussman*'s abrogation, on exhaustion, was recognized in *Smith-Thompson v. District of Columbia*, 657 F. Supp. 2d 123, 136-37 (D.D.C. 2009). Yet courts have cited *Sussman* for the proposition at issue here. *See, e.g.*, *Safeco Ins. Co. of America v. City of White House, Tenn.*, 191 F.3d 675, 692 (6th Cir. 1999) (citing *Sussman* as "distinguishing benign from suspect "outreach" programs); *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 20 (D.C. Cir. 2001) (citing *Sussman* for proposition that "program does not create preferences in hiring based on race or gender, and therefore need not be examined under strict scrutiny").

[24] *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2561 (2019) (quoting *Legal Tender Cases*, 12 Wall. 457, 536, 20 L.Ed. 287 (1871)).

[25] *Id.* (quoting *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 341 (1999)).

[26] *Id.* at 2561, 2567. The *Department of Commerce* Court limited its ruling to the citizenship question before it under the Constitution's Enumeration Clause and the Census Act. *See id.*, 123 S.Ct. at 256. But its analysis suggests that inclusion of other census questions would survive similar scrutiny. *See id.*, 123 S.Ct. at 2566-67 (noting "demographic questions have been asked in every census since 1790," "declin[ing] [] invitation to measure the constitutionality of the citizenship question by a standard that would seem to render every census since 1790 unconstitutional," and "look[ing] [] to Congress's broad authority over the census as informed by long and consistent historical practice").

[27] *Id.*

[28] *Id.* at 2561; *see also Baldrige v. Shapiro*, 455 U.S. 345, 353-54, n. 9 (1982); *United States v. Moriarity*, 106 F. 886, 891 (CC S.D.N.Y. 1901) (duty to take population census "does not prohibit the gathering of other statistics").

[29] *U.S. v. N.H.*, 539 F.2d at 279-80.

[30] *See, e.g.*, *U.S. v. N.H.*, 539 F.2d at 280.

[31] *Id.* at 280.

[32] *Id.*

[33] *Morales*, 116 F. Supp. 2d at 813-15.

[34] *Id.* at 813 (citing *Caulfield*, 583 F.2d at 611, and granting summary judgment to Secretary of Commerce).

[35] *Morales*, 116 F. Supp. 2d at 813-15.

[36] *Id.* at 814.

[37] *Id.* at 814-15.

[38] *See Hispanic Interest Coalition of Alabama* ("HICA") *v. Governor of Alabama*, 691 F.3d 1236, 1247-48 (11th Cir. 2012) (citing *Plyler v. Doe*, 457 U.S. 202, 230 (1982)).

[39] *Id.* at 1245 (citing *Morales*, 116 F. Supp. 2d at 814-15).

[40] The court's "duty [] is to analyze whether [the provision] operates in such a way that it 'significantly interferes with the exercise of' the right to an elementary public education as guaranteed by *Plyler*." *Id.* at 1245. Concluding that "an increased likelihood of deportation or harassment upon enrollment in school significantly deters undocumented children from enrolling in and attending school, in contravention of their rights under *Plyler*," it found the statute did not "further some substantial state interest" that would sustain it under the Equal Protection Clause. *Id.* at 1248-9.

[41] *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178 (2017); *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999); *Miller v. Johnson*, 515 U.S. 900, 906 (1995); *Shaw v. Reno*, 509 U.S.

630, 634 (1993); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 305 (5th Cir. 1978) (collecting cases); *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).
[42] *Id.*, 539 F.2d at 279-81; *compare e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-09 (1977) (recognizing "statistics can be an important source of proof in employment discrimination cases," discussing the nature of statistical evidence relevant in pattern-and-practice discrimination cases, and collecting authorities).
[43] *Id.*, 583 F.2d at 605, 610-11 (2d Cir. 1978) (citing *United States v. Jefferson County Bd. of Educ.*, 371 F.2d 836, 882-84 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (*en banc*), *cert. denied*, 389 U.S. 840 (1967)); *Sussman*, 39 F. Supp. 2d at *26-7 (FDIC program involving data collection was not constitutionally infirm).
[44] *Forsham v. Harris*, 445 U.S. 169, 185-87 (1980) (recognizing Department of Health, Education, and Welfare's right to obtain data developed by private physicians and scientists conducting studies of diabetes treatment but holding that data was not "agency record" subject to FOIA); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-30 (6th Cir. 1996) (recognizing HHS's authority to obtain race and ethnicity data, among other demographic data, in connection with its enforcement of Title VI of the Civil Rights Act of 1964).
[45] *Id.*, 897 F. Supp. at 1552.
[46] *See, e.g.*, *Moriarity*, 106 F. at 891 ("The functions vested in the national government authorize the obtainment of the [business-related] information demanded by section 7 of the [C]ensus [A]ct, and the exercise of the right befits a [] power, enacting laws adapted to the needs of the vast and varied interests of the people, after acquiring detailed knowledge thereof.").
[47] *See* Section I.C., *supra*, for relevant authorities.
[48] *See e.g.*, Executive Order No. 13985, Advancing Equity and Racial Justice Through the Federal Government, Jan. 20, 2021; Executive Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Jan. 20, 2021.
[49] *See, e.g.*, *United States v. Causey and Skilling*, Crim. No. H-04-025, 2004 WL 1243912, *14 (S.D. Tex. May 25, 2004) (quoting text of juror questionnaire); *United States v. Hernandez-Estrada*, No. 10cr0558 BTM, 2011 WL 1119063, *10 (S.D. Cal. March 25, 2011) (same); *see also Stephens v. Cox*, 449 F.2 657, 660 n.8 (4th Cir. 1971) (noting "[c]onsciousness of race in the [juror] selection process is sometimes necessary to avoid discrimination," and collecting authorities illustrating same).
[50] *See, e.g.*, *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344 (D.C. Cir.), *reh'g denied*, 154 F.3d 487, 500 (D.C. Cir. 1998) (Tatel, C.J., dissenting from denial of rehearing *en banc*) ("neither the Supreme Court nor any other court has ever applied strict scrutiny to programs that require nothing more than recruitment, outreach, *self-evaluation*, and *data collection*") (emphasis added).
[51] *See, e.g.*, *Moncada v. Peters*, 579 F. Supp. 2d 46, 55 n.13 (D.D.C. 2008) (F.A.A.'s collection of race data through employment application, because it was required by law, was not "pretext for discrimination").