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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
ADARAND CONSTRUCTORS, INC., :
Petitioner :
v. : No. 00-730
NORMAN Y. MINETA, SECRETARY OF :
TRANSPORTATION, ET AL. :
- - - - -X

Courtroom 20
333 Constitution Avenue, N.W.
Washington, D.C.
Wednesday, October 31, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:01 a.m.

APPEARANCES:

WILLIAM P. PENDLEY, ESQ., President and Chief Legal
Advisor, Denver, Colorado; on behalf of the
Petitioner.

THEODORE B. OLSON, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the
Respondent.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-730, Adarand Constructors, Inc. v. Mineta.
5 Mr. Pendley.

6 ORAL ARGUMENT OF WILLIAM P. PENDLEY

7 ON BEHALF OF THE PETITIONER

8 MR. PENDLEY: Mr. Chief Justice, and may it
9 please the Court:

10 In 1989, the small family business that is
11 Adarand lost a Federal contract because of a racial
12 program and the race of its owner, Randy Pesh.

13 In 1995, this Court held that Adarand had
14 standing to seek forward-looking relief because that
15 program prevented it from competing on an equal footing.

16 In 2001, Adarand returns to this Court because
17 it still can't compete on an equal footing.

18 QUESTION: Mr. Pendley, treat, if you will,
19 fairly shortly coming up in your argument, the Government
20 says that in a direct procurement program, these sort of
21 preferences that you're challenging are simply not used in
22 Colorado. You say they are. Do we simply have a factual
23 dispute here?

24 MR. PENDLEY: No, Your Honor. The evidence is
25 quite clear that the program still exists in Colorado.

1 There are a number of mechanisms -- the Government calls
2 them means; Adarand calls them tools or mechanisms -- by
3 which the Government implements this complex statutory
4 scheme that it has. It has monetary incentives, which
5 included the subcontracting compensation clause, which the
6 United States now asserts is turned off in Colorado as a
7 result of the benchmark studies.

8 But in addition --

9 QUESTION: You don't challenge those, as I
10 understand it.

11 MR. PENDLEY: Your Honor, Adarand has challenged
12 all manner in which the --

13 QUESTION: But they apply only in the State
14 subsidized programs, and you're -- you're claiming that
15 your challenge is limited to the Federal programs.

16 MR. PENDLEY: No, Your Honor. The monetary
17 incentives apply in the direct Federal procurement
18 program. In --

19 QUESTION: I thought -- I thought the monetary
20 incentives have been declared unconstitutional by the
21 district court, affirmed by the Tenth Circuit, and that's
22 out of the case.

23 MR. PENDLEY: Not at all, Your Honor.

24 QUESTION: -- what they call the
25 subcontracting --

1 MR. PENDLEY: Compensation clause, Your Honor.

2 QUESTION: Compensation clause? Didn't both
3 courts hold that that was unconstitutional?

4 MR. PENDLEY: What happened was that the -- the
5 district court held that the entire program, all of
6 section 8(d) of the Small Business Act, was
7 unconstitutional. The United States, on the 20th of June
8 of '96, asked the court to narrow its decision to include
9 only the subcontracting compensation clause. On the 23rd
10 of June, the district court declined.

11 At the Tenth Circuit Court of Appeals, the Tenth
12 Circuit held the district court was right as to the 1996
13 subcontracting compensation clause, but there was a new
14 subcontracting compensation clause now in place, and it
15 had been changed sufficiently.

16 QUESTION: The one that you were complaining
17 about last time around, that one has been held invalid.
18 Is that so?

19 MR. PENDLEY: It -- it -- Your Honor, it is the
20 same.

21 QUESTION: The Government hasn't challenged
22 that. Is that --

23 MR. PENDLEY: Excuse me. I don't understand.

24 QUESTION: The Tenth Circuit, I thought, said
25 that the clause that you were complaining about last time

1 around was invalid. It agreed with the district court to
2 that extent. The Government hasn't challenged that
3 determination. So, what you were originally complaining
4 about is now over and gone. Is that correct?

5 MR. PENDLEY: No, Your Honor, it is not correct.
6 The subcontracting compensation clause is still alive and
7 it still applies against Adarand. As this Court held in
8 Jacksonville, simply removing that selfsame program does
9 not allow the case to be moot. The -- the United States
10 is still implementing --

11 QUESTION: You just answered my question.

12 MR. PENDLEY: I'm sorry.

13 QUESTION: You said they -- they removed the
14 program.

15 MR. PENDLEY: No, Your Honor. They did not
16 remove the program.

17 QUESTION: I didn't ask you if the case was moot
18 or not because of it, but it's no longer what -- the
19 specific thing you were complaining about no longer
20 exists. Is that right?

21 MR. PENDLEY: It is not right, Your Honor.
22 Adarand continues to maintain the subcontracting
23 compensation clause is in place in Colorado. It is in
24 place in Colorado and it applies against Adarand.

25 QUESTION: If we disagreed with you on that, are

1 there other issues on which -- which are live and which
2 you have standing --

3 MR. PENDLEY: Absolutely.

4 QUESTION: And what are those?

5 MR. PENDLEY: Absolutely, Your Honor.

6 Your Honor, on the issue of standing or
7 mootness, this Court held in 1995 that Adarand had
8 standing, and as the Court said in its Adarand 2000
9 opinion, in the Adarand case and in the Laidlaw case, the
10 issue is now is not an issue of standing but one of
11 mootness. Has, indeed, the Adarand case been mooted?

12 It has not been mooted because the United States
13 in its tool bag of mechanisms by which it applies this
14 program -- it still has others.

15 To answer your question, Justice Kennedy, it
16 has, for example, the monetary -- the mandatory
17 subcontracting plans. These are plans that the United
18 States requires of contractors to adopt, and Adarand put
19 three of them in the lodging at tabs A, B, and C and on
20 through K of our -- Adarand's lodging in its reply brief
21 and which the United States, on three separate instances
22 since this Court ruled in Adarand 2000 -- where the United
23 States has used the mandatory subcontracting plans against
24 Adarand. And in fact, all three guardrail portions of
25 those three contracts were won by -- I'm sorry. It's in

1 -- it's in that yellow book, the big yellow --

2 QUESTION: Are these in --

3 MR. PENDLEY: -- lodging.

4 QUESTION: Are these provisions you just
5 mentioned in paragraphs 4 through 6 of 15 U.S.C. 637 --

6 MR. PENDLEY: Yes, Your Honor, they are. They
7 are --

8 QUESTION: That's -- those are the plans as to
9 which the court of appeals said in -- in one sentence, a
10 rather terse comment, nor are we presented with any
11 indication that Adarand has standing to challenge
12 paragraphs 4 through 6.

13 MR. PENDLEY: Well, as this Court said in
14 Adarand 2000, the courts and parties have been confused as
15 to the difference between standing and mootness, and the
16 Tenth Circuit was confused as to mootness and standing,
17 resulting in the Court's Adarand 2000 decision and it
18 appears to be still confused as to the two.

19 QUESTION: It -- it says that you have no
20 standing to attack these paragraphs that we've just
21 discussed, and -- and you don't challenge that in your
22 petition for certiorari or in your -- or in your opening
23 brief.

24 MR. PENDLEY: Well, Your Honor, we believe the
25 issue of standing is always before the Court. It was not

1 an issue -- it was not an issue in the original petition
2 in 1989. Yet, standing was addressed, as it properly is
3 always by the Court.

4 QUESTION: The issue of lack of standing is not
5 always before the Court. The Court -- the Court certainly
6 cannot render a judgment in a case where there is no
7 standing but where a party doesn't -- doesn't present any
8 -- any standing material, the Court is not going to go
9 looking to see whether, in fact, there is or not.

10 MR. PENDLEY: Well, Your Honor, the --

11 QUESTION: All the cases you're citing are cases
12 where both of the parties assumed standing and the Court
13 looked into it on its own. But -- but where -- where
14 standing has been denied below and -- and the party
15 doesn't come forward challenging that denial, I don't know
16 of any case where we say standing is nonetheless an issue.

17 MR. PENDLEY: Well, Adarand believes that
18 standing is under rule 14(a) is fairly included within the
19 questions presented because it was plain error for the
20 Tenth Circuit below to hold that Adarand did not have
21 standing because the Tenth Circuit below addressed the SCC
22 and yet declined to address the statutory program that
23 we're --

24 QUESTION: Mr. Pendley.

25 MR. PENDLEY: Yes, ma'am.

1 QUESTION: Did you challenge below the Small
2 Business Act provision, section 8(d)(4) through (6)?

3 MR. PENDLEY: Absolutely, Your Honor. In
4 Adarand's amended complaint on the 22nd of January of
5 1996, Adarand challenged all the statutes, all the
6 regulations, and all the contract provisions promulgated
7 as a result thereof.

8 QUESTION: Were -- were -- did Adarand bid on
9 contracts issued by States with Federal assistance?

10 MR. PENDLEY: Yes. Adarand has bid on State-
11 assisted or Federal-assisted State contracts --

12 QUESTION: Were they at issue in the suit?

13 MR. PENDLEY: It's not at issue in this case,
14 Your Honor.

15 QUESTION: So, the only thing that you now say
16 you're challenging are contracts -- direct contracts --

17 MR. PENDLEY: Yes, ma'am.

18 QUESTION: -- with the Federal --

19 MR. PENDLEY: Yes, Your Honor. It's the direct
20 Federal procurement program which remains unchanged.

21 QUESTION: And the Tenth Circuit seemed to think
22 that you did not challenge those Small Business Act
23 sections that I referred to.

24 MR. PENDLEY: Well, the Tenth Circuit was
25 absolutely incorrect. It's plain error for the Tenth

1 Circuit to reach that conclusion. The Tenth Circuit
2 looked at -- for example, this Court held that Adarand
3 challenged two things: number one, the financial
4 incentives; and number two, the statutory and regulatory
5 regimes, the racial presumptions that are their
6 foundation.

7 QUESTION: Can you cite us any filing in the
8 district court that specifically referred to section
9 8(d)(4)?

10 MR. PENDLEY: Yes, Your Honor. In -- on --
11 first of all, on the 20th of June of 1996, the United
12 States appealed to the district court and said Adarand
13 only challenged the SCC. It didn't challenge everything.
14 The district court denied that.

15 Then on the -- on the 19th of -- of August of
16 1998, the United States, in its appeal to the Tenth
17 Circuit, said the district court held that Adarand had
18 standing to challenge everything and -- and we don't think
19 that's true. In our --

20 QUESTION: Well, we have a joint appendix.
21 Could you refer us to the pages where you challenged
22 section 8(d)(4) through (6)? Can you say on page so and
23 so of the joint appendix, it shows that we did that?

24 MR. PENDLEY: Well, Your Honor, I -- I can cite
25 to the pleadings that Adarand filed in this case where

1 Adarand asserted that all parts of the program, all the
2 statutory provisions that allow this program to exist and
3 the United States to implement it, have been -- have been
4 challenged by Adarand.

5 QUESTION: What it says on --

6 QUESTION: Was there a separate question in your
7 petition for certiorari addressed to 8(d)(4) through (6)?

8 MR. PENDLEY: No, there was not a separate
9 question addressed to that, Your Honor.

10 QUESTION: They didn't say you didn't file it.
11 What the -- what the circuit said in footnote 32 on page
12 84 of your appendix, the parties have not addressed
13 paragraph (4) of section 8(d) at all, and because there is
14 no indication from the parties that Adarand has or will
15 bid for contracts governed by that paragraph's
16 requirement, we do not address it in great detail.

17 Now, I take it that the problem here is that
18 since that time, you have tried to get a contract and you
19 have tried to get a contract from a contractor who has in
20 the contract the very clause you're trying to attack.

21 If I'm right about that, what are we supposed to
22 do? The lower court didn't address the issue you want to
23 raise. The lower court thought you had no standing at
24 that time. You probably didn't have standing at that
25 time. You probably do have standing now. So, what is it

1 you suggest we do? Do we send it back to the lower court?
2 Do we dig the whole thing? Do we do something else?

3 MR. PENDLEY: Your Honor, Adarand had challenged
4 consistently -- first -- first of all, the subcontracting
5 compensation clause is one mechanism that the United
6 States developed to implement the statutory program that
7 Adarand challenges. Adarand challenges not just that tool
8 or mechanism by which it's implemented, but those statutes
9 that are used.

10 This Court held in Adarand 2000 that the
11 subcontracting compensation clause came directly out of
12 8(d)(4)(E). That was the holding of this Court in -- in
13 Adarand 2000. And so when the Tenth Circuit holds in the
14 footnote to which the Justice cited, that -- that the
15 parties have not discussed it, in fact there was no need
16 to discuss it because it was clear that this was the
17 mechanism by which -- this was the statutory mandate by
18 which the United States used the subcontracting
19 compensation clause against Adarand.

20 QUESTION: What's the answer to Justice Breyer's
21 question?

22 MR. PENDLEY: That Adarand had standing at that
23 time --

24 QUESTION: No. What are we supposed to do? He
25 gave you a premise and said, what do we do? Do we send it

1 back? Do we dig? Do we something else?

2 QUESTION: But -- but the premise was that you
3 had no standing at the time the court of appeals wrote
4 this decision. Do you agree with that premise?

5 MR. PENDLEY: I do not, Your Honor.

6 The reason Adarand does not agree with that
7 premise is because the Laidlaw decision holds that once
8 Adarand had standing, as a result of this Court's 1995
9 decision, that standing continued until such time as the
10 United States somehow made the case moot as the result of
11 the revocation of --

12 QUESTION: Well, I thought Laidlaw stood for the
13 principle that standing is judged as of the time the suit
14 is filed.

15 MR. PENDLEY: Yes, Your Honor.

16 QUESTION: And subsequent changes affect
17 mootness possibly, but not standing.

18 MR. PENDLEY: Yes, Your Honor.

19 QUESTION: Is that correct?

20 MR. PENDLEY: That's my understanding.

21 But -- so -- the question before the Court --

22 QUESTION: My question was not quite so
23 technical. It seemed to me that you're trying to raise a
24 serious issue and the fact is that the Tenth Circuit never
25 addressed it. Now, the reason that the Tenth Circuit

1 never addressed it is what they say; it's because you
2 didn't address section (4) -- subsection (4) of section
3 8(d). And they didn't address it because there was no
4 indication there would be any practical problem in the
5 future because you didn't -- they at time thought you
6 weren't bidding on the contract. Things have changed.

7 That's the premise of my question. It's not a
8 technical question. It makes that practical assumption
9 that's in paragraph -- in footnote 32. And so my question
10 was, what should we do?

11 MR. PENDLEY: Conclude that the Tenth Circuit
12 was wrong in stating what it stated in that footnote
13 because Adarand specifically challenged 8(d)(4).

14 QUESTION: Well, you raised it, but you surely
15 didn't address it. In fact, you didn't even address it in
16 your principal brief, and the Government has certainly not
17 addressed it in their -- in their principal brief because
18 everybody thought the fight was about these -- these new
19 regulations that -- that modify the -- the Subcontractor
20 Compensation Clause, rather -- rather than this other
21 clause.

22 Now, you may well have preserved the objection,
23 but the fact is it hasn't been discussed below and it has
24 barely been argued in the briefs here. Your reply brief
25 is devoted to it, but the Government's principal brief

1 certainly isn't.

2 MR. PENDLEY: Well, what -- what Adarand
3 addressed was the -- at the Tenth Circuit was the
4 constitutionality of this -- of this racial program, and
5 -- and there are a number of mechanisms by which the
6 racial program is implemented against Adarand. That flows
7 out of section (4)(d) -- section 8(d)(4) -- (4) to (6).

8 QUESTION: That's right, but all of those other
9 mechanisms the Government says in their brief have been
10 washed away by -- by the -- by the benchmark study
11 provision, which eliminates -- which eliminates the
12 difficulty. And in your reply brief, you do not contest
13 that. You simply say that despite the benchmark study,
14 there is still one other objection we have, and then --
15 and then you focus on the -- on the subcontractor
16 commitment requirement in -- in 8(d)(4).

17 MR. PENDLEY: It is one of the mechanisms by
18 which the United States continues to implement this --
19 this regime, this program.

20 QUESTION: And that wasn't discussed below and
21 had barely been discussed in the briefs here.

22 MR. PENDLEY: In addition, Adarand -- Adarand
23 noted that the benchmark study allows it to be turned on
24 and turned off, and it still can be turned -- turned on in
25 the State of Colorado.

1 QUESTION: But what do you mean by that, to be
2 turned on and turned off?

3 MR. PENDLEY: Well, here's what the -- pardon
4 me, Mr. Chief Justice.

5 Mr. Chief Justice, the United States asserts we
6 do these benchmark studies. We do them about once a year
7 and we decide where underutilization takes place.

8 Now, these benchmark studies don't comply with
9 Croson because they don't examine qualified, willing, and
10 able. They don't look at subcontracts, and -- and they
11 assume that racial disparity means racial discrimination.

12 But the United States says, in those States in
13 which there is not underutilization, we will not use some
14 of our mechanisms, like price evaluation adjustments and
15 other -- other monetary incentives. However, we retain
16 the ability to use the monetary -- excuse me -- the
17 mandatory subcontracting clause, as -- as Adarand has
18 pointed out in its lodging.

19 In addition, the United States reserves the
20 power to use these set-asides to achieve the goal.

21 QUESTION: You say they reserve the power. Does
22 that mean that in a State where they say -- like Colorado
23 where they say we're -- we're not using it, they -- they
24 nonetheless do use it or that they could later use it on a
25 different study?

1 MR. PENDLEY: That's -- that's what our lodging
2 demonstrates, Mr. Chief Justice. It demonstrates the
3 United States is today still using in Colorado the
4 mandatory subcontracting clauses. In addition, the United
5 States continues to use, as its 9 March memo points out,
6 the set-asides in Colorado, as well as the mentor protege
7 program. So, these -- these programs by which the United
8 States uses the racial preference program in Colorado --
9 those mechanisms still exist.

10 But tomorrow the United States, as a result of
11 an overdue benchmark study, could conclude, well, now
12 Colorado is into the underutilization category. These
13 monetary mechanisms go back on.

14 QUESTION: But to the extent that your -- your
15 answer, in effect, tells us that the controversy is live
16 and presented based on what you have in a lodging, you're
17 really asking us to make a -- a determination of fact in a
18 disagreement between you and the Government as to whether
19 they're being used or whether they're not being used. And
20 doesn't it make much more sense for us to send -- if
21 that's what the case is going to turn on, doesn't it make
22 much more sense for us to send it back to facts -- to
23 courts that engage in fact-finding and that will make that
24 determination on the basis of evidence as distinguished
25 from our making it on the basis of a lodging?

1 MR. PENDLEY: Well, the United States cannot
2 assert that it does not use the mandatory subcontracting
3 incentives because it's required by law. It's required by
4 8(d)(4) to (6).

5 QUESTION: It has asserted that. I mean --

6 QUESTION: That's what I thought they said in
7 their briefs.

8 QUESTION: Maybe -- maybe you say -- I mean, and
9 they have filed a memorandum from Arthur Hamilton, Federal
10 Lands Program Manager. Now, your assertion is that that
11 is not authorized by law.

12 MR. PENDLEY: I'm asserting that it violates law
13 and it violates the regulation. It violates 48 C.F.R.
14 19201. Your Honor, if you could hear me out on this.

15 On the -- on the 9th of March, the United States
16 was -- on the 24th of February, the United States was
17 invited by the Tenth Circuit to provide us additional
18 indication as to how this case is moot. On the 9th of
19 March, Mr. Hamilton wrote a memo, and he said, here's how
20 it's moot. We're not going to use the SCC in Colorado
21 anymore.

22 Now, of course, as of the 30th of June of '98,
23 apparently under the benchmark studies, they had stopped
24 using the SCC, but now all of a sudden on the 9th of March
25 of 2000, they say, well, now we're not going to use it

1 anymore.

2 So, Adarand comes forward to this Court and
3 says, it doesn't matter if they stopped using the SCC as
4 that 9 March memo shows, Your Honor, the United States
5 says, we'll use the requirements of the bar and we'll use
6 the set-aside. And then --

7 QUESTION: Mr. Pendley, may I ask you --

8 MR. PENDLEY: Your Honor, may I -- may I finish
9 this? I apologize. This is important to my case.

10 And so -- so, Adarand files this lodging and
11 says, wait, look, they're still using these FAR's and
12 they're hurting us.

13 And so, on the 24th of August, the United States
14 comes forward and says, oh, oh, wait, we've changed our
15 mind. Not only are we not going to use the SCC's, now
16 we're not going to use the FAR's either, even though on
17 the 9th of March we said we would use the FAR's.

18 But whether they've abandoned the FAR's and
19 whether they've abandoned the SCC, they are still using
20 the set-asides in Colorado. And, Your Honor, I don't
21 think the United States should be permitted to moot this
22 case by withdrawing this program on the eve of this
23 argument and -- and then allowed to reinstitute it as soon
24 as this Court --

25 QUESTION: Mr. Pendley, may I -- may I now ask

1 what is very important, I think, in this -- in this case?
2 And you seem to be walking away from it.

3 MR. PENDLEY: I apologize.

4 QUESTION: This Court is a court of review.

5 MR. PENDLEY: Yes.

6 QUESTION: Not a court of first view. The Tenth
7 Circuit isn't even a court of first view. To the extent
8 that you are arguing things that have occurred since the
9 last litigation, one would expect you to be in the
10 district court with the current controversy.

11 So, one question is, what do we have? What
12 lower court determination are we reviewing?

13 And the second is, what is the concrete
14 controversy that you have? Last time it was easy to see.
15 You bid on a certain contract. You were the high bidder,
16 and nonetheless you didn't get it. Now, what is the focus
17 of this case? It's no longer that contract because that
18 \$10,000 bonus is out of the picture.

19 MR. PENDLEY: Your Honor, the -- the controversy
20 Adarand presents in 2001 is that Adarand still is unable
21 to compete on an equal footing because the United States
22 still has in its tool of -- in its tool kit mechanisms by
23 which it is applying this racial preference against
24 Adarand. And it is a matter of mootness indifference
25 whether it is the -- the monetary incentives, the

1 mandatory subcontracting clause, the set-asides, or the
2 mentor protege program. The United States is still -- it
3 still has mechanisms. It's still using it against Adarand
4 notwithstanding its attempt to tell this Court --

5 QUESTION: Mr. Pendley.

6 MR. PENDLEY: -- that it's withdrawn those.

7 QUESTION: May I ask you just one question?

8 MR. PENDLEY: Yes.

9 QUESTION: I'd like you to just assume for a
10 minute that you're dead right on everything you've argued
11 so far. I'd like you to spend a minute or 2 explaining to
12 me why you think the program is unconstitutional.

13 MR. PENDLEY: Absolutely, Your Honor.

14 The first --

15 QUESTION: The specific provisions of the
16 statute that you challenge are unconstitutional.

17 MR. PENDLEY: Under strict scrutiny, the Court
18 must start, as Croson dictates, with the question, is
19 there a strong basis in evidence of a compelling
20 governmental interest? Congress declined this Court's
21 invitation, and generous invitation, in 1995 to provide
22 that. Instead, the Congress said, we'll leave it up to
23 the courts. We don't know, and furthermore, let's get
24 some information on this. Let's ask the General
25 Accounting Office to do a study.

1 That report from the General Accounting Office
2 is in.

3 QUESTION: Your first point is that the
4 congressional findings are inadequate.

5 MR. PENDLEY: There are no findings, Your Honor.
6 They asked the GAO, find something for us, find the facts.
7 And the GAO came back just like City of Richmond did in --
8 in the Croson case, and said, we don't know how many DBE's
9 there are. We don't know what market they're in. We
10 don't know if they're qualified, willing, and able, and we
11 don't know how many subcontracts they win. The GAO said
12 in its report the lack of information prevents anyone from
13 knowing the nature of this program. And that's at --
14 that's at page 6, 26, and 27 of Adarand's petition
15 appendix -- or merits appendix.

16 The second reason it's unconstitutional, Your
17 Honor, is simply because it's not narrowly tailored. It
18 presumes that all people of certain racial groups are
19 socially and economically disadvantaged and entitled to
20 the benefits of the program without any individualized
21 findings. There are no time requirements. It's ageless
22 in its ability to reach into a person's past. Timeless in
23 its ability to affect their future. There's no severity
24 requirements. There's no in-the-USA requirements. No
25 other construction industry requirements. And nothing

1 removes the taint from an individual, not winning a Nobel
2 Peace Prize, not election to the U.S. Senate, and not
3 graduating magna cum laude from the Wharton School of
4 Business at the University of Pennsylvania. Nothing
5 removes the taint. And that lack of individualized
6 finding requirement demonstrates it's not narrowly
7 tailored.

8 And the regulations can't save it because the
9 agency has admitted on the 30th of June of '98, we can't
10 separate the social and economic -- social and economic
11 determinations, one from the other, because that violates
12 the intent of Congress.

13 Mr. Chief Justice, may I reserve my time?

14 QUESTION: Very well, Mr. Pendley.

15 General Olson, we'll hear from you.

16 ORAL ARGUMENT OF THEODORE B. OLSON

17 ON BEHALF OF THE RESPONDENT

18 QUESTION: General Olson, if -- if counsel for
19 the petitioner is correct, it would be fair to infer
20 there's a certain amount of bobbing and weaving going on
21 on the part of the Government in this case. Would you
22 address that somewhere in your --

23 MR. OLSON: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 I certainly will. I believe there has been no

1 showing of any bobbing and weaving of any sort on the part
2 of the Government here.

3 What we have, first of all, the Subcontractor
4 Compensation Clause is no longer a part of this case. To
5 the extent that Adarand had standing with respect to it,
6 that provision of the law was declared unconstitutional.
7 The Government has not challenged that provision. That --
8 there is no evidence in this record that that provision is
9 being used with respect to Adarand at all.

10 With respect to the --

11 QUESTION: And that was the provision that was
12 the focus of the original suit?

13 MR. OLSON: Yes, Justice O'Connor.

14 Now --

15 QUESTION: Well, cannot those under -- under the
16 amended statute, cannot some additional compensation be
17 provided but subject to the new regulations?

18 MR. OLSON: Well, if we distinguish between that
19 the Federal aid program and the direct Federal procurement
20 program and the Subcontractor Compensation Clause the
21 United States Government has abandoned in all respects,
22 those provisions have not been justified, and the United
23 States Government is not employing those.

24 With respect to the clauses --

25 QUESTION: You're not employing them on what

1 basis?

2 MR. OLSON: On the basis that -- that they've
3 been determined to be unconstitutional. And the United
4 States is not pursuing that.

5 Now, what -- where the bobbing and weaving has
6 occurred is, as this Court has identified, Adarand has
7 changed its position. It now has decided to challenge the
8 subcontractor clause provisions of the direct procurement
9 actions by the Department of Transportation. But as this
10 Court noted and -- and the Tenth Circuit specifically
11 held, there was no indication that Adarand at the time was
12 challenging those provisions or that Adarand has or will
13 continue to bid for contracts or subcontracts covered by
14 those paragraphs, the race-conscious provisions of those
15 paragraphs.

16 QUESTION: Those provisions were specifically
17 mentioned in Adarand's amended complaint.

18 MR. OLSON: They were mentioned.

19 QUESTION: Specifically mentioned.

20 MR. OLSON: The challenge was to the
21 compensation clause provisions. All of the litigation, up
22 to the point of the reply brief in this Court, had to do
23 with the subcontracting compensation provisions which are
24 not -- no longer in this case.

25 The clause that Adarand now challenges cannot be

1 and is not being applied in the areas in which Adarand
2 does business pursuant to --

3 QUESTION: Well, it certainly didn't come as
4 late as the reply brief, Mr. Olson. The -- the petition
5 for certiorari says the following, that the Government is
6 -- is favoring these racial minorities -- this is on page
7 2 of the petition for certiorari -- through a combination
8 of compulsion and incentives. As to compulsion, the
9 statutes require every private prime contractor, on
10 penalty of being ineligible to win Federal contracts, to
11 establish and adhere to a plan to try to hire DBE's as
12 subcontractors.

13 MR. OLSON: The --

14 QUESTION: That is precisely the issue that --

15 MR. OLSON: It was -- it was mentioned in -- at
16 the beginning of the brief and not addressed -- those
17 provisions were not addressed in the arguments of the
18 brief.

19 But, more importantly, pursuant to the
20 Department of Justice guidelines issued in 1996, those
21 race -- any race-conscious provisions in the statute may
22 not be applied in any area of the country unless they're
23 justified by the Department of Commerce benchmark study
24 that shows a disparity in effect in those districts. The
25 Department of Commerce made its study, and in all but

1 eight States, which do not include Colorado, those
2 measures have been ruled out of bounds, and they're not
3 being applied. And the Department of Transportation has
4 confirmed that.

5 QUESTION: But are the benchmark studies
6 conducted every year?

7 MR. OLSON: They're to be conducted every year,
8 but they're not actually being conducted that -- that
9 often.

10 QUESTION: What does that mean?

11 (Laughter.)

12 MR. OLSON: Well, it's one of those -- one of
13 those Government programs that it is hoped will be
14 conducted more often than they actually get conducted,
15 Chief Justice Rehnquist.

16 (Laughter.)

17 QUESTION: But a new benchmark study could find
18 that Colorado was subject to --

19 MR. OLSON: Well, it's conceivable, yes. That's
20 -- that's entirely possible. But there is no evidence
21 that that will occur. There is no evidence that that is
22 likely to occur. That is not usual.

23 QUESTION: Well, there -- there is evidence that
24 Adarand is working in a context where regulations are
25 changing year to year in order to effect the one -- this

1 one goal, to which it -- it claims there is a substantial
2 doubt in --

3 MR. OLSON: There is no evidence in this record
4 that the subcontract clause provisions, which Adarand is
5 now discussing, have been applied ever in Colorado or in
6 those States precluded by the benchmark study.

7 QUESTION: What is the basis for not applying
8 them, Mr. Olson? That -- that's what puzzles me. What
9 possible basis is there for the Government not to apply
10 them? They are required by the statute.

11 MR. OLSON: Well, and also they are required by
12 the holdings of this Court to apply and interpret that
13 statute in a constitutional fashion. Precisely what this
14 Court discussed in Adarand is to implement whatever
15 programs it has in a narrowly tailored fashion.

16 What the Department of Justice did, after this
17 decision in Adarand, is enter into a lengthy study,
18 determined that race-conscious programs or provisions of
19 Federal statutes could not be applied in ways that were
20 not narrowly tailored, responding directly to this Court's
21 guidance. As a result of that, the Department of Justice
22 study indicated that they would only be applied -- only --
23 even at the outset -- in areas where there was evidence of
24 the direct effects of discrimination in Federal
25 contracting.

1 The Department of Commerce thereafter conducted
2 a study, did not find these disparate impact in terms of
3 effects of discrimination in the areas in which Colorado
4 exists. In fact, in 42 -- 42 States. And as a result of
5 that, the Department of Transportation has not used and
6 has not employed the -- the race-conscious provisions of
7 those clauses in those areas.

8 QUESTION: Well, Mr. Olson, does -- are those
9 clauses covered by section 8(d)(4) through (6)?

10 MR. OLSON: Yes.

11 QUESTION: And I thought that Mr. Pendley argued
12 that, in fact, in Colorado some of those provisions have
13 been and are, in fact, now in contract forms.

14 MR. OLSON: They are in the contract forms, but
15 the Department -- that is again another carryover of
16 instances where they probably should be removed from the
17 contract forms, but they're not being implemented or
18 enforced to impose any race-conscious remedy --

19 QUESTION: Well, why wouldn't the -- why
20 wouldn't the --

21 QUESTION: But they're in there.

22 QUESTION: -- contractor have standing to say
23 that I'm contracting, I'm trying to business in a milieu
24 where the Government has, through either prior or existing
25 policies, required contractors to put in clauses that

1 injure me, and I want those clauses removed so that I can
2 do business on a fair basis?

3 MR. OLSON: Well --

4 QUESTION: And he has standing to say that now.

5 MR. OLSON: Well, he -- well, in the first
6 place, the three contracts that were mentioned in the
7 reply brief -- Adarand was not the high bidder in those
8 three contracts. And Adarand has not alleged --

9 QUESTION: High bidder or low bidder?

10 MR. OLSON: I mean the low bidder. Excuse me.
11 In fact, in the submission that it -- that it put before
12 the Court --

13 QUESTION: So, despite all these years of
14 litigation, he still has to litigate bid by bid.

15 MR. OLSON: Well, he has got to demonstrate --
16 as I understand this Court's holdings with respect to
17 standing, he's got to show some immediate impact or the
18 potential for actual harm. Now, what is -- the Department
19 of Justice has said race-conscious remedies will not be
20 applied in these areas. The Department of Commerce has
21 delineated the areas. The Department of Transportation
22 has again, on August 24th as submitted to this Court, made
23 it absolutely specific that it is the policy of the
24 Federal Highway Administration that separate percentage
25 goals shall only be required in those areas where the --

1 QUESTION: Well, all of this is new since the
2 Tenth Circuit looked at it.

3 MR. OLSON: Yes.

4 QUESTION: What are supposed to do now, please?

5 MR. OLSON: This case --

6 QUESTION: I mean, these are new things the
7 Government is presenting.

8 MR. OLSON: Well, no, no. What the Government
9 has said in this August 24 memorandum is entirely
10 consistent with what the Department of Justice guidelines
11 require and what the Department of Justice and -- and the
12 Department of Transportation has been saying all along.
13 To the extent that those provisions appear in the
14 contract, this -- this document, that was issued on August
15 24, says contracting officers shall disregard those goals
16 in --

17 QUESTION: That's fine, but they're still in the
18 contracts. I'm a contractor and I have signed a contract
19 that says I will make these special provisions for
20 minority firms, and I will -- I will try to get these
21 goals. And I know that I'm subject to penalties if -- if
22 I do not make a, quote, good faith effort. Have letters
23 gone out to those contractors that say, hey, forget about
24 it? No. No letters have gone out. You just come up and
25 tell us, oh, the Government won't enforce that. I --

1 MR. OLSON: Justice --

2 QUESTION: I don't think that that's adequate
3 assurance to those -- to those companies who are competing
4 for -- for contracts where -- where the prime contractor
5 has signed a commitment to get a certain -- a certain goal
6 of -- of minority participation.

7 MR. OLSON: The -- the Department of
8 Transportation and the Department of Justice have
9 consistently adhered to the provision that those race-
10 conscious provisions will not be enforced in the direct
11 procurement program in these areas. And there's no
12 evidence that they ever have been.

13 QUESTION: Have they told -- have they told the
14 contractors and subcontractors?

15 MR. OLSON: Yes, they have, and they
16 reaffirmed --

17 QUESTION: Where was that?

18 MR. OLSON: Well, this -- this memorandum --

19 QUESTION: This went out to Federal Lands
20 Highway Division engineers. We have no indication that
21 the people who signed these commitments have been put on
22 notice that these commitments do not -- do not bind
23 anymore.

24 MR. OLSON: Well, Justice Scalia, it strikes me
25 -- and I -- I respectfully submit that -- that you're

1 switching it around. It seems to me that Adarand has the
2 responsibility to suggest or demonstrate to this Court
3 that it's actually being hurt or that there is some
4 evidence that -- that race-conscious decisions are being
5 made in the contracting process. And Adarand has not
6 demonstrated, with respect to even the three contracts it
7 mentioned, that it was the low bidder.

8 QUESTION: Do you think that for a single minute
9 if these clauses required racial discrimination, an
10 absolute clear, patent violation of the Fourteenth
11 Amendment, that we would say there's no standing for a
12 minority who wanted these removed? Not for a single
13 minute.

14 MR. OLSON: Well, I -- I wouldn't contradict
15 that, but I would say when the Government has made it
16 absolutely clear that it is not enforcing race-conscious
17 remedies, as instructed by this Court in the first Adarand
18 decision, except in a narrowly tailored fashion, and
19 there's been subsequent legislation of a compelling need,
20 but that that response to that compelling need has been
21 narrowed down to the areas where it is necessary and --

22 QUESTION: But the provision hasn't been removed
23 from the contract.

24 MR. OLSON: The provision was not removed in
25 some of those contracts, and I -- I can't tell this Court

1 how many. But it is -- it is explicitly clear and there
2 is no evidence to contradict that they're not being --
3 those race-conscious provisions are not being enforced
4 with respect --

5 QUESTION: If they were being enforced, do you
6 agree that Adarand has standing to -- to challenge it?

7 MR. OLSON: If they were being enforced and
8 Adarand could suggest that it was somehow affected by
9 that. And it has not been able to do that either because
10 with respect to the three contracts, its own lodging --
11 and I would refer the Court in part to C1 of tab M in the
12 yellow -- the first volume of the yellow submission, which
13 is a sheet in which -- this is the Adarand submission.
14 And tab M refers to one of those contracts, just as an
15 example. And it says in that document -- this is an
16 Adarand document -- who was awarded the work we bid? And
17 then it circles the company who was awarded the bid. If
18 not us, why not? And it's scribbled in here from Adarand,
19 we were not high -- we were high. Excuse me.

20 QUESTION: They were the high bidder.

21 MR. OLSON: They were the high bidder and
22 therefore they didn't get the contract because they were
23 -- were not the low bidder. And that's true if -- it
24 takes a little bit of combing through the record, but it's
25 demonstrably true with respect to those other two

1 contracts as well.

2 QUESTION: And -- and you think they're --
3 they're not at risk of that happening in -- in other
4 contracts when these provisions still exist in the
5 contract clauses and all we have is -- is your assurance?

6 If I were the prime contractor, I'd say, I
7 better not take a chance. I understand that there is
8 somewhere floating around the Government a memorandum that
9 says that they won't enforce this, but I've never been
10 told about it.

11 MR. OLSON: It's -- it's -- well, Justice
12 Scalia, it has been the documented, articulated policy of
13 the -- since the Department of Justice study. The
14 guidelines went out to all Federal agencies not to employ
15 these programs, except under certain conditions. The
16 Commerce Department implemented that decision, and there's
17 no evidence to the contrary.

18 QUESTION: What programs? Let's -- let's be
19 clear about what programs we're talking about. I
20 understand that at an early date we said until these
21 studies are done and -- and the studies show no
22 underutilization, the compensation and the other two
23 programs would -- would not be used. But as far as I
24 know, the first indication that the contracting commitment
25 would not be used is this memorandum of August 24, 2001.

1 Is -- is there any earlier memorandum?

2 MR. OLSON: Well, if you look at the
3 Government's --

4 QUESTION: Dealing with the contracting clauses.

5 MR. OLSON: No. But the -- what there is is a
6 Department of Justice requirement imposed upon all Federal
7 agencies not to employ race-conscious remedies in those
8 areas --

9 QUESTION: When -- when was that memorandum?

10 MR. OLSON: That was in 1996.

11 QUESTION: Well, but why, if that went out in
12 1996, was it necessary to have this memorandum in the
13 summer of 2001, if that had -- if the earlier one had any
14 effect?

15 MR. OLSON: Well, it -- well, the memorandum in
16 August of -- of 2001 reiterates the policy that the
17 Department of Transportation had been operating under.

18 QUESTION: Would you read me the '96 one? I
19 think it's -- it's pretty clear to me that the '96 one did
20 not cover the contracting requirement. It just covered
21 the other three programs.

22 MR. OLSON: I don't agree with you. I -- I --

23 QUESTION: Where is it? Where is it?

24 MR. OLSON: I can't -- I can't give you cite to
25 the record, but the -- the Department of Justice memoranda

1 is in the Government's appendix. It's a -- it's a lengthy
2 document, and it makes it clear that race-conscious
3 remedies cannot be used except in those areas subject to
4 the Department of Commerce benchmark study.

5 QUESTION: Is there another reason here why it
6 doesn't apply and that is -- and I read this somewhere --
7 that Mountain Gravel is itself a small business and for
8 that reason the clause wouldn't apply in any event?

9 MR. OLSON: It would not have applied in 1989
10 when this case first arose. The -- that's -- that's a
11 very good point, Justice Souter. When this case first
12 arose, Mountain Gravel was not -- was a small business
13 enterprise itself. At the appendix to the Government's
14 brief at pages 202 to 203 to 204, the actual contract is
15 listed. The box is checked, are you a small business
16 enterprise. That's checked. And then on the page which
17 contains the subcontractor -- subcontracting clause
18 itself, the language in there specifically says, this
19 shall not apply to small business concerns. Now --

20 QUESTION: Why is it -- why is it then that --
21 that what they say in the first three pages of their reply
22 brief, for example, is that they have to -- they want to
23 get a sub under a prime, that the Weenomunch Construction
24 Authority got the prime. And they got the prime contract
25 on August 27, 2001. And when they got the contract, they

1 looked up the requests for bid, and in the request for
2 bid, there was an appendix. And in that appendix, it gave
3 an example of just what the prime had to have. And one of
4 the things the prime had to have was a promise that it
5 would use its best efforts to try to get subs awarded to
6 small business -- disadvantaged small businesses. So,
7 they're saying at least on that one, we saw right in the
8 contract -- that we saw right -- right there the kind of
9 thing that you say doesn't exist.

10 MR. OLSON: Well, as I say, they were not the
11 low bidder on that contract. They weren't
12 disadvantaged --

13 QUESTION: All right, but they're saying --

14 MR. OLSON: -- by that contracting situation.

15 QUESTION: -- give you three examples, you know.
16 We're a guardrail company and we're going to go and we're
17 going to bid again and again and again. And the last
18 three all have these examples in it, which you say I
19 wouldn't have gotten anyway, but maybe in the future we'll
20 get it anyway.

21 MR. OLSON: Well, all I can say is that the
22 Government has announced its policy, and there's no
23 evidence in the record that it's acted inconsistently with
24 any application of race-conscious remedies in the area in
25 which Adarand --

1 QUESTION: So, we have just a mistake possibly,
2 the appendix C. But if that's -- if that's so, do you
3 think we should just send this back to the Tenth Circuit
4 and say, okay, you sort it out?

5 MR. OLSON: This --

6 QUESTION: They say they're facing these clauses
7 all the time. You say they're absolutely not facing them.
8 Colorado isn't a place where this is appropriate. And
9 that's the end of it, and let them sort it out.

10 MR. OLSON: Well, I think it's very important to
11 emphasize that this is a facial challenge to the statute
12 and to the system. And this Court has consistently said
13 that unless there are no set of circumstances under which
14 the regulation and the statute could be enforced on a
15 constitutional matter -- that's the Salerno case.

16 QUESTION: But what's -- what's a facial
17 challenge in -- in this context? I mean, it seems to me a
18 lot of the questioning here and to Adarand's counsel has
19 been to show that Adarand was directly affected by the
20 thing. And so, I -- I don't think you're really talking
21 about a facial challenge in the sense we use that in the
22 First Amendment.

23 MR. OLSON: I -- I respectfully disagree with
24 respect to whether Adarand was adversely affected by the
25 program. They have not demonstrated that they lost a

1 single contract as a result of -- of the provisions which
2 they're -- which they've decided now to challenge.

3 QUESTION: Well, they certainly in -- in the
4 case we first -- we first decided, the 1995 case -- we
5 decided that they -- they were sufficiently affected, so
6 we ruled.

7 MR. OLSON: Yes, and they were affected by --
8 we're not contending that they did not have standing to
9 challenge that subcontracting compensation provision.

10 QUESTION: It challenged that financial
11 compensation provision.

12 MR. OLSON: Yes.

13 QUESTION: Which now has been found to be
14 unconstitutional.

15 MR. OLSON: Yes.

16 QUESTION: And it's out of the picture.

17 MR. OLSON: That's correct.

18 QUESTION: But now we have a new set of
19 arguments basically.

20 MR. OLSON: Yes, and -- and to the extent that
21 -- that the program, as it exists, requires people to --
22 in order to be designated as a disadvantaged business
23 enterprise, must file certificates articulating that they
24 have been the victim of a social and economic
25 disadvantage.

1 QUESTION: What does that mean?

2 MR. OLSON: Well, it's defined in the statute.

3 QUESTION: I -- I could probably certify to
4 that.

5 QUESTION: For yourself?

6 QUESTION: Yes, absolutely. I mean, it depends
7 what you mean by social or economic --

8 MR. OLSON: Well, it's --

9 QUESTION: There are country clubs I couldn't
10 get into.

11 (Laughter.)

12 MR. OLSON: It's -- it's explained in the
13 statute both with respect to ethnic and racial prejudice
14 because of their identity as a group without regard to
15 individual qualities, and that economic disadvantage --
16 the ability to compete in the free enterprise system has
17 diminished capital and credit opportunities as compared to
18 others in the same business area --

19 QUESTION: Either -- either social or economic,
20 even though the social would -- would be quite irrelevant
21 to whether you can --

22 MR. OLSON: Both -- well, that's a social -- the
23 use of the term in the statute described a victim of -- of
24 prejudice or bias, and that has had economic effect on the
25 individual. Both of those points are required. The

1 regulations themselves --

2 QUESTION: I think the form is attached to the
3 reply brief of the --

4 MR. OLSON: No. That -- that form is a --

5 QUESTION: That is not the right form?

6 MR. OLSON: That is not the right form. There
7 is a -- that's a -- that's a part of a notice of proposed
8 rulemaking. That form has never been adopted . I'm --
9 I'm reasonably confident that it never will be adopted.

10 The -- the regulations which explain in further
11 detail social and economic disadvantage are contained --

12 QUESTION: I'm just saying if this isn't the
13 right form, what is? The form has not yet --

14 MR. OLSON: The forms -- the different States
15 use different forms. There's no uniform form. But the
16 regulations explain --

17 QUESTION: But apparently what -- what the
18 agency proposed -- proposed on May 8th, 2001 -- simply
19 says, I hereby certify that I am a member of one of the
20 following groups -- you check the minority group -- and
21 that I have held myself out as a member of that group. I
22 further certify I am an owner of a company seeking DBE
23 certification and that I have experienced social
24 disadvantage due to the effects of discrimination based
25 upon my -- check all that apply -- race, ethnicity,

1 gender, other. Print name, signature, date.

2 MR. OLSON: But that is --

3 QUESTION: That's what the agency said. Let's
4 float this. Maybe this is what we'll adopt. Right?

5 MR. OLSON: But the -- but the -- but that has
6 to be looked at in terms of the -- what the statute
7 defines as social and economic disadvantage and what the
8 regulations, which are in -- at pages 70 to 72a of the
9 Government's appendix, which define -- which -- which are
10 the regulation -- Department of Transportation
11 regulations. And it's a -- it's a rebuttable and
12 challengeable position, Justice Scalia. It has to be
13 signed before a notary. The agency --

14 QUESTION: Well, how would one go about
15 rebutting it? I mean, who could rebut it and how would
16 you go about it?

17 MR. OLSON: Any adversely affected party can
18 rebut it. The State may challenge it. In fact --

19 QUESTION: But, I mean, what -- what would you
20 have to show to rebut it?

21 MR. OLSON: Well, what you have to show to be
22 entitled to certification, according to the regulations,
23 is substantial and chronic social disadvantage in the
24 business world and that -- and that credit has been
25 impaired due to diminished capital or opportunities have

1 been impaired due to diminished capital and credit
2 opportunities, as compared to others in the same or
3 similar line of business. I submit --

4 QUESTION: Social disadvantage in the business
5 world. What is that?

6 MR. OLSON: Social -- social disadvantage,
7 Justice Scalia, is defined in the statute as having been a
8 victim of racial or -- or prejudice of that nature, and
9 that it has produced economic disadvantage based upon --

10 QUESTION: You say just two opposite things on
11 this economic disadvantage. You say in your brief that
12 they -- you have to sign an affidavit that says my ability
13 to compete in the free enterprise system has been impaired
14 due to diminished capital and credit opportunities. Then
15 you say, moreover, if you have more than \$750,000 net
16 worth, you're out of it. You can't qualify.

17 They say something completely different. They
18 say that if you have less than \$750,000, you -- you
19 automatically qualify. So, that in fact, despite those
20 words, all that you have to say is I have less than
21 \$750,000. That's the end of it. You qualify. You say,
22 no, that isn't so at all. You're out if it's over --
23 which is right?

24 MR. OLSON: Well, I believe that we're correct.

25 (Laughter.)

1 MR. OLSON: Once you -- once you --

2 QUESTION: That's the right answer.

3 (Laughter.)

4 MR. OLSON: And I hope I said it persuasively.

5 (Laughter.)

6 MR. OLSON: I think the regulations are
7 relatively clear. Once you've reached a certain plateau
8 of economic category, you're out. And these -- these
9 certifications are -- again, the regulations explain the
10 State must conduct a relatively careful investigation of
11 applications for certification. In fact, I understand --
12 it's not in the record, but I understand in the last 12
13 months in Colorado, out of 160 applications, only 65 or --

14 QUESTION: So, your point, to be absolutely
15 explicit, is if you are below the plateau, \$750,000, you
16 still might not qualify as being economically
17 disadvantaged.

18 MR. OLSON: That's correct. That's our
19 position. And I -- and I don't -- well, that is our
20 position. I don't understand the analysis that would come
21 out the other way because I think the statute is
22 relatively clear with respect to that.

23 The -- the -- so, the -- in the first place, the
24 certification process requires someone asserting under
25 oath, because that -- that affidavit requirement is there,

1 that subject to challenge -- Adarand itself said in its
2 cert petition in the most recent case before this one that
3 it was not prepared to sign a certification about social
4 and economic disadvantage because it was afraid of being
5 prosecuted for fraud, perjury, and disbarment charges and
6 things of that -- that sort. So, there's plenty of
7 evidence that people take these things seriously, that the
8 statutory threshold and the regulatory threshold must be
9 met. It may be challenged by people. There are field
10 procedures in place and so forth. So, that's another step
11 of the narrow tailoring requirement that takes place with
12 respect to this process.

13 So, we submit that with respect to the subject
14 of a compelling governmental interest, this Court
15 addressed that very point in its first Adarand decision,
16 and -- and made it clear in the last paragraph of part
17 3(d) of that opinion that the unhappy persistence of both
18 the practice and lingering effects of racial
19 discrimination against minority groups in this country is
20 an unfortunate reality.

21 QUESTION: Well -- but when you get to that,
22 General, you have this list of people. You know, some by
23 culture, you know, people from the Northern Marianas,
24 Macau, Fiji, Tonga, Kiribati, Tuvalu, Nauru, the Federated
25 State of Micronesia, Hong Kong. How did all -- what

1 studies put all those --

2 MR. OLSON: Well, in the first place, there's
3 about 30-some years of study by Congress of disadvantage
4 and discrimination, which this Court recognized in
5 Fullilove and in Croson and in Adarand, that is taking
6 place in the contracting industry. Those -- those
7 categories --

8 QUESTION: The people from Macau were
9 discriminated in the contracting --

10 MR. OLSON: People -- people of a certain racial
11 background and a certain color are discriminated against
12 and those --

13 QUESTION: But -- but this thing just sets it
14 out in great detail by country.

15 MR. OLSON: Well, I -- I submit that when you --
16 if you were to describe different people of different
17 national backgrounds or racial backgrounds that have been
18 guilty of discrimination, they may fall in any of those
19 categories. They may come from a certain country in
20 Africa or -- or a certain country in Southeast Asia or a
21 certain Hispanic community. That doesn't change the fact
22 that what the racial discrimination is has been on the
23 basis of the characteristics of skin and nationality, of
24 which those are simply subgroups.

25 QUESTION: Well, but -- but they aren't. It's

1 only those subgroups that get the preference. In -- in my
2 experience, racial discrimination is usually stupid enough
3 that it's not that reticulated --

4 MR. OLSON: Well --

5 QUESTION: -- that you discriminate against
6 people from Gabon but -- but not from the next-door
7 country. That -- that's weird.

8 MR. OLSON: Well, what -- what the Congress said
9 over and over again, on the basis of detailed analytical
10 studies which are -- which are described in considerable
11 detail in the -- in the court of appeals opinion, and what
12 this Court has said is that there has been the lingering
13 effects, unfortunately, of publicly financed
14 discrimination in the construction industry.

15 What you're referring to, Justice Scalia, is an
16 effort by the Government. Now, we have all three branches
17 of Government recognizing a significant, serious problem
18 that Government has a responsibility to address. What the
19 -- what the executive branch did with respect to the
20 regulations in its programs is put a number of measures in
21 to attempt to meet the very points that this Court
22 suggested that are ways to narrowly tailor the remedy,
23 which is certainly something that the Government has a
24 responsibility to do, to make sure that only individuals
25 that fall into cases where there's actual -- actually been

1 discrimination are the beneficiaries and limits on the
2 program to make sure that it does not go to a broader area
3 or longer temporally than it should.

4 I submit that what we have here is the executive
5 branch attempting to respond to a legitimate serious
6 problem that all three branches of Government have been
7 concerned about in a highly responsible way. And in the
8 face of a facial challenge, it cannot be said that there
9 are not ways that this -- these regulations can be
10 implemented in a constitutional fashion.

11 And therefore, to the extent that there is a
12 facial challenge, the petitioner has not met, by any
13 stretch of the imagination, its burden. If anything, this
14 case should be dismissed as improvidently granted, but if
15 the Court rules on the merits, these programs are
16 constitutional against a facial challenge.

17 QUESTION: Thank you, General Olson.

18 Mr. Pendley, you have 5 minutes remaining.

19 REBUTTAL ARGUMENT OF WILLIAM P. PENDLEY

20 ON BEHALF OF THE PETITIONER

21 MR. PENDLEY: Mr. Chief Justice, may it please
22 the Court:

23 First of all, the -- the Department of Justice
24 guidelines, the proposed reforms have never gone final.
25 They were put out in 1996. They have never been

1 implemented in the direct Federal procurement program.

2 Secondly and relatedly, they have been
3 implemented to some degree with regard to the State aid
4 programs, but that case isn't at issue here.

5 Thirdly, the Court held in Jacksonville --

6 QUESTION: How do we know they haven't been
7 implemented? The -- the Solicitor General tells us they
8 have.

9 MR. PENDLEY: The -- the Government concedes,
10 with regard to the State aid program, that that's not at
11 issue in this -- in this case, and that's in the
12 Government's responsive brief. However, the -- the
13 proposed reforms -- one need only look at the small
14 business regulations at 13 C.F.R. and also the -- the bar
15 regulations at 48 C.F.R. Those are unchanged with regard
16 to this race-neutral approach that the -- that the United
17 States is talking about.

18 In the -- in the Jacksonville case, what is
19 necessary for Adarand to show is its inability to compete
20 on an equal footing, the back end. That's what this Court
21 held in 1995, and it is still unable to compete on an
22 equal footing because of these very -- various programs
23 they have in place.

24 In the City of Jacksonville, the Court -- this
25 Court refused to permit the City of Jacksonville to remove

1 a program and submit a new program. And this Court said,
2 you don't need to have the selfsame program to maintain
3 your challenge.

4 The Government can't simply change the program,
5 play this little shell game, and deny this Court
6 jurisdiction. This isn't even removing the whole program.
7 This is simply changing the mechanism by which it is
8 applying it and saying, well, we're not using that bad,
9 old SCC anymore, but we have this other bag of tricks that
10 we're -- we're going to utilize.

11 The -- the Court is absolutely right. These
12 contractors out there are on pain of loss of serious money
13 if they don't comply with these mandatory subcontracting
14 plans. The term is liquidated damages. In one contract,
15 this guardrail subcontract, it was \$105,000. If that
16 prime does not issue that contract to a DBE, he loses that
17 \$105,000. The United States takes it from him.

18 This is both a facial and an as-applied
19 challenge. We have made that clear consistently. We say
20 the statute is unconstitutional on both.

21 And finally, let me draw the Court's attention
22 to the subcontracting decision by the Tenth Circuit. It's
23 at page 70 to 71 of Adarand's petition appendix. And
24 therein, the Tenth Circuit makes it very clear there used
25 to be a bad, old SCC in 1996. That isn't there anymore.

1 We have a brand new SCC that's been changed and it won't
2 be quite so -- quite so non-narrowly tailored. But there
3 still is an SCC in place.

4 And finally, Your Honor, the United States told
5 this Court that the benchmark study is overdue, and I know
6 in my bones, as I know that this case has gone on forever
7 by the United States' effort to make it go on forever and
8 with broad jurisdiction from this Court, that the day this
9 case ends is the day the benchmark study comes out, and
10 suddenly and miraculously Colorado is back in the
11 underutilized category and all these mechanisms apply.

12 I think it's incredibly amazing that on the 9th
13 of March of 2000, the man in charge of this program said,
14 don't use the SCC, continue to use the FAR and its
15 mandatory subcontracting plans, and that 2 weeks before we
16 filed that lodging that showed all those mandatory
17 subcontracting plans, suddenly his instruction from the
18 9th of March of 2000 was withdrawn and said, wait, wait,
19 don't use the mandatory subcontracting plans out of the
20 FAR. Use the set-asides instead. And whether they call
21 it the set-aside or the mandatory subcontracting plans or
22 the subcontracting compensation clause or the price
23 evaluation adjustments, Adarand is still denied that equal
24 footing this Court found in 1995.

25 I urge this Court to reach this case on the

1 merits because the day this Court says it's moot is the
2 day Adarand gets standing again because it loses another
3 contract because this program is applied in Colorado, and
4 Adarand will start this sad process again.

5 Thank you for the Court's indulgence.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Pendley.

8 The case is submitted.

9 (Whereupon, at 11:00 a.m., the case in the
10 above-entitled matter was submitted.)

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