IN THE SUPREME COURT OF THE UNITED STATES

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ADARAND CONSTRUCTORS, INC., :

Petitioner :

v. : No. 00-730

NORMAN Y. MINETA, SECRETARY OF :

TRANSPORTATION, ET AL. :

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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.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

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

Mr. Pendley.

ORAL ARGUMENT OF WILLIAM P. PENDLEY

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

But in addition --

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

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

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

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

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

MR. PENDLEY: Not at all, Your Honor.

QUESTION: -- what they call the subcontracting --

MR. PENDLEY: Compensation clause, Your Honor.

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

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

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

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

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

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

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

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

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

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

QUESTION: You just answered my question.

MR. PENDLEY: I'm sorry.

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

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

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

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

QUESTION: If we disagreed with you on that, are

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

MR. PENDLEY: Absolutely.

QUESTION: And what are those?

MR. PENDLEY: Absolutely, Your Honor.

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

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

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

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

QUESTION: Are these in --

MR. PENDLEY: -- lodging.

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Mr. Pendley.

MR. PENDLEY: Yes, ma'am.

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

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

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

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

QUESTION: Were they at issue in the suit?

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

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

MR. PENDLEY: Yes, ma'am.

QUESTION: -- with the Federal --

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

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

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

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

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

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

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

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

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

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

QUESTION: What it says on --

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

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

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

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

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

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

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

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

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

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

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

back? Do we dig? Do we something else?

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

MR. PENDLEY: I do not, Your Honor.

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

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

MR. PENDLEY: Yes, Your Honor.

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

MR. PENDLEY: Yes, Your Honor.

QUESTION: Is that correct?

MR. PENDLEY: That's my understanding.

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

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

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

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

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

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

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

certainly isn't.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: It has asserted that. I mean --

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

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

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

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

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

anymore.

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

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

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

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

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

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

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

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

MR. PENDLEY: I apologize.

QUESTION: This Court is a court of review.

MR. PENDLEY: Yes.

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

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

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

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

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

QUESTION: Mr. Pendley.

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

QUESTION: May I ask you just one question?

MR. PENDLEY: Yes.

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

MR. PENDLEY: Absolutely, Your Honor.

The first --

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

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

That report from the General Accounting Office is in.

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

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

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

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

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

Mr. Chief Justice, may I reserve my time?

QUESTION: Very well, Mr. Pendley.

General Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE RESPONDENT

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

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

I certainly will. I believe there has been no

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

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

With respect to the --

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

MR. OLSON: Yes, Justice O'Connor.

Now --

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

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

With respect to the clauses --

QUESTION: You're not employing them on what

basis?

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

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

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

MR. OLSON: They were mentioned.

QUESTION: Specifically mentioned.

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

The clause that Adarand now challenges cannot be

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

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

MR. OLSON: The --

QUESTION: That is precisely the issue that --

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

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

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

QUESTION: But are the benchmark studies conducted every year?

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

QUESTION: What does that mean?

(Laughter.)

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

MR. OLSON: Yes.

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

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

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

QUESTION: But they're in there.

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

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

MR. OLSON: Well --

QUESTION: And he has standing to say that now.

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

QUESTION: High bidder or low bidder?

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

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

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

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

MR. OLSON: Yes.

QUESTION: What are supposed to do now, please?

MR. OLSON: This case --

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

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

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

MR. OLSON: Justice --

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

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

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

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

QUESTION: Where was that?

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

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

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

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

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

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

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

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

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

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

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

QUESTION: They were the high bidder.

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

contracts as well.

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

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

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

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

Is -- is there any earlier memorandum?

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

QUESTION: Dealing with the contracting clauses.

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

QUESTION: When -- when was that memorandum?

MR. OLSON: That was in 1996.

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

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

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

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

QUESTION: Where is it? Where is it?

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

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

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

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

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

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

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

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

MR. OLSON: -- by that contracting situation.

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

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

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

MR. OLSON: This --

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

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

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

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

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

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

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

QUESTION: It challenged that financial compensation provision.

MR. OLSON: Yes.

QUESTION: Which now has been found to be unconstitutional.

MR. OLSON: Yes.

QUESTION: And it's out of the picture.

MR. OLSON: That's correct.

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

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

QUESTION: What does that mean?

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

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

QUESTION: For yourself?

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

MR. OLSON: Well, it's --

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

(Laughter.)

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

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

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

regulations themselves --

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

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

QUESTION: That is not the right form?

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

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

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

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

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

gender, other. Print name, signature, date.

MR. OLSON: But that is --

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

QUESTION: That's the right answer.

(Laughter.)

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

(Laughter.)

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

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

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

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

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

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

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

studies put all those --

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

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

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

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

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

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

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

MR. OLSON: Well --

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

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

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

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

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

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

QUESTION: Thank you, General Olson.

Mr. Pendley, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM P. PENDLEY

ON BEHALF OF THE PETITIONER

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

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

implemented in the direct Federal procurement program.

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

Thirdly, the Court held in Jacksonville --

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

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

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

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

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

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

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

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

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

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

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

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

I urge this Court to reach this case on the

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

Thank you for the Court's indulgence.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pendley.

The case is submitted.

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