

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ADARAND CONSTRUCTORS, INC. Petitioner v.  
FEDERICO PENA, SECRETARY OF  
TRANSPORTATION, ET AL.

CASE NO: No. 93-1841

PLACE: Washington, D.C.

DATE: Tuesday, January 17, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   ADARAND CONSTRUCTORS, INC.       :  
4                   Petitioner               :  
5                   v.                       :   No. 93-1841  
6   FEDERICO PENA, SECRETARY OF       :  
7   TRANSPORTATION, ET AL.           :  
8   - - - - -X  
9                                       Washington, D.C.  
10                                      Tuesday, January 17, 1995  
11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:03 a.m.  
14   APPEARANCES:  
15   WILLIAM PERRY PENDLEY, ESQ., Denver, Colorado; on behalf  
16       of the Petitioner.  
17   DREW S. DAYS, III, ESQ., Solicitor General, Department of  
18       Justice, Washington, D.C.; on behalf of the  
19       Respondents.  
20  
21  
22  
23  
24  
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM PERRY PENDLEY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	DREW S. DAYS, III, ESQ.	
7	On behalf of the Respondents	25
8	REBUTTAL ARGUMENT OF	
9	WILLIAM PERRY PENDLEY, ESQ.	
10	On behalf of the Petitioner	49
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 93-1841, Adarand  
5 Constructors, Inc., v. Federico Pena, Secretary of  
6 Transportation.

7 Mr. Pendley.

8 ORAL ARGUMENT OF WILLIAM PERRY PENDLEY

9 ON BEHALF OF THE PETITIONER

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

12 Adarand is a small, family-owned corporation  
13 that does business in Colorado Springs, Colorado. It is  
14 owned by and operated by Randy Pech, his wife Valerie, his  
15 mom Ruth, and their friend and Partner, Steve Gaglan.

16 In the year surrounding the events that led to  
17 this action, Adarand's annual average gross receipts were  
18 approximately \$900,000, but their average annual net  
19 profits was but \$30,000. In fact, in the year before this  
20 event, they had a net negative cash flow of some \$20,000.

21 Adarand specializes in the construction of  
22 highway guardrails, primarily as a result of the receipt  
23 of subcontracts from prime contractors. In 1989, Adarand  
24 submitted a bid to do the guardrail work on the  
25 subcontract as a subcontractor along 4.7 miles of highway

1 in the San Juan National Forest in extreme Southwestern  
2 Colorado.

3 Although it submitted the lowest bid, and  
4 although it has an excellent reputation for doing quality  
5 work on a timely basis its bid was rejected by operation  
6 of the statute questioned here, a statute which presumes  
7 that all members of certain enumerated racial and ethnic  
8 groups are socially and economically disadvantaged.

9 Adarand challenged the constitutionality of the  
10 statute both on its face and as applied to him in the loss  
11 of this \$20,000 contract.

12 QUESTION: Do we know that that was the reason  
13 for the rejection?

14 MR. PENDLEY: Absolutely, Justice Scalia. When  
15 we look at the statement by Mountain Sand and Gravel at  
16 page 30 and 31 of the joint appendix, Mountain Sand and  
17 Gravel says, but for the SCC, the subcontractor  
18 compensation clause, Adarand would have received the  
19 contract. But --

20 QUESTION: Does that clarify that it was the  
21 presumption that was crucial in this case?

22 MR. PENDLEY: No. That is clear by other means,  
23 Justice Souter. There are several means: 1) Adarand,  
24 Randy Pech testified that in fact it was the operation of  
25 the presumption. He said, Gonzales is a DBE because he is

1 a minority.

2 In addition, we have the testimony that's  
3 contained in the appendix in the reply, at pages 7, 9 and  
4 10, and 14, where three Government officials testified  
5 they knew of no circumstance under which anybody had been  
6 a DBE for any other reason than the operation of the  
7 presumption.

8 QUESTION: Did the judge take that -- make that  
9 a finding that that was an undisputed material fact?

10 MR. PENDLEY: There -- Justice Souter, there  
11 were no genuine issues of material fact remaining in the  
12 dispute. As page 31 of the appendix in our petition for  
13 writ of cert makes clear, both parties on cross-motions  
14 for summary judgment stipulated to all the facts, or  
15 agreed there were no genuine issues of material fact  
16 remaining in dispute. One of those issues would have been  
17 the subcontracting compensation clause's operation.

18 QUESTION: But you said the statute, and there  
19 are several statutes under which one can be certified.  
20 Can you tell us which of the statutes you are challenging  
21 in this proceeding?

22 MR. PENDLEY: Yes, Justice Ginsburg. We're  
23 challenging the -- several statutes. We're challenging  
24 section 502 of the Small Business Act, which is section  
25 644(g), which is contained at page 11-A of the

1 Government's brief.

2 In addition, that -- there is section 637(d),  
3 which is on page 11 of the Government's appendix, which  
4 sets out the presumption, and that presumption is applied  
5 to 644(g) because of the appropriation in the STURAA,  
6 what's called the STURAA, the Surface Transportation and  
7 Uniform Relocation Assistance Act, which is at page 16-A  
8 of the Government's brief.

9 QUESTION: But you're not challenging what has  
10 been called the 8(a) certification, or are you -- does  
11 that enter into this case?

12 MR. PENDLEY: No, Justice Ginsburg, it does not,  
13 simply the presumption under this Federal highway set-  
14 aside, which is a direct funding program.

15 QUESTION: May I ask, Mr. Pendley, the plaintiff  
16 is not suing for the -- for damages or any backward-  
17 looking relief for this particular contract, as I  
18 understand it.

19 MR. PENDLEY: We -- no, Justice O'Connor. We  
20 believe that we could go back and seek relief. We --

21 QUESTION: Well, but that was not sought, and is  
22 not sought in this suit?

23 MR. PENDLEY: We seek such other -- such other  
24 relief as may be just and equitable under the premises,  
25 and that's on page 24.



1 QUESTION: I thought you were seeking an  
2 injunction and forward-looking relief.

3 MR. PENDLEY: We are seeking both, Your Honor.

4 QUESTION: The Solicitor General takes the  
5 position that the petitioner lacks standing for a failure  
6 to show that the presumption was applied here, or if it  
7 was, that it was applied incorrectly.

8 MR. PENDLEY: Well, Justice O'Connor, we believe  
9 that there is plenty of evidence below to demonstrate that  
10 it was in fact a presumption. We have Mr. Pech's  
11 testimony, we have three Federal officials who were  
12 running that particular agency, the Central Federal Lands  
13 Highway Division, who testified that they know of no other  
14 basis that anyone in Colorado was certified as a DBE,  
15 except for the presumption.

16 And one of the reasons why that's very  
17 important, Justice O'Connor, is because section 108, the  
18 subcontracting compensation clause, requires the prime  
19 contractor to provide to the Federal Government a copy of  
20 the DBE certification, so the Federal officials involved  
21 in this program have known from the very beginning the  
22 basis upon which the certification took place, which adds  
23 increased importance to their testimony that they knew of  
24 no situation in which DBE's were certified by any other  
25 way than the presumption.

1 QUESTION: And what did the petitioner show  
2 would be his future damages, or the injury to be suffered  
3 in the future?

4 MR. PENDLEY: His injury, Justice O'Connor, is  
5 the fact that he cannot compete on an equal footing, as  
6 this Court held in the Jacksonville case, that that is the  
7 harm, that is the harm, direct harm --

8 QUESTION: Well, in Jacksonville, was there some  
9 backward-looking relief being sought?

10 MR. PENDLEY: I don't believe so, Justice  
11 O'Connor.

12 But what Mr. Pech has testified is, he bids on  
13 every single contract in Colorado. Every single guardrail  
14 contract in Colorado, he bids on those projects, and as  
15 long as there is a subcontractor compensation clause in  
16 the provision that prevents him from competing on an equal  
17 footing, he will be unable to compete.

18 In fact, he presented evidence in response to  
19 the Government's interrogatory number 22 that showed he  
20 had lost some 12 contracts already as a result of the  
21 application of the socially and economically  
22 disadvantaged --

23 QUESTION: Had he issued about 83 bids over a  
24 period of some 9 years? Was that the testimony?

25 MR. PENDLEY: Yes, Your Honor, Justice Kennedy.

1 The testimony from the Government in response to one of  
2 our interrogatories was there were some 87 contracts let  
3 that contained guardrail work.

4 Of those, 64 were given to subcontractors to do,  
5 and of that, 43 percent of that number went to DBE's, and  
6 that's consistent with the documents provided by the L. S.  
7 Lee amicus brief, where they point to the General  
8 Accounting Office report that shows that in many of these  
9 States -- for example in Colorado, 78 percent of the  
10 traffic signaling is going to DBE's. In Connecticut,  
11 90 percent of the guardrails and fencing is going to  
12 DBE's.

13 QUESTION: Of those 83, or, I guess 64 where  
14 there were subcontractors, had your client bid on all of  
15 those?

16 MR. PENDLEY: He bids on every one that has a  
17 guardrail, depending on the bid.

18 QUESTION: Mr. Pendley, I'm still trying to get  
19 clear on the significance of what we have for the standing  
20 issue. Let me go back behind the summary judgment motion  
21 to the complaint. Did your complaint specify the  
22 presumption as being the flaw in the statutory scheme, or  
23 the clause as being the flaw?

24 MR. PENDLEY: The -- excuse me, Your Honor, the  
25 floor as to the --

1 QUESTION: No, I -- flaw --  
2 MR. PENDLEY: Oh, flaw.  
3 QUESTION: The constitutional infirmity. I'm  
4 sorry.  
5 MR. PENDLEY: Excuse me, Your Honor.  
6 QUESTION: It's my regional accent.  
7 (Laughter.)  
8 MR. PENDLEY: It's my hearing.  
9 We assert that the flaw is the presumption. The  
10 presumption --  
11 QUESTION: And you asserted that in the  
12 complaint?  
13 MR. PENDLEY: I believe that we did, Your Honor,  
14 yes.  
15 QUESTION: Okay.  
16 QUESTION: Do you contend that Congress failed  
17 to make adequate findings concerning racial discrimination  
18 in the construction industry to support the legislation?  
19 MR. PENDLEY: Yes, Your Honor. We think there's  
20 a dearth of findings when one examines the Congressional  
21 Record. Basically, what we're dealing with here are  
22 situations where there's a piggy-back on the SBA  
23 administrative relief that was fashioned, a piggy-back on  
24 the Public Works Employment Act that this Court considered  
25 in Fullilove, and a continuing piggy-back without any



1 analysis as to what is the today situation.

2 QUESTION: Well, Fullilove spoke at some length  
3 on the adequacy of congressional findings. Do you think  
4 that has a bearing here?

5 MR. PENDLEY: I think that Fullilove is  
6 distinguishable, Your Honor, with regard to what the Court  
7 permitted. There, of course, as you know it was a facial  
8 challenge, and --

9 QUESTION: I'm talking about the findings of  
10 Congress.

11 MR. PENDLEY: Yes. Well, I'm trying to answer  
12 that, Justice -- excuse me. I hope this is the answer,  
13 and the answer is that it was a facial challenge, and so  
14 Justice -- Chief Justice Burger insisted that he had --  
15 the Court had reasonable assurances that the  
16 administrative process would be operating effectively and  
17 properly, it would be narrowly limited, it would be  
18 limited to the situations in which it applied, in fact, as  
19 amicus Pacific Legal Foundation points out in footnote 44,  
20 it was very clear -- 44 of the Fullilove brief, opinion --  
21 it was very clear that it was only going to apply to  
22 minorities who were disadvantaged.

23 QUESTION: Well, that goes to the tailoring. I  
24 don't think that goes to whether there were adequate  
25 findings of racial discrimination, and Fullilove spoke to

1 the congressional findings of discrimination in the  
2 construction industry.

3 MR. PENDLEY: Your Honor, I don't think there's  
4 adequate findings here. I think what one has to look  
5 at -- the Court should look at is the appendix B of the  
6 Government's brief, where they set -- where it sets out  
7 what they think is the best -- its best shot at  
8 demonstrating the findings.

9 And one looks at pages 21 and 23, for example,  
10 and we hear again the litany of problems that small  
11 businesses like Adarand face, problems getting bonding,  
12 problems getting certification, problems dealing with  
13 Government paperwork, problems getting paid by prime on  
14 time, these are problems that cut, as the Court has said  
15 in the past, not across racial lines but across business  
16 on size lines. That's really the issue. When Congress  
17 makes findings like that, they are so amorphous as to be  
18 limitless.

19 In addition, the Government points to two  
20 specific things: 1) problems with trade unions in New  
21 York, and 2) problems with State officials in Illinois.

22 Now, it seems that those cry out for race-  
23 neutral resolution, that those are issues that can be  
24 dealt with on a case-specific basis to end whatever  
25 problems are occurring with trade unions or with State

1 officials who are violating the law.

2 QUESTION: Suppose the Government interest here  
3 were to remedy the past effects of racial discrimination.  
4 Could the Government pass a statute to accomplish its  
5 interest without using race-conscious measures?

6 MR. PENDLEY: Oh, I think that's the  
7 aspirational goal, Justice Kennedy, that the Congress be  
8 victim-specific. I think when you look at the continuum  
9 that spreads out there, we have a victim-specific remedy,  
10 and at the other end we have a total indifference to the  
11 nature of the victims, if they are, and whether or not  
12 they've suffered. That's what we have here, total  
13 indifference.

14 I mean, we have a situation here where a Hong  
15 Kong banker, a Japanese electrical engineer, or the son of  
16 landed gentry from Spain could come to Colorado Springs,  
17 buy 51 percent of Adarand, and turn it into a DBE.

18 QUESTION: I don't see how it could do that,  
19 because I thought that the claim had to be one of specific  
20 injury to this particular subcontractor, by virtue of  
21 membership in some group.

22 MR. PENDLEY: That's the Government's --

23 QUESTION: I guess, to make it clear, I thought  
24 group membership was necessary, but it was not sufficient.

25 MR. PENDLEY: Your Honor, it is sufficient.

1 Under the regulations the Government has set forward, and  
2 it's discussed on page --

3 QUESTION: Well, the way the statute is written,  
4 is it sufficient?

5 MR. PENDLEY: The way the regulations are. The  
6 way --

7 QUESTION: Well, let's start with the statute.  
8 Under the statute, would it be sufficient simply to be a  
9 member of a group?

10 MR. PENDLEY: Yes.

11 QUESTION: The regulations read as though the  
12 SBA will issue a certification only if the business shows  
13 it meets the definition of economic disadvantage, and does  
14 that mean that each participant has to personally  
15 demonstrate harm from discrimination to qualify?

16 MR. PENDLEY: In this situation, Justice  
17 O'Connor, the certification was by the States, and --

18 QUESTION: Well, what if that were the  
19 regulatory scheme --

20 MR. PENDLEY: Excuse me.

21 QUESTION: -- that each individual would have to  
22 show a demonstration of harm from discrimination to  
23 qualify? Does that meet your objections, if that were the  
24 case?

25 MR. PENDLEY: It goes a lot further than the



1 current situation, which is totally indifferent to any --  
2 any injustice, or --

3 QUESTION: I thought the regulations could be  
4 read to require just that and I wondered, if they did,  
5 what your view of them might be?

6 MR. PENDLEY: I don't think the regulations can  
7 be read that way. In fact, they specifically say,  
8 there's -- in the notice of proposed rulemaking that we  
9 discuss on page 22 of -- I believe it's page 22 of our  
10 brief, where the Government says -- talking about the  
11 proposed rulemaking coming out on certification, and it  
12 says, we've had inquiries from States saying, what do we  
13 do, do we inquire into the economic status of these  
14 organizations?

15 And the answer is, States, you don't do that.  
16 Once you have determined that this applicant is a member  
17 of one of the identified racial groups, the inquiry ends.  
18 That individual, that organization is certified.

19 QUESTION: Mr. Pendley, isn't it accurate to say  
20 that actual, personal harm from discrimination is  
21 necessary, but it is presumed? I mean, there -- isn't the  
22 scheme of the statute that technically it is necessary,  
23 but it is simply presumed to exist if the enterprise is a  
24 minority enterprise?

25 MR. PENDLEY: Absolutely, Justice Scalia.

1                   QUESTION: Now, the Government says that that's  
2   good enough. If you have a problem with the presumption,  
3   you could have come in and showed that in your case, in  
4   the case of this contract, the presumption was not valid.  
5   Did you have such an opportunity?

6                   MR. PENDLEY: The rules permit a third party to  
7   challenge the presumption, but as Pacific Legal Foundation  
8   points out in their amicus brief, that's not consistent  
9   with the real world.

10                  I think the first question is, is it fair, is it  
11   right to ensure the equal protection guarantees be put on  
12   the back of an Adarand, rather than on the Government,  
13   which is dispensing these benefits, and the benefited  
14   party?

15                  In addition, the difficulty an Adarand has,  
16   first of all, Judge Posner -- as the amicus Association of  
17   General Contractors' brief points out, discussing Judge  
18   Posner's point that what if we had a rebuttable  
19   presumption that blacks could not do highway construction  
20   work? That would be odious and offensive on its face,  
21   even if it was rebuttable.

22                  The irony here, in comparison is in that  
23   situation, the black contractor is in possession of the  
24   knowledge necessary to rebut the presumption. Here an  
25   Adarand, without subpoena power, without any ability to

1 gather the information, is incapable of challenging the  
2 presumption.

3 In addition, I think he exposes himself to being  
4 a litigious entity vis-a-vis other companies. The last  
5 thing you want in the highway contracting business is to  
6 know the guy you're dealing with is litigious. In  
7 addition, a possible lawsuit for deformation by the DBE --  
8 as the Solicitor General points out in his brief, that's a  
9 criminal violation, to hold oneself out falsely as a DBE.

10 QUESTION: Of course, here, we're not presuming  
11 that black people can't work on highways. The presumption  
12 is that a person who is black has suffered prejudice or  
13 cultural bias. Do you think that that's an unreasonable  
14 presumption as a matter of fact, or is it that you're  
15 saying, assuming that it's reasonable as a matter of fact,  
16 nonetheless there is something in the law that forbids it?

17 I take it you're arguing the latter, and what,  
18 precisely, is it in the law that forbids making that  
19 presumption which might be reasonable as a matter of fact,  
20 and how many cases would this Court have to overrule, if  
21 any, in order to reach that proposition of law?

22 MR. PENDLEY: Justice Breyer, the problem with  
23 it is, it's an impermissible stereotype. It's a racial  
24 stereotype that presumes that every member of one of these  
25 listed groups -- and I want to point out that we have 26

1 nation -- member, individual --

2 QUESTION: You know I'm asking you a legal  
3 question.

4 MR. PENDLEY: Yes, sir.

5 QUESTION: The legal question I'm asking -- of  
6 course, you could take it on either ground.

7 I had assumed you were assuming as a matter of  
8 fact it is rational to assume that black people have  
9 suffered prejudice or cultural bias. If that's so, what  
10 is it in the law that would prohibit the Congress or the  
11 Department of Transportation from making that factual but  
12 rebuttable presumption, particularly given past Supreme  
13 Court cases?

14 In other words, what are you going to do about  
15 those? Are we supposed to overrule those past cases? Is  
16 it that it's unreas -- I'm trying to get your legal  
17 argument.

18 MR. PENDLEY: Yes, Your Honor.

19 I don't think the Court has to overrule any  
20 case. I think this is totally consistent with the  
21 traditional test that was espoused in a number of cases  
22 the Court has embraced with regard to equal protection,  
23 and it's consistent with all of those cases. I would  
24 distinguish Metro on the basis that we're not talking  
25 about a gross public benefit to the Nation, because the



1 Court found there was a nexus between the ownership of  
2 television stations and what is broadcast --

3 QUESTION: Fullilove is the most obvious.

4 MR. PENDLEY: Your Honor?

5 QUESTION: Fullilove would seem the most  
6 obvious.

7 MR. PENDLEY: Fullilove does seem the most  
8 obvious, and as this Court indicated in the dissent --  
9 some justices indicated in the dissent in Metro, at least  
10 six justices wanted something approaching strict scrutiny.

11 The triggering mechanism is, we have a  
12 stereotype that is so rarely relevant --

13 QUESTION: I'm sorry, I'm asking would this  
14 Court have to overrule Fullilove? Wouldn't it?

15 MR. PENDLEY: No.

16 QUESTION: Why not?

17 MR. PENDLEY: Because in Fullilove it was a  
18 totally different factual situation. It was an as-applied  
19 challenge. The regulations had come out in October, and  
20 in November the parties filed the lawsuit.

21 We have a situation where it's actually been  
22 applied. We have the testimony of the officials as to how  
23 it's being applied, the fact that they can't get waivers,  
24 they don't get waivers, the fact that we have a 15- to 18-  
25 percent set-aside, and the fact there's a presumption that

1 operates, all of these things are distinguishable from the  
2 factual situation in Fullilove.

3 QUESTION: But Fullilove involved a straight-  
4 out set-aside, no flexibility at all, and it seems that  
5 this program is about the most flexible, rebuttable  
6 presumption -- I thought you were making both a facial  
7 challenge first --

8 MR. PENDLEY: Yes.

9 QUESTION: And let's just take that facial  
10 challenge.

11 MR. PENDLEY: Yes.

12 QUESTION: On the facial challenge, to agree  
13 with you, mustn't we overrule Fullilove?

14 MR. PENDLEY: No, Your Honor.

15 QUESTION: How can you take both statutes on  
16 their face and say the one that has an absolute 10-percent  
17 set-aside is good, and the other, that has a rebuttable  
18 presumption, that has a concept of economic disadvantage,  
19 that is not race-specific, that that one is no good?

20 MR. PENDLEY: In the Fullilove case, Justice --  
21 Chief Justice Burger's opinion is filled with references  
22 to the flexibility of the program, the waivers in the  
23 program, how they can get out from under it, the ceilings  
24 of the program, how they could not give to DBE's in  
25 improper situations, so it was a very flexible program.

1 QUESTION: But here, the contractor doesn't even  
2 have to have anything to do with any DBE, the successful  
3 bidder on the Government project, isn't that right?

4 MR. PENDLEY: The prime contractor, Justice --

5 QUESTION: Yes.

6 MR. PENDLEY: -- Ginsburg? The prime contractor  
7 is economically compelled. I would think it would be  
8 comparable to, say, the Arlington Heights case, where if  
9 the city, instead of passing a zoning change, actually  
10 said we're going to pay \$1,000 to every homeowner, \$1,000  
11 more if that homeowner will not sell to a minority.

12 That's the situation we have here. The prime  
13 contractor is being told, you'll get a \$10,000 bonus if  
14 you give this contract to one of our DBE's instead of the  
15 low-bidding Adarand.

16 QUESTION: Congress described that not as a  
17 bonus but -- am I wrong in recalling that it was supposed  
18 to be a cost compensation, recognizing that it would be an  
19 additional cost for the principal contractor to take on a  
20 subcontractor that didn't have secure credit and that  
21 might have to have some assistance in dealing with labor  
22 problems and the like?

23 MR. PENDLEY: The report that the Highway  
24 Department did, it's a 1985 report that's entered into the  
25 record, a 1985 highway report, they said their discussions

1 with contractors, with prime contractors is that the  
2 subcontractors, they don't have to find them, the  
3 subcontractors, the DBE's come looking for them.

4 In addition, the DBE's testified, we don't need  
5 the help. That's all very nice to have the help, but  
6 we're fine. We're perfectly capable of doing this job.  
7 We don't need that assistance.

8 So in addition, I also think on its face that's  
9 an impermissible racial stereotype to say, jeez, all these  
10 DBE's out there are so incompetent that they need the  
11 help, when the fact is they don't.

12 QUESTION: Well, let's -- you said that on --  
13 that although Fullilove was okay under the Constitution on  
14 its face, this arrangement is not. That's --

15 MR. PENDLEY: Justice -- Chief Justice --  
16 this -- yes. This arrangement is not. Chief Justice  
17 Burger said -- if Fullilove pushes the outer limits -- he  
18 says, just because it pushes the outer limits, there's no  
19 reason to strike it. This is going over the edge. This  
20 Adarand program --

21 QUESTION: I don't see why this has gone beyond  
22 Fullilove. Fullilove had, what was it, a 10-percent set-  
23 aside, wasn't that it?

24 MR. PENDLEY: Yes.

25 QUESTION: What this has got is a presumption of



1 specific harm to a specific subcontractor which in fact is  
2 rebuttable. How does that go beyond the limit of  
3 Fullilove?

4 MR. PENDLEY: Justice Souter, I believe it goes  
5 beyond because it puts the burden on the wrong party. It  
6 puts the burden on a party who's incapable of disproving  
7 it himself.

8 QUESTION: Well, you say it puts the burden. In  
9 fact, it gives an opportunity to rebut which in Fullilove  
10 did not exist, isn't that true?

11 MR. PENDLEY: No. They could be challenged in  
12 Fullilove. Certification could be challenged in  
13 Fullilove.

14 QUESTION: What would the challenge have  
15 consisted of? I just don't remember this. You'll have to  
16 help me.

17 MR. PENDLEY: Whether or not the parties  
18 participating were authorized to participate and fell  
19 within the definition, but the point here is --

20 QUESTION: And fell within the definition as --

21 MR. PENDLEY: Of a --

22 QUESTION: -- as a minority.

23 MR. PENDLEY: MBE.

24 QUESTION: Yes.

25 MR. PENDLEY: Yes, Your Honor.

1           QUESTION: So that in Fullilove, the criterion  
2 was simply class membership, whereas here the criterion is  
3 ultimately actual harm, isn't that correct?

4           QUESTION: The difference between MBE and DBE,  
5 then -- this is called disadvantaged.

6           MR. PENDLEY: Yes, Your Honor.

7           QUESTION: And in Fullilove you could show that  
8 the minority status claim was a sham, perhaps, but here,  
9 it's disadvantage, you can say. Minority, yes, but  
10 disadvantaged, no.

11          MR. PENDLEY: Here, the rebuttable presumption,  
12 the burden falls upon the Adarands of the world to  
13 challenge it. If the burden is upon the Adarands of the  
14 world to assure equal protection, that's not going to  
15 happen. They just simply --

16          QUESTION: But the presumption is of harm, i.e.,  
17 to this particular contractor, isn't it?

18          MR. PENDLEY: The presumption, Your Honor, is of  
19 membership in the race, is a presumption of socially  
20 harmed and economically disadvantaged.

21          QUESTION: To this particular contractor. I  
22 mean, that was your answer, as I understood it, to Justice  
23 Scalia.

24          MR. PENDLEY: Yes.

25          QUESTION: Okay.

1 QUESTION: What is the standard we apply in  
2 reviewing this scheme? Is it strict scrutiny? Is that  
3 the position you take?

4 MR. PENDLEY: Yes, Your Honor, strict scrutiny.  
5 Mr. Chief Justice, I reserve the remainder of my  
6 time.

7 QUESTION: Very well. Thank you, Mr. Pendley.  
8 General Days, we'll hear from you.

9 ORAL ARGUMENT OF DREW S. DAYS, III

10 ON BEHALF OF THE RESPONDENTS

11 GENERAL DAYS: Thank you, Mr. Chief Justice, and  
12 may it please the Court:

13 The subcontracting compensation clause  
14 challenged here is a means of effectuating a national  
15 policy designed by Congress and supported by Presidents of  
16 both parties to ensure to the greatest extent possible  
17 that Federal procurement programs do not compound the  
18 continuing effects of well-documented discrimination but,  
19 rather, serve to offset their consequences.

20 The process by which compensation is awarded is  
21 neither overinclusive, since members of certain designated  
22 racial and ethnic groups were not, in fact, disadvantaged  
23 or ineligible under the program, nor underinclusive, since  
24 some individuals who are not members of those designated  
25 groups may qualify as socially and disadvantaged persons

1 under the regulatory scheme.

2 QUESTION: General Days, why couldn't Congress  
3 have done this without a presumption, and just said that  
4 if the DBE can show factual economic disadvantage, it gets  
5 the benefit, but not use any presumption?

6 GENERAL DAYS: Mr. Chief Justice, Congress could  
7 have done that, but I think what the record reflects here  
8 is a review by Congress over a number of years, looking at  
9 the degree to which Federal contracting dollars were going  
10 to contractors who had participated in some way or  
11 reinforced discrimination against members of certain  
12 racially and economically disadvantaged groups and decided  
13 that this was the appropriate way to do it.

14 QUESTION: So it's really a matter of  
15 administrative convenience? They figured it would come  
16 out this way in the majority of cases?

17 GENERAL DAYS: Well, I wouldn't characterize it  
18 as administrative convenience. It was simply a  
19 determination that if the results that Congress wanted to  
20 have occur were to occur, they would have to be done in  
21 this way. Congress --

22 QUESTION: And Congress, then, was indifferent  
23 to the fact that perhaps people who had not been in fact  
24 economically disadvantaged might, because of the  
25 presumption, nonetheless get the benefit of it?



1           GENERAL DAYS: Congress was, I think, concerned  
2 about that, but was aware that the administrative scheme  
3 that was in place or set up after the statute was amended  
4 would deal with those particular problems.

5           One has to understand that the Small Business  
6 Act, for example, was in existence for 25 years before  
7 Congress decided to focus, as it has in recent years, on  
8 the problems of members of certain racial and ethnic  
9 groups that were socially and economically disadvantaged,  
10 so there was some experience on the part of Congress with  
11 the way in which Federal procurement dollars were somehow  
12 not finding their way to people who were the victims of  
13 discrimination.

14           QUESTION: General Days, as a practical matter,  
15 how does a third party go about challenging the economic  
16 disadvantage presumption as applied to a particular  
17 contractor?

18           GENERAL DAYS: What a contractor, a  
19 subcontractor would do in a situation like this in  
20 Adarand's case is bring to the attention of the  
21 contracting officer or, if it were appropriate, to the  
22 SBA, the fact that it felt that a company that claimed to  
23 be a disadvantaged business enterprise was not a  
24 disadvantaged business enterprise. It could point to, for  
25 example, the amount of contracts, the number of contracts

1 that that particular company had won.

2 QUESTION: How does he know that the company is  
3 claiming that status? Is it posted somewhere publicly  
4 that he would know whose claim to challenge?

5 GENERAL DAYS: Yes. Under the STURAA scheme  
6 disadvantaged business enterprises are listed by the  
7 States so that they can participate in programs that the  
8 State enters into with the Federal Government, so it is  
9 possible for one to look down that list and identify those  
10 who are claiming to be disadvantaged business enterprises.

11 QUESTION: But how would you know which one? I  
12 mean, you have a particular bid situation. There is a job  
13 going out for bid.

14 GENERAL DAYS: Yes.

15 QUESTION: And how does someone like petitioner  
16 know that from that long list a particular one is going to  
17 be trying to get the certification and therefore that's  
18 the one that should be challenged?

19 GENERAL DAYS: Well, it can be done at the time  
20 that that subcontractor comes forward. For example, in  
21 this subcontracting compensation clause situation, in the  
22 Adarand situation, once Mountain Gravel decided that it  
23 was going to participate in the SCC program and was  
24 seeking out disadvantaged business enterprises and  
25 Gonzales was identified as a DBE that could fulfill its

1 needs, at that point --

2 QUESTION: How would the petitioner know that  
3 Gonzales had been identified?

4 GENERAL DAYS: One of the ways that Adarand  
5 would know, in fact, is that Gonzales has been involved in  
6 a number of contracts, and they're generally aware --

7 QUESTION: But there's no mechanism to let the  
8 petitioner know in a particular situation that this is the  
9 one to focus on?

10 GENERAL DAYS: I think that once the subcontract  
11 is let to Gonzales, Adarand can come in and say Gonzales  
12 does not qualify appropriately as a DBE.

13 QUESTION: That makes it much harder to upset, I  
14 suppose, after the fact.

15 Are you aware of any instances where third  
16 parties have successfully challenged --

17 GENERAL DAYS: Yes.

18 QUESTION: -- one of these certifications?

19 GENERAL DAYS: Yes, I am. We have cited in our  
20 brief, for example, a challenge that came through the SBA  
21 process in the Autek case, where a Native American firm  
22 had claimed social and economic disadvantaged status, and  
23 it was determined that because of the income of that  
24 particular company, it should not be permitted that status  
25 as a disadvantaged business enterprise. There are also --

1 QUESTION: Who determined that?

2 GENERAL DAYS: This was determined by the Small  
3 Business Administration.

4 QUESTION: In response to somebody's challenge,  
5 or on its own initiative?

6 GENERAL DAYS: It's not clear exactly how that  
7 was done, but --

8 QUESTION: Do you have any example where  
9 somebody in the position of Adarand successfully  
10 challenged, brought -- an individual successfully brought  
11 a challenge? Do you know of any?

12 GENERAL DAYS: It's very hard, Justice Scalia,  
13 to identify that, because --

14 QUESTION: You don't know of any.

15 GENERAL DAYS: That's correct, but the record  
16 does reflect that there have been many situations where  
17 that has happened.

18 QUESTION: When you say "that," what do you  
19 mean?

20 GENERAL DAYS: Well, by that I mean that there  
21 have been challenges to the certification of agencies as  
22 disadvantaged business enterprises.

23 QUESTION: By competing subcontractors?

24 GENERAL DAYS: I think the point, Mr. Chief  
25 Justice --



1 QUESTION: You can answer that yes or no,  
2 General Days.

3 GENERAL DAYS: No, I don't think that we have  
4 precisely pinned down, but the point is that the SBA and  
5 the State contracting agencies get information from a  
6 number of sources, and they are open to claims from any  
7 source, and then investigate those particular situations.

8 QUESTION: Well, Adarand says that as a  
9 practical matter that's a fantasy, that there's not enough  
10 time, there's not enough information, and besides which  
11 you blackball yourself by identifying yourself as a  
12 litigious individual.

13 No general contractor wants to hire somebody  
14 who's going to promote litigation, and if -- now, is that  
15 true or false?

16 Unless you can show me some -- you know, the  
17 fact that this presumption is really only that, and that  
18 it's a real, live, working system in which it's challenged  
19 with some regularity, it seems to me to be in effect a  
20 conclusive presumption.

21 GENERAL DAYS: Well, it is not, Justice Scalia.  
22 I'd like to point the Court to an amicus brief by the  
23 Latin American Management Association, which identifies at  
24 pages 24 to 26 a number of reported situations where  
25 challenges have been made. It's not clear from what

1 particular source those challenges came, but challenges  
2 were successfully made to claims that certain  
3 organizations were disadvantaged business enterprises.

4 QUESTION: I might be wrong about this, but I --  
5 correct me if I -- but my impression was under section  
6 8(d), which is -- I take it is what they're challenging,  
7 it's the procurement officer who makes the challenge. The  
8 procuring agency contracting officer, and that what the  
9 other contractors do is, they submit information --

10 GENERAL DAYS: That's correct.

11 QUESTION: -- to that officer, and I take it  
12 that could be confidential, or not, I don't know on that.

13 GENERAL DAYS: Well, I don't know --

14 QUESTION: And I take it it's the procuring  
15 officer himself who undertakes the burden. The contractor  
16 doesn't have to do it.

17 GENERAL DAYS: That's correct.

18 QUESTION: The contractors go to the officer.

19 GENERAL DAYS: That's correct, and as I  
20 indicated, this information can be received from any  
21 source.

22 QUESTION: Is it open to one who challenges the  
23 certification to show that the individual that owns the  
24 certified firm has not him or herself been the victim of  
25 societal discrimination?

1           GENERAL DAYS: Yes, Justice Kennedy, but that I  
2 think is done in a practical sense through challenging  
3 economic disadvantage.

4           In other words, if a challenge can show that a  
5 claimed disadvantaged business enterprise is competing at  
6 the same level as companies that are not disadvantaged in  
7 any of the traditional terms, or traditional senses, then  
8 that can be a basis for disqualification.

9           As I indicated, in the Autek case that was the  
10 way the Court looked at the situation.

11          QUESTION: But under the act, at least it's  
12 theoretically possible to challenge the determination that  
13 this person has not in fact been subject to racial  
14 discrimination?

15          GENERAL DAYS: I think, Justice Kennedy, it's  
16 not correct to say that there can be a challenge to  
17 someone who says, I am an African American, that they in  
18 fact are not African American.

19          The real focus of this program is on  
20 disadvantage, and so the inquiry naturally focuses on  
21 whatever the problems this particular organization has  
22 had, if it's overcome those disadvantages and is competing  
23 as would any other agency or company, then it is not  
24 eligible for participation in the disadvantaged business  
25 enterprise program.

1           And let me just say on the question of whether  
2           there have been challenges, we view this particular  
3           lawsuit as a facial challenge. It is challenging not the  
4           specific operation of these schemes, but challenging the  
5           existence of the rebuttable presumption under this scheme  
6           that was set up by Congress.

7           QUESTION: General Days, I believe Mr. Pendley  
8           said he's not challenging the 8(a) certification program,  
9           and it does seem that there's a big difference when you  
10          get to economic disadvantage, that it's not automatic  
11          under 8(a). Am I right in that --

12          GENERAL DAYS: that's correct.

13          QUESTION: -- that there's a presumption under  
14          8(d) that if nobody challenges it just sticks based on  
15          minority status, but that's not so for 8(a) certification?

16          GENERAL DAYS: That's correct. In fact, Justice  
17          Ginsburg, although it appears that under 8(a) one can  
18          challenge economic -- that there's a presumption of social  
19          disadvantage but not of equal economic disadvantage, and  
20          that under the 8(d) program there's a presumption with  
21          respect to both.

22          The fact is that the analysis under both regimes  
23          is that there can be an open challenge to the nature of  
24          the particular company as to whether it's economically  
25          disadvantaged, so the regimes and the challenges and the



1        rebuttals are all directed at determining whether this  
2        particular company is economically disadvantaged, although  
3        it might satisfy the social disadvantage prong of the  
4        particular scheme.

5                QUESTION:    General Days, what is the limit of --  
6        if there is any, of the Government's ability to use race  
7        as a -- as the basis for a presumption in some of its  
8        programs?

9                Suppose the Government has a very important  
10       space program which just can't afford any mistakes, and it  
11       says, just looking over education statistics, whites  
12       generally have a higher level of education, and we are  
13       going to assume that any bidder that is white-owned is a  
14       more competent bidder -- it's just a presumption. It can  
15       always be refuted by nonwhite bidders -- and we're going  
16       to use that presumption for the program. Is that okay? A  
17       very --

18               GENERAL DAYS:    I --

19               QUESTION:    -- very serious, critical need for  
20       perfection in this program, and the Government says, we're  
21       just going to adopt this presumption.

22               Of course, it's rebuttable. No problem. If you  
23       want to come in and show that even though you're not  
24       white, you're very smart and very competent, that's okay,  
25       but you can come in and show it.

1           GENERAL DAYS: Justice Scalia, I think that the  
2 difference between this situation and the situation that  
3 you posed is a question of whether Congress is acting for  
4 remedial purposes, and what we have here is --

5           QUESTION: I don't know what that means. It's a  
6 good, valid governmental purpose in both cases.

7           GENERAL DAYS: No, but what I'm talking about is  
8 Congress either explicitly or by way of the operation of a  
9 statutory scheme is attempting to remedy the effects of  
10 prior racial discrimination, relying upon its authority  
11 under section 5 of the Fourteenth, or other provisions of  
12 the Civil War Amendment.

13          QUESTION: Well, but how can section 5 of the  
14 Fourteenth Amendment give Congress authority to lessen the  
15 effect of that amendment on congressional actions?  
16 There's -- I think there's a statement in the Katzenbach  
17 case that Congress can move in only one direction under  
18 the Fourteenth Amendment.

19          GENERAL DAYS: Correct.

20          QUESTION: It could make the standards more  
21 stringent, but not less stringent. But your argument is  
22 in effect that Congress can make the standards less  
23 stringent when applied to Congress.

24          GENERAL DAYS: That Congress can make the  
25 rules --

1 QUESTION: Yes.

2 GENERAL DAYS: -- less stringent?

3 QUESTION: Yes, that the equal protection  
4 component, let's say, of the Fifteenth -- of the Fifth  
5 Amendment would be less demanding on Congress.

6 GENERAL DAYS: I think what this Court has  
7 indicated in a number of decisions is that Congress  
8 possesses a unique and comprehensive power to legislate  
9 under section 5 of the Fourteenth Amendment, or section 2  
10 of the Thirteenth, or of the Fifteenth Amendment, to  
11 remedy the effects of racial discrimination, or denial of  
12 equal protection, but particularly where racial  
13 discrimination is concerned, and the example that Justice  
14 Scalia gave indicates nothing about the desire of Congress  
15 to deal with discrimination and to remedy it.

16 QUESTION: It can do that, but can it do it by  
17 adopting race-based presumptions? I mean, there's no  
18 question that it can do it --

19 GENERAL DAYS: Yes.

20 QUESTION: -- that it can act to eliminate the  
21 effects of discrimination, but can it do it by simply  
22 adopting a presumption on racial lines?

23 GENERAL DAYS: Yes, it can. I think that the  
24 question came up about the role of Fullilove, but in the  
25 Fullilove case, the Public Works Employment Act that was

1 at issue there in effect designated certain groups as  
2 being entitled to the 10-percent set-aside with no  
3 expectation that there would be the type of rebuttable  
4 presumption and searching inquiry that this scheme at  
5 issue here provides.

6 QUESTION: Congress made the determination in  
7 Fullilove, I suppose, that 10 percent was the adequate  
8 remedial number.

9 GENERAL DAYS: Mm-hmm.

10 QUESTION: One of the problems in this case, if  
11 I understand the scheme correctly, is that there is no  
12 particular number. It's up to the contractor. He can  
13 give preferential treatment to as many MBE's as he wants,  
14 isn't that right?

15 GENERAL DAYS: Well, I suppose that's correct in  
16 one sense, Justice Scalia, but one has to understand how  
17 the SCC works.

18 QUESTION: So the punishment doesn't fit the  
19 crime. I mean, it's really up to the individual  
20 contractor.

21 GENERAL DAYS: No, that's not correct. First of  
22 all, it is an optional program, as has already been  
23 pointed out.

24 QUESTION: Optional if you want to forgo the  
25 \$10,000 --



1                   GENERAL DAYS: The 10 percent. If one  
2       subcontracts above 10 percent, then one can get the  
3       benefit of the SCC, but it's not an open-ended program.  
4       In other words, the prime contractor cannot continue to  
5       gain more and more money by taking on more DBE  
6       subcontractors in that particular contract, because the  
7       compensation is limited to 1.5 percent of the overall  
8       contract, or 2 percent, if there are more than -- two or  
9       more subcontractors, but there's not an infinite ability  
10      of a prime contractor to just add on DBE's in order to  
11      gain compensation.

12                  QUESTION: Is he more favored if he adds on more  
13      DBE's?

14                  GENERAL DAYS: No, he is not. There's no  
15      indication that a prime contractor, Mountain Gravel in  
16      this case, would have lost a contract because it didn't  
17      take advantage of the SCC. It's purely optional, and  
18      therefore Mountain Gravel could have decided not to use  
19      the SCC at all, and would have kept the prime contract and  
20      would have carried it out in ways other than under the DBE  
21      program.

22                  QUESTION: General Days, can I ask you a  
23      question about the regulations? Do the regulations  
24      contain any provisions requiring the States, or whatever  
25      the agency is that designates a particular business as a

1 DBE to review its status from time to time, or is it once  
2 designated you have that privilege forever?

3 GENERAL DAYS: No, the regulations require that  
4 there be an annual review with respect to DBE  
5 certification. It's also the case that the Small Business  
6 Administration under its program conducts annual reviews  
7 of those businesses that have been admitted into the  
8 program.

9 What we have here, Justice Stevens, in fact is a  
10 continuing review by Congress and the agency with respect  
11 to this program. Under --

12 QUESTION: What do the States look for when they  
13 conduct their annual review, or is it possible to  
14 generalize as to all 50 States?

15 GENERAL DAYS: Well, I think what the review is  
16 supposed to do is identify on an annual basis the extent  
17 to which those who have been certified as DBE's are, in  
18 fact, DBE's.

19 QUESTION: That is, minority-owned, not  
20 necessarily disadvantaged. I mean, this inquiry isn't an  
21 annual inquiry into whether they have in fact been  
22 discriminated against. It's just an inquiry into whether  
23 they are minority-owned year by year.

24 GENERAL DAYS: No.

25 QUESTION: No?

1           GENERAL DAYS: That's not correct. It's an  
2   inquiry as to whether they continue to warrant the  
3   benefits under this program as disadvantaged business  
4   enterprises, so, for example --

5           QUESTION: What does that mean? Does it mean  
6   that there's an inquiry into whether they suffered  
7   discrimination in the past?

8           GENERAL DAYS: No, that's a determination that's  
9   made when they are certified, but after they're  
10   certified --

11          QUESTION: Is that determination made when  
12   they're certified? I thought they're certified so long as  
13   they're minority-owned and therefore come within the  
14   presumption?

15          GENERAL DAYS: That is not correct. The way  
16   that the States go about the certification process is to  
17   look not only at whether a company is in fact presumed to  
18   be economically and socially disadvantaged under the  
19   presumption, but also whether it continues to be  
20   economically disadvantaged. That is, has it continued to  
21   suffer the effects of discrimination from year-to-year.

22          So if there is a company -- there may be a  
23   situation --

24          QUESTION: Of the presumed discrimination?

25          GENERAL DAYS: It's true with respect to all

1 DBE's.

2 QUESTION: General Days, let me give you --

3 QUESTION: Are you referring just to the --

4 QUESTION: May I ask about a specific  
5 hypothetical?

6 GENERAL DAYS: Yes.

7 QUESTION: Suppose a subcontractor repeatedly  
8 got preferential treatment for a year or so and increased  
9 its gross sales from 100,000 to 20 million. Would that be  
10 a factor that would -- and be exactly the same racial  
11 composition of the company. Would it be apt to lose its  
12 certification if it had that kind of business growth?

13 GENERAL DAYS: Absolutely. Absolutely. It  
14 could be decertified because it's no longer a small  
15 business, or it could be decertified because it had  
16 reached a level of economic take-off that would not  
17 justify its receiving whatever benefits were available  
18 under the program.

19 QUESTION: Where do we find the provision that  
20 would require or permit that in the regulations, or in the  
21 statute?

22 GENERAL DAYS: Well, Mr. Chief Justice, we have  
23 indicated on pages 14 to 16 and 17 of our brief the way in  
24 which the rebuttal process works, and the extent to which  
25 there can be an annual review.



1 QUESTION: But the -- a lot of that, at least 14  
2 and 15, is initiated by a competitor. I gather in your  
3 answer to Justice Stevens that there is some Government-  
4 initiated process which reviews these certifications?

5 GENERAL DAYS: Yes. I can direct the Court to  
6 footnote 15 of our brief on page 15. It addresses the  
7 question of how there must be a filing annually by DBE's  
8 and if there's credible evidence coming to the attention  
9 of the administration, it may trigger a review, and the  
10 administration is required to investigate that.

11 QUESTION: But under the SBA regulations I take  
12 it that they look at the net worth of the certified  
13 contractor --

14 GENERAL DAYS: Yes.

15 QUESTION: -- but they exclude from the net  
16 worth the value of his residence and the value of his  
17 business, so if you had a business that's worth \$4 million  
18 and a house that's worth \$1 million, you'd have a net  
19 worth of zero under the regulations, as I understand it.

20 GENERAL DAYS: I don't understand that to be  
21 correct, Justice Kennedy, but in any event, the analysis  
22 is with respect to whether the business is competing in a  
23 way that would justify its being discharged from the  
24 program or whether it's competing in a way that reflects  
25 that it's continuing to suffer the consequences --

1 QUESTION: What are the criteria --

2 GENERAL DAYS: -- of the discrimination that  
3 Congress found.

4 QUESTION: I'm sorry. What are the criteria for  
5 determining whether it is sufficiently successful to be  
6 discharged? I understood that -- and I can't remember  
7 whether this was a matter of statute or reg, that if the  
8 average net income for a period, I think of 3 years, was  
9 above a certain multimillion-dollar amount, that there  
10 would no longer be qualification for an economically  
11 disadvantaged status.

12 Are there other criteria, perhaps considering a  
13 shorter period of time, for example, under which the  
14 States could refuse to continue certification? If, for  
15 example, a given contractor went from making a \$500,000-  
16 a-year profit to a \$100 million-a-year profit in 1 year,  
17 would that be a basis for withdrawing the designation?

18 GENERAL DAYS: Yes. Justice Souter, there are  
19 various ways in which a business can exit from this  
20 particular type of program. There's voluntary withdrawal,  
21 there's an expiration of a program that's actually set by  
22 Congress of 9 years, and once let out of the program, the  
23 company cannot come back.

24 QUESTION: Well, what about -- where are the --  
25 where would we find the criteria which the State agencies

1 would use to de-designate?

2 GENERAL DAYS: Right. Well, 113 C.F.R. 124.207  
3 talks generally about --

4 QUESTION: Is that in the briefs?

5 GENERAL DAYS: Yes. Yes, I believe it is. It's  
6 not in the appendix, but it's certainly referred to in our  
7 brief.

8 QUESTION: General Days, could I ask --

9 GENERAL DAYS: Well, let me just finish my  
10 answer.

11 QUESTION: Oh, okay.

12 GENERAL DAYS: The regulations list 25 reasons  
13 why a firm can be terminated, and under this particular  
14 arrangement hundreds of firms have in fact been terminated  
15 under this disadvantaged business enterprise program.

16 Yes, Justice Scalia.

17 QUESTION: I was going to ask about the standing  
18 issue, which we haven't talked about this morning. You  
19 spent a bit of your principal brief on that issue. Was it  
20 raised in opposition to the petition? I looked quickly  
21 through that, and I didn't see that. Is there some reason  
22 why the Government didn't raise it then?

23 I mean, I hate to take a case and go through the  
24 labor of reading the briefs and then dismissing it because  
25 of no standing, when that issue was not raised at the

1     outset, when it should have been. Did the Government  
2     raise it in the brief in opposition to the petition?

3             GENERAL DAYS: I think we in effect raised it by  
4     pointing out that there was no indication that Adarand had  
5     suffered as a result of the application of this particular  
6     provision.

7             QUESTION: Do you know off-hand where that was?  
8     I didn't find it in there, and I really don't like, you  
9     know, jurisdictional arguments that come after we've taken  
10    the case. It's not --

11            GENERAL DAYS: Well, Justice Scalia, we had  
12    raised this issue in the lower courts. The standing issue  
13    was in fact part of the record, and therefore was part of  
14    the record that came to this Court.

15            QUESTION: Well, that's very nice, but I don't  
16    read the record when I decide whether to vote to grant a  
17    petition for certiorari. I read the brief, and the brief  
18    in opposition -- the petition and the brief in opposition,  
19    and I didn't -- I don't recall that being an issue at the  
20    time, and then when I get the principal briefs, I find it  
21    is an issue and we may have a case here in which we can't  
22    decide the question that we thought we were going to  
23    decide.

24            QUESTION: Is part of your argument that there  
25    was no injury, that Adarand had the ability to challenge



1 the standing of the successful subcontractor?

2 GENERAL DAYS: There certainly is injury. He  
3 lost -- Adarand lost the contract, but there's a question  
4 of whether there's traceability, or redressability with  
5 respect to this particular situation. There's no showing  
6 that Adarand lost this contract because of the rebuttable  
7 presumption.

8 Even if we were to conclude that Gonzales was a  
9 disadvantaged business enterprise, there's nothing in this  
10 record that indicates that Gonzales was not, in fact,  
11 socially and economically disadvantaged, and therefore --  
12 and there's no showing here that Adarand was socially --  
13 or economically disadvantaged, and therefore --

14 QUESTION: Well, he -- they do ask for  
15 prospective relief.

16 GENERAL DAYS: It is true --

17 QUESTION: And I take it your argument is that  
18 it's always available to Adarand to challenge  
19 disadvantaged status by suing minority contractors, which  
20 I take it you think promotes racial harmony.

21 GENERAL DAYS: No, that's not the suggestion.  
22 Our point is that under this Court's precedents, Lujan and  
23 Lyons, for example, this Court has imposed very severe  
24 restrictions on the extent to which a person in an  
25 individual lawsuit can seek prospective, injunctive, or

1 declaratory relief. This is a situation --

2 QUESTION: General Days, am I right that Adarand  
3 in fact couldn't bring such a lawsuit because it  
4 doesn't -- there, there would be no standing. Isn't it  
5 only the procurement officer in the 8(d) program? Does  
6 someone in the position of Adarand have a right to sue the  
7 successful bidder -- I mean, the successful DBE?

8 GENERAL DAYS: No, that would not be possible.

9 QUESTION: So the only thing that someone in  
10 Adarand's position could do is to say, procurement  
11 officer, there's a problem here. You look into it.

12 GENERAL DAYS: That's right, and to challenge  
13 the extent to which the contracting officer had not, in  
14 fact, done that and had allowed a DBE that was, in fact,  
15 not economically and socially disadvantaged to benefit  
16 from the operation of the subcontracting compensation  
17 clause.

18 QUESTION: Do you want to add anything about the  
19 limits of the -- the limits of the remedial efforts? That  
20 is, I think there are decisions of this Court that would  
21 say a legislature could take race into account in trying  
22 to cure past segregation in schools, for example -- skip  
23 it. That's all right.

24 GENERAL DAYS: That is correct, Your Honor.

25 QUESTION: Thank you, General Days.

1 Mr. Pendley, you have 4 minutes.

2 REBUTTAL ARGUMENT OF WILLIAM PERRY PENDLEY

3 ON BEHALF OF THE PETITIONER

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

6 With regard to the presumption, the reason the  
7 presumption wasn't opposed, Mr. Justice Scalia, is because  
8 from the beginning, from the get-go and the origin in this  
9 case, the Government knew the presumption worked, and that  
10 was the assumption all the way through --

11 QUESTION: Mr. Pendley --

12 MR. PENDLEY: -- this process. Excuse me, Your  
13 Honor.

14 QUESTION: -- may I ask you a question about the  
15 presumption, which is quite an important part of the case?  
16 Would your legal argument be different if, instead of a  
17 presumption, the statute said that the person seeking a  
18 DBA certification could put in evidence of discrimination  
19 against other members of that person's race to attempt to  
20 make the showing, and that the trial -- that the fact-  
21 finder would be entitled to rely on such evidence? Would  
22 that be a different case?

23 MR. PENDLEY: I think that would be an  
24 absolutely different case.

25 QUESTION: Would that be permissible, in your

1 view?

2 MR. PENDLEY: To the extent that Congress set up  
3 some fact-finding that was necessary, some level that was  
4 necessary, some hurdle that had some meaning that there  
5 was -- so one could see if there was a tight fit between  
6 the discrimination and the remedy.

7 QUESTION: The tight fit would be that an Afro-  
8 American would prove that a lot of other Afro-Americans  
9 had been discriminated against, but this one never  
10 suffered any discrimination.

11 MR. PENDLEY: No, I -- that --

12 QUESTION: Would that be a permissible showing?

13 MR. PENDLEY: I don't think so.

14 QUESTION: You don't?

15 MR. PENDLEY: No.

16 QUESTION: So it really isn't --

17 MR. PENDLEY: I think it has to be -- excuse me,  
18 Your Honor.

19 QUESTION: It's not the presumption that is  
20 critical but, rather, the relevance of the discrimination  
21 against other members of the race?

22 MR. PENDLEY: Exactly, Your Honor. We --

23 QUESTION: That that's an irrelevant factor.

24 MR. PENDLEY: As I pointed out, we have people  
25 from Hong Kong who come to this country under this, 26



1 Asian nations that are listed.

2 The presumption was never challenged. The  
3 Federal officials testified it was the operation of the  
4 presumption. In our reply on pages 7, 9, 10, and 14, it's  
5 set forth where they said that, and they said that because  
6 they had the documents. They knew that it was the  
7 presumption that was working, and had it, and that's why  
8 they didn't raise it until this last point.

9 We did challenge STURAA in our complaint,  
10 because -- on page 22 of the complaint. The Solicitor  
11 General is correct, others may qualify for this program,  
12 but I draw the Court's attention to page 212 of part 23,  
13 subpart D, appendix A, where they list the Vietnam  
14 veteran, the Appalachian white, the ascetic Jews, but said  
15 it must be emphasized that these individuals are not  
16 determined to be socially and economically disadvantaged  
17 on the basis of their group membership, rather of the  
18 social and economic disadvantage of each must be  
19 determined on an individual, case-by-case basis.

20 QUESTION: And you have no problem with that?

21 MR. PENDLEY: No, Your Honor. That's victim-  
22 specific. That's what this Court has said is permissible,  
23 but here -- and that's the difference here. Those in the  
24 presumption group step forward, prove their race. Those  
25 in the nonpresumptive group step forward and prove, on a

1 case-by-case basis, that they qualify.

2 The Government cites to its footnote 15, with  
3 regard to the State's annual review, this is a regulation  
4 that applies to the administrator of the SBA. Gonzales  
5 was certified by the State of Colorado, not under this  
6 program, and not under this.

7 In fact, the regulations are very clear with  
8 regard to what is required. I draw the Court's attention  
9 to page 23 of our brief, footnote 20. In making the  
10 certification decision, the recipient, that's the State,  
11 relies on this presumption and does not investigate the  
12 social and economic status of individuals who fall into  
13 one of the presumptive groups.

14 QUESTION: In the State of Colorado's presump --  
15 certification, is that permanent, or is that subject to  
16 periodic review, when the State certifies?

17 MR. PENDLEY: I believe they come for it  
18 annually, Your Honor, but the form simply says, 1) is it  
19 what percent owned, 2) check your race, 3) --

20 QUESTION: Anything on the form about financial  
21 success?

22 MR. PENDLEY: It asks the question, is the  
23 applicant socially and economically disadvantaged under  
24 the SBA program, and in this case, Gonzales checked no.

25 The -- I want to say something about the

1 challenge and the protest. First of all, when an Adarand  
2 challenges, what happens? The first thing that happens is  
3 the contracting officer stops the contract, and he  
4 infuriates the prime contractor.

5 Number 2, the DBE presumption continues in  
6 place, so this DBE continues to be able to bid on other  
7 projects until the process is over, and frankly, when one  
8 examines the amorphous basis upon which one is socially  
9 and economically disadvantaged under the statute and the  
10 regulations, it's hard to imagine how an Adarand could  
11 defeat the presumption.

12 Thank you, Your Honor.

13 CHIEF JUSTICE REHNQUIST: Thank you,  
14 Mr. Pendley.

15 The case is submitted.

16 (Whereupon, at 11:03 a.m., the case in the  
17 above-entitled matter was submitted.)  
18  
19  
20  
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25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*ADARAND CONSTRUCTORS, INC. Petitioner v. FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.*

*CASE NO.:93-1841*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)