No. 99-295

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

RODNEY SLATER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this case, in which petitioner alleged that one of the United States Department of Transportation's programs to enhance contracting opportunities for socially and economically disadvantaged business enterprises (DBEs) embodied a racial preference that unconstitutionally affected its ability to compete with DBEs for subcontracts, became moot when petitioner was itself certified as a DBE.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 169 F.3d 1292. The memorandum opinion and order of the district court (Pet. App. 14-87) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1999. A petition for rehearing was denied on May 19, 1999 (Pet. App. 88-89). The petition for a writ of certiorari was filed on August 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This Court has previously reviewed this case. See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 205-207 (1995). Petitioner claimed that the United States Department of Transportation's Subcontractor Compensation Clause (SCC) program was unconstitutionally racially discriminatory. The SCC program compensates prime contractors who subcontract with businesses owned by socially and economically disadvantaged persons (DBEs) and presumes that members of certain minority groups and women are so disadvantaged. Petitioner alleged that he was at a competitive disadvantage when competing with DBEs for subcontracts.

1. At the time the complaint was filed, the Central Federal Lands Highway Division of the Federal Highway Administration of the Department of Transportation (DOT) used the Subcontracting Compensation Clause program to encourage prime contractors to subcontract with socially and economically disadvantaged business enterprises. The subcontracts helped DOT satisfy requirements under the Small Business Act, 15 U.S.C. 631 *et seq.*, and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Surface Transportation Act), Pub. L. No. 100-17, 101 Stat. 132 *et seq.* *Adarand*, 515 U.S. at 209. The Small Business Act established a federal government-wide goal that small business concerns owned and controlled by socially and economically disadvantaged individuals participate in at least "5 percent of the total value of all prime contract and subcontract awards." 15 U.S.C. 644(g)(1) (1994 & Supp. III 1997).

The Surface Transportation Act, which authorized funds for federal highway contracts, also had a goal for

DBE participation. Section 106(c) of the Act provided that DOT should try to ensure that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. The Surface Transportation Act adopted Section 8(d) of the Small Business Act's definitions for socially and economically disadvantaged individuals. Section 8(d) presumes that "black Americans, Hispanic Americans, Native Americans, and other minorities," as well as any other groups designated from time to time by the Small Business Administration (SBA), are socially disadvantaged and economically disadvantaged, 15 U.S.C. 637(d)(3)(C); 13 C.F.R. 124.105, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for the purposes of this subsection." § 106(c)(2)(B), 101 Stat. 146. The relevant provisions in the Surface Transportation Act were later reenacted in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921. Following an extensive debate on the constitutionality of the DBE program,[1] these provisions were again reenacted in the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Tit. I, § 1101(b)(1), 112 Stat. 113.

DOT used the SCC program to encourage prime contractors to subcontract with DBEs by compensating the prime contractors in the following manner: (1) "[i]f a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount"; or

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[1] See 144 Cong. Rec. S5413-S5414 (daily ed.) (May 22, 1998), H3957-H3960 (May 22, 1998), H2000-H2012 (Apr. 1, 1998), S1395-S1434 (Mar. 5, 1998), S1481-S1498 (Mar. 6, 1998).

(2) "[i]f subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." *Adarand*, 515 U.S. at 209.[2]

Under DOT regulations, there are two paths through which a business may become certified as a DBE:

First, a business may be certified by the SBA as a participant in the SBA's 8(a) program, see 15 U.S.C. 637(a), which is a small business development program for disadvantaged businesses that includes "automatic eligibility for subcontractor compensation provisions of the kind at issue in this case." *Adarand*, 515 U.S. at 207. Under the 8(a) program, members of minority groups are presumed to be socially disadvantaged, but they must in addition prove economic disadvantage in order to participate. *Ibid.*

Second, a business may receive DBE certification through a state highway agency pursuant to standards set out in the DOT regulations which, as required under ISTEA, incorporate the requirements and presumptions of the Small Business Act's 8(d) program. See 15 U.S.C. 637(d) (1994 & Supp. III 1997); 13 C.F.R. 124.601; 49 C.F.R. 23.69. The 8(d) program is a subcontracting program that provides opportunities for socially and economically disadvantaged businesses to participate in federal government contracts and procurements. Members of minority groups are presumed to be both socially and economically disadvantaged

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[2] On November 10, 1997, the Federal Lands Highway Program Administrator issued a memorandum changing the SCC program so that it no longer provides automatic compensation on the basis of a percentage of the contract. The prime contractor now is reimbursed only for its additional expenditures resulting from hiring DBEs, up to the percentages stated.

under the 8(d) program. *Adarand*, 515 U.S. at 207. See 13 C.F.R. 124.105(b).

Those businesses whose owners are not members of minority groups presumed to be socially and economically disadvantaged may also be certified as DBEs. The DOT regulations require that non-minorities provide a personal statement in which they may include that they suffered "discrimination in receipt (award and/or bid) of government contracts." 49 C.F.R. Pt. 23, Subpt. D, App. C, para. (A)(2)(iii); C.F.R. 23.53. Under both the 8(a) and 8(d) programs, as well as the DBE program, the presumption that an individual is socially or economically disadvantaged is rebuttable and may be challenged at any time by a third party, either before or after certification. See 13 C.F.R. 124.601-124.609 (1994); 49 C.F.R. 23.69.[3]

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[3] On February 2, 1999, DOT issued new regulations for the DBE program to account for "developments in case law requiring narrow tailoring" of affirmative action programs and to address concerns raised during the 1998 congressional debates prior to the enactment of the Transporation Equity Act for the 21st Century. 64 Fed. Reg. 5096 (1999) (final rule announcing changes). For example, the new regulations require that recipients maximize the use of race-neutral means to achieve their DBE participation goals. 64 Fed. Reg. at 5132. The goal-setting methodology used by recipients has been substantially revised and the goal itself is to be based upon "demonstrable evidence of the availability of ready, willing and able DBEs" in the state or locality. 64 Fed. Reg. at 5131. Under the new regulations, the ten percent statutory goal for DBE participation is an aspirational goal that applies to DOT nationally and not to individual recipients of federal funding. Recipients are not required to set goals at any particular level, and they may not be sanctioned for failing to meet their DBE participation goal. 64 Fed. Reg. at 5097. Waivers of program provisions may be sought by recipients, 64 Fed. Reg. at 5129, and in general the DBE program has given recipients more flexibility in achieving the program objectives. Certification requirements have

2. On August 10, 1990, petitioner filed suit for declaratory and injunctive relief against DOT officials, alleging that the SCC program violates 42 U.S.C. 1983, 42 U.S.C. 2000d *et seq.* (Title VI), and the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner contended that he was denied a subcontract on a federal highway project funded by the Surface Transportation Act because of the SCC program. *Adarand*, 515 U.S. at 205.

In April 1991, the parties filed cross motions for summary judgment. In April 1992, the district court held that the constitutionality of the SCC program should be tested under intermediate scrutiny and granted defendants' motion for summary judgment. *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240 (D. Colo. 1992). In February 1994, the court of appeals affirmed. *Adarand Constructors, Inc.* v. *Peña*, 16 F.3d 1537, 1539 (10th Cir. 1994). This Court granted certiorari and, in June 1995, vacated the court of appeals' judgment. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995). The Court held that strict scrutiny, not intermediate scrutiny, is the correct test to use when determining if a race-based classification imposed by a federal government agency violates the equal protection standard of the Fifth Amendment. *Id.* at 227. The Court ordered the lower courts to determine "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 238.

3. The court of appeals remanded the case to the district court. Pet. App. 17. In the district court, the

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also been changed and now include a provision that businesses seeking certification as DBEs be owned by individuals whose net worth does not exceed $750,000. 64 Fed. Reg. at 5136.

parties again filed cross motions for summary judgment, and on June 4, 1997, the district court granted petitioner's motion for summary judgment. The court held that DOT's SCC program satisfied the first part of strict scrutiny, *i.e.*, that the "requisite particularized findings of discrimination to support a compelling governmental interest for Congress's action in implementing the SCC program" are present. *Id.* at 57. The court held, however, that the program was not narrowly tailored to accomplish that interest. *Id.* at 77. Therefore, the district court struck down "§ 106(c) [of the Surface Transportation Act], § 1003(b) of ISTEA, § 8(d) of the [Small Business Act], 15 U.S.C. § 637(a), and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the subcontracting compensation clause program arising pursuant to those statutes and regulations." *Id.* at 86. The court also permanently enjoined the use of the SCC program in Colorado. *Ibid.* The Department of Transportation filed a notice of appeal.

4. After the district court entered its judgment in this case, petitioner filed a separate suit against State of Colorado officials, alleging that Colorado's use of DBE guidelines in administering state contracts assisted with federal funds was unconstitutional. See *Adarand Constructors, Inc.* v. *Romer*, Civ. No. 97-K-1351 (D. Colo. filed June 26, 1997). On July 25, 1997, the district court in *Romer* held a hearing on petitioner's motion for a preliminary injunction. Pet. App. 135. During that hearing, the district court said that petitioner may not have standing in that case. The district court stated that petitioner might be eligible to be a DBE because the court had held, in this case, that Randy Pech, petitioner's principal, had been discriminated against in violation of the Constitution.

Id. at 136. After the hearing, petitioner applied to the State of Colorado for, and was granted, DBE status. *Id.* at 5. After being informed that petitioner was now certified as a DBE, DOT filed a motion with the court of appeals in the instant case to dismiss this case as moot.[4]

5. On March 4, 1999, the court of appeals dismissed the case as moot and vacated the district court's judgment. Pet. App. 1-13. The court stated that, under this Court's holding in *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997), to have standing to litigate, a party must show an "actual or imminent" harm and this requirement also applies on appeal. Pet. App. 5 (quoting *Arizonans*, 520 U.S. at 64). The court held that as a result of Adarand's certification as a DBE, the case was moot. Specifically, the court held that because "Adarand is now entitled to the preference it challenges, it can no longer assert a cognizable constitutional injury." *Id.* at 5.

The court of appeals rejected petitioner's claim that it received DBE status only as a result of the district court's judgment and would lose that status if the judgment was vacated. The court held that petitioner's claim cannot defeat mootness because the "dispositive fact for our standing analysis is that [Adarand] now has that status." Pet. App. 7.

Nor was the court persuaded by petitioner's claim that this case is "capable of repetition yet evading

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[4] The United States and the Department of Transportation appealed the district court's denial of their motion to intervene in petitioner's action against the State. On September 29, 1999, the Tenth Circuit ruled in a brief unpublished order that the federal appellants should be permitted to intervene, and it remanded that case to the district court "to consider further the issue of mootness." *Adarand Constructors, Inc.* v. *Romer*, No. 97-1285, 1999 WL 770176 (10th Cir. Sept. 29, 1999).

review." Pet. App. 7. The court explained that that doctrine is applicable only when: (1) the challenged action is "in its duration too short to be fully litigated prior to its cessation or expiration"; and (2) there is a "reasonable expectation that the same complaining party would be subjected to the same action again." *Ibid.* (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990)). The court held that petitioner failed to show that the circumstances of its "challenge are too brief for complete litigation." *Ibid.* The court also held that "Adarand's suggestion, made without factual support, that Colorado will continually revoke Adarand's DBE certification, and then reimpose it to avoid review, does not comprise a reasonable expectation that the plaintiff will be subjected to the same action again." *Id.* at 8 (internal quotation marks omitted). The court found that there was no "evidence that the [federal] government manipulated both Adarand and Colorado into respectively seeking and conferring DBE status, in an effort to establish a repetitive and unreviewable pattern of certification and revocation." *Ibid.*

The court also rejected petitioner's claim that "because its DBE certification is not recognized by the federal government," it will not be able "to compete equally for federal highway subcontracts in Wyoming and New Mexico." Pet. App. 8. The court explained that, in the federal lands direct contracting program in which the SCC is used, "a small business is entitled to DBE treatment" if any State's Department of Highways/Transportation certifies it as a DBE. *Ibid.* The court held that, in any event, "[r]efusal of certification by other states * * * does not affect Adarand's DBE preference in Colorado—and the use of the SCC

in Colorado highway construction is the only issue before us." *Ibid.*

The court of appeals rejected petitioner's claim that the "new Colorado DBE regulations do not comply with federal regulations and might be rejected by the Department of Transportation." Pet. App. 9. The court noted that federal regulations allow "state DBE programs to certify nonminority individuals on a case-by-case basis." *Ibid.* (quoting 49 C.F.R. 23.69). Therefore, the claim that DOT would reject Colorado's program is too "speculative to avoid a finding of mootness." *Ibid.*

In vacating the district court's judgment, the court of appeals explained that the normal practice when a civil case becomes moot on appeal "is to reverse or vacate the judgment below and remand with a direction to dismiss." Pet. App. 10. The court determined that equity required that the judgment be vacated in this case because the "circumstances causing mootness in this case were precipitated by the actions of a third party [the State of Colorado] and Adarand itself * * * and there is no evidence that the [federal] government sought mootness in an effort 'to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment.'" *Id.* at 11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of the court of appeals' fact-bound determination that petitioner's claim became moot when petitioner obtained certification as a DBE is not warranted.

1. The court of appeals' decision to dismiss the case as moot is correct and unexceptional. Article III of the Constitution prohibits federal courts from exercising

jurisdiction unless presented with live "cases" or "controversies." The standing doctrine "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). Therefore, the plaintiff must demonstrate that he or she has suffered an actual or imminent harm, the action being challenged caused the harm, and a favorable decision will redress the harm. *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). The plaintiff's standing must be present even on appeal —"an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). If, during the appeal, the plaintiff has lost standing, the case becomes moot and the federal court is divested of jurisdiction. *Arizonans*, 520 U.S. at 68 & n.22.

The court of appeals' decision is a straightforward application of these established principles. Petitioner's contention is that the SCC program unfairly enhances federal contracting opportunities for businesses owned and controlled by members of the specified minority groups. Petitioner applied for certification as and became a DBE. Colorado's certification of petitioner as a DBE "entitles Adarand to the benefit of the SCC under challenge," Pet. App. 4, as well as "to the federal contracting preference based on any valid certification, regardless of whether it is certified by the particular state in which the highway construction occurs." *Id.* at 8-9.[5] As the court of appeals explained, since "Adarand

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[5] As we noted in our response to petitioner's suggestion of rehearing en banc in the court of appeals, the Department of Transportation has informed us that, after it was certified as a DBE in June 1998, Adarand received more than $2.25 million in

is now entitled to the preference it challenges, it can no longer assert a cognizable constitutional injury." *Id.* at 5.

2. Petitioner asserts (Pet. 12-16) that it is important for this Court to review the merits of its challenge—the question whether the SCC program satisfies strict scrutiny—because, petitioner states, the case has important implications for federal highway contracting and constitutional law. The importance of the issues presented, however, provides a significant reason why a court should not address them in the absence of a genuine and persisting case or controversy. In addition, this Court has repeatedly stated that it ordinarily does not "decide in the first instance issues not decided below." *NCAA* v. *Smith*, 119 S. Ct. 924, 930 (1999); see also *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). Since the court of appeals correctly dismissed the case as moot, it did not adjudicate the constitutional issues that had previously been presented in this case. Therefore, the only issue presently before this Court is the correctness of the court of appeals' conclusion that, on the particular facts of this case, it is moot; the constitutional questions to which petitioner seeks the answers are not properly before the Court on this petition.

3. Contrary to petitioner's claims (Pet. 16-25), the court of appeals' decision does not conflict with any decision of this Court.

a. Petitioner contends (Pet. 16-17) that the decision to dismiss the appeal conflicts with this Court's decision in *Northeastern Florida Chapter of the Associated*

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federally assisted prime contracts and subcontracts. See Gov't C.A. Response to Petition for Rehearing En Banc 8 n.7.

General Contractors of America v. *City of Jacksonville*, 508 U.S. 656, 661-662 (1993). That contention is mistaken.

The issues presented and adjudicated by this Court in *Northeastern Florida Contractors* are not present here. *Northeastern Florida Contractors* held, in part, that a municipality's decision to change an ordinance being challenged as unconstitutional did not moot the case against the municipality. 508 U.S. at 662. Here, the federal government took no action that caused the case against it to become moot. Instead, the case became moot when petitioner—the plaintiff in the case, not the defendant—voluntarily applied for and received certification as a DBE. Pet. App. 5. It thereby obtained all of the relief to which it could have been entitled in this lawsuit—the advantages of DBE status in bidding for subcontracts—and its claim thereby became moot. The federal government was not responsible for petitioner's decision to seek DBE certification, for certifying petitioner as a DBE, or even for approving the State of Colorado's certification. Colorado granted petitioner DBE status because CDOT determined that Randy Pech, petitioner's principal, was socially and economically disadvantaged. *Ibid.*

Petitioner's contention (Pet. 17) that the United States Department of Transportation could "invalidate" CDOT's "voluntary cessation" of its previous program does not make this case analogous to *Northeastern Florida Contractors*, nor is it a persuasive argument that the case is not moot.[6] Regardless of the existence

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[6] In issuing new regulations governing the DBE program, the Department of Transportation has required all recipients of federal highway funds, including the State of Colorado, to submit their DBE programs for review. See 64 Fed. Reg. at 5129 (to be codified

or exercise of federal authority to disapprove the State's action, the fact remains that it was petitioner who decided to apply for DBE status and the State—a non-party to this case—that instituted a new program and then certified petitioner as a DBE. As the court of appeals noted, petitioner produced no "evidence that the [federal] government 'manipulated' both Adarand and Colorado into respectively seeking and conferring DBE status, in an effort to establish a repetitive and unreviewable pattern of certification and revocation." Pet. App. 8. *Northeastern Florida Contractors* is therefore inapposite.[7]

b. Petitioner similarly errs in asserting (Pet. 28-29) that there is a conflict between this case and *United*

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at 49 C.F.R. 26.21(b)(1)). The Department is currently reviewing the large number of programs that have been submitted to it, including Colorado's TC-554 program.

[7] In addition, the inconsistency that petitioner claims to exist (Pet. 20 n.24) between federal regulations and CDOT's regulations would not assist petitioner in urging that the case is not moot. Petitioner claims that CDOT's regulations are inconsistent with federal regulations because CDOT's regulations no longer presume members of specified minority groups to be socially and economically disadvantaged. But Colorado's regulations have always permitted certification of individuals (like petitioner's owner, Randy Pech) when such individuals demonstrate social and economic disadvantage. Pet. App. 111. In this regard, Colorado's regulations are consistent with federal regulations. See 49 C.F.R. 23.62 (old regulation); 64 Fed. Reg. at 5136 (to be codified at 49 C.F.R. 26.67) (new regulation effective Mar. 4, 1999); 64 Fed. Reg. at 5147 (to be codified at 49 C.F.R. Pt. 26, App. E). Any program submitted to and approved by the Department of Transportation must continue to provide an opportunity for non-minority individuals to be certified as socially and economically disadvantaged and therefore eligible to be certified as DBEs. See p. 5, *supra*. As we note below, see pp. 17-18, *infra*, Adarand's owner therefore could reapply for certification as a DBE at any time.

States v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). *W.T. Grant Co.* held that when a defendant voluntarily ceases the conduct being challenged, the case is not moot unless the defendant proves that there is "no reasonable expectation that the wrong will be repeated." *Ibid.* Here, the circumstances that rendered this case moot had nothing to do with any cessation of conduct by the federal defendants. Therefore, *W.T. Grant Co.* is inapposite.

4. Nor does the court of appeals' decision conflict with the principle that a case is not moot if it is capable of repetition yet evading review. See Pet. 18-30. Under that principle, a suit for prospective relief may "go forward despite the abatement of the underlying injury only in the 'exceptional situations,' * * * where the following two circumstances [a]re simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), and *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam)).

This case does not satisfy those requirements. Petitioner does not, and cannot, suggest that DOT's administration of the challenged statutes and regulations is by its nature too short in duration to be fully litigated. See *Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998) (rejecting argument that case is capable of repetition and evades review when inmate could not show time between parole revocation and expiration of sentence "is always so short as to evade review"); cf. *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (noting that normal 266-day human gestation period is generally too short to allow com-

pletion of usual appellate review process in challenge to abortion restriction). Petitioner's contentions to the contrary, as well as his contentions that the ordinary rules regarding the "capable of repetition, yet evading review" doctrine are not applicable, are not persuasive.

a. Petitioner's contention (Pet. 18-21) that the United States will likely not approve Colorado's certification of Adarand as a DBE is meritless. The court of appeals correctly held that that claim is too speculative to defeat a finding of mootness. Pet. App. 9.

Proceedings to challenge petitioner's certification as a DBE could be initiated in three ways: (a) a third party could file a challenge to petitioner's DBE certification with CDOT, see 49 C.F.R. 23.69(b)(1)[8]; (b) CDOT could decide to review petitioner's DBE status if it found "reason to believe that the challenged party is in fact not socially and economically disadvantaged," see 49 C.F.R. 23.69(b)(3)(i); or (c) DOT could require the State to begin administrative proceedings to decertify petitioner, see 49 C.F.R. 26.87(c)(1) (effective March 4, 1999).[9] After one of those steps is taken, CDOT must

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[8] In fiscal year 1997, DOT reviewed 12 challenges to DBE status out of the thousands of DBEs certified nationwide.

[9] Petitioner errs in contending that "the United States had unilateral authority to order the decertification of Adarand." Pet. 21. See also *id.* at 22 ("[T]he United States may order the CDOT to decertify Adarand at any time."). The authority to which petitioner refers provides that, if the Department of Transportation "determines that * * * information available * * * provides reasonable cause to believe that a firm certified does not meet the eligibility criteria," then the Department "may direct [the State] to initiate a proceeding to remove the firm's certification." 49 C.F.R. 26.87(c)(1) (effective Mar. 4, 1999). By its plain terms that regulation does not provide that the United States may order Adarand's decertification; it provides only that the Department of Transportation may require CDOT to "initiate a proceeding,"

hold a hearing and then make a final determination as to whether petitioner's principal is socially and economically disadvantaged. See 49 C.F.R. 23.69(b)(6). Any adversely affected party may appeal CDOT's final determination to DOT. See 49 C.F.R. 23.69(c).

Petitioner has provided no information, and DOT's records do not show, that any third party challenged petitioner's certification. Nor did CDOT or DOT officials challenge petitioner's DBE status. Even if a challenge had been instituted, it would have been dealt with in accordance with the administrative procedures established by DOT and by the State of Colorado, leading to ultimate review under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, in federal district court. See 49 C.F.R. 26.87. Until and unless those administrative proceedings are initiated and completed, it cannot be concluded that petitioner is ineligible for DBE status, and without that conclusion, petitioner has no basis to challenge the ways in which DBE status is awarded to others.[10]

b. Petitioner asserts (Pet. 11, 23) that its principal owner, Randy Pech, declined to reapply for certification as a DBE after the court of appeals decided this case, because the vacatur of the district court judgment in this case left Pech in a position in which he could no longer properly claim that he had been socially dis-

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which may or may not result in decertification of Adarand and whose results, as noted in text, would ultimately be reviewable in federal court.

[10] Petitioner asserts (Pet. 5) that before the court of appeals the United States stated that petitioner is not certified for purposes of DOT programs. That is not correct. The federal respondents explained that DOT does not certify firms itself; its normal practice is to accept state DBE certification unless that certification is challenged by third-parties or by the State itself .

advantaged. *Id.* at 23. Petitioner's decision not to reapply occurred after the court of appeals' decision and it therefore presents facts not in the record in this case. In any event, petitioner's voluntary action in declining to reapply for recertification after the court of appeals had already determined that the case was moot could not revive its claim.

Petitioner speculates that, because the district court judgment was vacated, petitioner had no choice but to decline to seek recertification, since it could not meet the definition of "socially disadvantaged" under the CDOT program. There is nothing in the court of appeals' decision, however, that would have prevented petitioner—or that would prevent petitioner in the future—from reaffirming to CDOT that it believed that it had been discriminated against by the federal program on the basis of race and therefore was entitled to DBE status. Indeed, that is precisely the claim that petitioner has advanced all along in this lawsuit. The fact that the district court decision favoring petitioner was vacated on a ground (mootness) unrelated to its merits surely does not preclude petitioner from continuing to advance that claim.[11]

c. Nor is there merit to petitioner's contention (Pet. 24) that, because counsel for the United States stated in the court of appeals that petitioner could bring another lawsuit if in the future it is denied a subcontract because of the SCC program, this is a case that is capable of repetition yet evading review. The statements made by government counsel were legally correct and

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[11] As we have noted (see n.4, *supra*), the question whether petitioner's claims are moot under its current circumstances is pending on the remand proceedings from the Tenth Circuit's decision in *Adarand* v. *Romer*.

have no bearing on whether this case satisfies the "capable of repetition" doctrine. On the current state of the record in this case, petitioner successfully obtained certification as a DBE and could obtain recertification if it seeks to do so. As a result, petitioner has no claim that, at this time, it is being denied subcontracts on account of race. Petitioner's speculation that at some future date it will be denied DBE certification—and will then be denied subcontracts because of the SCC program—is insufficient to keep this lawsuit alive. If petitioner (like any other entity) were to suffer unconstitutional discrimination in the award of subcontracts (or in any other area) in the future, its remedy would be to file another lawsuit. Speculation that that might occur, however, does not establish that this case remains alive.

d. Petitioner contends (Pet. 26-28) that CDOT will abandon the program under which it was certified as a DBE, that petitioner therefore will be subject to the type of alleged discrimination it has been challenging since 1990, and that this case is therefore capable of repetition. The court of appeals reviewed that fact-specific claim and correctly held that petitioner's contention was "made without factual support" and therefore, "does not comprise a 'reasonable expectation that the plaintiff will be subject to the same action again.'" Pet. App. 8.[12]

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[12] Petitioner asserts that, in March 1998, it lost another guardrail subcontract. Pet. 27 n.31. If petitioner lost a contract in Colorado, it was not because of the SCC, since the federal government at that time was permanently enjoined by the district court decision in this case from using the SCC in Colorado. In any event, petitioner's factual contention is outside the record of this case.

But even if petitioner's claim is true it does not establish that the case would evade review. The fact that this case has been litigated for nine years and has reached every possible level of federal court review shows that, when a plaintiff has standing, the issues are quite capable of being reviewed.

5. Petitioner contends that CDOT's TC-554 program, which was modified to permit certification based on an applicant's affirmation that it is a DBE, is a "short term order." Pet. 25. Therefore, according to petitioner, the court of appeals' decision conflicts with *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The question, however, is not whether Colorado's process for certifying DBEs is a "short term" order (although there is no reason to believe that it is), but whether the federal government's SCC program is a "short term" order. As the court of appeals held (Pet. App. 7), the SCC program is not a short term order; it has been in existence for 16 years.

Petitioner also contends (Pet. 29) that there is a conflict between the court of appeals' decision and the D.C. Circuit's decision in *Alton & Southern Railway* v. *International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 878-879 (1972). The D.C. Circuit in *Alton* did comment that the "capable of repetition, yet evading review doctrine" includes a "public interest" component. Regardless of whether that is correct, however, *Alton* provides no reason to believe that the D.C. Circuit would have decided this case differently from the Tenth Circuit. First, as in this case, the appeal in *Alton* was dismissed as moot. *Id.* at 881-882. Furthermore, the court in *Alton* explained that the public interest in the "capable of repetition, yet evading review doctrine" is in "preventing an agency from avoiding review by making its orders of limited dura-

tion." *Id.* at 879 n.9. The SCC program, however, is not a program of limited duration. Indeed, although the actions of the nonparty State of Colorado are of little relevance in this context, even the State's TC-554 program is not one of limited duration. Accordingly, *Alton* provides no basis for claiming that the D.C. Circuit would have viewed this case as governed by the "capable of repetition, yet evading review" doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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