SUPREME COURT OF THE UNITED STATES

No. 91–1721

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, PETITIONER *v.* CITY OF JACKSONVILLE, FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 14, 1993]

JUSTICE THOMAS delivered the opinion of the Court.

A Jacksonville, Florida, ordinance accords preferential treatment to certain minority-owned businesses in the award of city contracts. In this case we decide whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance. We hold that it is not.

In 1984, respondent Jacksonville, Florida, enacted an ordinance entitled "Minority Business Enterprise Participation," which required that 10% of the amount spent on city contracts be set aside each fiscal year for so-called "Minority Business Enterprises" (MBE's). City of Jacksonville Purchasing Code §§126.604(a), 126.605(a) (1988). An MBE was defined as a business whose ownership was at least 51% "minority" or female, §126.603(a), and a "minority" was in turn defined as a person who is or considers himself to be black, Spanish-speaking, Oriental, Indian, Eskimo, Aleut, or handicapped, §126.603(b). Once projects

were earmarked for MBE bidding by the city's chief purchasing officer, they were "deemed reserved for minority business enterprises only." §§126.604(c), 126.605(c). Under the ordinance, "[m]athematical certainty [was] not required in determining the amount of the set aside," but the chief purchasing officer was required to "make every attempt to come as close as possible to the ten percent figure." §§126.604(a)(4), 126.605(a)(4). The ordinance also provided for waiver or reduction of the 10% set-aside under certain circumstances. §126.608.

Petitioner, the Northeastern Florida Chapter of the Associated General Contractors of America (AGC), is an association of individuals and firms in the construction industry. Petitioner's members do business in Jacksonville, and most of them do not qualify as MBE's under the city's ordinance. On April 4, 1989, petitioner filed an action, pursuant to 42 U. S. C. §1983, against the city and its Mayor (also a respondent here) in the United States District Court for the Middle District of Florida. Claiming that Jacksonville's ordinance violated the Equal Protection Clause of the Fourteenth Amendment (both on its face and as applied), petitioner sought declaratory and injunctive relief. In its complaint petitioner alleged that many of its members "regularly bid on and perform construction work for the City of Jacksonville," Complaint ¶9, and that they "would have . . . bid on . . . designated set aside contracts but for the restrictions imposed" by the ordinance, *id.*, ¶46.

On April 6, 1989, the District Court entered a temporary restraining order prohibiting the city from implementing the MBE ordinance, and, on April 20, it issued a preliminary injunction. Respondents appealed. Concluding that petitioner had not demonstrated irreparable injury, the Court of Appeals reversed the issuance of the preliminary injunction, and remanded the case for an expedited disposition

on the merits. 896 F. 2d 1283 (1990). Chief Judge Tjoflat concurred in the judgment. In his view the suit should have been dismissed for lack of standing, because petitioner's complaint did not "refer to any specific contract or subcontract that would have been awarded to a nonminority bidder but for the set-aside ordinance." *Id.*, at 1287.

In the meantime, both petitioner and respondents had moved for summary judgment.[1] On May 31, 1990, the District Court entered summary judgment for petitioner, concluding that the MBE ordinance was inconsistent with the equal protection criteria established by this Court in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). Once again respondents appealed, and once again they obtained a favorable ruling. 951 F. 2d 1217 (1992). Rather than addressing the merits of petitioner's equal protection claim, the Court of Appeals held that petitioner "lacks standing to challenge the ordinance establishing the set-aside program," *id.*, at 1218, because it "has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts," *id.*, at 1219. The Court of Appeals accordingly vacated the District Court's judgment, and remanded the case with instructions to dismiss petitioner's complaint without prejudice.

Because the Eleventh Circuit's decision conflicts with decisions of the District of Columbia Circuit and the Ninth Circuit, see *O'Donnell Constr. Co.* v. *District of Columbia*, 295 U. S. App. D. C. 317, 320, 963 F. 2d 420, 423 (1992); *Coral Constr. Co.* v. *King County*, 941 F. 2d 910, 930 (CA9 1991), cert. denied, 502 U. S. ___ (1992), we granted certiorari. 506 U. S. ___ (1992).

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[1]In their motion for summary judgment respondents claimed only that they were entitled to judgment as a matter of law on the merits; they did not challenge petitioner's standing. See 2 Record, Exh. 33.

On October 27, 1992, 22 days after our grant of certiorari, the city repealed its MBE ordinance, and replaced it with an ordinance entitled "African-American and Women's Business Enterprise Participation," which became effective the next day. This ordinance differs from the repealed ordinance in three principal respects. First, unlike the prior ordinance, which applied to women and members of seven different minority groups, the new ordinance applies only to women and blacks. Jacksonville Purchasing Code §126.601(b) (1992). Second, rather than a 10% "set aside," the new ordinance has established "participation goals" ranging from 5 to 16%, depending upon the type of contract, the ownership of the contractor, and the fiscal year in which the contract is awarded. §126.604. Third, the new ordinance provides not one but five alternative methods for achieving the "participation goals." §§126.605, 126.618. Which of these methods the city will use is decided on a "project by project basis," §126.605, but one of them, the "Sheltered Market Plan," is (apart from the percentages) virtually identical to the prior ordinance's "set aside." Under this plan certain contracts are reserved "for the exclusive competition" of certified black- and female-owned businesses. §126.605(b).[2]

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[2]The four other methods are (1) a "Participation Percentage Plan," under which contractors are required to subcontract with black- or female-owned businesses, §§126.605(a), 126.612; (2) a "Direct Negotiation Plan," pursuant to which the city engages in "direct negotiations" with black- or female-owned businesses, §126.605(c); (3) a "Bid Preference Plan," which provides for the award of a contract to the black- or female-owned business whose bid is within a certain percentage or dollar amount of the lowest

Claiming that there was no longer a live controversy with respect to the constitutionality of the repealed ordinance, respondents filed a motion to dismiss the case as moot on November 18, 1992. We denied that motion on December 14. 506 U. S. ___ (1992).

In their brief on the merits, respondents reassert their claim that the repeal of the challenged ordinance renders the case moot. We decline to disturb our earlier ruling, however; now, as then, the mootness question is controlled by *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283 (1982), where we applied the "well settled" rule that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, at 289. Although the challenged statutory language at issue in *City of Mesquite* had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Ibid.*

This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case

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bid, §126.605(d); and (4) an "Impact Plan," under which "point values" are awarded to black- and female-owned businesses and to businesses that use black- or female-owned subcontractors or suppliers or have a specified employment program for black and female employees, §126.618.

from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way.[3]

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[3]At bottom, the dissent differs with us only over the question whether the new ordinance is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues—or, as the dissent puts it, whether the ordinance has been "sufficiently altered so as to present a substantially different controversy than the one the District Court originally decided." *Post*, at 3. We believe that the ordinance has not been "sufficiently altered"; the dissent disagrees. As for the merits of that disagreement, the short answer to the dissent's argument that this case is controlled by *Diffenderfer* v. *Central Baptist Church of Miami, Inc.*, 404 U. S. 412 (1972) *(per curiam)*, and *Fusari* v. *Steinber*g, 419 U. S. 379 (1975)—both of which predate *City of Mesquite*—is that the statutes at issue in those cases were changed substantially, and that there was therefore no basis for concluding that the challenged conduct was being repeated. See *Diffenderfer*, *supra*, at 413–414 ("crux of [the] complaint" was that old statute violated Constitution insofar as it authorized tax exemption "for church property used primarily for commercial purposes"; new statute authorized exemption "only if the property is used predominantly for religious purposes"); *Fusari*, 419 U. S., at 380

We hold that the case is not moot, and we now turn to the question on which we granted certiorari: whether petitioner has standing to challenge Jacksonville's ordinance.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan* v. *Defenders of Wildlife*, 504 U. S. ___, ___ (1992) (slip op., at 4), which itself "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," *Allen* v. *Wright*, 468 U. S. 737, 750 (1984). It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan*, *supra*, at ___ (citations, footnote, and internal quotation marks omitted) (slip op., at 4); (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41–42 (1976); and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative," *Allen* v. *Wright*, *supra*, at 752. These elements are the "irreducible minimum," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982),

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(challenged statute was "significantly revised"); *id.*, at 385 (legislature enacted "major revisions" of statute).

required by the Constitution.

The Court of Appeals held that petitioner could not establish standing because it failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance. Under these circumstances, the Court of Appeals concluded, there is no "injury." 951 F. 2d, at 1219–1220. This holding cannot be reconciled with our precedents.

In *Turner* v. *Fouche*, 396 U. S. 346 (1970), a Georgia law limiting school-board membership to property owners was challenged on equal protection grounds. We held that a plaintiff who did not own property had standing to challenge the law, *id.*, at 361, n. 23, and although we did not say so explicitly, our holding did not depend upon an allegation that he would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position. Accord, *Quinn* v. *Millsap*, 491 U. S. 95, 103 (1989) (plaintiffs who do not own real property have standing to challenge property requirement for membership on "board of freeholders").

We confronted a similar issue in *Clements* v. *Fashing*, 457 U. S. 957 (1982). There a number of officeholders claimed that their equal protection rights were violated by the "automatic resignation" provision of the Texas Constitution, which requires the immediate resignation of some (but not all) state officeholders upon their announcement of a candidacy for another office. Noting that the plaintiffs had alleged that they would have announced their candidacy were it not for the consequences of doing so, we rejected the claim that the dispute was "merely hypothetical," and that the allegations were insufficient to create an "actual case or controversy." *Id.*, at 962. Citing *Turner* v. *Fouche*, we emphasized that the plaintiffs' injury was the

"obstacle to [their] *candidacy*," 457 U. S., at 962 (emphasis added); we did not require any allegation that the plaintiffs would actually have been elected but for the prohibition.

The decision that is most closely analogous to this case, however, is *Regents of University of California* v. *Bakke*, 438 U. S. 265 (1978), where a twice-rejected white male applicant claimed that a medical school's admissions program, which reserved 16 of the 100 places in the entering class for minority applicants, was inconsistent with the Equal Protection Clause. Addressing the argument that the applicant lacked standing to challenge the program, Justice Powell concluded that the "constitutional requirements of Art. III" had been satisfied, because the requisite "injury" was the medical school's "decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race." *Id.*, at 281, n. 14 (emphasis added) (opinion of Powell, J.). Thus, "even if Bakke had been unable to prove that he would have been *admitted* in the absence of the special program, it would not follow that he lacked standing." *Id.*, at 280–281, n. 14 (emphasis added). This portion of Justice Powell's opinion was joined by four other Justices. See *id.*, at 272.[4]

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[4]Although *Bakke* came to us from state court, our decision in *ASARCO, Inc.* v. *Kadish*, 490 U. S. 605 (1989), does not retroactively render *Bakke*'s discussion of standing dictum. See Brief for Public Citizen et al. as *Amici Curiae* 7, n. 4 (suggesting that it might). In *ASARCO* we held that we had jurisdiction to review the judgment of a state court even though the respondents (plaintiffs in the trial court) "had no standing to sue under the principles governing the federal courts," 490 U. S., at 623, because the petitioners (defendants in the trial court) "allege[d] a specific injury stemming from the state-court decree," *id.*, at 617. But we did not hold that it was

Singly and collectively, these cases stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. See, *e. g.*, *Turner* v. *Fouche*, *supra*, at 362 ("We may assume that the [plaintiffs] have no right to be appointed to the . . . board of education. But [they] do have a federal constitutional right to be *considered* for public service without the burden of invidiously discriminatory disqualifications") (footnote omitted) (emphasis added). And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. See *Croson*, 488 U. S., at 493 (opinion of O'CONNOR, J.) ("The [set-aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race") (emphasis added). To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an

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irrelevant whether the state-court plaintiffs met federal standing requirements; instead we made it clear that a determination that the plaintiffs satisfied those requirements would have "obviated any further inquiry." *Id.*, at 623, n. 2. Thus, while Bakke's standing was not a necessary condition for our exercise of jurisdiction, it was sufficient.

equal basis.[5]

In urging affirmance, respondents rely primarily upon *Warth* v. *Seldin*, 422 U. S. 490 (1975). There the plaintiffs claimed that a town's zoning ordinance, both by its terms and as enforced, violated the Fourteenth Amendment insofar as it had the effect of preventing people of low and moderate income from living in the town. Seeking to intervene in the suit, an association of construction firms alleged that the zoning restrictions had deprived some of its members of business opportunities and profits. We held that the association lacked standing, and we provided the following explanation for our holding:

> "The complaint refers to no specific project of any of [the association's] members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by [the association's] members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, [the association] has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention." *Id.*, at 516.

We think *Warth* is distinguishable. Unlike the other

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[5]It follows from our definition of "injury in fact" that petitioner has sufficiently alleged both that the city's ordinance is the "cause" of its injury and that a judicial decree directing the city to discontinue its program would "redress" the injury.

cases that we have discussed, *Warth* did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit. In *Turner* v. *Fouche*, *Quinn* v. *Millsap*, and *Clements* v. *Fashing*, the plaintiffs complained that they could not be considered for public office. And in both *Bakke* and this case, the allegation was that the plaintiff (or the plaintiff's membership) was excluded from consideration for a certain portion of benefits—in *Bakke*, places in a medical school class; here, municipal contracts. In *Warth*, by contrast, there was no claim that the construction association's members could not apply for variances and building permits on the same basis as other firms; what the association objected to were the "refusals by the town officials to *grant* variances and permits." 422 U. S., at 515 (emphasis added). See also *id.*, at 530 (Brennan, J., dissenting) ("the claim is that respondents will not approve any project") (emphasis deleted). The firms' complaint, in other words, was not that they could not compete equally; it was that they did not win. Thus, while there is undoubtedly some tension between *Warth* and the aforementioned line of cases, this case is governed by the latter.

In any event, the tension is minimal. Even assuming that the alleged injury in *Warth* was an inability to *compete* for variances and permits on an equal basis, and that *Warth*, too, is analogous to this case, it is distinguishable nonetheless. Unlike petitioner, which alleged that its members regularly bid on contracts in Jacksonville and would bid on those that the city's ordinance makes unavailable to them, the construction association in *Warth* did not allege that "any member ha[d] applied . . . for a building permit or a variance with respect to any current project." *Id.*, at 516. Thus, unlike the association in *Warth*, petitioner has alleged an "injury . . . of sufficient immediacy . . . to warrant judicial intervention." *Ibid.*

Furthermore, we did not hold in *Warth*, as the Court of Appeals—*mutatis mutandis*—did here, that the association was *required* to allege that but for a discriminatory policy, variances or permits would have been awarded to its members. An allegation that a "specific project" was "precluded" by the existence or administration of the zoning ordinance, *ibid.*, would certainly have been sufficient to establish standing, but there is no suggestion in *Warth* that it was necessary.

In its complaint petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able. Complaint ¶¶9, 46. Because those allegations have not been challenged (by way of a motion for summary judgment, for example), we must assume that they are true. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. ___, ___, n. 3 (slip op., at 7, n. 3); *Pennell* v. *San Jose*, 485 U. S. 1, 7 (1988). Given that assumption, and given the legal standard we have reaffirmed today, it was inappropriate for the Court of Appeals to order that petitioner's complaint be dismissed for lack of standing.[6] The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

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[6]There has been no suggestion that even if petitioner's members have standing to sue, petitioner itself does not, because one or more of the prerequisites to "associational standing" have not been satisfied. See *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977). Nor, given the current state of the record, do we have any basis for reaching that conclusion on our own.

So ordered.