CONSTITUTIONAL LAW—STANDING—A CONTRACTORS' ASSOCIATION SATISFIES THE STANDING REQUIREMENT BY SHOWING THAT IT IS READY AND ABLE TO BID ON CITY CONTRACTS, BUT CANNOT DO SO ON AN EQUAL BASIS BECAUSE OF A GOVERNMENT MINORITY SET-ASIDE PROGRAM—*Associated General Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297 (1993).

Under Article III of the United States Constitution, federal courts have the power to decide only "cases" or "controversies."[1] Standing is the most pivotal doctrine defining the case or controversy requirement.[2] Standing ensures that only parties who have

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[1] *See* U.S. CONST. art. III, § 2, cl. 1. The Case or Controversy Clause provides:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States . . . .

*Id.* (emphasis added); *see* Minnesota v. Hitchcock, 185 U.S. 373, 382-83 (1902) (explaining that Article III, § 2 of the United States Constitution "defines the matters to which the judicial power of the United States extends"); EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 331-33, 359 (1964) (discussing the case or controversy requirement's limiting effect on federal judicial power); C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 197-98 (1987) (professing that the United States's approach to the exercise of federal judicial power is modeled after the British requirement of a "case," which also requires an actual dispute).

[2] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 107 (2d ed. 1988); *see* Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301 (1993) (citation omitted) (declaring that standing is an essential element defining Article III's case or controversy requirement); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citation omitted) (explaining that standing is a perennially necessary component of Article III's case or controversy requirement). Emanating from the constitutional case or controversy requirement, standing "concerns [the] power of federal courts to hear and decide cases and does not concern ultimate merits of substantive claims involved in the action." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990) (citation omitted). Likewise, Laurence Tribe explained that "[s]tanding differs, in theory, from all other elements of justiciability by its primary focus 'on the *party* seeking to get his complaint before a federal court' and only secondarily 'on the *issues* he wishes to have adjudicated.'" TRIBE, *supra*, § 3-14, at 107 (alteration in original) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). Specifically, Tribe asserts, the standing doctrine addresses the issue of whether "'a party has a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Id.* (alteration in original) (quoting Sierra Club v. Morton, 405 U.S. 727, 731 (1972)).

Tracing the evolution of the standing doctrine during the eras of the Warren and Burger Courts, Tribe discovered that the Burger Court redirected the constitutional focus of the standing inquiry from a concern for avoiding advisory opinions to a concern for preventing separation of powers violations. *Id.* § 3-14, at 108. To clarify, Tribe explained that the Warren Court focused upon "whether the litigant's personal stake in a lawsuit assured 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult consti-

tutional questions.' Whether a litigant had standing did not, 'by its own force, raise separation of powers problems . . . .'" *Id.* § 3-14, at 108-09 (quoting *Flast*, 392 U.S. at 99, 100).

In contrast, Tribe opined, subsequent cases illustrate that this earlier concern was discarded in favor of the Supreme Court's interest with the proper role of the United States federal courts. *Id.* § 3-14, at 109 (citations omitted). For instance, Tribe noted, the Burger Court announced that the doctrine of standing was now "'built on a single basic idea—the idea of separation of powers,' recognizing 'the proper—and properly limited—role of the courts in a democratic society.'" *Id.* (quoting Allen v. Wright, 468 U.S. 737, 750, 752 (1984) (citations omitted)). Thus, Tribe concluded, the test of standing screens out those "injuries that are not viewed as 'judicially cognizable' because their recognition and protection would unduly enhance the role of the judiciary in relation to other branches." *Id.* § 3-16, at 114-15 (citing Vander Jagt v. O'Neill, 699 F.2d 1166, 1177-80 (D.C. Cir. 1983) (Bork, J., concurring)); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894-97 (1984)).

Perhaps implicitly acknowledging the shifting focus of the standing doctrine, the United States Supreme Court has confessed that Article III standing jurisprudence has been less than clear. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982); *cf.* Kenneth Culp Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. 759, 759 (1949) (criticizing the Court's standing jurisprudence as unnecessarily complex and in grave need of simplification). The Court has stated:

> We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.

*Valley Forge*, 454 U.S. at 475. Nonetheless, the Court lectured, Article III standing is an essential element of all federal cases. *Id.* at 475-76. Thus, the Court cautioned:

> [O]n one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States. Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit . . . it is a part of the basic charter promulgated by the Framers of the Constitution . . . .

*Id.*

Furthermore, although the definition of Article III standing may be unclear, federal courts have consistently recognized three requirements of Article III standing: (1) that individually, the plaintiff has suffered an actual or threatened injury; (2) that the injury is fairly traceable to the alleged conduct of the defendant; and (3) that a favorable decision by the court is likely to redress the litigant's injury. *Associated Gen. Contractors*, 113 S. Ct. at 2301-02 (citations omitted); *Lujan*, 112 S. Ct. at 2136 (citations omitted); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (citations omitted); *Allen*, 468 U.S. at 751 (citations omitted); *Valley Forge*, 454 U.S. at 472 (citations omitted); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41-42 (1976); Warth v. Seldin, 422 U.S. 490, 508 (1975). These three requirements of Article III standing have been labeled, respectively, "injury in fact," "causation," and "redressability." *See* TRIBE, *supra*, § 3-14, at 108 (citations omitted).

Even if a complainant establishes the three Article III requirements, she may still be deemed to lack standing based upon prudential principles established by the federal judiciary. *Id.* For instance, in *Valley Forge* the Supreme Court indicated that a plaintiff may lack standing on nonconstitutional grounds where a litigant: (1) presents "generalized grievances" that are merely abstract questions of general public concern; (2) states a claim based on a third party's rights, not his own; or (3) presents

suffered an actual and particularized harm, as opposed to a speculative injury, can invoke a federal court's authority.[3] Courts refer to this concept as the requirement of "injury in fact."[4]

The doctrine of standing, particularly its injury in fact element, has recently come to the forefront in affirmative action challenges.[5] In *City of Richmond v. J.A. Croson Co.*,[6] the United States Supreme Court adopted a strict scrutiny standard of review for state-based affirmative action programs.[7] Because of this high level

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a claim falling outside of the protected "zone of interests" of the constitutional guarantee or statute at issue. *Id.* (citing *Valley Forge*, 454 U.S. at 474-75) (other citations omitted). The purpose of such prudential considerations is to allow the judiciary "'to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.'" *Id.* (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979)) (citation omitted).

3 TRIBE, *supra* note 2, § 3-16, at 114 (citations omitted).

4 *See id.* In *Valley Forge*, the Court remarked: "The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show injury in fact resulting from the action which they seek to have the court adjudicate." *Valley Forge*, 454 U.S. at 473. Injury in fact has been defined as "concrete and certain harm . . . redress[able] by relief the court can grant." BLACK'S LAW DICTIONARY 786 (6th ed. 1990) (citation omitted); *see also Lujan*, 112 S. Ct. at 2136 (citations omitted) (defining injury in fact as a harm which is "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical'"); TRIBE, *supra* note 2, § 3-16, at 114 (describing injury in fact as "an individuated harm impacting specifically upon [a litigant] . . . of a tangible, concrete nature"). Given such broad and evasive definitions, Laurence Tribe has remarked that no single definition of the injury in fact requirement is genuinely satisfactory; only an in-depth analysis of the various cases would make possible an understanding of the injury in fact requirement. TRIBE, *supra* note 2, § 3-16, at 115. For a discussion of cases in which the Supreme Court has ruled on the issue of injury in fact, see generally *id.* § 3-16 to § 3-17, at 115-29.

5 *See* George R. La Noue, *Court's Jacksonville Decision Opens Affirmative Action Plans to Increased Litigation*, NATION'S CITIES WKLY., July 12, 1993, at 9 (explaining that, in the context of minority-business and female-business set-aside programs, the number of constitutional challenges has been limited because a given challenger's standing to sue has been uncertain); *see also* Lisa M. Bromberg, Lujan v. Defenders of Wildlife: *Where Does the Standing Issue Stand in Environmental Litigation?*, 16 AM. J. TRIAL ADVOC. 761, 761 (1993) ("Acting as a sieve, the doctrine of standing helps to limit the flow . . . [of] all types of litigated matters."); Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 906 n.6 (1992) (citations omitted) (calculating that the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.* "jeopardized over 200 set-aside programs," subjected approximately 41 affirmative action programs to *Croson* challenges, and lead to the voluntary termination of 65 management business enterprise programs); *infra* notes 10 & 11 (listing cases since *Croson* where the issue of standing has been addressed in the context of affirmative action challenges).

6 488 U.S. 469 (1989).

7 *Id.* at 493-94. In *Croson*, the City of Richmond adopted an affirmative action plan requiring general contractors awarded city construction contracts to subcontract to a minority business enterprise (MBE) at least 30% of the total dollar amount of each city construction contract. *Id.* at 477 (citation omitted). The Supreme Court

of review, the doctrine of standing became an important means of limiting the class of persons who may wage equal protection challenges against affirmative action programs.[8]

After *Croson*, a split developed among the circuit courts as to the kind of injury necessary to challenge programs that set aside a specific number of government contracts for minority-owned businesses.[9] The Eleventh Circuit has consistently required that a

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adopted a strict scrutiny standard of review and struck down the plan, finding that the city failed to demonstrate past discrimination that would satisfy a compelling governmental interest. *Id.* at 493-94, 498-500; *see* Daly, *supra* note 5, at 905 (citations omitted) (commenting that the Court's decision in *Croson* effectively requires states to clearly prove active participation in past discrimination, thereby "frustrat[ing] local initiatives to eradicate the pervasive, lingering effects of public and private discrimination"); *cf.* Janna D. Peters, Note, *In* Croson*'s Wake—The Eleventh Circuit Weakens the Application of Strict Scrutiny to State and Local Affirmative Action Plans*, 20 STETSON L. REV. 1013, 1016-17 (1991) (discussing how the Eleventh Circuit has avoided *Croson*'s strict scrutiny mandate). Much criticism surrounds the Court's decision in *Croson*. *See* Michael F. Potter, Note, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance"*, 63 S. CAL. L. REV. 1151, 1208-13 (1990) (criticizing the Court's holding in *Croson* as impinging upon state authority to enact race-conscious legislation); Jill B. Scott, Note, *Will the Supreme Court Continue to Put Aside Local Government Set-Asides as Unconstitutional?: The Search for an Answer in* City of Richmond v. J.A. Croson Co., 42 BAYLOR L. REV. 197, 229 (1990) (suggesting that the *Croson* decision reflects the Court's recognition of a deep-rooted opposition to affirmative action); Eleanor Holmes Norton & Edward Norton, *A Setback for Minority Businesses*, LEGAL TIMES, May 1, 1989, at 31 (viewing *Croson* as a disappointing setback to minority business enterprises). *See generally* Joan C. Williams, *The Constitutional Vulnerability Of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986) (arguing that cities should be granted more sovereignty to conduct their own affairs and fashion appropriate remedies to their unique social circumstances). *But see* Nina Farber, Comment, *Justifying Affirmative Action After* City Of Richmond v. J.A. Croson*: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975, 1000 (1990) (approving the adoption of a strict scrutiny standard of review for state affirmative action programs).

[8] *See* La Noue, *supra* note 5, at 9 (noting that constitutional challenges to minority set-aside programs have been limited due to uncertainty concerning challengers' standing to sue). Since *Croson*, 14 of the 22 cases involving government minority set-aside or preference programs have discussed the issue of standing. Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 8, Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297 (1993) (No. 91-1721); *see infra* notes 10 & 11 (listing the post-*Croson* affirmative action cases addressing the issue of standing).

[9] Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2300 (1993) (citations omitted); *see infra* notes 10-11 and accompanying text (explaining the nature of the circuit split and citing the relevant cases evidencing the split).

A minority set-aside program is a fixed quota system whereby certain goals are set for the award of contracts or other benefits to members of designated groups. James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 535 (1975). To illustrate the need for such affirmative action programs, one commentator has suggested the following analogy:

> The White Team and the Black Team are playing the last football game of the season. The White Team owns the stadium, owns the referees

plaintiff allege injury with great particularity, claiming the loss of a specific contract because of the set-aside program.[10] Both the District of Columbia and Ninth Circuits, however, have uniformly

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> and has been allowed to field nine times as many players. For almost four quarters, the White Team has cheated on every play and, as a consequence, the score is White Team 140, Black Team 3. Only 10 seconds remain in the game, but as the White quarterback huddles with his team before the final play, a light suddenly shines from his eyes.
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> "So how about it, boys?" he asks his men. "What do you say from here on we play fair?"

Andrew Ward, *Whites: 140, Blacks: 3*, N.Y. TIMES, February 7, 1989, at A29. *See generally* Leland Ware, *A Remedy for the "Extreme Case:" The Status of Affirmative Action After* Croson, 55 MO. L. REV. 631 (1990) (providing a thorough commentary on the substantive aspects of recent affirmative action jurisprudence).

[10] *See* Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1219-20 (11th Cir. 1992) (citations omitted) (rejecting contractors' association's claim of standing because the association did not declare that it had been denied a specific contract as a result of the set-aside ordinance), *rev'd*, 113 S. Ct. 2297 (1993); S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 758 (11th Cir. 1991) (ruling that neither loss of business opportunities and profits nor loss of an "opportunity to compete on an equal basis with other bidders" was a recognized Article III injury sufficient for standing), *cert. denied*, 111 S. Ct. 2274 (1991); Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1205-06, 1210 (11th Cir.) (denying standing to challenge an affirmative action program because the contractor failed to allege that it had lost any specific contract due to the program), *cert. denied*, 111 S. Ct. 2238 (1991). A number of other courts have taken a similar position on the issue. *See* Carpenter v. Barnhart, No. 88-3578, 1990 WL 2314, at *3 (4th Cir. Jan. 16, 1990) (declaring that plaintiff contractor lacked standing because he did not regularly bid on city contracts and did not identify any specific contracts that were denied him due to the minority business program); Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co., 759 F. Supp. 1498, 1502 (W.D. Wash. 1991) (holding that the plaintiffs "must allege that they would have bid for and received some or all of the work given by defendants"); Michigan Road Builders Ass'n, Inc. v. Blanchard, 761 F. Supp. 1303, 1310, 1311 (W.D. Mich. 1991) (holding that an association lacked standing where it presented no evidence that its members actually bid on the set-aside projects); Underground Contractors Ass'n v. Metropolitan Water Reclamation Dist., No. 90-C-3586, 1991 WL 127616, at *3 (N.D. Ill. July 10, 1991) (citations omitted) (proclaiming that contractors challenging minority set-aside programs must allege that they were refused contracts for specific projects); Contractors Ass'n, Inc. v. City of Philadelphia, 735 F. Supp. 1274, 1283 & n.3, 1284 (E.D. Pa. 1990) (holding that plaintiffs had standing when they identified projects that, but for the ordinance, they would have been awarded; but, other plaintiffs lacked standing when they presented no evidence other than affidavits from members stating that they generally bid on the type of contracts covered by the program), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991). *Compare* Sims v. Florida Dep't of Highway Safety & Motor Vehicles, 862 F.2d 1449, 1458-59 (11th Cir.) (holding that association could sue on behalf of its members where it alleged that the state unlawfully refused to issue registrations and titles to certain vehicle owners), *cert. denied*, 110 S. Ct. 64 (1989) *with* Associated Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1287 n.2 (11th Cir. 1990) (Tjoflat, C.J., concurring) (citation omitted) (disagreeing with the *Sims* Court's holding that an association could sue on behalf of its members because the *Sims* Court "did not address the plaintiff's failure to allege that any of its members suffered actual or threatened injury"), *rev'd on other grounds*, 113 S. Ct. 2297 (1993).

maintained less stringent standards, holding that standing's injury requirement is satisfied if a complainant alleges an inability to compete for contracts because of a set-aside program.[11]

Recently, the United States Supreme Court definitively addressed the standing issue in *Associated General Contractors of America v. City of Jacksonville.*[12] In *Associated General Contractors*, the Supreme Court focused upon the plaintiff's inability under a minority set-aside program to compete on an equal basis with minority-owned businesses for city contracts.[13] Even without an alleged loss of a specific contract, the Court concluded, the plaintiff's inability to compete equally amounted to a sufficient injury in fact to confer standing to challenge the set-aside program.[14]

In 1984, the city of Jacksonville, Florida passed an ordinance[15] that proposed to increase minority business activity in city construction contracts.[16] Among its requirements, the Jacksonville ordi-

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[11] *See* O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 423 (D.C. Cir. 1992) (citations omitted) (finding that lack of "opportunity to compete on an equal footing" for city contracts was enough to establish standing); Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir. 1991) (interpreting that the preference given to female-owned businesses created an objectively unequal bidding process and thereby caused injury to the complaining construction firm every time the male-owned company placed a bid), *cert. denied*, 112 S. Ct. 875 (1992); *see also* United Fence & Guard Rail Corp. v. Cuomo, No. 88-CV-306, 1991 WL 197675, at *8 (N.D.N.Y. Oct. 1, 1991) (declaring that allegation of a history of bidding for department of transportation contracts, together with an allegation of an intention to continue to bid on such contracts, was enough to satisfy standing requirements); Associated Gen. Contractors, Inc. v. City of New Haven, 130 F.R.D. 4, 7 (D. Conn. 1990) (citation omitted) (remarking that the loss of opportunity to compete was injury sufficient to establish standing); National Coal Ass'n v. Hodel, 617 F. Supp. 584, 588 (D.D.C. 1985) (holding allegations of economic injury sufficient to satisfy the standing requirement where the Secretary of Interior removed federal coal lands from the system of competitive leasing), *aff'd*, 825 F.2d 523 (D.C. Cir. 1987).

[12] 113 S. Ct. 2297 (1993).

[13] *See id.* at 2303.

[14] *Id.* The Court expressly stated: "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." *Id.* (citing Turner v. Fouche, 396 U.S. 346, 362 (1970)). For a discussion of *Turner*, see *infra* notes 45-48 and accompanying text.

[15] JACKSONVILLE, FLA., PURCHASING CODE §§ 126.601 to .613 (1988) (repealed 1992).

[16] *Associated Gen. Contractors*, 113 S. Ct. at 2299 (citation omitted). The purpose of the ordinance was to permit Jacksonville to remedy:

> past inequities and disparities [that] have disadvantaged minority business enterprises in the awarding of contracts by the City, and [to address the City's finding that] . . . these minority business enterprises have been disadvantaged in their participation in the general welfare of the City and in City expenditures for services, supplies and materials.

JACKSONVILLE, FLA., PURCHASING CODE § 126.601 (1988) (repealed 1992).

nance provided for a ten percent set-aside of government contracts for minority business enterprises (MBEs).[17] The Northeastern Florida Chapter of the Associated General Contractors of America (AGC) brought an action under 42 U.S.C. § 1983[18] against Jackson-

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[17] *Associated Gen. Contractors*, 113 S. Ct. at 2299 (citation omitted). Pursuant to the ordinance, for five years beginning from October 1, 1988, Jacksonville was to set aside for MBEs 10% of the total amount of money spent on city capital improvements contracts and 10% of the total amount spent on all other city contracts. *See* JACKSONVILLE, FLA., PURCHASING CODE §§ 126.613, 126.604(a), 126.605(a) (1988) (repealed 1992). Under the ordinance, Jacksonville's Chief Purchasing Officer was directed to earmark projects for MBE bidding; the earmarked projects were then set aside only for minority business enterprises. *Id.* §§ 126.604(c), 126.605(c). Although "[m]athematical certainty [was] not required in determining the amount of the set aside . . . the Chief Purchasing Officer [was to] make every attempt to come as close as possible to the ten percent figure." *Id.* §§ 126.604(a)(4), 126.605(a)(4).

The Chief Purchasing Officer, under certain circumstances, was also given the authority to waive the set-aside or reduce the percentage amount to less than 10%. *Id.* § 126.608. Pursuant to the ordinance, the specific factors the Chief Purchasing Officer was to consider in determining to waive or reduce the set aside amount included:

> (a) the total dollar amount of the proposed set aside.
> (b) the extent to which the type or types of contracts involved may be reasonably susceptible to separate contracting of portions of work, services, goods, supplies and the like.
> (c) the particular type or types of work, services, goods, supplies and the like which are involved in the set aside.
> (d) the availability of minority business enterprises in the particular contracting specialties, areas or fields involved in the set aside.
> (e) the additional cost to the City of securing the specified percentage of minority business enterprise participation.

*Id.* It has been estimated that, between 1984 and 1989, $25 million in construction contracts has been awarded to women and minority businesses under the Jacksonville ordinance. *Court Throws out Ruling Against Set-Asides*, MIAMI HERALD, Feb. 6, 1992, at 2B.

[18] 42 U.S.C. § 1983 (1988). Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

While the Supreme Court's opinion indicated that AGC brought its action pursuant to 42 U.S.C. § 1983, the lower court opinion noted that AGC based its action upon § 1981 as well. *See Associated Gen. Contractors*, 113 S. Ct. at 2299; Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1218 (11th Cir. 1992), *rev'd on other grounds*, 113 S. Ct. 2297 (1993). Section 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is en-

ville and Jacksonville's mayor,[19] claiming that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[20]

AGC is an association of various firms and individuals involved in the construction industry.[21] Even though the members of AGC were active in the construction business in Jacksonville,[22] most of the members did not qualify as MBEs for purposes of the ordinance.[23] AGC alleged that its members regularly bid on city contracts and would have bid on the specified set-aside contracts but for the requirements of the ordinance.[24]

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joyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (Supp. IV 1993).

AGC filed suit seeking declaratory relief and also filed a motion for a temporary restraining order and a preliminary injunction preventing Jacksonville from implementing the MBE ordinance. Complaint for Injunctive and Declaratory Relief at ¶¶ 1-2, *Associated Gen. Contractors* (No. 89-278-Civ-J-16).

19 Throughout this Note, both respondents, Jacksonville and the Mayor, will be referred to collectively as "Jacksonville."

20 *Associated Gen. Contractors*, 113 S. Ct. at 2299. The Fourteenth Amendment provides in relevant part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* TRIBE, *supra* note 2, § 16-22, at 1521-44 (discussing equal protection jurisprudence in the affirmative action context).

21 *Associated Gen. Contractors*, 113 S. Ct. at 2299. According to AGC's complaint, AGC is a not-for-profit Florida corporation, "organized for the purpose of furthering the interests of general contractors, subcontractors and suppliers in the construction industry." Complaint for Declaratory and Injunctive Relief at para. 9, *Associated Gen. Contractors* (No. 89-278-Civ-J-16).

22 *Associated Gen. Contractors*, 113 S. Ct. at 2299. AGC claimed that its members "regularly bid on and perform construction work for the City of Jacksonville." Complaint for Declaratory and Injunctive Relief at para. 9, *Associated Gen. Contractors* (No. 89-278-Civ-J-16).

23 *Associated Gen. Contractors*, 113 S. Ct. at 2299. Under the Jacksonville Ordinance, an MBE was defined as a business that is "at least fifty-one percent . . . owned, operated and controlled by minority group members or by women." JACKSONVILLE, FLA., PURCHASING CODE § 126.603(a) (1988) (repealed 1992). The ordinance defined "minority" as "a person who is, or considers himself or herself to be" Spanish-speaking American, Oriental, Indian, Aleut, Eskimo, black, or handicapped. *Id.* § 126.603(b).

24 *Associated Gen. Contractors*, 113 S. Ct. at 2299. Specifically, AGC "alleged that many of its members 'regularly bid on and perform construction work for the City of Jacksonville,' and that they 'would have . . . bid on . . . designated set aside contracts but for the restrictions imposed' by the ordinance." *Id.* (quoting Complaint for Declaratory and Injunctive Relief at para. 9, 46, *Associated Gen. Contractors* (No. 89-278-Civ-J-16)). AGC further alleged that

> [n]umerous non-minority members . . . have been damaged by . . . actions of the Defendants because they have ben [sic] deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts for persons holding construction contracts who have been required to award such contracts to MBEs.

Florida issued a temporary restraining order,[25] and then a preliminary injunction,[26] prohibiting Jacksonville from enforcing the MBE ordinance.[27] Concluding that AGC did not demonstrate irreparable injury, the Court of Appeals for the Eleventh Circuit reversed the district court's grant of a preliminary injunction.[28] Although

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Complaint for Declaratory and Injunctive Relief at para. 49, *Associated Gen. Contractors* (No. 89-278-Civ-J-16).

[25] *Associated Gen. Contractors*, 113 S. Ct. at 2299. A temporary restraining order (TRO) is "[a]n emergency remedy of brief duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require, on the subject matter of the controversy and otherwise determine what relief is appropriate." BLACK'S LAW DICTIONARY 1464 (6th ed. 1990) (citation omitted). A TRO is often issued ex parte and, therefore, the circumstances must be such that "the petitioner will suffer irreparable injury if relief is not granted immediately, and the time simply does not permit either the delivery of notice or the holding of a hearing." *Id.* at 784 (citation omitted).

[26] *Associated Gen. Contractors*, 113 S. Ct. at 2299. A preliminary injunction is "[a]n injunction granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right to which is in dispute, and which may either be discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined." BLACK'S LAW DICTIONARY 784-85 (6th ed. 1990) (citation omitted).

[27] *Associated Gen. Contractors*, 113 S. Ct. at 2299.

[28] Associated Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1286 (11th Cir. 1990). The court of appeals warned that a preliminary injunction should be granted reluctantly, reasoning that a preliminary injunction of a legislative enactment is an extraordinary remedy that "interfere[s] with the democratic process and lack[s] the safeguards against abuse or error that come with a full trial on the merits." *Id.* at 1285. Although the court expressed doubts regarding the constitutionality of the Jacksonville ordinance, the court held that the record was inadequate to warrant a preliminary injunction. *Id.* at 1286. Specifically, the court found that a "substantially likely equal protection violation" does not satisfy the irreparable injury requirement necessary for the issuance of a preliminary injunction. *Id.* at 1285; *see* BLACK'S LAW DICTIONARY 786 (6th ed. 1990) ("'Irreparable injury' justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.") (citation omitted); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 336 (1985) (explaining that the usual application of the irreparable injury requirement occurs where only an equitable remedy will avert a threatened injury and where money damages will be inadequate). *See generally* Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065 (1979) (reviewing OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978)) (providing a thorough commentary discussing the preliminary injunction's irreparable injury requirement). Accordingly, the court of appeals rejected the district court's conclusion that the irreparable injury requirement was satisfied by the substantial likelihood that the MBE program would result in a continuing violation of AGC's constitutional rights. *Associated Gen. Contractors*, 896 F.2d at 1285 (citations omitted).

Furthermore, the Eleventh Circuit continued, other forms of relief would be available if AGC's claim were successful. *Id.* at 1286. The court announced that the damage to AGC is "chiefly, if not completely, economic," and therefore, if AGC is successful its members injured by Jacksonville's set-aside program may obtain adequate relief by way of money damages or injunctive relief after a full trial. *Id.* For example, the court suggested that if AGC were successful, the court could order Jacksonville to award city contracts to AGC members who would have bid successfully for

the court of appeals did not rule on the issue of standing, Chief Judge Tjoflat, concurring in the judgment, argued that the reversal should have been made on the grounds that AGC lacked standing to sue.[29] Over the Chief Judge's objection, the court of appeals remanded the case for an expedited trial or other disposition on the merits.[30]

On remand, the district court granted summary judgment in favor of AGC and issued a permanent injunction prohibiting Jacksonville's enforcement of the MBE ordinance.[31] Jacksonville appealed the decision, and the Eleventh Circuit held that AGC

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the contracts but for the set-aside program. *Id.* Likewise, the court stated that the deciding court can require Jacksonville to pay money damages, such as lost profits, to compensate an AGC member who was wrongfully denied a contract. *Id.* Hence, the Eleventh Circuit opined that even if AGC could establish on remand that it suffered an injury, equitable relief would be unnecessary because other relief would be available. *Id.*

[29] *Associated Gen. Contractors*, 896 F.2d at 1287 (Tjoflat, C.J., concurring). The Chief Judge first asserted that a threshold inquiry in every federal case, regardless of whether the parties raise the issue, is whether the plaintiff has standing. *Id.* at 1287 n.1 (Tjoflat, C.J., concurring) (quoting Church of Scientology Flag Serv. Org. v. City of Clearwater, 777 F.2d 598, 606 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986)). Chief Judge Tjoflat declared that for AGC to have standing, it must satisfy the prerequisites of associational standing; namely, AGC must demonstrate that its members themselves would have standing if they were to bring suit in their own right. *Id.* (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-45 (1977)). To satisfy standing requirements, the Chief Judge indicated, AGC's members would have to demonstrate, among other showings, "that they have suffered (or will suffer) an actual (or threatened) injury." *Id.* (citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

Concluding that AGC did not allege with sufficient particularity that its members suffered any injury, Chief Judge Tjoflat decided that AGC lacked standing. *Id.* According to the Chief Judge:

> [AGC failed to] identify any member who was not allowed to bid on a particular project or to plead facts tending to establish that member's eligibility to bid. Nor does the complaint refer to any specific contract or subcontract that would have been awarded to a nonminority bidder but for the set-aside ordinance.

*Id.* The Chief Judge stressed that it was AGC's responsibility to clearly allege particular facts that are sufficient to demonstrate standing and the court should not "'speculate concerning the existence of standing nor . . . [infer] support for the plaintiff.'" *Id.* (alteration in original) (quoting Anderson v. City of Alpharetta, 770 F.2d 1575, 1582 (11th Cir. 1985)).

[30] *Id.* at 1286.

[31] Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1218 (11th Cir. 1992), *rev'd*, 113 S. Ct. 2297 (1993). Between the time when the district court granted a preliminary injunction and the Eleventh Circuit reversed the grant of that injunction, both parties moved for summary judgment. *See id.* Reaching the merits of the case, the district court granted summary judgment for AGC and entered a permanent injunction, reasoning that Jacksonville's MBE program suffered from similar constitutional infirmities as those found by the Supreme Court in the Rich-

lacked standing to challenge the ordinance.[32] The court of appeals concluded that AGC had not shown that, in the absence of the ordinance, any of AGC's members would have bid successfully for any of the Jacksonville contracts awarded to MBEs.[33] Consequently, the Eleventh Circuit vacated the district court's judgment and remanded the case with instructions to dismiss AGC's complaint without prejudice.[34]

The United States Supreme Court granted certiorari[35] to determine whether or not AGC had standing to challenge Jacksonville's MBE ordinance.[36] Approximately three weeks later, Jacksonville repealed the contested MBE ordinance and replaced it with a new ordinance.[37] Claiming that the repeal of the challenged ordinance eliminated any controversy with respect to its constitu-

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mond, Virginia plan challenged in *City of Richmond v. J.A. Croson Co. Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-500 (1989)).

32 *Id.* at 1219-20. The court of appeals remarked that under the law of associational standing, and specifically under *Hunt v. Washington State Apple Advertising Commission*, AGC, "as a representative association may have standing to challenge the ordinance only if its members as individuals would have standing to litigate their claims." *Id.* at 1219 (citing *Hunt*, 432 U.S. at 343-45); *see also* TRIBE, *supra* note 2, § 3-20, at 145-47 (providing a general discussion concerning associational standing). The court of appeals subsequently found that AGC did not demonstrate an injury sufficient to establish standing. *Associated Gen. Contractors*, 951 F.2d at 1219-20. According to the court, AGC did not show that it had suffered an economic injury because it did not show that, but for the set-aside program, any member of AGC would have been awarded any of the contracts awarded to MBEs. *Id.* at 1219. The court then summarily concluded that AGC did not show a noneconomic injury. *Id.* at 1220 (citation omitted).

33 *Associated Gen. Contractors*, 951 F.2d at 1219. The court of appeals cited *Coral Construction Co. v. King County* for the proposition that the "'question is whether [plaintiff] has alleged a more certain injury than a potential lost bid.'" *Id.* (alteration in original) (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992)).

34 *Id.* at 1220. For a brief synopsis of the Eleventh Circuit's decision in *Associated General Contractors*, see Albert Sidney Johnson & Susan Cole Mullis, *Constitutional Civil Law*, 44 MERCER L. REV. 1107, 1119-20 (1993).

35 Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 50, 50 (1992). The Supreme Court granted certiorari because of a split between the Eleventh Circuit and both the Ninth and District of Columbia Circuits. Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2300 (1993); *see supra* notes 10-11 and accompanying text (illuminating the nature of the split in the circuit courts).

36 *Associated Gen. Contractors*, 113 S. Ct. at 2300.

37 *Id.* The new ordinance was entitled "African-American and Women's Business Enterprise Participation." *See* JACKSONVILLE, FLA., PURCHASING CODE §§ 126.601-.622 (1992). The new ordinance expressly stated that its goal was "to increase the use of African-American and Women's Business Enterprises to a level comparable with their availability. . . . [and] to remedy the present effects of past discrimination which have been demonstrated in the legislative findings." *Id.* § 126.601.

tionality, Jacksonville moved to dismiss the suit as moot.[38] The Court, however, denied Jacksonville's motion.[39]

The Supreme Court announced that AGC had alleged a sufficient injury to establish standing.[40] In a seven to two decision,[41] the Court held that AGC's injury was the denial of equal treatment caused by Jacksonville's minority set-aside program, rather than AGC's inability to obtain a specific city contract.[42] Thus, the Court concluded, to establish standing, the contractors' association needed to demonstrate only that it was ready and able to bid on city contracts and that it could not do so on an equal basis because of the city's discriminatory policy.[43]

Courts have addressed the standing doctrine's injury in fact requirement on many occasions, and the results have been as varied as the cases presented for review.[44] In *Turner v. Fouche*,[45] for

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38 *Associated Gen. Contractors*, 113 S. Ct. at 2300-01. In support of its argument, Jacksonville alleged that the new ordinance was enacted after, and in response to, the Court's decision in *City of Richmond v. J.A. Croson Co.* Respondents' Motion to Dismiss as Moot at 8-9, Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct 2297 (1993) (No. 91-1721) (citation omitted). Supporting its position, Jacksonville asserted that: the new ordinance was predicated upon an independent study commissioned by the city; a special city council committee conducted numerous public hearings before enacting the new ordinance; and the committee's findings were expressly incorporated into the new ordinance. *Id.* at 3-4. Jacksonville claimed further that, under the new ordinance, all bidders were "unquestionably permitted to compete for city contracting" because the new ordinance completely replaced the old one. *Id.* at 9, 11. Accordingly, Jacksonville argued, AGC is not subject "to the same alleged illegality occasioned by the circumstances surrounding the enactment of the repealed pre-*Croson* ordinance." *Id.* at 9; *see infra* note 84 and accompanying text (comparing the old ordinance with the new ordinance).

39 Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 808, 808 (1992). For a thorough explanation of the Court's view of the mootness issue, see *infra* notes 83-86 and accompanying text.

40 *Associated Gen. Contractors*, 113 S. Ct. at 2304-05.

41 *See id.* at 2299. Justice Thomas delivered the Court's opinion, in which Chief Justice Rehnquist and Justices White, Scalia, Stevens, Kennedy, and Souter joined. *Id.* Justice O'Connor authored a dissenting opinion, in which Justice Blackmun joined. *Id.* at 2305 (O'Connor, J., dissenting). Opining that the case was rendered moot by the repeal of the challenged ordinance, Justices O'Connor and Blackmun refused to reach the issue of standing. *Id.* The dissent criticized the majority's decision and expressed concern that the opinion could prove to be merely advisory. *Id.* at 2308 (O'Connor, J., dissenting); *see infra* notes 83-86, 120-26, and accompanying text (providing a more thorough analysis of both the majority's and the dissent's perspectives on the mootness issue).

42 *Associated Gen. Contractors*, 113 S. Ct. at 2303 (citation omitted).

43 *Id.*

44 TRIBE, *supra* note 2, § 3-16, at 115 ("[O]nly through immersion in the various cases raising questions of injury in fact is it possible to come to some understanding of what the requirement entails."); *see supra* note 4 (outlining the complex nature of standing's injury in fact requirement).

45 396 U.S. 346 (1970). In *Turner*, two African-American residents of Taliaferro

instance, the Supreme Court addressed an equal protection challenge to a state law scheme that limited school board membership exclusively to property owners.[46] The Court alluded to the issue of whether the litigants had standing to bring suit, hinting that it was unnecessary for the claimants to prove that they had actually been excluded from a position on the board of education.[47] Instead, the Court insinuated, the existence of a state law that discriminated against nonfreeholder applicants provided a sufficient basis for the nonfreeholders' standing to challenge the law.[48]

The landmark case discussing a contractors' association's standing to challenge an allegedly unconstitutional city policy is *Warth v. Seldin*.[49] In *Warth*, the United States Supreme Court held that a contractors' association lacked standing to intervene as a plaintiff in an equal protection challenge against a town's zoning

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County, Georgia, challenged the state's constitutional and statutory provisions regulating jury and school-board selection. *Id.* at 349, 350. Seeking compensatory, injunctive, and declaratory relief, the residents claimed that Georgia's law was unconstitutional on its face and as applied because it resulted in the exclusion of African-Americans and nonfreeholders from selection to the school board and only token inclusion of African-Americans on grand juries. *Id.*

The United States Supreme Court found that the residents demonstrated a great statistical disparity between the percentage of African-Americans selected for the grand jury and the percentage of African-Americans in the county population as a whole. *Id.* at 360. Thus, the Court concluded, the residents made out a prima facie case of discrimination in jury selection and Georgia did not satisfy its burden of overcoming the prima facie case. *Id.* at 360, 364.

In addition, the Supreme Court noted, Georgia's law making only property owners eligible for school-board membership violated the Equal Protection Clause of the Fourteenth Amendment because the freeholder requirement was not supported by any rational state interest. *Id.* at 364. The Court explained that, although the residents did not have a right to be appointed to the county school board, they did have "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Id.* at 362-63 (citations omitted). The right of equal consideration, the Court implied, was a sufficient basis upon which to ground a rejection of Georgia's contention that neither appellant had standing to bring the equal protection challenge. *Id.* at 361 n.23. In a footnote, the Court stated that the district court allowed the nonfreeholder resident to intervene "for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of . . . [the equal protection] issue." *Id.* Further, in response to Georgia's argument that there was no "evidence that the freeholder requirement actually has operated to exclude anyone from the . . . board of education," the Court retorted that the resident's "allegation that he is not a freeholder is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law." *Id.*

46 *Id.* at 348, 349-50.

47 *Id.* at 361 n.23.

48 *Id.*

49 422 U.S. 490 (1975).

ordinance because the association failed to allege a sufficient injury.[50] Specifically, the Court reasoned that the association did not

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[50] *Id.* at 516. The *Warth* Court addressed the standing of several litigants. *See id.* at 508, 512, 514, 516. The first group of litigants included low- and moderate-income persons who alleged to have unsuccessfully made efforts to obtain housing in the town in which the ordinance applied. *Id.* at 502, 503. The Court stated that this group of claimants failed to show a sufficient causal connection between their unsuccessful efforts to obtain housing and the zoning ordinance. *Id.* at 504. The Court explained:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in . . . [the town] and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

*Id.* (citation omitted). The group's allegation, the Court concluded, amounted to nothing more than an assertion that their situations would have possibly been better had it not been for the zoning ordinance. *Id.* at 507. Accordingly, the Court held that this group of claimants lacked standing. *Id.* at 518.

The second and third group of litigants claiming to have standing to challenge the zoning ordinance, town taxpayers and Metro-Act, Inc., both asserted that they had standing based on taxpayer status. *Id.* at 508, 512. The Court explained, though, that a litigant generally must assert his own rights and cannot rest his claim on the rights of others. *Id.* at 509, 514; *see* TRIBE, *supra* note 2, § 3-19, at 134-45 (examining the Supreme Court's policy against third-party standing). *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (criticizing the Supreme Court's reliance upon prudential considerations to deny litigants third-party standing). The Court then held that these claimants improperly sought to assert the "putative rights of third parties" and, as a result, lacked standing to challenge the zoning ordinance. *Warth*, 422 U.S. at 514, 518.

Next, the Court also denied standing to Home Builders, Inc., a contractors' association that sought both monetary damages and prospective relief. *See id.* at 516, 518. Because the individual members of Home Builders, Inc. were not made parties to the action, the Court noted, individualized proof of the fact and extent of injury was unavailable. *Id.* at 515-16. The Court asserted that this individualized proof was necessary because any monetary damages suffered were peculiar to the individual members concerned. *Id.*

Likewise, the Court rejected Home Builders's claim for prospective relief, though for different reasons. *Id.* at 516. Regarding the claim for prospective relief, the Court found that Home Builders failed to satisfy the requirements of associational standing because it did not "allege[ ] facts sufficient to make out a case or controversy had the members themselves brought suit." *Id.* The Court explained:

> The complaint refers to no specific project of any of its 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 Home Builders' 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, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

*Id.* (citations omitted). Accordingly, the Court held that the contractors' association failed to establish standing to challenge the ordinance. *Id.* at 518.

apply for any specific current project that was precluded, or that might later become precluded, by the challenged ordinance.[51] Therefore, the *Warth* Court deemed that the association inadequately supported its allegation that it lost profits and business opportunities due to the zoning ordinance.[52]

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Finally, for similar reasons the Court found that the last litigant, Housing Council, also lacked standing. *Id.* at 517. The Court noted that, with one exception, none of Housing Council's seventeen members had made any effort involving the town or had taken steps toward building housing in the town. *Id.* at 516-17. The exception, the Court continued, was a building corporation whose application to build in the town was denied six years prior to the commencement of the suit. *Id.* at 517. Because the corporation failed to allege facts sufficient to show that there remained a concrete dispute, the Court declared that the building corporation's application did not salvage Housing Council's insufficient claim of standing. *Id.*

51 *Id.* at 516.

52 *Id.*; *see supra* notes 50-51 and accompanying text (discussing the *Warth* Court's reasoning). Justice Douglas and Justice Brennan authored separate dissents, with Justices White and Marshall joining in Justice Brennan's dissent. *Warth*, 422 U.S. at 518 (Douglas, J., dissenting), 519 (Brennan, J., dissenting). Justice Douglas asserted that Metro-Act and Housing Council had standing because the importance of providing low- and moderate-income housing justified "lower[ing] the technical barriers." *Id.* at 518-19 (Douglas, J., dissenting). Specifically, Justice Douglas asserted:

> Standing has become a barrier to access to the federal courts, just as 'the political question' was in earlier decades. The mounting caseload of federal courts is well known. But cases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed.

*Id.*

Likewise, Justice Brennan declared that the low- and moderate-income litigants, Home Builders and Housing Council, had standing. *Id.* at 521 (Brennan, J., dissenting). Regarding these two building associations, Justice Brennan reasoned that previous plans for building in the town had been futile, as would be any application for future projects, and therefore the associations' future intent to build in the town should have been sufficient for standing purposes. *Id.* at 530 (Brennan, J., dissenting). The Justice openly suggested that the Court's decision to the contrary reflected hostility toward the merits of the claim. *Id.* at 520-21 (Brennan, J., dissenting).

Constitutional law scholar Laurence H. Tribe has sharply criticized the Court's decision in *Warth*, calling it an aberration. TRIBE, *supra* note 2, § 3-18, at 134. Tribe remarked that never before has the Court required litigants to identify loss of specific projects or property, but only "deprivation of the *opportunity to persuade others* to permit or to support desired purchase, lease, or construction in an area." *Id.* § 3-18, at 133; *see* Trafficante v. Metropolitan Life Ins. Co., 4029 U.S. 205, 208, 211 (1972) (approving occupants' claim that restrictions prohibited them from associating with excluded groups without requiring the occupants to identify specific persons who would have moved in had the restrictions not been implemented); James v. Valtierra, 402 U.S. 137, 139 (1971) (permitting parties who were eligible to live in low-cost housing to contest a law restricting building of low-cost housing despite the fact that the parties did not allege that a specific building project would be undertaken or that any particular person could occupy the new housing if built); Hunter v. Erickson, 393 U.S. 385, 387, 393 (1969) (approving litigants' claim that the dismissal of the complaint to the fair housing committee caused injury even though the litigants did not attempt to show that they could have purchased housing had it not been for the dismissal); Vil-

Three years later, in *Regents of the University of California v. Bakke*,[53] the Supreme Court alluded to the standing issue in the context of a medical school's denial of admission to a white male applicant.[54] In a plurality opinion,[55] the Court considered the applicant's equal protection challenge to the medical school's affirmative action admissions policy under which a certain number of places in the entering class were reserved exclusively for minority applicants.[56] Dedicating the standing issue to a footnote, the plurality indicated that the applicant's standing did not hinge on his exclusion from the medical school.[57] Rather, the *Bakke* Court found that the applicant's standing injury was his inability to compete for all the places in the class because of his race.[58]

In an allusive manner similar to that employed by the *Bakke* Court, the Supreme Court in *Clements v. Fashing*[59] implicitly addressed the injury in fact requirement of the standing doctrine.[60]

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lage of Euclid v. Ambler Realty Co., 272 U.S. 365, 384-85 (1926) (allowing landowner to refer broadly to unidentified "prospective buyers of land" who had been "deterred from buying" because of challenged zoning provisions). The reason for the Court's previous approach, according to Tribe, was that a rule such as that enunciated in *Warth* would present excluded groups with a dilemma: "[T]he more severely and successfully exclusionary a challenged scheme is, the more difficult it would be to find insiders or developers willing to incur the inconvenience and expense of joining outsiders in designing a project or transaction that could meet any judicial test of specific identification." TRIBE, *supra* note 2, § 3-18, at 132-33.

53 438 U.S. 265 (1978) (plurality opinion).

54 *Id.* at 280 n.14.

55 Justice Powell authored the Court's judgment. *Id.* at 269 (plurality opinion). Justices White, Marshall, and Blackmun each authored separate opinions. *Id.* at 379 (White, J.), 387 (Marshall, J.), 402 (Blackmun, J.). Additionally, Justices Brennan, White, Marshall, and Blackmun wrote a joint opinion concurring in part and dissenting in part. *Id.* at 324 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part). Justice Stevens also filed an opinion concurring in part and dissenting in part, in which Chief Justice Burger and Justices Rehnquist and Stewart joined. *Id.* at 408 (Stevens, J., concurring in part and dissenting in part); *see* Ware, *supra* note 9, at 634-40 (discussing each individual justice's opinion in detail, and concluding that the *Bakke* plurality opinion generally endorsed the concept of affirmative action, but left much confusion in its wake regarding the appropriate analytical framework for reviewing an affirmative action plan); *see also* Patricia A. Celano, Comment, *A Cry for Help to the United States Supreme Court: What is the Constitutional Status of Affirmative Action in Higher Education?*, 3 SETON HALL CONST. L.J. 161, 180-87 (1993) (analyzing the various opinions of the *Bakke* plurality).

56 *Bakke*, 438 U.S. at 269-70.

57 *Id.* at 280 n.14.

58 *Id.* The Court suggested that even if Bakke "had been unable to prove that he would have been admitted" but for the special admissions program, this lack of proof would not necessarily have stripped Bakke of his standing. *Id.*; *see also* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 115-17 (1985) (comparing the Court's approach to standing in *Bakke* with the approach taken in other Court precedent).

59 457 U.S. 957 (1982).

60 *See id.* at 962. In *Clements*, state officeholders challenged two Texas constitu-

In *Clements*, several state officeholders brought an equal protection challenge against a Texas constitutional provision restricting eligibility to run for the state legislature.[61] The *Clements* Court implied that the officeholders' injury was their inability to be considered for another office because the challenged law provided for automatic resignation of the officeholders' present office if they announced their candidacy for another office.[62] Accordingly, the Supreme Court concluded that an Article III case or controversy existed even though the officeholders presently were not candidates, finding sufficient the plaintiffs' allegation that but for the constitutional provision, several officeholders would have declared their candidacy for another office.[63]

The Court subsequently discussed the requirements of injury in fact sufficient to confer standing in *Valley Forge Christian College v.*

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tional provisions as violative of the First and Fourteenth Amendments. *Id.* at 959. The first provision rendered a present officeholder ineligible for the state legislature if the term of the legislative office commenced before the officeholder's current office term expired. *Id.* at 960 (citations omitted). Article III, § 19 of the Texas Constitution provided:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

TEX. CONST. art. III, § 19. The second provision challenged was Article XVI, § 65, entitled the "automatic resignation" provision. *Clements*, 457 U.S. at 960. Article XVI, § 65 read in relevant part:

> [I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one . . . year, such announcement or such candidacy shall constitute an automatic resignation of the office then held . . . .

TEX. CONST. art. XVI, § 65.

61 *Clements*, 457 U.S. at 959-60.

62 *Id.* at 962. Before reaching the merits of the litigants' constitutional claims, the United States Supreme Court found that the officeholders' allegations created a "case or controversy," not merely a "hypothetical" dispute. *Id.* at 961, 962. Supporting its finding that a "case or controversy" existed, the Court explained that the litigants precisely alleged that "but for the sanctions of the constitutional provision . . . they would engage in the very acts that would trigger the enforcement of the provision." *Id.* at 962. Thus, the Court claimed, because the provision provided for the "*automatic* resignation upon an announcement of candidacy, it cannot be said that § 65 presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office." *Id.* (citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974); Turner v. Fouche, 396 U.S. 346, 361 n.23 (1970)). Additionally, the Court stated, § 19 prevented one complainant from running for the state legislature because the complainant presently held another office, the term of which would overlap the state legislature's term. *Id.*

63 *Id.*

*Americans United for Separation of Church and State, Inc.*[64] In *Valley Forge*, relying on the Establishment Clause of the First Amendment,[65] an organization committed to the separation of church and state sought to invalidate a gratuitous governmental transfer of military property to a church-related college.[66] Reasoning that the organization failed to identify any specific personal injury resulting from the governmental transfer, the Court held that the organization lacked standing to challenge the transfer.[67]

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64 454 U.S. 464, 476-90 (1982). Noting that the exercise of judicial power is limited to those instances where the litigant can show injury in fact, the *Valley Forge* Court asserted that the injury in fact requirement furthers several policies implicit in Article III. *Id.* at 472 (citations omitted). First, the Court explained, the actual injury requirement ensures that the legal issues presented will be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* Second, the Court declared, the requirement of standing ensures that federal court decisions will discourage litigation where the factual context differs from the context that a particular decision addressed. *Id.* Third, the Court indicated that because the use of judicial power is properly limited to Article III "cases and controversies," an injury in fact precludes "the conversion of courts of the United States into judicial versions of college debating forums." *Id.* at 473. Finally, according to the Court, the standing requirement serves a host of other functions, including: protecting the separation of powers; generally ensuring that litigants assert their own rights and not those of others; precluding courts from deciding mere "generalized grievances"; and permitting complaints only within the protected "zone of interests." *Id.* at 473-75 (citations omitted).

65 U.S. CONST. amend. I. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

66 *Valley Forge*, 454 U.S. at 467-69. The Court noted that, pursuant to authority granted by the Property Clause, Congress enacted the Federal Property and Administrative Services Act of 1949 to implement a system for disposing of surplus federal government property. *Id.* at 466 (quoting U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States"); Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-544 (1976 & Supp. IV)). The *Valley Forge* Court explained that, under the Act, property that has been found to be no longer useful to the federal government is deemed "surplus" and may be conveyed to private or public entities. *Id.* at 466-67 (citing 40 U.S.C. § 484 (1976 & Supp. IV)).

Under this authority, the Secretary of Education, in *Valley Forge*, transferred a 77-acre former Army-owned tract to Valley Forge Christian College. *Id.* at 467-68.

67 *Id.* at 485. The organization claimed to have organizational standing on behalf of its members and did not allege injury suffered by the organization itself. *Id.* at 476 n.14; *see* TRIBE, *supra* note 2, § 3-20, at 145-54 (providing an elaborate discussion on the issue of organizational standing). Consequently, the Court noted that according to the approach set forth in *Warth v. Seldin*, the organization's standing was derived only from those of its members whom the organization sought to represent. *Valley Forge*, 454 U.S. at 476 n.14 (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)) (other citations omitted). Therefore, the Court stated the issue as whether the organization's "'members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'" *Id.* (quoting *Warth*, 422 U.S. at 511) (other citations omitted).

Accordingly, the Court noted, the organization first claimed to have standing to

To have standing, the *Valley Forge* Court emphasized, the appli-

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sue on behalf of its taxpaying members, who were allegedly suffering from unconstitutional governmental spending. *Id.* at 476. The Court explained that under *Flast v. Cohen*, a party has standing as a taxpayer only when the alleged unconstitutionality results from exercises of congressional authority pursuant to Article I, § 8 of the United States Constitution, the Taxing and Spending Clause. *Id.* at 478 (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)). The Court, however, rejected the organization's claim to taxpayer standing because the governmental transfer at issue was an act of congressional power conferred by the Property Clause, not the Taxing and Spending Clause. *Id.* at 480, 482-83; *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (denying taxpayer standing because plaintiffs "did not challenge an enactment under Article I, § 8, but rather an action of the Executive Branch"); TRIBE, *supra* note 2, § 3-16, at 116, § 3-17, at 124-29 (discussing taxpayer standing and criticizing the *Valley Forge* Court's formalistic distinction between the constitutional sources of Congress's power).

Moreover, the Court asserted, the organization claimed to have standing because the governmental conveyance at issue violated the Establishment Clause of the Constitution. *Valley Forge*, 454 U.S. at 482. On this basis too, the Court held that the organization had failed to establish standing to challenge the governmental action in question. *Id.* at 489-90. The Court declared that a litigant invoking judicial review must show not only that the statute is invalid, but also that he has suffered, or is in immediate danger of suffering, a direct injury because of the enforcement of the statute. *Id.* at 477 (quotations omitted). Likening the organization's alleged injury to a generalized grievance shared in common with citizens generally, the Court stated that "Art. III requirements of standing are not satisfied by the 'abstract injury in nonobservance of the Constitution.'" *Id.* at 482-83 (quoting *Schlesinger*, 418 U.S. at 223 n.13) (other quotation omitted) (citation omitted). Further clarifying its rejection of the organization's standing, the Court explained:

> Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right'" to a government that does not establish religion, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws . . . .

*Id.* at 489 n.26 (quotation omitted).

In addition, the Court expressly rejected an interpretation of injury in fact that would confer standing upon a litigant merely because of "the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486. Rather, the Court stated that the "'concrete adverseness which sharpens the presentation of issues, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.'" *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). The Court, therefore, refused the organization's claim to standing despite the organization's general interest in the legal claims involved. *See id.*

Finally, the *Valley Forge* Court forcefully reacted to the organization's assertion that if the organization did not have standing to sue, then no one would. *Id.* at 489 (quoting *Schlesinger*, 418 U.S. at 227). The Court stated that "[t]his view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined [the organization] in [its] suit." *Id.* Accordingly, the Supreme Court held that the organization lacked standing on this final basis. *Id.* at 489-90.

cant's injury must be particularized and either actual or imminent.[68] According to the Court, the members of the organization in *Valley Forge* did not suffer any direct or particular harm merely because the congressional action in question allegedly violated the Establishment Clause of the Constitution.[69] In fact, the Court noted, an unconstitutional statute, unaccompanied by a direct injury resulting from the statute's enforcement, is not a cognizable injury sufficient for standing.[70]

More recently, in *Lujan v. Defenders of Wildlife*,[71] the Supreme Court further clarified the standing doctrine's injury in fact requirement.[72] In *Lujan*, several environmental organizations sought declaratory and injunctive relief aimed at interpreting the Endan-

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68 *Valley Forge*, 454 U.S. at 472. Specifically, the Court stated: "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . .'" *Id.* (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)); *see* TRIBE, *supra* note 2, § 3-14, at 108 (citing *Valley Forge* for the proposition that, in addition to Article III requirements for standing, there are also various prudential considerations upon which the Court may base the denial of a litigant's standing); *see also supra* note 2 (listing the prudential considerations of standing enumerated in *Valley Forge*) and note 4 (discussing the nature of a sufficient injury in fact).

69 454 U.S. at 485; *see id.* at 487 n.23 (explaining that the organization was "still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution").

70 *Id.* at 477, 485 (quotations omitted). *Contra* TRIBE, *supra* note 58, at 119 (criticizing the *Valley Forge* Court's approach to standing as a facade for a substantive decision).

71 112 S. Ct. 2130 (1992); *see* Johnson & Mullis, *supra* note 34, at 1119 n.89 (discussing the *Lujan* Court's reaffirmation of Article III's standing requirements despite the existence of a statutory right of action); Cass R. Sunstein, *What's Standing After* Lujan*?—Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 223 (1992) (asserting that *Lujan* left many issues unsettled and created a number of new issues); Stu Stuller, Casenote, 62 U. COLO. L. REV. 933, 956 (1991) (alleging that *Lujan* did not change existing standing doctrine, but merely "restated" it); *see also* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (validating environmental injury as a basis for standing). *See generally* Tony Ed Monzingo, *I Think that I Shall Never See, Standing for a Tree: Or Has the* Lujan v. Defenders of Wildlife *Decision Spelled Doom for Extraterritorial Environmental Standing?*, 10 ARIZ. J. INT'L & COMP. L. 431 (1993) (attempting to describe guidelines for a litigant to follow to satisfy *Lujan*'s requirements); Patrick Lloyd Proctor, Comment, *No Generalized Grievances: The "Law of Rules" Approach to Standing*, 19 OHIO N.U. L. REV. 927 (1993) (arguing that the *Lujan* Court's approach to standing doctrine reflects the Court's belief about its proper role in resolving matters of social policy).

72 *See Lujan*, 112 S. Ct. at 2136. The *Lujan* Court defined an injury in fact as "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quotations omitted) (citations omitted).

gered Species Act of 1973[73] to include actions taken in foreign countries.[74] After articulating that the party invoking judicial power has the burden of establishing standing, the Supreme Court distinguished between the basic factual allegations of injury sufficient for the pleading stage and the more specific evidence necessary during the summary judgment stage.[75]

Presented with a motion for summary judgment, the Court examined the affidavits of two members of the plaintiff environmental organizations.[76] The Court concluded that the affiants' descriptions of their past experience visiting the habitats of endangered species were insufficient to demonstrate a continuing present injury necessary for injunctive relief.[77] Additionally, the Court asserted, the affiants' alleged future intentions to return to those environmental communities were too speculative to demonstrate an "imminent" injury.[78] Thus, the *Lujan* Court declared, the environmental organizations lacked standing to sue.[79]

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[73] 16 U.S.C. §§ 1531-44 (1988 & Supp. V). The relevant part of the Act provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

*Id.* § 1536(a)(2).

[74] *Lujan*, 112 S. Ct. at 2135.

[75] *Id.* at 2136, 2137 (citations omitted).

[76] *See id.* at 2138.

[77] *Id.* Specifically, the Court stated that simply because the affiants "'had visited' the areas of the projects before the projects commenced proves nothing. . . . '[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Id.*

[78] *Id.* The *Lujan* Court declared that:

> the affiants' profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.

*Id.* (alteration in original) (quotations omitted) (citations omitted).

[79] *Id.* at 2146. The Court also rejected the environmental organization's other theories of standing: standing based on ecosystem nexus, animal nexus, and vocational nexus theories. *See id.* at 2139-40. The theory of ecosystem nexus is an assertion that anyone has standing as long as they use "*any part* of a 'contiguous ecosystem' adversely affected by a funded activity," irrespective of where that activity is located. *Id.* at 2139. Under the animal nexus approach, anyone with an interest in seeing or studying endangered or threatened animals anywhere in the world has standing. *Id.*

According to the vocational nexus theory, anyone who has a professional interest in endangered or threatened animals can sue. *Id.* The Court asserted: "It goes beyond the limit . . . into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species . . . ." *Id.* For commentary advocating standing based on purely ideological interest in the environment, see generally Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974-75); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Laurence H. Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545 (1974-75); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1973-74).

Besides failing to establish an injury in fact, the Court noted, the environmental organizations also failed to satisfy standing's redressability requirement. *Lujan*, 112 S. Ct. at 2140. This is so, the Court concluded, because federal agencies other than the Secretary of the Interior would not be bound by the Court's declaratory judgment because they were not joined as parties to the litigation. *Id.* at 2140-41. Therefore, the Court asserted, even if the environmental organizations obtained a favorable ruling, such a ruling would not redress their alleged injury and complaint. *Id.* at 2141.

Justice Kennedy, joined by Justice Souter, filed a concurring opinion. *Id.* at 2146 (Kennedy, J., concurring). Justice Kennedy agreed with the majority that the affidavits in the record failed to establish a concrete injury necessary for standing under traditional or any nexus theory. *Id.* The Justice expressed an unwillingness, however, to foreclose the possibility of a similar nexus theory in the future, if adequately supported by the circumstances. *Id.* (citation omitted). Justice Kennedy then noted that because the environmental organizations failed to satisfy standing's injury requirement, it was unnecessary to address standing's redressability prong. *Id.*

Justice Stevens also authored a concurring opinion, interpreting the Endangered Species Act of 1973 as inapplicable to actions in foreign countries, and disagreeing with the majority's analysis of the standing issue. *Id.* at 2147 (Stevens, J., concurring). Justice Stevens reasoned that the "imminence" of the environmentalists' "injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur." *Id.* at 2148 (Stevens, J., concurring) (citation omitted). Because of the environmentalists' genuine interest in endangered animals, Justice Stevens insisted, "the likelihood that [they] will be injured by the destruction of the endangered species is not speculative." *Id.* In addition, the Justice noted that the environmental organizations' injury would be redressed by a favorable decision because other federal agencies would obey the Court's construction of the statute in question. *Id.* at 2149 (Stevens, J., concurring). Moreover, Justice Stevens concluded, "it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species." *Id.*

Additionally, Justice Blackmun, joined by Justice O'Connor, dissented from the majority opinion. *Id.* at 2151 (Blackmun, J., dissenting). Justice Blackmun argued that the majority confused the burden of proof in a summary judgment motion with the evidentiary burden necessary to withstand such a motion. *Id.* at 2152 (Blackmun, J., dissenting). Specifically, the dissent indicated, the environmental organizations must demonstrate only that a "genuine issue of material fact" exists as to standing; they need not produce any specific types of evidence, such as affidavits asserting specific facts. *Id.* (citing FED. R. CIV. P. 56(c)). The dissent then asserted that the affidavits provided a genuine issue of material fact as to injury in fact and that the majority's requirement of more particularized pleadings was an empty formality and an unnec-

Against this backdrop of the evolution of the standing doctrine, the United States Supreme Court confronted the issue of injury in fact in *Associated General Contractors of America v. City of Jacksonville*.[80] In *Associated General Contractors*, the Court considered whether the plaintiff, a contractors' association, alleged sufficient injury to establish standing to challenge a city ordinance implementing a minority set-aside program.[81] Specifically, the Court observed, the issue was whether the plaintiff was required to demonstrate that any of its members would have been awarded a city contract in the absence of the ordinance.[82]

Justice Thomas, writing for the majority, first addressed the issue of whether the repeal of the original ordinance and subsequent enactment of a new ordinance rendered the case moot.[83] Comparing the two ordinances, the *Associated General Contractors* Court proffered that although the new ordinance differed from the prior ordinance in three ways, the differences did not affect the challenged aspects of the repealed ordinance.[84] The Court rea-

essary prerequisite for separating those who were genuinely injured from those who were not. *Id.* at 2153 (Blackmun, J., dissenting).

80 113 S. Ct. 2297 (1993).

81 *Id.* at 2299.

82 *Id.*

83 *Id.* at 2300-01. For an examination of the repealed Jacksonville ordinance, see *supra* notes 15-17 and accompanying text; for an analysis of the new ordinance, see *supra* notes 37-38 and accompanying text.

84 *Associated Gen. Contractors*, 113 S. Ct. at 2300, 2301. First, the Court observed, whereas the repealed ordinance applied to a variety of minority groups as well as women, the new ordinance pertained only to blacks and women. *Id.* at 2300 (citing JACKSONVILLE, FLA., PURCHASING CODE § 126.601(b) (1992)); *see supra* note 23 (listing the minorities eligible for the benefits of the MBE program under § 126.601 of the previous ordinance). Second, the Court indicated, instead of a 10% "set aside," Jacksonville's new ordinance created "participation goals" between 5 and 16%, depending upon various factors. *Associated Gen. Contractors*, 113 S. Ct. at 2300 (citing JACKSONVILLE, FLA., PURCHASING CODE § 126.604 (1992)); *see supra* notes 15-17 and accompanying text (discussing the set-aside provisions of §§ 126.601-.613 of the original MBE ordinance). The new ordinance declared that the participation goals "shall be used as guidelines and shall not be construed as a ceiling or floor to African-American and Women's Business Enterprise [AWBE] participation." JACKSONVILLE, FLA., PURCHASING CODE § 126.601 (1992). The new ordinance further defined "participation goals" to mean "percentage objective for increasing participation of certified [AWBEs] . . . to a level comparable to their availability in the relevant market area and to remedy the present effects of past discrimination." *Id.* § 126.603(h).

Finally, the Court stated, the new ordinance included five alternative means for achieving the established "participation goals." *Associated Gen. Contractors*, 113 S. Ct. at 2300 (citing JACKSONVILLE, FLA., PURCHASING CODE §§ 126.605, 126.618 (1992)). One of these alternatives was the "Sheltered Market Plan," which the Court found was in all principal respects essentially identical to the repealed ordinance's "set aside." *Id.* Specifically, the Court elaborated, the "Sheltered Market Plan" permitted the city, under certain circumstances, to reserve certain contracts exclusively for MBEs. *Id.*

soned, therefore, that the original ordinance was not sufficiently altered as to render the case moot.[85] Accordingly, the Supreme Court affirmed its earlier denial of Jacksonville's motion to dismiss for mootness.[86]

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(citing JACKSONVILLE, FLA., PURCHASING CODE § 126.605(b) (1992)). The Court then briefly mentioned the four other methods for achieving the "participation goals." *Id.* at 2300 n.2. The first method, the Court noted, was a "Participation Percentage Plan" that required contractors to demonstrate that they have subcontracted with female- or black-owned businesses. *Id.* (citing JACKSONVILLE, FLA., PURCHASING CODE §§ 126.605(a), 126.612 (1992)). The second means to achieve the participation goals, the Supreme Court continued, was through a "Direct Negotiation Plan," under which Jacksonville would engage in "direct negotiations" with female- or black-owned businesses. *Id.* (citing JACKSONVILLE, FLA., PURCHASING CODE § 126.605(c) (1992)). The Court then stated that the third alternative, a "Bid Preference Plan," was a system by which a contract was awarded to the female- or black-owned business that placed a bid within a certain dollar amount or percentage of the lowest bid. *Id.* (citing JACKSONVILLE, FLA., PURCHASING CODE § 126.605(d) (1992)). The Court asserted that the fourth and final method of satisfying participation goals, an "Impact Plan," provided for the award of "point values" to female- and black-owned businesses and to businesses that maintain a certain employment program for both black and female employees or who contract with black-owned or female-owned suppliers or subcontractors. *Id.* (citing JACKSONVILLE, FLA., PURCHASING CODE § 126.618 (1992)).

[85] *Associated Gen. Contractors*, 113 S. Ct. at 2301.

[86] *Id.* Finding that the differences between the ordinances were insignificant, the Court rejected the dissent's argument that the case was moot. *Id.* at 2301 n.3. The Court professed:

> The gravamen of [AGC'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.

*Id.* at 2301.

Buttressing its conclusion, the Court announced that the mootness issue was controlled by *City of Mesquite v. Aladdin's Castle, Inc.* *Id.* (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). The Court indicated that under *City of Mesquite*, the deletion of challenged statutory language while a case is still pending does not render the case moot. *Id.* (citing *City of Mesquite*, 455 U.S. at 289). According to the Court, the *City of Mesquite* Court found that if the case were dismissed on mootness grounds, the defendant-city could later reenact the same statute. *Id.* The Court noted, however, that the *Mesquite* Court's decision was not limited to the possibility of reenactment of only the "selfsame statute." *Id.* The Court lectured that "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." *Id.* Thus, the Supreme Court stressed, the threat of a repeated violation presented in *City of Mesquite* had already materialized in the instant case—Jacksonville had enacted a new ordinance that disadvantaged AGC in the "same fundamental way" as the original ordinance. *Id.*; *see also* TRIBE, *supra* note 2, § 3-11, at 82-93 (providing a thorough analysis of mootness doctrine).

Delegating its rebuttal to a footnote, the Court observed that the dissent differed from the majority on the mootness issue only as to whether the two ordinances were sufficiently similar so as to present substantially the same controversy. *Associated Gen.*

Having disposed of the mootness issue, the majority assessed AGC's standing to challenge Jacksonville's newly-enacted set-aside program.[87] The doctrine of standing, Justice Thomas admonished, is an essential element defining Article III's case or controversy requirement.[88] To establish standing, the Court explained, a claimant must demonstrate as an "irreducible minimum:"[89] a concrete and particularized injury in fact; a causal relationship between the claimant's injury and the defendant's conduct; and a likelihood that a favorable decision will redress the claimant's injury.[90] Significantly, the Supreme Court commented, the definition of injury in fact adopted in the instant case allowed for AGC's easy satisfaction of the causation and redressability elements of standing.[91] Accordingly, the Court insinuated that the crux of the case hinged on whether or not AGC had alleged a sufficient injury in fact.[92]

After narrowing the focus to AGC's alleged injury in fact, the majority defined the essential injury in equal protection challenges

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*Contractors*, 113 S. Ct. at 2301 n.3. Concerning the dissent's position that the case was controlled by *Diffenderfer v. Central Baptist Church, Inc.* and *Fusari v. Steinberg*, the Court announced that both of those cases predated *City of Mesquite v. Aladdin's Castle, Inc.*, and that both of those cases, unlike the present one, involved statutes that were "changed substantially." *Id.* (citing Fusari v. Steinberg, 419 U.S. 379, 386-87, 389 (1975); Diffenderfer v. Central Baptist Church, Inc., 404 U.S. 412, 414-15 (1972) (per curiam)); *see infra* notes 120-26 and accompanying text (discussing the dissent's analysis of the mootness issue).

87 *Associated Gen. Contractors*, 113 S. Ct. at 2301-05.

88 *Id.* at 2301. For a discussion of the standing doctrine's role in establishing an Article III case or controversy, see *supra* note 2.

89 *Associated Gen. Contractors*, 113 S. Ct. at 2301-02 (citations omitted).

90 *Id.* at 2302 (quoting Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992); Allen v. Wright, 468 U.S. 737, 752 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Specifically, the Court explained, the injury must be "'concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 112 S. Ct. at 2136). Further, the Court added, the claimant must show that the injury "'fairly can be traced to the challenged action of the defendant.'" *Id.* (quoting *Simon*, 426 U.S. at 41-42). Last, the Court concluded, the "'prospect of obtaining relief from the injury as a result of a favorable ruling' . . . [must not be] 'too speculative.'" *Id.* (quoting *Allen*, 468 U.S. at 752). For a list of cases establishing these three requirements of standing, see *supra* note 2.

91 *Associated Gen. Contractors*, 113 S. Ct. at 2303 n.5. The Court devoted almost its entire opinion to the injury in fact analysis, and relegated the causation and redressability issues to a footnote. *See id.* at 2302-04, 2303 n.5. Specifically, the Court stated that: "It follows from our definition of 'injury in fact' that [AGC] 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." *Id.* at 2303 n.5.

92 *See id.*

against government minority set-aside programs.[93] Justice Thomas insisted that an association's inability to obtain the sought-after benefit—a specific contract—was not the relevant injury in fact.[94] Rather, the Court contended, the injury was the association's inability to compete for the benefit on an equal basis because of the set-aside program.[95]

The majority relied primarily upon three cases to illustrate this proposition.[96] First, the Court discussed *Turner v. Fouche*,[97] where a plaintiff who was not a property owner was held to have standing to assert an equal protection challenge against a Georgia law restricting school-board membership exclusively to property owners.[98] According to Justice Thomas, the Court in *Turner* did not base its holding upon the plaintiff's allegation that, but for the statutory limitation, he would have obtained a position on the board.[99] Instead, Justice Thomas speculated, the relevant injury was the plaintiff's inability to be considered for the desired public office.[100]

Furthermore, the Supreme Court explained, a similar issue was presented in *Clements v. Fashing*.[101] In *Clements*, the Court noted, several officeholders brought an equal protection challenge against a Texas constitutional provision restricting their eligibility to campaign for the state legislature while holding a particular office.[102] The *Associated General Contractors* Court emphasized that in

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93 *Id.* at 2303.

94 *Id.*

95 *Id.* The Court proclaimed:

> 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.

*Id.*

96 *See id.* at 2302-03. The three cases upon which the Court relied in its opinion were *Turner v. Fouche*, *Clements v. Fashing*, and *Regents of the University of California v. Bakke*. *See id.* (citing Turner v. Fouche, 396 U.S. 346, 360-61 (1970); Clements v. Fashing, 457 U.S. 957, 962 (1982); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (plurality opinion)).

97 396 U.S. 346 (1970); *see supra* notes 45-48 and accompanying text (discussing the *Turner* decision).

98 *Associated Gen. Contractors*, 113 S. Ct. at 2302 (citing *Turner*, 396 U.S. at 360-61).

99 *Id.*

100 *Id.* (citation omitted).

101 *Id.* at 2302 (citing *Clements*, 457 U.S. at 962). For a more thorough discussion of the Court's reasoning in *Clements*, see *supra* notes 59-63 and accompanying text.

102 *Associated Gen. Contractors*, 113 S. Ct. at 2302. The Court explained that the challenged provision in *Clements* required the automatic resignation of some officeholders immediately upon announcing an intention to seek another state or federal office. *Id.* The Court stressed that the *Clements* Court did not demand that the litigants actu-

*Clements*, the officeholders' injury arising from the Texas provision was their inability to be considered for another office, not their failure to have been elected.[103]

After analogizing the instant case to both *Turner* and *Clements*, the Supreme Court indicated that the present case was most similar to the equal protection challenge in *Regents of the University of California v. Bakke*.[104] In *Bakke*, Justice Thomas averred, the medical school applicant's requisite standing injury was his inability to compete for all the seats in the entering medical school class merely because of his race.[105] Thus, the *Associated General Contractors* Court commented, even if the applicant was unable to show that he would have been accepted but for the special admissions program, the *Bakke* Court suggested that this lack of proof would not necessarily have stripped the applicant of his standing.[106]

After discussing this precedent, the *Associated General Contractors* Court concluded that the injury in fact in equal protection cases "of this variety" is the unequal treatment created by a governmentally erected barrier.[107] The injury in fact is not the final inability to obtain the sought-after benefit, Justice Thomas continued, but rather is the denial of equal treatment, making it more difficult for individuals of certain groups to obtain the benefit.[108] Thus, the Court stressed, to establish standing to bring suit

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ally allege that, but for the challenged provisions, they would have obtained the sought-after benefit. *Id.* The Court observed that the *Clements* Court instead found sufficient several officeholders' allegations that, but for the constitutional provision, the officeholders would have declared their candidacy for another office. *Id.* In short, the Supreme Court indicated, the litigants' injury in *Clements* was the creation of an "'obstacle to [their] candidacy.'" *Id.* (alteration in original) (quoting *Clements*, 457 U.S. at 962).

103 *Id.* at 2302 (quoting *Clements*, 457 U.S. at 962).

104 *Id.* (citing Regents of the University of California v. Bakke, 438 U.S. 265, 280 n.14 (1978) (plurality opinion)); *see supra* notes 53-58 and accompanying text (providing a more elaborate discussion of the *Bakke* Court's plurality opinion).

105 *Id.* at 2302-03 (quoting *Bakke*, 438 U.S. at 280 n.14).

106 *Id.* at 2303 (quoting *Bakke*, 438 U.S. at 280 n.14).

107 *Id.* Specifically, the Court stated: "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." *Id.* (citation omitted). In support of this proposition, the Court quoted *Turner*, asserting that the *Turner* Court declared the right to be a candidate for public office without being discriminated against on an invidious basis to be a "federal constitutional right." *Id.* (quoting Turner v. Fouche, 396 U.S. 346, 362 (1970)). Further, the Court opined, "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." *Id.* (citation omitted).

108 *Id.*; *see supra* note 107 (setting forth the Court's analysis of the injury suffered by plaintiffs in equal protection challenges to government minority set-aside programs).

against a government set-aside program, the challenging party must show only that it is ready and able to bid on government contracts and that a discriminatory policy precludes the party from bidding on an equal basis.[109]

Finally, Justice Thomas distinguished the present case from *Warth v. Seldin*,[110] where the Court held that a contractors' association lacked standing to intervene in an equal protection challenge against a town's zoning ordinance because the association failed to allege a sufficient injury.[111] According to the Court, *Warth* differed from *Turner* and *Clements* because *Warth* concerned a claimant's alleged failure to obtain a specific benefit, while the other cases addressed a claimant's alleged inability to compete equally for a desired benefit.[112] The Court further commented that, even assuming that the claimed injury in *Warth* was the association's inability to compete on an equal basis, *Warth* would still be distinguishable from the present case because, unlike AGC, the claimant in *Warth* failed to allege that it had made a current effort to obtain the sought-after benefit.[113] Thus, the Court concluded,

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109 Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2303 (1993).

110 422 U.S. 490 (1975). For a discussion of *Warth*, see *supra* notes 49-52 and accompanying text.

111 *Associated Gen. Contractors*, 113 S. Ct. at 2303-04 (quoting *Warth*, 422 U.S. at 516). The plaintiffs in *Warth*, the Court noted, claimed that the zoning ordinance precluded low- and moderate-income people from residing in the town. *Id.* at 2303. The intervenor contractors' association, the Court narrated, alleged that the restrictions had divested some of the association's members of profits and business opportunities. *Id.*

112 *Id.*, 113 S. Ct. at 2304. For instance, the Court stated, in *Warth* the claimant argued that town officials denied his applications for variances and permits, not that he was unable to apply on an equal basis for the variances and permits. *Id.* In *Turner* and *Clements*, however, the Court explained, the litigants claimed that they "could not be considered for public office." *Id.* Likewise, the Court continued, in *Bakke* the plaintiff alleged that he was prevented from being considered for a definite portion of benefits—positions in a medical school class. *Id.*

113 *Id.* (citing *Warth*, 422 U.S. at 516). The Court contended that, unlike AGC, the association in *Warth* did not allege a current injury. *Id.* (quoting *Warth*, 422 U.S. at 516). Specifically, the Court stated:

> Unlike [AGC], 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." Thus, unlike the association in *Warth*, [AGC] has alleged an "injury . . . of sufficient immediacy . . . to warrant judicial intervention."

*Id.* (alterations in original) (quoting *Warth*, 422 U.S. at 516) (citations omitted) (emphasis added). Consequently, the Court remarked, although the *Warth* Court declared that a claim "that a 'specific project' was 'precluded'" would ordinarily be

*Warth* did not support the contention that, to have standing, AGC must allege that but for Jacksonville's discriminatory policy, AGC would have obtained a specific contract.[114]

Accordingly, the Court held that AGC's inability to compete for city contracts on an equal basis was a sufficient injury to establish standing to bring an equal protection challenge against Jacksonville's minority set-aside program.[115] Justice Thomas expressly rejected Jacksonville's and the Eleventh Circuit's contention that the contractors' association must allege prior inability to obtain a specific contract.[116] Instead, the Court announced that the association need allege only that it is ready and able to bid on city contracts and that, because of the city's MBE program, it is unable to compete for the contracts on an equal basis.[117] Thus, the Supreme Court reversed the decision of the Eleventh Circuit and remanded the case for further proceedings.[118]

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sufficient to establish standing, the association's alleged injury in *Warth* was not sufficiently ripe to warrant judicial action. *Id.*

114 *Id.* at 2304-05.

115 *Id.* at 2303. *See* 8 No. 6 FED. LITIGATOR 157 (Sept. 1993) (discussing the Court's conclusion in *Associated General Contractors* that an equal protection claim's injury in fact is the denial of equal treatment because of the imposition of an impediment to the benefit, rather than the inability to obtain the benefit).

In addition, the injury identified in *Associated General Contractors* has been described as "probabilistic harm." *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 308 (1993) [herinafter *Leading Cases*]. More specifically, it has been asserted that

> [AGC's] injury in fact was neither the simple existence of racial classifications nor the denial of the contract. Rather, it was the increased likelihood of a tangible, equal protection violation created by the existence of racial classifications. By characterizing the injury in this way, the Court recognized probabilistic harm—a barrier that imposes an increased risk of a tangible harm—as a basis for standing.

*Id.* (footnote omitted).

116 *Associated Gen. Contractors*, 113 S. Ct. at 2302.

117 *Id.* at 2303.

118 *Id.* at 2305. The Court acknowledged as unchallenged and, therefore, as assumed to be true, AGC's allegation that its members regularly bid on Jacksonville contracts and that they would have bid on the set-aside contract. *Id.* at 2304 (citations omitted). Further, the Court noted, no one contested AGC's failure to meet the requirements of associational standing to sue on behalf of its members, and the Court postponed discussion of this issue. *Id.* at 2305 n.6 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

On remand, the Eleventh Circuit further remanded the case to the district court for reconsideration in light of the Supreme Court's decision in *Associated General Contractors*. Associated Gen. Contractors of Am. v. City of Jacksonville, 997 F.2d 835, 835 (11th Cir. 1993) (per curiam). The court noted that AGC should be permitted to amend its complaint to raise the constitutionality of the new Jacksonville ordinance. *Id.* (citation omitted).

Justice O'Connor, joined by Justice Blackmun, dissented.[119] The dissent refused to address the standing issue, maintaining that Jacksonville's repeal of the original ordinance and enactment of a different ordinance rendered the case moot.[120] Justice O'Connor first argued that the challenged ordinance no longer existed and, therefore, any prospective relief issued by the Court would be "meaningless."[121] The dissent observed that the new ordinance was materially different from the originally challenged ordinance.[122] The new ordinance, Justice O'Connor asserted, was "more narrowly drawn," making it unclear how the changes in the new ordinance would affect AGC's claims.[123]

Justice O'Connor then accused the majority of avoiding the difficulty presented by the significant changes in the new ordinance by characterizing AGC's complaint "in the most general terms possible."[124] Thus, the dissent warned, declaring the ordinance invalid or issuing injunctive relief against Jacksonville's enforcement of the ordinance might render the Court's decision

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119 *Associated Gen Contractors*, 113 S. Ct. at 2305 (O'Connor, J., dissenting). *See generally* Rocco Potenza, Comment, *Affirmative Action: Will Justice O'Connor Author Its End?*, 22 U. TOL. L. REV. 805 (1991) (analyzing Justice O'Connor's views and approaches toward the constitutionality of affirmative action programs).

120 *Associated Gen. Contractors*, 113 S. Ct. at 2305 (O'Connor, J., dissenting). In its opinion, the dissent relied mainly on *Fusari v. Steinberg* and *Diffenderfer v. Central Baptist Church of Miami, Inc.* to support its position that the case was rendered moot by the enactment of a new ordinance. *Id.* at 2306 (O'Connor, J., dissenting) (citing Fusari v. Steinberg, 419 U.S. 379, 386-87, 388-89, 390 (1975); Diffenderfer v. Central Baptist Church, Inc., 404 U.S. 412, 415 (1972) (per curiam)).

121 *Id.* at 2305 (O'Connor, J., dissenting). For instance, the dissent remarked, "[n]either a declaration of the challenged statute's invalidity nor an injunction against its future enforcement would benefit the plaintiff, because the statute no longer can be said to affect the plaintiff." *Id.* (citations omitted). Furthermore, the dissent stressed, "[a] determination that [AGC] has standing to challenge the repealed law avails it nothing, since that law no longer exists." *Id.* at 2308 (O'Connor, J., dissenting).

122 *Id.* at 2307 (O'Connor, J., dissenting).

123 *Id.* The dissent asserted that "the Court acknowledge[d] that Jacksonville's new ordinance [was] more narrowly drawn than the last [ordinance]." *Id.* (citing *id.* at 2301). Accordingly, the dissent admonished:

> The new law ultimately may suffer from the same legal defect as the old. But the statute may be sufficiently altered so as to present a substantially different controversy than the one the District Court originally decided. In such cases, this Court typically has exercised caution and treated the case as moot.

*Id.* at 2306 (O'Connor, J., dissenting).

124 *Id.* at 2308 (O'Connor, J., dissenting). Justice O'Connor criticized as overbroad the majority's interpretation of the issue as whether AGC's "members are disadvantaged in their efforts to obtain city contracts." *Id.* (quoting *id.* at 2301). The dissent claimed that the more proper approach when a more narrowly drawn ordinance replaces a challenged ordinance is to "decline to render a decision." *Id.*

merely advisory.[125] Consequently, the dissent would have vacated the Eleventh Circuit's judgment and ordered that AGC be allowed to challenge the new ordinance.[126]

Paving the way for more frequent judicial review of state affirmative action programs,[127] the Court in *Associated General Con-*

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125 *Id.* The dissent warned:

> Thus, today's ruling on the standing question could prove advisory. For that reason, I believe the wiser course, and the one most consistent with our precedents, would be to follow *Diffenderfer*. . . . I would vacate the Court of Appeals' judgment and . . . remand the case . . . to permit [AGC] to challenge the new ordinance.

*Id.*

Furthermore, the dissent disagreed with the Court's claim that *City of Mesquite v. Aladdin's Castle, Inc.* controlled the mootness issue. *Id.* (citing *id.* at 2301). *City of Mesquite*, the dissent declared, presented a narrow exception—the voluntary-cessation doctrine—to the general rule that where an ordinance is replaced with a more narrowly drawn ordinance pending review, the proper course is to decline to render a decision. *Id.* at 2308, 2309 (O'Connor, J., dissenting). The dissent commented that under the voluntary-cessation doctrine, a federal court does not lose jurisdiction merely because a defendant voluntarily chooses to cease practicing its challenged conduct. *Id.* at 2308 (O'Connor, J., dissenting) (quoting City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283, 289 (1982)). The dissent remarked, however, that *City of Mesquite* does not overrule the lengthy line of cases holding that the repeal of a challenged ordinance rendered a case moot; instead, *City of Mesquite* merely stands for the proposition that the Court may decide a case in which the challenged ordinance has been amended or repealed. *Id.* at 2309 (O'Connor, J., dissenting).

Moreover, Justice O'Connor commented, *City of Mesquite* was the only decision in which the Supreme Court required a legislative body to establish that it was unreasonable to expect that the legislative body would "reenact repealed legislation before [the Court] dismiss[ed] the case as moot." *Id.* The dissent suggested that *City of Mesquite* was a rare situation where the Supreme Court presumed that the city was acting in bad faith because the city had announced its intention to reenact the repealed ordinance. *Id.* The dissent also indicated that in *City of Mesquite* the city had "already . . . eliminated and then reinstated another aspect of the same ordinance in the course of the same litigation, obviously in response to prior judicial action. These circumstances made it virtually impossible to say that there was 'no reasonable expectation' that the city would reenact the challenged language." *Id.* (citing *City of Mesquite*, 455 U.S. at 289).

Furthermore, the dissent asserted:

> Unlike in *City of Mesquite*, in the ordinary case it is not at all reasonable to suppose that the legislature has repealed or amended a challenged law simply to avoid litigation and that it will reinstate the original legislation if given the opportunity. This is especially true, where, as here, the law has been replaced—no doubt at considerable effort and expense—with a more narrowly drawn version designed to cure alleged legal infirmities. We ordinarily do not presume that legislative bodies act in bad faith.

*Id.*

126 *Id.* at 2308 (O'Connor, J., dissenting).

127 *See* Tom Provost, *Supreme Court Rulings Have Local Impact*, NATION'S CITIES WEEKLY, June 21, 1993, at 2. By framing the contractors' association's injury as the inability to compete equally, the Court has, in effect, served notice to all state and local governments that their affirmative action programs are subject to attack by virtu-

*tractors of America v. City of Jacksonville* adopted an extremely broad interpretation of the standing doctrine's injury in fact requirement.[128] To support this expansive definition, the Court unpersua-

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ally any number of people. *See id.* In the face of such threats, those governments may choose to forego enacting any affirmative action plans and thereby avoid any potential equal protection challenges and corresponding litigation costs. *Id.* The Court's decision "could have a devastating effect on city minority set-aside laws because businesses now will need only show that they were treated differently from minorities in order to challenge such a law." *Id.*

Other commentators have also suggested that the *Associated General Contractors* Court's low standing threshold will invite more equal protection challenges against local government affirmative action plans. *See Leading Cases, supra* note 115, at 304 (remarking that the Court's decision represents "an expansive justiciability decision that furthers judicial access for the opponents of affirmative action"); *see also* La Noue, *supra* note 5, at 9. La Noue remarked that "The Jacksonville case and some other lower court decisions suggest that cities may expect more litigation whenever they imply racial or gender classifications and that defending these classifications will be more difficult than before." La Noue, *supra* note 5, at 9. The reason for the threat of increased litigation, La Noue proffered, was the Court's announcement of "a broad standard for defining 14th Amendment injuries." *Id.* La Noue explained:

> [U]ntil *Jacksonville*, standing to sue has been uncertain . . . .
>
> Now after *Jacksonville*, litigation will more often be brought by associations or public interest law firms. These law suits will not only be better financed, but settlement will be less likely if these plaintiffs believe legal principles favorable to them will be created.

*Id.*

Moreover, some scholars have suggested that the Supreme Court sometimes manipulates justiciability doctrine to serve substantive ends. *See, e.g.*, Joan Biskupic, *With Trio of Religion Cases, High Court Term Is Taking Shape*, WASHINGTON POST, October 18, 1992, at A7 (quotations omitted) (suggesting that justices frequently select cases that will further a particular development of legal doctrines); Colleen T. Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 GEO. WASH. L. REV. 1580, 1581-82 (1992) (commenting that courts frequently manipulate standing doctrine to achieve substantive results); TRIBE, *supra* note 58, at 99 (critiquing the Supreme Court's "purported denial of Article III authority to adjudicate those claims which the Court's substantive doctrines would require it reluctantly to *accept* on the merits, coupled with selective receptivity to those claims the Court is anxious to reach in order to *reject* them on the merits"). Tribe notes that "[d[espite the clarity and growing simplicity of the standing doctrine, its basic structure remains impressionistic and highly discretionary. It remains a brooding omnipresence with the potential to descend upon and annihilate otherwise indisputable claims for the protection of individual rights." TRIBE, *supra* note 58, at 118; *see Leading Cases, supra* note 115, at 307 (asserting that the Court's "uncharacteristically 'liberal' stance on justiciability . . . indicates a . . . nexus to . . . [the Court's] substantive encouragement of challenges to affirmative action programs"). *But see* LaTour Rey Lafferty, *Are Contractors Denied a Remedy to Discriminatory MBE Programs?*, 6 FLA. B. J. 34-39 (1992) (suggesting that strict standing requirements may insulate city MBE plans from attack); K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 5-7 (1992) (discussing the principal arguments against affirmative action and the effect of growing sentiment against affirmative action upon the Court's approach to such programs).

128 *See* Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2303 (1993) (citation omitted) ("The 'injury in fact' in an equal protection case of

sively distinguished *Warth v. Seldin* from *Associated General Contractors.*[129] In *Warth*, the Supreme Court held that a contractors' association lacked standing because the association did not allege that it had currently bid on a specific project.[130] The *Associated General Contractors* Court, however, interpreted *Warth* as relying solely on the lack of currentness of the bid, deemphasizing the *Warth* Court's reference to specific projects.[131] Apparently deeming regular bidding sufficiently certain and precise to support a finding of currentness, and finding bidding on non-set-aside contracts equivalent to bidding on the set-aside contracts, the Court distinguished the association in *Warth* from that in *Associated General Contractors.*[132]

The Court's dismissive approach toward the specificity requirement is troubling because of the standing doctrine's require-

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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.*, Harp Advertising Ill., Inc. v. Village of Chicago Ridge, 9 F.3d 1290, 1292 (7th Cir. 1993) (rationalizing the Court's new interpretation of the requisite standing injury in fact). In *Harp Advertising*, the Seventh Circuit explained that, in *Associated General Contractors*, Jacksonville's reservation of construction contracts for minority contractors:

> caused a concrete injury to contractors ineligible to bid for the reserved projects, [and] competition *among* contractors made it impossible to know whether any particular firm would have gotten the business had it been eligible to bid . . . . Knowledge that there was *an* injury, coupled with inability to identify the victim—an inability attributable to the law being challenged—made it appropriate to recharacterize the injury as a denial of the opportunity to compete.

*Id.* (citation omitted).

The impact of the *Associated General Contractors'* Court's broadening the definition of standing's injury in fact has already spread beyond the affirmative action context. *See* Shaw v. Hunt, No. 92-202-CIV-5-BR, 1994 WL 457269, at *10 (E.D.N.C. Aug. 22, 1994). For instance, the United States District Court for the Eastern District of North Carolina has applied *Associated General Contractors'* "liberal rule of standing" to race-based districting. Shaw v. Hunt, NO. 92-202-CIV-5-BR, 1994 WL 457269, at *10 (E.D.N.C. Aug. 22, 1994). Specifically, the court decided:

> the same expansive notion of standing developed in . . . cases challenging explicit racial set-asides must also apply to cases challenging race-based districting; that is, that any person who can show that a redistricting plan has assigned him to vote in a particular district at least in part because of his race has standing to challenge it, even if he cannot show that it has caused any concrete injury to his political interests.

*Id.*

129 *See Associated Gen. Contractors*, 113 S. Ct. at 2303-04 (citing Warth v. Seldin, 422 U.S. 490, 516 (1975)).

130 *Warth*, 422 U.S. at 516.

131 *Associated Gen. Contractors*, 113 S. Ct. at 2304-05. Specifically, the *Associated General Contractors* Court asserted that the *Warth* Court deemed the preclusion of a specific contract generally sufficient, but not necessary to establish the contractors' association's standing. *Id.* at 2304.

132 *See id.* at 2303-04.

ment of particularized harm.[133] In *Valley Forge*, the Supreme Court indicated that a claimant must show not only that the challenged law is illegal, but also that the claimant has endured, or is in imminent danger of enduring, a direct personal injury because of the challenged law.[134]

Perhaps the *Associated General Contractors* Court satisfies the requirement of particularized harm and avoids the *Valley Forge* Court's concern by presumably requiring the claimants allege that they are ready and able to apply for the sought-after benefit.[135] Depending on how the Court later interprets this requirement, virtually any interested entity may challenge affirmative action programs.[136] Only time will tell the effect of this broadening of the

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133 *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 477 (1982) (quotation omitted). For a discussion of the Court's decision in *Valley Forge*, see *supra* notes 64-70.

134 *See id.* Moreover, in dicta, the *Valley Forge* Court expressly rejected the idea that a litigant would have standing to challenge all affirmative action programs on the grounds that he had a "personal right to a government that does not deny equal protection of the laws." *Id.* at 490 n.26.

135 *See Associated Gen. Contractors*, 113 S. Ct. at 2303 ("To establish standing . . . 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 equal basis.").

136 The Supreme Court's subsequent interpretation of the requirement that the plaintiff allege that it is ready and able to be considered for the benefit is somewhat unclear. *See* Reno v. Catholic Social Servs., Inc., 113 S. Ct. 2485, 2496 n.19 (1993); *id.* at 2501-02 (O'Connor, J., concurring); *id.* at 2508 (Stevens, J., dissenting). In *Reno*, decided a few days after *Associated General Contractors*, several immigration rights organizations brought class actions challenging Immigration Naturalization Service (INS) regulations governing the legalization of illegal aliens. *Id.* at 2489. The five-justice majority indicated that the challenged regulations limited access to a benefit granted by the federal legalization program, but that aliens desiring the benefit must undertake actions beyond those covered by the disputed regulations. *Id.* at 2496. The majority found it unclear whether the claimants would undertake these actions as the immigrants did not show a "history of application behavior" similar to that of the contractors' association in *Associated General Contractors*. *Id.* at 2496 & n.20. Accordingly, the majority concluded that the claim was not ripe for adjudication. *Id.*

Justice O'Connor, however, authored a concurring opinion. *Id.* at 2501 (O'Connor, J., concurring). The Justice opined that:

> If it is "inevitable" that the challenged rule will "operat[e]" to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may well be a justiciable controversy that the court may find prudent to resolve.

*Id.* at 2501-02 (O'Connor, J., concurring) (alteration in original). Justice O'Connor further explained that the claim at issue was not a "simply anticipatory challenge to the INS regulations." *Id.* at 2502 (O'Connor, J., concurring). Instead, the Justice's focus was on "criticiz[ing] the Court's reasoning—its reliance on a categorical rule that would-be beneficiaries cannot challenge benefit-conferring regulations until they apply for the benefit." *Id.*

Further complicating the matter, Justice Stevens, joined by Justices White and Blackmun, dissenting, disagreeing with Justice O'Connor's approach to the ripeness issue, but agreeing that the litigants' claims were ripe. *Id.* at 2506, 2508 (Stevens, J., dissenting). The dissent interpreted *Associated General Contractors* as holding "that a class of contractors could challenge an ordinance making it more difficult for them to compete for public business without making any showing that class members were actually in a position to receive such business, absent the challenged regulation." *Id.* at 2508 (Stevens, J., dissenting).

These varied opinions may be summarized as follows: (1) proof is required that the plaintiff would have applied for the benefit but for the challenged regulation, *id.* at 2496 n.19; (2) no proof of intended application is required if the court can predict that the plaintiff would apply and be denied the benefit, *id.* at 2501-02 (O,Connor, J., concurring); and (3) plaintiff need not show that she would able to receive the benefit. *Id.* at 2508 (Stevens, J., dissenting). Given these different approaches to the Supreme Court's supposed "ready and able" requirement, a prediction is difficult regarding how the Supreme Court will rule in future cases where a litigant challenging an affirmative action program alleges that it cannot compete equally because of the program, but does not demonstrate that it would have actually applied for, or been able to receive, the benefit in the absence of the challenged program. *Cf.* AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. Partnership, 6 F.3d 867, 873-74 (2d Cir. 1993) (holding that plaintiff lacked standing because it had "not alleged or proffered admissible evidence tending to prove that it has been denied access to buildings it sought to service in the past, or that it will seek to enter into buildings open to franchised operators if given the statutory right to do so in the future").

Moreover, the United States District Court for the Middle District of Florida, the original situs of the *Associated General Contractors* case, continues to require more particularized injury than that required by the Supreme Court. *See* Cone Corp. v. Hillsborough County, No. 89-540-CIV-T-17A, 1994 WL 371386, at *2-3 (M.D. Fla. July 8, 1994). In *Cone*, the court addressed contractors' associations' challenge to a government affirmative action plan. *Id.* at *2. The court stated the plaintiffs' relevant allegations as follows:

> In paragraph 44, Plaintiffs state that they have and will continue to bid for contracts let by Hillsborough County and will bid to prime contractors on such contracts.
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> Paragraph 45 contains an allegation that Plaintiffs must make certain assumptions in preparing for the submission of bids. Its subparagraphs also state that the usual charges of . . . [minority- and female-owned] subcontractors are higher than those of . . . [non-minority- or female-owned] subcontractors. Plaintiffs contend that their bid prices are affected because they are required to subcontract to . . . [minority- and female-owned] subcontractors, and that such subcontracting causes plaintiff corporations to incur higher costs than those incurred by . . . [minority- and female-owned] contractors. Thus, Plaintiffs allege that they are prevented from competing on equal footing with . . . [minority- and female-owned] contractors in the bidding for contracts let by Hillsborough County.
>
> In paragraph 46, Plaintiffs argue that they are also at a competitive disadvantage in bidding for subcontract work on the grounds that a certain percentage of subcontracting is reserved for . . . [minority- and female-owned] subcontractors.

*Id.* Concluding that "[p]laintiffs have not named specific, particularized injuries, but have instead submitted generalized descriptions of their contracting and subcontracting experiences and anticipated experiences," the court dismissed the contractors'

concept of injury in fact in the context of affirmative action challenges.

*Adrian Daunarummo*

associations' complaint for failure to allege a sufficient injury in fact stemming from the city MBE program. *Id.* at *3.

In a subsequent proceeding in the *Cone* case, the district court, *sua sponte*, imposed Rule 11 sanctions upon the contractors' associations' counsel. Cone Corp. v. Hillsborough County, No. 89-540-CIV-T-17A, 1994 WL 526019, at *3 (M.D. Fla. Sept. 16, 1994). Emphasizing that despite plaintiffs' counsel's two opportunities to amend the complaint, the court indicated that the complaint still did not point to "any contract they have lost or . . . to any contract which they are in imminent danger of losing due to the specific provision . . . . [Plaintiffs] allegations have been conclusory, conjectural and hypothetical statements about possible future injury." *Id.* at *6. Thus, at least one district court has interpreted *Associated General Contractors* as still requiring a more particularized injury than mere allegations of unequal treatment and generalized bidding intentions. *See Cone*, No. 89-540-CIV-T-17A, 1994 WL 371386, at *2, *3.