

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: NORTHEASTERN FLORIDA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, Petitioner v. CITY OF JACKSONVILLE,
FLORIDA, et al.

CASE NO: 91-1721

PLACE: Washington, D.C.

DATE: February 22, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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NORTHEASTERN FLORIDA CHAPTER :
OF THE ASSOCIATED GENERAL :
CONTRACTORS OF AMERICA, :
Petitioner :
v. : No. 91-1721
CITY OF JACKSONVILLE, FLORIDA, :
ET AL. :

Washington, D.C.
Monday, February 22, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:
DEBORAH A. AUSBURN, ESQ., Atlanta, Georgia; on behalf of
the Petitioner.
LEONARD S. MAGID, ESQ., Assistant General Counsel, City of
Jacksonville, Jacksonville, Florida; on behalf of the
Respondents.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 91-1721, Northeastern Florida Chapter of the
5 Associated General Contractors of America v. the City of
6 Jacksonville, Florida. Ms. Ausburn.

7 ORAL ARGUMENT OF DEBORAH A. AUSBURN

8 ON BEHALF OF THE PETITIONER

9 MS. AUSBURN: Mr. Chief Justice and may it
10 please the Court:

11 4 years ago my clients filed an equal protection
12 challenge to an ordinance passed by the City of
13 Jacksonville, Florida. Today, the question is before this
14 Court of whether nonminority contractors who do business
15 with the City of Jacksonville have standing to challenge
16 an ordinance that excludes nonminority contractors who do
17 business with the City of Jacksonville from consideration
18 for certain city contracts.

19 There are before this Court three --

20 QUESTION: Ms. Ausburn, do we also have to
21 decide whether the case is moot?

22 MS. AUSBURN: Yes, Your Honor, that issue has
23 been presented to this Court. The -- as we discussed in
24 our briefs, the city has repealed the ordinance that was
25 originally challenged. However, it did not simply repeal

1 that ordinance, it repealed it and replaced it with
2 another ordinance that for purposes of standing is
3 identical.

4 QUESTION: Well, is it? The new ordinance is
5 rather different, is it not?

6 MS. AUSBURN: Your Honor, the city claims that
7 it is different in the fact that it is supported by
8 evidence that was presented to the city council before the
9 ordinance was enacted. That, however, is not in the
10 record, and frankly we will not know until someone has
11 standing to challenge that ordinance and obtain court
12 review.

13 QUESTION: Well, in structure it's different as
14 well, is it not?

15 MS. AUSBURN: Yes, Your Honor. Rather than
16 being a simple set-aside which the original ordinance was,
17 this new ordinance has five different ways of granting
18 preferences along racial lines. There are set-asides,
19 there are bid preferences, there are direct negotiations,
20 there are subcontracting requirements. The different --

21 QUESTION: Is it possible that the standing
22 analysis would be different under the new ordinance?

23 MS. AUSBURN: Your Honor, it might be that in
24 some instances there would be a question of subcontracting
25 requirements of whether there were contractors who would

1 have standing to challenge the subcontracting
2 requirements, which is not an issue under the old
3 ordinance.

4 However, for purposes of the fact that
5 nonminority contractors come into the bidding process with
6 a distinct disadvantage for a certain percentage of city
7 contracts, that standing analysis would be the same
8 under --

9 QUESTION: Has your complaint been amended
10 anywhere down the line to address the new ordinance?

11 MS. AUSBURN: No, Your Honor, the case has been
12 dismissed because of the standing issue.

13 QUESTION: So as it comes to us, anyway, it was
14 based on an ordinance that's now repealed.

15 MS. AUSBURN: Yes, Your Honor, although I would
16 use the word, replaced with another substantially similar
17 and, for purposes of standing, identical ordinance.

18 QUESTION: Ms. Ausburn, our judgments don't
19 address legal issues. I mean, I agree with you the legal
20 issue that you raise will continue to be there under the
21 new ordinance, maybe in somewhat different form, but
22 courts don't address legal issues, they issue judgments,
23 and you're essentially asking us to strike down a -- or to
24 disallow the implementation of a statute which no longer
25 exists. You're asking us to do something that's a useless

1 act, aren't you?

2 MS. AUSBURN: Not necessarily, Your Honor. It
3 is far from clear in this case that the injunction which
4 the district court entered in this case originally almost
5 3 years ago -- it is far from clear whether that permanent
6 injunction does not cover the new ordinance.

7 The court's injunction stated that the city was
8 free to reenact constitutional ordinance that met this
9 court's guidelines in City of Richmond v. Croson. It is
10 no more than an assertion on the part of the City of
11 Jacksonville that this new ordinance meets the city of --
12 the guidelines of Croson and therefore meets the terms of
13 the original injunction.

14 If it were not for the standing issue, Your
15 Honor, either party could go back to the court under the
16 original injunction and ask the court to review this new
17 ordinance under the same standards and under the same
18 legal issues that were presented 4 years ago.

19 QUESTION: I see.

20 MS. AUSBURN: However, no one can do this until
21 someone has standing.

22 QUESTION: All you're asking this Court to do is
23 to reverse the Eleventh Circuit on the standing question.
24 You're not asking us to decide anything on the merits, are
25 you?

1 MS. AUSBURN: No, Your Honor. There is nothing
2 on the merits that has been preserved in this case
3 through -- from the district court through the Eleventh
4 Circuit. The Eleventh Circuit did not decide the merits
5 of the old ordinance, and the merits of the new ordinance
6 have never been challenged.

7 QUESTION: And, of course, the Eleventh Circuit
8 didn't decide any questions on the adequacy of the
9 pleadings, and there was no question about your ability to
10 amend your complaint because they invoked the standing
11 rule to dismiss the action.

12 MS. AUSBURN: Yes, Your Honor. They invoked the
13 standing rule, ordered it dismissed on the basis that our
14 pleadings did not allege sufficient facts that they
15 believed to be required for standing in this case.

16 QUESTION: Was the ordinance repealed, and then
17 a new one enacted, or was it just amended?

18 MS. AUSBURN: It was repealed and replaced. The
19 beginning of the ordinance -- I believe, Your Honor, at
20 the very beginning it said that they repealed section 6 of
21 the City of Jacksonville Purchasing Code and replaced it
22 with this following section 6, so the -- a new part
23 section 6 is added to the code, I believe is the exact
24 language.

25 So the new ordinance is in exactly the same

1 place that the old one was. It is part of the code. It
2 uses the same statutory citations and for that purpose
3 we've argued that the case is not moot on those grounds.

4 The question upon which this Court granted
5 certiorari, which is standing and whether a group of
6 nonminority contractors have standing based on the
7 pleadings that were present in this record, there have
8 been three particular standards that have been identified
9 to this Court for determining that standing issue.

10 The first one is the rule adopted by the
11 Eleventh Circuit Court of Appeals, which apparently no
12 party before this Court is defending any longer, and that
13 is that the contractors must identify a specific bid and a
14 specific contract that was lost due to the enactment of
15 the ordinance.

16 The second rule that was presented is the City
17 of Jacksonville's latest proposal, which is that the
18 contractors need not show that we actually lost a
19 contract, we need only show that we specifically bid for
20 an ordinance.

21 And then the third standard is that submitted by
22 petitioners in this case, which is that the statute
23 creates a racial preference that disadvantages certain
24 parties and that we are within that category of people who
25 are disadvantaged.

1 We believe, Your Honors, that it is this last
2 rule is the only one that is consistent with this Court's
3 precedent in both standing and equal protection law. As
4 we explained in our brief, the categorical rule which
5 petitioners would ask this Court to adopt stems from a
6 number of cases, such as Baker v. Carr, Quinn v. Millsap
7 and others, which is that the Equal Protection Clause
8 protects access, it does not protect what the Eleventh
9 Circuit asks the injury to be.

10 It does not protect actually getting a contract,
11 it does not protect actually being able to perform the
12 contract, the Equal Protection Clause protects access to
13 the system, and that when a party does not have complete
14 and fair access to the system, and that access is
15 conditioned on an unconstitutional barrier, that is the
16 injury, and that is sufficient injury for the Equal
17 Protection Clause.

18 Now, the second rule, which is the latest
19 version, has -- sounds more perfectly reasonable that you
20 have to identify a bid. However, it is an unnecessary
21 addition to the law of equal protection, or the law of
22 standing, and it is not consistent with this Court's
23 rulings in prior cases such as --

24 QUESTION: I'm sorry, may I just interrupt you
25 for a minute? Is the difference between the first and the

1 second essentially kind of an empirical difference in the
2 sense that you're claiming that by identifying the
3 contractors and the association as contractors who
4 customarily bid on a range of contracts, that you
5 therefore in effect have identified them as probably
6 harmed, whereas the second category is asking simply for a
7 more specific demonstration, or a more, maybe a heightened
8 probability of harm? Is that the difference between the
9 two?

10 MS. AUSBURN: It could be looked at as that
11 difference, Your Honor. We would argue that our
12 allegations in this case show sufficient probability. We
13 have alleged that we are contractors who regularly bid on
14 and perform contracts for the City of Jacksonville, that
15 we do business with the City of Jacksonville on a regular
16 basis, that there are contracts that we would have bid for
17 but we were not eligible for --

18 QUESTION: -- in your complaint specifically
19 says that many of your members would have bid.

20 MS. AUSBURN: Yes, Your Honor, I believe that is
21 in -- it is in paragraph 46 of our complaint, which is in
22 the Joint Appendix -- Joint Appendix page 18, "Numerous
23 nonminority members of AGC have been eligible and would
24 have bid on contracts but for the set-aside program."

25 We also allege that there -- as long as the set-

1 aside program is in effect, that we are shut out from
2 these. The requirement of a specific bid arguably would
3 heighten the probability, but it is the sort of mechanical
4 requirement that becomes simply a pleading requirement,
5 and --

6 QUESTION: Well, being shut out, you don't
7 really say that being shut out is enough. I mean, I
8 assume that contractors in Seattle, Washington are shut
9 out, too. You think an individual contractor in Seattle,
10 Washington, could come and bring this suit?

11 MS. AUSBURN: Only if he proved that he does
12 business with the City of Jacksonville and would like to
13 do business with the City of Jacksonville.

14 QUESTION: So being shut out alone is not
15 enough.

16 MS. AUSBURN: No, Your Honor. There is some
17 requirement that you be within the group of people
18 affected by the ordinance, and the ordinance only affects
19 those people who do business with the City of
20 Jacksonville.

21 QUESTION: But the city identifies in advance
22 the reserved -- at least under the old ordinance they
23 identified in advance the bids that were reserved.

24 MS. AUSBURN: Yes, Your Honor, under both the
25 old ordinance, and I believe under the new ordinance, the

1 set-aside, or the contracts that are reserved are -- it is
2 included within the bid specifications that these
3 contracts would be let only to minority bidders.

4 QUESTION: And that's -- and nonminority
5 contractors are shut out from bidding on those --

6 MS. AUSBURN: Yes.

7 QUESTION: Particularly identified contracts.

8 MS. AUSBURN: Yes, Your Honor. I suppose in a
9 technical sense we could bid for the contracts. we simply
10 would not be considered, and that is, of course, one of
11 the problems with the City of Jacksonville's standard, is
12 that they are asking our contractors to bid for contracts
13 that on its face our contractors are not eligible for.

14 They are requiring a futile act in order to
15 prove standing, which this Court has held in many cases,
16 including criminal law standards, that -- to analogize to
17 criminal law, that a person need not submit themselves to
18 a threat of prosecution in order to have challenge -- in
19 order to have standing to challenge a law that
20 criminalizes some behavior unconstitutionally.

21 This Court has also held in many cases that an
22 impending injury is enough, and that if there is evidence
23 in this case or in our case allegations in the complaint
24 of an impending injury, in our case the contractors who
25 would have bid on these contracts and who would like to

1 bid on these contracts, that is precisely the sort of
2 pleading that this Court found adequate in Clemments v.
3 Fashing, which was a statute that required politicians in
4 Texas to resign from a current office in order to run from
5 another office.

6 This Court did not require those people to
7 actually go and run for office or apply to be a candidate
8 for the office. The Court simply held that the
9 allegations, which were that they would like to run and
10 would run if it weren't for the fact that they had to
11 resign from their current office, was sufficient to give
12 them standing to challenge that resign-to-run provision.

13 QUESTION: If you were representing just one
14 client rather than -- one contractor rather than
15 association, and the contractor was new in the business,
16 had never bid on anything whatsoever, would you think it
17 was sufficient for you simply to acclaim that your client
18 would have bid but for the set-aside?

19 MS. AUSBURN: Your Honor, there might be a --
20 with the individual contractor there might be a heightened
21 element of evidence in order to prove that he would have
22 bid, and that would come down to the difference between
23 allegations and evidence submitted at summary judgment in
24 order to prove that.

25 QUESTION: -- allegation.

1 MS. AUSBURN: I would believe, Your Honor, that
2 would be sufficient to establish standing and to get the
3 case -- to get the case into court so that those
4 allegations could be tested.

5 There would be all sorts of evidence required
6 that this person was competent to perform contracts for
7 the City of Jacksonville, that he was otherwise eligible;
8 there would be many issues, but those would be evidentiary
9 proof issues rather than pleadings issues for allegations.

10 The question of what -- whether a person would
11 have to submit a bid, that second test that has been
12 presented to this Court is not one that is necessary to
13 protect the principles that are at issue in standing
14 cases. This Court has stated that the issue in standing
15 cases is whether you have the proper plaintiff before the
16 Court, a plaintiff who is likely to be injured, a
17 plaintiff who is concerned about what is happening in this
18 case.

19 We would submit that, on the basis of our
20 allegations, that we do business with the City of
21 Jacksonville, that we would like to continue to do
22 business with the City of Jacksonville, that you have the
23 proper plaintiffs before this Court.

24 After all, the ordinance is directed towards
25 contractors who do business with the City of Jacksonville,

1 and if we can prove we are within that category, then
2 there is no one else that is going to be able to challenge
3 the ordinance, other than people within that category.

4 The third rule is the one that this Court
5 originally granted cert on, which is the Eleventh Circuit
6 rule requiring proof of an actual contract. We believe
7 that the Eleventh Circuit confused the standards for
8 standing in equal protection cases with the standards at
9 issue for a bid protest or your standard civil suit where
10 damages are sought, and for all the reasons contained in
11 our brief we believe that injunctive relief, and
12 particularly injunctive relief under the Equal Protection
13 Clause, does not require proof of a specific lost contract
14 but simply being allowed to -- or, excuse me, not being
15 considered or not being able to compete on an equal basis
16 is sufficient.

17 The finally issue that has arisen in the briefs
18 is the level of evidence that is required. The posture of
19 this case is that everything about standing has been
20 decided on the pleadings. There is no evidence in the
21 record that our clients submitted a bid and were refused,
22 or that they would have gotten a contract.

23 The reason we believe that this Court should
24 focus on the allegations and determine whether the
25 allegations are sufficient for standing is because in many

1 cases, this -- or in most cases where the Court has
2 focused on the -- considered standing, they have focused
3 on the allegations in the complaint unless, if standing
4 came up as an issue in the lower courts, in the issue of
5 summary judgment or in other standards, then this Court
6 has considered that the nonmoving party or the party
7 plaintiff who has proved standing has had adequate notice.

8 Celotex is an example where this Court made a
9 point that the plaintiff in that case had not presented
10 sufficient evidence to sustain her pleadings, but that she
11 had sufficient notice, and all of these cases -- many of
12 these cases that the Court has considered have used
13 language that if it is contested at trial, if the question
14 is brought up -- in Lujan, the language was, in response
15 to a motion for summary judgment evidence is needed.

16 There was no such motion, there was no such
17 notice for the petitioners in this case. The question
18 never came up until -- as I believe the briefs adequately
19 show, the question never came up until 6 months before
20 this case came up on appeal when the Eleventh Circuit
21 adopted its new rule and then applied it in this case.

22 This Court has never dismissed pleadings or
23 never decided a case on standing for lack of evidence
24 unless there was notice in the lower courts that this has
25 come up. In this case, the City of Jacksonville never

1 raised the issue.

2 In fact, at a hearing on the preliminary
3 injunction when the judge asked them if they were claiming
4 that we had no standing, they said no. The issue of bids
5 and being denied for a bid went to irreparable injury for
6 a preliminary injunction, which was the issue at that time
7 4 years ago, when we sought preliminary injunction.

8 The issue of injury and requiring a bid has
9 never been an issue in this case until the Eleventh
10 Circuit's -- the Eleventh Circuit decided its decision.

11 QUESTION: What do you do about our language in
12 Warth v Seldin, where we denied standing to the
13 homebuilders saying, "The complaint refers to no specific
14 project of any of its members that is currently precluded
15 by the ordinance"?

16 Remember, this was an ordinance that --

17 MS. AUSBURN: Yes. Your Honor, the --

18 QUESTION: "There is no averment that any member
19 has applied to respondents for a building permit."

20 MS. AUSBURN: Yes.

21 QUESTION: Were we just -- why were we saying
22 that?

23 MS. AUSBURN: Well, because in Warth v. Seldin,
24 that was the only injury that those homeowners -- that
25 those homebuilders could allege, was economic injury.

1 They were not the targets, or they were not suffering any
2 discrimination as a result of that zoning ordinance.

3 The injury that the homebuilders were alleging
4 was indirect injury, injury to them resulting from the
5 violation of someone else's rights. It was the rights of
6 the people to live in that community, the other rights.
7 They had no equal protection rights for discrimination,
8 and it's that distance, there, that economic injury was
9 all that they could claim, and therefore this Court
10 rightly went back to the standard for damages in the case.

11 QUESTION: Your clients don't have any separate
12 equal protection rights here, apart from the contracts.
13 They're not complaining of some violation of equal
14 protection rights in the abstract, they're complaining
15 about denial of particular contracts.

16 MS. AUSBURN: Yes, Your Honor, but the statute
17 has created racial classifications and has put our clients
18 within those racial classifications. In Warth v. Seldin
19 the homeowners -- excuse me, the homebuilders association,
20 none of their clients were classified and directly
21 affected --

22 QUESTION: Well, that's very true, but I don't
23 see how that has anything to do with the standing
24 question.

25 MS. AUSBURN: Your Honor, the -- again, I would

1 go back to the injury that they were claiming --

2 QUESTION: Right.

3 MS. AUSBURN: In Warth was not related to the
4 Equal Protection Clause. The injury to those particular
5 plaintiffs was purely economic. In our case, we are
6 alleging more than economic injury.

7 QUESTION: You are. What is the injury you are
8 alleging?

9 MS. AUSBURN: The -- the -- being excluded from
10 the process. That encompasses --

11 QUESTION: Being excluded from the process?

12 MS. AUSBURN: Yes, Your Honor, being excluded
13 from consideration.

14 QUESTION: I don't understand that. I thought
15 you were complaining about not being able to get contracts
16 with the city.

17 MS. AUSBURN: We're not even considered for
18 contracts. It is true that what we're looking at is
19 economic, that it is the contracts, but I believe there is
20 a difference between the contracts and saying that it is
21 all economic injury. I'm not denying that there is
22 economic injury in this case and that if it is only
23 economic injury then you must quantify it to the extent of
24 damages.

25 QUESTION: Well, is there any difference between

1 your case and Croson in the sense of the kind of injury
2 you're talking about?

3 MS. AUSBURN: Your Honor, the injury that this
4 Court identified in Croson was the injury of not
5 being considered -- or being lumped in a category because
6 of racial preferences and not being allowed. We would put
7 ourselves in the Croson category as opposed to the Warth
8 v. Seldin category, because we are directly affected by
9 the statute and it is our directly Equal Protection rights
10 that are being affected.

11 QUESTION: You say it's more -- more proximate
12 in your case than it was in Warth, then.

13 MS. AUSBURN: Your Honor, we're saying that the
14 injury, the Equal Protection injury is more proximate to
15 us than it was in Warth. They had no Equal Protection
16 injury in Warth v. Seldin. All that they had was economic
17 injury.

18 QUESTION: It seems to me the question is not so
19 much the kind of injury but the likelihood of its
20 occurrence, and in Warth v. Seldin we found there was just
21 no likelihood shown that the injury would ever occur, and
22 it seems to me that that should be the distinction, not
23 the constitutional basis that underlies the cause of
24 action for asserting the injury.

25 MS. AUSBURN: That is true, Your Honor, there is

1 a difference in Warth between the proximity.

2 We look to the Equal Protection Clause not to
3 determine proximity, we simply look to the Equal
4 Protection Clause to determine the injury that is
5 acceptable, and that is the main area of disagreement that
6 we have with the Eleventh Circuit's argument. They looked
7 at the only injury that is acceptable is economic injury.

8 QUESTION: Well, I -- I guess that's a different
9 answer -- I mean, if you said that language in Warth may
10 go too far, but the proximity is different, that language
11 aside -- but that language seemed to say not just, it
12 isn't proximate enough, but that it can't be proximate
13 enough unless you will identify a particular contract.

14 MS. AUSBURN: Yes, Your Honor, and if Warth
15 requires people who suffer Equal Protection injury to
16 prove a bid or to show that they had submitted themselves
17 to the process, then Warth is not consistent with this
18 court's prior holdings in standing and equal protection,
19 because there are many cases where -- the voters in Baker
20 v. Carr did not have to show that they had actually voted.

21 The plaintiffs in Gilmore, where they were
22 excluded from the parks, they didn't have to show that
23 they had gone out and tried to enter the parks. All they
24 had to show is that the ordinance said only these people
25 are allowed in the parks, and you are not one of these

1 people.

2 And Warth v. Seldin, we believe that the only
3 way to reconcile it with the other cases is to make the
4 difference between the rights that are asserted and the
5 proximity in this case.

6 QUESTION: But when you say that your members
7 would have bid on these contracts, are you telling us that
8 we should read that allegation to mean, in effect, that
9 they would have bid and that, given the large number of
10 them and the fact that they customarily seek contracts for
11 this kind of work, that there is a reasonable probability
12 that one of them would have gotten at least some of these
13 set-aside contracts? Are you telling us that's the way we
14 should read that allegation?

15 MS. AUSBURN: Certainly you can read that, Your
16 Honor. We do not believe that it's necessary for there to
17 be at the end of any chain of reasoning a decision that
18 someone would have gotten a contract.

19 QUESTION: So then you really are saying, I
20 guess, that you're not complaining of economic injury, you
21 are simply complaining of kind of an abstract exclusion
22 from a bidding process, and it seems to me that that is
23 weaker than read your allegations to be.

24 MS. AUSBURN: We --

25 QUESTION: You're not complaining of -- at

1 least, I didn't think you were complaining of a mere
2 abstract classification which excludes you from a bidding
3 process. I thought you were complaining of an exclusion
4 in the course of which some of your members would obtain
5 contracts.

6 MS. AUSBURN: Yes, Your Honor, I believe that
7 that is true and that it can be read that way.

8 QUESTION: So ultimately you are complaining of
9 an economic injury, and the debate seems to be how
10 specific must you articulate your allegations to raise a
11 probability, or a claim of probability of actual economic
12 injury. That's fair to say, isn't it?

13 MS. AUSBURN: Your Honor, it is true that in
14 this case our clients would not be bidding for contracts
15 if they didn't think they could get them. They are in
16 business, and they would like to perform contracts and be
17 paid for performing those contracts.

18 However, it's simply a question of whether
19 performing the contracts, receiving the contracts, is a
20 necessity, and we believe that there is certainly --

21 QUESTION: Well, you mean whether obtaining a
22 particular contract is a necessity.

23 MS. AUSBURN: Is a necessity for standing.

24 QUESTION: Yes.

25 MS. AUSBURN: Yes. Yes, Your Honor, and we

1 believe that the Court can find from our pleadings that
2 certainly someone within the Association of General
3 Contractors is going to be performing, or is going to
4 receive and perform adequately a contract for the City of
5 Jacksonville.

6 QUESTION: Of course, the court below insisted
7 that you prove not only that you would have bid for the
8 contract, but that you would have gotten it.

9 MS. AUSBURN: Yes. Yes, Your Honor, but for --
10 again, it was a simple damages type of analysis that they
11 applied to this case, and given all those reasons, we
12 believe that the only standard that is consistent with
13 this Court's precedent, and consistent with this Court's
14 precedents in both the Equal Protection Clause and
15 standing, is the standard that our allegations meet, which
16 is that the City of Jacksonville passed an ordinance that
17 affects contractors who do business with the City of
18 Jacksonville, and we do business with that city.

19 Thank you.

20 QUESTION: Thank you, Ms. Ausburn.

21 Mr. Magid. Am I pronouncing your name
22 correctly?

23 MR. MAGID: Magid.

24 QUESTION: Magid. Mr. Magid, we'll hear from
25 you.

1 ORAL ARGUMENT OF LEONARD S. MAGID

2 ON BEHALF OF THE RESPONDENTS

3 MR. MAGID: Mr. Chief Justice, and may it please
4 the Court:

5 The Eleventh Circuit decision on standing should
6 be affirmed, and we are here to defend that decision,
7 because it correctly held the AGC to the economic injury
8 stated in its complaint. Even if the injury is found to
9 be noneconomic, the AGC failed to allege such injury or
10 any other injury, economic or noneconomic, with any
11 particularity in accordance with the Warth case and others
12 of this Court.

13 QUESTION: Are you talking about some sort of a
14 pleading rule that would require alleging with
15 particularity economic injury, or are you talking about a
16 substantive rule as to what sort of a showing you would
17 have to make to win your lawsuit?

18 MR. MAGID: Initially, Your Honor, it would be a
19 pleading rule. It's a pleading rule in the sense that
20 from the complaint it must appear that standing is
21 present. Without standing being present, the court has no
22 jurisdiction to proceed further.

23 That is why we're here today, because the
24 allegations in the AGC complaint are not very clear, and
25 the court -- at least, it took an appellate court to

1 realize that the case should not have proceeded on the
2 pleadings alone, and of course, as you go through the
3 different stages of the case, and you get to the summary
4 judgment stage of the case, that rule would be heightened
5 and you would need more evidence, and we were at that
6 stage in this case.

7 QUESTION: The district court granted summary
8 judgment --

9 MR. MAGID: Against the city.

10 QUESTION: Against the city, and issued a
11 preliminary injunction.

12 MR. MAGID: And a permanent injunction.

13 QUESTION: And a permanent injunction, and so
14 the Eleventh -- there were no more proceedings to be had
15 in the district court, then.

16 MR. MAGID: No, Your Honor.

17 QUESTION: And the Eleventh Circuit reversed
18 because of no showing of standing, in its view. So why
19 are we talking about a pleading rule if the case went on
20 summary judgment and there were no further proceedings to
21 be had in the district court? It went beyond -- it had
22 gotten beyond the pleading stage in this case.

23 MR. MAGID: We agree with you wholeheartedly,
24 Judge -- Your Honor -- Chief -- Mr. Chief Justice. Even
25 if --

1 (Laughter.)

2 MR. MAGID: Sorry -- I got it.

3 (Laughter.)

4 MR. MAGID: Even if the pleadings are found to
5 be sufficient, we're not at that stage in this case. The
6 AGC failed to support the general allegations of its
7 complaint at the summary judgment stage with any evidence,
8 and again, like Your -- Mr. Chief Justice, you said, the
9 case had already gone to judgment. It seems a little
10 late to say well, we can show you we should have been here
11 in the first place.

12 QUESTION: Did you challenge standing at that
13 stage?

14 MR. MAGID: Your Honor, we never challenged
15 standing until the appeal.

16 QUESTION: Until the appeal, so -- and now you
17 complain that they didn't put in more evidence of
18 standing, when you never challenged -- surely, at least in
19 those circumstances the standard we should apply is the
20 pleading standard, they come in and plead something that
21 would show enough standing.

22 MR. MAGID: Your Honor, we assumed that standing
23 was present. We assumed that if a group of nonminority
24 contractors were challenging a minority program, that you
25 basically had standing.

1 QUESTION: But you've changed your mind now.

2 MR. MAGID: Correct. The Eleventh Circuit --
3 the Eleventh Circuit, which has an obligation, and every
4 court -- and it's really between -- almost between the
5 plaintiff and the court.

6 QUESTION: I don't deny their obligation, but
7 I'm just -- it doesn't seem to me to apply to them a
8 higher standard than would be necessary to pass a judgment
9 on the pleadings, when you have never at any point, until
10 they're in the court of appeals, challenged the standing,
11 and then you want us to apply the test that ought to be
12 applied either at summary judgment or later still, at
13 trial. That doesn't seem to me very fair.

14 MR. MAGID: They had notice, like any other
15 litigant, that standing is an essential element of their
16 case. They moved for summary judgment. When they moved
17 for summary judgment, they represented to the court that
18 the court should grant that judgment as a matter of law,
19 and here's all our evidence that we need.

20 Again, they had notice that standing is an
21 essential element of the case, but they did not submit any
22 evidence establishing that standing for the court to rule,
23 for the court and the Eleventh Circuit to render a ruling
24 and to exercise its lawful authority in this case.

25 QUESTION: But the Eleventh Circuit orders the

1 action to be dismissed, it doesn't remand so that the
2 pleadings can be amended.

3 MR. MAGID: The effect, Your Honor, is the same.
4 The case was dismissed without prejudice. If they do --
5 in fact they're able to show an actual case in
6 controversy, they can be back at our doorstep and sue us
7 tomorrow.

8 QUESTION: Is it without -- if you dismiss
9 someone for no standing, that's without prejudice? You
10 can come back in the next day and say oh, I really do have
11 standing, I just didn't allege enough facts. You can't do
12 that.

13 MR. MAGID: Your Honor, I think the decision is
14 worded that it's without prejudice, and it should be
15 anyway because it has no res judicata effect.

16 QUESTION: A decision on standing has no res
17 judicata effect.

18 MR. MAGID: As to showing later on that there is
19 an injury. If your allegations are insufficient and you
20 lack evidence, tomorrow you may have an actual case in
21 controversy. The problem in this case, Your Honor --

22 QUESTION: Well, if you get -- if this
23 further -- I mean, if there was a further event, but not
24 if you simply want to come back in with allegations that
25 you could have made in the first instance. You can't do

1 that.

2 MR. MAGID: Then, Your Honor, the only thing I
3 can refer to is the decision in this case. It is without
4 prejudice.

5 QUESTION: Well, Mr. Magid, the question
6 presented in the petition for certiorari is whether an
7 association challenging a racially exclusive Government
8 ordinance may establish standing by showing its members
9 are precluded from bidding on certain municipal contracts,
10 or whether the association must show that its members
11 actually would have received one or more of those
12 contracts.

13 That is a question of substantive standing law,
14 not pleading law, and you know, you're entitled to urge
15 affirmance on any other ground of the court of appeals,
16 but I suggest that you do discuss somewhere in your
17 30 minutes the standing question.

18 MR. MAGID: We believe, Your Honor, that in this
19 case the Eleventh Circuit has not established a new rule
20 of standing -- has not changed anything substantively on
21 the basis of constitutional standing.

22 The Eleventh Circuit does not require litigants
23 challenging an affirmative action program or reverse
24 discrimination to show a denial of a benefit or a lost
25 contract. In this case, it merely required the plaintiff,

1 who was the AGC, to prove specifically -- or to allege,
2 first specifically, and then to establish by
3 evidentiary -- by evidence that standing was present.

4 QUESTION: They said that in order to do that
5 they had to show that they would have successfully bid on
6 contracts, didn't they?

7 MR. MAGID: Correct, and the reason the Eleventh
8 Circuit did that is because the complaint itself states
9 the injury as being economic, and I refer you to
10 paragraphs 48, 49, and 52. It says, we were harmed. How
11 were we harmed? We were harmed because we lost
12 economically. What did you lose economically? We lost --
13 lost contracts.

14 So the Eleventh Circuit thereupon said, show us
15 an actual case in controversy, show us an actual concrete
16 case in this matter where that happened. Where is a
17 particular project that you lost, and they didn't plead
18 one, they didn't submit one in evidence on summary
19 judgment, and therefore the Eleventh Circuit ruled against
20 them, and it was no new rule of the Eleventh Circuit.

21 QUESTION: Mr. Magid, suppose -- suppose Alaska,
22 having a budget surplus from the sale of the State's oil,
23 decides, instead of dividing it up among all our citizens
24 we're going to have a lottery.

25 This will be much more exciting and will -- but

1 we won't give everybody in the State a lottery ticket.
2 We'll just give a ticket to minorities in the State. Or,
3 I mean, better yet, we'll only give tickets to the
4 majority in the State. We will not give tickets to
5 minorities.

6 Now, do you think that those minorities have not
7 been deprived of any economic benefit because they cannot
8 prove that they will win in the drawing? Those tickets
9 will sell for a certain amount of money, won't they? The
10 tickets will be worth something. I mean, that --

11 MR. MAGID: Right.

12 QUESTION: That's why lottery tickets are sold.

13 MR. MAGID: Your Honor, in your example, race is
14 an absolute barrier to their participation.

15 QUESTION: I'm talking about whether there's any
16 economic value to a chance of getting something.

17 MR. MAGID: The injury in that case, in your
18 example, is not an opportunity, it's very --

19 QUESTION: I'm not complaining about my race
20 being demeaned, I'm complaining about the fact that I
21 don't have a lottery ticket, which is worth something,
22 isn't it, even though I don't know for sure that it's
23 going to win?

24 MR. MAGID: Even a losing lottery ticket.

25 QUESTION: Well, I don't -- if I know it's a

1 losing lottery ticket, it's worth nothing.

2 (Laughter.)

3 QUESTION: But at the outset I don't know
4 whether it's a winner or loser, just as here. In
5 submitting a bid you don't know whether you're going to be
6 a winner or loser, but it's worth something to be able to
7 submit a bid, is it not?

8 MR. MAGID: I would submit to you that the
9 injury that you're stating in your complaint, your
10 hypothetical complaint, is an injury more of a racial
11 stigma, of a personal indignity, saying I'm not allowed to
12 have that lottery ticket based upon my race.

13 QUESTION: Nonsense. Assume it wasn't upon my
14 race, it was upon the letter of the alphabet that my name
15 begins with. I'd still be mad, because these other people
16 got lottery tickets and I didn't. I've been deprived of
17 economic value, and hasn't -- haven't these people been
18 deprived of economic value? They have a chance of getting
19 the contracts.

20 MR. MAGID: They've been deprived of economic
21 value, but again, they state in their complaint that their
22 injury is economic, and their injury is economic because,
23 again, if read paragraphs 48, 49, and 52, their injury is
24 that we lost business. Not that we lost the right to
25 participate in the system, but that we lost a contract.

1 That's why they're here. They're here because
2 they claim that they have not -- they are unable to win
3 certain contracts let by the city, but we don't know which
4 ones.

5 QUESTION: Well, how could these members
6 possibly expect to win a contract for a project that's
7 listed as reserved for minorities? How can the -- they
8 just wouldn't even consider the bid.

9 MR. MAGID: This relates -- your question, Your
10 Honor, relates to the imminence of the injury. In order
11 to warrant a --

12 QUESTION: Well, didn't the city set aside
13 certain contracts that would be awarded only to
14 minorities?

15 MR. MAGID: Yes, but it is --

16 QUESTION: And so what should somebody do, go
17 perform a futile act, a nonminority -- you go bid, and
18 certainly how could you ever prove that you would have
19 gotten the contract when they're reserved for minorities?

20 MR. MAGID: Well, facially on the record, Your
21 Honor, and the ordinance is the only thing we have in the
22 record, we don't have any bid specifications, and if you
23 look at the ordinance, the ordinance specifically has a
24 waiver provision. The ordinance is not a quota. It's not
25 an absolute bar. It does not state that 10 percent of the

1 City of Jacksonville contracts will be let to a certain
2 class of people. It says, that is the city's goal.

3 In fact, an application much -- as a matter of
4 fact, there also is a gender classification in the
5 ordinance that is not challenged by the AGC, and the
6 ordinance can let all the contracts under the ordinance to
7 women-owned businesses.

8 QUESTION: Mr. Magid, may I just interrupt you
9 with a question? Isn't it also an allegation in the case,
10 which we are taking as true at this point, that the city
11 manager, whoever it was, identified particular contracts
12 as subject to the set-aside, and that the only claim that
13 these people are making is that as to those contracts they
14 were excluded from bidding, and if that is true, then the
15 fact that there may be a waiver provision is irrelevant to
16 our issue, isn't it?

17 MR. MAGID: Well, Your Honor --

18 QUESTION: Because there was no waiver as to
19 those identified contracts.

20 MR. MAGID: But again, the complaint does not
21 identify the particular contracts that the city might set
22 aside in the future.

23 QUESTION: No, I -- that, I assume, is the case,
24 but you were placing some emphasis on the fact that the
25 city can waive the set-aside requirement.

1 My only point is, as I understand it, the
2 pleadings here include a claim that there have been
3 specific contracts as identified as being subject only to
4 minority bids, and those are the only contracts which we
5 have before us, and if that is so, the fact that there
6 could have been a waiver is irrelevant, isn't it?

7 MR. MAGID: I would submit to you, Your Honor,
8 that provision has to be -- that allegation should be read
9 in context with the evidence, which is the ordinance, and
10 the ordinance --

11 QUESTION: Well, I'm willing to do that, and I
12 still don't see what difference it makes, and why we
13 should consider the possibility of a waiver when the
14 subject matter of this litigation goes to contracts which
15 have -- or to bids as to which there has been no waiver of
16 the ordinance.

17 MR. MAGID: Well, Your Honor, again, that is the
18 problem with this case, is that, like the Warth case,
19 there is no particular project. We don't know from the
20 complaint --

21 QUESTION: Well, let me ask you just a question
22 about allegations. Is it true, or is it not true -- maybe
23 I'm wrong on this -- that the allegation is that as to
24 specifically identified contracts, i.e., those which are
25 set aside by the city manager as being subject to the set-

1 aside, the members of this association are excluded from
2 bidding, is that correct?

3 MR. MAGID: It is uncertain from the pleading in
4 that no particular contract is identified --

5 QUESTION: No specific contract, i.e., the
6 contract to pave, you know, West Rollins Street, is not
7 identified, but the class of contracts is identified, and
8 that class of contracts is described as those which are
9 set aside by the city which are identified by the city
10 manager as subject to the set-aside, isn't that true?

11 MR. MAGID: But it's unclear that --

12 QUESTION: Well, isn't that true?

13 MR. MAGID: Your Honor, no, because it is
14 unclear from the ordinance itself whether --

15 QUESTION: But I'm asking about the pleadings.
16 Isn't that what they've pleaded?

17 MR. MAGID: They have alleged -- correct, Your
18 Honor. They have alleged generally that they have been
19 precluded in the past from certain business.

20 QUESTION: Okay.

21 MR. MAGID: However, the ordinance itself does
22 not state whether the particular projects that they might
23 be interested in have ever been set aside or will be set
24 aside in the future.

25 It doesn't say, construction contracts, or

1 within the area of construction contracts, electrical
2 contracts, plumbing contracts, whatever contracts --

3 QUESTION: Right, I understand that, yes.

4 MR. MAGID: So there's no matching, so there's
5 no -- we don't know if --

6 QUESTION: Well, it says it. It just doesn't
7 say it specifically. It says, some of those set aside we
8 would have bid on, doesn't it?

9 MR. MAGID: That's correct, Your Honor.

10 QUESTION: Well, when you say there's no
11 matching, you mean there's no matching between this
12 contractor and this contract.

13 MR. MAGID: Correct, Your Honor.

14 QUESTION: Okay.

15 MR. MAGID: And also -- and I would submit to
16 you that there is a contradiction facially with the
17 ordinance. The ordinance allows the waiver provision, and
18 allows them to bid. It doesn't preclude them from
19 bidding, and again that 10 percent is no absolute bar.

20 The problem in this case is the fact that they
21 sued as an association, and as an association they may sue
22 as a representative of its members, but the associational
23 standing does not negate the requirement that you have
24 actual case in controversy.

25 A representative standing case or an association

1 can't hide behind its associational standing. The general
2 allegations of the complaint that our members are
3 suffering under this ordinance are unsupported even in the
4 complaint, in the complaint and later on in summary
5 judgment, with any specific instance, and like any other
6 litigant an association should have to come forward and
7 show a specific instance of actual case in controversy so
8 the court -- a court doesn't find itself in a situation
9 where we are today.

10 QUESTION: Well, certainly -- certainly it very
11 likely -- it should at some stage of the litigation, if
12 you say you can't show that there was any contract you
13 were excluded from, they should have to show that their
14 allegation in their complaint that the city had set aside
15 certain ones was true, but I don't think you can focus
16 just on the complaint in that inquiry.

17 There are all sorts of ways in litigation to
18 bring out specific answers to questions that may have to
19 be asked at trial.

20 MR. MAGID: The only thing I would refer you to,
21 Your Honor, is that of course, as you get through the
22 stages of the litigation like the Lujan case specifically
23 talked about, you have a higher threshold of evidence to
24 show the court that you fulfilled the obligation, and you
25 can assure the court that there was an actual case in

1 controversy.

2 However, there's a case -- Bender v.
3 Williamsport -- where the court talks in language of any
4 doubt that that actual case in controversy is present
5 should be resolved in favor of not allowing a case to
6 proceed, or the presumption is that -- the presumption is
7 that actual case in controversy is not present.

8 Based upon those very -- the law is exacting
9 when it comes to standing. Based upon those opinions, we
10 would submit to you that you should put it in your
11 pleadings and specifically allege, and put the court on
12 alert, that you have standing.

13 If you continually -- if litigants continually
14 to allege -- continue -- associations continue to allege
15 our members are hurt generally, a court can't be satisfied
16 that standing is present.

17 QUESTION: Well, the test is whether that
18 allegation is sufficient to show standing. You wouldn't
19 insist that in a separate paragraph of the complaint the
20 plaintiff would say the plaintiff had standing, would you?

21 MR. MAGID: No. That would be a general
22 conclusory allegation and of course would be insufficient,
23 but something to say here is our actual case, here is the
24 elements of our -- here is a particular -- like Warth
25 suggested, here is a particular project. We are injured

1 because in this particular project company A was minimally
2 eligible to bid, the city was going to set aside that
3 project, we bid, we didn't get it.

4 QUESTION: Well, rule 8(a) says the complaint
5 should set aside, what, a short, simple statement of the
6 claim. Are you saying there must be a different rule for
7 complaints where there might be any challenge to standing?

8 MR. MAGID: I would suggest to you, Your
9 Honor -- Mr. Chief Justice, sorry -- that when it comes to
10 standing, standing is such a critical doctrine that goes
11 to the separation of powers, of -- and the lawful exercise
12 of the court's authority, that when it comes to that
13 doctrine, that standing should be evident from the face of
14 the pleadings, and conclusory allegations alone put us in
15 a situation where we are here, where a case actually went
16 to judgment and there is no record evidence that at least
17 one AGC member in one instance has ever been injured by
18 the ordinance.

19 QUESTION: But isn't that attributable to the
20 fact that standing was never raised until it got to the
21 Eleventh Circuit?

22 MR. MAGID: Partly, Your Honor.

23 QUESTION: Well --

24 MR. MAGID: I mean -- well, wholly, but the idea
25 is that if there was a pleading rule, that it should be

1 from the face of the pleadings that it should appear, and
2 I think there is some language in *Bender v. Williamsport*
3 that it should appear from the pleadings that
4 presumptively -- the presumption is that it doesn't exist,
5 so you must -- when you have to overcome a presumption,
6 there's something more you would have to do than just
7 do -- cite conclusory allegations.

8 And I know there's a conflict with the Federal
9 Rules of Civil Procedure when it comes to Rule 8, but
10 standing is so important, and there's a presumption that a
11 court -- at the minimum, a court at the pleading stage
12 would dismiss the case and say, you know -- not dismiss
13 the case, dismiss the pleading, and allow you to replead.

14 But again, in this case we have gone to the
15 summary judgment stage, and when you're at the summary
16 judgment stage, and you move for summary judgment, you're
17 on notice that that standing element is present.

18 QUESTION: May I ask another question? We've
19 talked mostly about the set-aside of 10 percent that your
20 opponents say they were entirely excluded from getting
21 contracts.

22 Did they not also allege that even as to the
23 contracts they got they had an obligation under the
24 ordinance to have subcontracted 10 percent of that work,
25 and that that had caused them extra expense, and is that

1 the subject of a different analysis?

2 MR. MAGID: Your Honor, I'm aware of the
3 allegation that you're reading. The ordinance does not
4 suggest -- actually, the allegation of the complaint is
5 that all city contracts require 10 percent subcontracts.

6 The ordinance itself does not require all
7 contracts be -- have 10 percent participation of
8 minorities. There's no place in the ordinance that
9 requires --

10 QUESTION: But does it require some contracts
11 given to nonminority contractors to have 10 percent for
12 minority contractors?

13 MR. MAGID: Yes, but it doesn't say 10 percent.
14 It leaves it open as to what the percentage might be. The
15 provision that you're referring to --

16 QUESTION: But in any event, they did allege
17 that that provision of the ordinance caused them to make
18 subcontracts that were less advantageous than if they'd
19 not had to do that.

20 MR. MAGID: Right, Your Honor, but that
21 allegation, again there is -- on its face, and I think the
22 Eleventh Circuit has stated this previously, that an
23 allegation that it costs you more to hire somebody else,
24 you're just going to pass it on in your bid, anyway.

25 I mean, everybody has the same equal playing

1 field. As a general contractor you're trying to meet your
2 subcontracting requirements and therefore it's not going
3 to cost anybody anybody -- anything extra, so there is no
4 economic injury for that alone.

5 In this case, Your Honor, the litigants and
6 lawyers and courts need to be reminded that sometimes --
7 that they are blinded by the ultimate ends a lawsuit might
8 bring, and in this case the litigant's zealousness to stop
9 a Government program that they did not like, did not wait
10 for the time when an actual case had arisen.

11 The fact that the issue was raised by the court
12 only -- or the appellate court in this case, only
13 underscores the importance of the standing doctrine to the
14 court's lawful exercise of its authority.

15 The AGC in this case rushed to court after the
16 Croson decision attempting to halt the city's program, and
17 successfully did, without ever showing that an actual
18 case, an actual instance where one AGC member was injured
19 during the 5 years of the existence of the program, and
20 they were able to get an opinion that now stands as an
21 advisory opinion because there's no record of evidence in
22 that record, even though the case had gone to judgment,
23 that there is an actual case in controversy.

24 In conclusion, conclusory allegations of injury
25 are not sufficient to establish constitutional standing.

1 Without allegations of specific injury, a court cannot be
2 assured that standing is present and that it should
3 resolve a dispute between the parties.

4 Relaxing standing doctrine would only upset the
5 delicate balance of power among the branches of
6 Government, expand judicial power unnecessarily, and
7 sanction advisory opinions.

8 The court in this case, the appellate court in
9 this case provided a check, and if that check is not
10 fulfilled, the legitimacy of the court can ultimately be
11 undermined.

12 Thank you.

13 QUESTION: Thank you, Mr. Magid. Ms. Ausburn,
14 you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF DEBORAH A. AUSBURN

16 ON BEHALF OF THE PETITIONER

17 MS. AUSBURN: Thank you, Your Honor.

18 The standard that the City of Jacksonville would
19 have this Court use is one that imposes evidentiary
20 standards on pleading requirements. We believe that our
21 allegations are sufficient to show that we were excluded
22 from contracts because of an ordinance that was
23 adjudicated to be unconstitutional, and that we will
24 continue to be excluded from those contracts.

25 If this Court believes that more evidence is

1 necessary, we are prepared, certainly, to present that.
2 We would simply ask that this Court decide what it is that
3 we must show in the lower court, whether we must show a
4 specific contract, or whether we must show the matching
5 contracts that the City of Jacksonville is asking for.

6 In the final analysis, however, we believe that
7 in order to be consistent with prior precedent, that the
8 correct rule in this case is the one that we have already
9 met, which is that the City of Jacksonville has an
10 ordinance that excludes contractors from consideration if
11 they fit within the category, and that we, as nonminority
12 contractors who do business with the City of Jacksonville,
13 are within that category.

14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
16 Ausburn. The case is submitted.

17 (Whereupon, at 1:53 p.m., the case in the above-
18 entitled matter was submitted.)

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CERTIFICATION

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

North Eastern Florida Chapter ✓
City of Jacksonville Florida

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

BY Lona M. May

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