SUPREME COURT OF THE UNITED STATES

No. 91–1721

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

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

[June 14, 1993]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

When a challenged statute expires or is repealed or significantly amended pending review, and the only relief sought is prospective, the Court's practice has been to dismiss the case as moot. Today the Court abandons that practice, relying solely on our decision in *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283 (1982). See *ante*, at 5–6. I believe this case more closely resembles those cases in which we have found mootness than it does *City of Mesquite*. Accordingly, I would not reach the standing question decided by the majority.

Earlier this Term, the Court reaffirmed the longstanding rule that a case must be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant `any effectual relief whatever' to a prevailing party." *Church of Scientology of California* v. *United States*, 506 U. S. ___, ___ (1992) (slip op., at 3) quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895)). That

principle applies to challenges to legislation that has expired or has been repealed, where the plaintiff has sought only prospective relief. If the challenged statute no longer exists, there ordinarily can be no real controversy as to its continuing validity, and an order enjoining its enforcement would be meaningless. In such circumstances, it is well settled that the case should be dismissed as moot. See, *e.g.*, *New Orleans Flour Inspectors* v. *Glover*, 160 U. S. 170 (1895) (repeal). Accord, *Burke* v. *Barnes*, 479 U. S. 361, 363–365 (1987) (expiration); cf. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 478, n. 1 (1989) (expiration of set-aside law did not moot case where parties had continuing controversy over question whether prior application of ordinance entitled plaintiff to *damages*).

The analysis varies when the challenged statute is amended or is repealed but replaced with new legislation. I agree with the Court that a defendant cannot moot a case simply by altering the law "in some insignificant respect." *Ante*, at 5. We have recognized, however, that material changes may render a case moot. See, *e.g.*, *Princeton University* v. *Schmid*, 455 U. S. 100, 103 (1982) *(per curiam)* ("substantia[l] amend[ment]" of challenged regulation mooted controversy over its validity). It seems clear, for example, that when the challenged law is revised so as plainly to cure the alleged defect, or in such a way that the law no longer applies to the plaintiff, there is no live controversy for the Court to decide. Such cases functionally are indistinguishable from those involving outright repeal: Neither 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. See, *e.g.*, *Department of Treasury* v. *Galioto*, 477 U. S. 556, 559–560 (1986) (equal protection challenge to federal firearms statute treating certain felons more

favorably than former mental patients moot after Congress amended statute to eliminate discrimination); *Kremens* v. *Bartley*, 431 U. S. 119, 128–130 (1977) (challenge to law per-mitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Board of Public Utility Comm'rs* v. *Compañia General De Tabacos De Filipinas*, 249 U. S. 425, 426 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); *Berry* v. *Davis*, 242 U. S. 468, 470 (1917) (suit to enjoin mandatory vasectomy on plaintiff dismissed after statute requiring operation was replaced by law inapplicable to plaintiff).

A more difficult question is presented when, after we have granted review of a case, the challenged statute is replaced with new legislation that, while not obviously or completely remedying the alleged infirmity in the original act, is more narrowly drawn. 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.

In *Diffenderfer* v. *Central Baptist Church of Miami, Inc.,* 404 U. S. 412 (1972) *(per curiam),* for example, plaintiffs challenged a Florida statute that exempted from taxation certain church property used in part as a commercial parking lot as violative of the Religion Clauses of the First Amendment. After this Court noted probable jurisdiction, the Florida Legislature repealed the statute and replaced it with new legislation exempting from taxation only church property used predominantly for religious purposes. Observing that the church property in question might

not be entitled to an exemption under the new law, we concluded that the controversy before us was moot. We reasoned:

> "The only relief sought in the complaint was a declaratory judgment that the now repealed [statute] is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed." *Id.*, at 414–415.

Recognizing that the plaintiffs might wish to challenge the newly enacted legislation, we declined simply to order dismissal, as is our practice when a controversy becomes moot pending a decision by this Court. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39, and n. 2 (1950). Instead, we vacated the lower court's judgment and remanded with leave to the plaintiffs to amend their pleadings. 404 U. S., at 415.

The Court took a similar approach in *Fusari* v. *Steinberg*, 419 U. S. 379 (1975), in which plaintiffs challenged Connecticut's procedures for determining continuing eligibility for unemployment compensation. A three-judge District Court held that the scheme violated due process because it failed to provide an adequate hearing and because administrative review of the hearing examiner's decision took an unreasonably long time. After this Court noted probable jurisdiction, the state legislature amended the relevant statutes, establishing additional procedural protections at the hearing stage and altering the structure of administrative review to make it quicker and fairer. Because these changes "[might] alter significantly the character of the system considered by the District Court," *id.*, at 386–387, and because it was unclear how the new procedures would operate, *id.*, at 388–389, we vacated the lower court's judgment and remanded for

reconsideration in light of the intervening changes in state law. See *id.*, at 390; see also *Allee* v. *Medrano*, 416 U. S. 802, 818–820 (1974) (where criminal statutes declared unconstitutional were replaced by "more narrowly drawn" versions, case was moot absent pending prosecutions).

These precedents establish that, where a challenged statute is replaced with more narrowly drawn legislation pending our review, and the plaintiff seeks only prospective relief, we generally should decline to decide the case. The controversy with respect to the old statute is moot, because a declaration of its invalidity or an injunction against the law's future enforcement would not benefit the plaintiff. Where we cannot be sure how the statutory changes will affect the plaintiff's claims, dismissal avoids the possibility that our decision will prove advisory.

Like *Diffenderfer*, this case concerns a law that was repealed and replaced after this Court granted review. Petitioner's complaint requests only declaratory and injunctive relief from a set-aside ordinance that no longer exists. The Court acknowledges that Jacksonville's new ordinance is more narrowly drawn than the last. See *ante*, at 5 ("The new ordinance may disadvantage [petitioner's members] to a lesser degree than the old one"). But the majority believes that *Diffenderfer* and similar cases are inapposite because, in the majority's view, Jacksonville's new ordinance does not differ substantially from the one challenged in petitioner's complaint. See *ante*, at 6, n. 3. I cannot agree.

"The gravamen of petitioner's complaint," *ante,* at 5, as I read it, was that the original set-aside law violated the Equal Protection Clause for two reasons: The law "[lacked] an adequate factual basis," in that the city had not undertaken studies to determine whether past discrimination or its continuing effects

made a preference program necessary, App. 15–17; and the ordinance "[was] not narrowly tailored to remedy any prior racial discrimination," because the program was not limited in time, the 10% set-aside figure was not rationally related to any relevant statistic, and preferences were awarded to groups against whom no discrimination ever had occurred in the city, *id.*, at 17–18. The District Court invalidated the ordinance on the authority of *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), in which we held that a set-aside program deficient in similar respects violated the Equal Protection Clause. App. to Pet. for Cert. 10–13. The District Court concluded that Jacksonville had not made sufficient findings of past discrimination; it therefore did not reach the "narro[w] tailor[ing]" question. *Id.*, at 12.

The new ordinance clearly was written to remedy the constitutional defects that petitioner alleged and the District Court found in the original program. The new law was passed after completion of an independent study, which the city commissioned, and after a Select Committee of the Jacksonville City Council conducted numerous public hearings. The new ordinance expressly adopts the Select Committee's findings concerning "the present effects of past discrimination" in city contracting. Jacksonville Purchasing Code §126.601 (1992).

The city's effort to make the law more narrowly tailored also is evident. By its terms, the new program will expire in 10 years. §126.604(a). In addition, as the Court explains, all but two of eight previously favored groups have been eliminated from the list of qualified parti-cipants; the participation goals vary according to the type of contract and the ownership of the contractor; and there are now five alternative methods for achieving the participation goals. See *ante*, at 4. Only one of the five methods for complying with the participation goals, the "Sheltered Market Plan," resembles the earlier set-

aside law. *Ibid.* It is unclear how the city will decide when, if ever, to use the Sheltered Market Plan, rather than an alternative method, for a particular project. As in *Fusari*, "we can only speculate how the new system might operate." 419 U. S., at 388–389.

Whether or not the new ordinance survives scrutiny under the Fourteenth Amendment—a question on which I express no view—I cannot say that these changes are "insignificant," *ante*, at 5, to petitioner's equal protection claim. The majority avoids this difficulty by charac-terizing petitioner's complaint in the most general terms possible: "The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts." *Ibid.* We did not undertake such a generalized approach in *Diffenderfer* or our other cases involving more narrowly drawn statutory changes. There, as here, any challenge to the new law "presents a different case," *Allee*, 416 U. S., at 818, and the proper course therefore is to decline to render a decision.

That the only issue before us—and the only question decided by the Court of Appeals—concerns petitioner's standing does not compel a different result. Cf. *Burke* v. *Barnes*, 479 U. S., at 363 (declining to reach standing question where expiration of law mooted controversy). A determination that petitioner has standing to challenge the repealed law avails it nothing, since that law no longer exists. Petitioner can benefit only from a determination that it has standing to challenge the new ordinance. But even assuming that the standing ques-tions are identical under the old and new ordinances, the Court's decision in this case, in my view, remains inappropriate. Petitioner has not yet attempted to amend its pleadings or to file another complaint to challenge the new ordinance. See Tr. of Oral Arg. 5. 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*. On the authority of that case, I would vacate the Court of Appeals' judgment and remand to that court with instructions to remand the case to the District Court to permit the petitioner to challenge the new ordinance.

I also cannot agree with the majority's assertion that *City of Mesquite* "control[s]" this case. *Ante,* at 5. I understand *City of Mesquite* to have created a narrow exception to the general principles I have described—an exception that clearly is inapplicable here.

The plaintiff in *City of Mesquite* challenged a licensing ordinance governing coin-operated amusement estab-lishments. One of the factors considered in determining whether to grant a license under the ordinance was whether the applicant has "connections with criminal elements." 455 U. S., at 287 (internal quotation marks omitted). The District Court held that this phrase was unconstitutionally vague, and the Court of Appeals affirmed. While the case was pending before the Court of Appeals, however, the contested language was eliminated from the ordinance.

When the case came before us, we concluded that it need not be dismissed as moot. We relied on the voluntary-cessation doctrine, which provides that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, at 289. If it did, defendants forever could avoid judicial review simply by ceasing the challenged practice, only to resume it after the case was dismissed. In such cases, we have said that the defendant, to establish mootness, bears a heavy burden of "demonstrat[ing] that there is no reasonable expectation that the wrong will be repeated." *United*

States v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953) (internal quotation marks omitted).

In *City of Mesquite* we decided to reach the merits of the plaintiff's claim because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." 455 U. S., at 289. We expressly noted that the city in fact had announced an intention to do exactly that, just as it already had eliminated and then reinstated another aspect of the same ordinance in the course of the same litigation, obviously in response to prior judicial action. *Id.*, at 289, and n. 11. These circumstances made it virtually impossible to say that there was "no reasonable expectation" that the city would reenact the challenged language.

City of Mesquite did not purport to overrule the long line of cases in which we have found repeal of a challenged statute to moot the case. Significantly, we have not referred to the voluntary-cessation doctrine in any other case involving a statute repealed or materially altered pending review. The reason seems to me obvious. 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. That is why, other than in *City of Mesquite*, we have not required the government to establish that it cannot be expected to reenact repealed legislation before we will dismiss the case as moot.

At most, I believe *City of Mesquite* stands for the proposition that the Court has discretion to decide a

case in which the statute under review has been repealed or amended. The Court appropriately may render judgment where circumstances demonstrate that the legislature likely will reinstate the old law—which would make a declaratory judgment or an order enjoining the law's enforcement worthwhile. But such circumstances undoubtedly are rare. And the majority points to nothing in the record of this case to suggest that we are dealing with the same sort of legislative improprieties that concerned us in *City of Mesquite*.

The majority is therefore quite unconvincing in its assertion that the mootness question in this case "is controlled by" *City of Mesquite*. *Ante*, at 5. By treating that exceptional case as announcing a general rule favoring the exercise of jurisdiction, moreover, today's decision casts doubt on our other statutory-change cases and injects new uncertainty into our mootness juris-prudence. In my view, the principles developed in the other decisions I have described should continue to apply in the ordinary case. Where, as here, a challenged statute is replaced with a more narrowly drawn version pending review, and there is no indication that the legislature intends to reenact the prior version, I would follow *Diffenderfer*, vacate the lower court judgment, and direct that the plaintiff be permitted to challenge the new legislation. Accordingly, I respectfully dissent.