[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13657

CITY OF SOUTH MIAMI,

Plaintiff-Appellee,

FLORIDA IMMIGRANT COALITION, INC.,
FARMWORKER ASSOCIATION OF FLORIDA, INC.,
FAMILY ACTION NETWORK MOVEMENT, INC.,
QLATINX,
WECOUNT!, INC., et al.,

Plaintiffs-Appellees,

PHILLIP K. STODDARD,

Plaintiff,

versus

GOVERNOR OF THE STATE OF FLORIDA,
ATTORNEY GENERAL, STATE OF FLORIDA,

discriminate based on race and national origin in violation of the Fourteenth Amendment. And they maintained that the transport provision is preempted by federal law. After a bench trial, the district court permanently enjoined the governor and attorney general from enforcing compliance with these provisions.

This controversy is not justiciable because the organizations lack standing. The organizations have not established a cognizable injury and cannot spend their way into standing without an impending threat that the provisions will cause actual harm. Moreover, the organizations' alleged injury is neither traceable to the governor or attorney general nor redressable by a judgment against them because they do not enforce the challenged provisions. Instead, local officials, based on the state law, must comply with federal immigration law. We vacate and remand with instructions to dismiss for lack of jurisdiction.

I. BACKGROUND

In 2019, the Florida Legislature passed Senate Bill 168, Ch. 2019-102, § 1, Laws of Fla. (codified at FLA. STAT. §§ 908.101–908.109), to advance the state's interest in "cooperat[ing] [with] and assist[ing] the federal government in the enforcement of federal immigration laws within th[e] state." *Id.* § 908.101. Among other things, S.B. 168 prohibits so-called "sanctuary policies" by requiring local law enforcement to assist federal authorities in enforcing federal immigration law.

This appeal involves three provisions of S.B. 168. First, the best-efforts provision, *id.* § 908.104(1), states that law enforcement must "use best efforts to support the enforcement of federal immigration law." Second, the sanctuary provision forbids state and local entities from adopting any "sanctuary policy." *Id.* § 908.103. The statute defines a "sanctuary policy" as "a law, policy, practice, procedure, or custom . . . which prohibits or impedes a law enforcement agency from complying with" certain federal initiatives and from cooperating with federal immigration officials regarding access to prisoners and detainers. *Id.* § 908.102(6). And third, the transport provision authorizes law enforcement officers to "securely transport" an alien who is in their custody and "subject to an immigration detainer" to a federal facility. *Id.* § 908.104(4).

Two other provisions of S.B. 168 are relevant. The statute contains an explicit anti-discrimination provision that bars officers from basing "actions under this chapter on the gender, race, religion, national origin, or physical disability of a person except to the extent authorized by the United States Constitution or the State Constitution." *Id.* § 908.109. It also permits the governor and attorney general to sue state and local officers to enjoin violations of the statute. *Id.* § 908.107(1), (2).

Shortly after S.B. 168's passage, a group of plaintiffs—including a coalition of non-profit organizations devoted to immigrant rights—sued to enjoin the governor and attorney general from enforcing S.B. 168. The organizational plaintiffs alleged that the best-efforts requirement and the sanctuary provision were

unconstitutional because they violated the Equal Protection Clause. U.S. C

essential . . . services, . . . enforcing their legal rights, . . . and applying to and enrolling in public schools." For similar reasons, the district court ruled that the organizations had standing to challenge the transport provision. The district court ruled that the organizations established associational standing because they alleged that their members faced a threat of "unlawful detention, transportation, and enforcement under S.B. 168." And the district court concluded that the organizations had organizational standing because they had to divert resources "away from core activities in order to respond to member inquiries about S.B. 168's enactment, implications, and enforcement." The district court granted a preliminary injunction with respect to the transport provision on the ground that it was likely preempted but denied the motion with respect to the remaining provisions.

The parties filed competing motions for summary judgment. After reviewing the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the district court denied summary judgment on the organizations' equal-protection claims. But the district court ruled that the transport provision was unconstitutional because it was preempted by federal law and granted summary judgment in favor of the organizational plaintiffs on their preemption claim. It made permanent the injunction against enforcement of the transport provision.

The case proceeded to a bench trial on the equal-protection claims. After trial, the district court issued an opinion in which it

ruled that the organizations had proved Article III standing for the same reasons it had cited in its earlier order. That is, the organizations had to, and would

that he has standing, which requires proof of three elements." *Jacobson*, 974 F.3d at 1245 (internal quotation marks and citation omitted). "The litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Id.* When, as here, "plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are 'certainly impending.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013)). The organizational plaintiffs failed to prove any of the three elements of standing.

A. The Organizations Did Not Prove an Injury in Fact.

An organization cannot sue without proof of an actual injury. That is, the organizations must establish that they have already been harmed by, or face "certainly impending" harm from, S.B. 168. *Clapper*, 568 U.S. at 401. An organization can establish Article III standing either "through its members [or] . . . through its own injury in fact." *Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1114 (11th Cir. 2022).

The organizations assert that they established both types of standing. First, the organizations maintain that their members have suffered, and will continue to suffer, racial profiling by law enforcement complying with S.B. 168. Second, the organizations assert that they have diverted resources from existing programs to respond to S.B. 168. Neither theory holds water.

The organizations resist this conclusion. They argue that their members "have suffered injuries from racial and ethnic profiling, unlawful or unfounded traffic stops, and illegal detentions by law enforcement agencies that are attempting to comply with the requirements of S.B. 168." The organizations maintain that this evidence "show[s] that [their] members have been and will be direct targets of S.B. 168."

We disagree. Forty years ago, the Supreme Court made clear that past occurrences of unlawful conduct do not establish standing to enjoin the threat of future unlawful conduct. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The members' generic allegations of *previous* racial profiling by Florida law enforcement do not prove that any future injury is imminent.

The organizations try to solve their imminence problem by alleging actual present harm under S.B. 168. That is, they argue that their members have already been profiled because of the new law. But their proof is lacking.

The record does not establish that S.B. 168 caused their alleged profiling. For example, one 168 Tw 36 -.(l)-1.3 Tw 6.7e6 Tw -18.103 -150 Td( )l32 h1

to profiling. In this sense, their challenge is not ripe for judgment. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). Even if the organizations could prove that local officers profiled their members, they have not proved that the officers acted based on S.B. 168.

The organizations also argue that their members have suffered present harm because the members have refused "essential health, social, and government services" to avoid racial profiling under S.B. 168. But *Clapper* forecloses this theory. "Where a 'hypothetical future harm' is not 'certainly impending,' plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves.'" *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (en banc) (quoting *Clapper*, 568 U.S. at 416). And we have rejected the argument that plaintiffs have standing based on their "subjective fear of . . . harm" and its "chilling effect." *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1238–39 (11th Cir. 2019). Because the members' feared racial profiling is not "certainly impending," their self-imposed harms do not create a cognizable injury sufficient to support Article III standing.

2. The Organizations Do Not Have Standing in Their Own Right.

The organizations also have not proved that they suffered an Article III injury "in their own right." *Jacobson*, 974 F.3d at 1249. To establish standing, an organization, like an individual, must prove that it either suffers actual present harm or faces a threat of imminent harm. *Clapper*, 568 U.S. at 409. An organization suffers actual harm "if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing the organization

to divert resources to counteract those illegal acts." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). In *Browning*, for instance, the NAACP had standing to challenge a new voting requirement because the NAACP "reasonably anticipate[d]" it would need to "divert personnel and time" from other projects "to educating . . . voters on compliance with" the requirement.

circuit explained that to determine whether there was a concrete injury the district court needed to consider two things: "first, whether [the defendant's] alleged discriminatory conduct injured the [plaintiff organization's] interest in promoting fair housing and, second, whether the [plaintiff organization] used its resources to counteract that harm." *Id.* It held that because the organization failed to prove an injury from the law's actual application to the community the organization sought to support, any diversion was a "self-inflicted" injury that could not support standing. *Id.* at 1142.

The Third Circuit has also held that the diversion of resources, standing alone, does not suffice to establish standing. In *Fair Housing Council v. Montgomery Newspapers*, the plaintiff took issue with a purportedly discriminatory newspaper advertisement and alleged that it would need to divert resources to counteract the discriminatory impact of the advertisement through an education program. 141 F.3d 71, 77 (3d Cir. 1998). The court determined that the plaintiff could not establish standing because it failed to prove any member of the public was denied housing or deterred from seeking housing because of the advertisement. *Id.* In essence, the organization failed to prove the education was necessary to address an actual, non-speculative harm caused by the advertisement. *Id.* As in *Equal Rights Center*, the organization lacked standing because it failed to prove a cognizable injury to the community it sought to protect. In similar fashion, the Fifth Circuit has held that an organization cannot establish standing based on diversion of resources when it diverted resources "due to fear" of the

challenged activity instead of "any concern over the impacts of" the activity itself. *El Paso Cnty v. Trump*, 982 F.3d 332, 344 (5th Cir. 2020).

Although the organizations diverted resources, they failed to produce concrete evidence that S.B. 168 is an imminent threat to their members or the immigrant community. The record is rife with speculative fears of future harm. But the record fails to establish that local officers profiled anyone based on S.B. 168. *Cf. Lyons*, 461 U.S. at 102 ("Past wrongs [are] evidence bearing on whether there is a real and immediate threat of repeated injury." (internal quotation marks and citation omitted)). And the threat of enforcement is not imminent because it rests on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410; *cf. Ga. Latino All. for Hum. Rts.*, 691 F.3d at 1258 (immigrants faced a "credible threat of detention"). At best, the organizational plaintiffs have diverted resources to address "fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *El Paso Cnty.*, 982 F.3d at 344.

In the same way that the members could not "manufacture standing," *Clapper*, 568 U.S. at 402, by inflicting harm on themselves based on "highly speculative" fears, *id.* at 410, neither can the organizations do so. The organizations' commitment of resources amounts to a self-imposed injury "based on speculative fears of future harm." *Shelby Advocs.*, 947 F.3d at 982; *see also Equal Rts. Ctr.*, 633 F.3d at 1142. Speculative harms are no more

The organizations maintain that S.B. 168 will injure their members because it will "lead to the erosion of trust in law enforcement . . . [and] racial profiling." In other words, the organizations say that officers will target their members—consciously or unconsciously—based on their ethnicity.

to transport detainees into federal custody after receiving federal detainers. *Id.* § 908.104(4). In sum, the disputed provisions give local officials the authority to detain and transport illegal aliens. Neither the governor nor the attorney general acts under S.B. 168 in such a way that the organizations' injury is traceable to them or redressable by enjoining them.

sera1002 Tc 011TJ0 T256s
168
asemeesgsal[(S).5 (i)3.7 (ct)5.8 (t)5

added.) And the organizational plaintiffs agree with this assessment.

The organizations nevertheless insist that their injuries are both traceable to the governor and a

Lewis, 944 F.3d at 1296, 1298–99). And the record contains no evidence that an injunction against the governor or the attorney general will curtail or otherwise redress racial profiling by local officials who are not parties to this action. Without this evidence, the organizations have failed to meet their burden as to traceability and redressability.

The organizations offer two arguments that we rejected in *Lewis* and *Jacobson*. First, they maintain that the governor and attorney general have sufficient control over local officials because "S.B. 168 *expressly* authorizes Defendants to enforce S.B. 168 against local officials and governments by filing a lawsuit." But the organizations in *Jacobson* made an identical argument. *Id.* at 1253. There, several voters and organizations sued the Florida Secretary of State to enjoin the enforcement of a law governing the order in which candidates appear on the ballot. *Id.* at 1242. Because he did not control the ballot order, we held that the Secretary of State was not a proper defendant. *Id.* at 1254. Florida law instead "expressly g[ave] a different, independent official control over the order in which candidates appear on the ballot." *Id.* The organizations insisted that the secretary had control over the supervisors of elections because he could "bring actions . . . to enforce the performance of [their] duties." *Id.* (internal quotation marks and citation omitted). We rejected that argument. As we explained, "[t]hat the Secretary must resort to judicial process if the Supervisors fail to perform their duties underscores her lack of authority over them." *Id.* So it is here. The governor and attorney general are limited to

coercive suits and do not "enforce" S.B. 168 against the organizations or their members.

The organizations maintained at oral argument that S.B. 168 is distinguishable from the law in *Jacobson* because it specifically contemplates that the governor will "enforce" the law. To be sure, the governor may sue local officers "to *enforce* compliance" with the disputed provisions. FLA. STAT. § 908.107(1) (emphasis added). But the same was true in *Jacobson*. The Florida Code expressly confers on the secretary the power to "[b]ring and maintain . . . actions at law or in equity . . . to *enforce* the performance of any duties of a county supervisor of elections." FLA. STAT. § 97.012(14) (emphasis added). A statute's use of the magic word "enforce" does not conjure up standing to challenge that law.

Second, the organizations assert that the governor has sufficient control over local officials because S.B. 168 provides that local officials may be "subject to action by the governor in the exercise of his or her authority under the State Constitution and state law." FLA. STAT. § 908.107(1). The organizations speculate that the governor will use this statutory grant of general authority together with his preexisting authority under article IV of the Florida Constitution to suspend local officials who refuse to enforce S.B. 168.thorthf 8 (ri)-1 8 (f)e t

ruled that this standing theory "prove[d] entirely too much" because it would make the attorney general "a proper party defendant under innumerable provisions of the Alabama Code." *Id.* The same is true here. As the governor and attorney general argue, if the g

this pre-enforcement posture, the record does not establish that it is likely that officers will discriminate based on race under S.B. 168—which would violate the law itself.

The record contains no evidence—*none*—that Governor DeSantis would use his suspension authority to encourage racial profiling. There was no evidence that, for instance, the governor made any statement or in any way suggested that a state or local official ought to use racial profiling in connection with enforcing S.B. 168—a statute that requires race neutrality—or cooperating with federal immigration priorities. Indeed, the organizations offered no evidence that Governor DeSantis said anything about how or under what circumstances he would enforce S.B. 168. If anything, Governor DeSantis would presumably follow the law and seek to curtail the discrimination that S.B. 168 expressly prohibits. So, in the absence of

that federal law preempted the state law, which "authorize[d] Georgia law enforcement officers to investigate the immigration status of an individual if the officer ha[d] probable cause to believe the individual ha[d] committed another crime and the individual [could not] provide one of the pieces of identification listed in the statute." *Id.* at 1256. The district court entered a preliminary injunction against the state officials. *Id.* at 1257. On appeal, we held, based on the plaintiffs' allegations and declarations, that the state officials had sufficient enforcement authority to establish traceability and redressability because the governor had "sufficient, albeit indirect, contact with (t)5.9 1 (o)-5.86., atap2-4.4 (i)1.3 .7 (s)]TJ0.8 (t)0.8 r htit,T 2]TJ-0.003 Tc 1.001

criminal prosecutions and has the final authority to direct the attorney general to 'institute and prosecute' on behalf of the state." *Luckey*, 860 F.2d at 1016 (internal citation omitted). Part of the Governor's prosecutorial role included "furnish[ing] counsel" to indigent defendants. *Id.* We concluded that the class established standing because the class members "alleg[ed] that they [we]re presently being denied constitutional rights as a direct result of the failure of [defendants] to furnish [constitutionally sufficient] counsel." *Id.* That is, they alleged an injury traceable to and redressable by the governor.

Both *Georgia Latino Alliance* and *Luckey* establish that the governor may be a proper defendant to enjoin the enforcement of a state law when the governor has sufficient enforcement power to remedy the [illegible]gnce 1.002 Tc 0.ov to (f)9ti (o)-4.8 (la5-1f 0 Tc 0 Tw 1.249.65d( )Tj-0.0

enjoined or not. "[W]e have held traceability to be lacking if the plaintiff would have been injured in precisely the same way without the defendant's alleged misconduct." *Walters v. Fast AC, LLC,* 60 F.4th 642, 650 (11th Cir. 2023) (internal quotation marks and citation om

IV. CONCLUSION

We **VACATE** the judgment against the governor and attorney general and **REMAND** with instructions to dismiss for lack of jurisdiction.

KATHRYN KIMBALL MIZELLE, District Judge, Concurring:

The majority's opinion correctly holds that the district court lacks jurisdiction. This concurrence addresses a discrete issue with the district court's analysis.

In concluding that the Florida Legislature enacted S.B. 168 with discriminatory intent, the district court relied, in part, on the

prejudice," *see objective*, *Black's Law Dictionary*, *supra*. Whether a dinner plate should be square or round (or some other shape) might be subject to debate, with each advocate bringing his own subjective views to the table; that a triangle has three sides is true regardless of who says it. Put another way, an objective statement is either true or false, and the speaker's motive in offering it is irrelevant to the statement's veracity.

Turning to the data here, the district court took issue with a report produced by FAIR that defines "sanctuary jurisdiction" and provides a list of jurisdictions that meet the definition. Each entry

particular municipality satisfies that definition is an objective inquiry.

Of course, one can draw false conclusions from objective statements. For example, one can use improper methods or misread data to support a wrong conclusion. *See generally, e.g.*, Thomas Sowell, *Discrimination and Disparities* (2018) (noting this common error). An objective statement can also be offered with a racist motive. But the motive of a speaker cannot undermine or taint the truth of an objective statement. Thus, it was error for the district court to assume that objectively verifiable data could be tainted solely because of the alleged views of the speaker.

This does not end the problem. The district court went further, imputing the alleged motive of the speaker—FAIR—to the listener, the entire Florida Legislature, simply by virtue of the listener using the speaker's data. This is a fallacy stacked on a fallacy. Repeating the *objective* statementn Td[(sv4 w.034 0 Td.3 (a)-0.4 (v)-147 (kt27.31Tm( )T

jurisdictions" when they fell outside the proffered definition), that might have been a relevant factor in an

definition and data "strongly suggests the existence of underlying racial animus.") Of course, the district court did not explain how the elements of FAIR's definition were discriminatory or why any of the resulting data was tainted.

Instead of one of these legitimate findings, the district court assumed that the data was suspect solely because of the alleged views of FAIR and CIS. Then, the district court concluded that use of the data was proof of racial animus by the Florida Legislature as a whole. Such ad-hominem reasoning and compounding of attenuated inferences is error. The Florida Legislature is permitted to use objectively verifiable data without being condemned because of who collected the data. *See*