CITY OF SOUTH MIAMI V. GOVERNOR: REINFORCING TRADITIONAL NOTIONS OF HARM AND JUDICIAL REMEDY: ELEVENTH CIRCUIT VACATES INJUNCTION DUE TO LACK OF STANDING FOR ORGANIZATIONAL PLAINTIFFS

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In *City of South Miami v. Governor*, the Eleventh Circuit addressed jurisdictional issues surrounding the race-based discrimination claims of organizational plaintiffs brought against the Governor and Attorney General of Florida.[1] Specifically, the plaintiffs alleged that Senate Bill 168 ("S.B. 168") includes provisions that were adopted with the "intent to discriminate based on race and national origin in violation of the Fourteenth Amendment."[2] The district court permanently enjoined the governor and attorney general from enforcing compliance with several of the law's provisions.[3] The Eleventh Circuit, however, found that the plaintiffs lacked standing and vacated the district court's judgment for lack of jurisdiction.[4]

In 2019, the Florida state legislature passed S.B. 168 "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."[5] In addition to prohibiting sanctuary cities, the bill requires local law enforcement to use their "best efforts" in supporting federal immigration law.[6] The bill further authorizes law enforcement to transport aliens who are in custody and "subject to an immigration detainer" at a federal facility.[7] Finally, the bill prohibits discrimination while enforcing the statute,[8] and authorizes the governor and attorney general to take action against local officers to enjoin violations of the statute.[9]

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[1] 65 F.4th 631, 634 (11th Cir. 2023).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* (alteration in original) (quoting FLA. STAT. § 908.101 (2019)).
[6] FLA. STAT. § 908.103 (2019); FLA. STAT. § 908.104(1) (2023).
[7] FLA. STAT. § 908.104(4).
[8] *Id.* § 908.109 (2019).
[9] *Id.* § 908.107(1)–(2) (2019).

Following the bill's passage, multiple organizational plaintiffs sued to enjoin the governor and attorney general from enforcing the bill under § 908.107(1)–(2).[10] The plaintiffs are non-profit organizations based in Florida whose purpose is to protect the rights of immigrant communities.[11] Some of the organizations consist of members who are immigrants.[12] In an effort to protect their membership base, the plaintiffs alleged that the best-efforts and sanctuary provisions violated the Equal Protection Clause.[13] The plaintiffs maintained that the relevant provisions would have a disparate impact on their members because local law enforcement would rely on racial profiling to enforce the law.[14] The plaintiffs further contended that federal law preempted the transportation provision.[15] In a preliminary injunction hearing, the district court found that the plaintiffs had established both associational standing and organizational standing.[16] At trial, the district court again found standing for the same reasons mentioned in its preliminary injunction hearing and enjoined the defendants from enforcing the provisions.[17]

Reviewing the district court's decision *de novo*, the Eleventh Circuit explained that for a plaintiff to have standing, the plaintiff 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."[18] Further, when plaintiffs seek prospective relief, they must prove their would-be injuries to be "certainly impending."[19] The court stated that the plaintiffs had not established that their members faced a

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[10] *City of South Miami*, 65 F.4th at 635.

[11] City of South Miami v. DeSantis, 561 F. Supp. 3d 1211, 1227 (S.D. Fla. 2021).

[12] *Id.*

[13] City of South Miami v. Governor, 65 F.4th 631, 635 (11th Cir. 2023).

[14] *Id.*

[15] *Id.*

[16] *Id.* Organizations can prove standing either through injuries of their members, known as associational standing, or through their own injuries, known as organizational standing. *Id.* at 636. The district court found that the plaintiffs had associational standing because S.B. 168 would discourage members from "accessing essential . . . services, . . . enforcing their legal rights, . . . and enrolling in public schools." *Id.* at 635 (alteration in original) (quoting City of South Miami v. Desantis, 408 F. Supp. 3d 1266, 1285–86 (S.D. Fla. 2019)). The court also found organizational standing because one or more organizations operated toll-free hotlines to address member concerns, hosted community meetings, and presented "Know Your Rights" informational sessions. City of South Miami v. Governor, 65 F.4th 631, 635 (11th Cir. 2023).

[17] *Id.* The court granted summary judgment in favor of the plaintiffs regarding their transportation provision claims but refused to do the same for the plaintiffs' equal protection claims. *Id.* The court then found that the best-efforts and sanctuary provisions violated the Equal Protection Clause. *Id.* at 636.

[18] *Id.* (citing Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1245 (11th Cir. 2020)).

[19] *Id.* (citing *Jacobson*, 974 F.3d at 1245).

"certainly impending" threat of racial profiling because their concerns rested on a "highly speculative fear."[20]

The court first addressed whether the plaintiffs had suffered an "injury in fact" through injuries to their members, as required for associational standing.[21] The plaintiffs argued both impending and present harm, alleging that since some members had been racially profiled during detentions and traffic stops, the members have been and will continue to be direct targets of profiling under the bill.[22] The court disagreed and noted that "past occurrences of unlawful conduct do not establish standing to enjoin the threat of future unlawful conduct."[23] Additionally, the court concluded the plaintiffs' examples of present racial profiling did not establish that S.B. 168 caused the alleged profiling, because one member's alleged profiling took place before S.B. 168 was effective, and another member did not know why she had been stopped.[24] Finally, the court rejected the plaintiffs' argument that their members' attempts to avoid racial profiling under S.B. 168 by refusing to seek essential services constituted present harm, because "plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves.'"[25] Thus, the court found no injury that sufficiently supports associational standing.[26]

Continuing its "injury in fact" inquiry, the court evaluated organizational standing by stating that, to establish organizational standing, the plaintiffs must prove actual harm or a threat of imminent harm to the organizations themselves.[27] Actual harm of an organization occurs "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."[28] When alleging an injury in fact based on a diversion of resources, the plaintiff "must prove both a diversion of resources and a cognizable injury . . . ."[29] But an organization cannot establish standing through a self-inflicted diversion of funds based only on "its members' 'fears of hypothetical future harm that is not certainly impending.'"[30] Nor can a plaintiff

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[20] *City of South Miami*, 65 F.4th at 637.
[21] *Id.* at 637–38.
[22] *Id.* at 637.
[23] *Id.* (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).
[24] *Id.* at 638.
[25] *Id.* (quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 931 (11th Cir. 2020)).
[26] *City of South Miami*, 65 F.4th at 638.
[27] *Id.*
[28] *Id.* (alteration in original) (quoting Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008)).
[29] *Id.* at 639.
[30] *Id.* at 638 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013)).

establish organizational standing by "spend[ing] its way into standing based on [its own] speculative fears of future harm" or "mere[ly] conjectur[ing] about possible governmental actions."[31] Therefore, to establish an injury that supports organizational standing, the harm resulting in the diversion of resources must be "concrete and imminent."[32]

While a diversion of resources can establish organizational standing,[33] the court stated that the plaintiffs failed to produce concrete evidence that S.B. 168 placed the plaintiffs' members under the imminent threat of racial profiling or that local officers had racially profiled anyone based on S.B. 168.[34] The court reasoned that the threat of enforcement is "not imminent because it rests on a 'highly attenuated chain of possibilities.'"[35] As such, the court found no actual harm to the organization nor certainly impending harm to the organization's members that justified a conclusion of organizational standing because the plaintiffs diverted resources based on merely speculative fears.[36]

Finding no "injury in fact," the court next addressed whether the alleged injuries were "fairly traceable" to the defendant's actions.[37] And if so, whether the plaintiffs showed that "it is likely, not merely speculative, that a favorable judgment will redress [its] injury."[38] In terms of traceability and redressability, the key questions are (1) "who caused the injury," and (2) "how it can be remedied."[39] Looking to the statute, the court reasoned that the challenged provisions demand cooperation from both local law enforcement and local officials, not the attorney general nor the governor.[40] Therefore, as only local law enforcement and local officials would racially profile targeted individuals, "[n]either the governor nor the attorney general acts under

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[31] *Id.* at 639.

[32] *City of South Miami*, 65 F.4th at 639.

[33] *Id.*; *see Browning*, 522 F.3d at 1165 (holding that the organizational plaintiffs which helped black voters comply with voting laws had standing where a forced diversion of resources took place to address a change in Florida voting laws); Ga. Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012) (holding that the organizational plaintiffs had standing when it was forced to divert funds to protect members from a new immigration law that posed a "credible threat of detention").

[34] *City of South Miami*, 65 F.4th at 639.

[35] *Id.* at 640 (quoting *Clapper,* 568 U.S. at 410).

[36] *Id.*

[37] *Id.*

[38] *Id.* (alteration in original) (quoting Lewis v. Governor of Alabama, 944 F.3d 1287, 1296 (11th Cir. 2020)).

[39] *Id.* (citing Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1253–54 (11th Cir. 2020)).

[40] *City of South Miami*, 65 F.4th at 641 (citing FLA. STAT. §§ 908.102(6), 908.103, 908.104(1), 908.104(4)).

S.B. 168 in such a way that the organizations' injury is traceable to them or redressable by enjoining them."[41]

Additionally, while the attorney general and governor have the ability to enjoin violations of S.B. 168 against local officials, they generally lack the authority to actually *enforce* the bill against the organizations or their members.[42] A public official's lack of authority is underscored when he or she "must resort to [the] judicial process if [local officials] fail to perform their duties."[43] The plaintiffs nonetheless suggested that the governor will use the power granted by the statute, in combination with his constitutional powers, to "suspend local officials who refuse to enforce S.B. 168."[44] The court declined to accept this argument because the plaintiffs failed to prove that the governor's constitutional power would lead to racial profiling by local law enforcement.[45] In fact, the record contained no evidence that the governer intended to "use his suspension authority to encourage racial profiling."[46] Instead, the governor would "presumably follow the law and seek to curtail the discrimination that S.B. 168 expressly prohibits."[47] Ironically, then, an injunction against the governor would harm the organizations, as it would "inhibit the governor's oversight under the antidiscrimination provision."[48]

Although the Eleventh Circuit has previously held that public officials can be proper parties,[49] here, the plaintiffs had the burden to establish each element of standing at trial and failed to do so.[50] S.B. 168 permits federal officials to communicate the identity of individuals they seek to detain to local officials and then request cooperation from local officials who would detain and transport those individuals.[51] The

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[41] *Id.*

[42] *Id.* at 642.

[43] *Id.*; *see Jacobson*, 974 F.3d at 1253 (holding that the secretary of state did not have sufficient control over local officials because the fact that "the [s]ecretary must resort to judicial process if the [officials] fail to perform their duties underscores her lack of authority").

[44] *City of South Miami*, 65 F.4th at 642; *see* FLA. CONST. art. IV, § 7(a).

[45] *City of South Miami*, 65 F.4th. at 643.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*; *see* Luckey v. Harris, 860 F.2d 1012, 1016 (11th Cir. 1988) (holding that the governor and state judges were proper defendants in a suit seeking a preliminary injunction surrounding practices within the indigent criminal defense system because the governor is responsible for executing the laws of the state and holds residual power over the attorney general to prosecute on behalf of the state, and the state judges are responsible for administering the system on behalf of the indigent criminals).

[50] *City of South Miami*, 65 F.4th at 643.

[51] *Id.* at 645.

court noted that neither the governor nor attorney general would play any part in any incidents of racial profiling throughout this process.[52] Thus, even if the court were to enjoin the defendants from enforcing the law, the organizations would still be allegedly harmed in the same manner.[53] The Eleventh Circuit concluded by stating that "[t]he organization's alleged injuries are neither traceable to the Florida governor or attorney general nor redressable by any injunction against these officials."[54]

The decision in *City of South Miami* highlights the significant hurdle that the attenuated connections between state and local officials pose in protecting immigrants from discrimination. Additionally, to prove standing in the Eleventh Circuit, a party must be prepared to (1) identify the party responsible for the injury, and (2) address the proposed remedy for that injury.[55] If a plaintiff seeks prospective relief, it must prove certainly impending, non-speculative harm.[56] Further, if the plaintiff pursues a diversion of resources theory, that diversion must occur in reaction to some concrete evidence of harm and not on mere speculative fears.[57] While sufficient control can be enough to establish a connection enabling a court to remedy the harm by enjoining a defendant, the connection must be immediate enough as to impact the alleged harmful conduct.[58]

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[52] *Id.*
[53] *Id.*
[54] *Id.* at 640.
[55] *Id.*
[56] *City of South Miami*, 65 F.4th at 636.
[57] *See id.*
[58] *See id.* at 645.