No. 21-13657

United States Court of Appeals

for the

Eleventh Circuit

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,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN CASE NO. 1:19-CV-22927-BB (HONORABLE BETH BLOOM, U.S. DISTRICT JUDGE)

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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21-13657 *City of South Miami, et al. v. Governor of the State of Florida, et al.*

CERTIFICATE OF INTERESTED PERSONS

Counsel for *amici* certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in Eleventh Circuit Local Rules 26.1-1 to 26.1-3 have an interest in the outcome of this case:

1. Araiza, William D., *Amicus Curiae*
2. Chacón, Jennifer M., *Amicus Curiae*
3. Chemerinsky, Erwin, *Amicus Curiae*
4. Condon, Jenny-Brooke, *Amicus Curiae*
5. Davis, Seth, *Amicus Curiae*
6. Garrett, Brandon L., *Amicus Curiae*
7. Harris, Cheryl I., *Amicus Curiae*
8. Huq, Aziz, *Amicus Curiae*
9. Litman, Leah, *Amicus Curiae*
10. Motomura, Hiroshi, *Amicus Curiae*
11. Yoshino, Kenji, *Amicus Curiae*
12. Howard, Theodore A., *Counsel for Amici*

No publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ *Theodore A. Howard*
Theodore A. Howard

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1-1, Counsel for *amici* certifies that none of the *amici* are publicly owned corporations or have any parent companies, subsidiaries or affiliates that have issued shares to the public.

/s/ *Theodore A. Howard*
Theodore A. Howard

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law scholars at American law schools whose research addresses the law, policy, and theory of equal protection. The names and affiliations of *amici* are:

- William D. Araiza
  Stanley A. August Professor of Law
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  Seton Hall University School of Law

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[1] Pursuant to Fed. R. App. P. 29(a), *amici* state that no party's counsel authored this brief in whole or part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief. This brief is filed with the consent of all parties, pursuant to Fed. R. App. P. 29(a)(2).

- Brandon L. Garrett
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  Chief Justice Earl Warren Professor of Constitutional Law
  NYU School of Law

As scholars, teachers, and in some cases, litigators, *amici* have a strong interest in contributing to the development and understanding of equality jurisprudence. They write to identify for the Court the deeply concerning and erroneous arguments advanced by Defendants in this case—particularly Defendants' distortion of the factors established by the Supreme Court in *Village of Arlington Heights v. Metropolitan*

Housing Development Corporation, 429 U.S. 252 (1977).

Ignoring the familiar holistic inquiry into discriminatory intent demanded by that and other bedrock equal protection precedents, Defendants ask this Court to rubber stamp a patently discriminatory legislative enactment. To do so, they manufacture new and inapposite requirements that are not a part of the *Arlington Heights* framework. They propose a "presumption" of good faith that is—in effect—an inexorable command to take the legislature at its word, no matter how implausible its explanation. They graft onto *Arlington Heights* a "clearest evidence" standard from unrelated doctrines to invent a new and likely impossible-to-satisfy evidentiary standard. They claim that courts may not consider as evidence of discriminatory intent contemporaneous statements from a bill's sponsors or from groups intimately involved in the bill's passage. This is not the law.

As set forth more fully below, *amici* explain that sanctioning Defendants' distortions of equal protection doctrine will do grave violence to *Arlington Heights* and the fundamental imperatives of the Fourteenth Amendment. Anti-immigrant hate groups promoting xenophobic and racist ideologies worked hand-in-hand with state legislators to pass SB

168. These groups—often at the request of state legislators—offered advice on how to present the bill and strengthen its effects. *Amici* write to explain that if the Fourteenth Amendment cannot protect Americans targeted by legislation enacted in partnership with hate groups, this Court must question what remains of the Amendment at all. Thus, *amici* urge this Court to reject Defendants' baseless arguments and distortions of doctrine and uphold the District Court's proper application of *Arlington Heights*.

STATEMENT OF THE ISSUES[2]

1. Whether Plaintiff immigrant justice organizations have standing to challenge provisions of SB 168 that cause Plaintiffs harm and that Defendants may enforce.

2. Whether the District Court clearly erred in finding, after a six-day bench trial, that SB 168's Best Efforts Provision and Sanctuary Policy Prohibition were enacted with discriminatory intent in violation of the Equal Protection Clause.

[2] *Amici* submit this brief to address only the second issue.

3. Whether federal law preempts SB 168's Transport Provision, which authorizes Florida correctional facilities to unilaterally transport individuals to federal facilities.

SUMMARY OF ARGUMENT

The District Court's conclusion that Florida Senate Bill 168's ("SB 168") Best Efforts Provision[3] and Sanctuary Prohibition[4] are unconstitutional is based upon a sound and unimpeachable application of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), to ample evidence in the record. Accordingly, the Court correctly found that these provisions were enacted with discriminatory intent.

SB 168's enactment was driven by racial animus. Floridians for Immigration Enforcement ("FLIMEN") and the Federation for American Immigration Reform ("FAIR")—"anti-immigrant hate groups that overtly promote xenophobic, nationalist, and racist ideologies"—were intimately

[3] The "Best Efforts" provision requires employees of Florida's law enforcement agencies to use their "best efforts to support the enforcement of federal immigration law" when acting within the scope of their official duties or employment. Fla. Stat. § 908.104(1).

[4] A "sanctuary policy" is defined to include any policy or practice that "prohibits or impedes a law enforcement agency" from "communicating or cooperating with a federal immigration agency." Fla. Stat. § 908.102(6). SB 168 prohibits any state or local entity from adopting a "sanctuary policy." *Id.* § 908.103.

involved in the legislative process.[5] Doc: 201 ("Op.") 12–18, 97. These hate groups provided the sponsor of the bill—Senator Gruters—with data about so-called sanctuary cities, strategic advocacy points, advice on proposed amendments, and input on how to strengthen the bill. Op. 84. The groups proudly told their supporters they were "working with" key legislators to enact SB 168. Op. 86. For their part, Senator Gruters and his staff proactively reached out to the groups for "comments and input" and followed their advice on key legislative developments. Op. 84–88. When confronted with the fact that SB 168 relied principally on research and data provided by anti-immigrant hate groups, Senator Gruters "renounced discrimination," but nevertheless continued to work with—and rely upon—FAIR and FLIMEN. Op. 89.

This kind of case is precisely why the *Arlington Heights* factors exist. Because legislators may try to conceal impermissible discriminatory motives, courts conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Conducting this analysis, the District

[5] The Center for Immigration Studies ("CIS")—a spinoff of FAIR—also played a role in the enactment of SB 168.

Court properly concluded that the Legislature enacted SB 168 with a discriminatory motive.

Defendants' arguments reflect a fundamental misunderstanding of *Arlington Heights*. They say that the "clearest evidence" standard—which has never been applied under the *Arlington Heights* framework—governs a District Court's inquiry into whether legislation was enacted with discriminatory intent. It does not. They say that the District Court erred in considering as evidence the fact that hate groups were involved in enacting SB 168. It did not. They say that the District Court failed to afford Defendants a presumption of good faith by not taking them at their word in the face of substantial evidence to the contrary. It did not; rather, the presumption was rebutted. And they say that the District Court erred by considering the discriminatory motive of SB 168's sponsors in determining whether SB 168 was enacted with a discriminatory motive. Yet again, it did not.

Defendants' criticisms of the District Court's factual findings are also unavailing. Their contention that SB 168 is not a proactive policing bill is belied by the plain terms of the bill and the voluminous factual record. Their contention that the mere inclusion of a boilerplate

antidiscrimination provision ended the inquiry into discriminatory intent is flatly incorrect. And their contentions that the District Court erred in interpreting complex direct and circumstantial evidence is nothing more than an attempt to substitute their own judgment for that of the factfinder.

The evidence in this case confirms that SB 168 was enacted with discriminatory intent. Defendants' quixotic attacks on the District Court's findings do not warrant the conclusion that the District Court clearly erred in reaching such a conclusion.

ARGUMENT

I. SB 168 Presents a Textbook *Arlington Heights* Case.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Supreme Court recognized shortly after the ratification of the Fourteenth Amendment that "[t]he words of the amendment" establish "the right to exemption from unfriendly legislation" based on race. *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1879). As Justice Harlan put it, the Reconstruction Amendments "removed the race line

from our governmental systems." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

But legislatures sometimes try to evade these constitutional commands through pretextual justifications. For example, in 1901, Alabama provided for the disenfranchisement of citizens convicted of crimes "involving moral turpitude"—a "racially neutral" law that was nevertheless "enacted with the intent of disenfranchising blacks." *Hunter v. Underwood*, 471 U.S. 222, 227, 229 (1985) (holding unconstitutional). Similarly, a Georgia county enacted a plausibly race-neutral "at-large scheme of electing commissioners" but used the system "for the invidious purpose of diluting the voting strength of the black population." *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (holding unconstitutional). The City of San Francisco passed a licensing ordinance that was "fair on its face, and impartial in appearance" but "applied and administered by public authority with an evil eye and an unequal hand" toward Chinese immigrants. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding unconstitutional). And the State of Louisiana "sculpted a 'facially race-neutral'" non-unanimous jury verdict rule "in order 'to ensure that African-American juror service would be

meaningless"—precisely because the state was "aware that th[e] [Supreme] Court would strike down any policy of overt discrimination." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (citations omitted) (holding unconstitutional under the Sixth Amendment).

In sum, "easy" cases "are rare," *Arlington Heights*, 429 U.S. at 266, because "[o]utright admissions of impermissible racial motivation are infrequent," *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *see also Hall v. Holder*, 117 F.3d 1222, 1225 (11th Cir. 1997). Thus, for over 45 years, the standard constitutional approach for ferreting out impermissible racial motive has been the framework of *Arlington Heights*. That inquiry recognizes that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *accord Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729, (2018) (deploying similar principles to strike down government action premised on "impermissible hostility toward" an individual's "sincere religious beliefs").

This inquiry must at a minimum include an examination of the following factors: (1) "the impact of the official action and whether it 'bears more heavily on one race than another;'" (2) "[t]he historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes;" (3) the "specific sequence of events leading up to the challenged decision;" (4) "departures from the normal procedural sequence;" (5) "[s]ubstantive departures," "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;" and (6) "[t]he legislative or administrative history," "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *See id.* at 266–68. These factors "are not exhaustive," and courts may consider other relevant evidence. *See Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983).

The passage of SB 168 is a paradigmatic example of the kind of legislative process *Arlington Heights* proscribes. Here, SB 168's sponsoring legislators announced that they passed the bill to improve public safety and uphold the rule of law. *See* Op. 81. SB 168's principal sponsor even publicly "renounced discrimination." Op. 89. But, behind

the scenes, these same legislators were working with "overtly racist, nationalist, and xenophobic" anti-immigrant hate groups who "desire to preserve the allegedly superior white race above all others." Op. 11, 53. These groups gave significant input on the legislative drafting and amendment process, provided data for the legislature's bill analysis, and offered strategic advice on how to present the bill. *See* Op. 43–44, 84.

This fact pattern—in which legislators publicly avowed a neutral intent while colluding with anti-immigrant hate groups behind closed doors—demonstrates why *Arlington Heights* is so important to protecting the guarantees of the Fourteenth Amendment. Without the fact-intensive inquiry its framework dictates, the true nature of a law and the true motives of its supporters would remain hidden behind a thinly veiled façade of neutrality unreachable by the antidiscrimination norms that undergird the guarantee of equal protection.

II. Defendants' Arguments Reflect a Fundamental Misunderstanding of *Arlington Heights*.

Defendants strain to limit *Arlington Heights*. If Defendants' unrecognizable version of *Arlington Heights* were controlling, the Fourteenth Amendment would offer little to no protection from official discrimination packaged in facially neutral laws. But this toothless

vision of *Arlington Heights* is not the law.

A. Conduct of Non-Legislators May Be Probative of Discriminatory Intent.

Defendants contend that statements of non-legislators are not probative when assessing a legislature's motivations in passing a law. Def. Br. 26, 39. But, under *Arlington Heights*, "[t]he historical background" and "sequence of events leading up to a challenged decision . . . may shed some light on the decisionmaker's purposes." 429 U.S. at 267 (citations omitted). As this Court has explained, these factors may encompass "constituent statements and conduct" where they bear on "the intent of public officials" and particularly where non-legislators' "efforts" "translate" "into official action." *Stout by Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1007–08 (11th Cir. 2018) (alterations omitted) (collecting cases).

The District Court properly used this evidence, explaining that the conduct of private sponsors "can be relevant to show that a legislative body took certain actions to effectuate the discriminatory motives of private third parties or that it ratified the racially discriminatory conduct of third-party groups." Op. 83. Here, the numerous communications between SB 168's sponsors and FLIMEN and FAIR "strongly suggest

that the Legislature ratified the racially discriminatory views of [these groups] and enacted SB 168 to effectuate those motives." Op. 84. Accordingly, the District Court "held no erroneous view of the law of intentional discrimination," and its findings of fact were not "clearly erroneous." *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005).

B. The District Court Afforded Defendants a Presumption of Good Faith.

Defendants repeatedly—and falsely—assert that they were not afforded a presumption of "good faith," and argue that "instead of drawing inferences in favor of the legislature, [the District Court] consistently drew them the other way." Def. Br. 24. But the District Court expressly recognized Defendants' "facially valid justification of SB 168." Op. 96. However, after finding this presumptive justification "unsupported by any research or data"—and accompanied by substantial evidence to the contrary—the Court concluded that the explanation was "actually pretextual." Op. 95–96; *accord infra* Section III.A. The District Court properly presumed good faith, but, once presented with evidence dispelling Defendants' good-faith explanation, it was not required to stick its head in the sand.

Indeed, after the Court found substantial direct and circumstantial evidence of discriminatory intent, the presumption was rebutted. *See Arlington Heights*, 429 U.S. at 265–66 ("When there is . . . proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified."); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (explaining that the "good faith of a state legislature must be presumed" only "until a [plaintiff] makes a showing sufficient to support" an allegation of "race-based decisionmaking").

The burden then shifted to the state to show that the law would have been enacted absent its discriminatory purpose. *See Hunter*, 471 U.S. at 225; *Jean*, 711 F.2d at 1486 (finding that after a plaintiff has made a prima facie showing, "mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the prima facie case").

Defendants make much of the fact that the District Court did not expressly use the phrase "presumption of good faith" in its decision. Def. Br. 24. But the court is not "require[d]" "to incant magic words." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022). The relevant inquiry is whether the court "meaningfully

accounted for the presumption." *Id.* The District Court did. It stated that "*Plaintiffs must prove* that SB 168 was enacted with purposeful discriminatory intent." Op. 62 (emphasis added); *accord* Op. 63–66 (accurately relaying standard). Because "[t]he district court's explanation of the law echoes the essence of the Supreme Court's holding in *Arlington Heights*," it did not err. *Holton*, 425 F.3d at 1348 (upholding district court's *Arlington Heights* analysis even though it did not mention the case by name).

C. The *Arlington Heights* Factors Are the Relevant Standard for Assessing Discriminatory Legislative Intent.

Defendants and their *amici* introduce a new evidentiary standard, arguing that if a legislature asserts any legitimate interest, a court must "confine[] itself to only the *clearest* evidence" of a racially discriminatory purpose. Def. Br. 26; *see also* Georgia Br. 6–8. They are wrong.

Defendants and *amici* pluck this standard from unrelated lines of cases involving the *Ex Post Facto* Clause and selective-prosecution claims. *See Smith v. Doe*, 538 U.S. 84, 105 (2003) (determining if legislature intended to make a civil law in order to assess the applicability of the *Ex Post Facto* Clause); *United States v. Armstrong*,

517 U.S. 456, 464 (1996) (assessing the intent of prosecutor in selective-prosecution claim and making no mention of *Arlington Heights*).[6] The standards from these contexts do not apply here. Rather, when assessing whether a legislature enacted a law with discriminatory intent, "the approach of *Arlington Heights* . . . determine[s] whether the law violates the Equal Protection Clause." *Hunter*, 471 U.S. at 227. And *Arlington Heights* commands that courts review "circumstantial and direct evidence of intent *as may be available*." 429 U.S. at 266 (emphasis added).

In fact, a panel of this Court rejected this precise argument—cautioning that the clearest evidence standard should not be "[r]ecklessly plucked from an unrelated line of precedent [that] runs contrary to decades of established equal protection jurisprudence." *Lewis v.*

[6] The requirement for "clear evidence" from the selective-prosecution context is based on special constitutional and prudential concerns related to the exercise of prosecutorial discretion. *Armstrong*, 517 U.S. at 464–65. In addition, prosecution-specific safeguards—such as the probable cause requirement—act to help ensure prosecutors' decisions are proper. *See id.* at 464. Equal protection claims outside of the selective-prosecution context are thus generally not amenable to its clear-evidence standard. The Supreme Court has never applied that standard to an assessment of discriminatory intent in the legislative context, and Defendants do not cite any authority to support such an expansion here.

Governor of Ala., 896 F.3d 1282, 1296 (11th Cir. 2018), *decided on other grounds on reh'g en banc*, 944 F.3d 1287, 1298 (11th Cir. 2019); *see also Veasey v. Abbott*, 830 F.3d 216, 231 n.12 (5th Cir. 2016) (rejecting argument to apply "clearest proof" standard instead of *Arlington Heights* standard). Thus, the clearest evidence standard "has no place in equal protection law, which remains governed by the longstanding framework established in *Arlington Heights*." *Lewis*, 896 F.3d at 1296.

D. Actions Taken and Statements Made by a Bill's Sponsor Are Highly Relevant.

Defendants argue that the District Court did not appropriately consider legislative intent because the intent of the full Florida Legislature was the "legally dispositive intent." Def. Br. 26. They contend that because "the vote of a sponsor is only one vote among many," a sponsor's statement cannot "demonstrate discriminatory intent by the state legislature." *Id.* at 27 (citations, quotations, and alterations omitted). Defendants thus construe statements made by SB 168's sponsors that evinced a discriminatory intent as effectively irrelevant. *See id.* at 26–27, 39. Defendants misapprehend the law.

Specifically, the argument runs counter to decades of precedent. *Arlington Heights* expressly provides that "contemporary statements by

members of the decisionmaking body" "may be highly relevant." *Arlington Heights*, 429 U.S. at 268. Unsurprisingly, this Court has found that a "speech made by the sponsor" of a piece of legislation "was evidence of an intent to discriminate." *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987); *accord Stout by Stout*, 882 F.3d at 1007–08 (upholding district court finding of discriminatory intent based on, *inter alia*, "statements" made by "members of the [municipal] Board [of Education]" who "played a primary role" in the relevant decision); *cf. Masterpiece Cakeshop*, 138 S. Ct. at 1729 (citing statements of individual decisionmakers in multi-member commission as evidence of religious animus).

The cases cited by Defendants—*Thai Meditation* and *Greater Birmingham Ministries*—are not to the contrary. Def. Br. 26–27, 39. In *Thai Meditation*, the contemporary statement at issue was made by "a subordinate *non*-decisionmaker to the final decisionmakers." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile,* 980 F.3d 821, 836 (11th Cir. 2020) (emphasis in original) (citations omitted). In *Greater Birmingham Ministries*, the statement was made by a bill's sponsor, but it was "about a different bill on a different topic unrelated to the" law at

issue. *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324–25 (11th Cir. 2021). These cases stand for the commonsense proposition that not all contemporary statements are probative—for example, where they are not made by the relevant decisionmaker or where they are unrelated to the relevant decision.

Here, the District Court properly concluded that the contemporary statements and actions of SB 168's sponsors were highly relevant evidence under the *Arlington Heights* inquiry. For example, the District Court found it relevant that the bill's sponsors spoke in support of SB 168 at a "racially charged" press conference hosted by a "xenophobic hate group[]." Op. 89–92, 24. It strains credulity to suggest that such behavior by the key legislative drivers of the bill has "no application to this case." Def. Br. 26–27 (citation and quotation omitted). The District Court committed no legal error in considering this evidence.

III. The District Court Properly Applied the *Arlington Heights* Factors.

The District Court's findings on each of the *Arlington Heights* factors are set out in painstaking detail and are supported by substantial direct and circumstantial evidence—most of which remains unrebutted. Op. 62–102.

For example, as to disparate impact and foreseeability, the District Court considered "unrebutted, significant evidence of the racially discriminatory police practices used in Florida generally, and of how those discriminatory practices are aggravated by proactive police measures." Op. 68–69. It relied on relevant statistics and studies in Florida that show a statistically significant relationship between proactive policing and racial profiling at every level of law enforcement. Op. 73 (citing data showing that although undocumented immigrants from South and Central America and the Caribbean comprised 83.2% of all undocumented immigrants in Florida, they comprised 93.9% of U.S. Immigration and Customs Enforcement ("ICE") arrests in Florida from 2015 to 2018).

The District Court also cited the highly irregular involvement of hate groups in the legislative process, finding that "the facts present a clear narrative that FAIR and FLIMEN became intimately involved in the legislative process through their connections to the bill's sponsors and that they exerted significant influence over those sponsors throughout the course of SB 168's drafting and ultimate passage." Op. 102.

These findings warrant significant deference. This Court "review[s]

a finding of a racially discriminatory purpose for clear error." *Stout by Stout*, 882 F.3d at 1006 (citing *Holton*, 425 F.3d at 1350). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* (citations and quotations omitted).

Notwithstanding the ample evidence supporting the District Court's holding and this Court's deferential posture, Defendants quixotically attack its application of the *Arlington Heights* factors. Defendants' contentions utterly fail to support a determination that the District Court clearly erred.

A. The District Court Properly Considered and Rejected Defendants' Race-Neutral Explanations for SB 168.

Defendants argue that the District Court "ignored a plausible race-neutral historical account" of SB 168's origin. Def. Br. 34–36. But even a cursory examination of the District Court's opinion reveals that it did no such thing. The District Court repeatedly recognized that the bills' sponsors "emphasized that SB 168 was about public safety, promoting respect for the rule of law, and cooperating with federal immigration

enforcement efforts." Op. 90; *see also* Op. 95 ("[T]he bill sponsors consistently justified SB 168 as a public safety measure that aimed to reduce crime in Florida communities.").

Accordingly, the District Court did not "ignore" the Defendants' race-neutral historical account. Rather, it did not buy it. The District Court found that—despite the "public safety" justifications—Florida crime rates were consistently dropping even as the number of undocumented immigrants was steadily increasing. Op. 81–82. The drop in crime rates was even more rapid in so-called "sanctuary cities" than in the rest of Florida. *Id.* Thus, "the [public safety] factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267.

The groundlessness of the legislature's explanation also suggests that it served as a racial dog whistle. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (citing as "strong testimonial evidence" "'camouflaged' racial expressions" including "concern[s] about public safety due to influx of 'new' people"); Ian Haney López, Dog Whistle Politics 24 (2015) (explaining how "law and order" appeals have been used as "coded phrases . . . to appeal to racial fears"). Relatedly, it was

proper for the District Court to find that Senator Gruters' "use of the pejorative term 'illegals'" in these purported public safety appeals "reveal[ed] his racial animus." Op. 93. Under these circumstances, the District Court's conclusion that legislators "utilized code words to communicate their race-based animus . . . was not clearly erroneous." *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 610 (2d Cir. 2016).

In sum, the District Court was not required to simply accept as true "the self-serving testimony of high government officials that the policy was not intended to be discriminatory." *Jean*, 711 F.2d at 1496. The District Court properly assessed the government's proffered rationale under the rubric of *Arlington Heights* and found that its explanation did not add up in light of the mountain of evidence of discriminatory intent.

B. The District Court Properly Concluded that SB 168 Is a Proactive Policing Measure.

Defendants argue that SB 168 is not a proactive policing bill because it "operates in jails and prisons and has no effect on street-level police that might lead to racial profiling." Def. Br. 14. Defendants' contention, however, is expressly belied by the plain terms of SB 168's Best Efforts Provision, which instructs "law enforcement agenc[ies]" to "use best efforts to support the enforcement of federal immigration law."

Fla. Stat. § 908.104(1). "Law enforcement agency" is defined to include any Florida agency "charged with enforcement of state, county, municipal, or federal laws." *Id.* § 908.102(4). As Plaintiffs explain, this broad sweep imposes the best-efforts requirement on officials ranging from local police officers to firefighters to employees at the Department of Health. Pl. Br. 5–6. Thus, SB 168 deputizes an expansive set of state officials and employees as de facto immigration agents.

If SB 168 was not a proactive policing bill, the Best Efforts Provision would make little sense. As Defendants acknowledge, when a person is arrested and booked into custody, their fingerprints and other information must be shared with other law enforcement agencies, including ICE, irrespective of the policies of states and localities. Def. Br. 4–6 & n.4. Thus, Defendants' contention that SB 168 applies primarily to undocumented immigrants in jails and prisons is implausible. Either the Best Efforts Provision has no effect at all on law enforcement operations—in which case it cannot possibly achieve its stated objectives and can be understood only as an expression of official animus—or it is intended to and does change routine street-level policing practices, including outside of prisons and jails.

Moreover, SB 168 has in fact resulted in proactive policing. For example, the District Court cited testimony from Plaintiffs that, since the enactment of SB 168, they "began to observe instances where, rather than issuing citations for traffic violations, law enforcement officers were calling immigration authorities during routine traffic stops to detain the individuals stopped." Op. 29. Thus, the District Court did not err in its characterization of SB 168 as a "proactive policing measure." Op. 71.

C. The District Court Properly Analyzed SB 168's Antidiscrimination Provision.

Defendants say that, "most glaringly," the District Court "overlooked the most obvious evidence that the legislature had a valid purpose": SB 168's antidiscrimination provision. Def. Br. 24. But, early in its opinion, the District Court clearly explained that "Section 908.109 prohibits state and local entities or their agents from discriminating . . . when acting pursuant to SB 168" in a subsection titled the "Antidiscrimination Provision." Op. 6. The Court later found probative to the question of discriminatory intent the fact that "[t]he [Executive Office of the Governor] has not taken steps to investigate violations of the Antidiscrimination Provision or to ensure that agencies comply with that provision." Op. 44–45. The Court also observed that

prior "anti-discriminatory" measures were unsuccessful because of a lack of "meaningful efforts to enforce" them. Op. 50. Thus, the Court did not "overlook" anything.

Defendants also express incredulity that "[t]he [D]istrict [C]ourt never explained why a Legislature bent on racial discrimination would prohibit discrimination," and assert that "[i]t would not." Def. Br. 24. If Defendants' proposition were correct, then even the most blatant example of legislation motivated by discriminatory intent could be negated by the inclusion of generic antidiscrimination language. That cannot be right. "The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough." *Smith v. Texas*, 311 U.S. 128, 130 (1940). "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." *Id.*

In any event, the antidiscrimination provision appears intended to permit state and local law enforcement to engage in racial profiling. Specifically, it prohibits state and local agencies and officials from basing "actions under this chapter on the . . . race . . . [or] national origin . . . of a person *except to the extent authorized by the United States*

Constitution." Fla. Stat. § 908.109 (emphasis added). Because the Supreme Court has said a person's race and national origin may be a "relevant factor" in federal immigration policing, *see United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975), this provision does not appear intended to create any new limits on racial profiling.[7] Furthermore, the legislature rejected an amendment that would have clearly prohibited racial and national-origin profiling after Senator Gruters pushed to *allow* such profiling. Pl. Br. 13, 38–39. Thus, the antidiscrimination provision—coupled with its legislative history—suggests an intent to facilitate racial profiling by Florida law enforcement.

D. The District Court Properly Concluded that Legislative Collusion with Hate Groups Was Improper, Despite Prior Citations to CIS Data.

Defendants say it was "inappropriate" for the District Court to be alarmed that SB 168's Senate bill analyses included data compiled by anti-immigrant hate groups. Def. Br. 39. To support this position, they claim the Supreme Court has "relied" on these groups' "work[]." *Id.* at 3,

[7] However, as Plaintiffs explain, national origin classification by *state* officials is subject to strict scrutiny. Pl. Br. 39. Thus, unlike in some *federal* contexts, Defendants' efforts to facilitate racial or national-origin profiling is impermissible and probative of discriminatory intent.

39.

But Defendants repeatedly fudge the facts regarding FLIMEN and FAIR. They claim that the District Court focused on the involvement in the legislative process of "two organizations"—presumably, FLIMEN and FAIR—"*whose work* the Supreme Court has relied upon." *Id.* at 3 (citing *Arizona v. United States*, 567 U.S. 387, 398 (2012)) (emphasis added). Although the Supreme Court quoted erroneous statistics from CIS in *Arizona*, it at no time relied on information from FAIR or FLIMEN, contrary to Defendants' misleading contention. That the Court relied on the work of a research organization that was created to provide the racist agenda of FAIR with a veneer of research legitimacy does not excuse FAIR's overt racism.

Defendants also claim that because certain governmental agencies have cited FAIR and CIS' work, this somehow purges these groups' anti-immigrant agenda. Def. Br. 42–43. It does not. There is no authority—and Defendants do not cite any—that suggests that past governmental reliance on an entity's data excuses the entity's contemporary racism.

E. The District Court Drew Proper Inferences from the Factual Record, Despite Defendants' Contrary Preferences.

Defendants offer their own revisionist interpretations of some of the other contemporary evidence assessed by the District Court. Under this Court's "highly deferential standard of review," Defendants cannot establish clear error even if they "would have weighed the evidence differently." *Holton*, 425 F.3d at 1351. Defendants' arguments do not cast any doubt on the District Court's factual findings.

For example, Defendants challenge the District Court's focus on "a large sign" Senator Gruters displayed in "the lobby of his office in the Senate" that contained the statement "FACES OF CRIMINAL ILLEGALS." Op. 93–94; *see also* Def. Br. 27, 40. But this focus was warranted. The District Court found that the sign "highlighted [Senator Gruters'] animosity toward the immigrant community" after carefully considering the context in which the sign was posted, including that (1) it was coupled with numerous other racially charged statements, (2) contained an overwhelming number of photographs of people of color, and (3) falsely implied that undocumented immigrants were committing high rates of serious crimes. Op. 94–95. Where, as here, the District

Court draws an inference "based on common sense and ordinary human experience," its "conclusion [i]s not clearly erroneous." *United States v. Philidor*, 717 F.3d 883, 885–86 (11th Cir. 2013); *accord Lloyd v. Holder*, 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013) (explaining that "facially non-discriminatory terms" such as "illegal alien" can function as "racially charged code words"); *Clark v. ACE AFSCME Loc. 2250*, 2019 WL 3860269, at *3 (D. Md. Aug. 15, 2019) (similar).

Likewise, Defendants assert that statements made by Representative Byrd—a sponsor to SB 168's companion bill—that SB 168 was "not anti-immigrant" is "direct evidence" that is "stronger" than the "circumstantial evidence proffered by the plaintiffs." Def. Br. 40 (citations omitted). But the District Court properly determined that this self-serving statement was outweighed by substantial evidence to the contrary—including Representative Byrd's own actions. *See, e.g.*, Op. 89, 93. The District Court's factfinding was well-reasoned and devoid of error.

F. The District Court Properly Analyzed the Effect of SB 168 on Racial Groups.

Defendants assert that the District Court "mistook motive to enforce the law against federal-immigration violators for racial animus."

Def. Br. 27. Defendants argue that "undocumented aliens are not a suspect class," and that "the [D]istrict [C]ourt's misunderstanding of the classification at issue infected its constitutional inquiry." *Id.* at 27–28 (citation and quotation omitted). But the District Court's analysis was grounded in the effect of SB 168 on racial groups, not on immigration status. *See* Op. 62–102.

Specifically, in its analysis, the District Court expressly accounted for racial disparities within immigration enforcement and found that Plaintiffs' expert "opinions regarding disparate racial impact are not limited to undocumented immigrants" because "SB 168 will also disproportionately impact U.S. citizens of racial and ethnic minorities." Op. 73. It likewise addressed "*racial* animus toward the immigrant population." Op. 92 (emphasis added). Thus, far from mistaking motives, the District Court's analysis shows a clear understanding of the relationship between race and immigration status.

However, even if this Court found that SB 168 was not motivated by racial animus, but solely by animus against undocumented immigrants, the law would still be unconstitutional. Where "[t]he legislative history" of a law reveals "a bare . . . desire to harm a politically

unpopular group," then it does not "rationally further some legitimate governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996). Because SB 168 "hardly offers an effective method of dealing with" the problem it purports to solve, *Plyler v. Doe*, 457 U.S. 202, 228 (1982), it would be proper to conclude that it "rest[s] on an irrational prejudice against" undocumented immigrants. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). Thus, the law "is wholly without any rational basis." *Moreno*, 413 U.S. at 538.

* * *

The District Court did not err, clearly or otherwise.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's finding that SB 168's Best Efforts Provision and Sanctuary Prohibition are unconstitutional.

Dated: August 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On behalf of *amici*, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,279 words.

Dated: August 23, 2022

/s/ *Theodore A. Howard*
Theodore A. Howard

CERTIFICATE OF SERVICE

I, Theodore A. Howard, counsel for *amici curiae* and a member of the Bar of this Court, certify that on August 23, 2022, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ *Theodore A. Howard*
Theodore A. Howard