IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CENTRAL ALABAMA FAIR HOUSING CENTER, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NUMBER: 2:11-cv-00982-MHT-CSC
JULIE MAGEE, Revenue Commissioner for the State of Alabama, et al.,	)	
Defendants.	)	

STATE DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS (DOC. 85)

State Defendant, Commissioner Julie Magee, sued in her official capacity as Revenue Commissioner for the State of Alabama, replies in support of her motion to dismiss (doc. 85). Plaintiffs agree that the State Defendant is immune from suit for damages under the Fair Housing Act. The Plaintiffs' other claims are due to be dismissed because the court lacks subject matter jurisdiction over this action because it is moot and Plaintiffs lack standing. Additionally, Plaintiffs fail to state a claim upon which relief can be granted.

I. THE CASE IS MOOT BECAUSE THE POLICY ON WHICH PLAINTIFFS BASE THEIR LAWSUIT NO LONGER EXISTS.

The Court lacks subject matter jurisdiction over this action as the case is moot. *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1281 (11th Cir. 2004) ("A moot case is nonjusticiable and Article III courts lack jurisdiction to entertain

it."). The Revenue Department no longer has a policy that "treats the act of complying with Alabama Code § 40-12-255 as a 'business transaction'" under Section 30 of Act No. 2011-535, the allegation on which Plaintiffs' lawsuit is based. Doc. 31, First Amended Complaint, ¶ 7.[1] *See also* doc. 95, State Defendant's Motion to Submit Additional Evidence; Doc. 101-1, Dec. 20, 2011 Memo. of Comm'r Magee.[2] Plaintiffs recognize the Department's changed policy—indeed, they welcome it—but contend that the case is not moot because the Department could reinstate the old policy if it wanted to. Doc. 105, Pl.'s Opp. to Mot. to Dismiss, 26. In this Circuit, however, "a challenge to *governmental* action has been mooted when the alleged wrongdoers have ceased the allegedly illegal behavior and the court can discern no reasonable chance that they will resume it upon termination of the suit." *Troiano*, 382 F.3d at 1284 (emphasis in original). This has been called the "*Troiano* presumption in favor of governmental entities." *Harrell v. Florida Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010).

[1] References to page numbers following a citation to a document by document number are to the page numbers at the top of the document which are electronically burned onto the page by the CM/ECF system.

[2] The Court granted the State Defendant's motion for leave to submit the December 20, 2011 Memorandum in support of the motion to dismiss. Doc. 100, Order. In addition, because the Memorandum is to establish facts of which the Court may take judicial notice, Eleventh Circuit precedent suggests the Court need not treat Defendants' motion as one for summary judgment. *See* Fed. R. Evid. 201(b); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-81 (11th Cir. 1999). *See also Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995) ("Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss.") (citation omitted).

A. Plaintiffs' Reliance on *Harrell* Is Misplaced.

In *Harrell*, the case on which Plaintiffs chiefly rely to argue the case is not moot, the Florida Bar had an established pattern of switching its policy on lawyer advertising back and forth, over a period of six years. *Harrell*, 608 F.3d at 1248-53. The Florida Bar had a three tier administrative review process for lawyers' challenges to the Bar's advertising rules. *Id.* at 1248-49. The first level was the Bar's Ethics and Advertising Department, which issued advisory opinions on specific proposed advertisements. *Id.* The second level was the Standing Committee on Advertising, which heard appeals of the Department's decisions. *Id.* The third level was the Board of Governors, the Bar's chief governing body, which heard appeals of the Standing Committee's decisions, and which could review decisions of the Standing Committee *sua sponte* under limited circumstances. *Id.*

Harrell, the plaintiff, had a long history with the Bar which had "repeatedly rejected" his proposed advertisements. *Id.* at 1249. Giving rise to the instant case was Harrell's proposal in 2002 to use the slogan "Don't settle for anything less" in his advertisements. *Id.* The Bar refused to approve the slogan but offered an alternative slogan instead, "Don't settle for less than you deserve." *Id.* Harrell adopted the Bar's alternative slogan. *Id.* Five years later, the Bar informed Harrell that the slogan was improper. *Id.* Harrell appealed to the Standing Committee, arguing primarily that "the Bar had itself suggested the slogan several years earlier," but the Standing Committee denied Harrell's appeal. *Id.* Rather than appealing the Standing Committee's decision to the Board of Governors, Harrell filed the instant lawsuit, challenging not only the Bar's

latest ruling on the particular slogan but also the Bar's advertising rules in general. *Id.* at 1250.

The Bar moved to dismiss Harrell's lawsuit, arguing that the claims were not ripe for review because Harrell had not sought an advisory opinion from the Bar before filing suit. *Id.* at 1252. The district court denied the motion, explaining that the Bar could articulate in court whether it thought that Harrell's proposed advertisements violated the Bar's rules. *Id.* Separately, while the motion to dismiss was pending, Harrell was informed by the Bar that the Board of Governors had taken up the matter of his particular slogan *sua sponte* and reversed the Standing Committee's decision. *Id.* Thus, the Bar reversed itself after six years of vacillating regarding the particular slogan, and a history stretching further back with this lawyer and the Bar on advertisements generally.

After changing course again, the Bar moved to dismiss a second time, arguing that the Board's recent decision mooted the case. *Id.* The district court deferred ruling, and the parties filed cross-motions for summary judgment. *Id.* at 1252-53. The district court granted summary judgment for the Bar, holding that Harrell's challenge regarding the particular slogan was now moot, and holding that with regard to Harrell's other challenges he either lacked standing to raise them, they were not ripe, or they failed on the merits. *Id.* at 1253.

The Eleventh Circuit reversed, however, and determined that under these facts, it could not apply the *Troiano* presumption in favor of governmental entities. *Id.* at 1267-68. By reversing itself without explanation or reason, the Board as the chief governing body of the Bar had not "unambiguously terminated" the challenged conduct. *Id.*

Because the Board "fail[ed] to disclose any basis for its decision," it was impossible to determine whether the Board's decision was "'well-reasoned' and therefore likely to endure." *Id.* at 1267.

The Eleventh Circuit also noted that the Board may have "'changed course simply to deprive the [district] court of jurisdiction.'" *Id.* (quoting *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005)). The Court explained that "the Board took up the matter of Harrell's advertisements only at the urging of the Bar's counsel after this litigation commenced." *Id.* In so doing, moreover, the Board "may have departed from its own procedures" which allowed the Board to review a matter *sua sponte* only if the matter was "'of widespread interest or unusual importance to a significant number of Florida Bar members.'" *Id.* The Bar did not state that Harrell's matter was of widespread interest or unusual importance. *Id.* Thus the Court concluded that the challenge to the slogan was not moot, because it was not "'*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 1268 (quoting *Alabama v. Corps of Eng'rs*, 424 F.3d 1117, 1131 (11th Cir. 2005)) (emphasis in *Harrell*).

B. There Is a Rational Basis for the New Revenue Department Policy That Makes It Clear That the Conduct Challenged by the Plaintiffs Cannot Reasonably Be Expected to Recur.

The Plaintiffs' challenge of the Revenue Department's policy regarding the issuance of manufactured home registration decals is very different from the challenge in *Harrell*. First, the Revenue Department changed its policy to the one that Plaintiffs now welcome a matter of weeks after the law went into effect. Section 30 went into effect on

September 1, 2011. Doc. 33-1, Act No. 2011-535, at 72 (§ 34 states that "the remainder of this act," including Section 30, "shall become effective on the first day of the third month following the passage and approval of this act by the Governor"), and at 73 (approval by the Governor June 9, 2011). This is a far cry from the six years of Harrell's back-and-forth with the Florida Bar regarding the particular slogan, and a history stretching further back between Harrell and the Bar on advertisements generally.

Second, unlike the Florida Bar, the Revenue Department has not vacillated back and forth without explanation, suggesting that the Department might change its mind. It is true that when the Plaintiffs filed their complaint and sought an immediate injunction, the Revenue Department defended the existing policy. That defense, however, was short-lived: A review of the challenged policy in the light of guidance subsequently issued by the State's Attorney General made it clear that the Revenue Department's policy was contrary to State law, and that policy was revised, accordingly. "The only evidence that [Plaintiffs have] presented in this case to suggest that the [Department] might return to its previous version of the [policy] is the fact that the [Department] has defended its [policy]." *Nat'l Adver. Co.*, 402 F.3d at 1334. This is not enough. Plaintiffs bear "the burden of presenting affirmative evidence that [their] challenge is no longer moot." *Id.* "Mere speculation that the [Department] may return to its previous ways is no substitute for concrete evidence of secret intentions." *Id.*

Third, the *Troiano* presumption in favor of governmental entities does apply to the Revenue Department's policy because the Department has "unambiguously terminated" its former policy. Unlike the Florida Bar, the Revenue Department did indeed "disclose

[a] basis for its decision." *Harrell*, 608 F.3d at 1267. The Department explained that its decision was based on the Attorney General's Guidance Letter 2011-02 "addressing the meaning of the phrase 'business transaction' as used in Section 30 of the Act." Doc. 101-1 at 2. The December 20, 2011 Memorandum indicates that the "[r]egistration of and issuance of decals on manufactured homes" pursuant to Ala. Code § 40-12-255 is grouped in the transactions involving taxes and titles, instead of the transactions involving licenses. Doc. 101-1. The Alabama Code provides that obtaining a manufactured home registration decal is "in lieu of the ad valorem taxes" a manufactured homeowner would otherwise owe. Ala. Code § 40-12-255(a). The policy regarding the issuance of manufactured home registration decals was issued in the context of the Department's "re-evaluat[ion]" of its policy regarding Section 30 generally, prompted by the Guidance Letter, and was issued alongside a list of other transactions the Department considers not to be business transactions under Section 30 and those it does—eleven transactions in all. *See* doc. 101-1. This basis and context demonstrate that the Department's decision is indeed "'well-reasoned' and therefore likely to endure." *Harrell*, 608 F.3d at 1267.

Fourth, unlike *Harrell*, there is no suggestion that the Revenue Department issued its new policy "to deprive the court of jurisdiction." *Id.* The December 20, 2011 Memorandum states unequivocally that the new policy was being issued, "[p]ursuant to [the] definition of 'business transaction'" in the Guidance Letter. Doc. 101-1 at 2. Moreover, there is no evidence that the Department "departed from its own procedures" in doing so. *Harrell*, 608 F.3d at 1267.

C. The Revenue Department's Reevaluation of Its Department-wide Policy Regarding Section 30 in Light of the Attorney General's Guidance Is Evidence of Good Faith, Not Bad.

The Department did reevaluate its policy regarding Section 30 after this litigation commenced. Of course, this fact alone does not make the case a live controversy in perpetuity, otherwise mootness—which is jurisdictional—would almost never apply. If avoiding needless litigation prompts a defendant to amend a policy, such a motivating factor "is not the central focus" of the court's inquiry, "nor is it dispositive." *Nat'l Adver. Co.*, 402 F.3d at 1334. "Rather, the most important inquiry is whether [the Court] believe[s] the [Department] would re-enact the prior [policy]." *Id.* What the Court must find in order to agree with the Plaintiffs is that the Department's new policy is a sham, and that the Department intends to revert to its former policy when this litigation is ended. *See Harrell*, 608 F.3d at 1268 (stating that a defendant's cessation is ambiguous if the allegedly wrongful behavior could "reasonably be expected to recur"). Given the December 20, 2011 Memorandum's unequivocal stated basis—Guidance Letter 2011-02—what the Court must find in order to agree with Plaintiffs is that the Attorney General's guidance is a sham. *See* doc. 101-1. This question is answered simply by the Attorney General's representation to this Court that the guidance is genuine, and that, as the State's chief law officer, the Attorney General intends to enforce Section 30 in a manner consistent with that guidance, unless and until a court of competent jurisdiction compels a contrary result. *See Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007) (the positions the Attorney General takes in litigation are binding on State officials).

Finally, with respect to the timing of the Attorney General's guidance and the resulting change in policy, the State Defendant submits that the Act itself is a new, comprehensive law. The Act has, moreover, been the subject of much litigation over the past few months. It is not surprising, therefore, that State and local governmental officials are continuing to examine and revise their policies in light of the more than thirty provisions of the Act. Such reviews are, indeed, mandatory in response to the opinions and injunctions of federal courts which continue to inform the judgment of the attorneys representing State and local governmental entities.

Plaintiffs go to great lengths to characterize this case as one like *Harrell*, but it is not. Unlike the Florida Bar there, in this case, the Revenue Department has taken every prudent measure, when practicable, to respond to Plaintiffs' concerns rather than ignore them. That this effort has culminated in a policy, consistent with Guidance Letter 2011-02, that is favorable to Plaintiffs is evidence that the State Defendant has acted in good faith, not bad. There is no suggestion that the Department intends to reinstate a former policy that is at odds with its own Department-wide review and deliberation and the guidance published by the State's Attorney General. *See Graham v. Butterworth*, 5 F.3d 496, 499-500 (11th Cir. 1993) (holding that case was moot where attorney general and local prosecutor "withdrew their initial determination that the appellants' conduct violated the statute" after litigation was filed).

D. There Is No Controversy between Plaintiffs and the State Defendant.

Plaintiffs imply that the case is not moot because local officials—the individuals actually responsible for issuing the manufactured home registration decals—might not

follow the Department's policy, and might instead insist on proof of citizenship or immigration status from applicants and deny decals to those who cannot produce it. *See* doc. 105 at 24 (asserting that Plaintiffs "have no legal means to enforce interpretative Memoranda promulgated by the Attorney General or the Revenue Commissioner"), and at 26 (asserting "lack of enforceability"). Such claims are speculative, at best, and there is no reason to suppose that the Department's policy will not be followed. Even if a particular local official refused to follow the policy, however, the State Revenue Commissioner would have limited authority. *See* Ala. Code § 40-2-11 (outlining the Revenue Department's powers but providing no power to remove local officials from office who fail to follow Department directives). Instead, the proper remedy for such a malfeasance would be to sue non-compliant officials in State court to compel their compliance with State law.

It is the Department's policy that Plaintiffs have complained about in their lawsuit. *See* doc. 31, First Amended Complaint, ¶ 7. Now that the Department has changed its policy to one which Plaintiffs welcome, this litigation serves no purpose, and the Court lacks jurisdiction over it. *See Nat'l Adver. Co.*, 402 F.3d at 1334-35; *Graham*, 5 F.3d at 499-500. A judgment concerning a defunct policy benefits no one. *See Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009) (finding that plaintiffs lacked standing where "a decision in [their] favor would not bring [them] any relief"). For the same reasons, Plaintiffs fail to state a valid claim for relief. *See American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (the court

is not required to accept legal conclusions as true, and well-pleaded facts must "plausibly give rise to an entitlement to relief") (citation and internal quotation marks omitted).

Because the case is moot, this Court lacks subject matter jurisdiction and Plaintiffs' claims are due to be dismissed.

II. PLAINTIFFS LACK STANDING

Because the case is moot, the Court lacks subject matter jurisdiction, and need not address the companion jurisdictional question of standing. *Troiano*, 382 F.3d at 1281, n. 3 ("We need not and do not address the companion jurisdictional question of standing, because if a case is moot, plainly we lack subject matter jurisdiction to evaluate the merits on that ground alone."). However, if the Court should find that the case is not moot, then the Court should dismiss this action for lack of standing.

A. The Individual Plaintiffs Lack Standing to Assert the Claims of Aliens Who Are Known to the Federal Government but Who Do Not Contain Certain Documentation Demonstrating Lawful Presence.

The State Defendant argued in the motion to dismiss that "the Court lacks subject matter jurisdiction as the admittedly unlawfully present John Doe plaintiffs lack standing to assert the claims of aliens who are known to the federal government but who do not contain certain documentation demonstrating lawful presence." Doc. 85, Motion to Dismiss, at 3-4. The Doe Plaintiffs are here without permission, and therefore cannot represent persons in some "gray area" who have permission but no documents to back it up. The Plaintiffs offer no adequate response to this argument, nor have they ever.

According to Plaintiffs, such aliens fall into the category of "literally thousands of individuals who do not have the documents … but are legally authorized by the United

States to be here." Nov. 23, 2011 H'ing. Tr., 188. Plaintiffs assert that such aliens include "individuals who enter this country through the visa waiver program" and "individuals who have been granted temporary protected status." *Id.* at 189. At the November 23, 2011 hearing, Plaintiffs explained that the John Doe plaintiffs do not fall into this category (they are admittedly unlawfully present), but asserted that the potential "class members certainly do." *Id.* When pressed by the Court, the Plaintiffs stated that there are "many, many cases in which Doe plaintiffs and those who are undocumented Doe plaintiffs have had standing to raise preemption challenges regardless of their status. So it's not required that we tie a specific type of immigration status to --," but ultimately conceded that was a misstatement and that, rather, "there are ample cases allowing Doe plaintiffs to raise preemption challenges and making no inquiry into their immigration status." *Id.* at 194.

In their proposed findings of fact, Plaintiffs cited to *Georgia Latino Alliance for Human Rights v. Deal*, --- F. Supp. 2d ---, 2011 WL 2520752 at *4-5 (N.D. Ga. June 27, 2011) and *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB at 46, 59, 72, 85 (N.D. Ala., pending). Doc. 51, Plaintiffs' Proposed Findings of Fact, at 30. However, these cases did not hold that individual plaintiffs who are not lawfully present can bring claims on behalf of those who are. To the contrary, these courts made specific findings that the named plaintiffs had traceable injuries that gave rise to standing to assert the specific claims at issue, and Plaintiffs have offered no authority to the contrary.

B. The Organizational Plaintiffs Lack Standing.

Nor do the organizational plaintiffs have standing to raise a preemption or Fair Housing Act claim. The organizational plaintiffs do not identify any member of theirs who will be adversely affected by the State Defendant's enforcement of Section 30 with respect to registration of manufactured homes. *See* doc. 105 at 15, n. 7 ("None of the organizational Plaintiffs is a membership organization, and they do not assert associational or representative standing.") (citation omitted). They therefore have standing to challenge this policy only if it creates a distinct and palpable injury to these entities themselves. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The challenged policy does not directly injure any of the organizational plaintiffs. These plaintiffs allege that they are "diver[ting]" resources to "ameliorate" and "counteract" the alleged effects of the Department's policy, and that their missions are "frustrated" by the policy. Doc. 105 at 10-11, 17. But they do not identify how these expenditures will hinder some specific, established activity the organizations undertook before the Department began enforcing Section 30 in the manner challenged in this lawsuit, except CAFHC's assertion that the policy has "prevented and delayed" completion of certain projects. *Id.* at 17-18. Plaintiff FHCNA does not even list such specific projects. It simply asserts that resources have been "divert[ed]" from activities such as "discrimination testing in housing sales and insurance" and "normal outreach and client intake." *Id.* at 18. And Plaintiff FHCNA states only that "it will have to" divert resources in the future, not that it already has. *Id.* Plaintiff CFH makes the similar

general assertion that resources have been "diverted" from activities such as "general rent testing and routine outreach activities" and "education and outreach on other issues." *Id.*

In particular, none of these plaintiffs has assisted persons with manufactured-home registration prior to the State Defendant's enforcement of Section 30 in this context. These plaintiffs' own pleadings and evidentiary materials make clear that any expenditure of resources in response to the State Defendant's conduct represents a major shift in their activities. They concede, for example, that these new expenditures will be for activities *other* than "their core activities," doc. 31 at ¶16, or their "regularly planned activities" and "programs," *id.* ¶¶112, 113.

No one has identified a single "gray-area" alien who lives in a mobile home, who is a member of a plaintiff organization, or who has been advised by a plaintiff organization. The organizational plaintiffs have not explained how Section 30's application to gray-area plaintiffs affect them in any way. The State Defendant's conduct therefore does not injure the organizational plaintiffs in any concrete way. *Accord*, *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB at 20-24, 99-101 (N.D. Ala., pending) (rejecting organizations' standing arguments similar to Plaintiffs' arguments here).

Plaintiffs cite *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (organization engaged in mobilizing voters can challenge statute that raises the cost of voting), and *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164-66 (11th Cir. 2008) (same), for the proposition that an organization's expenditure of resources can amount to an "injury" for Article III purposes. But these two cases—and

the Supreme Court decision on which they are based, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)—cannot be extended so far. In each of these decisions, the challenged conduct effectively required organizational plaintiffs to expend additional resources if they desired to continue engaging in established, pre-conduct activities.

The organizational plaintiffs' attempt to establish standing by asserting that they face a threat of "future injury" is particularly feeble in light of the December 20, 2011 Memorandum and the cases's mootness. Doc. 105 at 16. Under the Department's policy, any anticipation these plaintiffs have that they will divert resources in the future has no basis at all and is not reasonable. Plaintiffs should not be allowed to manufacture Article III standing by asserting that they will spend money in the future discussing a policy that causes no harm. Neither should Plaintiffs be allowed to establish standing by stating that they are spending money on things that, at times, appear to fall squarely within their missions.

III. CONCLUSION

Because the policy on which Plaintiffs' lawsuit is based no longer exists, this case is moot, and the Court lacks subject matter jurisdiction. The case is due to be dismissed for this reason alone. Additionally, the Plaintiffs lack standing, and they fail to state a valid claim for relief. For these reasons, and those stated in the motion to dismiss, the State Defendant respectfully requests that the Court dismiss this action.

Respectfully submitted,

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I HEREBY CERTIFY that on the 9th day of January 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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