

I. The Preliminary Injunction Is Not Necessary for the Same Reasons the Case Is Moot.

The preliminary injunction is not necessary for the same reasons the case is moot. *See* doc. 112, State Defendant’s Reply in Support of Mot. to Dismiss.¹ Simply put, the Court’s preliminary injunction no longer makes a difference in the State Defendant’s behavior because the Revenue Department no longer applies Section 30 of Act No. 2011-535 to manufactured home registration.

A. This Case Is Moot Because the Policy on Which Plaintiffs Base Their Lawsuit No Longer Exists.

Alabama Code § 40-12-255 requires certain owners of manufactured homes to pay an annual registration fee for their manufactured home and to display the furnished decal. *See also* doc. 31, First Amended Complaint, ¶ 6. In this regard, Plaintiffs’ lawsuit is premised on the allegation that the Revenue Department “treats the act of complying with Alabama Code § 40-12-255 as a ‘business transaction’” with state or local government under Section 30 of Act No. 2011-535. *Id.* at ¶ 7. If an act is a “business transaction” under Section 30, then unlawfully present aliens, and persons acting on their behalf, may not engage in the act. *Id.* at ¶ 5; Act No. 2011-535, § 30(b).

Plaintiffs filed this litigation, asking for an as-applied injunction of Section 30, and arguing that, absent an injunction, the two John Doe plaintiffs would not be able “to make the annual registration payment and obtain current identification decals for their

¹ Accordingly, the State Defendant incorporates the reply in support of the motion to dismiss (doc. 112), the motion to submit the December 20, 2011 Memorandum in support of the motion to dismiss (doc. 95) and the December 20, 2011 Memorandum (doc. 101-1).

manufactured homes, as they are required to do” under Alabama Code § 40-12-255. *Id.* at ¶¶ 2-3, 9. At the time the lawsuit was filed, it was the Revenue Department’s policy that registration of and issuance of decals on manufactured homes pursuant to Alabama Code § 40-12-255 was a “business transaction” under Section 30. However, the lawsuit has become moot, because the Revenue Department has rescinded and replaced that policy. *See* doc. 112 at 1-11.

Plaintiffs recognize the Department’s changed policy. *Id.* at 2; doc. 105, Pl.’s Opp. to Mot. to Dismiss, 26. Indeed, they welcome it. *Id.* Plaintiffs nevertheless insist that the case is not moot because the Department could reinstate the old policy if it wanted to. *Id.* As the State Defendant explained in the reply in support of the motion to dismiss (doc. 112), the *Troiano*² presumption in favor of governmental entities applies, there is a rational basis for the current Department policy that makes it clear that the conduct challenged by the Plaintiffs cannot reasonably be expected to recur, and there remains no controversy between Plaintiffs and the State Defendant. *See* doc. 112 at 1-11. The case is thus moot and is due to be dismissed for lack of subject matter jurisdiction. *See id.*

B. The Preliminary Injunction Is Due to Be Dissolved for the Same Reasons the Case Is Moot.

For the same reasons the case is moot, the preliminary injunction is not necessary and is due to be dissolved. *See* doc. 112 at 1-11.

² *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276 (11th Cir. 2004).

The Court's preliminary injunction enjoins the State Defendant, the co-defendant Elmore County Probate Judge, and all those acting in concert with them, (1) from requiring any person who attempts to pay the annual registration fee required by Alabama Code § 40-12-255 to prove his or her U.S. citizenship or lawful immigration status; and (2) from refusing to issue the manufactured home decal required by Alabama Code § 40-12-255 to any person because that person cannot prove his or her U.S. citizenship or lawful immigration status. Doc. 88, Preliminary Injunction, 1-2. The preliminary injunction order also declares that it is not a criminal violation of Section 30 of Act No. 2011-535 for an individual who owns, maintains, or keeps a manufactured home to make, or attempt to make, a registration payment and obtain a registration decal without providing proof of U.S. citizenship or lawful immigration status. *Id.* at 2.

This injunction is not necessary. The Commissioner's December 20, 2011 Memorandum states plainly that the Revenue Department does not consider the "[r]egistration of and issuance of decals on manufactured homes," pursuant to Alabama Code § 40-12-255, to be a "business transaction" under Section 30. Doc. 101-1 at 2. Plaintiffs recognize this fact, and welcome it. *See* doc. 105 at 26. The only argument Plaintiffs have against dismissal on mootness grounds—which presumably is their only argument against dissolution of the preliminary injunction on the same grounds—is that, if the Department were so inclined, it could reinstate the old policy that the transaction at issue is a "business transaction" under Section 30. *See id.* As explained in the State Defendant's reply in support of the motion to dismiss, the Department's current policy is entitled to the *Troiano* presumption that the policy is genuine, and moots this action,

unless the court can discern a “reasonable chance” that the Department will revert to the old policy upon termination of the suit. *See* doc. 112 at 1-2, 6-9; *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1284 (11th Cir. 2004). There is no such reasonable chance because the Department has unambiguously terminated its former policy. Doc. 112 at 6-9.

In the December 20, 2011 Memorandum, the Department explained that its decision to issue the current policy 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; *see also* doc. 112 at 7. In the reply brief, the State Defendant explained that the policy outlined in the December 20, 2011 Memorandum is genuine, and the Attorney General represented to this Court that the guidance on which the Department’s policy is based is genuine, and as the State’s chief law officer, the Attorney General intends to enforce Section 30 in a manner consistent with the guidance. Doc. 112 at 8; *Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007) (the positions the Attorney General takes in litigation are binding on State officials).

Finally, in response to Plaintiffs’ attempts to argue that a live controversy exists between them and the State Defendant by suggesting that local officials might not follow the Department’s current policy, the State Defendant explained that her authority is limited. Doc. 112 at 9-10. The proper remedy for such malfeasance would be to sue non-compliant officials in State court to compel their compliance with State law. *Id.* at 10. An injunction against the State Defendant is not appropriate—the Plaintiffs welcome her Department’s policy.

For these reasons, and those stated in the State Defendant's reply in support of the motion to dismiss, the action is moot and the preliminary injunction is not necessary. *See* doc. 112; *see also Troiano*, 382 F.3d at 1281-86; *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1334-35 (11th Cir. 2005); *Graham v. Butterworth*, 5 F.3d 496, 499-500 (11th Cir. 1993). And, as this Court has recognized, plaintiffs no longer have standing where "a decision in [their] favor would not bring [them] any relief." *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009).

II. The Weight of Authority Suggests That If the Court Is Inclined to Dissolve the Preliminary Injunction, It Should Enter an Order to That Effect So That the Eleventh Circuit May Remand the Case for That Purpose.

There is authority that suggests the Court may dissolve a preliminary injunction while the injunction is on appeal if there has been a change in circumstances. *See Decatur Liquors, Inc. v. District of Columbia*, 2005 WL 607881, *2 (D.D.C. March 16, 2005) ("The issue presented is whether a district court may properly entertain a motion to dissolve an interlocutory order that has been appealed. Absent a change in circumstances, the Court finds that it may not."). Absent a change in circumstances, the *Decatur Liquors* court held that the district court does not retain jurisdiction to dissolve a preliminary injunction simply because it is an interlocutory order. *See id.* at *3.

In any event, the case cited by the movant in *Decatur Liquors* held that the proper procedure is for the district court to indicate that it will grant the relief sought, and for the appellant to move the appellate court for a remand so that the district court may grant the relief. *See Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991). This procedure is consistent with Eleventh Circuit precedent. *See Wyatt by and through Rawlins v. Rogers*, 92 F.3d

1074, 1080, n. 14 (11th Cir. 1996) (district court stayed the preliminary injunction because it found the need for the preliminary injunction was moot, and it informed the court of appeals that upon remand it would dissolve the preliminary injunction).

This procedure is now embodied in Rule 62.1, Fed. R. Civ. P., which post-dates *Decatur Liquors, Hoai, and Wyatt*.³ The Rule provides that “[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending,” the district court may “(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” Rule 62.1(a), Fed. R. Civ. P. “The district court may decide the motion if the court of appeals remands for that purpose.” Rule 62.1(c), Fed. R. Civ. P.

Under Eleventh Circuit Rule 12.1-1(c), “[i]f the motion filed in the district court requests substantive relief from the order or judgment under appeal, such as a motion to modify a preliminary injunction . . . , the district court may consider whether to grant or deny the motion without obtaining a remand from [the court of appeals].” The district court may deny the motion without a remand. 11th Cir. R. 12.1-1(c)(1). “If the district court determines that the motion should be granted, the district court should enter an order stating that it intends to grant the motion if [the court of appeals] returns

³ “Experienced lawyers often refer to the suggestion for remand as an ‘indicative ruling.’” Rule 62.1, Fed. R. Civ. P., Committee Comments, 2009 Adoption.

jurisdiction to it.” 11th Cir. R. 12.1-1(c)(2). The Eleventh Circuit then may decide to remand the case for the district court to enter an order granting the motion. *Id.*⁴

III. Conclusion.

There is no need for the preliminary injunction for the same reasons the case is moot and due to be dismissed. If, however, the Court declines to dismiss the case but agrees that the preliminary injunction is no longer warranted, the Court should enter an order to that effect so that the Eleventh Circuit may remand the case for this Court to dissolve the preliminary injunction.

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⁴ Although the Court need not decide the question, it may be that the State Defendant’s reply brief that argued mootness (doc. 112) may be treated as a post-judgment motion, such as a Rule 52 motion, that, according to Rule 4(a)(4), Fed. R. App. P., “if filed within the relevant time limit, suspend[s] the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of.” Rule 62.1, Fed. R. Civ. P., Committee Comments, 2009 Adoption. *See also Benson v. Giant Food Stores, LLC*, 2011 WL 722256, *2 (E.D. Pa. Febr. 28, 2011) (citing same); *Travelers Cas. and Sur. Co. of America v. Thorington Elec. & Const. Co.*, 2010 WL 743138, *1 (M.D. Ala. March 1, 2010) (construing briefs as post-judgment motions).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th 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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