

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

CENTRAL ALABAMA FAIR  
HOUSING CENTER, et al.,

Plaintiffs,

v.

JULIE MAGEE, Revenue  
Commissioner for the State of Alabama,  
et al.,

Defendants.

CIVIL ACTION NUMBER:  
2:11-cv-00982-MHT-CSC

**STATE DEFENDANT'S REPLY PURSUANT TO ORDER**  
**DATED JANUARY 10, 2012 (DOC. 114)**

State Defendant, Commissioner Julie Magee, sued in her official capacity as Revenue Commissioner for the State of Alabama, submits this reply pursuant to the Order dated January 10, 2012 (doc. 114) directing the parties to further address mootness, and in response to Plaintiffs' Surreply/Response Brief (doc. 120).

Plaintiffs offer no evidence against mootness. Instead, they ask this Court to ignore the *Troiano*<sup>1</sup> presumption in favor of governmental entities, and to find that because Commissioner Magee could revert to the challenged policy, there is a reasonable chance she will. There is no case or controversy here. The Court should dismiss the case as moot.

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<sup>1</sup> *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276 (11th Cir. 2004).

# **I. Plaintiffs' Lawsuit Challenges a Policy That Has Been Repealed.**

It is undisputed that 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. Doc. 31, First Amended Complaint, ¶ 7. It is also undisputed that the Revenue Department no longer has such a policy. Doc. 101-1, Dec. 20, 2011 Memo. of Comm'r Magee (registration of and issuance of decals on manufactured homes pursuant to Alabama Code § 40-12-255 is no longer considered a "business transaction" for purposes of Section 30); doc. 120, Pl.'s Surreply/Response Brief, 2 (Plaintiffs "welcome Commissioner Magee's most recent announcement that she will not apply Section 30 against individuals seeking to comply with Section 40-12-255 of the Alabama Code..."); *id.* at 9 (Commissioner Magee's "change in policy is welcome..."). The policy has been repealed. *See id.*

Plaintiffs' recent response to this undisputed fact that moots the dispute is largely a rehash of their response to the motion to dismiss. *See* doc. 105, Pl.'s Response to Mot. to Dismiss; doc. 120. As the State Defendant explained in her reply to that brief, this case is very different from *Harrell v. Florida Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010). Doc. 112, Reply in Support of Mot. to Dismiss, 3-5. Unlike the governmental actors in *Harrell*, with a long history of changing their minds back-and-forth for several years, the Revenue Department here repealed the old policy as soon as it conducted a Department-wide review of transactions pursuant to the Attorney General's Guidance Letter 2011-02, and the Department disclosed that guidance as the basis for its decision in the December

20, 2011 Memorandum. Doc. 112 at 5-7; doc. 101-1; *compare Harrell*, 608 F.3d at 1267.

The guidance explains that “business transactions” under Section 30 are license-type transactions, involving “the issuance of official government documents or like items of similar formality granting authorization to engage in some activity.” Doc. 79-4, Attorney General’s Guidance Letter 2011-02, 5.

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; doc. 112 at 5-7. 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); doc. 112 at 5-7. 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; doc. 112 at 5-7. 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; doc. 112 at 5-7.

In their latest filing, Plaintiffs suggest that the State Defendant cannot benefit from the *Troiano* presumption because “Section 30 has been neither repealed nor amended.” Doc. 120 at 4. But Plaintiffs do not challenge Section 30 on its face. They challenge a particular defunct application of Section 30—the Revenue Department’s

former policy—that has been unambiguously terminated. Plaintiffs offer no authority to support their suggestion that the State Defendant’s termination is somehow due less deference because the challenged activity is a policy applying a particular statute rather than the statute itself. As the challenged statute was repealed in *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005), the challenged policy has been repealed here. *See* doc. 101-1.

In a footnote, Plaintiffs suggest that the repeal of the old policy is ambiguous because, as welcome as the Guidance Letter 2011-02 and the December 20, 2011 Memorandum may be, only a “court order” can bind State officials to follow the Attorney General’s guidance or the Revenue Department’s current policy. Doc. 120 at 7, n. 4. Plaintiffs do not cite authority for this proposition, other than to disagree with the State Defendant’s reading of *Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007). The State Defendant cited *Chapman* for the straightforward proposition that the positions the Attorney General takes in litigation are binding on State officials. Doc. 112 at 8; doc. 116, State Def.’s Resp. to Order Dated Jan. 10, 2012, 5. *Chapman* states plainly that when the Attorney General joined that case “he brought with him the construction and application of [the legal provision at issue] *advocated by the plaintiffs* and made it binding on the defendants,” who were the State officials in question. *Chapman*, 974 So. 2d 972 at 988 (emphasis in original).

The Attorney General offered this proposition in connection with the observation that, 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’ contention

that the case is not moot is that the Attorney General’s guidance is a sham. Doc. 112 at 8; doc. 101-1. The Attorney General responded by representing 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. Doc. 112 at 8.

Plaintiffs do not explain how State or local officials are free to ignore the legal interpretations of the State’s chief law officer or the executive directives of the State Revenue Commissioner. *Cf. Chapman*, 974 So. 2d at 988 (The Attorney General is the “chief law officer” of the State and has the “power to formulate legal policy” for the State, including “the power to bind [S]tate officers and departments in litigation.”) (internal quotation marks and citations omitted); Ala. Code § 40-2-11(1) (Revenue Department has the power “[t]o have and exercise general and complete supervision and control” of the assessment and collection of taxes “and of the enforcement of the tax laws of the [S]tate.”); Ala. Code § 40-2-40 (the Department’s powers are exercised by the Commissioner). Plaintiffs’ arguments certainly do not change the fact that, in this action, Plaintiffs have sued the Revenue Commissioner (not unnamed “Alabama officials”), taking issue with her Department’s policy, and this policy has been repealed. *Cf. doc. 120 at 7, n. 4.*

## **II. Plaintiffs’ Reliance on Pre-Troiano Case Law is Misplaced.**

Attempting to avoid the consequences of the undisputed repeal of the challenged policy, Plaintiffs ask this Court to ignore the *Troiano* presumption in favor of governmental entities. *See doc. 120 at 4-5.* Plaintiffs cite to four cases—*National*

*Association of Board of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011) (“NABP”); *Harrell*, 608 F.3d 1241, *Socialist Workers Party v. Leahy*, 145 F.3d 1240 (11th Cir. 1998), and *American Civil Liberties Union v. Florida Bar*, 999 F.2d 1486 (11th Cir. 1993) (“ACLU”).<sup>2</sup> Two of these cases—*Socialist Workers Party* and *ACLU*—predate *Troiano*, and therefore provide no guidance in construing it. In any event, they are distinguishable from this case.

*ACLU* was a pre-enforcement First Amendment challenge by a judicial candidate to “a provision of the Florida Code of Judicial Conduct that require[d] candidates for judicial office to ‘maintain the dignity appropriate to judicial office.’” *ACLU*, 999 F.2d at 1488 (citation omitted). The candidate wanted to speak publicly about his opponent’s criminal record. *Id.* The district court dismissed the action as moot, because two enforcement bodies—the Florida Bar and the Judicial Qualifications Commission—disavowed enforcement. *Id.* at 1494. The Eleventh Circuit reversed, noting that the Bar and the JQC were not bound by their court statements that the conduct provision as applied was unconstitutional, and noting that, with regard to the JQC, the Florida Supreme Court was actually the ultimate decision-maker in cases involving interpreting the Code of Judicial Conduct. *Id.* The Court held that because the Bar and the JQC “are not bound to their pronouncements in this case that the [conduct provision] does not apply to truthful campaign speech, a reasonable expectation exists that this wrong will be repeated.” *Id.* at 1495. However, the key fact on which the Court based its ruling was that the committee created to issue advisory opinions took the opposite position to that of

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<sup>2</sup> The State Defendant has already explained how *Harrell* is inapposite. *See supra*, 2-3; doc. 112.

the Bar and the JQC. The committee ruled that the judicial candidate's speech *was* prohibited by the conduct provision. *Id.* at 1489 ("After the Committee on Standards informed [the candidate] that his proposed campaign speech *would* violate Canon 7(B)(1)(a), and after the district court in the *Horn* case had enjoined the Bar and the JQC from enforcing Canon 7(B)(1)(c), [the candidate] asked the JQC whether it would enforce Canon 7(B)(1)(a) against him. The JQC refused to render an advisory opinion."); 1494 ("Although this may seem far fetched, consider the membership of the JQC – two judges of the district courts of appeal, two circuit judges, two county judges, to members of the Florida Bar, and five Florida residents not members of the Bar – is strikingly similar to the membership of the Committee on Standards on Conduct of Judges, the committee that issued the advisory opinion to [the candidate] that his proposed campaign speech *would* violate Canon 7(B)(1)(a).").

Here, there is no governmental entity taking the opposite position to that of the Department, and 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.

*Socialist Workers Party* followed *ACLU* and held that because a statute had been applied in the challenged manner by prior secretaries of state on three separate occasions over the course of several years, a credible threat of future enforcement existed. 145 F.3d at 1245-46. Indeed, the most significant occasion, according to the Court, was the application of the statute by the current defendant secretary of state "shortly *after* the district court had concluded that there was no actual 'case or controversy.'" *Id.* at 1246

(emphasis added). This case is different. The statute in question is new. The challenged application was short-lived. Once the Revenue Department conducted its Department-wide review of transactions it might consider “business transactions” under Section 30—pursuant to the Attorney General’s Guidance Letter 2011-02—the challenged application of Section 30 was unambiguously terminated.

### **III. Plaintiffs’ Reliance on *NABP* is Misplaced.**

Plaintiffs’ reliance on *NABP* is also misguided. As a preliminary matter, that case quoted the *Troiano* presumption directly, and also noted that “‘the Supreme Court has held almost uniformly that voluntary cessation [by a government defendant] moots the claim.’” *NABP*, 633 F.3d at 1310 (quoting *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 917 (11th Cir. 2009)) (collecting cases) (brackets in *NABP*). *See id.* at 1310 (quoting *Troiano*, 382 F.3d at 1285) (brackets in *NABP*) (“And ‘this Court ha[s] consistently held that a challenge to [government conduct] that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the [governmental conduct] will [resume] if the suit is terminated.’” ).

After reaffirming the *Troiano* presumption, *NABP* provided three factors to measure the sufficiency of the governmental actor’s termination: (1) whether the termination of the challenged conduct is unambiguous; (2) whether the change in government policy appears to be the result of substantial deliberation, or simply an attempt to manipulate jurisdiction; and (3) whether the new policy has been “consistently applied.” *Id.* at 1310.



Regarding the first factor, Plaintiffs offer nothing new. They continue to insist without any evidence that because Commissioner Magee could revert to the repealed policy if she wanted to, the termination of that policy is ambiguous. Doc. 120 at 7-8; *cf. Nat'l Adver. Co.*, 402 F.3d at 1334 (Plaintiffs bear “the burden of presenting affirmative evidence that [their] challenge is no longer moot. Mere speculation that the [Department] may return to its previous ways is no substitute for concrete evidence of secret intentions.”).

In a footnote, Plaintiffs suggest that local officials do not have to obey the Revenue Department’s policy as announced in Commissioner Magee’s December 20, 2011 Memorandum. Doc. 120 at 7, n. 4 (“Neither the Attorney General’s December 2, 2011 Guidance Letter nor Magee’s December 20, 2011 Memorandum have this binding effect on Alabama officials.”); *see also id.* at 13-14. Plaintiffs do not explain how local officials are free to ignore directives from the Executive Branch of State government, but, more to the point, Plaintiffs’ assertions do nothing to undermine the unambiguous nature of the termination of the old policy and the establishment of the new one. *See supra*, 4-5. Plaintiffs try to obscure this fact by asserting that the State Defendant’s policy change does not entail the conclusion that applying Section 30 in the challenged manner is “unlawful.” Doc. 120 at 8. But that is exactly the conclusion the policy change entails. The December 20, 2011 Memorandum states unequivocally that the Revenue Department “no longer consider[s]” registration 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. In other words, the Department considers the application of Section 30

in this instance to be “unlawful” pursuant to the terms of Section 30. And this conclusion is based on the Department-wide review of the Revenue Department’s transactions pursuant to the Attorney General’s Guidance Letter 2011-02. *Id.* The termination is unambiguous.

Regarding the second factor, Plaintiffs assert that the State Defendant has not explained the basis for the new policy. Doc. 120 at 9-11. As explained throughout this brief, the basis for the new policy is the Attorney General’s guidance, and a Department-wide review of transactions, pursuant to that guidance. *See also* doc. 112 at 5-11. The only post-guidance statement Plaintiffs criticize is the statement in court filings, three days after the guidance was issued, that the registration decals were more in the nature of licenses than registration requirements. Doc. 120 at 9; *see also* doc. 80, State Defendant’s Supp’l Brief in Opp. to Prelim. Inj., 12. This interpretation was simply a continuation of the interpretation in place since the beginning of the lawsuit. Once the Revenue Department conducted its Department-wide review of transactions it might consider “business transactions” under Section 30, pursuant to the Attorney General’s guidance, the challenged policy was unambiguously terminated. *See* doc. 101-1.

In an attempt to cast ambiguity on this good-faith deliberate policy change, Plaintiffs argue for the pre-Department-wide-review policy. Plaintiffs quote from the Guidance Letter, and assert that the manufactured home registration decals issued pursuant to Alabama Code § 40-12-255 are like licenses, and are subject to Section 30, because they “authorize” a person to own, maintain, or keep a manufactured home in Alabama. Doc. 120 at 10. As the December 20, 2011 Memorandum indicates, this

assertion is erroneous. The registration 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 Department’s substantial deliberation resulted in a better reading of Section 30 as applied to the registration of manufactured homes. Paying the registration fee and obtaining the decal which is “in lieu of ad valorem taxes” no more “authorizes” a person to own, maintain, or keep a manufactured home than paying one’s property taxes “authorizes” him or her to own the property in question. Plaintiffs’ attempt to create ambiguity based on pre-Department-wide-review court filings should be rejected.

Finally, with regard to the third factor, Plaintiffs simply misconstrue it. As the *NABP* Court explained, “we ask whether the government has ‘consistently applied’ a new policy or adhered to a new course of conduct.” 633 F.3d at 1310 (citation omitted). Plaintiffs do not allege that the Revenue Department has failed to consistently apply its new policy. Instead, Plaintiffs just revert back to their general complaint that the Department has changed its policy. Doc. 120 at 11-13. This is not evidence of ambiguity or bad faith. *See, e.g., 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).

**IV. Plaintiffs Ask for the Continuation of a Preliminary Injunction Based on Nothing More Than Speculation.**

The only allegations Plaintiffs make regarding the necessity of the preliminary injunction is that “it is highly likely that some putative class members have yet to renew their [2011] registrations,” and that “a putative class member who newly obtains possession of a manufactured home or brings an unregistered manufactured home into the State must register the home with the appropriate County official within 30 days.” Doc. 120 at 15. Plaintiffs offer no evidence in support of these allegations. Neither do Plaintiffs address the fact—other than admit its truth—that the registration deadline for this year is December 1, 2012. *See id.*, n. 9. Neither do Plaintiffs explain when or how the State Defendant will supposedly change her policy so as to potentially cause any harm at all. The need for a preliminary injunction is entirely speculative, and simply does not exist. Plaintiffs fail to meet their burden of showing imminent and irreparable harm.

**V. Plaintiffs Agree Regarding the Indicative Ruling Procedure for Dissolving a Preliminary Injunction on Appeal.**

Plaintiffs agree that the Court should make an indicative ruling so the Eleventh Circuit may remand the case for dissolution of the preliminary injunction, if the Court determines that a preliminary injunction is no longer warranted. Doc. 112 at 18-19 (“Accordingly, if the Court were to conclude that the preliminary injunction is no longer necessary, it should follow the course of action articulated in *Wyatt [by and through Rawlins v. Poundstone]*, 941 F. Supp. 1100, 1108 (M.D. Ala. 1996)].”); doc. 116 at 6-7 (noting that the *Wyatt* procedure is now embodied in Rule 62.1, Fed. R. Civ. P. and 11th

Cir. Rule 12.1-1). The State Defendant only responds to correct the Plaintiffs' misstatement that "Commissioner Magee did not file her reply brief within 28 days of the entry of the preliminary injunction." Doc. 120 at 18. The preliminary injunction was entered on December 12, 2011. *See* doc. 88. Commissioner Magee's reply in support of the motion to dismiss was filed 28 days later, on January 9, 2012. *See* doc. 112.

## **VI. Conclusion**

For these reasons, the case is moot and should be dismissed. If the Court declines to dismiss the case but determines that the preliminary injunction is no longer necessary, the Court should enter an order stating its intent to dissolve it so the Eleventh Circuit may remand the case for that purpose.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31st 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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