from whom the individual has sought assistance for the abuse.[34] HUD states that the written referral or observation need only include the minimum amount of information needed to document that the individual is fleeing or attempting to flee abuse or violence.[35] HUD does not expect the written referral to contain specific details about the incidents of abuse or violence.[36] ■

[34]*Id.* at 75,996-75,997.
[35]*Id.* at 75,997.
[36]*Id.*

Rural Housing Service Formally Clarifies Student Income Determinations

As reported in the *Housing Law Bulletin*, some Rural Development (RD) offices have been improperly following a 2007 directive regarding treatment of student income.[1] The 2007 unnumbered letter directed RD staff to treat the income of students receiving rental assistance in Rural Housing Service Section 514 and 515 housing in the same manner that the Department of Housing and Urban Development (HUD) treats the income of students in Section 8 housing. Rural Housing Service (RHS) Administrator Tammye Treviño advised National Housing Law Project staff that the 2007 unnumbered letter, which had expired, was not consistent with the law and would be revised.

On November 30, 2011, RHS issued a new unnumbered letter advising that local offices "should not include the full amount of student financial assistance paid directly to the student or educational institution when calculating a student's annual income for [multifamily housing] properties."[2] The unnumbered letter does not change the income calculation for students living in RHS housing who receive Section 8 assistance. Their income will continue to be calculated in the manner prescribed by HUD. ■

[1]NHLP, *Rural Housing Service Clarifies Student Income Determinations*, 41 Hous. L. Bull. 217, 217 (Sept. 2011).
[2]Unnumbered Letter, Student Income Eligibility for Rural Development Multi-family Properties (Nov. 30, 2011), *available at* http://www.rurdev.usda.gov/SupportDocuments/ulnovember11.pdf.

Court Enjoins Alabama's Anti-Immigrant Law as Applied to Mobile Home Ownership

U.S. District Court Judge Myron Thompson has enjoined state officials from enforcing one section of Alabama's comprehensive anti-immigrant law against families who live in mobile homes.[1] In issuing the preliminary injunction against the law as applied, the court relied on both federal preemption under the Supremacy Clause and the Fair Housing Act in finding that that plaintiffs had demonstrated a likelihood of success on the merits. As a result of this ruling, families lacking documented status may register and thus continue to reside in their mobile homes, at least until a final decision in the case.

Background

In June 2011, the Alabama legislature adopted HB 56,[2] which makes far-reaching changes in the relationships between undocumented persons and the state, as well as between undocumented persons and other individuals and businesses. Among many other provisions, the law prohibits undocumented persons from receiving any public benefits (including public college), makes it illegal for an undocumented person to seek or perform work or for anyone to rent accommodations to them, and voids certain contracts made by undocumented persons. One section—Section 30—prohibits business transactions between undocumented persons and state or local government. In the words of its sponsor, by making living in Alabama impossible, the law is designed to make undocumented immigrants "deport themselves."[3]

After enactment of the law, several lawsuits—including one by the United States—were filed raising facial challenges to its validity.[4] That litigation, filed in another district court, resulted in a preliminary injunction against several sections of the law, including the prohibition on renting housing to undocumented persons.[5] However, that litigation did not enjoin Section 30 of HB 56.[6]

[1]Cent. Alabama Fair Hous. Ctr. v. Magee, No. 11cv982, 2011 WL 6182334 (M.D. Ala. Dec. 12, 2011).
[2]HB 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, is codified at Ala. Code § 31-13-29 (Westlaw, Jan. 14, 2012).
[3]*Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *2.
[4]Individual plaintiffs, religious leaders, and several advocacy groups, including the Hispanic Interest Coalition of Alabama, the National Immigration Law Center, the Mexican American Legal Defense and Educational Fund, and the American Civil Liberties Union, filed suits. Hispanic Interest Coal. of Ala. v. Bentley, No. 11cv2484 (N.D. Ala. July 1, 2011); Parsley v. Bentley, No. 11cv2736 (N.D. Ala. Aug. 1, 2011). The United States also challenged HB 56. United States v. Alabama, No. 11cv2746 (N.D. Ala. Aug. 1, 2011).
[5]Hispanic Interest Coal. of Ala. v. Bentley, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011); United States v. Alabama, 2011 WL 4469941, at *44-*45 (N.D. Ala. Sept. 28, 2011).
[6]*United States v. Alabama*, 2011 WL 4469941, at *59-60. Both the private

Section 30 imposes criminal penalties against any individual who enters into, or attempts to enter into, a "business transaction" with the state or a political subdivision without proof of U.S. citizenship or lawful immigration status. A person who violates such a provision can be convicted of a Class C felony and imprisoned for up to 10 years.[7]

Another provision of state law requires owners of mobile homes situated in mobile home parks to pay, in lieu of property taxes, an annual registration fee to obtain an identification decal that must be visibly displayed on the exterior of their manufactured home.[8] Civil and criminal penalties exist for noncompliance.[9]

The enforcement of Section 30 by state and county officials charged with issuing annual registration tags to mobile home owners would have left undocumented immigrants in an impossible position: attempt to renew the registration tags needed and risk being charged with a felony under HB 56, or refrain from renewing before the deadline and risk other civil and criminal penalties.

The Litigation

Facing the November 30 deadline for delinquent registrations, a team of civil rights lawyers—Relman, Dane & Colfax, the Southern Poverty Law Center, the National Immigration Law Center, the ACLU Immigrants' Rights Project, and LatinoJustice—filed a class action suit on November 18. The action was filed on behalf of three Alabama fair housing groups, two individual plaintiffs (noncitizens with citizen children), and a class of victims, alleging that Section 30 violated the Fair Housing Act (FHA) and the Supremacy and Due Process clauses of the U.S. Constitution. The FHA claim was based upon both intentional and disparate impact liability.

On November 23, after taking testimony, the court issued the preliminary injunction prohibiting Alabama officials from enforcing Section 30 against families who live in mobile homes. Two weeks later, the court issued an extensive opinion, finding a substantial likelihood of success on the plaintiffs' claims that enforcement of Section 30, as applied to individuals seeking to renew their mobile home registrations, intentionally discriminates against and has an unlawful disparate impact on Latinos, in violation of the FHA. The court also found a substantial likelihood of success on the plaintiffs' federal preemption claims and that the plaintiffs would suffer irreparable harm, absent an injunction.

The Court's Analysis

The court first analyzed whether Section 30 of the law regulating "business transactions" with the state actually covered mobile home registrations. Based on the state's position in this litigation, which apparently differed from that in the other cases,[10] the court found it undisputed that the state now interpreted Section 30's prohibition to cover paying registration fees and obtaining moving permits under state law. Individuals who cannot verify their citizenship or lawful residency are precluded from registering their manufactured homes, and therefore cannot legally move them. Such an as-applied challenge thus presented claims distinctly different from the facial claims to the law being litigated in the other cases. In the court's words:

> Taken together, therefore, the court finds that the application of § 30 of HB 56 [the business transactions prohibition] to § 40-12-255 [the mobile home registration and permit requirements] puts aliens who are unable to verify their lawful residency between a rock and a hard place: they face civil and criminal liability for not paying their manufactured home tax, while simultaneously facing civil and criminal liability if they attempt to remove their homes from the State. They can neither stay, nor can they go. In addition, even attempting to pay the registration fee without verification of lawful residence amounts to a felony. This is not mere speculation…. [W]hen § 30 of HB 56 is applied to § 40–12–255, "the individual Plaintiffs cannot continue living in Alabama in manufactured homes they own and maintain on certain property without violating either Section 30 or Ala.Code § 40-12-255 or causing others to violate Section 30."[11]

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parties and the United States sought a stay of enforcement pending the outcome of their appeal for the non-enjoined sections of HB 56. Although the Eleventh Circuit granted in part and denied in part the stay, *United States v. Alabama*, 2011 WL 4863957, at *6 (11th Cir. Oct. 14, 2011), Section 30 was not stayed pending appeal and remained in effect.

[7]*Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *2 (citing 1975 Ala. Code § 13A-5-6(a)(3)).

[8]1975 Ala.Code § 40-12-255(a).

[9]The registration and fee are delinquent if not paid by November 30, at which point a noncompliant owner of a manufactured home can be given a civil fine or face criminal charges for a Class C misdemeanor, punishable up to three months in jail. *Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *2 (citing 1975 Ala. Code § 13A-5-7(a)(3)). In addition, state law requires that the owner obtain a permit "to move said manufactured home on the highways of Alabama," and a current registration is required to obtain the moving permit. 1975 Ala. Code § 40-12-255(j).

[10]In another case, based upon the state's claim that covered "business transactions" did not include payment of property taxes or court fees, that court interpreted Section 30 narrowly and found that it prohibited only "transactions" involving the issuances of a number of licenses, including licenses to drivers, businesses, professionals, hospitals and daycare facilities. *United States v. Alabama*, 2011 WL 4469941, at *60. Because that court expressly found that "the term 'business transactions' does not reach registration requirements," it had "no need to decide whether prohibiting unlawfully-present aliens from complying with state and local government registration laws is prohibited." *Id.* at *59 n.25.

[11]*Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *3 (citing the state's Proposed Facts).

Federal Preemption Claims

Commencing its preliminary injunction analysis under the applicable Eleventh Circuit standard, the court focused on the plaintiffs' likelihood of success on the merits, initially with respect to the federal preemption claims. Here, the court found support in the unanimous holdings of all the recent cases that have evaluated the legality of state or local restrictions conditioning housing on lawful immigration status.[12] The plaintiffs' first preemption claim was that applying Section 30 to Alabama's manufactured home registration requirements constitutes an impermissible "regulation of immigration," exclusively a federal power. The court stated:

> The crux of the issue here is whether § 30 of HB 56, as applied to § 40-12–55, is preempted as a "regulation of immigration" because it "alters the conditions" under which an alien "may remain" in Alabama. It appears to do just that. By effectively barring undocumented immigrants from owning an entire class of dwellings, the statute goes to the very core of an immigrant's residency. Unlike laws related to the employment of undocumented or unauthorized aliens, which fall under States' traditional police powers…, this case is about an immigrant's residence, which the State has no power to regulate.[13]

For this conclusion, the court relied primarily on *Farmers Branch* and *Lozano*, which invalidated restrictions on rental property. The court rejected the state's claim that Alabama's law was merely a restriction on owning a mobile home, not a total ban on housing for undocumented persons, instead favoring a more practical analysis:

> The next case is unknown, but this sort of incremental intrusion is precisely how the slippery-slope toward an actual all-out ban for undocumented immigrant residency works…. These "auxiliary burdens," as seen from the shift between rental in prior cases to actual ownership here, is why the court's perspective is not only Alabama's law. If Alabama "can regulate as it has here, then so could every state or locality."[14]

The court also found that Section 30 was preempted because it conflicted with the objectives of federal immigration law. The state law created two impermissible obstacles to federal policy, by regulating an immigrant's residency and by imposing an impermissible verification scheme. Essentially, the court characterized the state law as seeking to deny housing in order to effectuate the removal of undocumented persons against whom the federal government has not initiated removal proceedings. Moreover, it noted that some undocumented persons have federally protected status. Although the state law also relies on federal verification procedures, those procedures alone are inadequate to finally determine which undocumented persons will ultimately be entitled to retain lawful residence, because of discretionary federal powers to grant relief from deportation. Because undocumented status does not alone determine deportability, the court determined that the state's inference of an unalterable connection between the two conflicts with federal immigration policy. On preemption, the court concluded:

> [T]hrough the creation of a residency regulation for unauthorized aliens, Alabama has usurped federal control over immigration policy. Whether this incursion is labeled express or conflict preemption, the plaintiffs have established by a substantial likelihood that it is void under the Supremacy Clause.[15]

Fair Housing Act (FHA) Claims

The court then turned to the plaintiffs' claims under the FHA,[16] which asserted that application of Section 30 to the mobile home registration statute violates both subparts (a) and (b) of Section 3604 of the FHA. There was no dispute that, as applied to the registration statute, Section 30 effectively "makes unavailable" a manufactured home and changes the terms or conditions of residing in a manufactured home by conditioning residence on a demonstration of lawful presence in the United States. The initial disputed fair housing issue concerned whether the state law discriminated on the basis of race or national origin. The plaintiffs asserted discrimination against Latinos. The state contended that its law has nothing to do with race or national origin, but only lawful immigration status, outside of the FHA's coverage. The court's analysis determined that the plaintiffs amply demonstrated such discrimination.

The plaintiffs alleged both intentional and disparate impact discrimination against Latinos, thereby implicating the state's motivation for the law. The plaintiffs' claim of intentional discrimination against Latinos required proof that race or national origin played a role in the passage

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[12] *Id.* at *5 (citing Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); United States v. Alabama, 2011 WL 4469941 (N.D. Ala. 2011); Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010); Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1056-57 (S.D. Cal. 2006). Although the Supreme Court remanded *Lozano* for reconsideration in light of its decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), which addressed an Arizona statute sanctioning employers that hire undocumented workers, the district court nevertheless found that *Lozano*'s housing analysis remained sound and persuasive.

[13] *Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *8.

[14] *Id.* at *9-*10 (citing *Lozano*, 620 F.3d at 221).

[15] *Id.* at *13.

[16] 42 U.S.C. §§ 3601 *et seq.* (Westlaw Jan 14, 2012).

of HB 56.[17] Under applicable precedent, race need only be a motivating factor, as shown through direct or circumstantial evidence, using a five-factor analysis: the effect of the bill, its historical background, the sequence of events leading up to its enactment, its substantive departures from established policies, and the contemporaneous statements of legislators. The court concluded that, while concern about illegal immigration was clearly a substantial factor behind the passage of HB 56, there was substantial evidence that race and national origin also played a role. The court found persuasive support for its preliminary conclusion of intentional discrimination in the following factors: the statute's disproportionate effect on Latinos; the departure from the state's normal solicitude for minors in punishing children (who may well be citizens) for the status of their parents;[18] and the conflation of Latino and undocumented status by many legislators in the debates preceding passage.

Turning to the plaintiffs' disparate impact claim,[19] the court evaluated the prima facie showing of discriminatory effect—here, that the application of Section 30 to the registration requirements makes housing options significantly more restrictive for Latinos than for others. The initial subset of the population affected is owners of manufactured homes (and their children) who, but for the challenged policy, would pay and register their mobile homes—i.e., noncitizens. In Alabama, that group is overwhelmingly and disproportionately Latino.[20] The court concluded:

> Since Latinos are more likely to reside in mobile homes than are other racial groups, they will bear a disproportionate burden from any regulation targeting mobile home residents. Section 30's application to Alabama's manufactured homes statute therefore targets two groups that are disproportionately Latino: noncitizens residing in Alabama and residents of mobile homes. Doing so creates a severe and disproportionate effect on Alabama's Latino population.[21]

In response to the state's assertion that the statistics are misleading because targeting undocumented persons would always disproportionately impact foreign-born, the court responded by pointing out that the prima facie case is only the first analytical step in establishing liability. A challenged policy with such an impact may subsequently be upheld after a more searching inquiry. However, under the four-factor inquiry used by many courts, including those in the Eleventh Circuit,[22] the court found that each factor favored plaintiffs: (1) the challenged policy has a dramatic disparate impact; (2) the plaintiffs have provided substantial evidence of discriminatory intent; (3) the state has exceeded its authority in attempting to regulate immigration, an improper state interest; and (4) the plaintiffs ask only to pay their registration fees, not for the state to provide housing.[23]

Preliminary Injunction Analysis

The last phase of the preliminary injunction analysis required the plaintiffs to show that they would be subject to irreparable harm, that the balance of hardships favored granting the injunction, and that issuance of the injunction would not be adverse to the public interest.[24] The court found irreparable harm not only flowing presumptively from housing discrimination, but also because the policy would have an especially destructive and irreparable impact on the plaintiffs' ownership interest in their mobile homes. The court added yet another reason: "[I]ndividual plaintiffs will face a dilemma of either abandoning their homes or deciding to commit crimes, and this court lacks the remedial tools to undo the full effect and consequences of either choice."[25] Concluding its analysis, the court found that the balance of hardships and public interest factors also favored the plaintiffs' request.

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[17] *Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *14. In making this determination, the Eleventh Circuit has followed the factors outlined in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), an equal protection case. *See* Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1283-84 (11th Cir. 2006).

[18] The court stated, "Moreover, that HB 56's treatment of children in mixed status families, who are overwhelmingly Latino, is so markedly different from the State's historical treatment of children in general suggests strongly that the difference in treatment was driven by animus against Latinos in general and thus that the statute was discriminatorily based." *Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *19.

[19] The Supreme Court recently issued certiorari in a case that will examine whether disparate impact theory is in fact available under the FHA and, if so, what analysis should apply. *See* Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, __ U.S.L.W.__ (U.S. Nov. 7, 2011) (No. 10-1032). Additionally, the Department of Housing and Urban Development (HUD) has published proposed regulations implementing disparate impact theory under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

[20] The court cited the following statistics: "While Latinos make up only 3.7% of the State's population, they constitute 64.8% of non-citizens residing in Alabama. Moreover, while only 13.5% of Alabamians live in mobile homes, roughly 27.6% of Latinos do so (compared to 14.6% of whites, 10.2% of Blacks, and 3.2% of Asians). Put another way, while Latinos make up only about 3.7% of the State's population, they constitute nearly 7% of those living in mobile homes." *Id.* at *24.

[21] *Id.*

[22] Although there is apparently no Eleventh Circuit decision on this point, cases cite *United States v. Housing Authority of City of Chickasaw,* 504 F. Supp. 716, 727 (S.D. Ala. 1980), which employed the following four-factor test: (1) the magnitude of the discriminatory effect; (2) whether there is any evidence of discriminatory intent; (3) the defendant's interest in taking the complained-of action; and (4) whether the plaintiffs sought to compel the defendant affirmatively to provide housing for members of a protected class or merely restrain the defendant from interfering with individual property owners who wish to provide such housing. *Cent. Alabama Fair Hous. Ctr.*, 2011 WL 6182334, at *23.

[23] *Id.* at *25-*26.

[24] *Id.* at *26.

[25] *Id.* at *27.

Accordingly, the court enjoined Alabama's revenue commissioner, a Montgomery County official, and all those acting in concert with them from: (1) requiring any person who attempts to pay the annual mobile home registration fee to provide documentation of citizenship or lawful immigration status; and (2) refusing to issue manufactured home decals to any person because that person cannot prove citizenship or lawful immigration status. The court further declared that it is not a criminal violation of Section 30 for an individual to apply for and obtain a registration decal without providing proof of citizenship or lawful immigration status. The court also ordered the revenue commissioner immediately to notify all other responsible county officials of the preliminary injunction.

Subsequent to the ruling, presumably acting upon advice about the scope of covered "business transactions" under Section 30, the state revenue commissioner has issued a revised policy[26] stating that proof of residency is no longer required for registering and issuing decals on mobile homes, applying for homestead exemptions on property, applying for current use valuation on property or issuing titles on motor vehicles or mobile homes. The policy also states that no proof of residency is required for an application for any exemption on property or abatement on property taxes, tax sale of property for failure to pay property taxes, and redemption of property sold for nonpayment of property taxes.

Further proceedings in the case remain pending. ■

[26]Memorandum from Julie P. Magee, Commissioner, to County Probate Judges, et al. (Dec. 20, 2011), http://www.ador.alabama.gov/documents/immigration_memo_magee_revisedinstructions_12202011.pdf.

Court: Sex Offender Registration Requirement Is Not a Basis for Voucher Termination*

In 1998, Congress enacted provisions barring sex offenders who are subject to lifetime registration obligations under state law from admission into federally assisted housing.[1] Consequently, some public housing agencies (PHAs) have asserted that they are required to terminate a participant's Section 8 voucher assistance if the PHA learns the participant is a lifetime sex offender registrant. When reviewing these PHA decisions, advocates should carefully analyze the facts and law, as demonstrated by a Missouri federal court decision. In *Perkins-Bey v. Housing Authority of St. Louis County*, the district court granted a voucher participant's motion for preliminary injunction, finding a great likelihood that the PHA "violated his rights by discontinuing his Section 8 housing subsidy on the basis that he is required to register as a sex offender."[2] At issue was whether the participant violated his family obligations[3] through his lifetime registration as a sex offender.

Background

Nearly 37 years ago, a Missouri court convicted Alton Perkins-Bey of two counts of rape. He served approximately 14 years in prison, was released and is currently on parole until 2049.[4] In 2004, Perkins-Bey applied for Section 8 voucher assistance with the Housing Authority of St. Louis County (HASLC). After a lengthy wait, he was contacted by HASLC in 2008. Perkins-Bey completed an updated application and signed a form authorizing HASLC to perform a criminal background check.[5] HASLC approved Perkins-Bey for a voucher. He located a unit and was admitted to the voucher program in January 2009.[6]

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[1]Quality Housing and Work Responsibility Act (QHWRA), codified at 42 U.S.C. §§ 13661-13664 (Westlaw January 19, 2012).

[2]Perkins-Bey v. Hous. Auth. of St. Louis County, 2011 U.S. Dist. LEXIS 25438 (E.D. Mo. Mar. 14, 2011). LSEM represented Perkins-Bey.

[3]*See* 24 C.F.R. § 982.551 (2011).

[4]*Perkins-Bey*, 2011 U.S. Dist. LEXIS 25438, at *1.

[5]*Id.* at *1-2. The results of any background check performed in 2008 are unknown, as the documents were destroyed by HASLC in accordance with its Administrative Plan.

[6]*Id*. "Admission" is the point when the family becomes a "participant" in the program. *See* 24 C.F.R. § 982.4(b) (2011). HUD regulations distinguish between an "applicant" and a "participant." An "applicant" is a "family that has applied for admission to a program but is not yet a participant in the program." A "participant" is a "family that has been admitted to the PHA program and is currently assisted in the program. The family becomes a participant on the effective date of the first [Housing Assistance Payments] contract executed by the PHA for the family (first day of initial lease term)." *Id.*