11-16114-CC

United States Court of Appeals for the Eleventh Circuit

JULIE MAGEE, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF REVENUE FOR THE STATE OF ALABAMA,
Defendant- Appellant,

v.

CENTRAL ALABAMA FAIR HOUSING CENTER, *ET AL.*,
Plaintiffs-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, CIVIL ACTION NO. 2:11-0982-MHT, HON. MYRON H. THOMPSON

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLANT IN SUPPORT OF REVERSAL

Lawrence J. Joseph
D.C. Bar No. 464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Magee v. Central Alabama Fair Housing Ctr, No. 11-16114-CC

The undersigned counsel hereby certifies, pursuant to 11th Cir. R. 26.1-1, that – in addition to those previously identified as having an interest in the outcome of this case – the following additional persons have such an interest:

Immigration Reform Law Institute, *amicus curiae* ("IRLI");

John J. Park, Jr., counsel for *amicus curiae* IRLI;

Eagle Forum Education & Legal Defense Fund, *amicus curiae* ("Eagle Forum"); and

Lawrence John Joseph, Counsel for *amicus curiae* Eagle Forum.

Pursuant to FED. R. APP. P. 26.1, *amicus curiae* Eagle Forum makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 16, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
D.C. Bar #464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether Plaintiffs have standing to assert claims that extend beyond the injuries suffered by the sole individual Plaintiff.

2. Whether the Plaintiff associations have standing.

3. Whether the presumption against preemption applies.

4. Whether Plaintiffs are likely to prevail on the merits that federal immigration law or housing law preempts Alabama law.

5. Whether Plaintiffs are likely to prevail on their discrimination-based claims.

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief with the consent of all the parties.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. Finally, the members of Eagle Forum's Alabama chapter face elevated tax and other burdens that the challenged Alabama law seeks to redress. For these reasons, Eagle Forum has a direct and vital interest in the issues presented here.

---

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

STATEMENT OF THE CASE

Because the various plaintiffs-appellees (collectively, "Plaintiffs") have brought an as-applied challenge to the interplay between §30 of Alabama Act 2011-535 (hereinafter, "HB56") and ALA. CODE §40-12-255, the result here may differ from the facial challenges to HB56 pending before this Court:[2] "[t]hat the regulation may be invalid as applied… does not mean that the regulation is facially invalid" and vice versa. *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). For the reasons stated herein and in Alabama's brief, federal law does not preempt §30 as applied to §40-12-255.

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd

---

[2] Two cases pending before this Court concern HB56's facial preemption by federal immigration law. *U.S. v. Alabama,* Nos. 11-14532-CC & 11-14674-CC (11th Cir.); *Hispanic Interest Coalition of Ala., v. Bentley,* Nos. 11-14535-CC and 11-14675-CC (11th Cir.).

if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.,* 523 U.S. at 94 (interior quotations omitted).

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Courts rely on two presumptions to assess preemption claims. First, the analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Statutory Background

The federal Immigration and Naturalization Act ("INA") includes various roles for state and local immigration enforcement. *See, e.g.,* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements for state or local government to communicate with, or report to, the federal government regarding illegal aliens and "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §1373.

The Fair Housing Act, 42 U.S.C. §§3601-3631 ("FHA"), prohibits various "discriminatory housing practices" based on race, color, religion, sex, familial status, national origin, and handicap in covered forms of housing. *See* 42 U.S.C. §3603 (outlining FHA's coverage). In addition to

providing a private cause of action against those "persons"[3] who violate FHA's requirements, 42 U.S.C. §3613, FHA also preempts state and local laws that require or permit "discriminatory housing practices" under FHA. 42 U.S.C. §3615.

Section 30 makes it a state-law crime for illegal aliens – or those acting on their behalf – to enter into a "business transaction" with state or local government. ALA. CODE §31-13-29. In addition, Alabama's law on manufactured homes (*i.e.,* mobile homes) requires private owners to register their home, pay a fee "in lieu of the *ad valorem* taxes" that the owner otherwise would owe, and obtain a decal. ALA. CODE §40-12-255. Plaintiffs allege that, taken together, these two provisions simultaneously require and prohibit illegal aliens' obtaining the decal, in violation of the Supremacy Clause, federal immigration law, FHA, and the Fourteenth Amendment.

SUMMARY OF ARGUMENT

At least with respect to injuries not personally suffered by the sole

---

[3] FHA defines "person" to "include[] one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries." 42 U.S.C. §3602(d).

individual Doe plaintiff, Plaintiffs lack standing to challenge §30's application to situations that do not injure Plaintiffs (Sections I.A). The Plaintiff associations cannot establish standing for their self-inflicted injuries of allocating funds to counteract HB56 (Section I.B).

On the merits, the presumption against preemption protects Alabama's licensing and taxing of manufactured homes from federal preemption (Section II.A). Federal immigration law does not preempt Alabama law, which expressly tracks INA's federal standards (Sections II.B). FHA does not itself provide a cause of action against a state (Section II.C), and FHA's preemption of state law is limited to intentional discrimination (Section II.C.2). Proposed federal guidance does not warrant deference, both because it is merely a proposal and because it cannot convert an intentional-discrimination statute into a disparate-impact statute (Section II.C.1). Finally, because Plaintiffs have not established discrimination under either an intentional-discrimination standard (Section II.C.3) or a disparate-impact standard (Section II.C.4), Plaintiffs cannot prevail.

ARGUMENT

I. PLAINTIFFS LACK STANDING FOR CLAIMS OVER FEDERALLY AUTHORIZED ILLEGAL ALIENS

Although the district court did not address it, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). The individual Doe Plaintiff who remains in the litigation may have standing for his or her own injuries, but that standing cannot extend to illegal aliens who are differently situated. As to the Plaintiff associations, they lack standing altogether. To the extent that Plaintiffs here lack standing to pursue some of their claims, they cannot pursue relief on those claims: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). To the extent that Plaintiffs lacks standing for even some of the relief requested, this Court must trim the injunctive relief to match Plaintiffs' standing.

Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). In addition, courts have erected prudential standing concerns, including that the "plaintiff's complaint [must] fall within the zone of interests to

be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (interior quotations omitted). For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)).

A. The Doe Plaintiff Lacks Standing for Claims over Federally Authorized Illegal Aliens

In its preemption analysis, the district court discusses the plight of illegal aliens who have established "temporary protective status" ("TPS") from the federal government, Slip Op. at 49, and argues that – as to these illegal aliens – "Alabama's policy of encouraging self-deportation serves as an obstacle to federal policy." *Id.* (interior quotations omitted). Nothing establishes that the Doe Plaintiff has TPS status. Consequently, he or she lacks standing to litigate the plight of

illegal aliens with TPS status.[4]

B. Plaintiff Associations' General Interest in Immigration Cannot Manufacture Standing

For their part, the Plaintiff associations lack standing for *any* claims. Plaintiffs cannot establish standing through self-inflicted injuries, such as their devoting resources to counteracting HB56. *Pevsner v. Eastern Air Lines, Inc.,* 493 F.2d 916, 917-18 (5th Cir. 1974); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). Unless Plaintiffs have a legally protected right to avoid the effort in question, Plaintiffs' voluntary counseling or advocacy on HB56 cannot establish standing.

Presumably relying on *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378-79 (1982), and its Circuit progeny in voting-related cases, the Plaintiff associations might argue for standing based on HB56's "forcing the organization to divert resources to counteract [HB56]." *Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350 (11th Cir. 2009). If made, this argument would overstate the scope of *Havens* standing.

As this Circuit recognized, the "precise issue in *Havens* was

---

[4] Because §30 relies on federal standards to determine an alien's immigration status, ALA. CODE §31-13-29(c), it is unclear how *any* alien could suffer this injury. The relevant question, however, is whether the plaintiffs here would suffer the injury.

whether the organizational plaintiff had statutory standing to sue under section 812 of the Fair Housing Act." *Florida State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1165 n.14 (11th Cir. 2008). That statute created a right – applicable to individuals *and associations* – to truthful, non-discriminatory information about housing:

> Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because the *Havens* statute "extend[ed] to the full limits of Art. III, the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact." *Browning,* 522 F.3d at 1165 (*citing Havens,* 455 U.S. at 372) (interior quotations omitted).[5] The Plaintiff associations here lack

[5] FHA's statutory causes of action extend standing to the fullest limits of Article III (*i.e.,* preclude judicial doctrines that prudentially limit standing). *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91,

several critical elements of *Havens*.

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to the truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing. *Warth,* 422 U.S. at 514 ("Congress may create a statutory right … the alleged deprivation of which can confer standing"). The Plaintiff associations have no claim to any rights whatsoever under INA. Even under the Fair Housing Act, the violations alleged here fall outside of the informational right at issue in *Havens*.

Second, and related to the first issue, the injury that the Plaintiff associations claim must align with the other components of their standing, *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). Unlike in *Havens,* nothing in INA even *remotely* relates to the Plaintiff associations' spending. Even the Fair

---

108-09 (1979); *Havens,* 455 U.S. at 372. As explained in Section II.C, *infra,* Plaintiffs here are not suing under an FHA cause of action.

Housing Act does not designate these associations as guardians of illegal aliens for purposes of injuries suffered *by illegal aliens*.

Third, the FHA provisions at issue in *Havens* statutorily eliminated prudential standing. Here, the Plaintiff associations have no claim whatsoever that INA eliminates prudential standing doctrines, and it is fanciful to suggest that INA puts the Plaintiff associations and their private spending in INA's zone of interests or enables these organizations to enforce the INA rights (if any) of third parties. *Coyne v. American Tobacco Co.,* 183 F.3d 488, 494 (6th Cir.1999) ("in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the statute in question"). Similarly, except as specifically provided for in the Fair Housing Act – as with access to information in *Havens,* for example – public-interest groups do not have statutory rights *of their own* that fall within FHA's zone of interests.

At bottom, the Plaintiff associations' diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton,* 405 U.S.

727, 739 (1972) (organizations lack standing to defend "abstract social interests"); *Nat'l Taxpayers Union, Inc. v. U.S.,* 68 F.3d 1428, 1433-34 (D.C. Cir. 1995) (same). *Havens* did not – and *could not* – eviscerate Article III. Instead, FHA pared back prudential standing for FHA information claims, which is simply inapposite here.

II. PLAINTIFFS CANNOT PREVAIL ON THE MERITS

After establishing the relevant rules of statutory construction, *amicus* Eagle Forum demonstrates that Plaintiffs cannot prevail on their preemption claims under any theory of federal preemption.

A. The Presumption against Preemption Applies

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Santa Fe Elevator,* 331 U.S. at 230. When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Here, the district court avoided the presumption "[b]ecause the verification of lawful immigration status and setting residency requirements for aliens are areas where the federal government, not the States, has traditionally held the reins." Slip Op. at 25 n.6. That is a *non sequitur*. First, HB56 relies on the *federal* test to determine immigration status, so *no*

presumption and no preemption is even relevant there. Second, §30 – the provision at issue here – concerns licensing or taxing of real property, an area in which states have "traditionally held the reins." For all but the wealthiest, the ability to work for pay is even more central to residency than the ability to own a home. Since the presumption against preemption applies to the former (*i.e.,* employment), *DeCanas v. Bica,* 424 U.S. 351, 357-58 (1976), it plainly applies here.

Even if a court finds that Congress expressly preempted *some* state or local action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3

(2009) (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

As signaled above, HB56 intersects with several areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, and the state fisc. *DeCanas,* 424 U.S. at 354-55. The authority to combat illegality is central to the states' traditional police power: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (holding that the states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs' view would deny Alabama the "right to protect itself" against the unlawful taking up of residency and all of the resulting ills. The lawlessness that follows is predictable and, if a community's "right to protect itself" is recognized, entirely preventable.

The extra-circuit and district-court decisions cited by the district court cannot displace the requirement of clear and manifest congressional intent before this Court can find preemption of Alabama's police power.[6] *Santa Fe Elevator,* 331 U.S. at 230. As explained below, that argument is fanciful under federal immigration law and misplaced under federal housing law.

B. Federal Immigration Law Does Not Preempt §30

Nothing in INA expressly preempts state and local enforcement. Quite the contrary, INA preserves state and local authority in several savings clauses. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c).

---

[6] Plaintiffs cannot rely on decisions under the National Labor Relations Act ("NLRA") to address the presumption against preemption. Contrary to the presumption *against* preemption at issue here, NLRA cases rely on "a presumption *of federal pre-emption*" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54,* 468 U.S. 491, 502 (1984) (emphasis added). To invoke NLRB cases would "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* (emphasis added). While Congress undoubtedly *could have* written immigration or housing law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). This Court cannot saddle Alabama with NLRA-style preemption.

To prevail, Plaintiffs require conflict or field preemption. Before addressing those two possibilities however, *amicus* Eagle Forum first addresses three background issues that distinguish several of the arguments that Plaintiffs and the district court made below.

The district court cited *DeCanas,* 424 U.S. at 354-55, for the obvious point that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." Slip Op. at 35. That is as undeniably true as it is undeniably irrelevant. The question is not whether Congress *could have* preempted HB56. The question is *whether* Congress *did* preempt HB56.

On that question, moreover, citing cases that found states preempted from regulating *legal* aliens is – while perhaps not always entirely *irrelevant* – not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler v. Doe,* 457 U.S. 202, 223 (1982). Similarly, citing decisions that discuss states' authority to regulate *immigration* also is not very compelling because the states retain authority with respect to illegal aliens within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. In any event, HB56 simply does not regulate "immigration" in the sense of "determin[ing] who should or should not be admitted into the country." *DeCanas,* 424 U.S. at 355. While it may discourage illegal aliens from remaining *in Alabama,* HB56 is indifferent to their relocating *within the U.S.*

1. INA Does Not Conflict Preempt §30

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal immigration law and HB56, Plaintiffs necessarily invoke the "prevent-or-frustrate" prong.

Amicus Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with

broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring). The conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted).

Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous

advantages." *Wyeth,* 555 U.S. at 583 (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to "prevent-or-frustration" preemption, Plaintiffs cannot conflate federal administrative inaction with *congressional* intent. Even if INA did not save state and local enforcement authority, the Executive's non-enforcement could not preempt state and local enforcement. *Cf. Wyeth,* 555 U.S. at 576-81 (*Federal Register* preamble statement cannot preempt state law).

In any event, HB56 tracks the federal guidelines for determining immigration status. ALA. CODE §31-13-29(c). Indeed, Congress itself authorized states to make inquiries to the federal government on that very question. 8 U.S.C. §§1357(g)(10), 1373(a)-(c). Moreover, applying those congressionally authorized inquires cannot frustrate

congressional purpose in INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Whiting,* 131 S.Ct. at 1981 (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of traditional state and local concern, Plaintiffs' arguments do not rise to the level of preemption.

2. INA Does Not Field Preempt §30

Given its numerous clauses that *save* state and local authority over immigration-related enforcement, *see, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), INA cannot *field preempt* state and local involvement. Plaintiffs would be not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier,* 529 U.S. at 881, INA does not do so.

To foreclose state and local regulation, courts require that

Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 552 U.S. 364, 367-68, 373 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). In place of an ostensibly door-shutting congressional determination, however, INA includes door-opening savings clauses. If INA does not conflict preempt HB56, INA plainly does not field preempt it, either.[7]

C. Federal Housing Law Does Not Preempt §30

Plaintiffs' challenge to §30 under the Fair Housing Act is simply a preemption challenge on other grounds. While FHA provides a cause of action against any "person" who violates FHA's requirements, 42 U.S.C.

---

[7] "[T]he categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

§3613, neither the State of Alabama nor a state judge are "persons" within the meaning of FHA. *See* 42 U.S.C. §3602(d); *accord* 1 U.S.C. §1. Similarly, "neither a State nor its officials acting in their official capacities are 'persons' under [42 U.S.C. §1983]." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 68-71 (1989); *U.S. v. United Mine Workers of America,* 330 U.S. 258, 275 (1947). Plaintiffs cannot sue under FHA itself because FHA does not apply, by its terms, to the defendants.[8]

Instead, Plaintiffs' FHA arguments rely on FHA's express preemption clause: "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under [FHA] shall to that extent be invalid." 42 U.S.C. §3615. As with their immigration-law challenge, Plaintiffs' FHA-based challenge comes under §1983 or *Ex parte Young,* based on the Supremacy Clause.

For FHA to preempt it, §30 must therefore "require or permit" a

---

[8] The Supreme Court has reserved or avoided the question whether a government entity qualifies as a "person" under FHA. *Gladstone, Realtors,* 441 U.S. at 109 n.21; *Village of Arlington Heights v. Metro. Housing Development Corp.,* 429 U.S. 252, 271 (1977). If FHA contemplated *FHA suits* against government entities, suits against *state* government would raise issues under the Eleventh Amendment.

"discriminatory housing practice," *id.,* which FHA defines as "an act that is unlawful under [42 U.S.C.] section 3604, 3605, 3606, or 3617." 42 U.S.C. §3602(f). Of these possible grounds for an FHA-based preemption suit, only parts of §3604 could even *potentially* apply to Plaintiffs' claims against §30.[9] Indeed, most of §3604 is inapposite by its terms: §3604(c)-(e) apply only to advertising, representations, and inducements; and §3604(f) applies only to discrimination on the basis of handicap. *See* 42 U.S.C. §3604(c)-(f). As the district court notes, §3604(a)-(b) include general prohibitions against "otherwise mak[ing] unavailable or deny[ing], a dwelling to any person because of race … or national origin," 42 U.S.C. §3604(a), and "discriminat[ing] against any person … in the provision of services or facilities in connection [with "the terms, conditions, or privileges of sale or rental of a dwelling"], because of race … or national origin." 42 U.S.C. §3604(b). Assuming

[9] Section 3605 prohibits discrimination in connection with "loans or … other financial assistance" and "selling, brokering, or appraising of residential real property." 42 U.S.C. §3605(b). Section 3606 applies to discrimination in connection with a "multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings." 42 U.S.C. §3606. Section 3617 prohibits retaliation in connection with the exercise of certain rights secured by FHA. 42 U.S.C. §3617.

arguendo that these general provisions apply to government services such as the decals at issue here, Plaintiffs' challenge must fail because §30 "discriminates" because of illegal-alien status, not "because of race … or national origin."

1. This Court Does Not Owe Deference to Nascent HUD Rulemakings or Policies

In a recent notice of proposed rulemaking, the federal Department of Housing and Urban Development ("HUD") proposed to adopt a disparate-impact standard under FHA. *See* Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (2011). Of course, the eventual rule itself cannot apply retroactively to the conduct challenged in this lawsuit. *Georgetown University Hospital v. Bowen,* 488 U.S. 204, 208 (1988). Similarly, as a mere *proposed rule,* the current proposal warrants no deference. *Matter of Appletree Markets, Inc.,* 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). In the event that Plaintiffs

might claim deference *now,* based only on HUD's proposal, *amicus* Eagle Forum demonstrates that HUD deserves no deference.

At the outset, HUD's present-day claim that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate," 76 Fed. Reg. at 70,921, does not recognize that previous Administrations took the opposite view. *See* Presidential Statement on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988). Consistency of interpretation can increase deference, *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), and inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, under whatever form of deference Plaintiffs would claim for HUD's present position, the primary issue is whether HUD's position is consistent *with FHA.*

As explained in Section II.C.2, *infra,* Congress enacted an intentional-discrimination statute, and HUD cannot change that by

agency decree. The first step of any deference analysis is for the Court to evaluate the issue independently. Thus, before considering HUD's position, this Court must employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). If that analysis reveals an intentional-discrimination statute, that is the end of the matter, regardless of HUD's position:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an obligation itself, it lacks the authority to do so.

Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). As explained in Section II.C.2, *infra,* FHA prohibits intentional discrimination, not disparate impacts.

But even if HUD could promulgate a regulation to establish a disparate-impact analysis for intra-agency proceedings (*e.g.,* administrative hearings, enforcement), that would not establish a right

of action for the public to enforce those regulations outside of HUD. Only Congress can create rights of action:

> [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Alexander v. Sandoval, 532 U.S. 275, 291 (2001). Here, Congress did not create a right of action against disparate impacts, and any HUD views to the contrary could apply only within HUD.

Of course, where Congress has created a right of action to enforce regulations or where the agency regulation defines the conduct governed by a statutory cause of action, an agency regulation will play a role in the statutory cause of action. *Id.; Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). But unlike the determination in *Wright* that HUD's interpreting "rent" to include utilities could bring utility costs into a statutory action based on rent, the entire point of *Sandoval* is that an agency cannot define "discrimination" to include disparate impacts under intentional-discrimination statutes.

2. FHA Does Not Prohibit Actions that Disparately Impact Protected Classes without Intentionally Discriminating Against Them

In pertinent part, FHA prohibits discrimination "because of race … or national origin." 42 U.S.C. §3604(a), (b). Because that language indicates intentional or purposeful discrimination, the district court's disparate-impact analysis cannot stand.

As with any statutory question, courts look to the statutory text to determine whether a statute imposes liability for only intentional discrimination versus allowing liability for disparate-impact claims. *Smith v. City of Jackson, Miss.,* 544 U.S. 228, 233-36 (2005). When Congress uses the "because-of" phrasing, that indicates disparate treatment (*i.e.,* intentional discrimination), not disparate impacts. *Ricci v. DeStefano,* 129 S. Ct. 2658, 2672 (2009); *Smith,* 544 U.S. at 236 n.6 (plurality opinion of four justices); *id.* at 246 (Scalia, J., concurring in part); *id.* at 249 (O'Connor, J., concurring with three other justices). "The words 'because of' mean 'by reason of: on account of.'" *Gross v. FBL Financial Services, Inc.,* 129 S.Ct. 2343, 2350 (2009) (*quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)). Thus, for example, it would be "absurd" to contend that Title IX's prohibition of

discrimination "on the basis of sex" prohibited anything other than intentional discrimination. *Sandoval,* 532 U.S. at 282 & n.2. On the other hand, when Congress intends to allow disparate-impact claims, Congress uses text that clearly indicates that intent. 42 U.S.C. §2000e-2(a)(2); 29 U.S.C. §623(a)(2); 42 U.S.C. §1973c(b). Thus, FHA's plain language indicates that it prohibits only intentional discrimination.

The presumption against preemption has particular relevance to FHA, given Plaintiffs' attempt to override states in an area of traditional state concern. As indicated, to find preemption, this Court must find that preempting this historic state authority "was the *clear and manifest purpose* of Congress." *Santa Fe Elevator,* 331 U.S. at 230 (emphasis added). Even assuming *arguendo* that one could interpret FHA to allow disparate-impact claims, the presumption against preemption would prevent this Court's entertaining that interpretation to preempt Alabama's police power if the intentional-discrimination interpretation was also viable. *Altria Group,* 555 U.S. at 77 (quoted *supra*); *Bates,* 544 U.S. at 449. Thus, while neither Alabama nor Eagle Forum concedes that Plaintiffs' disparate-impact interpretation *is* viable, that is not the test. The burden is on Plaintiffs to demonstrate

that the intentional-discrimination interpretation *is not* viable. Plaintiffs cannot meet that burden.

Simply put, statutes that prohibit discrimination *because of* race or other protected status prohibit only purposeful discrimination and disparate treatment, not disparate impacts (*i.e.,* actions *because* of the protected status, not merely *in spite of* that status), *Sandoval,* 532 U.S. at 282-83 & n.2; *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Therefore, unless and until Congress specifies otherwise, "because" means "because."

3. Plaintiffs Have Not Made Out a Case for Intentional Discrimination

Whether under FHA or the Fourteenth Amendment, Plaintiffs cannot establish that Alabama discriminates on the basis of race or national origin. This familiar standard applies to action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class. *Feeney,* 442 U.S. at 279 (emphasis added). Targeted against those popularly known as "illegal aliens," HB56 "discriminates" based on illegality, not based on race or national origin. *Plyler,* 457 U.S. at 223 ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a

'constitutional irrelevancy'"). Even assuming *arguendo* that HB56's impacts fall disproportionately on Latinos, that disproportion would not be actionable in its own right.

Leaving aside that Plaintiffs' data do not appear to distinguish between legal and illegal Latino aliens and Latino citizens, Plaintiffs' data has approximately *two times* the rate of Latinos in mobile homes (7%) than Latinos' overall percentage of Alabama's population (3.7%). Slip Op. at 68, 94. That does not even approach the anomaly required for courts to find intentional discrimination "unexplainable on grounds other than race" behind facially neutral principles. *Arlington Heights,* 429 U.S. at 266 (collecting cases). For example, in *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Because women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney*. Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Like Massachusetts in *Feeney,* Alabama acted *because of*

permissible criteria, which is not unlawful discrimination.

4. Plaintiffs Have Not Made Out a Case for Discrimination under a Disparate-Impact Theory

Although it disputes that a disparate-impact test applies, *amicus* Eagle Forum respectfully submits that Plaintiffs have not demonstrated that §30 disparately impacts Latino illegal immigrants or even Latinos. The district court accepted that Latinos make up a larger percentage of mobile-home residents (7%) than their representation in the total population (3.7%). Slip Op. at 68, 94. Missing from this analysis is any indication – either by race or by national origin – of how non-Latino illegal immigrants fare vis-à-vis Latino illegal immigrants under §30.

Moreover, mobile-home living correlates to lower economic status. Thus, for example, if Latinos as a group are less wealthy on average than other ethnic groups, one would expect that Latinos would have a higher representation on metrics that correlate with lower economic status. Accordingly, an appropriate analysis must consider who – if anyone – bears a disparate impact, after correcting for economic status, by race and by national origin. Anything less than that would compare unlike groups, which is "nonsensical" and "lacks probative value." *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 651 (1989);

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996 (1988) (plurality). Even under their own theory, Plaintiffs cannot prevail.

CONCLUSION

For the foregoing reasons and those argued by Alabama, this Court should vacate the preliminary injunction.

Dated: March 16, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
D.C. Bar #464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF COMPLIANCE

Magee v. Central Alabama Fair Housing Ctr, No. 11-16114-CC

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,502 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Century Schoolbook 14-point font.

Dated: March 16, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
D.C. Bar #464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, I electronically submitted the foregoing document to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users. I further certify that I have mailed the foregoing document by Priority U.S. Mail, postage prepaid, on the following participants in the case who are not registered CM/ECF users:

Mary Catherine Bauer
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104-4331

Diana S. Sen
LatinoJustice PRLDEF
99 Hudson St Fl 14
New York, NY 10013-2815

Fred Lee Clements Jr.
Webb & Eley, PC
7475 Halcyon Pointe Dr
P.O. Box 240909
Montgomery, AL 36124

Margaret L. Fleming
James W. Davis
Misty S. Fairbanks
Attorney General's Office
501 Washington Ave
Montgomery, AL 36130

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com