

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DO NO HARM,

Plaintiff,

v.

WILLIAM LEE, in his official capacity as
Governor of the State of Tennessee,

Defendant.

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Case No. 3:23-cv-01175

**DEFENDANT'S REPLY IN SUPPORT
OF MOTION TO DISMISS AMENDED COMPLAINT**

INTRODUCTION

In its Response (Doc. 26), Plaintiff insists it is “certain” that Member A and Member B will be harmed by the challenged laws when Dr. Khumalo’s term ends in 2027. However, there will be no fewer than four openings on the Board between now and when Dr. Khumalo’s term expires in 2027. Any of the openings on the Board between now and 2027 could be filled by any qualified individual, and as recently as 2022, multiple members of the Board were members of racial minorities. In that case, there is no injury to “Member A” or “Member B” because the laws will not apply to Board openings. Accordingly, it is far from “virtually certain” that when Dr. Khumalo’s term ends, there will not be “at least one” member of a racial minority on the Board, which is all that the challenged laws contemplate. In other words, Plaintiff’s opposition rests on the assumption that only white people will be appointed to the Board between now and when Dr. Khumalo’s term expires.

Given that Do No Harm’s clandestine members do not have standing, the Court need not reach the issue of whether Plaintiff has satisfied the Sixth Circuit’s requirement to “identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant’s conduct.” *Weiser v. Benson*, 48 F.4th 617, 623 n.4 (6th Cir. 2022) (quoting *Ass’n of Am. Physicians & Surgeons v. USFDA*, 13 F.4th 531, 537 (6th Cir. 2021)). Should the Court reach the issue, it should decide that the Sixth Circuit would find such ersatz identification insufficient, particularly given the Governor’s factual challenge.

ARGUMENT

I. Members A and B have no standing.

It is doubtful, and certainly not “virtually certain,” that any member of Do No Harm will ever be affected by the challenged statutes. Dr. Khumalo, an African-American, is chair of the

Board, and his term does not expire until 2027. Between now and then, there will be no fewer than four openings on the Board. Only if white people exclusively are chosen for those positions will the challenged laws potentially apply to the appointment of Dr. Khumalo's successor, and only then would either Member A or Member B face any potential harm.

Furthermore, Plaintiff raises factual issues that are demonstrably wrong. The Governor submitted proof of Dr. Khumalo's race with his initial memo, and out of an abundance of caution submits additional evidence in his reply. Also, despite Plaintiff's claim that there is "no timetable" for gubernatorial appointments, the expiration of each Board member's term is publicly available. Accordingly, Plaintiff fails to give the Court any reason to find it has standing. *See Kanuszewski v. Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) ("Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of proving the three elements of standing.").

A. Any harm to Members A or B is speculative.

Plaintiff's injury relies on it being "virtually certain" that the Governor will exclusively appoint white people to the Board for the many openings between now and the end of Dr. Khumalo's term on June 30, 2027. *See* Resp. at 10. Plaintiff relies heavily on *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011), to support its claim of standing. However, in that case, the court held that the Plaintiffs had experienced an "'actual' present injury" as well as faced "'imminent' future injury." *Id.* at 535-36 (internal quotations omitted). There, the plaintiffs suffered injury because of the "virtual certainty" that the Affordable Care Act, a law of general applicability, would apply to Plaintiffs on its effective date. *Id.* at 538.

No such certainty or imminence is present here. Unlike the Affordable Care Act, which requires every person to purchase health insurance, the challenged statutes only have potential effect when there are no members of a racial minority on the Board. Only in that instance would

it be necessary for the Governor to consider race to “strive to ensure” that “at least one” member of the Board is a racial minority come into play. Tenn. Code Ann. § 8-1-111; *id.* § 63-3-103(b).

Moreover, as recently as 2022, both Dr. Khumalo and Dr. Ramesh Pavuluri, an Indian-American, served on the Board contemporaneously. *See* March 11, 2022, Board Minutes¹; *see also* Ex. C to Smith Declaration (Dr. Pavuluri application). In short, Plaintiff’s alleged injury, and its reliance on no members of racial minorities filling any of multiple future Board openings, is precisely the type of speculation that courts routinely hold is insufficient for standing. *See Vonderhaar v. Vill. of Evendale, Ohio*, 906 F.3d 397, 401 (6th Cir. 2018) (“Claimants cannot file a lawsuit based on a ‘highly speculative fear’ that a law may harm them at some future date.”).²

B. Plaintiff’s factual challenges are demonstrably wrong.

Plaintiff’s additional arguments fare no better. First, Plaintiff incorrectly alleges that the Governor has provided no evidence that Dr. Khumalo “is a racial minority.” Resp. at 12. However, page 2 of the Governor’s memorandum cites to the Tennessee Secretary of State Website, <http://tinyurl.com/584e88mj>, which identifies Dr. Khumalo both as a member of the Board and as African-American.³

Second, Plaintiff erroneously asserts that there is no “timetable upon which the public can expect or anticipate gubernatorial appointments to the Board.” Resp. at 12. The expiration of each

¹ <https://www.tn.gov/content/dam/tn/health/healthprofboards/03-11-2022-Minutes.pdf>

² Furthermore, it is even more unlikely that Member B will ever be injured by the challenged statutes. Member B is allegedly eligible for the sole citizen member seat on the Board, so any injury to him would require not only that (1) all remaining members of the Board are white, but also (2) that the sole citizen-member seat is not filled. Such future injury is conjectural, not imminent.

³ Out of an abundance of caution, the Governor attaches the Declaration of Candyce Wilson, who has personally worked with and met Dr. Khumalo and testifies as to his race, as well as his appointment form in which he identifies himself as African-American. *See* Ex. D to Smith Dec.

member’s term is publicly available. *See* Def. Memo., Doc. 25-1, at 3. Indeed, Plaintiff’s original complaint noted that “[t]wo seats on the Board opened in June 2023.” Compl., Doc. 1, at ¶ 19. Plaintiff then waited more than two months to file suit, by which time the Governor had filled those positions. The Governor is not required to withhold appointments indefinitely for the benefit of Plaintiff’s standing.⁴

II. Pseudonymity Is Not a Free Pass to Standing in This Circuit.

Because Plaintiff’s unnamed members lack standing, the Court can dismiss this suit without addressing whether bringing suit on behalf of “Member X” satisfies the Sixth Circuit’s requirement that an association “name” and “identify” an injured member. If the Court takes up the issue, the Sixth Circuit requires that Do No Harm “name the individuals who were harmed” even at the motion-to-dismiss stage. *Tenn. Republican Party v. SEC*, 863 F.3d 507, 520-21 (6th Cir. 2017) (quotations omitted) (denying standing where an organization “fail[ed] to identify any members,” satisfied only where members were “identified”—by name); *id.* at 517 (actually naming affected members). Use of a pseudonym, by definition, does not name a member.

Though Plaintiff asserts a “tidal wave of uniform precedent” dispensing with naming members altogether, only one circuit has allowed the use of pseudonyms to satisfy a naming requirement, the Tenth Circuit. *See Speech First, Inc. v. Shrum*, 2024 WL 506224 (10th Cir. 2024).⁵ The Tenth Circuit held that proceeding with pseudonyms was sufficient but expressed

⁴Plaintiff also asserts, without explanation, that the challenged laws make every appointment racially conscious. (Resp., 13). That ignores the plain language of the statutes, which only state that the Governor “shall strive to ensure . . . that *at least one* (1) person serving on the board is a member of a racial minority.” Tenn. Code § 63-3-103(b) (emphasis added); *see also id.* at § 8-1-111. When at least one member of the Board is a racial minority, there is nothing more to ensure.

⁵ *Cf. Am. Coll. of Emergency Physicians v. Blue Cross & Blue Shield of Ga.*, 833 F. App’x 235, 240 (11th Cir. 2020) (satisfied with alleging “all members whose patients are insured by Defendants”); *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1037 (9th Cir. 2015) (satisfied with alleging “individual members . . . who are not registered to vote and members who are

concerns about “the cloak of anonymity,” and required “the district court [to] *later* verify the existence and status of the pseudonymous members through in camera review.” *Speech First*, 2024 WL 506224, at *2 n.1 (emphasis added). Such rule allows plaintiffs to “proceed to discovery in nearly every case,” depriving the State’s ability to challenge standing at the earliest stage. *Prairie Rivers Network v. Dynegy Midwest Generation*, 2 F.4th 1002, 1010 (7th Cir. 2021). This Court should not allow a lone out-of-circuit unpublished case to undermine the value—and purpose—of a 12(b)(1) factual attack, where the court is able to “consider[] evidence outside the pleadings to resolve [plain] jurisdictional question[s],” *Ames v. LaRose*, 86 F.4th 729, 731 (6th Cir. 2023).

No Sixth Circuit case blesses this shortcut to discovery. In *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004), the Sixth Circuit did not dispense with its naming requirement but invoked an *exception* to Rule 10(a) for parties that are subject to harassment. *Doe*, 370 F.3d at 560. Plaintiff suggest no potential harm to its members requiring anonymity. Further, *Association of American Physicians v. USFDA*, Resp. 7, is inapposite. The court did not address the use of pseudonyms and instead dismissed the case because the unnamed member had no basis for standing. The Court may do likewise dismiss without addressing pseudonymity, but should not allow Plaintiff to circumvent its “independent obligation to assure that standing exists” at every stage. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

For these reasons, the Court should grant Defendant’s motion to dismiss.

registered to vote but have moved or will move”); *Hancock Cnty. Bd. of Sup’rs v. Ruhr*, 487 F. App’x 189, 198 (5th Cir. 2012) (satisfied with alleging “some of its members were voters”); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (“allow[ing] for the member on whose behalf the suit is filed to remain unnamed by the organization”); *Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) (satisfied with “alleg[ing] that one or more of its members has suffered a concrete and particularized injury,” not requiring “nam[ing] names”); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 594 (D.C. Cir. 2022) (satisfied by “survey responses evidencing the concrete injuries [of] individual members”).

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General & Reporter

/s/ Reed N. Smith

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Assistant Attorney General

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via this Court's electronic filing system on this 1st day of March 2024.

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Attorneys for Plaintiff

/s/ Reed N. Smith
REED N. SMITH
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DO NO HARM,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:23-cv-01175
)	
WILLIAM LEE, in his official capacity as)	
Governor of the State of Tennessee,)	
)	
Defendant.)	

DECLARATION OF CANDYCE WILSON

I, Candyce Wilson, declare as follows:

1. I am over 18 years old, of sound mind, and fully competent to attest to the facts stated herein.
2. I am the Unit 1 Director at the Tennessee Department of Health. In that role, I interact with the Board of Podiatric Medical Examiners (“Board”), including in-person.
3. I am familiar with Dr. Bhekumuzi Khumalo. He has served on the Board since October 16, 2019, and is currently the Board’s chairperson. Dr. Khumalo is African-American.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Davidson County, Tennessee on February 27, 2024.


CANDYCE WILSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via this Court's electronic filing system on this 1st day of March 2024.

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Attorneys for Plaintiff

/s/ Reed N. Smith
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Assistant Attorney General

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DO NO HARM,)	
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Governor of the State of Tennessee,)	
)	
Defendant.)	

**SUPPLEMENTAL DECLARATION OF REED N. SMITH IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

I, Reed N. Smith, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over twenty-one years of age, of sound mind and body, and am otherwise competent to testify to the matters stated herein. I am counsel for Defendant William Lee, in his official capacity as Governor of the State of Tennessee, and have personal knowledge of the facts stated herein.
2. Exhibit C, attached to this declaration, is a true and correct copy of Dr. Ramesh Pavuluri’s application for the Board of Podiatric Medical Examiners, in which he identifies himself as an Indian American.
3. Exhibit D, attached to this declaration, is a true and correct copy of Dr. Bhekumuzi Khumalo’s Appointment form for the Board of Podiatric Medical Examiners. On this form, he identifies himself as black.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2024
Nashville, TN

/s/ Reed N. Smith
Reed N. Smith (BPR# 040059)
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via this Court's electronic filing system on this 1st day of March 2024.

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Attorneys for Plaintiff

/s/ Reed N. Smith
REED N. SMITH
Assistant Attorney General

Exhibit C

APPLICATION FOR GUBERNATORIAL APPOINTMENT TO A BOARD OR COMMISSION

Board or Commission for which you would like to be considered: **Board of Podiatric Medical Examiners (Podiatrist)**

Name: (First, Middle, Last) RAMESH B. PAWLORA		Title: <input type="checkbox"/> Mr. <input type="checkbox"/> Ms. <input type="checkbox"/> Mrs. <input checked="" type="checkbox"/> Dr.	
Home Address: 1766 FONSYTH PARK DR		Business Address: 214 SKYLINE CIRCLE	
BRENTWOOD, TN		DICKSON, TN	
Zip Code: 37027		Zip Code: 37055	
Home Phone: 615-377-0016		Business Phone: 615-441-0002	
Home Fax:		Business Fax: 615-446-2827	
Mobile Phone: 615-477-8139		Current Employer: ASSOCIATED PODIATRISTS OF TN	
E-mail: RAMP20@GMAIL.COM		Position: PODIATRIST	
House District: 63	Senate District: 23		

Personal Information:

Gender: <input type="checkbox"/> Female <input checked="" type="checkbox"/> Male	Date of Birth: 01-20-1964	Social Security No: 414-29-6201
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Education and General Qualifications:

Level	Name of School	Location (City, State)	Did you Graduate?	Type Degree(s)	Year Graduation/ Degree Awarded	Major Course of Study
High School/GED	HILLSBORO	NASHVILLE TN	YES	DIPLOMA	1982	
College/Other	TENNESSEE STATE	NASHVILLE TN	YES	BS	1986	
Graduate/Postgrad.	NYCPM	NEW YORK NY	YES	DPM	1990	

Licenses held (if applicable):
TN DPM 406

Special Skills and Qualifications:

Community Activities/Organizational Affiliations (current):

Declarations

Are you registered to vote in Tennessee? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Are you a citizen of the U.S.? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Have you ever been convicted of a crime or felony? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, provide written details.)	Are you a Permanent Resident of the U.S.? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Have you ever had a professional/occupational license revoked, or suspended as a result of disciplinary action? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is there anything in your background that might become an embarrassment to you if it were to become public? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Are you a current employee of the State of Tennessee? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Are you a current employee of the U.S. government? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Are you registered as a lobbyist? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, please specify the groups you represent.)	Are you currently serving on a board or commission? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If yes, please list the board or commission.)

Diversity Information. The Governor desires broad representation on boards, representative of the entire State. The information below will assist in this goal and is voluntary on your part.

Ethnicity: (Of what race or ethnicity do you consider yourself to be?)

<input type="checkbox"/> Black/African-American	<input type="checkbox"/> White/Caucasian	<input type="checkbox"/> Native American
<input type="checkbox"/> Latino/Hispanic	<input type="checkbox"/> Asian or Pacific Islander	<input checked="" type="checkbox"/> Other (please specify) INDIAN AMERICAN
<input type="checkbox"/> Senior/Elder Citizen (60 yrs or older)	<input type="checkbox"/> Veteran of U.S. Armed Forces	<input type="checkbox"/> Gay, Lesbian, Bi-Sexual, Transgendered (GLBT)
<input type="checkbox"/> Person with Disabilities	<input type="checkbox"/> Young Adult (16-24 yrs)	<input type="checkbox"/> Other (please specify)

(Note: You should also attach a current resume or biographical sketch to this application form)

I certify that the facts and declarations contained in this application are true and correct to the best of my knowledge. I authorize investigation of all statements contained herein and any personal references that I may include, or later provide, to obtain any and all pertinent information.


Signature:  Date: **2-21-17**

Exhibit D

Oath of Office

I, Bhekumuzi Khumalo, do solemnly swear that as a member of the Board of Podiatric Medical Examiners, I will support The Constitution of the State of Tennessee and The Constitution of the United States and that I will perform with fidelity the duties of the office to which I have been appointed and which I am about to assume. So help me God.

This the 16 day of NOVEMBER, 2023.


Member Signature


State of Tennessee,
County of OBION

I, ARTHUR W. ROWE

Have this day administered the oath of office to Bhekumuzi Khumalo, a member of the Board of Podiatric Medical Examiners as prescribed and required by law.

This the 16 day of NOVEMBER 2023.




Notary Public

My Commission Expires: 9/23/25

For Secretary of State Use

Bhekumuzi Khumalo is being reappointed to the Board of Podiatric Medical Examiners as a Representative of Podiatrists for a term beginning November 1, 2023 and ending June 30, 2027. This seat was formerly held by Dr. Bhekumuzi Khumalo.



November 1, 2023

Dr. Bhekumuzi Khumalo
1141 West Highway 22
Union City, Tennessee 38261-7134

Dear Bhekumuzi:

Today, it is my distinct pleasure to confirm your appointment to the Board of Podiatric Medical Examiners as a Representative of Podiatrists. In the thorough, aggressive search for candidates, your individual characteristics and professional qualifications were exceptional among the number of nominees who expressed interest. This appointment is effective immediately and runs through June 30, 2027.

I consider it very important to ensure that Tennessee's boards and commissions are filled with the most dedicated and qualified citizens. I believe that your participation is certain to leave a positive impact on this board and the work it does.

Thank you for your interest in state government and for your willingness to serve your fellow citizens of Tennessee in this way. Please accept my very best wishes. I look forward to working with you and all Tennesseans to make our great state an even better place to live, work, and raise a family.

Warmest regards,

A handwritten signature in black ink that reads "Bill Lee". The signature is written in a cursive, flowing style.

Bill Lee

Governor's Appointment

Please fill out this form and submit to our office (*Governor's Office of Boards and Commissions, G-7 State Capitol, Nashville, TN 37243*) along with your notarized Oath of Office.

I. **Oath of Office:** Tennessee law requires that you complete the enclosed Oath of Office. You must sign the top portion of the Oath before an authorized notary, who will then complete the bottom portion (According to T.C.A 8-16-302, a notary public has the power to administer the Oath as well as notarize it). After the Oath of Office has been signed and notarized, please email all forms to our office within 7 days. Forms can be sent to **gov.boards@tn.gov**. Your appointment will be finalized only upon receipt of the Oath. You will then receive further information from your designated liaison.

II. **State Legislative District:** This information can be found at <http://www.capitol.tn.gov>

House District: 77 Senate District: 24

III. **Personal Information:**

a. Full Name: Bhekumuzi M. Khumalo
 b. Mailing Address: 1141 W. Hwy 22
Union City TN 38261
 County: Obion
 c. Business Phone: 731-599-9909 Home Phone: _____
 Mobile Phone: 901-487-0011 E-mail: bm.khumalo@yahoo.com

IV. **Declarations:**

Are you a citizen of the United States? Yes: <u>X</u> No: _____	Have you ever been convicted of a crime or felony? (If yes, attach written details) Yes: _____ No: <u>X</u>
Have you ever had a professional/occupational license revoked or suspended as a result of a disciplinary action? Yes: _____ No: <u>X</u>	Is there anything in your background that might become an embarrassment to you if it were to become public? (If yes, attach written details) Yes: _____ No: <u>X</u>
Are you currently an employee of the State of Tennessee? Yes: _____ No: <u>X</u>	Are you a registered lobbyist? (If yes, attach written details) Yes: _____ No: <u>X</u>

V. **Diversity Information:**

a. This information is requested pursuant to T.C.A. 10-7-611 and is voluntary
 b. Date of Birth: 08/02/1966
 c. Male: X Female: _____
 d. Ethnicity: (What race or ethnicity do you consider yourself?) Black

VI. **Office Use Only:**

Board ID Number: _____ Position ID Number: _____