UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DO NO HARM, a nonprofit corporation incorporated in the State of Virginia, Plaintiff, v. JEFF LANDRY, in his official capacity as Governor of Louisiana, Defendant.	No.: 5:24-cv-00016-JE-MLH **Judge Jerry Edwards Jr.** **Mag. Judge Mark L. Hornsby**

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES

I. Do No Harm is entitled to its discovery requests

Defendant does not contest that Plaintiff's discovery requests are relevant, nor does Defendant oppose the requests as disproportional to the needs of this case. Plaintiff is thus entitled to its requested discovery. *See* Fed. R. Civ. P. 26(b)(1). *See also Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011).

Seeking to avoid this straightforward conclusion, Defendant states that: (1) Plaintiff could obtain some of the requested discovery from the Louisiana State Archives itself; and (2) he lacks control over discovery possessed by the Louisiana Board of Medical Examiners. Defendant's Opposition to Motion to Compel on Behalf of Jeff Landry, in His Official Capacity as Louisiana Governor at 3–5 (ECF 22). Neither excuse persuades.

Fed. R. Civ. P. 34 "is broadly construed and documents within a party's control are subject to discovery, even if owned by a nonparty." *Autery v. SmithKline Beecham*

Corp., No. 6:05-cv-982, 2010 WL 1489968, at *2 (W.D. La. Apr. 13, 2010). A document is within the "possession, custody or control" of a party even when the party only "has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a nonparty to the action." *Id.* (quoting *Chesapeake Operating, Inc. v. Stratco Operating Co.*, No. 3:07-cv-00354, 2009 WL 426101, at *4 (M.D. La. Feb. 20, 2009)). Indeed, "a party is 'charged with knowledge of what its agents know or what is in records available to it.'" *Id.*

That records from Governor Edwards' administration "were boxed and sent to the Louisiana State Archives before Governor Landry took office," and are "public records equally accessible to the Plaintiff and the Defendant," Def.'s Oppo. at 3, does not relieve Defendant of his obligation to produce documents within his "possession, custody or control." *See Benson v. Rosenthal*, No. 2:15-cv-00782, 2016 WL 1046126, at *3 (E.D. La. Mar. 16, 2016) ("[T]hat 'some responsive documents are in the public domain and are thus equally available' to defendant … is unpersuasive."). The Complaint in this case was filed on January 4, 2024, prior to Governor Landry's inauguration, and names the Governor in his official capacity as Defendant. ECF 1. Which particular individual holds the office now is thus relevant only in determining who has possession of discovery documents. *See* La. Stat. Ann. § 44:5(D). Whoever possesses the documents does not, however, exclusively "control" the documents. Because the State Archives possesses the records from the Edwards administration and those records are public, La. Stat. Ann. § 44:5(B)(1), Defendant "has the legal right to obtain the documents on demand or has the practical ability to obtain the

documents from a nonparty to the action." *Autery*, 2010 WL 1489968, at *2. *See also Whale Cap., L.P. v. Ridgeway*, No. 2:22-cv-02570, 2024 WL 838505, at *4 (E.D. La. Feb. 28, 2024). And given that Defendant is "charged with knowledge of … what is in records available to [him]," *Autery*, 2010 WL 1489968, at *2, simply pointing out that Plaintiff could obtain the records from the State Archives itself does not absolve Defendant of his obligation to produce the requested—and unobjected to—records.[1]

The same is true for records allegedly possessed by the Board of Medical Examiners. As Defendant notes, the Board operates under the Louisiana Department of Health. Def.'s Oppo. at 4; La. Stat. Ann. § 36:259(A)(8). But both heads of the Department of Health—the Secretary and Surgeon General— "report directly to the Governor."[2] [3] *See* La. Stat. Ann. §§ 36:253; 254; 254.4. *See also Whale Cap.*, 2024 WL 838505, at *4 (relationship due to affiliation, employment, or statute, allowing a party to command release of documents in the custody and control of nonparty). In any event, as the official responsible for appointing members to the Board of Medical Examiners, the discovery sought by Plaintiff is information that should be in Defendant's records. *See*, *e.g.*, Ex. A to Plaintiff's Motion to Compel Discovery Responses (ECF 20-2) (Interrogatory No. 9 ("Identify all applicants … for membership on the … Board")); (Interrogatory No. 10 ("Identify all applicants … who were

[1] Notably, Defendant does not say whether any efforts were taken to retrieve responsive documents from the State Archives at all.

[2] Organizational Chart, Louisiana Department of Health, *available at* https://ldh.la.gov/assets/docs/OrgCharts/LDHOrgChart.pdf (last visited Sept. 3, 2024).

[3] *Governor Jeff Landry, LDH announce key leadership changes*, Louisiana Department of Health (June 25, 2024), *available at* https://ldh.la.gov/news/surgeon-general.

appointed to serve on the [] Board")). In fact, Defendant's supplemental document production includes applications to the Governor for membership on the Board, and those applications contain some of the information that Plaintiff seeks in the discovery requests subject to this motion to compel. *See* Ex. C. *See also* Def.'s Oppo. at 6 ("Request No. 5 asked for documents that would have been appointed by Governor Edwards, and those records are maintained in the Louisiana Archives").

Regardless of whether the State Archives or Board of Medical Examiners possess documents requested by Plaintiff, Defendant maintains control over those records and must produce them.

II. The Governor lacks immunity and this case is not moot

Defendant additionally asks this Court to deny Plaintiff's motion to compel due to the Governor's declaration that he will not enforce the statute challenged in this case. Def.'s Oppo. at 2–3; Ex. A (ECF 22-1). While Plaintiff appreciates Defendant's statement, it is insufficient to divest this Court of jurisdiction over this case.

The *Ex parte Young* exception to sovereign immunity applies where "certain private parties [] seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). *Ex parte Young* thus "covers suits for prospective relief against state officers who 'are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence' proceedings to enforce an unlawful act." *United States v. Abbott*, 85 F.4th 328, 334 (5th Cir. 2023). Here, Plaintiff seeks prospective relief against Defendant's

enforcement of the racial mandate of La. Stat. Ann. § 37:1263(B). ECF 1. By the express terms of the statute, Defendant is required to enforce the mandate. § 37:1263(B). And even though Defendant's declaration states that he will not enforce the challenged mandate, Defendant's position cannot and does not bind future governors or remove the mandate from state law. Further, Plaintiff's discovery requests at issue in this motion to compel also seek to determine the extent to which the original Defendant in this case—Governor Edwards—complied with § 37:1263(B). This case is thus nothing like *Abbott*, where plaintiffs could not even raise a "credible threat" of enforcement where the defendant was not charged with enforcement of the relevant law. 85 F.4th at 335. *See also Younger v. Harris*, 401 U.S. 37, 42 (1971) ("[Plaintiffs] do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.").

Ultimately, Defendant's argument that a lack of threat of immediate enforcement divests this Court of jurisdiction over this case is not really an argument for sovereign immunity. Rather, such an argument is more appropriately made against a plaintiff's supposed lack of injury for standing purposes. But Defendant has not made that argument.

Nor does the Governor's declaration moot this case. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 189 (2000). To show mootness, Defendant has a "heavy burden" to make "it absolutely clear that the allegedly wrongful behavior

could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Defendant does not come close to meeting that burden here.

This case does not challenge a mere policy of the government. Plaintiff's Complaint seeks declaratory and injunctive relief from a statute duly enacted in 2018 that the Governor is compelled to comply with. *See* La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8). This case is thus not one contemplated by *Sossamon v. Lone Star State of Texas*, in which "formally announced changes to official governmental *policy*" could moot a case. 560 F.3d 316, 325 (5th Cir. 2009) (emphasis added). That Defendant has announced his intention not to comply with the challenged statute will also in no way bind future governors, and Defendant's declaration will not result in the statutory mandate ceasing to remain on the books. Thus, should Defendant change his mind, or upon the inauguration of Defendant's successor, the challenged racial mandate of La. Stat. Ann. § 37:1263(B) will still apply.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion to compel.

DATED: September 3, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, I presented the foregoing document to the Clerk of Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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