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 Edwards** **Magistrate Judge Hornsby**

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Louisiana law requires Defendant Jeff Landry, in his official capacity as Governor of Louisiana, to appoint individuals to the Board of Medical Examiners on account of their race. La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8). Specifically, "[a]t least every other member appointed from [lists] provided" by the Louisiana State University Health Sciences Centers at New Orleans and Shreveport, as well as the Louisiana Hospital Association, "shall be a minority appointee." *Id.* § 37:1263(B)(2)–(3), (7). Likewise, "[a]t least every other consumer member appointed to the board shall be a minority appointee." *Id.* § 37:1263(B)(8). These statutes thus mandate that Defendant evaluate an individual's race when making alternating appointments to four of the Board's ten seats. As a result, individuals who are not from a preferred race are prohibited from consideration for those seats. That's Louisiana law. Full stop.

Plaintiff Do No Harm, on behalf of its multiple Louisiana members, filed this lawsuit on January 4, 2024, challenging the race-based mandates of section 37:1263(B)(2)–(3), (7)–(8), because they plainly and facially violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Doc. 1. Do No Harm seeks prospective declaratory and injunctive relief to prevent Defendant, now and in the future, from considering the race of candidates for current and future openings on the Board. Do No Harm has multiple members who are qualified, ready, willing, and able to be appointed to fill these openings, but they are prohibited from consideration because they are not a racial minority. Doc. 1 ¶¶ 6, 18–19.

Requiring Defendant to make appointment decisions based on an individual's race is not only morally wrong, it is blatantly unconstitutional. To his credit, Governor Landry agrees. *See* Doc. 22-1. But Governor Landry's individual views do not bind future governors, and section 37:1263(B)(2)–(3), (7)–(8), continues to require unconstitutional discrimination in Louisiana, and there is a history of enforcement.

The parties have completed discovery, and on the eve of expected cross-motions for summary judgment,[1] Defendant filed the instant motion to dismiss on mootness and sovereign immunity grounds. *See* Doc. 17, 30. There is no reason in the law why Governor Landry's promise to not enforce Louisiana law renders the case moot. For the reasons discussed below, Defendant's motion to dismiss should be denied.

[1] Plaintiff still anticipates filing a motion for summary judgment by January 30, 2025.

BACKGROUND

In 2018, the Louisiana Legislature enacted House Bill 778, mandating that the Governor name a "minority appointee" to four of ten seats on the state Board of Medical Examiners. La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8). When HB 778 was considered in the Senate Health and Welfare Committee, an amendment was offered to require the proposed seat on the Board for which the Louisiana Hospital Association submits names to the Governor to include a race-based quota. Video Recording of the Senate Health and Welfare Committee at 1:34:58 (Apr. 25, 2018).[2] Under questioning, the bill sponsor (Representative Jackson) stated that she was contacted by minority physicians in Louisiana who complained that the Board frequently lacks minority representation. *Id*. Senator Claitor then asked about the then-current composition of the Board and was told that two of the Board's then-seven seats were held by black women. *Id*. Senator Claitor also asked how a "minority" would be defined for the purposes of the statute and was told that it would be defined the same as elsewhere in state code. *Id*. Representative Jackson explained the perceived importance of HB 778 as addressing the stated need that the Board should reflect the composition of the state's physicians—a view that Senator Barrow echoed. *Id*. Later that session when HB 778 was heard and debated on the Senate floor, Senator Morrell offered several amendments, including amendments to add additional seats to the Board and additional seats subject to an alternating minority

[2] *Available at* https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/04/042518H~W_0.

quota. Video Recording of Senate proceedings at 1:40:40 (May 9, 2018).[3] All that is to say that at the time HB 778 was enacted, reserving seats on the Board for members of minority races was top of mind for legislators and the only explanation offered was the desire to achieve proportional representation.

In the ensuing years, Governor Edwards complied with HB 778 (La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8)). Do No Harm brings this suit, as part of its mission to eliminate discrimination in healthcare, on behalf of its members. Doc. 1 ¶¶ 1, 3, 6. Its members include individuals who are Louisiana physicians as well as members who would qualify for appointment to the consumer slot but for their race. Doc. 1 ¶ 3.

ARGUMENT

I. This Case Is Not Moot

"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) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). 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.'" *Laidlaw*, 528 U.S. at 189 (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.[4]

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[3] *Available at* https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/05/050918SCHAMB_0.

[4] Where the government repeals a challenged law, there is a presumption that the challenged conduct is unlikely to recur. *See Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th 824, 833 (5th Cir. 2023). Here, of course, there is no repeal. Accordingly, Defendant continues to bear the "heavy burden" of showing mootness.

While Plaintiff Do No Harm appreciates Governor Landry's nonbinding declaration stating that *he* will not enforce La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8), in a racially discriminatory manner, *see* Doc. 22-1, that does not render an active statute moot. Defendant is sued in his official capacity. Doc. 1, ¶ 7. The original defendant in this action was Governor John Bel Edwards. *Id*. Upon Governor Landry's successor taking office, the future governor will be bound to enforce the racially discriminatory aspects of La. Stat. Ann. § 37:1263(B) regardless of Governor Landry's declaration. As a result, Defendant is wrong that the discrimination that Plaintiff complains of "could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. *See also Federal Bureau of Investigation v. Fikre*, 601 U.S. 234, 241 (2024) (case moot when defendant shows there is "no reasonable expectation" that it will continue challenged actions). To the contrary, it is mandated by law to recur.

The record confirms that enforcement of section 37:1263(B)(2)–(3), (7)–(8)—a statute enacted in 2018—is likely to recur when a new governor succeeds Governor Landry. Several documents produced by Defendant in discovery show that Governor Edwards' administration considered race in seeking out candidates for seats on the Board of Medical Examiners. Exhibit A. Thus, the only action that could effectively moot this case is legislative repeal—not a single governor's promise not to enforce the statute. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed.").

Nor is Plaintiff's injury speculative. Governor Landry's declaration does not have the force of law and cannot bind future governors. *See* Doc. 30-1 at 3 ("The

Declaration reflects Governor Landry's personal commitment."). Unless this Court enjoins the racially discriminatory aspects of section 37:1263(B)(2)–(3), (7)–(8), and declares them unconstitutional, future governors—and even Governor Landry—is required by Louisiana law to discriminate on the basis of race. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (moratorium on chokeholds by police did not moot challenge to such practices where "the moratorium by its terms is not permanent"); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) (case not mooted by university's changes to challenged policy because of "the continuing existence of the unaltered definition" of term at issue in amended policy); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) ("far from clear that the government has ceased the challenged conduct … with the permanence required under" governing mootness analysis).

To be clear, Do No Harm does not question Governor Landry's sincerity, but given that Defendant's declaration does nothing to remove the challenged statute from Louisiana law today or bind governors in the future, a live controversy remains. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (case not moot where legality of practices challenged and defendant "is free to return to his old ways" even if he has voluntarily stopped practices for time being).

This case is also unlike the typical mootness case in which a government repeals official *policy* and claims the case is moot. For example, in *Freedom from Religion Foundation*, the case was moot after the Texas State Preservation Board repealed a rule under which an exhibit was denied for display in the Capitol. 58 F.4th

at 828, 833. And in *Sossamon v. Lone Star State of Texas*, the Texas Department of Criminal Justice revised its policy in response to the complaint made in the case. 560 F.3d 316, 322, 325 (5th Cir. 2009); *see also Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014) (same). Because this case challenges the constitutionality of a state statute rather than a mere policy of the government that officials can effectively repeal without the need for legislative action, Defendant's declaration does nothing to moot the controversy.

II. The Governor Is the Proper Defendant

The *Ex parte Young*, 209 U.S. 123 (1908), exception to state sovereign immunity granted by the Eleventh Amendment applies where: (1) A plaintiff names "individual state officials as defendants in their official capacities;" (2) plaintiff alleges "an ongoing violation of federal law; and (3) the relief sought [is] properly characterized as prospective." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (citations omitted). All three factors are easily satisfied here. Plaintiff's Complaint names Defendant in his official capacity as Governor of Louisiana, Doc. 1 ¶ 7, and seeks only prospective relief, *id*. at 7, Prayer for Relief. Given that section 37:1263(B) requires Defendant to comply with the racially discriminatory aspects of the law regardless of Governor Landry's declaration, the violation of Plaintiff's constitutional rights is also ongoing until the law is enjoined or repealed. *See* Doc. 1 ¶¶ 1, 3, 7, 14–15, 17–19, 22, 27. *See also* La. Stat. Ann. § 37:1263(B)(2)–(3), (7) ("At least every other member appointed from a list provided for in this Paragraph *shall be* a minority appointee.") (emphasis added);

§ 37:1263(B)(8) ("At least every other consumer member appointed to the board *shall be* a minority appointee.") (emphasis added).

Defendant seeks to avoid the application of *Ex parte Young* by arguing that, because he has filed a declaration disclaiming enforcement of La. Stat. Ann. § 37:1263(B)(2)–(3), (7)–(8), he "has effectively removed himself from the status of a state officer empowered to enforce the contested statute, and any judgment that might be rendered would of necessity be a prohibited judgment against the State itself." Doc. 30-1 at 4. The Fifth Circuit has articulated three "guideposts" to determine whether a named state official is the proper defendant under *Ex parte Young*. *See Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024) (citing *Texas All. for Retired Ams. v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022)). First, the official must have "more than the general duty to see that the laws of the state are implemented, i.e., a particular duty to enforce the statute in question." *Id*. Second, the official must have "a demonstrated willingness to exercise that duty." *Id*. Third, the official "compels or constrains persons to obey the challenged law." *Id*. (cleaned up).

First. Far more than being merely "authorized to make Board appointments based on minority status," Doc. 30-1 at 4, section 37:1263(B) gives Defendant the sole authority to make appointments to the Louisiana Board of Medical Examiners. In exercising that statutory responsibility, Defendant is required to make certain appointments based on a candidate's status as a minority. § 1263(B)(2)–(3), (7) ("At least every other member appointed from a list provided for in this Paragraph *shall*

be a minority appointee.") (emphasis added); § 1263(B)(8) ("At least every other consumer member appointed to the board *shall be* a minority appointee.") (emphasis added). As a result, Defendant enforces "'the particular statutory provision that is the subject of the litigation.'" *Mi Familia*, 105 F.4th at 327 (quoting *Texas All.*, 28 F.4th at 672).

Second. Willingness to enforce section 37:1263(B) means that Defendant "must have taken some step to enforce" the law. *Id.* at 329 (quoting *Texas Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020)). "The bare minimum" step toward enforcement "appears to be 'some scintilla' of affirmative action by the state official." *Texas Democratic Party*, 961 F.3d at 401. Past enforcement can satisfy that showing. *Mi Familia*, 105 F.4th at 329; *see also Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). As noted above, documents produced by Defendant show that Governor Edwards' administration considered race in seeking out candidates for seats on the Board of Medical Examiners. Exhibit A. Defendant has thus taken steps to enforce section 37:1263(B) in the past and, regardless of Governor Landry's declaration, the statute still requires Defendant to comply with it now and in the future. *See* Doc. 1 ¶¶ 14–15, 17, 19, 22.

Third. Defendant "compel[s] or constrain[s]" several categories of individuals to comply with section 37:1263(B). *Mi Familia*, 105 F.4th at 332 (quoting *Texas All.*, 28 F.4th at 672). For example, because Defendant's appointments require Senate confirmation, § 37:1263(B), and because the statutory language requires "at least every other" appointee for certain seats on the Board of Medical Examiners to be "a

minority appointee," § 37:1263(B)(2)–(3), (7)–(8), the Senate is compelled to consider only Defendant's minority appointments at the proscribed interval and is constrained in considering nonminority appointments, including members of Plaintiff, *see* Doc. 1 ¶¶ 1–3, 6, 18–19. Similarly, the Louisiana State University Health Sciences Centers at New Orleans and Shreveport, as well as the Louisiana Hospital Association, are compelled to provide Defendant with at least one name of a minority candidate for appointment to the Board to comply with section 37:1263(B)(2)–(3), (7). Further, other members of the Board, individuals and entities regulated by the Board, and even the Board itself are compelled to recognize Defendant's appointments to the Board upon being confirmed by the Senate, even if the appointee took office pursuant to the challenged aspects of section 37:1263(B)(2)–(3), (7)–(8). Defendant is the proper *Ex parte Young* defendant in this case.[5]

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss should be denied.

DATED: January 10, 2025.

Respectfully submitted,

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[5] Contrary to Defendant's argument, Doc. 30-1 at 5, Plaintiff has not filed an amended complaint nor alleged "that the Attorney General is poised to enforce the subject provisions."

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2025, 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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