

No. 25-30568

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Do No Harm, a nonprofit corporation incorporated in the
State of Virginia,

Plaintiff – Appellant,

v.

Jeff Landry, in his official capacity as the Governor for the State of
Louisiana as successor in office to Governor John Bel Edwards,

Defendant – Appellee.

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport Division
No. 5:24-cv-00016-JE-MLH (Hon. Jerry Edwards, Jr.)

APPELLANT’S OPENING BRIEF

LAURA M. D’AGOSTINO
Va. Bar No. 91556
PACIFIC LEGAL FOUNDATION
3100 Clarendon Boulevard
Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
Facsimile: (916) 419-7747
LDAgostino@pacificlegal.org

CALEB R. TROTTER
Cal. Bar No. 305195
PACIFIC LEGAL FOUNDATION
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
CTrotter@pacificlegal.org

Attorneys for Plaintiff – Appellant

CERTIFICATE OF INTERESTED PERSONS

No. 25-30568; *Do No Harm v. Jeff Landry*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Appellant:

Do No Harm, a nonprofit corporation
incorporated in the State of Virginia,

Appellant Counsel:

Caleb R. Trotter
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
CTrotter@pacifical.org

Laura M. D'Agostino
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
Fax: (916) 419-7747
LDAgostino@pacifical.org

Plaintiff District Court Counsel:

Caleb R. Trotter
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
CTrotter@pacificlegal.org

Laura M. D'Agostino
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
Fax: (916) 419-7747
LDAgostino@pacificlegal.org

James S. C. Baehr
Baehr Law
609 Metairie, LA 70005
Telephone: (504) 475-8407
Fax: (504) 828-3297
james@baehr.law

Appellee:

Jeff Landry, in his official capacity as the
Governor for the State of Louisiana as
successor in office to Governor John Bel
Edwards;

Appellee Counsel:

J. Benjamin Aguiñaga
Solicitor General
Louisiana Dept. of Justice
1885 North Third Street
Baton Rouge, LA 70802
aguinagaj@ag.louisiana.gov

Defendant District Court Counsel:

Carey T. Jones
Amanda M. LaGroue
Assistant Attorneys General
Louisiana Dept. of Justice
P.O. Box 94005
Baton Rouge, LA 70802
JonesCar@ag.louisiana.gov
LaGroueA@ag.louisiana.gov

s/ Caleb R. Trotter
CALEB R. TROTTER
Attorney for Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Do No Harm is a nonprofit corporation, organized under the laws of the State of Virginia, with a principal place of business in Virginia, without parent corporations. No corporation or publicly held entity holds any stock in Do No Harm. No other corporation has a direct financial interest in the outcome of this litigation.

STATEMENT REGARDING ORAL ARGUMENT

This case challenges the constitutionality of a Louisiana law that expressly discriminates on the basis of race in establishing criteria for membership on the Louisiana State Board of Medical Examiners. Rather than defend the merits of that law—in fact, Governor Landry has conceded that it is unconstitutional—the Governor sought dismissal, which the district court granted, on the grounds that the Governor is an improper defendant because he refuses to comply with the challenged law. Given the weighty issues at stake in this case, including the constitutionality of the law, as well as the vitality of the voluntary cessation doctrine and the extent to which government officials can engage in gamesmanship to avoid judicial review, oral argument would be helpful to this Court in resolving them.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
CORPORATE DISCLOSURE STATEMENT	iv
STATEMENT REGARDING ORAL ARGUMENT	v
TABLE OF AUTHORITIES.....	vii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES.....	1
INTRODUCTION.....	1
STATEMENT OF THE CASE	3
A. The Louisiana State Board of Medical Examiners	3
B. The Racial Mandate	5
C. Do No Harm.....	8
D. Procedural History	9
SUMMARY OF ARGUMENT.....	10
ARGUMENT	13
I. Standard of Review	13
II. Governor Landry Is the Proper Defendant.....	13
A. Gov. Landry has sole authority to enforce the mandate	16
B. The governor has enforced the racial mandate	16
C. The governor compels third parties to comply with the racial mandate.....	19
III. This Case Is Not Moot	22
IV. The Racial Mandate Is Unconstitutional.....	28
A. The racial mandate does not further a compelling governmental interest	30
B. The racial mandate is not narrowly tailored	33
CONCLUSION.....	37
CERTIFICATE OF SERVICE.....	38
CERTIFICATE OF COMPLIANCE.....	39

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995).....	35
<i>Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.</i> , 851 F.3d 507 (5th Cir. 2017).....	17
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	13
<i>Associated Gen. Contractors of Ohio, Inc. v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000).....	32, 34–35
<i>Baker v. Bell</i> , 630 F.2d 1046 (5th Cir. 1980).....	28
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	13
<i>City of Austin v. Paxton</i> , 943 F.3d 993 (5th Cir. 2019).....	21
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983).....	25
<i>City of Mesquite v. Aladdin’s Castle, Inc.</i> , 455 U.S. 283 (1982).....	23
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	<i>passim</i>
<i>Ctr. for Individual Freedom v. Carmouche</i> , 449 F.3d 655 (5th Cir. 2006).....	22
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991).....	29

Env't Conservation Org. v. City of Dallas,
 529 F.3d 519 (5th Cir. 2008)..... 22

Fed. Bureau of Investigation v. Fikre,
 601 U.S. 234 (2024)..... 24

Fisher v. Univ. of Tex. at Aus.,
 570 U.S. 297 (2013)..... 29, 33

Flores v. Pompeo,
 936 F.3d 273 (5th Cir. 2019)..... 13

Freedom from Religion Found., Inc. v. Abbott,
 58 F.4th 824 (5th Cir. 2023) 23, 26

Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.,
 528 U.S. 167 (2000)..... 11, 23–24, 27

Gratz v. Bollinger,
 539 U.S. 244 (2003)..... 34

Green Valley Special Util. Dist. v. City of Schertz,
 969 F.3d 460 (5th Cir. 2020)..... 10, 14

Grutter v. Bollinger,
 539 U.S. 306 (2003)..... 29, 33, 35

Hormel v. Helvering,
 312 U.S. 552 (1941)..... 28

Kentucky v. Graham,
 473 U.S. 159 (1985)..... 17

Mallory v. Harkness,
 895 F. Supp. 1556 (S.D. Fla. 1995)..... 36

McCorvey v. Hill,
 385 F.3d 846 (5th Cir. 2004)..... 25

Mi Familia Vota v. Ogg,
 105 F.4th 313 (5th Cir. 2024) *passim*

Palmore v. Sidoti,
 466 U.S. 429 (1984)..... 29, 33

Powell v. McCormack,
 395 U.S. 486 (1969)..... 23

Regents of Univ. of Cal. v. Bakke,
 438 U.S. 265 (1978)..... 32

Rice v. Cayetano,
 528 U.S. 495 (2000)..... 30

Shaw v. Hunt,
 517 U.S. 899 (1996)..... 32

Sossamon v. Lone Star State of Texas,
 560 F.3d 316 (5th Cir. 2009)..... 26–27

Speech First, Inc. v. Fenves,
 979 F.3d 319 (5th Cir. 2020).....25–26

Stauffer v. Gearhart,
 741 F.3d 574 (5th Cir. 2014)..... 26

*Students for Fair Admissions, Inc. v. President & Fellows of
 Harvard Coll. (SFFA)*,
 600 U.S. 181 (2023)..... *passim*

Tex. All. for Retired Ams. v. Scott,
 28 F.4th 669 (5th Cir. 2022) 15–16, 19, 21

Tex. Democratic Party v. Abbott,
 961 F.3d 389 (5th Cir. 2020)..... 17

Tex. Midstream Gas Servs., LLC v. City of Grand Prairie,
 608 F.3d 200 (5th Cir. 2010)..... 28

Tucker v. Gaddis,
 40 F.4th 289 (5th Cir. 2022) 25

United States v. Concentrated Phosphate Exp. Ass’n,
 393 U.S. 199 (1968)..... 11, 23, 27

United States v. W.T. Grant Co.,
345 U.S. 629 (1953)..... 26

Vitolo v. Guzman,
999 F.3d 353 (6th Cir. 2021)..... 31

Will v. Mich. Dep’t of State Police,
491 U.S. 58 (1989)..... 17

Wymore v. City of Cedar Rapids,
635 F.Supp.3d 706 (N.D. Iowa 2022).....36–37

Ex parte Young,
209 U.S. 123 (1908)..... *passim*

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

La. Stat. § 36:259(A)..... 5

La. Stat. § 37:1263(B)..... *passim*

 La. Stat. § 37:1263(B)(1)..... 4

 La. Stat. § 37:1263(B)(2)..... *passim*

 La. Stat. § 37:1263(B)(3)..... *passim*

 La. Stat. § 37:1263(B)(5)..... 5

 La. Stat. § 37:1263(B)(6)..... 5

 La. Stat. § 37:1263(B)(7)..... *passim*

 La. Stat. § 37:1263(B)(8)..... *passim*

 La. Stat. § 37:1263(B)(8)..... 15–16

La. Stat. § 37:1263(C)..... 4
 La. Stat. § 37:1263(C)(2)..... 5
La. Stat. § 37:1270..... 3

Rules

Fed. R. App. P. 4(a)(1)(A) 1
Fed. R. Civ. P. 12(b)(1) 9
Fed. R. Civ. P. 25(d)..... 18

Other Authorities

House Bill 778 (Act No. 599) 5–6
Video Recording of the Senate Health and Welfare
Committee (Apr. 25, 2018), *available at*
[https://senate.la.gov/s_video/videoarchive.asp?v=senate/
2018/04/042518H~W_0](https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/04/042518H~W_0)..... 6–7
Video Recording of Senate Proceedings
(May 9, 2018), *available at*
[https://senate.la.gov/s_video/videoarchive.asp?v=senate/
2018/05/050918SCHAMB_0](https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/05/050918SCHAMB_0) 7–8

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. The district court's order granting Defendant's Motion to Dismiss is a final decision over which this Court has appellate jurisdiction. *See* 28 U.S.C. § 1291. The district court's order granting the motion to dismiss was entered on September 29, 2025. ROA.311. Plaintiff-Appellant Do No Harm filed a notice of appeal on September 30, 2025. ROA.316. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUES

The issues on appeal are:

1. Whether Governor Jeff Landry is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908).
2. Whether La. Stat. § 37:1263(B)(2)–(3), (7)–(8), violates the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

Louisiana law expressly commands the Governor to discriminate on the basis of race when making appointments to the Louisiana State Board of Medical Examiners (Medical Board or the Board). La. Stat.

§ 37:1263(B)(2)–(3), (7)–(8) (Racial Mandate). Both parties to this case agree that the Racial Mandate is unconstitutional. *See* ROA.104. Yet the district court dismissed the case without reaching the merits holding that Defendant-Appellee Governor Jeff Landry’s litigation declaration disclaiming enforcement of the statute rendered him immune from suit. *See* ROA.311. That ruling cannot be squared with *Ex parte Young*, the voluntary-cessation doctrine, or basic principles of judicial review.

If affirmed, the decision below would establish a dangerous rule: that a state official may insulate an unconstitutional statute from judicial review simply by promising not to enforce it—while leaving the statute fully operative and binding on successors. Nothing in the Constitution permits an executive official to nullify a duly enacted law, evade review, and retain the power to resume enforcement at any time. Under the district court’s approach, plainly unconstitutional statutes could remain on the books indefinitely, enforced intermittently or opportunistically, yet forever shielded from judicial scrutiny.

That danger is concrete here. Even accepting the Governor’s present assurance, the Racial Mandate continues to compel discrimination by entities required to submit lists of possible nominees,

like the Louisiana State University Health Sciences Centers at New Orleans and Shreveport, and the Louisiana Hospital Association. And because the Governor is sued in his official capacity, his declaration binds neither future governors nor even himself tomorrow. Absent judicial relief, Louisiana law will continue to require race-based appointments—precisely the ongoing constitutional violation *Ex parte Young* exists to remedy.

Because Governor Landry is the official charged by statute with enforcing the Racial Mandate, and because a nonbinding declaration cannot moot a live constitutional controversy or confer sovereign immunity, the district court’s dismissal should be reversed. And given the Governor’s concession that the statute violates the Equal Protection Clause, this Court should remand with instructions to enter summary judgment in favor of Plaintiff-Appellant Do No Harm.

STATEMENT OF THE CASE

A. The Louisiana State Board of Medical Examiners

The Louisiana State Board of Medical Examiners regulates the practice of medicine in Louisiana. La. Stat. § 37:1270. The Board is currently comprised of ten voting members appointed by the Governor

and subject to Senate approval. La. Stat. § 37:1263(B). Of these ten seats, nine must be filled by physicians and one by a member of the public. *Id.*

All nine physician members of the Board must be residents of Louisiana for at least six months, licensed and in good standing to engage in the practice of medicine in Louisiana, actively engaged in the practice of medicine, not been convicted of a felony, not been placed on probation by the Board, and have had at least five years of experience in the practice of medicine in Louisiana. *Id.* § 37:1263(C). In addition to these requirements, the nine physicians are also recruited from varying backgrounds: (a) two must be appointed from a list of names submitted by the Louisiana State Medical Society, with one of these members practicing in a parish or municipality with a population of less than twenty thousand people (§ 37:1263(B)(1)); (b) one member is appointed from a list of names submitted by the Louisiana State University Health Sciences Center at New Orleans (§ 37:1263(B)(2)); (c) one member is appointed from a list submitted by the Louisiana State University Health Sciences Center at Shreveport (§ 37:1263(B)(3)); (d) one member is appointed from a list of names submitted by Tulane Medical School (§ 37:1263(B)(4)); (e) two members are appointed from a list submitted by

the Louisiana Medical Association (§ 37:1263(B)(5)); (f) one member is appointed from a list submitted by the Louisiana Academy of Family Practice Physicians (§ 37:1263(B)(6)); and (g) one member is appointed from a list submitted by the Louisiana Hospital Association (§ 37:1263(B)(7)).

The consumer member of the Board must be a citizen of the United States, a resident of Louisiana for at least one year immediately prior to appointment, have attained the age of majority, have never been licensed by any of the licensing boards identified in § 36:259(A), not have a spouse that has ever been licensed by a board identified in § 36:259(A), never been convicted of a felony, and not have or ever had a material financial interest in the healthcare profession. *Id.* § 37:1263(C)(2).

B. The Racial Mandate

In 2018, the Louisiana Legislature enacted House Bill 778 (Act No. 599). The law added three seats to the then-seven-member Medical Board. *Id.* Louisiana law now requires the Governor to ensure that “at least every other member [appointed to the Board] . . . shall be a minority appointee” in regard to three of the physician seats as well as the public consumer seat. *See* § 37:1263(B)(2)–(3), (7)–(8). The three physician seats

subject to this Racial Mandate are those pertaining to the Louisiana State University Health Sciences Centers at New Orleans and Shreveport, and the Louisiana Hospital Association. § 37:1263(B)(2)–(3), (7).

When House Bill 778 was first considered in the Senate Health and Welfare Committee, an amendment was offered to require the proposed new seat on the Medical Board for which the Louisiana Hospital Association would submit 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).¹ Under questioning, the bill sponsor (Representative Jackson) stated that she was contacted by minority physicians in Louisiana who complained that the Medical Board frequently lacked 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

¹ Available at https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/04/042518H~W_0.

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 quota. Video Recording of Senate Proceedings at 1:40:40 (May 9, 2018).² Thus, 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 on the basis of race.

The legislative record contains no discussion of racial discrimination, disparities, statistics, or even anecdotes of discrimination. There is only a general desire to achieve proportional representation on the basis of race. ROA.234–35; Video Recording of the Senate Health and Welfare Committee at 1:34:58 (Apr. 25, 2018); Video

² Available at https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/05/050918SCHAMB_0.

Recording of Senate proceedings at 1:40:40 (May 9, 2018). Indeed, throughout discovery in this case, the only interest that Governor Landry claimed is advanced by the Racial Mandate is ensuring that “all segments of the population with an interest in healthcare as it impacts that discrete segment have a voice in matters and decisions of the Board.” ROA.234. Governor Landry also suggested that “membership in a racial minority group increases the likelihood that a person will speak with concern about the welfare of that group.” ROA.236.

C. Do No Harm

Plaintiff-Appellant Do No Harm is a national nonprofit corporation and membership organization made up of medical professionals, students, policymakers, and other interested members of the general public. ROA.10–11, 224. Its mission is to protect healthcare from a radical, divisive, and discriminatory ideology. *Id.*

Do No Harm’s membership includes one or more individuals who are licensed physicians in Louisiana and eligible for membership on the Medical Board. ROA.10–11, 225–26. Do No Harm’s membership also includes one or more members who are eligible to be a public consumer member of the Board. ROA.10–11, 226. Do No Harm has physician and

consumer members who are qualified, willing, and able to be appointed to the Board, but the Racial Mandate precludes them from being considered for appointment, or at least disadvantages them from being considered on equal footing with other candidates. ROA.14, 225–26.

D. Procedural History

The complaint in this case was filed on January 4, 2024. ROA.9. Do No Harm challenged the Racial Mandate as violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After the parties completed discovery, Governor Landry moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. Because of a declaration signed by the Governor stating he would not enforce the Racial Mandate, ROA.103, the Governor claimed that this case was moot and that he was not a proper defendant. Nevertheless, Do No Harm proceeded to file a motion for summary judgment. In opposition, Governor Landry conceded the merits of the Equal Protection challenge but reasserted his claims of mootness and that he was not a proper defendant. Dkt. No. 39. The district court granted the motion to dismiss—and denied the motion for summary

judgment as moot—on September 29, 2025. ROA.311. This appeal followed. ROA.316.

SUMMARY OF ARGUMENT

Governor Landry is the proper defendant under *Ex parte Young*. Louisiana law expressly assigns the Governor—and only the Governor—the duty to appoint members to the Louisiana State Board of Medical Examiners in accordance with the challenged Racial Mandate. See § 37:1263(B)(2)–(3), (7)–(8). Relying solely on the Governor’s litigation declaration disclaiming enforcement, ROA.103, the district court nevertheless held that he is immune from suit. ROA.312. That ruling has no basis in *Ex parte Young* or this Court’s precedent. A state official cannot defeat judicial review of an unconstitutional statute simply by promising not to comply with it while the statute remains in force.

The district court acknowledged that Do No Harm satisfied the traditional requirements for the *Ex parte Young* exception to sovereign immunity. See *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (en banc). But it treated the Governor’s declaration as dispositive under three “guideposts” discussed in *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024). See ROA.313.

That was error. Those guideposts do not authorize executive officials to nullify statutes by declaration, nor do they permit courts to ignore the official's statutory authority, past enforcement, and ongoing coercive effects. Here, all three factors confirm that the Governor is the proper defendant: he alone is charged with enforcing the Racial Mandate; the mandate has been enforced in the *very recent* past, *see* ROA.180–83; and it continues to compel discriminatory conduct by the Governor and third parties today.

Nor is this case moot. Accepting the Governor's theory would eviscerate the voluntary-cessation doctrine and invite precisely the sort of manipulation it exists to prevent. To establish mootness, a government defendant bears the "heavy burden" to make "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). That burden is typically met by repeal or amendment of a challenged law—not by a single official's nonbinding promise of nonenforcement. The Racial Mandate remains on the books, binds Governor Landry and future governors as a matter of Louisiana

law, and continues to compel race-based decision making by entities participating in the appointment process. As a matter of law, the controversy remains live.

Allowing dismissal on these facts would have sweeping consequences. It would permit governors to insulate unconstitutional statutes from judicial review whenever they disagree with them, leaving such laws dormant, selectively enforced, or revived at will—yet forever beyond the reach of the courts. The Constitution does not tolerate an executive veto over judicial review, and this Court’s precedents do not permit it.

Finally, although the district court did not reach the merits, this Court can and should. First, Governor Landry has conceded that the Racial Mandate violates the Equal Protection Clause. *See* ROA.104; Def’s Opp’n. to Pl.’s Mot. Summ. J., Dkt. No. 39. And the case was fully briefed on cross-motions for summary judgment before the district court, with a complete factual record and no disputed issues material to the constitutional question. Even if this Court independently analyzes the Racial Mandate, it has no hope of satisfying strict scrutiny. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*,

600 U.S. 181, 206 (2023) (Race-based classifications are presumptively unconstitutional and can only be overcome if the government satisfies the “daunting two-step examination” of strict scrutiny). Because there is no factual dispute and no plausible constitutional defense, remand for further proceedings would serve no purpose. The judgment should be reversed, and the case remanded with instructions to enter summary judgment in favor of Do No Harm.

ARGUMENT

I. Standard of Review

A district court’s dismissal of a complaint is reviewed *de novo*. *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019). A motion to dismiss can only be granted when the complaint fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts “must accept as true all of the allegations contained in a complaint.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Governor Landry Is the Proper Defendant

Even though Governor Landry conceded below that the Racial Mandate is unconstitutional, the district court dismissed the case on

Eleventh Amendment sovereign immunity grounds upon holding that the Governor is not the proper defendant. ROA.312. The district court reached that conclusion solely based on Governor Landry's promise not to enforce the Mandate. *See* ROA.312. A litigation declaration disclaiming enforcement is not law, is not binding, and is not a recognized basis for sovereign immunity under *Ex parte Young*. And an unenforceable promise cannot outweigh a history of enforcement or the fact that the Governor—and only the Governor—is mandated to comply with the Mandate in making appointments to the Medical Board.

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.*, 969 F.3d at 471 (citations omitted). The district court acknowledged that Governor Landry did “not dispute that Do No Harm meets these general requirements.” ROA.313.

Nor could Governor Landry have disputed that Do No Harm's Complaint satisfies all three factors. The Complaint names the Governor

as the Defendant in his official capacity as Governor of Louisiana, ROA.11, and seeks only prospective relief, ROA.15. Given that La. Stat. § 37:1263(B) requires the Governor to comply with the Racial Mandate regardless of Governor Landry’s views on the law, the violation of Do No Harm’s members’ constitutional rights is also ongoing until the law is enjoined or repealed. *See* ROA.9–11, 13–15. *See also* La. Stat. § 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).

To establish that a state official is a proper defendant under *Ex parte Young*, the Fifth Circuit has articulated three additional “guideposts.” *See Mi Familia Vota*, 105 F.4th at 325 (citing *Tex. 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). Each of these requirements is satisfied beyond any serious dispute.

A. Gov. Landry has sole authority to enforce the mandate

La. Stat. § 37:1263(B) gives Governor Landry the sole authority to make appointments to the Medical Board. This is undisputed. *See* ROA.313. Indeed, in exercising his statutory responsibility, Governor Landry is required to make certain appointments based on a candidate’s status as a minority. § 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). As a result, Governor Landry has authority to enforce “the particular statutory provision that is the subject of the litigation.” *Mi Familia Vota*, 105 F.4th at 327 (quoting *Tex. All.*, 28 F.4th at 672).

B. The governor has enforced the racial mandate

This case does not present a hypothetical or purely pre-enforcement challenge, but a statute with a documented history of race-based enforcement by the Governor’s office. Willingness to enforce the Racial

Mandate means that the Governor “must have taken some step to enforce” the law. *Mi Familia Vota*, 105 F.4th at 329 (quoting *Tex. 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.” *Tex. Democratic Party*, 961 F.3d at 401. Past enforcement can satisfy that showing. *Mi Familia Vota*, 105 F.4th at 329; *see also Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 519 (5th Cir. 2017).

Documents produced in discovery show that Governor Landry’s immediate predecessor, Governor Edwards, considered race in seeking out candidates for seats on the Medical Board. ROA.170–183. Consideration of Governor Edwards’ past enforcement is appropriate here as “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *accord Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (“an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.”). The Governor—the official holding the office of the

Governor of Louisiana—has thus taken steps to enforce the Racial Mandate in the past. Regardless of the individual currently holding office, Governor Landry, declaring his personal intention not to comply with the duly enacted statute, it still requires the Governor to comply with it. *See* ROA.13–14.

Previous enforcement by his immediate predecessor, Governor Edwards, also distinguishes this case from *Mi Familia Vota*. There, this Court held that a state official was not a proper defendant because the case was a pre-enforcement challenge and the official pledged not to enforce the challenged law until after the lawsuit was resolved. *See* 105 F.4th at 330–31. Here, the official holding office when the case was filed was complying with Louisiana law and enforcing the Racial Mandate.³

In any event, this Court noted in *Mi Familia Vota* that it was not “resolv[ing] whether statements made during the course of litigation about future behavior, *by themselves*, are sufficient to insulate state officials from *Ex parte Young*’s exception to sovereign immunity.” *Id.* at 331 n.12 (emphasis added). This Court declined to do so because the

³ Governor Edwards was initially named as the Defendant in this case, ROA.9, but was automatically substituted under Federal Rule of Civil Procedure 25(d) upon Governor Landry succeeding him in office.

Texas official's nonenforcement was simply "further evidence" that the official was not the proper defendant. *Id.* But here, the *only evidence* that Governor Landry is not the proper defendant is his declaration that he will not enforce the Racial Mandate. *See* ROA.103. Given Governor Edwards' prior enforcement of the Mandate and that the Mandate remains the law of Louisiana, this Court should hold that Governor Landry's declaration alone is insufficient to nullify the history of enforcement of the Racial Mandate.

C. The governor compels third parties to comply with the racial mandate

In addition to the Governor having previously enforced the Racial Mandate, Governor Landry "compel[s] or constrain[s]" others to comply with it. *Mi Familia Vota*, 105 F.4th at 332 (quoting *Tex. All.*, 28 F.4th at 672).

- Because the Governor's appointments require Senate confirmation, La. Stat. § 37:1263(B), and because the statute requires "at least every other" appointee for certain seats be "a minority appointee," La. Stat. § 37:1263(B)(2)–(3), (7)–(8), the Senate is not free to exercise independent judgment. It is compelled to ratify the Governor's race-based selections at

proscribed intervals and correspondingly constrained from considering nonminority candidates, including members of Do No Harm, *see* ROA.9–11, 14.

- The Louisiana State University Health Sciences Centers at New Orleans and Shreveport are compelled to provide the Governor with at least one name of a minority candidate for appointment to the Board to comply with the Racial Mandate. La. Stat. § 37:1263(B)(2)–(3).
- Similarly, the Louisiana Hospital Association is compelled to provide the Governor with at least one name of a minority candidate for appointment to the Board to comply with the Racial Mandate. La. Stat. § 37:1263(B)(7).
- Once confirmed by the Senate, the Governor’s appointees—whether selected pursuant to the Racial Mandate or not—lawfully take office and exercise regulatory authority. Other Board members, regulated physicians, healthcare entities, and the Board itself are therefore required to treat those appointments as valid and binding, even when the

appointment was made under the challenged race-based criteria.

If the Governor—the only official charged by statute with making these appointments—is not a proper defendant, then no state official could ever be sued to enjoin this law, a result *Ex parte Young* does not permit.

This case is far afield from those *Ex parte Young* cases where there is confusion as to which official is responsible for enforcing a statute or there exists textual vagueness or where multiple parties are responsible for enforcement. *See, e.g., Mi Familia Vota*, 105 F.4th at 328–29 (governor, attorney general, and local district attorneys all have enforcement responsibility over election integrity laws); *City of Austin v. Paxton*, 943 F.3d 993, 993 (5th Cir. 2019) (governor, attorney general, and workforce commission have different interrelated authority over housing law); *Tex. All.*, 28 F.4th at 670 (secretary of state sued over voting laws enforced by other branches of government). Here, there is one statute, and it expressly directs the Governor—and only the Governor—to appoint individuals to the Medical Board on the basis of race. It’s not confusing. It’s not even disputed.

None of this Court’s cases holding that various defendants were improper have anything to do with a proper official disavowing his legally mandated obligation to enforce state law. That is not—and has never been—a recognized defense to a Section 1983 suit. The Governor’s attempt to shoehorn his disavowal into that exception fails as a matter of law. Accepting the Governor’s theory would allow state officials to place unconstitutional statutes beyond judicial review indefinitely—neither enforced nor repealed, but immune from challenge whenever an official professes noncompliance. Governor Landry is the proper *Ex parte Young* defendant in this case.

III. This Case Is Not Moot⁴

“Mootness is ‘the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).’” *Env’t Conservation Org. v. City of Dallas*, 529 F.3d 519, 524–25 (5th Cir. 2008) (citing *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006)). Governor Landry’s nonbinding declaration and promise not

⁴ In the district court, Governor Landry additionally sought dismissal on the grounds that his declaration moots the case, but the district court did not address the argument in its order of dismissal. *See* ROA.311–15.

to enforce the Racial Mandate does not moot this case. Consequently, Do No Harm continues to experience a constitutional injury and has a “cognizable interest in the outcome” as a result. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

As a matter of law, the Governor’s argument that his nonbinding declaration moots this case sounds in voluntary cessation. But “voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). And the Governor’s declaration here fails for the same reason voluntary cessation arguments almost always fail: to show mootness, a government 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 *Concentrated Phosphate*, 393 U.S. at 203). That burden is typically met by repealing or amending the challenged law—not by a single official’s assurance of present nonenforcement.⁵ The Governor does not come close to meeting his burden here.

⁵ 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,

While 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* ROA.103, that does not render an active statute moot. The Governor is sued in his official capacity. ROA.11. The original defendant in this case was Governor John Bel Edwards. ROA.11. Upon Governor Landry’s successor taking office, the future governor will be bound to enforce the racially discriminatory aspects of La. Stat. § 37:1263(B) regardless of Governor Landry’s declaration. As a result, any claim that the discrimination enshrined in the Racial Mandate “could not reasonably be expected to recur” is plainly wrong. *See Laidlaw*, 528 U.S. at 189. *See also Fed. 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.

Given the record in this case demonstrating past enforcement of the Racial Mandate, and the continued existence of the statute, future

of course, there is no repeal. Accordingly, Governor Landry continues to bear the “heavy burden” of showing mootness.

enforcement is likely to recur. Several documents produced in discovery show that Governor Edwards' administration considered race in seeking out candidates for seats on the Board of Medical Examiners. ROA.170–183. 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.”).

Because the statute remains in force and binds the office of the Governor, recurrence is not merely possible—it is legally mandated absent judicial relief. Governor Landry's declaration does not have the force of law and cannot bind future governors. Unless this Court reverses and orders the racially discriminatory aspects of section 37:1263(B)(2)–(3), (7)–(8) enjoined and declared unconstitutional, future governors—and even Governor Landry—are 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 his 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 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, Governor Landry’s declaration does nothing to moot the controversy.

Should this Court hold that Governor Landry is not the proper defendant based solely on his declaration, it would completely undercut the “voluntary cessation” doctrine. If government officials could simply disavow enforcement and invoke sovereign immunity, there would no longer be “a heavy burden” to show unlikelihood of future enforcement. *See Laidlaw*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203). There would be no burden at all.

If a Governor’s litigation promise were enough to moot a constitutional challenge, then no unconstitutional statute would ever need to be repealed—only temporarily disavowed until the courthouse doors close. Sovereign immunity isn’t a cheat code that allows such gamesmanship.

IV. The Racial Mandate Is Unconstitutional

In dismissing Do No Harm's complaint, the district court did not address the merits of the equal protection claim in this case. But in opposition to Do No Harm's summary judgment motion, Governor Landry conceded that the Racial Mandate is unconstitutional. *See* Dkt. No. 39. In fact, the very basis for Governor Landry's declaration is the Governor's agreement that the Racial Mandate cannot be enforced. ROA.104. As a result, should this Court reverse the dismissal, "there is little sense in declining to address the merits and remanding for further proceedings." *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010). *See also Baker v. Bell*, 630 F.2d 1046, 1056 (5th Cir. 1980) ("[T]here are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'") (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)). Thus, because of the Governor's concession of the merits, this Court should simply remand the case to the district court with instructions to enter summary judgment in Do No Harm's favor.

Alternatively, should this Court prefer to separately analyze the constitutional question, the Racial Mandate cannot be upheld. “[R]acial discrimination is invidious in all contexts” and the “core purpose” of the Equal Protection Clause is “do[ing] away with all governmentally imposed discrimination based on race.” *SFFA*, 600 U.S. at 206, 214 (2023) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)). Race-based classifications are presumptively unconstitutional and can only be overcome if the government satisfies the “daunting two-step examination” of strict scrutiny. *SFFA*, 600 U.S. at 206.

Under strict scrutiny, Governor Landry must first demonstrate that the Racial Mandate is used to “further compelling governmental interests.” *Id.* at 206–07 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). Second, he must show that the “use of race is ‘narrowly tailored’—meaning ‘necessary’—to achieve that interest.” *Id.* at 207 (quoting *Fisher v. Univ. of Tex. at Aus.*, 570 U.S. 297, 311–12 (2013)). Governor Landry can make no such showing—the Racial Mandate fails both prongs of the test.

A. The racial mandate does not further a compelling governmental interest

The government is required to establish a compelling interest for engaging in race-conscious actions because it “assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). “Acceptance of race-based state action is rare for a reason: [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *SFFA*, 600 U.S. at 208 (citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

Governor Landry has not identified any compelling governmental interest for the Racial Mandate. Section 37:1263(B)(2)–(3), (7)–(8) expressly requires the Governor to make race-based appointments to the Medical Board, and the only interest Governor Landry has identified is ensuring that “all segments of the population with an interest in healthcare as it impacts that discrete segment have a voice in matters and decisions of the Board.” ROA.234–35, 241–42. Alongside this interest, Governor Landry also suggests that “membership in a racial minority group increases the likelihood that a person will speak with

concern about the welfare of that group.” ROA.236. These are not compelling interests.

After *Students for Fair Admissions*, only two compelling interests justify race-based government action: (1) “remediating specific, identified instances of past discrimination that violated the Constitution or a statute,” or (2) avoiding imminent risk of riots in a prison. *SFFA*, 600 U.S. at 207. The latter does not apply to this case and Governor Landry does not claim the former—nor could he.

The Governor cannot demonstrate that the Racial Mandate alleviates past discrimination because he has not: (1) shown that it targets “a specific episode of past discrimination;” (2) provided “evidence of intentional discrimination” in past appointments to the Medical Board; and (3) shown that the government “had a hand in the past discrimination it now seeks to remedy.” *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing U.S. Supreme Court precedents). A “searching judicial inquiry” into Governor Landry’s justification reveals a record deplete of the evidence necessary to support that justification. *Croson*, 488 U.S. at 493.

Governor Landry and the legislative record are silent as to any evidence of Louisiana governors discriminating against racial minorities in appointments to the Medical Board or any other state board or commission; rather, the legislative record reveals a desire to racially balance the Medical Board in order to increase “minority representation.” *See supra* at 6-8. The sponsor of the legislation, Representative Jackson, detailed how she was contacted by minority physicians who complained about the lack of minority representation on the Medical Board and emphasized how the legislation would help change the composition of the Board to reflect the diversity of the state’s physicians—a view echoed by Senator Barrow. *See supra* at 6-7; Video Recording of the Senate Health and Welfare Committee at 1:34:58 (Apr. 25, 2018); Video Recording of Senate proceedings at 1:40:40 (May 9, 2018). *See also* ROA.104 (Defendant does not identify the Legislature’s goals in his declaration but notes that “while the goal . . . may well have been laudable or well-intended,” he views the appointments of officials on the basis of race to be “constitutionally impermissible.”).

Apart from these discussions of diversity objectives, there is no mention of any racial disparities caused by discrimination, nor any other

alleged governmental interest that could satisfy the demands of strict scrutiny. But even if Governor Landry could point to racial disparities in appointments to the Medical Board, “evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court.” *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (citing *Croson*, 488 U.S. at 501–02). Similarly, an effort to alleviate the effects of “societal discrimination” is not a compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (noting that the Court has never approved of a classification that “aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals” in the absence of specific findings of constitutional or statutory violations); *Palmore*, 466 U.S. at 432 (“[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns”).

B. The racial mandate is not narrowly tailored

Even assuming Governor Landry could establish a compelling governmental interest to justify the Racial Mandate—which he cannot—it must still be “narrowly tailored” to that interest. To survive strict

scrutiny, the remedy must also “fit” the compelling goal “so closely” that there is “little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Croson*, 488 U.S. at 493. Moreover, the government must show “serious, good faith consideration of workable race-neutral alternatives.” *Grutter*, 539 U.S. at 339; *Croson*, 488 U.S. at 507. Courts must strike down race-based programs unless it is “satisfied that no workable race-neutral alternative” would achieve the compelling interest. *Fisher*, 570 U.S. at 312. Further, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications, *Croson*, 488 U.S. at 507–08; *Gratz v. Bollinger*, 539 U.S. 244, 273–75 (2003), and it must have an end point. *SFFA*, 600 U.S. at 225. The Racial Mandate fails to satisfy all of these factors and is not narrowly tailored as a result.

First. The Racial Mandate itself does not identify a specific racial group. § 37:1263(B)(2)–(3), (7)–(8) (“at least every other member [appointed to the Board] . . . shall be a minority appointee . . .”); ROA.104 (“The term ‘minority’ as commonly understood in the context of in the distribution and benefits of government connotes race, national origin, or minority status . . .”). By lumping together all “minorities,” the

government may be providing preference “where there has been no discrimination”—this “overinclusiveness” undermines narrow tailoring. *See Drabik*, 214 F.3d at 737 (citing *Croson*, 488 U.S. at 506). In other words, Governor Landry could satisfy the Racial Mandate by appointing members of minority groups that have never experienced discrimination in seeking appointment to the Medical Board. This result “suggests”—if not conclusively establishes—that the purpose behind the Racial Mandate “was not in fact to remedy past discrimination” against members of an identified group. *Croson*, 488 U.S. at 506.

Second. Remedial measures must be time-limited, but the Racial Mandate has remained in place since 2018 and is, in fact, perpetual. *See SFFA*, 600 U.S. at 212 (racially conscious government programs must have a “logical end point.”) (quoting *Grutter*, 539 U.S. at 342). *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238 (1995) (race-conscious programs must “not last longer than the discriminatory effects [they are] designed to eliminate.”).

Third. Neither Governor Landry nor the legislative record provide any evidence of “good faith” consideration of race-neutral alternatives. *See Grutter*, 539 U.S. at 339; ROA.234–35. Narrow tailoring ordinarily

requires that the legislature has “carefully examined and rejected race-neutral alternatives.” *Croson*, 488 U.S. at 507. No such examination occurred here—Louisiana simply adopted a race-based solution without further consideration. *See Drabik*, 214 F.3d at 738 (no narrow tailoring where record “contains no evidence ‘that the [legislature] gave any consideration to the use of race-neutral means . . . before resorting to race-based quotas.’”).

Fourth. The Racial Mandate imposes significant burdens on the rights of third parties because it bans members from other racial groups from applying for certain seats depending on the racial makeup of the board—it also requires the Louisiana State University Health Sciences Centers at New Orleans and Shreveport, as well as the Louisiana Hospital Association, to submit recommendation lists to the Governor that factor in the Racial Mandate. § 37:1263(B)(2)–(3), (7)–(8). “No federal court has deemed the burden imposed by a rigid quota reasonable or insignificant where the asserted goal of the program was no more than racial and gender diversity for its own sake.” *Mallory v. Harkness*, 895 F. Supp. 1556, 1562 (S.D. Fla. 1995). *See also Wymore v. City of Cedar Rapids*, 635 F.Supp.3d 706, 718 (N.D. Iowa 2022) (“There is no evidence

having a specific proportion of People of Color on every Board will serve those interests more than would a composition of random race proportions.”).

Governor Landry cannot show that the Racial Mandate furthers a compelling interest, and because it is not sufficiently tailored, it fails to meet the high demands of strict scrutiny and is unconstitutional.

CONCLUSION

Because Governor Landry is the proper defendant and this case is not moot, this Court should reverse the district court’s dismissal of the complaint and remand with instructions to enter summary judgment in favor of Do No Harm.

DATED: December 22, 2025

Respectfully submitted,

LAURA M. D’AGOSTINO
Va. Bar No. 91556
PACIFIC LEGAL FOUNDATION
3100 Clarendon Boulevard
Suite 1000
Arlington, VA 22201
Telephone: (202) 888-6881
Facsimile: (916) 419-7747
LDAgostino@pacificlegal.org

/s/ Caleb R. Trotter
CALEB R. TROTTER
Cal. Bar No. 305195
PACIFIC LEGAL FOUNDATION
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
CTrotter@pacificlegal.org

Attorneys for Plaintiff – Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Caleb R. Trotter
CALEB R. TROTTER
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because excluding the parts of the document exempted by Fed. R. App. P. 32(f):

- this document contains 7,040 words, **or**
- this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

- this document has been prepared in a proportionally spaced typeface using Word in 14-point, Century Schoolbook font, **or**
- this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

Dated: December 22, 2025.

s/ Caleb R. Trotter
CALEB R. TROTTER
Attorney for Appellant