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 MOTION FOR SUMMARY JUDGMENT

Plaintiff Do No Harm moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1. For the reasons set forth in the accompanying memorandum in support of this motion, there is no genuine dispute of material fact and Do No Harm is entitled to judgment as a matter of law.

DATED: January 30, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 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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MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Louisiana Law requires Defendant Jeff Landry, in his official capacity as Governor of the State of Louisiana, to appoint individuals to the Board of Medical Examiners (Medical Board) on the basis of race. La. Stat. § 37:1263(B)(2)–(3), (7)–(8) (Racial Mandate). Specifically, when considering individuals for appointments to the Medical Board—the Board responsible for licensing, regulating, and disciplining physicians and allied health professions within the State—Governor Landry must ensure that "at least every other member [appointed to the Board] … shall be a minority appointee" with respect to four out of the ten seats on the Medical Board. § 37:1263(B)(2)–(3), (7)–(8).

The reach of the Racial Mandate doesn't end there—it also forces entities like the Louisiana State University Health Sciences Centers at New Orleans and Shreveport as well as the Louisiana Hospital Association to discriminate. Defendant is required to make his race-based physician appointments to the Medical Board from the race-based recommendations submitted by these entities.[1] § 37:1263(B)(2)–(3), (7). So even if Defendant promises to ignore the state-mandated discrimination, he's still required to choose appointments from lists that are curated by race.

Requiring Defendant to make appointment decisions based on an individual's race is not only morally wrong, it is blatantly unconstitutional. To his credit, Defendant agrees. *See* Def.'s Opp. to Pl.'s Mot. to Compel, Ex. A, ECF No. 22-1. This

[1] Additional entities also provide Defendant with names for other seats on the Medical Board, but those seats are not subject to the Racial Mandate and are not implicated by this case.

Court should put an end to this facially discriminatory scheme and grant Do No Harm's motion for summary judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

In addition to the separate Statement of Undisputed Material Facts required under Local Rule 56.1, filed separately and linked to Plaintiff's Motion for Summary Judgment, Do No Harm offers a summary of the relevant facts here:

A. The Louisiana State Board of Medical Examiners

The Medical Board is comprised of ten voting members appointed by the Governor and subject to Senate approval. § 37:1263(B); Pl.'s Statement of Undisputed Material Facts (SUMF) ¶ 1. 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.* at § 37:1263(C); Pl.'s SUMF ¶ 2. 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))[2]; (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)). *See also* Pl.'s SUMF ¶ 3.

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.* at § 37:1263(C)(2); Pl.'s SUMF ¶ 4.

According to a list provided by Defendant, *see* Trotter Decl. ¶ 3, Ex. 3, the nine physician Board members are as follows: Dr. Juzar Alia (Louisiana State University Health Sciences Center at New Orleans representative whose term expires in 2026); Dr. Rita Y. Horton (Louisiana State University Health Sciences Center at Shreveport

[2] In a document produced by Defendant, the Louisiana Medical Association describes itself as an affiliate of the National Medical Association (NMA). *See* SUMF ¶ 3; Trotter Decl. ¶ 5, Ex. 5 ("The NMA is the largest and oldest national organization representing African American physicians and their patients in the United States."). The National Medical Association notes on its website that it "stands as the collective voice of African American physicians, tirelessly championing parity and justice in medicine." *See* https://nmanet.org/.

representative whose term expires in 2026); Dr. Roderick V. Clark (Louisiana State Medical Society representative whose term expires in 2026); Dr. Lester W. Johnson (Louisiana State Medical Society representative whose term expires in 2025); Dr. Patrick T. O'Neil (Tulane Medical School representative whose term expires in 2026); Dr. James A. Taylor, Jr. (Louisiana Academy of Family Practice Physicians whose term expires in 2026); Dr. Terrie R. Thomas (Louisiana Hospital Association whose term expires in 2026); Dr. Cheryl H. Williams (Louisiana Medical Society whose term expires in 2026); Dr. Leonard Weather, Jr. (Louisiana Medical Society whose term expired in 2023, but is still serving on the Medical Board according to the Board's website).[3] Kim S. Sport, J.D., is the consumer representative and her seat expires in 2026. Trotter Decl. ¶ 3, Ex. 3.

B. The Racial Mandate

In 2018, the Louisiana Legislature enacted House Bill 778 (Act No. 599); Pl.'s SUMF ¶ 5. The law added three seats to the Medical Board.[4] *Id.* It also now requires the Governor to comply with the Racial Mandate by ensuring 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); Trotter Decl. ¶ 1, Ex. 1; Pl.'s SUMF ¶ 5. The three physician seats subject to the Racial Mandate are those pertaining to the Louisiana State University Health

[3] *See* Louisiana State Board of Medical Examiners, Board Members, https://www.lsbme.la.gov/content/board-members (last visited Jan. 30, 2025). This Court can take judicial notice of information available on government websites. *See Huskey v. Jones*, 45 F.4th 827, 831 n.3 (5th Cir. 2022) (citations omitted).
[4] *See* https://www.legis.la.gov/legis/ViewDocument.aspx?d=1103110.

Sciences Centers at New Orleans and Shreveport, and the Louisiana Hospital Association. § 37:1263(B)(2)–(3), (7); Pl.'s SUMF ¶¶ 3, 5.

When House Bill 778 was 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 submits names to the Governor, to include a race-based quota. Pl.'s SUMF ¶ 6; Video Recording of the Senate Health and Welfare Committee at 1:34:58 (Apr. 25, 2018).[5] 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.*; Pl.'s SUMF ¶ 7.

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. Pl.'s SUMF ¶ 12; Trotter Decl. ¶ 1, Ex. 1; 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).[6] Indeed, throughout discovery in this case, the only interest Defendant claims 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." Pl.'s SUMF ¶ 13; Trotter Decl. ¶¶ 1–2, Exs. 1–2. Defendant also suggests that "membership in a racial minority group increases the

[5] *Available at* https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/04/042518H~W_0.
[6] *Available at* https://senate.la.gov/s_video/videoarchive.asp?v=senate/2018/05/050918SCHAMB_0.

likelihood" that a person will speak with "concern about the welfare of that group." Trotter Decl. ¶ 1, Ex. 1.

C. Do No Harm

Plaintiff Do No Harm is a national nonprofit corporation headquartered in Glen Allen, Virginia. Rasmussen Decl. ¶ 3. It is a membership organization made up of medical professionals, students, policymakers, and other interested members of the general public. *Id.* Its mission is to protect healthcare from a radical, divisive, and discriminatory ideology. *Id.* Do No Harm's membership includes one or more individuals that are licensed physicians actively engaged in the practice of medicine for at least five years, have resided in Louisiana for at least six months, and have not been placed on probation by the Medical Board nor been convicted of any felonies. Rasmussen Decl. ¶¶ 7, 9.

Do No Harm's membership also includes one or more members that are at least eighteen years of age, have never been convicted of a felony, have resided in Louisiana for more than a year, have never been licensed by any of the licensing boards identified in § 36:259(A), do not have a spouse licensed by a board identified in § 36:259(A), and do not have and have never had a material financial interest in the healthcare profession. Rasmussen Decl. ¶¶ 10–11. Do No Harm has physician and consumer members who are qualified, willing, and able to be appointed to the Board if the racial mandate is enjoined. Rasmussen Decl. ¶¶ 6–11.

Specifically, Do No Harm Member "A" is a licensed psychiatrist in Louisiana. Rasmussen Decl. ¶ 9. He is not a member of a racial minority. Rasmussen Decl. ¶ 9.

Member A resides in Louisiana, specializes in Neurology and Psychiatry, and has over 40 years of experience. Rasmussen Decl. ¶ 9. Member A is qualified to serve as a physician on the Board because he has been actively engaged in the practice of medicine for at least five years, has resided in Louisiana for at least six months, and has not been placed on probation by the Medical Board nor been convicted of any felonies. Rasmussen Decl. ¶ 9.

Do No Harm Member "B" is a citizen of Louisiana that would like to be considered for the "consumer" opening on the Board. Rasmussen Decl. ¶ 10. He is over eighteen years of age, has never been convicted of a felony, has resided in Louisiana for more than a year, has never been licensed by any of the licensing boards identified in § 36:259(A), does not have a spouse licensed by a board identified in § 36:259(A), and does not and has never had a material financial interest in the healthcare profession. Rasmussen Decl. ¶ 10.

Do No Harm Member "C" is a citizen of Louisiana that would like to be considered for the "consumer" opening on the Board. Rasmussen Decl. ¶ 11. She is over eighteen years of age, has never been convicted of a felony, has resided in Louisiana for more than a year, has never been licensed by any of the licensing boards identified in § 36:259(A), does not have a spouse licensed by a board identified in § 36:259(A), and does not and has never had a material financial interest in the healthcare profession. Rasmussen Decl. ¶ 11.

LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party is entitled to judgment "as a matter of law." *Pratt v. Harris Cnty.*, 822 F.3d 174, 180 (5th Cir. 2016) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The moving party can meet its summary judgment burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Perkins v. Safeco Ins. Co. of Oregon*, No. 5:22-CV-04652, 2024 WL 2703047, at *2 (W.D. La. Mar. 21, 2024) (citing *Celotex Corp.,* 477 U.S. at 325), *report and recommendation adopted*, 2024 WL 2702674 (May 24, 2024).

When the movant satisfies its burden, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Calumet Shreveport Ref. LLC v. Regan*, No. CV 5:24-0890, 2025 WL 51576, at *2 (W.D. La. Jan. 7, 2025) (citing *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995); Fed. R. Civ. P. 56; *Celotex Corp.*, 477 U.S. at 323). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Perkins*, 2024 WL 2703047, at *2 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). While evidence is viewed in the light "most favorable to the nonmoving party," the "existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment" if there is "no genuine [dispute] of material fact." *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 378 (5th Cir. 2019) (citing *Anderson*, 477 U.S. at 247–48).

ARGUMENT

I. DO NO HARM HAS STANDING TO BRING THIS LAWSUIT

A. Do No Harm Has Organizational Standing

Do No Harm is an association that brings this lawsuit on behalf of its injured members because of interests that are germane to its mission—protecting healthcare from a radical, divisive, and discriminatory ideology. *See* Pl.'s SUMF ¶¶ 20–24; Rasmussen Decl. ¶¶ 3, 6–11. Plaintiff organizations can satisfy the standing requirement of Article III by asserting "standing … as the representative of its members." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (*SFFA*) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). To invoke this, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 199 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Do No Harm satisfies each of these elements.

Do No Harm Members A, B, and C are ready, willing, and able to be appointed to the Medical Board but cannot because of their race—the Racial Mandate imposes an unconstitutional barrier against each of them. *See Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); § 37:1263(B)(2)–(3), (7)–(8); Pl.'s SUMF ¶¶ 5–25; Rasmussen Decl. ¶¶ 5–11. Moreover, neither the members' constitutional claims nor their requested relief (declaratory and injunctive)

requires their individual participation. *See Hunt*, 432 U.S. at 343 (1977) (citing *Warth*, 422 U.S. at 515, injunctive and declaratory relief inures to the benefit of member organization who are injured).

B. Do No Harm Satisfies All Article III Standing Requirements

i. Do No Harm suffers an "injury in fact"

The injury-in-fact in an equal protection case is the erection of "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Assoc. Gen. Contractors of Am.*, 508 U.S. at 666; *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). Here, it is undisputed—and undisputable— that such a barrier exists and continues to exist in Louisiana. Do No Harm therefore suffers an "injury in fact" that is concrete, particularized, and "actual or imminent," because its members are at a significant disadvantage in being appointed to the Medical Board. *See* Pl.'s SUMF ¶¶ 5–18, 21–25 ("[T]he Racial Mandate prevents these members from equal consideration for appointment to the Medical Board because La. Stat. § 37:1263(B)(2)–(3), (7)–(8) remains the law"); Rasmussen Decl. ¶ 5 ("The racial mandate in La. Stat. § 37:1263(B) stereotypes individuals on the basis of race, treats all individuals of different races as fungible, mandates racial quotas, requires racial balancing, has no 'good faith exception,' and has no end date."); *see also Food & Drug Admin.*, 602 U.S. at 381 ("An injury in fact can be a physical injury, a monetary injury … or an injury to one's constitutional rights …").

Nonminority candidates seeking to serve on the Medical Board are not only foreclosed from consideration for four out of the ten Board seats "every other" appointment cycle, at a minimum, but *every* appointment ultimately requires the Defendant, Senate, and the entities involved in making recommendations to Defendant to consider the race of candidates. § 37:1263(B)(2)–(3), (7)–(8). Defendant must make appointments to all four seats impacted by the Racial Mandate in 2026—the Louisiana State University Health Sciences Center in New Orleans seat (Dr. Juzar Alia), the Louisiana State University Health Sciences Center in Shreveport seat (Dr. Rita Y. Horton), the Louisiana Hospital Association seat (Dr. Terrie R. Thomas), and the consumer seat (Kim Sport, J.D.). Trotter Decl. ¶ 3, Ex. 3. According to documents produced by Defendant, Dr. Juzar Alia is "Asian," Dr. Rita Horton is "hispanic," Dr. Terrie R. Thomas is "black," and Kim Sport is "white." Trotter Decl. ¶¶ 3–4, Exs. 3–4.

The Racial Mandate requires Defendant to appoint *at least* one "minority" candidate in 2026 to replace Kim Sport, the public consumer. Trotter Decl. ¶¶ 3–4, Exs. 3–4. While the three physician seats affected by the Racial Mandate in 2026 are presently filled by physicians Defendant classifies as "minorities," the Racial Mandate is clear—it does not "preclude consecutive minority appointments from lists" submitted by the Louisiana State University Health Sciences Centers and the Louisiana Hospital Association. § 37:1263(B)(2)–(3), (7). Defendant's documents also suggest that even if certain seats on the Medical Board are not affected by the Racial Mandate, Defendant is still obtaining appointment recommendations from groups

that are affiliated with advocating for certain racial outcomes. *See* SUMF ¶¶ 3, 25; Trotter Decl. ¶ 5, Ex. 5.

Moreover, Defendant will also receive appointment recommendations curated by race during each appointment cycle from the Louisiana State University Health Sciences Centers at New Orleans and Shreveport as well as the Louisiana Hospital Association. § 37:1263(B)(2)–(3), (7)–(8); Pl.'s SUMF ¶¶ 3, 25. Thus, regardless of Defendant's declaration, ECF No. 22-1, the Racial Mandate remains law and injures Do No Harm through its members. *See* § 37:1263(B)(2)–(3), (7)–(8); Pl.'s SUMF ¶¶ 15–18.

ii. The injury-in-fact is traceable to Defendant

Defendant is properly before this Court—the "injury in fact" is "fairly traceable" to his official powers as Governor of Louisiana. *See* § 37:1263; Pl.'s SUMF ¶¶ 1, 15–18, 24–25; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is undisputed that Defendant has the sole authority to make appointments to the Medical Board and that he, and all Louisiana governors, are statutorily required to enforce the Racial Mandate when making these appointments. § 37:1263(B)(2)–(3), (7)–(8).[7] There is also clear evidence of past enforcement of the Racial Mandate by the Edwards administration. *See* Pl.'s Opp. to Def.'s Mot. to Dismiss, Ex. A, ECF No. 33-1; *see* Trotter Decl. ¶ 5, Ex. 5. Given these conditions, the violation of Do No Harm's

[7] In a recently filed motion to dismiss, Defendant argued he does not cause Do No Harm's injury because of sovereign immunity. Do No Harm responded to this argument in detail in its opposition. Defendant did not file a reply, and Do No Harm considers the argument abandoned at this point. And for good reason, it was meritless for the reasons explained in Do No Harm's opposition. Pl.'s Opp. to Def.'s Mot. to Dismiss, Ex. A, ECF No. 33-1.

constitutional rights is ongoing until the law is enjoined or repealed. *See* Def.'s Opp. to Pl.'s Mot. to Compel, Ex. A, ECF No. 22-1; Rasmussen Decl. ¶¶ 1–11; § 37:1263(B)(2)–(3), (7)–(8) ("At least every other member appointed from a list provided for in this Paragraph *shall* be a minority appointee.") (emphasis added).

iii. Do No Harm seeks a proper remedy

Do No Harm seeks a remedy that redresses its constitutional injury—prospective declaratory and injunctive relief from this Court that prevents Defendant from enforcing the statute in a discriminatory manner. *Food & Drug Admin.*, 602 U.S. at 381 ("If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury."). Do No Harm has standing.

II. THIS CASE IS NOT MOOT

"'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) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980))). Defendant's nonbinding declaration and promise not to enforce the Racial Mandate does not moot this case. 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).

"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't Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Only when the government repeals a challenged law is there 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); *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 legislature has not repealed the Racial Mandate, Do No Harm continues to experience harm—and countless other Louisianians are similarly threatened. *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.").

Even if Defendant promises not to enforce the Racial Mandate, his successor will not be bound by his promise—all future governors (and even Defendant) remain bound to enforce the Racial Mandate because it remains the law of the state. Defendant will also continue receiving appointment recommendations curated by race during each appointment cycle from the Louisiana State University Health Sciences Centers at New Orleans and Shreveport as well as the Louisiana Hospital Association. § 37:1263(B)(2)–(3), (7)–(8); Pl.'s SUMF ¶¶ 3, 25. Moreover, the record further demonstrates a history of enforcement, with the previous governor considering race when seeking out candidates for seats on the Medical Board. *See* Pl.'s Opp. to Def.'s Mot. to Dismiss, Ex. A, ECF No. 33-1; Pl.'s SUMF ¶ 16; *see also* Trotter Decl. ¶ 5, Ex. 5.

The key consideration is ultimately that this lawsuit challenges the constitutionality of a state statute and *not merely a policy*. *See Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990) ("If a statute is repealed then suits regarding its constitutionality are moot.") (citing *Diffenderfer v. Central Baptist Church,* 404 U.S. 412, 414–15 (1972)). Subsequently, the Governor's declaration does not end the discriminatory legal framework challenged in this case. This case is not moot.

III. THE RACIAL MANDATE DEPRIVES DO NO HARM OF EQUAL PROTECTION UNDER THE LAW

Defendant simply cannot meet his "demanding" burden to justify the Racial Mandate—and he concedes this. *See* Pl.'s SUMF ¶ 18; Def.'s Opp. to Pl.'s Mot. to Compel, Ex. A, ECF No. 22-1, ¶ 5–9. ("I regard the appointment of officials based upon their race, national origin, or minority status as constitutionally impermissible … any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and should not be indulged …"). The Supreme Court agrees—"racial 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 (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. Defendant 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 Austin*, 570 U.S. 297, 311–12 (2013)). Defendant 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)).

Defendant has not identified ***any*** compelling governmental interest for the Racial Mandate. It is undisputed that § 37:1263(B)(2)–(3), (7)–(8) requires Defendant to make race-based appointments to the Medical Board, Pl.'s SUMF¶¶ 5–18, 24–25, and the only interest Defendant 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." Pl.'s SUMF ¶ 13; Trotter Decl. ¶¶ 1–2, Exs. 1–2. Alongside this interest, Defendant 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." Pl.'s SUMF ¶ 13; Trotter Decl. ¶ 1, Ex. 1. 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 Defendant does not claim the former—nor could he. *See* Trotter Decl. ¶ 1, Ex. 1.

Defendant cannot demonstrate that the Racial Mandate alleviates past discrimination because the Governor 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 Defendant's justification reveals a record deplete of the evidence necessary to support that justification. *Croson,* 488 U.S. at 493.

Defendant 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." Pl.'s SUMF ¶¶ 7–14. 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. Pl.'s SUMF ¶¶ 7–13; 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* Def.'s Opp. to Pl.'s Mot. to Compel, Ex. A, ECF No. 22-1, ¶ 7. (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. Pl.'s SUMF ¶¶ 7–18. But even if Defendant 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." *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 University of California 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 Defendant 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. *See* Pl.'s SUMF ¶ 5 ("at least every other member [appointed to the Board] … shall be a minority appointee …"); § 37:1263(B)(2)–(3), (7)–(8); Def.'s Opp. to Pl.'s Mot. to Compel, Ex. A, ECF No. 22-1, ¶ 6 ("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, Defendant 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 Defendant nor the legislative record provide any evidence of "good faith" consideration of race-neutral alternatives. *See Grutter*, 539 U.S. at 339; Pl.'s SUMF ¶ 14; Trotter Decl. ¶¶ 1–2, Ex. 1–2. 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 Defendant 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 …").

Because Defendant 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

For the reasons stated above, the Court should grant summary judgment in Do No Harm's favor.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 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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