

TABLE OF CONTENTS

Order, United States Court of Appeals for the Sixth Circuit, June 2, 2026	1a
Judgment, United States Court of Appeals for the Sixth Circuit, June 2, 2026	5a
Appellant’s Unopposed Motion to Dismiss Appeal, United States Court of Appeals for the Sixth Circuit, May 29, 2025	6a
Memorandum, United States District Court for the Middle District of Tennessee, August 8, 2024	9a
First Amended Complaint, United States District Court for the Middle District of Tennessee, January 19, 2024	22a

Appendix 1a

FILED

Jun 2, 2026

Kelly L. Stephens,
Clerk

No. 24-5937

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DO NO HARM, a nonprofit)
corporation incorporated in)
the State of Virginia,)
Plaintiff-Appellant,)
v.)
WILLIAM BYRON LEE, in)
his official capacity as)
Governor of the State of)
Tennessee,)
Defendant-Appellee.)

ORDER

Before: WHITE, BUSH, and NALBANDIAN,
Circuit Judges.

Plaintiff-Appellant Do No Harm, a nonprofit corporation incorporated in the State of Virginia, appeals the district court's order dismissing this civil rights case for lack of standing. The parties agree recent changes to Tennessee law moot the appeal and that dismissal is appropriate. Do No Harm moves to vacate the district court's dismissal and dismiss this appeal as moot. Defendant Tennessee Governor William Byron Lee does not oppose dismissal or vacatur, but he believes that the appropriate approach is to dismiss the appeal and remand with instructions to dismiss the district court case as moot.

Appendix 2a

Do No Harm’s proposed approach is based on *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), in which the Supreme Court suggested that whenever a case is mooted after an appeal has been filed but before the appeal was resolved on the merits, the “established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.” *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 23 (1994) (noting that the portion of *Munsingwear* “describing the ‘established practice’ for vacatur was dictum.”). But Do No Harm’s reliance on *Munsingwear* is misplaced. Under our precedent, vacatur is merited only when “the burdened party[] didn’t cause the order’s mootness” and “the order would have a preclusive effect on later litigation” *Pavia v. Nat’l Collegiate Athletic Ass’n*, 154 F.4th 407, 415 (6th Cir. 2025) (citing *Mktg. Displays Int’l v. Shaw*, 93 F.4th 967, 971 (6th Cir. 2024)).

The first condition is present in this case, but Do No Harm makes no attempt to demonstrate the second. *Cf. Am. Coll. of Pediatricians v. Becerra*, No. 23-5053, 2024 WL 3206579, at *1-3 (6th Cir. June 27, 2024) (per curiam) (denying vacatur due to lack of preclusive effect in similar circumstances). And Governor Lee offers no argument in support of remanding with instructions to dismiss. Thus, neither party’s approach is justified here, and we will dismiss the appeal as moot without taking any further action.

Accordingly, Do No Harm’s motion to voluntarily dismiss is **GRANTED IN PART**, and this matter is **DISMISSED for lack of jurisdiction**.

WHITE, Circuit Judge, dissenting. I would dismiss the appeal and remand to the district court to dismiss the case as moot.

Appendix 3a

“The established practice of the [Supreme] Court in dealing with a civil case from a court in the federal system which has become moot while on its way [there] or pending [a] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *Munsingwear* has been repeatedly reaffirmed by the Supreme Court. See, e.g., *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 n. 3 (1994) (“We thus stand by *Munsingwear*’s dictum that mootness by happenstance provides sufficient reason to vacate.”). And although vacatur is rooted in equity, the Supreme Court has stated that, “one clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court.” *Alex M Azar, II v. Rochelle Garza*, 584 U.S. 726, 729 (2018) (cleaned up). As recently as 2023, the Supreme Court noted that its “*Munsingwear* practice is well settled” and declined an invitation to reconsider it. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023).

I recognize that our recent published cases have said that “we’ll vacate an order only if leaving it in place would have a preclusive effect on subsequent litigation.” *Mktg. Displays Int’l v. Shaw*, 93 F.4th 967, 971 (6th Cir. 2024). Nevertheless, all agree that the vacatur decision is based on equity. *Mktg. Displays Int’l*, 93 F.4th at 971; *Coal. for Gov’t Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 484 (6th Cir. 2004). And here the parties are in agreement that this appeal was rendered moot by appellee’s unilateral action and that the district-court decision should not stand undisturbed. I would therefore dismiss the

Appendix 4a

appeal and remand to the district court to dismiss the case as moot.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens

Kelly L. Stephens, Clerk

Appendix 5a

FILED

Jun 2, 2026

Kelly L. Stephens,
Clerk

No. 24-5937

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DO NO HARM, a nonprofit
corporation incorporated in
the State of Virginia,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

Before: WHITE, BUSH, and NALBANDIAN, Circuit
Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS MATTER was heard on the record and the
pleadings without oral argument. In accordance with
the order entered on this date and incorporated
herein,

IT IS HEREBY ORDERED that this matter is
DISMISSED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens

Kelly L. Stephens, Clerk

Filed: 05/29/2025

No. 24-5937

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DO NO HARM, a nonprofit corporation
incorporated in the State of Virginia,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee
Honorable Gregory F. Van Tatenhove, Judge
3:23-cv-01175

**APPELLANT'S UNOPPOSED MOTION TO
DISMISS APPEAL**

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Appendix 7a

* * *

Pursuant to Federal Rule of Appellate Procedure 42(b)(2), Plaintiff-Appellant moves to dismiss this appeal based on mootness. Appellant has conferred with Defendant-Appellee on this motion and all parties agree that this case is moot and should be dismissed.

Appellant respectfully asks this court to vacate the decision of the lower court under *United States v. Munsingwear*, 340 U.S. 36 (1950). *Munsingwear* is proper when mootness arises from actions by appellees or third parties, depriving an appellant of the opportunity to litigate the appeal. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997) (“Vacatur is in order when mootness occurs through . . . ‘unilateral action of the party who prevailed in the lower court.’” (citation omitted); *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994) (“A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.”).

Here, Do No Harm brought this lawsuit to challenge laws requiring that the Governor of Tennessee consider the race of candidates for seats on the Board of Tennessee Podiatric Medical Examiners. Compl., Doc. 1, PageID #1-7; First Am. Compl., Doc. 23, PageID # 82. *See* Tenn. Code Ann. §§ 63-3-103(b); 8-1-111. The district court dismissed this case on August 8, 2024, based on standing, Judgment, Doc. 38, PageID # 217, and Plaintiff filed a Notice of Appeal on August 30, 2024. Notice of Appeal, Doc. 40, PageID # 219.

Appendix 8a

Since Appellant filed the appeal, Tennessee has introduced and passed bills repealing the challenged statutes, thereby mooting this case. *See* H.B. 1237, 114th Gen. Assemb., Reg. Sess. (TN 2025); S.B. 1235, 114th Gen. Assemb., Reg. Sess. (TN 2025); S.B. 1084, 114th Gen. Assemb., Reg. Sess. (TN 2025). Because Appellant did not have an opportunity to litigate the standing issue in this appeal, the equities favor vacating the lower court's decision based on lack of standing.

Defendant-Appellant does not oppose dismissing this action, and does not oppose vacatur. However, Defendant believes the proper course of action is to remand to the district court with instructions to dismiss the case as moot.

ACCORDINGLY, Plaintiff voluntarily dismisses this action without prejudice. *See* Federal Rule of Appellate Procedure 42(b)(2).

DATED: May 29, 2025.

Respectfully submitted,

/s/ Anastasia P. Boden

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Pacific Legal Foundation

* * *

Counsel for Plaintiff-Appellant

Filed 08/08/24

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

DO NO HARM, a nonprofit
corporation incorporated in
the State of Virginia,

Plaintiff,

v.

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

Defendant.

NO. 3:23-cv-01175

**JUDGE
CAMPBELL
MAGISTRATE
JUDGE HOLMES**

MEMORANDUM

Pending before the Court is a motion to dismiss the amended complaint filed by Defendant William Lee (Doc. No. 25), to which Plaintiff filed a response (Doc. No. 26), and Defendant filed a reply (Doc. No. 30). Plaintiff also filed a notice of supplemental authority (Doc. No. 32), to which Defendant responded (Doc. No. 33).

For the reasons stated herein, the motion will be **GRANTED**.

I. BACKGROUND

The Tennessee Board of Podiatric Medical Examiners (the “Board”) was established almost one hundred years ago to regulate the practice of podiatry in Tennessee. (Am. Compl., Doc. No. 23, ¶ 20). The duties of the Board include licensing qualified podiatrists, investigating allegations of misconduct,

Appendix 10a

disciplining podiatrists that violate its rules or regulations, and interpreting the laws, rules, and regulations governing podiatry in Tennessee. (*Id.*, ¶ 21). The Board is comprised of six members appointed by the Governor of Tennessee. (*Id.* ¶ 21). Four of those members must be licensed Tennessee podiatrists who have been regulated by the Board for at least two years. (*Id.* (citing Tenn. Code Ann. § 63-3-103)). A fifth member must be a licensed orthotist, prosthetist, or pedorthist. (*Id.* (citing Tenn. Code Ann. § 63-3-213)). A sixth member must be a citizen who does not engage in any conduct that is regulated by the Board. (*Id.* (citing Tenn. Code Ann. § 63-1-124)).

When making appointments to boards, committees, and other governing or advisory entities of the executive branch of state government, including the Board of Podiatric Medical Examiners, the Governor “shall strive to ensure that at least one (1) such citizen serving on each such board, commission, committee, or other governing or advisory entity is sixty (60) years of age or older and that at least one (1) such citizen serving on each such board, commission, committee, or other governing or advisory entity is a member of a racial minority.” Tenn. Code Ann. §§ 8-1-111, 63-3-103(b).

Plaintiff Do No Harm is a national nonprofit corporation headquartered in Glen Allen, Virginia. (Doc. No. 23, ¶ 9). Its mission is “to protect healthcare from a radical, divisive, and discriminatory ideology.” (*Id.*). Do No Harm states that it has more than 6,000 members, including one or more individuals who have been a licensed podiatrist for over two years in Tennessee, and one or more individuals who are Tennessee citizens who do not engage in any

Appendix 11a

profession or business activity subject to regulation by the Board. (*Id.*).

Two of these members are identified in the Amended Complaint as “Member A” and “Member B.” (*Id.*, ¶¶ 10, 11). Plaintiff states that Member A has been a licensed podiatrist in Tennessee for over thirty years and is not a member of a racial minority. (*Id.*, ¶ 10). Member B is a Tennessee citizen who has resided in Tennessee for over 27 years; he does not engage in any profession, business, or activity subject to regulation by the Board; and he is not a member of a racial minority. (*Id.*, ¶ 11). Plaintiff states that Member A and Member B are qualified, willing, and able to be appointed to the Board of Podiatric Medical Examiners. (*Id.*, ¶¶ 10, 11).

Plaintiff Do No Harm bring this suit challenging the constitutionality of Tenn. Code Ann. §§ 8-1-111, 63-3-103(b). Plaintiff contends the statutory mandate for the Governor to “strive to ensure” that the Board includes at least one member of a racial minority violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Defendant moves to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Specifically, Defendant argues Do No Harm lacks standing because: (1) it fails to identify a particular member the challenged laws have allegedly injured; (2) there is no cognizable injury to any members or to the organization; and (3) the claims are not ripe.

II. STANDARD OF REVIEW

Rule 12(b)(1) “provides for the dismissal of an action for lack of subject matter jurisdiction.”

Appendix 12a

Cartwright v. Garner, 751 F.3d 752, 759 (6th Cir. 2014). “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3). “A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack).” *Id.* at 759. Where a Rule 12(b)(1) motion challenges subject matter jurisdiction based on the face of the complaint, the plaintiff’s burden is “not onerous.” *Musson Theatrical Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). A court evaluating this sort of facial attack to the assertion of subject matter jurisdiction must consider the allegations of fact in the complaint to be true and evaluate jurisdiction accordingly. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

“When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court must weigh the evidence.” *Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 537 (6th Cir. 2007). The Court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings. *Cartwright*, 751 F.3d at 759-60; *see also*, *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (allowing consideration of “affidavits, documents, and even a limited evidentiary hearing”). Under either standard, the plaintiff bears the burden to establish that subject matter jurisdiction exists. *Cartwright*, 751 F.3d at 760.

Here, Defendant raises both facial and factual challenges to subject matter jurisdiction. Defendant challenges standing on the grounds that Plaintiff

Appendix 13a

failed to name members is a facial challenge [sic]. Defendant's arguments that Plaintiff lacks a cognizable injury in fact and that the claim is not ripe present factual challenges.

III. ANALYSIS

A. Standing

Standing requires a plaintiff to show “(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief.” *Fed. Election Comm. v. Cruz*, 596 U.S. 289, 296 (2022). As an organization, Do No Harm has standing to bring a claim when: (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023); *Ass'n of Am. Physicians & Surgeons v. USFDA*, 13 F.4th 531, 537 (6th Cir. 2021) (same).

Defendant first argues Plaintiff has not established standing to sue on behalf of its members because the Amended Complaint fails to identify (by name) any member who has been injured. (Doc. No. 25-1 at 5-6). Plaintiff provides numerous circuit court opinions that, according to Plaintiff, allow for organizational standing based on members proceeding under pseudonyms. (Doc. No. 26 at 4-7; Doc. No. 32 at 1-2). Defendant relies on other cases, but those standing cases were not decided on the basis of pseudonyms, but instead on other standing and pleading grounds. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493

Appendix 14a

(2009) (allegations of generalized harm to members); *Ass’n of Am. Physicians & Surgeons v. United States Food and Drug Admin.*, 13 F.4th 531, 543 (6th Cir. 2021) (alleged injury to members was not caused by defendant); *Protecting Air for Waterville v. Ohio Env’t Prot. Agency*, 763 F. App’x 504 (6th Cir. 2019) (failure to demonstrate individual members suffered concrete injury); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250 (6th Cir. 2018) (no standing to seek injunctive relief for unspecified unnamed members when the specified named members were ineligible for relief); *Mich. Ass’n of Pub. Sch. Acads. v. United States Dep’t of Ed.*, No. 1:22-cv-712, 2024 WL 455079, at * 4 (W.D. Mich. Jan. 10, 2024) (failure to identify which members of the organization were directly injured); *Friends of George’s, Inc. v. Mulroy*, No. 2:23-cv-02163, 2023 WL 3790583 (W.D. Tenn. Jun. 2, 2023) (holding the organization had standing to bring claims based on injury to the organization (organizational standing) but not standing based on injury to members (association standing) because it failed to identify any member who would suffer injury), *rev’d and remanded*, 2024 WL 3451870 (6th Cir. Jul. 18, 2024) (finding no showing of pre-enforcement injury); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1010 (7th Cir. 2021) (plaintiff identified harm to members “only as a collective”).

Defendant asks the Court not to follow as persuasive the recent Tenth Circuit case *Speech First, Inc. v. Shrum*, 92 F.4th 947 (10th Cir. 2024).¹ In that

¹ Part of Defendant’s argument was that *Speech First v. Shrum* was an unpublished decision, which was true at the time

Appendix 15a

case, the Tenth Circuit held that an organization can base standing on the harms allegedly done to its members, even those proceeding under pseudonyms, absent a showing of reason to disbelieve the facts and declarations relevant to the requirements of standing. *Id.* at 950 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973); *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 286 n.6 (D.N.J. 2003), *aff'd on standing issue sub nom.*, *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006)).

Defendant relies on *Tennessee Republican Party v. Securities and Exchange Commission*, 863 F.3d 507 (6th Cir. 2017), for the proposition that member of organizations must be named in order for the organization to have standing to sue based on alleged injury to its members. That case, however, did not involve the use of pseudonyms, and the Supreme Court authority cited by the court was addressing purported organizational standing not anchored in an allegation of harm to a specific member, but instead based on generalized harm based on speculation that members may be harmed in the future. *Id.* at 520 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)).

Without a showing that the representations concerning Member A and Member B in the Amended Complaint (Doc. No. 23, ¶¶ 10, 11) and the Rasmussen Declaration (Doc. No. 26-1, ¶¶ 6, 7) are inaccurate, and given the long history of allowing parties to proceed under pseudonyms, the Court finds that Plaintiff has sufficiently identified members who are

of the briefing. The case has since been published. 92 F. 4th 947 (10th Cir. 2024) (filed February 9, 2024).

Appendix 16a

alleged to have standing in their own right.² See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958) (anonymous status of association’s members posed no standing hurdle); *Rumsfeld*, 547 U.S. at 52 n.2 (finding the plaintiff organization had standing even though its membership list was secret).

B. Injury in Fact and Ripeness

1. The Legal Standard

As discussed above, to satisfy Article III standing, a plaintiff must show, among other things, that it, or, in this case, its members, suffered an “injury in fact,” which can be “actual present harm or a significant possibility of future harm.” *Sumpter v. Wayne Cty.*, 868 F.3d 473, 490 (6th Cir. 2017); *Thomas More Law Center v. Obama*, 651 F.3d 529, 535 (6th Cir. 2011), *abrogated as to other issues by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). “In the context of claims for injunctive or declaratory relief, ‘a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized,’ and that ‘threat must be actual and imminent, not conjectural or hypothetical[.]’” *Sumpter*, 868 F.3d at 491 (citing *Summers*, 555 U.S. at 493).

The doctrine of ripeness originates from the same Article III limitation as standing. *Doe v. Univ. of Mich.*, 78 F.4th 929, 941 (6th Cir. 2023). In order to establish that a claim is “ripe for judicial resolution,” the court considers: (1) whether the claim is “‘fit[] . . . for judicial decision’ in the sense that it arises in a concrete factual context and concerns a dispute that is

² If information later comes to the Court’s attention that calls into question whether the two members have standing to sue in their own right, the Court will revisit standing.

Appendix 17a

likely to come to pass?” and (2) “the hardship to the parties of withholding court consideration[.]” *Id.* at 942 (citing *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc)). Similar to the considerations for an injury in fact, “[a] claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Id.* (citing *Texas v. United States*, 523 U.S. 296 (1998)). Sometimes standing and ripeness both “boil down to the same question”—whether the plaintiff suffered an injury in fact. *Id.* (“Ripeness requires that the injury in fact be certainly impending.”); *see also*, *Thomas More Law Center*, 651 F.3d at 537 (noting that reasoning in ripeness decisions applies equally to questions of standing when the Article III question concerns the imminence of the plaintiff’s injury). This is such a case.

The Sixth Circuit has explained that the “imminence” of the plaintiff’s injury depends not on temporal proximity, but on the probability that “an event will come to pass.” *Thomas More Law Center*, 651 F.3d at 536. Of course, “[t]he uncertainty that the event will come to pass may be based on developments that may occur during a gap in time between the filing of a lawsuit and a threatened future injury.” *Id.* (citing *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir.2006) (“Standing depends on the probability of harm, not its temporal proximity.”)). But the significance of the inquiry is the certainty of the injury, not temporal proximity. *Id.* (“[I]t is well settled that a time delay, without more, will not render a claim of statutory invalidity unripe if the application of the statute is otherwise sufficiently probable.”) (citing *Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995)).

Appendix 18a

2. The Statutes

As an initial matter, determination of whether Member A and Member B have established an injury in fact resulting from the statutes depends on what the statutes require with regard to the Governor's consideration of race in appointments to the Board.³ The Court begins, as it must with the statutes. The statute specific to the Board of Podiatric Medical Examiners provides that "the governor shall strive to ensure that . . . at least one (1) person serving on the board is a member of a racial minority." *See* Tenn. Code Ann. § 63-3-103(b). The general statute, Tenn. Code Ann. § 8-1-111, uses substantially the same language.

Defendant argues that the plain language of the statutes obligates the Governor to consider race of potential Board members to ensure at least one member of the Board is a member of a racial minority, and that once the Board has "at least one" racial minority "there is nothing more to ensure" and the statute has no further effect. (Doc. No. 30 at 4, n.4; *see also*, Doc. Nos. 25-1 and 30 throughout). In Plaintiff's view, the statute requires the Governor to "weigh and consider a candidate's race for every appointment" regardless of the composition of the Board because "at least one" "establishes a baseline, not a limit." (Doc. No. 26 at 13).

Defendant has the better argument. The Court agrees with Plaintiff that "at least one" sets a baseline, not a limit. But, to the extent that "shall strive to

³ The parties have not developed their argument concerning interpretation of the statutes. Their briefing on this issue consists of one paragraph in Plaintiff's response and one footnote in Defendant's reply. (Doc. No. 26 at 13; Doc. No. 30 at 4 n.4).

Appendix 19a

ensure” places any affirmative obligation on the Governor (neither Plaintiff, nor Defendant argue otherwise), that obligation ends when there is “at least one” person serving on the Board who is a member of a racial minority. Any further consideration by the Governor of the racial composition of the Board is purely discretionary.

3. Injury in Fact

Defendant argues neither Member A nor Member B can show standing because “no foreseeable openings for the Board are subject to the challenged acts until at least 2027.” Defendant asserts that because a racial minority is a current board member whose term will expire in 2027, any appointments between now and then will be unaffected by the relevant statute. (*Id.* at 9-10). Defendants add that even then, the alleged harm may never come to pass for a number of reasons: the members may no longer be ready, willing, and able to serve on the Board; the General Assembly may amend the statutes; or the Governor may appoint other racial minorities to the Board, such that the statutory obligation to “strive to ensure” there is “at least one” racial minority on the Board may never be triggered. (*Id.* at 10-11). Defendant notes that between now and 2027, four Board seats will become available and any alleged harm to Members A and B will come to pass if, and only if, each of those open Board seats are filled by non-minorities. Defendant states that, in the past, two racial minorities served on the Board at the same time and could very well do

Appendix 20a

so in the future. (Doc. No. 30 (citing March 11, 2022 Board Minutes)).^{4,5}

As discussed above, the imminence inquiry is more about the certainty that harm will come to pass than time, so the fact that all practitioner seats are currently filled is of no moment when the appointments are for limited terms and there is no question that the Governor will be called upon to appoint new Board members. But the inquiry does not end there. While the time does not itself defeat standing, “developments that may occur during a gap in time” are relevant to the inquiry as to certainty. *Thomas More Law Center*, 651 F.3d at 536. Here, although it is certain that Board seats will become available, whether the statutes will be triggered based on the composition of the Board is unknowable.

Plaintiff argues that members may come off the Board at “unpredictable times”—specifically that Dr. Khumalo may not remain on the Board until the end of his term—and contend that Board vacancies are not always timely publicized. (Doc. No. 26 at 12). Defendant responds by pointing to evidence that the term end dates are publicly available. (*See* Doc. No. 30 at 2; Doc. No. 25-1 at 3 (citing Bd. of Pod. Med.

⁴ The March 11, 2022 Board Minutes list as board members Dr. Ramesh Pavuluri and Dr. Bhekumuzi Khumalo. Defendant states that Dr. Pavuluri is Indian American and Dr. Khumalo is black. (*See* Supp. Decl. of Reed Smith, Doc. No. 30-2; Dr. Pavuluri’s Application for Gubernatorial Appointment to a Board or Commission dated February 21, 2017, Doc. No. 30-3; Dr. Khumalo’s undated application for Governor’s Appointment, Doc. No. 30-4).

⁵ The March 11, 2022 Board Minutes are available at <https://www.tn.gov/content/dam/tn/health/healthprofboards/03-11-2022-Minutes.pdf>.

Appendix 21a

Examiners: Bd. Members List, Tenn. Dep't of Health <https://www.tn.gov/health/health-program-areas/health-professional-boards/podiatricboard/podiatric-board/members.html> (showing term expiration dates)). Defendant argues that possibility [sic] of unanticipated openings is nothing but speculation. The Court agrees. The likelihood that a Board seat will become open before the end of a term [sic] just as speculative as the possibilities raised by Defendant that Members A and B may no longer be “ready, able, and willing, and able to serve on the Board” or that the legislature will repeal the law. “[T]hese events are hardly probable and not the kinds of future developments that enter into the imminence inquiry.” *Thomas More Law Center*, 651 F.3d at 537-38.

In sum, there is rampant speculation on both sides about whether there will be unscheduled Board openings and what the composition of the Board will be when openings occur. Plaintiff is correct that the possibility that a minority will be appointed between now and 2027 is no more than speculation. But, then again, so is the reverse. Either way, the certainty of injury to Members A and B is speculative. The speculation runs both ways, but the burden to establish standing lies with the Plaintiff. Here, the Plaintiff has not met that burden.

IV. CONCLUSION

For the reasons stated herein, Defendant’s Motion to Dismiss (Doc. No. 25) will be **GRANTED**. An appropriate Order will enter.

/s/ William L. Campbell, Jr.

WILLIAM L. CAMPBELL, JR.

CHIEF UNITED STATES DISTRICT JUDGE

Filed 01/19/24

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

DO NO HARM, a nonprofit
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WILLIAM LEE, in his
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Governor of the State of
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Defendant.

No. 3:23-cv-01175

**JUDGE CAMPBELL
MAGISTRATE
JUDGE HOLMES**

FIRST AMENDED COMPLAINT

INTRODUCTION

1. As the Volunteer State, Tennessee has a strong tradition of citizens offering their unique talents to serve in the military or government. While citizens may serve on a wide array of boards and commissions, an individual's candidacy often depends on factors outside his or her control, like age or race. Sadly, for more than thirty-five years, Tennessee governors have been required to consider an individual's race when making appointments to the state's boards, commissions, and committees.

2. These race-based appointments are often made in secret with little to no public oversight. The regulated public only learns of the discriminatory appointments weeks after they occur with no opportunity to question a nominee's qualifications or

Appendix 23a

object to the constitutionality of the governor's actions.

3. The Board of Podiatric Medical Examiners (Board) is one such board. It regulates, licenses, and investigates podiatrists to ensure they meet the high standards of the profession. Service on the Board generally requires that an individual be a licensed podiatrist for two years. However, the Board also requires the Governor to consider the race of potential board members when making appointments to the Board.

4. The Governor recently made multiple unannounced, race-conscious appointments to the Board. Neither the public, nor the regulated podiatrists were made aware of these appointments. They only came to light after the original complaint in this lawsuit was filed.

5. Such blatant racial discrimination against individuals who could sit on Tennessee's Board of Podiatric Medical Examiners serves no legitimate government purpose. It is demeaning, patronizing, un-American, and unconstitutional.

6. Do No Harm is an organization of over 6,000 medical professionals, students, and policymakers dedicated to eliminating racial discrimination in healthcare. It has members who are qualified, ready, willing, and able to be appointed to the Board. It brings this lawsuit to vindicate its members' constitutional rights and to ensure that every qualified podiatrist and qualified citizen in Tennessee has the equal right to serve on the Board, and to ensure that Tennesseans are regulated by a Board that is not selected on the basis of race.

JURISDICTION AND VENUE

7. This action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction over these federal claims under 28 U.S.C. § 1331 (federal question), and § 1343(a)(3) (redress for deprivation of civil rights). Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201.

8. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1), because Defendant resides in this district, and 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the claim occurred and continue to occur in this district.

PARTIES

9. Plaintiff Do No Harm is a national nonprofit corporation headquartered in Glen Allen, Virginia. It is a membership organization of over 6,000 medical professionals, students, and policymakers. Its mission is to protect healthcare from a radical, divisive, and discriminatory ideology. Do No Harm's membership includes one or more individuals who have been a licensed podiatrist for over two years in Tennessee. Do No Harm's membership also includes one or more Tennessee citizens who do not engage in any profession or business activity subject to regulation by the Board.

10. Specifically, Do No Harm Member "A" is a licensed podiatrist in Tennessee. He is a male who is not a member of a racial minority. Member A has been licensed as a Tennessee podiatrist for over 30 years. Member A resides and practices podiatry in Tennessee. Member A is qualified, ready, willing, and

Appendix 25a

able to be appointed to the Board of Podiatric Medical Examiners.

11. Further, Do No Harm Member “B” is a Tennessee citizen. He is a male who is not a member of a racial minority. He has resided in Tennessee for over 27 years. Member B does not engage in any profession, business, or activity subject to regulation by the Board. Member B is qualified, ready, willing, and able to be appointed as a citizen member to the Board of Podiatric Medical Examiners.

12. Defendant William Lee is the Governor of the State of Tennessee. Governor Lee is required by Tennessee law to make all appointments to the Board of Podiatric Medical Examiners. Tenn. Code §§ 8-1-111 and 63-3-103(b) require Governor Lee to consider race when making appointments to the Board. Governor Lee is sued in his official capacity.

FACTUAL ALLEGATIONS

History of Racial Mandate on Tennessee Boards

13. In 1988, the Tennessee legislature considered a bill endorsed by the American Association of Retired Persons that directed the Governor to appoint at least one person sixty or older to more than seventy different boards.

14. At the time, legislators raised concerns on whether this proposed provision was “legal” and “constitutional.”

15. During the April 13, 1988, senate hearing, state senators debated an amendment to the bill that would tack on a racial mandate to all the delineated boards.

16. Throughout the legislative discussions, there was no mention of the governmental interest behind

Appendix 26a

imposing a race-based classification for more than seventy Tennessee boards.

17. The legislative record contains no discussion of racial discrimination, statistics, or any other alleged governmental interest that formed the basis for the ultimate bill that imposed a racial mandate for appointments to more than seventy Tennessee boards.

18. In addition to the specifically delineated quotas, the bill also contained a catch-all provision which directed the Governor to consider these quotas whenever making appointments to “boards, commissions, committees, and other governing or advisory entities of the executive branch of state government, not specifically identified by the provisions of this act.” This provision is codified as Tenn. Code § 8-1-111.

The Board of Podiatric Medical Examiners

19. The Board of Podiatric Medical Examiners was created in 1931 to regulate the practice of podiatry in Tennessee.¹

20. To protect the health, safety, and welfare of Tennesseans, the Board interprets the laws, rules, and regulations governing podiatry in Tennessee. The Board licenses qualified podiatrists, investigates allegations of misconduct, and disciplines podiatrists that violate its rules or regulations.

21. The Board is comprised of six members appointed by the Governor. Four of those members must be licensed Tennessee podiatrists who have been regulated by the Board for at least two years. Tenn.

¹ Under the 1931 statute, the Board was known as the “Board of Registration in Chiropraxy.” *See* 1931 Pub. Acts, ch. 31, § 3.

Appendix 27a

Code § 63-3-103. A fifth member must be a licensed orthotist, prosthetist, or pedorthist. Tenn. Code § 63-3-213. A sixth member must be a citizen member who does not engage in any conduct that is regulated by the Board. Tenn. Code § 63-1-124.

22. When making appointments to the Board the Governor is required to “strive to ensure . . . that at least one (1) person serving on the board is a member of a racial minority.” Tenn. Code §§ 8-1-111 & 63-3-103(b).

23. So long as these racial quotas remain in place, Members A and B will never receive equal consideration for the openings on the Board—even in instances where the quotas have been met.

Appointments to the Board

24. Two physician seats on the Board opened in June 2023. No appointments to fill those slots were made in July, August, September, or October.

25. On November 8, 2023, Plaintiff filed its initial complaint in this case. At that time there was no indication in any publicly available domain that any appointments to the Board had been made to fill the two openings.

26. No public statements from Governor Lee were made announcing appointments to the Board. And the Board made no announcements that the vacancies had been filled. Well into December, the Board’s public website indicated that the two Board positions were open.

27. Yet, on November 1, 2023, Governor Lee had purportedly made two appointments to the Board by reappointing two holdover Board members.

Appendix 28a

28. Conversely, the Board seat reserved for a consumer member was listed as occupied when the original complaint was filed.

29. Indeed, at least one current Tennessee government website indicates that the position is filled.²

30. However, the website maintained by the Board of Podiatric Medical Examiners indicates that the seat is currently vacant.³

31. These inconsistencies and governmental vagaries underscore the volatility of Board membership.

32. Members come on and off the Board at unpredictable times. The Governor makes appointments to the Board at unpredictable times.

33. Two podiatrist Board positions are scheduled to become vacant on June 30, 2025, less than 18 months from now.

34. At all times, the racial mandates imposed by Tenn. Code §§ 8-1-111 & 63-3-103(b), require the governor to “strive to ensure” that a “racial minority” sits on the Board.

35. Do No Harm has one or more members who are qualified, willing, and able to be appointed to the Board of Podiatric Examiners for the upcoming podiatrist vacancies.

36. Do No Harm has one or more members who are qualified, willing, and able to be appointed to the

² <https://tnsos.net/publications/oa/memberdetails.php?Member=43975&Board=106&Position=583>.

³ <https://www.tn.gov/health/health-program-areas/health-professional-boards/podiatric-board/podiatric-board/members.html>.

Appendix 29a

Board of Podiatric Medical Examiners for the current consumer member vacancy.

CLAIMS FOR RELIEF

First Cause of Action

Tenn. Code § 63-3-103(b) Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

37. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1 through 36.

38. Under the Fourteenth Amendment to the United States Constitution, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

39. Tenn. Code § 63-3-103(b) requires the Governor to consider and make decisions on the basis of the race of potential board members when making appointments to the Board of Podiatric Medical Examiners.

40. Governmental classifications on the basis of race violate the Equal Protection Clause unless they are narrowly tailored to a compelling governmental interest.

41. The racial mandate in section 63-3-103(b) does not serve a compelling government interest.

42. The racial mandate in section 63-3-103(b) does not remediate any specific instances of racial discrimination that violated the Constitution or statutes.

43. Even if the racial mandate in section 63-3-103(b) served a compelling government interest, it is not narrowly tailored to remediating past, intentional discrimination.

Appendix 30a

44. The racial mandate in section 63-3-103(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.

Second Cause of Action

Tenn. Code § 8-1-111 Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

45. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1 through 36.

46. Under the Fourteenth Amendment to the United States Constitution, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

47. Tenn. Code § 8-1-111 requires the Governor to consider and make decisions on the basis of the race of potential board members when making appointments to Tennessee Boards.

48. Governmental classifications on the basis of race violate the Equal Protection Clause unless they are narrowly tailored to a compelling governmental interest.

49. The racial mandate in section 8-1-111 does not serve a compelling government interest.

50. The racial mandate in section 8-1-111 does not remediate any specific instances of racial discrimination that violated the Constitution or statutes.

51. Even if the racial mandate in section 8-1-111 served a compelling government interest, it is not

Appendix 31a

narrowly tailored to remediating past, intentional discrimination.

52. The racial mandate in section 8-1-111 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief.

1. A declaration that the racial mandates in Tenn. Code §§ 8-1-111 and 63-3-103(b) violate the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution;
2. A permanent prohibitory injunction forbidding the Governor and his agents from enforcing, or attempting to enforce, the racial mandates in Tenn. Code §§ 8-1-111 and 63-3-103(b);
3. An award of attorneys’ fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and
4. Such other relief as the Court deems just and proper.

DATED: January 19, 2024.

Respectfully submitted,

Daniel J. Turklay
TURKLAY LAW
* * *

Laura D’Agostino
PACIFIC LEGAL
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/s/ Joshua P. Thompson
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