

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JEREMY R. DURHAM,)
Plaintiff,)
v.) Case No. 3:17-cv-1172
LARRY MARTIN, as Commissioner of Finance)
and Administration of the State of Tennessee, in)
his official capacity; CONNIE RIDLEY, as)
Director of Legislative Administration for the State)
of Tennessee, in her official capacity; and DAVID)
H. LILLARD, JR., as Treasurer of the State of)
Tennessee, in his official capacity,)
Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants, Commissioner of Finance and Administration Larry Martin, Director of Legislative Administration Connie Ridley, and State Treasurer David H. Lillard, Jr., in their official capacities, submit this memorandum of law in support of their motion to dismiss Plaintiff's Complaint in its entirety for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6), respectively. In the alternative, Defendants ask the Court to abstain under the *Pullman* doctrine and/or certify the state-law questions to the Tennessee Supreme Court.

BACKGROUND

Plaintiff, Jeremy R. Durham, is a former member of the Tennessee House of Representatives. (D.E. 1 Complaint at ¶ 11.) Plaintiff alleges that in September 2016, the House of Representatives convened for a special session called by Governor Bill Haslam to pass

legislation necessary for the State's continuing eligibility for federal highway funds. (*Id.* at ¶¶ 2, 20, 22.) During the special session, as a preliminary, house-keeping matter, the House voted 70-2 to expel Plaintiff. (*Id.* at ¶ 24.) Among other things, this vote was procedurally necessary in order for the House to determine whether Plaintiff would be a voting member on any legislation presented during the special session. As a result of this expulsion, Plaintiff is not entitled to lifetime health insurance and retirement benefits under state law.

Plaintiff asserts one claim, brought under 42 U.S.C. § 1983, alleging that he has a protected property interest in his state benefits and that Defendants denied him due process "through the deprivation of these benefits." (D.E. 1 Complaint at ¶ 27.) Plaintiff alleges that the House had no authority to expel him during the special session, as opposed to a regular legislative session. (*Id.* at ¶ 2.) According to Plaintiff, the expulsion vote was *ultra vires*, in violation of art. III, § 9 of the Tennessee Constitution, which states:

[The Governor] may, on extraordinary occasions, convene the General Assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on *no legislative business* except that for which they were specifically called together.

Tenn. Const. art. III, § 9 (emphasis added).

The Court should dismiss Plaintiff's Complaint for lack of standing because the complaint fails to identify an injury in fact caused by the Defendants. Furthermore, even if Plaintiff had standing, he has failed to state a procedural due process claim as he has no protected property interest either in his elected office or in receiving lifetime state benefits and, even if he did, he was afforded adequate due process.

Alternatively, if the Court finds that Plaintiff has a viable due process claim, it should either abstain and dismiss his Complaint under the *Pullman* abstention doctrine or certify the state constitutional question to the Tennessee Supreme Court, as state questions predominate.

STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS

I. Dismissal for Lack of Subject Matter Jurisdiction

A challenge to the court's subject-matter jurisdiction under Rule 12(b)(1) may be either a facial attack or a factual attack. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack "questions merely the sufficiency of the pleadings." *Id.* When reviewing a facial attack, this Court must take the allegations in the complaint to be true. *Id.*

But when there is a factual attack, the Court must weigh conflicting evidence provided by the plaintiff and the defendant to determine whether subject-matter jurisdiction exists. *Id.* Thus in reviewing a factual attack, the court may consider evidence outside the pleadings and both parties are free to supplement the record by affidavits. *Id.* See *Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986).

II. Dismissal for Failure to State a Claim

To state a claim upon which relief can be granted, a complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Wittstock v. Mark A Van Sile, Inc.*, 330 F.3d 889, 902 (6th Cir. 2003). While the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-95 (2007)).

The United States Supreme Court has articulated two guiding principles to be applied in considering a motion to dismiss for failure to state a claim:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.”

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-1950 (2009) (citations omitted).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Plaintiff Lacks Standing to Pursue His Due-Process Claims.

Plaintiffs lacks the standing necessary to vest jurisdiction in this Court. Nothing in the Complaint alters that inescapable conclusion.

Article III of the United States Constitution gives federal courts jurisdiction only over “cases and controversies,” of which the component of standing is an “essential and unchanging part.” *Hooker v. Sasser*, 893 F. Supp.764, 766 (M.D. Tenn. 1995) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Thus, a party seeking to invoke a federal court’s jurisdiction must establish the necessary standing to sue before that court may consider the merits of the party’s cause of action. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990)); *see also Wilson v. United States*, No. 2:11-CV-02302-JTF, 2013 WL 3717738, at *2 (W.D. Tenn. July 11, 2013), *aff’d* (July 2, 2014) (federal court “must be satisfied that the jurisdictional and standing requirements are met before addressing the substance of plaintiff’s claims on the merits”).

The plaintiff bears the burden of proving jurisdiction on a motion to dismiss under Rule 12(b)(1). *United States v. Smith & Nephew, Inc.*, 749 F.Supp.2d 773, 778 (W.D. Tenn. 2010) citing *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir.1986); *see also United Gov't Sec. Officers of Am. v. Akal Sec., Inc.*, 475 F.Supp.2d 732, 736 (S.D. Ohio 2006). Thus, when a defendant challenges the plaintiff's standing to sue under Rule 12(b)(1), the burden is on the plaintiff to show that jurisdiction exists. *Taylor*, 680 F.3d at 612; *Lewis v. Whirlpool Corp.*, 630 F.3d 484, 487 (6th Cir.2011); *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir.2005).

The Supreme Court has set forth the three elements that constitute "the irreducible constitutional minimum of standing:" (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the challenged conduct; and (3) it must be likely that a favorable decision will remedy the injury. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990)). And the plaintiff bears the burden of establishing all three elements of standing:

The party invoking federal jurisdiction bears the burden of establishing these elements [of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . .

Lujan, 504 U.S. at 561.

Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). In other words, a plaintiff must allege "some threatened or actual injury resulting from the putatively illegal action of the defendant before a federal court may assume jurisdiction. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 666-67 (6th Cir. 2007) (citations

omitted).

Here Plaintiff fails to meet the Article III standing requirement of injury in fact and causation because the gravamen of Plaintiff's complaint is action by and between Plaintiff and the Tennessee House of Representatives—not any identified conduct by the Defendants. Indeed, all of the allegations in Plaintiff's Complaint relate to the actions of the Tennessee House of Representatives' vote to expel him from membership, and Plaintiff specifically alleges that the loss of his state benefits is the “direct and proximate result of his improper and unauthorized expulsion” by the members of the Tennessee House of Representatives:

1. Plaintiff Jeremy Durham brings this action to challenge the deprivation of his protected property interests in his state benefits, *which deprivation stemmed from his expulsion from the Tennessee House of Representatives on September 13, 2016.*
2. Plaintiff's expulsion took place during a special session constitutionally designated and limited by Article III, Section 9 of the Tennessee Constitution to address federal highway funds. *The House had no authority under the Tennessee Constitution or state law to expel Plaintiff at this special session* (as opposed to a regular legislative session).
3. *This violation of Article III, Section 9 of the Tennessee Constitution, which limits special sessions to the specific purposes for which they are convened, resulted in the deprivation of Plaintiff's protected property interest in his state benefits, specifically his pension and insurance benefits.*

8. On the second day of the special session, September 13, 2016, Representative Susan Lynn (R. – Mt. Juliet) introduced a motion to expel Plaintiff. *The Tennessee House of Representatives expelled Plaintiff* that same day.
9. *As the direct and proximate result of his improper and unauthorized expulsion, Plaintiff has lost his lifetime health insurance benefits and has been so informed by the State's Benefits Administration Division.*

(D.E. 1 Complaint at ¶¶ 1-3, 8-9, emphasis added.)

However, none of the Defendants are members of the House of Representatives and, therefore, could not have participated in any alleged “improper and unauthorized expulsion” of Plaintiff. Because Plaintiff's loss of his state benefits is fairly traceable *only* to the actions of the

Tennessee House of Representatives, and not to those of the Defendants, he does not have standing to seek relief from these Defendants as to this injury.¹ See *Stevens v. Malloy*, No. 3:15-CV-934 (JCH), 2016 WL 6440112, at *8 (D. Conn. Oct. 28, 2016)

As Plaintiff lacks the requisite Article III standing to seek relief from this Court, his Complaint should be dismissed in its entirety and with prejudice for lack of subject matter jurisdiction.

B. Plaintiff Lacks Standing Because He Fails to Present a Viable Federal Claim.

In the sole count of his Complaint, Plaintiff alleges that he was “afforded no post-deprivation remedy to challenge his expulsion or deprivation of his state benefits” and, therefore, Defendants deprived Plaintiff of his constitutional rights in violation of 42 U.S.C. § 1983. (D.E. 1 Complaint at ¶¶ 29, 30). But this federal claim is premised entirely upon Plaintiff’s interpretation of art. III, § 9, of the Tennessee Constitution. In other words, Plaintiff’s claim that Defendants deprived him of any protected property interest in violation of the Due Process Clause can proceed in the first instance, if, and only if, Plaintiff can demonstrate that his interpretation of art. III § 9, of the Tennessee Constitution is the correct interpretation. Plaintiff’s Complaint does not fulfill that requirement and should be dismissed.

As this Court has recognized, the interpretation of a statute or state constitutional provision is a “question of law.” *City of Goodlettsville, Tenn. V. Priceline.com, Inc.*, 844 F.Supp.2d 897, 904 (M.D. Tenn. 2012) (citing *Home Builders Ass’n of Middle Tenn. v. Williamson Cnty.*, 304 S.W.3d 812, 816–17 (Tenn.2010); see also *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn.2004); *Mullin v. Hartford Accident and Indem. Co.*, No. 3:04-CV-525, 2005 WL

¹ Moreover, the Supreme Court has recognized that “even if the relief [plaintiff] request[ed] might have a substantial effect” on remedying the alleged injury, a plaintiff still does not have standing when the injury is not “fairly traceable” to the challenged conduct. *Allen v. Wright*, 468 U.S. 737, 753, n.19 (1984).

1429305, at *2 (E.D. Tenn. June 17, 2005) (applying Tennessee law)); *see also U.S. v. Shafer*, 573 F.3d 267, 272 (6th Cir. 2009). Thus, the underpinning of Plaintiff’s alleged federal cause of action—the meaning of the language of art. III, § 9, of the Tennessee Constitution—is purely a question of law and appropriate for determination pursuant to a motion under Fed. R. Civ. P. 12(b).

Article III, § 9, gives the Governor authority to convene the Legislature for a special session and, when the Governor does so, he or she must state specifically the purposes for which the special session has been called. And when the Legislature is convened for such a special session, “they shall enter on no *legislative business* except that for which they were specifically called together.” Tenn. Const., art. III, § 9 (emphasis added).

Plaintiff’s allegation is that the General Assembly violated this constitutional limit on the business that may be conducted during a special session when it voted to expel him. (D.E. 1 Complaint at ¶ 3.) But that position rests on a misunderstanding of “legislative business” for purposes of art. III, § 9. In Plaintiff’s view, “legislative business” includes any business taken by the General Assembly during a special session. However, Plaintiff provides no support for this interpretation, and both the plain meaning and caselaw interpreting art. III, § 9 are to the contrary.

Federal courts must “interpret constitutional provisions in a principled way that attributes plain and ordinary meaning to their words and that takes into account the history, structure, and underlying values of the entire document.” *Bd. of Educ. of Shelby Cty., Tenn. v. Memphis City Bd. of Educ.*, 911 F.Supp.2d 631, 651-52 (W.D. Tenn. 2012) (quoting *Estate of Bell v. Shelby Cnty. *652 Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010)). In general, “legislative” is defined as “of or relating to lawmaking or to the power to enact laws.” *Black’s Law Dictionary* 982 (rev. 9th ed.). The Tennessee Supreme Court has held, for example, that the “Legislative authority”

which art. II, § 3 of the Tennessee Constitution vests in the General Assembly, is the authority to make, order, and repeal laws. *Richardson v. Young*, 125 S.W. 664, 668 (1910).

Tennessee cases interpreting art. III, § 9 demonstrate that the term “legislative business” refers to the passing of legislation by both houses of the General Assembly, not a unicameral procedural motion. In *State v. Woollen*, the Tennessee Supreme Court reviewed cases interpreting art. III, § 9 and held that “the presumption is always in favor of the constitutionality of *an act*, and that any *piece of legislation* so under consideration should be held within the call, if it can be done by any reasonable construction.” 128 Tenn. 456, 161 S.W. 1006, 1014-15 (1913) (emphasis added); *accord City of Rockwood v. Rodgers*, 154 Tenn. 638, 290 S.W. 381, 382 (1926) (quoting *Woollen*). Similarly, the *Woollen* court stated, “And cases may sometimes arise, it is to be sincerely hoped but seldom, in which it may become the duty of the court to declare *a law* passed under such circumstances beyond the scope of the legislative commission arising out of this provision of the Constitution.” *Id.* at 1014 (emphasis added).

The use of language such as “an act,” “a law passed,” and “a piece of legislation” to describe the business conducted during a special session demonstrates that the Tennessee Supreme Court interprets art. III, § 9 as placing limitations on the General Assembly’s ability to pass *legislation* outside the Governor’s call—legislation which requires bicameral action. This interpretation is not only consistent with the plain meaning of the term “legislative,” but also with the rest of the language of art. III, § 9, which authorizes the Governor to convene the “General Assembly” and states that “*they* shall enter on no legislative business except that for which *they* were specifically called together.”

The vote to expel Plaintiff from membership in one body of the General Assembly was not bicameral action and was not the passage of an act or a piece of legislation. It is undisputed that

only the House of Representatives voted to expel Plaintiff from its membership. *See* D.E. 1, Complaint at ¶¶ 2, 8, 23, 24). Moreover, the House of Representatives' vote to expel Plaintiff was on a motion—procedural in nature—in which the House disciplined one of its members. *Id.* at 8, 23 and 24. The Tennessee Constitution provides each house of the General Assembly with the authority to discipline its members:

Each House *may determine the rules of its proceedings*, punish its members for disorderly behavior, *and, with the concurrence of two-thirds, expel a member*, but not a second time for the same offence; and shall have all other powers necessary for a branch of the Legislature of a free State.

Tenn. Const. art. III, § 12 (emphasis added). Accordingly, the expulsion of Plaintiff by the House of Representatives did not constitute “legislative business” for purposes of art. III, § 9 and, therefore, the House motion to expel Plaintiff did not violate art. III, § 9. *See, e.g., Hagaman v. Andrews* (232 So.2d 1, 3 (Fla. 1970) (finding that resolution calling for investigation into election issues adopted by Florida House of Representatives during special session did not constitute “legislative business” within the meaning of Sec. 3(c)(1), Art. III, Fla. Const. (1968))).

In sum, the linchpin of Plaintiff’s federal claim is an assumption that has no legal basis. That inherently deficient linchpin cannot hold the wheel to the axle: Plaintiff has failed to state—and as a matter of law cannot state—a claim for violation of his due-process rights under the Fourteenth Amendment. Moreover, because Plaintiff’s claim is solely predicated on the assertion that the House of Representatives’ vote to expel him during a special session violates the Tennessee Constitution, and not any actions of the Defendants, it presents no federal claim at all, and the Complaint should be dismissed for that reason alone.

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b)(6).

Assuming Plaintiff can establish that he has the requisite standing to seek relief against

these Defendants, and further can establish that his interpretation of art. III, § 9 is correct, Plaintiff has still failed to state a viable procedural due process claim. Although the Complaint is not explicit about whether the claim is one of procedural or substantive due process, it appears that Plaintiff intends to bring a procedural due process claim.

“Procedural due process requires that the government, prior to depriving an individual of their property, provide that individual with notice of the proposed action and an opportunity to be heard.” *Paterek v. Vill. of Armada, Mich.*, 801 F.3d 630, 649 (6th Cir. 2015) (citing *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004)). “To establish a procedural due process claim, a plaintiff must show (1) the existence of a protected property interest at issue, (2) a deprivation of that protected property interest, and (3) that he or she was not afforded adequate procedures.” *Id.* (citing *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014)).

As a matter of law, Plaintiff does not have a protected property interest either in his elected office or in lifetime state benefits. Furthermore, even if he had a protected property interest, Plaintiff has failed to demonstrate that he was not afforded adequate post-deprivation remedies.

A. Plaintiff Does Not Have a Protected Property Interest in His Elected Office.

The first step in any due process analysis is to identify a property interest entitled to due process protections. *Royal Oak Entm’t, L.L.C. v. City of Royal Oak*, 316 F. App’x 482, 486 (6th Cir. 2009). “The federal Constitution does not create property interests.” *Mertik v. Blalock*, 983 F.2d 1353, 1359 (6th Cir. 1993). Rather, “[a] property interest can be created by a state statute, a formal contract, or a contract implied from the circumstances.” *Blazy v. Jefferson Cnty. Reg’l Planning Comm’n*, 438 F. App’x 408, 412 (6th Cir. 2011) (internal citations and quotation marks omitted). However, while state law might create a property interest, “federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by

the Due Process Clause.” *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 855-56 (6th Cir. 2012).

Plaintiff’s complaint alleges that he was “afforded no post-deprivation remedy to challenge his expulsion . . .” (D.E. 1 Complaint at ¶ 29). To the extent Plaintiff is asserting that he has a protected property interest in his elected office to the Tennessee House of Representatives, the courts—federal and state—have consistently refused to find a federally protected property right to office. The Supreme Court first addressed this issue in *Wilson v. North Carolina*, 169 U.S. 586 (1898). In that case, the Governor of North Carolina had suspended an elected railroad commissioner for alleged violations of the act establishing the State Railroad Commission. In dismissing the plaintiff’s due process claim under the Fourteenth Amendment, the Supreme Court stated:

[T]he Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

Id. at 595.

Only two years later, that Court addressed the issue again in *Taylor v. Beckham*, 178 U.S. 548 (1900). In that case, incumbent officeholders in Kentucky, who were the losers in an election, asserted that they had been denied the right to a public office protected by the Fourteenth Amendment. The Supreme Court rejected this argument, stating:

The view that public office is not property has been generally entertained in this country. The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. . . . In short, generally speaking the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.

Id. at 576-77. See also *Cave v. Missouri ex rel. Newell*, 246 U.S. 650 (1918); *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972).

More recently, the Second Circuit in *Monserrate v. New York State Senate*, addressed the importance of the government function involved when a legislative body expels a member and the constrained role of courts in interfering in such matters. 599 F.3d 148 (2d Cir. 2010). Monserrate was a New York State Senator who filed suit against the New York State Senate and certain members of the Senate challenging the Senate's decision to expel him after he was convicted of domestic violence. *Id.* at 152-53. The court held that "Monserrate's expulsion vindicates an important state interest in maintaining the integrity of the Senate. It is fundamental that a legislature has an important interest in upholding its reputation and integrity." *Id.* at 155 (citing cases, including *In re Chapman*, 166 U.S. 661, 668 (1897) (recognizing that Congress "necessarily possesses the inherent power of self-protection"))). As to the role of the courts in considering such claims, the Second Circuit held: "Prudence dictates that a federal court should exercise a respectful reluctance to interfere in the measures taken by a state legislature to regulate its affairs, discipline its members, and protect its integrity and good name." *Id.* at 157.

In view of this federal jurisprudence, Plaintiff cannot establish that he possessed a property right in his elected office that is entitled to protection under the Due Process Clause. Accordingly, any claim that he was entitled to due process either before or after his expulsion from his seat in the Tennessee House of Representatives must fail, and such claim should be dismissed under Rule 12(b)(6).

B. Plaintiff Does Not Have a Protected Property Interest in State Retirement and Health Insurance Benefits.

Plaintiff also asserts that he has a protected property interest in his state benefits and that

he was denied due process through the deprivation of these benefits. (D.E. 1 Complaint at ¶ 27).

In support of this claim, Plaintiff asserts that

[b]ased on the plain language of Article III, Section 9 of the Tennessee Constitution and prior failed attempts to call a special session for the specific purpose of expelling him, *Plaintiff had the reasonable understanding that he would retain his state benefits* (lifetime health insurance and a state pension) at the end of his term.

(D.E. 1 Complaint at ¶ 28.)

The Supreme Court has held that in order for a plaintiff to have a property interest in a benefit, he “must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

The Sixth Circuit has recognized that, in determining the existence of a property right protected by due process, the statute creating and defining that right is controlling. *Banks v. Block*, 700 F.2d 292, 296-96 (6th Cir. 1983). The state statutes creating and defining the right to retirement and health insurance benefits make clear that Plaintiff does not have a legitimate claim of entitlement to either benefit. Moreover, even if Plaintiff could somehow establish that he had a protected property interest, he has failed to demonstrate that adequate post-deprivation remedies were not available to him.

1. Retirement Benefits

Retirement benefits for state employees, including members of the General Assembly, are provided for in the statutes establishing the Tennessee Consolidated Retirement System (“TCRS”), found in chapters 34-36 of Title 8. Tennessee Code Annotated § 8-36-203 provides that a member may retire and receive a “service retirement allowance,” (i.e., retirement benefit) upon filing a written application with the Board of Trustees of TCRS, provided that the member has completed

the applicable eligibility requirements. Plaintiff, as a former member of the General Assembly, is defined as a “general employee”. Tenn. Code Ann. § 8-34-101(18). General employees are classified as members of Group 1. Tenn. Code Ann. § 8-35-105(a)(1).

A Group 1 member, in order to be eligible for retirement benefits, must have either attained the age of sixty (60) or completed thirty (30) years of creditable service. Tenn. Code Ann. § 8-36-201(a)(1). Furthermore, a Group 1 member, such as Plaintiff, is not eligible for retirement benefit unless such member has a minimum of four (4) years of creditable service. Tenn. Code Ann. § 8-36-204(a).

Plaintiff does not allege that he meets any of these eligibility requirements. Instead, the facts alleged establish that he does *not* meet these requirements. Plaintiff alleges that he was first elected to the House of Representatives in 2012. (D.E. 1 Complaint at ¶ 19). The Tennessee Supreme Court has held that a member of the General Assembly’s term begins on election day. *Comer v. Ashe*, 514 S.W.2d 730, 733 (Tenn. 1974) (citing Tenn. Const. art. II, § 3). Thus, Plaintiff’s service for purposes of his eligibility for retirement benefits did not begin until November 6, 2012. Plaintiff further alleges that the House voted to expel him on September 13, 2016—almost two months less than the required minimum four years of creditable service. (D.E. 1 Complaint at ¶¶ 23, 24.)

Thus, based on Plaintiff’s own fact allegations, Plaintiff does not meet the statutory eligibility requirements for retirement benefits and, therefore, cannot assert anything more than an “abstract need or desire” for such benefits.

Furthermore, even if Plaintiff could establish that he had a protected property interest in retirement benefits, to state a claim of deprivation of those rights without due process, he still must prove that state processes for redress are inadequate. *See Vicory v. Walton*, 721 F.2d 1062, 1066

(6th Cir.1983) (“In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong.”); *Jefferson v. Jefferson County Pub. Sch.* Sys., 360 F.3d 583, 588 (6th Cir. 2004) (“Plaintiff may not seek relief under *Section 1983* without first pleading and proving the inadequacy of *state or administrative processes or remedies* to redress her due process violations”).

Specifically, to maintain an action under 42 U.S.C. § 1983 based on a violation of procedural due process, Plaintiff must show that: “(1) the state does not provide any remedy; (2) the state provides a remedy, but it is inadequate; or (3) the state provides an adequate remedy in form, both procedurally and in damages, but the state failed to apply or misapplied the remedy.” *Gardner v. Village of Grand River*, 955 F.Supp. 817, 824 (N.D. Ohio 1997) (citing *Haag v. Cuyahoga County*, 619 F.Supp. 262 (1985), aff'd without opinion, 798 F.2d 1414 (6th Cir.1986)). Plaintiff must show that there are no such processes in place—not that he did not use or exhaust the processes if they indeed exist.

Plaintiff has failed to show that no such processes exist. They do exist. Administrative rules promulgated by TCRS specifically provide that “[a]ny person who is aggrieved by an action or decision made within the discretion or control of the TCRS may appeal the action or decision.” Tenn. Comp. R. & Regs. Ch. 1700-3-2-.03(1). These rules set out the procedures for such appeal process, including judicial review under the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301, *et seq.* As Plaintiff has not alleged that this administrative remedy is inadequate, or that he has availed himself of this remedy, but the State failed to apply or misapplied the remedy, Plaintiff has failed to meet his burden of demonstrating that the state processes for redress are inadequate.

In short, the statutes creating and defining Plaintiff's rights to retirement benefits control, and under these statutes, Plaintiff cannot establish any legitimate entitlement to retirement benefits—regardless of his “reasonable understanding.” Plaintiff also cannot establish that the appeal procedures set out in the TCRS rules do not provide an adequate post-deprivation remedy. Accordingly, Plaintiff's due process claim for deprivation of his retirement benefits wholly fails and must be dismissed pursuant to Rule 12(b)(6).

2. Health Insurance Benefits

As with the retirement benefits, any property interest Plaintiff has in health insurance benefits, is created and defined by statute. Specifically, Tenn. Code Ann. § 8-27-208(a)(1) provides:

Upon *retirement* from the general assembly, any senator or representative . . . may elect to retain retiree health benefits by participating in the plan authorized by the state insurance committee pursuant to § 8-27-205(a) and (b).

The word “retirement” is not defined in the statute. In construing statutes, though, courts seek “to determine legislative intent and to effectuate legislative purpose. The text of the statute is of primary importance, and [courts] seek to give the words their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.” *Am. Heritage Apartments, Inc. v. Hamilton Cnty. Water & Wastewater Treatment Auth.*, 494 S.W.3d 31, 45 (Tenn. 2016) (citations omitted).

Retirement is ordinarily defined as “withdrawal from one's position or occupation or from active working life.”² Thus, the “retirement” signifies a voluntary withdrawal from office, or in this case, the General Assembly. Conversely, “expel” is defined as “to force to leave by official

²https://www.merriam-webster.com/dictionary/retirement?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

action,” i.e., a forced withdrawal.³ The term “retirement” is not synonymous with “expel,” “remove,” “dismiss,” or words of similar import. *See Brown v. Little, Brown & Co.*, 168 N.E. 521, 526 (Mass. 1929); *accord Jacobs v. New Jersey State Highway Auth.*, 255 A.2d 266, 268 (N.J. 1969) (holding that “retirement” “ordinarily signifies voluntary withdrawal,” as opposed to “discharge,” which signifies “compulsory dismissal”); *Morrison v. Dep’t of Highways*, 85 So. 2d 51, 53 (La. 1955) (“Retirement is not dealt with in the amendment, unless by mental gymnastics we could come to construe that ‘removal’ means ‘retirement’. These words are not synonymous.”).

Thus, under the statute, in order to be eligible for health insurance benefits, Plaintiff must have *retired* from the General Assembly. However, Plaintiff did not retire or voluntarily withdraw from membership in the General Assembly; he was expelled by the Tennessee House of Representatives. Consequently, Plaintiff cannot establish that he has a legitimate expectation to health insurance benefits under Tenn. Code Ann. § 8-27-208(a)(1).

Moreover, even if Plaintiff could convincingly demonstrate that “retirement” as used in Tenn. Code Ann. § 8-27-208(a)(1) is synonymous with or includes the expulsion of a member pursuant to art. II, § 12, of the Tennessee Constitution, Plaintiff cannot establish that there are no adequate post-deprivation remedies available. Tennessee Code Annotated § 8-27-102 specifically authorizes an informal appeal process for resolving disputes over health insurance plan eligibility. Additionally, the Uniform Administrative Procedures Act authorizes an “affected person” to petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency, and any such agency decision may be further

³https://www.merriam-webster.com/dictionary/expel?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

subject to judicial review. *See* Tenn. Code Ann. §§ 4-5-322-325. Plaintiff has failed to establish that either of these proceedings would not have afforded him adequate post-deprivation due process had he sought to avail himself of them.

In sum, as with his claim to retirement benefits, Plaintiff cannot establish any legitimate entitlement to lifetime health insurance benefits, nor can he establish that Tennessee's procedures do not provide an adequate post-deprivation remedy. Accordingly, Plaintiff's due process claim for deprivation of his health insurance benefits wholly fails and must be dismissed pursuant to Rule 12(b)(6).

III. ALTERNATIVELY, PULLMAN ABSTENTION OR CERTIFICATION PURSUANT TO TENNESSEE SUPREME COURT RULE 23 IS WARRANTED BECAUSE UNSETTLED STATE-LAW ISSUES PREDOMINATE.

Should this Court nevertheless find that Plaintiff has standing and has stated a cognizable federal claim, then abstention and dismissal under the *Pullman* doctrine is called for, since state-law issues clearly predominate Plaintiff's claim. That doctrine, articulated in *Railroad Commission of Texas v. Pullman Company*, directs that when a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention is justified under principles of comity in order to avoid needless friction with state policies. Three objectives underlie this doctrine: (1) to "avoid the waste of a tentative decision" on an unsettled question of state law, where a federal court's decision could be supplanted by a later state court ruling; (2) to prevent "premature constitutional adjudication" of federal constitutional questions; and (3) to avoid needless friction between state and federal courts. 312 U.S. 496, 500-01 (1941).

The Sixth Circuit has held that "where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state

court has addressed the state questions.” *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) (quoting *Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O’Connor, J. concurring)).

The Sixth Circuit has further recognized that *Pullman* abstention has regularly been applied in Section 1983 actions. *Id.* (citations omitted).

As previously discussed, Plaintiff’s due-process claim rests entirely on his interpretation of art. III, § 9 of the Tennessee Constitution. Tennessee courts have never addressed the specific question of whether the House or Senate may expel a member during a special session, and Plaintiff’s interpretation that a unicameral procedural action is prohibited during a special session is contrary to the Tennessee cases interpreting the phrase “legislative business” in art. III, § 9. See *Rodgers*, 290 S.W. at 382; *Woollen*, 161 S.W. at 1014-15. *Pullman* abstention is especially appropriate and necessary in this case where the “state constitution” is “the nub of the whole controversy” and is a “matter of great state concern.” *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970). Indeed, Plaintiff’s interpretation of the language at issue should not be adopted without an authoritative ruling by the Tennessee Supreme Court, as his interpretation would give the Executive branch authority to exercise powers specifically delegated to the Legislative branch under the Tennessee Constitution. That is, Plaintiff’s interpretation of art. III, § 9 is that the Governor, in convening a special session of the legislature, has the authority to limit, by the scope of his call, the ability of the House and Senate to engage in unicameral procedural actions that have never before been found to constitute “legislative business.”

Usually when a district court abstains under *Pullman*, it retains jurisdiction pending an authoritative interpretation of the state law in question. In this case, however, it would serve no purpose for the Court to retain jurisdiction. No authoritative determination by the Tennessee courts could possibly leave grounds for further action by this Court; therefore, dismissal of this case is

appropriate. *See Brown v. Tidwell*, 169 F.3d 330, 333 (6th Cir. 1999). A decision rejecting Plaintiff's interpretation of art. III, § 9 would moot his federal constitutional claim, as that claim depends entirely on the acceptance of his interpretation. If, on the other hand, the Tennessee Supreme Court were to hold that Plaintiff's interpretation of art. III, § 9 is correct and that the action of the House in expelling Plaintiff violated the Tennessee Constitution, he could obtain appropriate relief in that forum.

Alternatively, the question of the correct interpretation of art. III, § 9 of the Tennessee Constitution should be certified to the Tennessee Supreme Court pursuant to Tenn. Sup. Ct. R. 23, § 1, which provides as follows:

The Supreme Court may, at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

The decision of whether to certify a question to a state supreme court “rests in the sound discretion of the federal court,” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), and it is a decision that may be made *sua sponte* by the court. *Elkins v. Moreno*, 435 U.S. 647, 662 (1978). This Court has noted that certification has various benefits:

[Certification] eliminates guesswork and speculation about questions of state law, and “[t]aking advantage of certification made available by a State may ‘greatly simplif[y]’ an ultimate adjudication in federal court.” *Arizonians for Official English v. Arizona*, 520 U.S. 43, 79 (1997); [*Lehman Bros. v. Schein*, 416 U.S. 386, 386 (1974)] (by certifying a question of state law, the federal court may save “time, energy and resources and hel[p] build a cooperative judicial federalism”). It also serves the salutary function of “protect[ing] states’ sovereignty,” something which “is no small matter, especially since a federal court’s error may perpetuate itself in state courts until the state’s highest court corrects it.”” *Haley v. Univ. of Tennessee-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006) (citation omitted).

Renteria-Villegas v. Metro. Gov't of Nashville and Davidson Cnty, No. 3:11-00218, 2011 WL 4048523, at *12 (M.D. Tenn. Sept. 12, 2011).

Pursuant to Tenn. Sup. Ct. R. 23, § 1, certification of the state law question of the proper interpretation of art. III, § 9 of the Tennessee Constitution is entirely appropriate and lies well within the discretion of this Court. Indeed, the answer to this state law question will determine the outcome of this case since Plaintiff's sole claim has as its genesis the alleged illegality of the Tennessee House of Representative's interpretation and application of art. III, § 9. Plaintiff's Complaint specifically alleges that the House of Representatives' actions in voting to expel Plaintiff during a special session violated art. III, § 9 which "resulted in the deprivation of Plaintiff's protected property interest in his state benefits, specifically his pension and insurance benefits." (DE at 1-2).

In sum, if the Court does not grant Defendants' motion to dismiss for failure to state a claim, it should exercise *Pullman* abstention and dismiss Plaintiff's claims or, alternatively, certify the question of the correct interpretation of art. III, § 9 to the Tennessee Supreme Court pursuant to Tenn. Sup. Ct. R. 23, § 1.

CONCLUSION

For these reasons, Defendants respectfully request that this Court dismiss the Complaint in its entirety with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In the alternative, abstention and dismissal under the *Pullman* doctrine is warranted. In the further alternative, if the Court does not dismiss the Complaint or abstain, it should certify the state constitutional interpretation question to the Tennessee Supreme Court.

Respectfully submitted

HERBERT H. SLATERY III
Attorney General and Reporter

LESLIE ANN BRIDGES
Senior Deputy Attorney General
Public Interest Section
Leslie.bridges@ag.tn.gov

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER
Deputy Attorney General
Public Interest Division
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403
Janet.kleinfelter@ag.tn.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of September, 2017 a copy of the above document has been served upon the following persons by Electronic Case Filing (ECF) System:

William L. Harbison
Michael G. Abelow
Amy R. Mohan
150 3rd Avenue South, Suite 1100
Nashville, TN 37201
bharbison@srvhlaw.com
mabelow@srvhlaw.com
amohan@srvhlaw.com

James F. Sanders
William J. Harbison II
1201 Demonbreun Street, Suite 2000
Nashville, TN 37203
jsanders@nealharwell.com
jharbison@nealharwell.com

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER
Deputy Attorney General