IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, et al.,

Plaintiffs,

v. Case No.: 4:22-cv-109-AW/MAF

CORD BYRD, in his official capacity as Florida Secretary of State,

Defendant.

_____/

THE SECRETARY'S REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

Defendant Secretary Cord Byrd provides this brief reply in support of his motion for partial summary judgment. The accompanying memorandum explains the bases to grant his motion. This reply is filed before the August 18, 2023 deadline set forth by this Court. Doc.159 ("The deadline for any reply is August 18.").

Dated: July 31, 2023

Respectfully submitted,

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LOCAL RULE CERTIFICATIONS

I certify that the reply is 60 words and thus complies with Local Rule 56.1(B). I also certify that this reply complies with Local Rule 5.1(C).

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, this document was filed through the Court's e-Filing portal, which will serve a copy on counsel of record.

/s/ Mohammad O. Jazil
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Memorandum

Partial summary judgment remains appropriate. The Organizational Plaintiffs don't have standing to challenge any district in Florida's enacted congressional map. Facts aren't in dispute. Having abandoned organizational standing, Doc.166 at 10 & n.3, the Organizational Plaintiffs rely on associational standing; yet FairDistricts still doesn't have any members, Doc.161-8 at 18-19, and Common Cause and NAACP still haven't identified any specific members who reside in any specific districts, Doc.161 at 10-11; Doc.166-8 ¶ 5; Doc.166-9 ¶ 5. The Secretary is thus entitled to partial judgment as a matter of law. Standing requires specifics, and the Organizational Plaintiffs failed to provide such specifics, contrary to Eleventh Circuit and Supreme Court dictates. The Secretary's motion for partial summary judgment should therefore be granted.

I.

Before discussing Plaintiffs' standing arguments, the Secretary notes that it's not entirely clear whether Plaintiffs are challenging the enacted map as a whole, as to north Florida, or as to the districts where the Individual Plaintiffs reside. Their second amended complaint suggests that they are challenging the map as a whole. Doc.131 at 59 (challenging the entire "Enacted Map"). But their response in opposition doesn't clarify whether this position remains the same or has changed. *Compare* Doc.166 at 8 ("After conducting discovery, Plaintiffs have determined to narrow their case to the intentional destruction of Benchmark CD-5 in violation of the Fourteenth and Fifteenth Amendments."), *with id.* at 9 ("In any event, Plaintiffs do have standing to

challenge, as alleged in the Complaint, that racial discrimination was a motivating factor in the drawing of Districts 2, 4, 10, 13, and 24."), *with id.* at 10 ("But if the Court were to reach the question of the Organizational Plaintiffs' standing," they would have standing to challenge "every single district in the state").[1]

II.

Regardless, case law is clear that in the redistricting context, standing is district specific. *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). The Individual Plaintiffs have standing to challenge the districts in which they reside: districts 2, 4, 10, 11, 13, 19, and 24. To the extent that Plaintiffs rely on the Organizational Plaintiffs to challenge the remaining twenty-one districts, the Organizational Plaintiffs must establish standing to do so.

The Organizational Plaintiffs dropped organizational standing and now rely on associational standing. Doc.166 at 10 & n.3. Associational standing requires specifics: at the very least, an organization must identify one member who has been injured or will be injured by the defendant's actions. *Ga. Republican Party v. SEC*, 888 F.3d 1198,

[1] It's most likely that Plaintiffs are only challenging the north Florida districts that comprise old benchmark district 5: enacted districts 2, 3, 4, and 5. Doc.166 at 8; Doc.166-8 ¶ 5; Doc.166-9 ¶ 5. Assuming that Organizational Plaintiffs lack standing, and that the Individual Plaintiffs have standing to challenge only districts 2 and 4, it's not entirely clear whether Plaintiffs can reinstate benchmark district 5, should they prevail at trial, given their two-district standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (a redistricting remedy "that is proper and sufficient lies in the revision of the boundaries of the individual's own district"). But that issue need not be decided at this juncture.

1203 (11th Cir. 2018). What an organization can't do is broadly assert that it has many members, and that one unidentified member is likely to have been or will likely be injured by the defendant's actions. That kind of "probabilistic" or "statistical" standing theory has been rejected by the Eleventh Circuit and Supreme Court. *Id.* at 1203-05 (referencing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)). It's no different in redistricting cases: an organization must identify at least one specific member who resides in a specific district. *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015).

Contrary to Plaintiffs' arguments, neither *GALEO v. Gwinnet Cnty. Bd. of Registration & Elections*, nor this Court's motion-to-dismiss order, changes matters. Doc.166 at 8. *GALEO* wasn't a redistricting case and doesn't change redistricting-standing rules. 36 F.4th 1100, 1113-14 (11th Cir. 2022). And this Court's motion-to-dismiss order was just that: a motion-to-dismiss order. It considered the pleadings, not evidence. It also confined its standing analysis by stating that "[a]t this early point in the litigation, we do not address whether" an "invalidation of the recently-enacted congressional districting map" "would be available to some or all of the plaintiffs if the allegations in the complaint were proven." Doc.115 at 3 n.1. That issue, of course, is now squarely presented in the Secretary's partial-summary-judgment motion.

III.

In their response in opposition, the Organizational Plaintiffs seem to concede that they failed to identify specific members in specific districts. Doc.166 at 10. They suggest that "probabilistic" and "statistical" standing is good enough, without citing

proper authority. Doc.166 at 11 ("surely at least one" of the organizations' members reside "in each of Florida's 28 districts"). They argue that establishing standing is burdensome. Doc.166 at 12 ("the additional burden required to identify organizational members in specific districts is disproportionate to the needs of the case"). And Plaintiffs then blame the Secretary for failing to connect their standing dots. It's true that the Secretary, at one time, was interested in taking corporate depositions and perhaps filing motions to compel. But having received and assessed Plaintiffs' discovery responses to his standing inquiries, the Secretary realized that he would be carrying Plaintiffs' standing burden by deposing corporate witnesses and compelling discovery. So he decided to cancel depositions, and he declined to compel documents and interrogatory responses. Nothing required him to act differently.

Plaintiffs also take *Alabama Legislative Black Caucus v. Alabama* completely out of context. Doc.166 at 11. That redistricting case, if anything, hurts them. There, a three-judge court dismissed an organizational plaintiff sua sponte for a lack of associational standing. 575 U.S. at 268. The Supreme Court disagreed with that decision, reasoning that the organization's standing was not directly questioned or challenged, and if given the opportunity to provide the court with a list of members in specific districts to establish standing, the organization likely could. *Id.* at 268-71. "At the very least," the Supreme Court stated, "the common sense inference is strong enough to lead the" organization "reasonably to believe that, in the absence of a state challenge or a court *request for more detailed information*, it need not provide additional information such a

specific membership list." *Id.* at 270 (emphasis added). So the Supreme Court allowed the organization to supplement that information.

That, of course, isn't what happened here. While the Secretary didn't seek a request for production of the Organizational Plaintiffs' membership list, the Secretary sought an interrogatory response that connected members to districts. Doc.161 at 10-11. Plaintiffs didn't provide members with districts. Doc.161 at 10-11. *Alabama Legislative Black Caucus* holds that an organization doesn't need to connect members with districts sua sponte; but that case doesn't stand for the proposition that an organization can decline to connect members with districts after being asked.[2]

IV.

Plaintiffs also fail to grapple with the Secretary's Rule 37 argument. The rule's text is clear: "[i]f a party fails to" "identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that" "witness to supply evidence on a motion" "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Here, Amy Keith from Common Cause and Adora Nweze from NAACP provided declarations in Plaintiffs' response in opposition. Doc.166-8; Doc.166-9. The

[2] In his partial-summary-judgment motion, the Secretary asserted that conclusory and unsubstantiated interrogatory responses can't survive a summary-judgment motion. Doc.161 at 12. That's an accurate statement of law. *See, e.g.*, *TocMail, Inc. v. Microsoft Corp.*, 67 F.4th 1255, 1265 (11th Cir. 2023); *McKenny v. United States*, 973 F.3d 1291, 1303 (11th Cir. 2020). But that statement was directed at Plaintiffs' evidence of *organizational standing*—their conclusory interrogatory responses that weren't substantiated by their production responses. Doc.161 at 12.

declarants were mentioned neither on Plaintiffs' nor the Secretary's initial disclosures, yet they were used "to supply evidence on" Plaintiffs' response to the Secretary's partial-summary-judgment "motion." Fed. R. Civ. P. 37(c)(1). That's a straightforward violation of Rule 37. And contrary to Plaintiffs' contentions, that rule provides no duties on the Secretary. Doc.166 at 3, 13-14.

The Organizational Plaintiffs themselves—Common Cause and NAACP—aren't witnesses under Rule 37. Doc.166 at 13. That's obvious because they didn't (and couldn't) provide declarations. Ms. Keith and Ms. Nweze did, and Ms. Keith and Ms. Nweze weren't properly disclosed witnesses.

That disclosure failure isn't harmless, nor is it justified. The Secretary would be harmed and prejudiced if their declarations defeated his partial-summary-judgment motion. And even if he wasn't going to depose them, the Secretary is still entitled to know who Plaintiffs' witnesses are *before* the end of discovery and *before* summary-judgment-motion practice. That could have very well changed his discovery calculus. This thirteenth-hour disclosure certainly harms him.

In any event, their declarations don't move the standing needle: like Plaintiffs' interrogatory responses, they don't identify specific members in specific districts. Associational standing remains lacking.

V.

Associational standing facts aren't in dispute. FairDistricts doesn't have any members, and Common Cause and FairDistricts failed to identify any. That's not good

enough, because associational standing case law requires specifics. As such, the Organizational Plaintiffs don't have standing to challenge any congressional district. The Secretary's motion should be granted.

A final note: should this Court require a hearing (which, the Secretary submits, it need not), he asks that the August 22 date be moved, Doc.159; the *BVM v. Byrd*, 2022 CA 666 (Fla. 2d Jud. Cir.), state-redistricting case is set for trial that day. That trial lasts from August 21 to September 1.

Dated: July 31, 2023

Respectfully submitted,

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