IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

DR. DOROTHY NAIRNE, *et al.*, *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00178-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson

JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant and Intervenor-Defendants (collectively, "Defendants"), respectfully submit this Joint Supplemental Brief in Support of Defendants' Motion for Summary Judgment, Doc. 149, in response to the Court's request, Doc. 170. This brief is in addition to the reply brief Defendants will file on or before November 13, as is authorized by this Court's rules. *See* L.C.R. 7(f) and 56(d).

I. Louisiana NAACP's disclosure is untimely and prejudicial.

Plaintiffs' new response to Defendant Ardoin's interrogatory is untimely. Fact discovery closed September 1, 2023, Doc. 110 at 2, and Plaintiffs did not move to extend that deadline. Plaintiffs' disclosure on November 6 was untimely, and Plaintiffs "cannot be allowed to use that information . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Plaintiffs bear the burden to show these things. *See Honey-Love v. United States*, 664 F. App'x 358, 361–62 (5th Cir. 2016). They cannot meet it.

First, the failure to comply with the discovery deadline has no valid justification. Defendant Ardoin first propounded written interrogatories on the NAACP on July 22, 2022, seeking

identification of certain membership information that the NAACP intended to rely upon to establish associational standing in this matter. Doc. 119-3 at 12. The NAACP's sworn interrogatory responses, served on July 3, 2023, objected to Interrogatory No. 3 on the grounds of First Amendment associational privilege. Doc. 119-4 at 9. The responses specifically provided that the NAACP had "identified members who reside in each of the districts challenged in this litigation" and affirmatively stated that the NAACP asserts associational standing on behalf of its members who purportedly "reside in the challenged districts resulting from the enacted maps and their votes are diluted." *Id.* at 10–11.

On August 9, 2023, the NAACP filed a Motion for Protective Order seeking to prevent the disclosure of its membership information during discovery, which was summarily denied. Doc. 119, 123. Since then, the parties have met and conferred approximately five times and spent countless hours on motions practice on this issue.[1] The NAACP has repeatedly changed its arguments, but continuously denied Defendants access to the information. Defendants repeatedly offered numerous compromises to resolve the dispute, including an attorneys-eyes-only designation, to no avail. Having taken this position, Plaintiffs bore the risk that their underlying position—that member identities are unnecessary to show associational standing, *see* Doc. 163 at 11-19—would not pan out. "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 897 (1990).

Nor can Plaintiffs show that their delay is harmless. Less than three weeks before trial, the NAACP has finally disclosed the identities of some of its members it intends to rely upon to establish its associational standing under an attorneys-eyes-only designation. It is unclear whether

[1] *See* Docs. 121, 122, 126, 127, 129, 130, 131, 132 (Defendant Ardoin's Motion to Compel), 132-1, 132-2, 135, 135-1, 136, 144, 144-1, 149, 149-1, 153, 153-1, 158, 159, 163, 169.

the NAACP will further rely on undisclosed members at trial. However, now, Defendants do not have sufficient time before trial to conduct discovery into those members and their alleged harm because the NAACP has failed to disclose discoverable material in a timely manner under Fed. R. Civ. P. 37. This late disclosure will substantially prejudice Defendants, who now have no time before trial to conduct adequate discovery into whether the identified members "would have standing to sue in their own right"—for example, whether each identified member actually votes in state legislative elections or whether each member's current representative is the candidate of his or her choice. *See Friends of the Earth, Inc. v. Laidlaw Environ. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000).

In all events, the only means for the Court to cure the harm imposed by Plaintiffs' unjustified delay is to reopen discovery and permit Defendants to seek discovery concerning the newly disclosed individuals. In addition, the Court must reschedule the upcoming trial to permit adequate time to conduct such discovery.

II. At most, Plaintiffs can proceed to trial on only a fraction of the challenged districts.

Even taking Plaintiffs' untimely disclosed evidence at face value, associational standing cannot provide Plaintiffs the relief they seek in this case. There are not individual Plaintiffs or disclosed members in all districts they challenge.

"To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Accordingly, an individual plaintiff has standing "only with respect to those legislative districts in which they reside." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018); *Gill*, 138 S. Ct. at 1929–30. While an organization may assert standing of its members, its standing is no broader than theirs. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Accordingly, even assuming the NAACP may assert the right of

members of its branches, *but see* Doc. 149-1 at 6–7, that could at most embrace standing to challenge districts where it has established its members reside.[2]

While Plaintiffs' Amended Complaint seeks a declaration that Louisiana's house and senate plans be declared invalid in their entirety, Amend. Compl., Doc. 14, Prayer for Relief ¶¶ A and B, they have since abandoned that position and limited their challenge to Senate Districts 2, 5, 7, 8, 10, 14, 15, 17, 19, 31, 36, 38 and 39 and House Districts 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 22, 25, 29, 34, 35, 36, 37, 47, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 81, 88, and 101. *See* Doc. 163-1 at 5; Doc. 135 at 3 n.1. Plaintiffs' supplemental disclosure, however, only lists members in HD1, HD25, HD34, HD60, HD65, HD68, HD101, SD8, SD17, and SD38. The named Plaintiffs provide evidence of residency in HDs 25, 60, 66, 69 and SD 2. Doc. 163-1 at 2. This leaves most districts Plaintiffs challenge with no disclosed member: SDs 5, 7, 10, 14, 15, 19, 31, 36, 39, and HDs 2, 3, 4, 5, 6, 7, 8, 9, 13, 22, 29, 35, 36, 37, 47, 57, 58, 59, 62, 61, 63, 67, 70, 81, and 88. At a bare minimum, summary judgment is warranted on these districts.

Plaintiffs say it is enough to have identified a member "in each area of the state" they challenge. Doc. 163 at 11. But the injury of vote dilution "is district specific," not area specific. *Gill*, 138 S. Ct. at 1930; *see Petteway v. Galveston Cnty.*, __F. Supp. 3d __, 2023 WL 2782704, at *5 (S.D. Tex. Mar. 30, 2023) (finding no standing of plaintiff who did not reside in challenged precinct, even though it was possible to create an additional opportunity district in the area). The challenge can proceed (at most) "only with respect to those legislative districts in which" identified members of the NAACP "reside." *Covington*, 138 S. Ct. at 2553. To be sure, relief in a district where a challenger has standing may entail incidental reconfiguration of surrounding districts to achieve relief in the *challenger's* district. *Gill*, 138 S. Ct. at 1931. But that entails "revising only

[2] Defendants' forthcoming reply brief will amplify their argument here and respond to Plaintiffs' other arguments in opposing the summary-judgment motion.

such districts as are necessary to reshape the voter's district." *Id.* Thus, Plaintiffs have no standing to demand any specific demographic character of districts where no Plaintiff or disclosed member resides.

Finally, the disclosed members or individual Plaintiffs residing currently in HDs 34 and 101, and SD 2 lack standing to sue in their own right. Those districts are already majority-BVAP districts that perform as equal opportunity districts in the challenged plans, and the plans Plaintiffs propose would—by their own evidence—do nothing to strengthen their own likelihood of electing their preferred candidates. *See* Doc. 148-2 at 26, 32 (showing materially identical performance scores for challenged and illustrative versions of HD 34 and HD 101). Plaintiffs are not injured by districts where they may personally elect their representatives of choice. *See Gill*, 138 S. Ct. at 1932. Their claimed injury could only be that Black voters in neighboring districts suffer vote dilution, and that is nothing but a "generalized grievance about the conduct of government." *Id.* at 1931. Thus, summary judgment is warranted on HD 34, HD 101, and SD 2 and, in all events, Plaintiffs can proceed to trial as to only a fragment of the case they intend to present.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion for Summary Judgment be granted. In the alternative, if this Court accepts the NAACP's evidence of standing, then the court should issue an order limiting the scope of relief to only those specific majority-minority districts that would remedy the identified individuals' injuries.

Respectfully submitted, this the 7th day of November, 2023.

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