

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 PARTIAL MOTION FOR SUMMARY JUDGMENT

Defendant Secretary Cord Byrd moves for partial summary judgment. The accompanying memorandum explains the bases to grant the motion.

Dated: June 30, 2023

Respectfully submitted,

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LOCAL RULE CERTIFICATIONS

I certify that the motion contains 36 words and thus complies with Local Rule 56.1(B). I also certify that this motion and memorandum comply with Local Rule 5.1(C).

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2023, this document was served on counsel of record.

/s/ Mohammad O. Jazil
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Introduction

Out of 28 Florida congressional districts, Plaintiffs only have standing to challenge seven. Those districts are districts 2, 4, 10, 11, 13, 19, and 24—districts in which the Individual Plaintiffs reside. Doc.131 ¶ 6. By comparison, none of the three Organizational Plaintiffs—Common Cause Florida, FairDistricts Now, and the Florida State Conference of the NAACP Branches—have standing to challenge the remaining congressional districts. Discovery has revealed that the enacted congressional district map neither injured them (organizational standing) nor their members (associational standing). As a result, no Plaintiff has standing to challenge congressional districts 1, 3, 5, 6, 7, 8, 9, 12, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 26, 27, and 28. Partial summary judgment should be granted as to those districts.

Statement of Facts

This case is a challenge to Florida’s enacted congressional district map. Doc.131 (second amended complaint). The challengers are three organizational plaintiffs and ten individual plaintiffs. *Id.* They seek a declaration that the enacted map, as a whole, is unconstitutional under the Fourteenth and Fifteenth Amendments. *Id.* at 57-60; *see also id.* ¶ 2 (“Plaintiffs bring this action to invalidate Florida’s new congressional map and establish one that is free of invidious discrimination.”).

Following the Rule 26(f) Report, Docs.121-23, discovery commenced. Discovery ends on June 30, 2023. Doc.159. During discovery, the Secretary was interested in ascertaining Plaintiffs’ standing to challenge the enacted map.

Individual Plaintiffs' Standing

It's axiomatic that standing consists of three elements: injury, traceability, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Each element must be established at each stage of litigation. *Id.* For individual plaintiffs in the redistricting context, “injury is district specific.” *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). A voter is “placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent” the voter has been injured. *Id.* In other words, for redistricting cases, injuries are determined on a “district-by-district” basis, not as a whole. *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015).

In their second amended complaint, Plaintiffs helpfully provided a chart that matches each Individual Plaintiff to their current congressional district.

Plaintiff's Name	County of Residence	Previous Congressional District	Congressional District in Enacted Plan
Dorothy Inman-Johnson	Leon	2	2
Cassandra Brown	Lake	11	11
Peter Butzin	Leon	2	2
Charlie Clark	Leon	5	2
Veatrice Holifield Farrell	Pinellas	13	13
Brenda Holt	Gadsden	5	2
Rosemary McCoy	Duval	5	4
Leo R. Stoney	Orange	10	10
Myrna Young	Lee	19	19
Nancy Ratzan	Miami-Dade	27	24

Doc.131 ¶ 6.

By residing in districts 2, 4, 10, 11, 13, 19, and 24, the Individual Plaintiffs can challenge those districts.

Organizational Plaintiffs’ Standing

A. An organizational plaintiff can establish a concrete injury in two ways: (1) through its members (associational standing) or (2) through its own injury (organizational standing). *GALEO v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1114 (11th Cir. 2022).

Associational standing requires an organizational plaintiff to identify at least one of its members who has standing to sue—a member who, at least, has suffered or will suffer an injury. *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018). For organizational standing, an organizational plaintiff can show that it “suffered an injury in” its “own right by diverting resources to combat the effects” of a challenged action. *Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020). A diversion of time, personnel, and finances from planned organizational projects, for example, can establish an injury. *City of S. Miami v. Gov. of Fla.*, 65 F.4th 631, 638-39 (11th Cir. 2023).

With these principles in mind, the Secretary sought discovery from the Organizational Plaintiffs; the Secretary wanted to know whether the Organizational Plaintiffs had standing to challenge the enacted map.

B. Three sets of documents bear noting: (1) the Organizational Plaintiffs' responses to the Secretary's requests for production; (2) the Organizational Plaintiffs' responses to the Secretary's interrogatories; and (3) the Plaintiffs' initial disclosures.

First, the responses to the requests for production. The Secretary propounded requests that broadly sought documents that could be used to establish a diversion-of-resources theory of organizational standing:

- **Request No. 9:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on get-out-the-vote activities.
- **Request No. 10:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on educating voters on how to vote.
- **Request No. 11:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on advocating for policies to expand voting rights and/or access to the political process.
- **Request No. 12:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on voter registration.
- **Request No. 13:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on any role you have played with regard to Florida's redistricting efforts.
- **Request No. 14:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on election protection efforts.
- **Request No. 15:** Any and all documents that evidence, relate to, or refer to your annual expenditures during the last five years on any of your activities or items (excluding those listed in Request Nos. 9 through 14) that you will discuss as part of this lawsuit.
- **Request No. 16:** Any and all documents that evidence, relate to, or refer to the type and/or specific amount of any resources that you will need to divert as a result of SB 2-C.
- **Request No. 17:** Any and all documents that evidence, relate to, or refer to your specific activities and/or items that will lose resources as a result of SB 2-C.

Att. 1 (Common Cause’s responses); **Att. 2** (FairDistricts’s responses); **Att. 3** (NAACP’s responses).

In total, the Secretary received a *final* production—responsive to *all* 30 requests for production—of 220 documents from Common Cause, 20 documents from FairDistricts, and just 3 documents from the NAACP. **Att. 4** (Common Cause’s production); **Att. 5** (FairDistricts’s production); **Att. 6** (NAACP’s production). As far as the Secretary could tell, there wasn’t a single document that showed expenditures or evidenced a diversion of resources to combat the enacted map: there weren’t spreadsheets of organizational finances pre- and post-enacted map, timesheets of personnel pre- and post-enacted map, or scheduling changes pre- and post-enacted map. Instead, the great bulk of documents produced were redistricting-related letters and emails, sent to elected and non-elected individuals, that pre-date the enacted map.

Second, the responses to the interrogatories. Despite the lack of documents evidencing a diversion of resources, the Organizational Plaintiffs broadly contended (with only slight differences) that they diverted resources to combat the enacted map:

- **Interrogatory No. 6:**
 - Please identify the type and/or specific amount of any and all resources that you will need to divert as a result of SB 2-C and identify the specific activities and/or items that any such resources will be diverted from.
 - **Response:** [The Organizational Plaintiff] incorporates all of the General Objections as if set forth fully herein. [The Organizational Plaintiff] further objects to this Interrogatory to the extent it calls for a legal conclusion. [The Organizational Plaintiff] further objects to this Interrogatory as unduly burdensome because it seeks

information irrelevant to the underlying litigation and that [The Organizational Plaintiff] need not identify “specific” resources that will be diverted. [The Organizational Plaintiff] further objects to this interrogatory to the extent it seeks information shielded from discovery by the attorney-client privilege, or communications protected under the work-product doctrine or the common-interest privilege. Subject to the foregoing General and Specific Objections, [The Organizational Plaintiff] responds that [The Organizational Plaintiff] must divert resources including time and money on a variety of activities related to SB 2-C. But for SB 2-C, [The Organizational Plaintiff] would use its funds to continue its broader voter education and voter-protection work that is not specific to SB 2-C’s unlawful infirmities. One of [The Organizational Plaintiff’s] primary purposes is to promote and defend voters’ rights to fair and legal congressional maps, and the Defendant’s promulgation of an illegal map via SB 2-C frustrates that purpose and impairs [The Organizational Plaintiff’s] ability to fulfil its goals.

- **Interrogatory No. 7:**

- For every activity or item identified in response to Interrogatory No. 6, please identify your annual expenditures during each of the last five years on those activities or items.
- **Response:** [The Organizational Plaintiff] incorporates all of the General Objections as if set forth fully herein. [The Organizational Plaintiff] further objects to this Interrogatory to the extent it calls for a legal conclusion. [The Organizational Plaintiff] further objects to this Interrogatory as unduly burdensome because it seeks information irrelevant to the underlying litigation and its scope in time is unduly broad and not proportional to the needs of this matter as SB 2-C was enacted during the Special Legislative session in April 2022. Subject to the foregoing General and Specific Objections, [The Organizational Plaintiff] will not be responding to this Interrogatory.

- **Interrogatory No. 8:**

- Please identify the specific activities and/or items that will receive the diverted funds that you have identified in response to Interrogatory No. 6, and the type and/or specific amount that each activity or item will receive.
- **Response:** [The Organizational Plaintiff] incorporates all of the General Objections as if set forth fully herein. [The Organizational

Plaintiff] further objects to this Interrogatory to the extent it calls for a legal conclusion. [The Organizational Plaintiff] further objects to this Interrogatory as unduly burdensome because it seeks information irrelevant to the underlying litigation and that [The Organizational Plaintiff] need not identify “specific” resources that will be diverted. Subject to the foregoing General and Specific Objections, [The Organizational Plaintiff] responds that [The Organizational Plaintiff] must divert resources including time and money on a variety of activities related to SB 2-C. But for SB 2-C, [The Organizational Plaintiff] would use its funds to continue its broader voter education and voter-protection work that is not specific to SB 2-C’s unlawful infirmities. One of [The Organizational Plaintiff’s] primary purposes is to promote and defend voters’ rights to fair and legal congressional maps, and . . . the Defendant’s promulgation of an illegal map via SB 2-C frustrates that purpose and impairs [The Organizational Plaintiff’s] ability to fulfil its goals.

The Secretary also wanted to know how many members the Organizational Plaintiffs have, and which districts they reside in:

- **Interrogatory No. 5:**

- Please identify whether you have any members, and if so, please list the approximate number of members you have, the congressional districts in which your members are located, any members who are parties or witnesses in this case, the dates on which those individuals first became members, and the specific injuries that your members are alleged to have suffered or will suffer in the future related to the claims in this litigation.
- **Response from Common Cause:** . . . Subject to the foregoing General and Specific Objections, Common Cause Florida responds that it has approximately 93,700 members and supporters in Florida and approximately 1.5 million members nationwide and that its members have undergone and will undergo a variety of harms and injuries, including the unconstitutional disadvantaging of the voting power of Black Floridians as a result of the claims in this litigation.
- **Response from FairDistricts:** . . . Subject to the foregoing General and Specific Objections, FairDistricts Now responds that it does not have members.

- **Response from NAACP:** Subject to the foregoing General and Specific Objections, FL NAACP responds that it has approximately 12,000 members across its many branches and chapters. Among the FL NAACP’s members are registered voters who have undergone and will undergo a variety of harms and injuries, including the unconstitutional disadvantaging of the voting power of Black Floridians as a result of the claims in this litigation.

Att. 7 (Common Cause’s responses); **Att. 8** (FairDistricts’s responses); **Att. 9** (NAACP’s responses).

Third, Plaintiffs’ initial disclosures. In the document, Plaintiffs identify over 20 individuals who might have knowledge about the facts in this case. Not one individual listed, however, appears to be a member of the Organizational Plaintiffs. **Att. 10** (initial disclosures). Upon information and belief, it doesn’t appear that Plaintiffs supplemented their initial disclosures.

Legal Standard

Summary judgment is warranted when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). If the movant can “point[] out to the district court that there is an absence of evidence to support the nonmoving party’s case,” a summary-judgment motion should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (cleaned up). Conclusory allegations and unsupported statements are insufficient to avoid summary judgment. *Ellis v. England*, 432 F.3d 1321, 1327 (11th Cir. 2005) (per curiam); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987).

Moreover, Federal Rule of Civil Procedure 37(c) bars a party from using a “witness to supply evidence on a motion” when that witness wasn’t identified in a Rule 26(a) disclosure. Fed. R. Civ. P. 37(c) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).

Discussion

The Secretary concedes that Plaintiffs can challenge districts 2, 4, 10, 11, 13, 19, and 24, which are the districts where the Individual Plaintiffs live. *Gill*, 138 S. Ct. at 1930.

Plaintiffs can’t, however, challenge the remaining districts. The Organizational Plaintiffs provide no assistance in that respect. The three organizations can’t establish organizational standing. There’s no documentary evidence of a diversion of resources caused by the enacted congressional district map. And the Organizational Plaintiffs’ unsubstantiated interrogatory responses can’t be used to avoid summary judgment. *Ellis*, 432 F.3d at 1327; *Rollins*, 833 F.2d at 1529; *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995) (per curiam) (holding that the “district court correctly granted summary judgment for Collins because Appellant failed to produce enough evidence to create a genuine issue of fact for trial”).

The Organizational Plaintiffs can’t show associational standing, either. Given the opportunity to explain where their members are, Common Cause and NAACP declined

to do so. *Cf. Ala. Legis. Black Caucus*, 575 U.S. at 270-71. FairDistricts responded, and stated that it didn't have any members. **Att. 8** at 18-19. Should Common Cause and the NAACP seek to respond to this motion with a non-disclosed witness, Rule 37 prevents them from doing so. Fed. R. Civ. P. 37(c).

Conclusion

In short, Plaintiffs can't challenge districts 1, 3, 5, 6, 7, 8, 9, 12, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 26, 27, and 28. Partial summary judgment should be granted as to those districts.

Dated: June 30, 2023

Respectfully submitted,

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LOCAL RULE CERTIFICATIONS

I certify that the memorandum is 2,446 words and thus complies with Local Rule 56.1(B). I also certify that this motion and memorandum comply with Local Rule 5.1(C).

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2023, this document was served on counsel of record.

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_____ /

ATTACHMENTS

<u>Attachment No.</u>	<u>Description</u>
1.	Common Cause's Responses to the Secretary's Requests for Production
2.	FairDistricts Now's Responses to the Secretary's Requests for Production
3.	NAACP's Responses to the Secretary's Requests for Production
4.	Common Cause's Production
5.	FairDistricts Now's Production
6.	NAACP's Production
7.	Common Cause's Responses to the Secretary's Interrogatories
8.	FairDistricts Now's Responses to the Secretary's Interrogatories
9.	NAACP's Responses to the Secretary's Interrogatories
10.	Plaintiffs' Rule 26(A)(1) Initial Disclosures