**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

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| Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Cassandra Brown, Peter Butzin, Charlie Clark, Dorothy Inman-Johnson, Veatrice Holifield Farrell, Brenda Holt, Rosemary McCoy, Leo R. Stoney, Myrna Young, and Nancy Ratzan,<br><br>*Plaintiffs,*<br><br>v.<br><br>Cord Byrd, in his official capacity as Florida Secretary of State,<br><br>*Defendant*. | Case No. 4:22-cv-109-AW-MAF |

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

## I. Introduction

This case is, at its core, about the Legislature's enacted congressional map that unlawfully discriminates against Black Floridians by intentionally destroying former CD-5 ("Benchmark CD-5"). The Secretary concedes that all of the Individual Plaintiffs have standing and, in particular, that there is at least one Plaintiff with standing to bring claims with respect to districts in North Florida that

resulted from the destruction of Benchmark CD-5. That renders the Secretary's partial motion for summary judgment largely irrelevant.

Nevertheless, the Secretary argues that the Organizational Plaintiffs either lack standing altogether (D.E. 161, Br. at 12) (Organizational Plaintiffs "can't establish organizational standing") or lack standing to challenge districts that are largely not at issue in this case (Br. at 1) (Organizational Plaintiffs have no "standing to challenge the remaining congressional districts").[1] None of this warrants this Court's time. It suffices, as the Court noted in denying the Secretary's earlier motion to dismiss, that at least one Plaintiff undisputedly has demonstrated standing to bring the claims on which this case is based.

And even if that were not the case, the Secretary's argument is based on his own failure to conduct discovery on the facts supporting the Organizational Plaintiffs' standing. Indeed, the Organizational Plaintiffs were prepared to submit to depositions on the very standing-related topics on which the Secretary now seeks partial summary judgment. The Secretary chose not to pursue those

[1] On the Secretary's list of largely irrelevant remaining districts for which he claims there is no party with standing are CD's 3 and 5. These districts are among the four districts created by the destruction of Benchmark CD-5. There is no need for a plaintiff to have standing to sue over those districts in order to challenge the demolition of Benchmark CD-5 because the Secretary concedes there are Plaintiffs with standing to challenge CD's 2 and 4, which are also resulting districts. In any event, as set forth below, the Organizational Plaintiffs have members in CD's 2 and 4 (as well as 3 and 5) and so have associational standing.

depositions, however, and now claims the Organizational Plaintiffs are barred from ever offering the evidence that those depositions would have revealed if he had taken them. Because that argument runs contrary to the Federal Rules of Civil Procedure, this Court should deny the Secretary's motion.

## II. Statement of Facts

As the Court is aware, this case is brought by ten individual Floridians (the "Individual Plaintiffs") and three public-interest organizations (Common Cause Florida, FairDistricts Now, and Florida State Conference of the National Association for the Advancement of Colored People Branches) (collectively, the "Organizational Plaintiffs").[2]

As the Secretary concedes, one or more of the Individual Plaintiffs reside in districts 2, 4, 10, 11, 13, 19, and 24 (and therefore have standing to challenge unlawful acts that led to the creation of those districts). Specifically, the following Individual Plaintiffs live in the following districts:

| 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 |

[2] For purposes of this motion, Plaintiffs do not rely upon the standing of Fair Districts Now.

| | | | |
|---|---|---|---|
| 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 |

D.E. 131, SAC ¶ 6.

As for the Organizational Plaintiffs, the Second Amended Complaint explained that they are all organizations devoted to protecting the voting rights of Black Floridians. SAC ¶¶ 3-5. Apparently believing that they might have information relevant to his defense—and in particular, to the topic of "standing to sue" as highlighted below—the Secretary included the Organizational Plaintiffs in his Rule 26(a)(1) disclosures:

A. Individuals Likely to Have Discoverable Information Supporting Defendant's Claims or Defenses.

1. Plaintiffs, both Individuals and Organizations
c/o Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
Subjects: standing to sue

Ex. 1 at 1 (Defendant's Rule 26(a)(1) disclosures).

Additionally, the Secretary served both document requests and interrogatories on each of the Organizational Plaintiffs. In response to those broad requests, the Organizational Plaintiffs made objections, and then produced certain documents and provided sworn responses.

In his document requests, the Secretary sought a variety of documents, but did not pose a single document request asking for materials identifying the Organizational Plaintiffs' members. *See* D.E. 161-1, 161-2, 161-3 (Organizational Plaintiffs' responses to the Secretary's Requests for Production).

In his interrogatories, the Secretary asked each Organizational Plaintiff a broad range of questions about its members, including the number of members, the districts in which those members reside, and the dates on which certain members became members. *See* Ex. 2 at 18 (Common Cause Responses), Ex. 3 at 16 (Florida NAACP Responses), Ex. 4 at 17 (FairDistricts Now Responses). In addition to objecting that the Interrogatory was overbroad, unduly burdensome, and irrelevant, among other issues, each Organizational Plaintiff also objected that:

> [t]o the extent this Interrogatory requests information for the purposes of establishing standing, this interrogatory is not proportional to that objective for several reasons. In multiplaintiff cases, if there is one plaintiff "who has demonstrated standing to assert these rights as his own," it is unnecessary to "consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9. Furthermore, to satisfy associational standing, organizations need only show that at least one member of the association has standing to

> sue in his or her own right. *See Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999).

Ex. 2 at 18–19 (Common Cause Responses), Ex. 3 at 16–18 (Florida NAACP Responses), Ex. 4 at 18–19 (FairDistricts Now Responses).

Subject to that and other objections, Plaintiff Common Cause Florida responded under oath "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." Ex. 2 at 19. Similarly, the Florida NAACP responded under oath "that it has approximately 12,000 members across its many branches and chapters. Among the Florida 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." Ex. 3 at 17–18.

Additionally, all the Organizational Plaintiffs listed "All Organizational Plaintiffs" in response to the Interrogatory asking for the names of those who might have knowledge about this action. Ex. 2 at 8 (Common Cause Responses), Ex. 3 at 7 (Florida NAACP Responses), Ex. 4 at 8 (FairDistricts Now Responses).

After the Organizational Plaintiffs served these responses, the parties met and conferred on May 8 and May 31, 2023. While the parties discussed documents relating to *the Individual Plaintiffs'* standing, at no point did the Secretary's counsel indicate that the various objections raised in the *Organizational Plaintiffs'* responses were inappropriate, or that their responses or productions were inadequate. Instead, counsel for the Secretary informed counsel for the Plaintiffs that they intended to notice Rule 30(b)(6) depositions of the Organizational Plaintiffs and would follow up with proposed topics for those depositions. Ex. 5 at 1 (May 31, 2023 Beato Email).

Counsel for the Secretary soon after outlined the proposed deposition topics, including "the number of members of each organization, and the number of those members in each district of Florida's enacted congressional map." Ex. 6 at 1 (June 5, 2023 Beato Email). Plaintiffs awaited the anticipated deposition notices and began preparing the appropriate Rule 30(b)(6) witnesses to testify on these subjects. Ultimately, though, counsel for the Secretary changed course and informed counsel for the Plaintiffs that the Secretary would no longer seek to depose the Organizational Plaintiffs. Ex. 7 at 1 (June 13, 2023 Beato Email).

This motion followed.

## III. Argument

As this Court held in its order denying in part the Secretary's motion to dismiss, as long as one plaintiff has standing to bring a particular claim, there is no need to assess the standing of the other plaintiffs. D.E. 115, Order on Defs.' Mot. to Dismiss at 2; *see also Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnet Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1113-14 (11th Cir. 2022) ("We need not parse each Plaintiff's standing, however, because one—GALEO—has standing . . . to assert all of the claims in the second amended complaint."). 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. The Individual Plaintiffs living in new districts CD-2 and 4 (which are remnants of Benchmark CD-5) have standing to challenge Benchmark CD-5's unlawful dissolution. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). As the Secretary concedes, certain Individual Plaintiffs live in those districts and accordingly have standing to bring these claims. This is true even without Individual Plaintiffs living in new CD-3 and 5, which also form the residue of Benchmark CD-5. (And, as set forth below, the Organizational Plaintiffs have members in all four districts that were carved out of Benchmark CD-5.) That alone is reason for this Court to deny the motion.

Plaintiffs do not need to demonstrate standing to sue on behalf of the voters in various other districts to prove that the destruction of Benchmark CD-5 violates the Constitution. Nor do Plaintiffs need to demonstrate standing to challenge other districts in order to introduce *evidence* concerning those districts at trial to prove their claims about Benchmark CD-5: "Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015). Similarly, this is true when plaintiffs bring a challenge of intentional discrimination under the Fourteenth Amendment, as here. *Vill. of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Facts relating to those districts (as spelled out in the Second Amended Complaint and the expert reports) remain relevant as circumstantial evidence. The Plaintiffs do intend to offer this evidence, although they will not seek relief as to those districts specifically. 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. *See* SAC ¶¶ 83-101. The Secretary does not dispute that at least one Individual Plaintiff resides in each of those districts. *See* SAC ¶ 6. Because, as the Secretary concedes, at least one Individual Plaintiff has standing to bring claims of intentional racial discrimination in dismantling Benchmark CD-5, the Court need not reach the standing of the Organizational Plaintiffs.

But if the Court were to reach the question of the Organizational Plaintiffs' standing to challenge the destruction of CD-5, or even every single district in the state, the Secretary has failed to carry his burden of demonstrating that there is no genuine dispute. *See* Fed. R. Civ. P. 56(a). By affirming under oath in their interrogatory responses that they have thousands of members throughout the state, the Organizational Plaintiffs have presented real, non-conclusory evidence of standing through an associational theory.[3] That is enough to survive summary judgment.

To counter that conclusion, the Secretary suggests that "unsubstantiated interrogatory responses can't be used to avoid summary judgment." Br. at 12. Yet the cases the Secretary cites contain no such holding. None holds that a *sworn* interrogatory response cannot defeat summary judgment unless it is "substantiated" by other evidence. In fact, none involved interrogatory responses at all. Those cases merely confirm the black-letter proposition that purely conclusory allegations of harm are insufficient to avoid summary judgment.

That is not what we have here. The Organizational Plaintiffs' interrogatory responses to the Secretary's requests, sworn to under oath, were sufficient to at

[3] For purposes of this motion, Plaintiffs do not rely on a diversion-of-resources theory, but do not concede that they would be unable to prove such a theory at trial.

least create a genuine dispute as to their standing. When reviewing a summary-judgment motion, this Court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). In the redistricting context, this Court can draw the "common sense inference" – sufficient for standing – that a statewide organization with many thousands of members, and whose purpose is devoted to voting rights, will have members in most every district. *See Ala. Legislative Black Caucus*, 575 U.S. at 270. Common Cause Florida has 93,700 members in Florida, while the Florida NAACP has 12,000. Those organizations, therefore, have, respectively, an average of over 3,300 and 428 members per district, surely at least one in each of Florida's 28 districts. And such organizations "need not provide additional information such as a specific membership list" to support this inference, at least at the summary judgment stage. *Id*. at 270.

If the Secretary were unsatisfied with Plaintiffs' interrogatory responses relating to membership and standing, he could have raised that issue during the meet-and-confers or at any other point before filing this motion. Or, he could have taken Rule 30(b)(6) depositions as he originally planned to do (and as Plaintiffs agreed he could do) and asked the representatives of the Organizational Plaintiffs for information about the locations of their members. Instead, the Secretary

rescinded his Rule 30(b)(6) deposition requests without explanation, and now claims that the Plaintiffs are barred from answering the questions he declined to ask.

As outlined in the attached affidavits, Exhibits 8 and 9, the Organizational Plaintiffs do not maintain records of their members in a way that makes identifying members by congressional district readily feasible. Because the Plaintiffs concededly have standing to continue pressing their claims, the additional burden required to identify organizational members in specific districts is disproportionate to the needs of the case. Nevertheless, out of an abundance of caution, Common Cause Florida and the Florida NAACP have undertaken the burden to demonstrate that they have at least one identifiable member in each of the districts that were created by the destruction of Benchmark CD-5: CD's 2, 3, 4, and 5. Ex. 8 ¶ 5; Ex. 9 ¶ 5. The Court can comfortably rely on this affidavit evidence in denying summary judgment: "Evidentiary material which is acceptable in opposition to a motion for summary judgment includes sworn affidavits . . . ." *Skipper v. Potter*, No. 3:07cv525/MCR/EMT, 2009 WL 10675301, at *1 (N.D. Fla. Feb. 2, 2009) (mag. op.) (citing Fed. R. Civ. P. 56(e)); *Bethel v. Escambia Cnty. Sheriff's Office*, No. 3:05cv376/MD, 2006 WL 8444813, at *1 (N.D. Fla. Nov. 1, 2006) (mag. op.) (same).

The Secretary argues that, despite his failure to pursue this evidence during discovery, Plaintiffs are now precluded by Rule 37 from offering these affidavits because the Organizational Plaintiffs were not identified in Plaintiffs' Rule 26 disclosures. That is incorrect. The Organizational Plaintiffs are not new, non-disclosed *witnesses* offering new evidence of racial discrimination. They are the plaintiffs in this case being asked about their own qualification to be plaintiffs, which they already described in the complaint that they filed. This testimony can come as no surprise to anyone. Indeed, the Organizational Plaintiffs all identified themselves as persons with knowledge in response to the Secretary's interrogatories. Ex. 2 at 8 (Common Cause Responses), Ex. 3 at 7 (Florida NAACP Responses), Ex. 4 at 8 (FairDistricts Now Responses). We are unaware of any case holding that exclusionary sanctions under Rule 37 have any application to a plaintiff's failure to disclose *itself* as a source of information in a Rule 26 disclosure, let alone information about standing that appears in the complaint itself and the plaintiff's interrogatory answers.

And in any event, Rule 37 excuses a failure to disclose a witness in a Rule 26 disclosure when that failure is "harmless." Fed. R. Civ. P. 37(c)(1). While the Eleventh Circuit has not yet "settled the meaning of harmlessness under Rule 37 and, in particular, its relationship to prejudice," the technical omission of the Organizational Plaintiffs from the Organizational Plaintiffs' own Rule 26

disclosures was assuredly harmless here. *Circuitronix, LLC v Kinwong Electr. (Hong Kong) Co., Ltd.*, 993 F.3d 1299, 1307 (11th Cir. 2021). The Secretary cannot possibly claim unfair surprise that the Organizational Plaintiffs have knowledge of their own membership. Indeed, the Secretary served detailed discovery requests and sought to depose the Organizational Plaintiffs on this very topic. For that matter, he also named the Organizational Plaintiffs in *his own* Rule 26 disclosures. Ex. 1 at 1. That the Secretary unilaterally decided not to pursue the Organizational Plaintiffs' Rule 30(b)(6) depositions does not mean the Organizational Plaintiffs are forever barred from providing the information those depositions would have revealed had they been taken. *See Benjamin v. Home Depot U.S.A., Inc.*, No. 09-82381-CIV, 2011 WL 90317, at *3 (S.D. Fla. Jan. 11, 2011) ("Plaintiff never sought to compel the taking of the deposition during discovery which is now closed. Therefore, they cannot now be heard to complain of a lack of evidence.") (internal citation omitted).

So while this Court need not reach the issue of whether the Organizational Plaintiffs have standing to challenge the destruction of Benchmark CD-5, those plaintiffs have in fact offered sufficient evidence of their standing to survive summary judgment.

## IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Secretary's motion for partial summary judgment. In any event, the Court should not dismiss for lack of standing claims arising from the destruction of Benchmark CD-5.

Respectfully submitted,

*/s/ Gregory L. Diskant*

Gregory L. Diskant *(pro hac vice)*
H. Gregory Baker *(pro hac vice)*
Jonah M. Knobler (*pro hac vice* forthcoming)
Catherine J. Djang *(pro hac vice)*
Alvin Li (*pro hac vice*)
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
gldiskant@pbwt.com
hbaker@pbwt.com
jknobler@pbwt.com
cdjang@pbwt.com
ali@pbwt.com

Katelin Kaiser *(pro hac vice)*
Christopher Shenton (*pro hac vice*)
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West Highway 54, Suite 101
Durham, NC 27707
(919) 323-3380
katelin@scsj.org
chrisshenton@scsj.org

Anthony P. Ashton (*pro hac vice* forthcoming)
Anna Kathryn Barnes (*pro hac vice* forthcoming)
NAACP OFFICE OF THE GENERAL COUNSEL
4805 Mount Hope Drive
Baltimore, MD 21215
Telephone: (410) 580-5777
aashton@naacpnet.org
abarnes@naacpnet.org

Henry M. Coxe III (FBN 0155193)
Michael E. Lockamy (FBN 69626)
BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
hmc@bedellfirm.com
mel@bedellfirm.com

*Attorneys for Plaintiffs*

Date: July 21, 2023

## LOCAL RULE CERTIFICATION

I hereby certify that this memorandum contains 3,113 words and complies with Local Rules 56.1(B) and 5.1(C).

/s/ *Gregory L. Diskant*
Gregory L. Diskant

## CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2023, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ *Gregory L. Diskant*
Gregory L. Diskant

**UNITED STATES DISTRICT COURT**
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*Plaintiffs,*

v.

Cord Byrd, in his official capacity as Florida Secretary of State,

*Defendant.*

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

**Exhibits**

| **Exhibit No.** | **Description** |
|---|---|
| 1. | Secretary of State Byrd's Rule 26(a)(1) Initial Disclosures |
| 2. | Common Cause Florida's Responses to the Secretary's First Set of Interrogatories |
| 3. | Florida NAACP's Responses to the Secretary's First Set of Interrogatories |
| 4. | FairDistricts Now's Responses to the Secretary's First Set of Interrogatories |
| 5. | May 31, 2023 Email from Michael Beato to Alvin Li and Michael Halper |
| 6. | June 5, 2023 Email from Michael Beato to Alvin Li and Michael Halper |
| 7. | June 13, 2023 Email from Michael Beato to Alvin Li, Catherine Djang and Michael Halper |

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|---|---|
| 8. | Declaration of Amy Keith |
| 9. | Declaration of Adora Nweze |