

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 MOTION TO
EXCLUDE ORGANIZATIONAL PLAINTIFF WITNESSES**

The Secretary moves to exclude two undisclosed Plaintiff witnesses: Cynthia Slater from the Florida NAACP and Eliza McClenaghan from Common Cause Florida. The reasons for the exclusion are expressed in the accompanying memorandum.

Dated: September 14, 2023

Respectfully submitted,

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*Admitted *Pro hac vice*

CERTIFICATE OF SERVICE

I certify that on September 14, 2023, I electronically filed the foregoing with the Clerk of Court using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

Memorandum

The Federal Rules of Civil Procedure couldn't be clearer: if “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” “at a trial, unless the failure was substantially justified or harmless.” Fed. R. Civ. P. 37(c)(1). But Plaintiffs intend to call at trial Cynthia Slater from the Florida NAACP and Eliza McClenaghan from Common Cause Florida. **Attachment A** (Plaintiffs' witness list).¹ Plaintiffs failed to identify those two witnesses on their Rule 26(a) initial disclosures. **Attachment B** (Plaintiffs' initial disclosures, served December 20, 2022). Plaintiffs never supplemented their initial disclosures under Rule 26(e) with the names of those two witnesses. Worse still—when the Secretary contested the Organizational Plaintiffs' standing at the summary-judgment stage of litigation, Plaintiffs relied on testimony from two *different* organizational witnesses. Doc.166-8 (Amy Keith from Common Cause Florida); Doc.166-9 (Adora Nweze from the Florida NAACP). Neither Ms. Slater nor Ms. McClenaghan were mentioned in Plaintiffs' interrogatory responses, either. Doc.161-7; Doc.161-9. Ms. Slater appears in no discovery-produced documents, Doc.161-6, while Ms. McClenaghan appears in certain discovery-produced emails, Doc.161-4.

¹ The Secretary notes that Plaintiffs' witness list includes three Individual Plaintiffs who reside in North Florida, but the list doesn't include an individual from the remaining Organizational Plaintiff, FairDistricts Now.

In short, the Secretary doesn't sufficiently know who Ms. Slater and Ms. McClenaghan are and (given the Secretary's issues with Plaintiffs' discovery responses, Doc.161) has no idea what they'll discuss on the stand. They should be excluded under Rule 37(c)(1).

Plaintiffs may argue that the Secretary's initial disclosures stated that "Plaintiffs, both Individuals and Organizations," "Likely" "Have Discoverable Information" relating to "standing to sue," and may argue that this statement allows Ms. Slater and Ms. McClenaghan to testify at trial. Doc.166 at 4 (referencing the Secretary's initial disclosures). That's not correct; Rule 26(a) and (e) impose duties on the party *with* the discoverable information—not the party who's entitled *to receive* that information.²

Nor can Plaintiffs argue that they can call *anyone* from the Florida NAACP or Common Cause Florida. That approach wouldn't work in other contexts. Under Plaintiffs' approach, the Michelin Company could theoretically call a range of potential

² See Fed. R. Civ. P. 26 (a)(1)(A)(i) ("a party must, without awaiting a discovery request, provide to other parties: the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment."); Fed. R. Civ. P. 26(e)(1)(A) ("A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.").

witnesses, from CEO Florent Menegaux, to a factory welder, to the Marshmallow Man. More specificity (and notice) is required. Otherwise, trial by ambush is the result.

Regardless, Plaintiffs' disclosure failure isn't substantially justified and isn't harmless. Fed. R. Civ. P. 37(c)(1). When assessing whether an undisclosed witness should be excluded under Rule 37, courts consider several factors: (1) the importance of the witness's testimony, (2) the prejudice to the opposing party if the witness had been allowed to testify, and (3) the reasons for the failure to disclose the witness earlier. *Romero v. Drummond Co.*, 552 F.3d 1303, 1321 (11th Cir. 2008); *Fabrica Italiana Lavorazione Materie Organiche, S.A.S v. Kaiser Aluminum & Chem. Corp.*, 684 F.2d 776, 780 (11th Cir. 1982). These factors favor exclusion.

Plaintiffs concede that Ms. Slater's and Ms. McClenaghan's testimony isn't important. According to Plaintiffs, their North-Florida-based Individual Plaintiffs *alone* allow them to challenge the Enacted Map's North Florida configuration: "certain Individual Plaintiffs live in" North Florida districts "and accordingly have standing to bring the[ir] claims." Doc.166 at 8. The first factor thus favors the Secretary.

So does the second. The Secretary would be prejudiced if Ms. Slater and Ms. McClenaghan testify at trial. The Secretary disagrees with Plaintiffs' standing theory. *See generally* Doc.168 at 5 n.1. If Plaintiffs ask this Court to impose a Benchmark CD-5-like district in North Florida, Doc.187 at 8, they need to have additional plaintiffs that reside in, for example, Enacted Map CD-3 and CD-5—the districts that also make up Benchmark CD-5. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Ms. Slater's and Ms.

McClenaghan's testimony, under the Secretary's theory, allows Plaintiffs to fill in their standing-and-relief holes. That makes their testimony prejudicial. As is the fact that the Secretary wasn't put on notice that Ms. Slater and Ms. McClenaghan (as opposed to, say, Ms. Keith or Ms. Nweze) have particularized knowledge about their respective organizations.

The third factor, the reasons for the failure to disclose witnesses earlier, also favors the Secretary. No reason can justify the disclosure failure. Plaintiffs had six months—from their December 20, 2022 initial disclosures to June 30, 2023, the close of discovery, Doc.159—to identify Ms. Slater and Ms. McClenaghan. Yet they waited until two weeks before trial and two months after the close of discovery to identify them. That delay isn't allowed and can't be justified. *See Dekker v. Weida*, 4:22-cv-325, Doc.212 (N.D. Fla. May 4, 2023) (Hinkle, J.) (excluding plaintiffs' late-breaking, undisclosed fact witness); *Deakins v. Wal-Mart Stores E. LP*, 2022 U.S. Dist. LEXIS 97600, *11 (S.D. Fla. 2022) (“[A]ny marginal benefit derived from the late-disclosed witnesses is outweighed by Plaintiff's lack of diligence in pursuing this evidence and making the requisite timely disclosures and the prejudice posed to Defendant.”).

As such, the Secretary asks that Ms. Slater and Ms. McClenaghan be excluded from testifying at trial.

Dated: September 14, 2023

Respectfully submitted,

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LOCAL RULE 7.1(F) CERTIFICATION

I certify that this motion contains 990 words, excluding the case style and certifications, and it complies with the size and font requirements in the local rules.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

ATTORNEY CONFERENCE CERTIFICATION

The parties conferred on the subject matter of the motion; Plaintiffs oppose the motion. The parties agreed that Plaintiffs will file a response by September 21, 2023, although Plaintiffs are likely to file their response before then. The Secretary will not file a reply.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I certify that on September 14, 2023, I electronically filed the foregoing with the Clerk of Court using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

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

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,

Plaintiffs,

v.

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

Defendant.

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

PLAINTIFFS' WITNESS LIST

Pursuant to the Court's August 7, 2023 Order Regarding Trial and Schedule, Dkt No. 171, Plaintiffs 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 (collectively the "Plaintiffs"), provide the following list of witnesses that the Plaintiffs plan to call at trial:

Name	Address and Telephone Number	Will Call - May Call	Type
J. Alex Kelly	c/o Holtzman Vogel Baran Torchinsky & Josefiak PLLC 119 S. Monroe Street, Suite 500, Tallahassee, FL 32301 (850) 270-5938	Will Call	Fact
Dorothy Inman- Johnson	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Fact
Charlie Clark	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Fact
Brenda Holt	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	May Call	Fact
Cynthia Slater – Florida NAACP	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Fact
Eliza McClenaghan – Common Cause Florida	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Fact

Fentrice Driskell	c/o Coffey Burlington 2601 South Bayshore Drive, Penthouse One, Miami, FL 33133 (305) 858-2900	Will Call	Fact
Matthew Barreto	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Expert
J. Morgan Kousser	c/o Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Will Call	Expert

Plaintiffs reserve the right to add or remove witnesses as necessary, including—but not limited to—the following: witnesses that are necessary to lay the foundation for the admissibility of evidence, should the parties be unable to stipulate to admissibility; witnesses for the purposes of rebuttal or impeachment; and any witnesses designated by the Defendant on his witness list.

s/ Gregory L. Diskant

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Date: September 12, 2023

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

Common Cause Florida, FairDistricts
Now, Florida State Conference of the
National Association for the
Advancement of Colored People
Branches, Dorothy Inman-Johnson,
Brenda Holt, Leo R. Stoney, Myrna
Young, and Nancy Ratzan,

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

PLAINTIFFS' RULE 26(A)(1) INITIAL DISCLOSURES

Pursuant to Federal Rule of Civil Procedure 26(a)(1), Plaintiffs Common Cause Florida, Florida State Conference of the National Association for the Advancement of Colored People Branches, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan (collectively, "Plaintiffs") make the following disclosures to Defendant Cory Byrd in the above-captioned action. These disclosures are based on information reasonably available to Plaintiffs as of this date. Plaintiffs reserve the right to supplement these disclosures pursuant to Rule 26(e) as circumstances warrant.

By making these disclosures, Plaintiffs do not represent that they are identifying every document, tangible thing, or witness possibly relevant to all issues that may eventually be raised in this lawsuit. Pursuant to Rule 26(a)(1) and other applicable Federal Rules of Civil Procedure, Plaintiffs are not disclosing documents or information protected by the attorney-client privilege or work-product immunity. Plaintiffs' disclosures represent a good-faith effort to identify information they reasonably believe are required by Rule 26(a)(1).

Plaintiffs do not waive any right to the production of any document or tangible thing identified in these disclosures based on undue burden or other valid objections available to it. Plaintiffs' disclosures are also made without waiving: (1) the right to object on the ground of competency, privilege, relevancy and materiality, hearsay, or other proper ground; (2) the right to object to the use of any such information, for any purpose, in whole or in part, in any subsequent proceeding in this action or any other action; and (3) the right to object on any and all grounds, at any time, to any other discovery request or proceeding involving or relating to the subject matter of these disclosures. The disclosures set forth below are made subject to the above objections and qualifications.

Plaintiffs' Initial Disclosures do not identify or otherwise include information concerning experts, as this subject is not covered by Federal Rule of Civil Procedure 26(a)(1)(A).

I. Persons with Knowledge of Discoverable Information

Pursuant to Rule 26(a)(1)(A)(i), Plaintiffs identify the following individuals who are likely to have information that Plaintiffs may use to support their claims. This list does not include all of Defendant's employees and agents who are likely to have discoverable information that Plaintiffs may use to support their claims, as Defendant has not yet disclosed all such individuals. Plaintiffs also anticipate that there will be additional third parties who will likely have discoverable information and whose identities are yet to be determined at this stage.

Name	Title	Contact Information	Subjects of Relevant Information
All Individual Plaintiffs		c/o Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036 (212) 336-2000	Individual Plaintiffs have knowledge of their residency and voter registration at the time relevant to the complaint.
Adam Foltz		Unknown at this time.	Mr. Foltz was engaged by the office of Governor DeSantis to draw Congressional maps.

Alex Kelly	Deputy Chief of Staff, Office of the Governor	Unknown at this time.	Mr. Kelly was involved in drawing the Congressional map endorsed by Governor DeSantis. Mr. Kelly also testified before the Senate Redistricting Committee.
Ray Rodrigues	Chair, Senate Reapportionment Committee	Unknown at this time.	Senator Rodrigues was involved in the reapportionment process.
Governor Ron DeSantis	Governor of Florida	Unknown at this time.	Governor DeSantis was the chief executive of the State of Florida during the reapportionment process.
Kaylee Tuck	Vice Chair, House Congressional Redistricting Subcommittee	Unknown at this time.	Representative Tuck was involved in the reapportionment process.
Randy Fine	Vice Chair, House Redistricting Committee	Unknown at this time.	Representative Fine was involved in the reapportionment process.
Tom Leek	Chair, House Redistricting Committee	Unknown at this time.	Representative Leek was involved in the reapportionment process.
Tyler Sirois	Subcommittee Chair, House Congressional Redistricting Subcommittee	Unknown at this time.	Representative Sirois was involved in the reapportionment process.

Robert Popper	Senior Attorney, Judicial Watch	Unknown at this time.	Mr. Popper testified before the House Redistricting Committee in connection with a map proposed by the Governor's office.
Ryan Newman	General Counsel, Office of the Governor	Unknown at this time.	Mr. Newman authored a memorandum in connection with the Governor's veto of Congressional maps passed by both chambers of the Florida Legislature.
Jennifer Bradley	Chair, Select Senate Subcommittee on Congressional Reapportionment	Unknown at this time.	Senator Bradley was involved in the reapportionment process.
Wilton Simpson	President, Florida Senate	Unknown at this time.	Senator Simpson was involved in the reapportionment process.
Chris Sprowls	Speaker, Florida House of Representatives	Unknown at this time.	Speaker Sprowls was involved in the reapportionment process.
Valdez V. Demings	United States Representative	Unknown at this time.	Representative Demings is the incumbent representative in CD-10.
Maxwell Alejandro Frost	United States Representative-Elect	Unknown at this time.	Representative-Elect Frost will represent CD-10 beginning January, 2023.

Alfred J. Lawson, Jr.	United States Representative	Unknown at this time.	Representative Lawson is the incumbent representative in CD-5.
John H. Rutherford	United States Representative	Unknown at this time.	Representative Rutherford is the incumbent representative in CD-4 and will represent CD-5 beginning January, 2023.
Kathy Castor	United States Representative	Unknown at this time.	Representative Castor is the incumbent representative in CD-14.
Anna Paulina Luna	United States Representative-Elect	Unknown at this time.	Representative-Elect Luna will represent CD-13 beginning January, 2023.
Charlie Crist	United States Representative	Unknown at this time.	Governor Crist is the incumbent representative in CD-13.
John Gore	Jones Day	Unknown at this time.	Mr. Gore was approached by the Governor's office to assist in the redistricting process.
Hans A. von Spakovsky	Heritage Foundation	Unknown at this time.	Mr. von Spakovsky was approached by the Governor's office to assist in the redistricting process.
Scott Kellar	Unknown at this time.	Unknown at this time.	Mr. Kellar was approached by the Governor's office to

			assist in the redistricting process.
Michael Barley	Unknown at this time.	Unknown at this time.	Mr. Barley was approached by the Governor's office to assist in the redistricting process.

II. Relevant Documents

Pursuant to Rule 26(a)(1)(A)(ii) and based on the information available at this time Plaintiffs may possess or have in their control the following categories of documents that it may use to support their claims or defenses:

1. Plan S0355C8060, *available at* <https://redistrictingplans.flsenate.gov/plandetails/121>
2. Plan P000C0079, *available at* <https://www.floridaredistricting.gov/pages/submitted-plans>
3. Plan P000C0094, *available at* <https://www.floridaredistricting.gov/pages/submitted-plans>
4. Plan H000C8015 *available at* <https://www.floridaredistricting.gov/pages/submitted-plans>
5. Plan H000C8019, *available at* <https://www.floridaredistricting.gov/pages/submitted-plans>
6. Plan P000C0109 (“Enacted Plan”), *available at* <https://www.floridaredistricting.gov/pages/submitted-plans>
7. Florida Senate Committee on Reapportionment and Select Subcommittee on Congressional Reapportionment Hearings Related to 2022 Congressional Redistricting Cycle, *available at* <https://thefloridachannel.org/videos/>

8. Florida House Redistricting Committee and Congressional Redistricting Subcommittee Hearings Related to 2022 Congressional Redistricting Cycle, *available at* <https://thefloridachannel.org/videos/>
9. Florida Legislature Special Session Hearings Related to 2022 Congressional Redistricting Cycle, *available at* <https://thefloridachannel.org/videos/>
10. Written testimony offered during legislative or rulemaking hearings.
11. Press releases, newsletters, and other public statements regarding the redistricting process and/or Redistricting Plans.
12. Memorandum from Ryan Newman, General Counsel, Executive Office of the Governor, March 29, 2022, re. Constitutionality of CS/SB 102, An Act Relating to Establishing the Congressional Districts of the State, *available at* <https://www.flgov.com/wp-content/uploads/2022/03/SLA-BIZHUB22032912102.pdf>
13. Memorandum from Florida Senate President Wilton Simpson and House Speaker Chris Spowls, April 11, 2022, re. “Redistricting Update,” *available at* <https://www.miamiherald.com/latest-news/article260313980.ece/BINARY/4.11.22%20Redistricting%20Update%20Joint.pdf>
14. Robert D. Popper’s Testimony Before the House Congressional Redistricting Subcommittee, February 18, 2022, *available at* <https://www.judicialwatch.org/wp-content/uploads/2022/02/Robert-Popper-Testimony-Florida-Gerrymandering-February-2022.pdf>
15. Advisory Opinion to Governor re. Whether Article III, Section 20(a) of the Florida Constitution Requires the Retention of a District in Northern Florida, No. SC22-139, Petition at 4 (Fla. Feb. 1, 2022), and Related Briefing.
16. Documents regarding Common Cause, FairDistricts Now, and the Florida NAACP’s organizational mission statement and structure.

III. DAMAGE CALCULATIONS

Rule 26(a)(1)(A)(iii) requires Plaintiffs to disclose a computation of each category of damages claimed and make available for inspection and copying the documents or other evidentiary material on which such computation is based,

provided such documents or evidentiary material are not privileged or otherwise protected from disclosure. Pursuant to Rule 26(a)(1)(A)(iii), Plaintiffs are not obligated to make any disclosure because Plaintiffs do not seek damages at this time.

IV. INSURANCE AGREEMENTS

Rule 26(a)(1)(A)(iv) requires Plaintiffs to make available for inspection and copying any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. Pursuant to Rule 26(a)(1)(A)(iv), Plaintiffs are not obligated to make any disclosure because Plaintiffs are not aware of any such insurance agreement(s) at this time.

PATTERSON BELKNAP WEBB
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s/Gregory L. Diskant

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