**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' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE ORGANIZATIONAL PLAINTIFF WITNESSES**

For the third time, the Secretary files an unnecessary motion unrelated to the merits of this dispute in order to press a peripheral complaint about Plaintiffs' organizational witnesses. D.E. 192. Since the Secretary concedes Plaintiffs have standing to bring this suit, there is no point in bothering this Court with this motion and the Court should deny it. There has been no gamesmanship here, just the substitution of one organizational witness for another, to testify to routine facts known to the organization. To emphasize the obvious: the Florida NAACP and

Common Cause Florida are *plaintiffs* in this case. We know of no case, and the Secretary cites none, in which a court has denied a plaintiff the right to testify on its own behalf.

## STATEMENT OF FACTS

The Secretary complains that the persons the Plaintiffs have listed as testifying on behalf of the Organizational Plaintiffs are different from the declarants that Plaintiffs relied upon in opposing the Secretary's motion for summary judgment on this issue. Plaintiffs are not attempting to sandbag the Secretary by introducing an as-yet-unheard-of witness who has imaginary information critical to the merits of this dispute. These witnesses are simply representatives of the Organizational Plaintiffs. They are presented for the plain reason of demonstrating the Plaintiff organizations have standing to sue, in the face of the Secretary's repeated challenges. They will say nothing materially different than the declarants said before and, in any event, as other courts have held, it does not matter who an organization presents on an issue such as this.

Meanwhile, this entire exercise is superfluous. Both the Florida NAACP and Common Cause Florida have *thousands of members* across the state. It is completely implausible that neither organization has even a single member in Congressional Districts 2, 3, 4, and 5, which span Northern Florida. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270 (2015) (highlighting the "common sense

inference" that a statewide organization devoted to minority rights would have at least some members in majority-minority districts). Lest there be any doubt, however, both organizations undertook the effort of searching their membership rolls and certifying that they have identified at least one member in each of districts 2, 3, 4, and 5. Indeed, the already-filed declarations should suffice to demonstrate organizational standing. *See id.* at 271 (affidavits certifying the presence of members in challenged districts would suffice to demonstrate standing). Since the Secretary is plainly unsatisfied with those efforts, Plaintiffs are prepared to prove these same facts through live testimony at trial.

There is no discovery issue here. The Secretary has always known, from the moment the complaint was filed, that the Organizational Plaintiffs claimed standing, as asserted in the complaint, and would have to prove standing through some unnamed live witness or witnesses. Thus, the Secretary himself listed the Organizational Plaintiffs in his Rule 26(a)(1) disclosures as persons having information relevant to standing to sue.

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

1. Plaintiffs, both Individuals and Organizations
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D.E. 166-1 at 1.

Then, during discovery, the Secretary served interrogatories on the Organizational Plaintiffs asking them if they had affected members. The Organizational Plaintiffs responded that they did. Specifically, Common Cause Florida answered "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." D.E. 166-2 at 19. Similarly, the Florida NAACP answered "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." D.E. 166-3 at 17–18.

Additionally, when asked by Interrogatory for the names of those who might have knowledge about this action, the Plaintiffs listed "All Organizational Plaintiffs". D.E. 166-2 at 8 (Common Cause Florida Responses); D.E. 166-3 at 7 (Florida NAACP Responses).

The Secretary then sought to depose the Organizational Plaintiffs. Plaintiffs agreed to make representatives of the Organizational Plaintiffs available for deposition, but the Secretary, for some unknown reason, withdrew the deposition requests. D.E. 166 at 7; D.E. 166-7 at 1. As a result, by his own choice, the Secretary never deposed the Organizational Plaintiffs and the Organizational Plaintiffs were never asked to designate a witness for that purpose. The partial summary judgment motion followed. Plaintiffs opposed that motion and explained that they had already provided evidence of the Organizational Plaintiffs' standing but, for the avoidance of doubt, offered sworn declarations to that effect. D.E. 166 at 12; D.E. 166-8; D.E. 166-9. This Court denied the Secretary's motion. D.E. 178.

Even after the motion was denied and the issue was raised, the Secretary did not ask Plaintiffs who would testify at trial on behalf of the Organizational Plaintiffs. Moreover, given the routine nature of the proposed testimony on standing, the Secretary had no reason to assume that the testifying witness would be the same as the declarant on summary judgment. Nor does the Secretary suggest now that he

has some particular reason to prefer that the declarant rather than the identified witness testify at trial.

By agreement of the parties, disclosure of trial witnesses was set for Sept. 12, 2022, and Plaintiffs disclosed their Organizational Plaintiff witnesses at that time. For reasons of timing, convenience, and scheduling—and because of the routine nature of the witness testimony—the Organizational Plaintiffs identified different witnesses to testify at trial on standing than the earlier declarants. ***The testimony that the trial witnesses will offer, however, will contain no surprises. It will be limited to the contents of the complaint, the discovery responses, and the sworn declarations—and nothing else.***

For Common Cause Florida, the declarant was Program Director Amy Keith. The designated trial witness is Liza McClenaghan, Chair of Common Cause Florida's advisory board. Since it seems to matter to the Secretary, we will call Ms. Keith as a witness instead, as she is available. For the Florida NAACP, the declarant was its President, Adora Nweze. The designated trial witness is Cynthia Slater, the lead for the Florida NAACP's statewide Civic Engagement Committee. It would cause a burden to substitute Ms. Nweze for Ms. Slater and so we will call Ms. Slater.

**ARGUMENT**

The Secretary outlines a three-factor test to evaluate whether this Court can excuse the supposed failure to identify these witnesses earlier. To start, that test is

applied by *appellate* courts to determine whether a district court has abused its discretion in allowing a late-disclosed witness and does not purport to cabin a trial court's considerable discretion in managing a trial. *See Romero v. Drummond Co.,* 552 F.3d 1303, 1321 (11th Cir. 2008).

Moreover, the Secretary's argument is contradictory. On the one hand, he argues that he will be prejudiced by testimony from these witnesses. On the other, he argues that this testimony is not important. Both points cannot be true. Either the testimony is important, and the Plaintiffs would be harmed by its absence, or the testimony is unimportant, and the Defendant would not be prejudiced by its presence. But in any event, each factor weighs in favor of the Plaintiffs.

As to the first factor, this testimony is important to Plaintiffs because it will protect against a later challenge by the Secretary that certain remedies are supposedly foreclosed because there is not a plaintiff in each of districts 2, 3, 4 and 5. This proposed argument by the Secretary is plainly wrong. There is no need for a live plaintiff in each of districts 2, 3, 4 and 5 for this Court to declare the Enacted Plan illegal because of the discriminatory destruction of Benchmark CD-5 and to order the Legislature to create a new plan to remedy that illegal act that is free of the taint of racial discrimination. Just one plaintiff suffering that harm by being placed in an illegally-created district—whether it is 2, 3, 4 or 5—suffices. Still, Plaintiffs wish to protect against the Secretary's baseless argument by retaining the ability to

call the Organizational Plaintiffs, at least in the remedy phase of this case, to show that they can represent all four districts.

As to the second factor, the Secretary suggests that he is prejudiced because he "has no idea what [these witnesses] will discuss on the stand." Let there be no doubt on this issue. No one is being sandbagged. As stated above, the witnesses will discuss their standing to sue, and nothing else. The Secretary further argues that he is prejudiced because he was never put on notice that Ms. Slater and Ms. McClenaghan have "particularized knowledge about their respective organizations." Regarding the issues about which they will testify, their knowledge is not materially different than that of the declarants. They do not have any special knowledge and their testimony will track the declarations. Indeed, an organization's "failure to identify a specific individual as the corporate representative is harmless because a representative would testify to general corporate policies and documents." *Pai v. Carnival Corp.*, No. 21-cv-23511, 2023 WL 2866380, at *3 (S.D. Fla. Mar. 7, 2023). Moreover, Plaintiffs are unaware of any case anywhere barring a plaintiff, person or not, from testifying in its own case because it failed to identify *itself* as a potential witness. The Secretary cites nothing either.

As to the third factor, the Secretary criticizes Plaintiffs' lack of diligence in failing to disclose these witnesses before the close of fact discovery on June 30, 2023. That is the same argument that the Secretary advanced on summary judgment.

When asked to identify the names of those with information about this case, the Plaintiffs identified "All Organizational Plaintiffs." D.E. 166-2 at 8; D.E. 166-3 at 7. The Secretary never sought information about particular names, let alone the names of those who might testify on behalf of the Plaintiffs. Had he done so, or had he deposed the Organizational Plaintiffs, he would have learned more. If there is a failure of diligence here, it is a failure by the Secretary.

Finally, the examples of witness-exclusion cited by the Secretary are inapposite. In the *Dekker* case, Judge Hinkle granted a motion *in limine* excluding a brand-new fact witness unrelated to the parties on the eve of trial, whom the Defendants did not have the opportunity to depose. *Dekker v. Weida*, No. 4:22-cv-00325, Doc. 194 (N.D. Fla. Sept. 7, 2022). That individual was not, as here, a representative of an *organizational plaintiff* in this case who had previously been identified as having relevant knowledge. The same is true of *Deakins*, which was a slip-and-fall case in which the plaintiff tried to disclose—*after* the deadline to exchange witness lists—two additional doctors who had treated him. *Deakins v. Wal-Mart Stores E. LP*, 2022 U.S. Dist. LEXIS 97600, at *2 (S.D. Fla. Feb. 16, 2022). That is not the case here either, where the testifying witnesses were both disclosed in timely fashion on the date on which to exchange witness lists.

## CONCLUSION

The motion to exclude should be denied.

Respectfully submitted,

*/s/ Gregory L. Diskant*

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Date: September 20, 2023

## LOCAL RULE 7.1(F) CERTIFICATION

I hereby certify that this memorandum contains 1868 words, excluding the case style, signature block, and certifications.

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

## CERTIFICATE OF SERVICE

I hereby certify that on September 20, 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*
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