THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff,

v.

THE CENSUS BUREAU, *et al.*,

Defendants.

Case No. 1:21-cv-3045-CJN-JRW-FYP

DEFENDANTS' MOTION IN LIMINE AND RULE 56(d) MOTION

INTRODUCTION

Before Defendants responded to the complaint in this case, Plaintiff filed a summary-judgment motion—attaching evidence from one expert and four of its members—seeking to reapportion the House of Representatives by judicial fiat. For the reasons explained in Defendants' motion to dismiss, the Court should dismiss the complaint. But legal problems aside, Plaintiff's summary-judgment motion is procedurally improper: this case is still in early stages, no discovery has occurred, and Plaintiff's motion relies on witnesses and evidence that Defendants have had no opportunity to test or rebut. Because Plaintiff has attempted to bypass discovery, its summary-judgment motion should be deferred or denied under Rule 56(d), or its evidence should be excluded under Rule 37 and its motion should be concomitantly denied.

ARGUMENT

I. The Court should deny or defer Plaintiff's motion under Rule 56(d).

Plaintiff filed its complaint in this case on November 17, 2021. ECF No. 1. Ten days before Defendants' deadline to respond to that complaint, however, Plaintiff filed a summary-judgment motion, attaching twenty-five supporting exhibits. *See* ECF No. 14. These materials included a declaration from "Data Scientist" Ayush Sharma (ECF No. 14-5) who outlined the results of various statistical calculations, as well as declarations from four of Plaintiff's members (ECF Nos. 14-22, 14-23, 14-24, 14-25). Plaintiff proffers these declarations to establish standing in support of summary judgment under Rule 56. *See, e.g.,* ECF No. 14-1 at 23, 32. At the time Plaintiff filed its motion, the Court had not set a discovery schedule or entertained any Rule 12 motion by Defendants. Plaintiff's Rule 56 motion is premature, so Defendants now move under Rule 56(d).

"A successful Rule 56(d) motion can result in a district court's deferring consideration of a pending summary judgment motion, denying the motion, allowing time to take discovery, or issuing 'any other appropriate order.'" *Jeffries v. Barr*, 965 F.3d 843, 855 (D.C. Cir. 2020) (quoting Fed. R. Civ. P. 56(d)). To obtain relief, a Rule 56(d) movant must: "(1) outline

the particular facts the party defending against summary judgment intends to discover and describe why those facts are necessary to the litigation"; "(2) explain why the party could not produce those facts in opposition to the pending summary-judgment motion"; and "(3) show that the information is in fact discoverable." *Id.* (citations omitted). Plaintiff's premature summary-judgment motion makes this burden easy to meet.

As to the facts Defendants intend to discover if the complaint is not dismissed, they would seek to depose each of Plaintiff's witnesses and determine the basis and reliability of their testimony. Plaintiff's expert, Ayush Sharma, opines on certain apportionment scenarios based on various data, concluding that some seats should shift between States. *See* Sharm Decl. ¶¶ 7–16, ECF No. 14-5. Mr. Sharma's opinions rest on data sources and reports that have disclosed limitations, and disclosed and undisclosed margins of error. ECF 14-8; ECF 14-10. In a deposition, Defendants would seek to question Mr. Sharma's qualifications and calculations, including the underlying assumptions of his scenarios and limits of his data and analysis. *See* Sverdlov Decl. ¶ 6. Defendants may also want to use their own experts to rebut Mr. Sharma's barebones methodology or provide further information about the limits of Mr. Sharma's data sources. *Id.* ¶ 7. Plaintiff's lay witnesses should similarly be deposed. Each one claims to be injured by the current apportionment because they live in a State that should supposedly have more Representatives if the Fourteenth Amendment's Apportionment Clause were fully implemented. *See* Banks Decl. ¶ 9, ECF No. 14-22; Lagos Decl. ¶ 7, ECF No. 14-23; Magnus Decl. ¶ 6, ECF No. 14-24; Carr Decl. ¶ 4, ECF No. 14-25. Defendants would seek to question these witnesses about the basis for their views, including their residency and knowledge of voting requirements across the States. *See* Sverdlov Decl. ¶ 8. In addition to depositions, Defendants may also serve Interrogatories and Requests for Admission about the scope of Plaintiff's claims that could focus the issues for any future summary-judgment motion or trial. *Id.* ¶ 9.

None of these facts are necessary to dismiss this case on the legal grounds explained in Defendants' motion to dismiss. But scrutiny of these facts would be necessary to evaluate

Plaintiff's standing for either Defendants' summary-judgment motion or trial. That is, if the Court were to reject Defendants' motion-to-dismiss arguments, Defendants would contend that Plaintiff still lacks an Article III injury if it cannot prove that its members would gain any Representatives with a new apportionment that takes into account the laws of *all* States. *See Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999). And Defendants have a right to seek discovery of those disputed facts. Indeed, the results of such discovery may also reveal that Plaintiff's witnesses should be excluded for other reasons, such as a lack of qualifications, unsound methodology, or the other witness' improper testimony under the Federal Rules of Evidence. Sverdlov Decl. ¶ 6.

All of the above facts are plainly discoverable in the normal course of litigation. But Defendants could not produce those facts in opposition to Plaintiff's pending summary-judgment motion because Plaintiff did *not* follow the normal course of litigation—and instead filed that motion (and non-disclosed evidence) before Defendants even responded to the complaint. *Id.* ¶ 10. That's why "[s]ummary judgment usually is premature unless all parties have had a full opportunity to conduct discovery." *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 530 (D.C. Cir. 2019) (citations omitted). So if the Court denies Defendants' motion to dismiss, Rule 56(d) relief is appropriate here.

II. Plaintiff's evidence could also be excluded under Rule 37, and its summary judgment motion denied.

Alternatively, because Plaintiff's premature Rule 56 motion failed to comply with the Federal Rules of Civil Procedure, its untested evidence should be excluded as prejudicial to Defendants and its summary-judgment motion should be concomitantly denied.

Rule 26 requires disclosures for relevant witnesses. Rule 26(a)(2), for example, requires the parties to disclose their expert witnesses "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D); *see also* Fed. R. Civ. P. 25(a)(1)(A)–(C) (requiring initial disclosures "within 14 days after the parties' Rule 26(f) conference," which, among other things, include "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"). And retained experts must provide an expert report containing "a complete statement of all opinions the witness will express and the basis and reasons for them"; "the facts or data considered by the witness in forming them"; and "any exhibits that will be used to summarize or support [the opinions]," Fed. R. Civ. P. 26(a)(2)(B). Far from being needless formalities, "[t]he importance of lay and expert witness disclosures and the harms resulting from a failure to disclose need little elaboration." *Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 134 (E.D. Wis. 2003). "When one party does not disclose, the responding party cannot conduct necessary discovery, or prepare to respond to witnesses that have not been disclosed, and for whom expert reports have not been provided." *Id.*

Plaintiff filed its summary-judgment motion before Defendants were even required to respond to the complaint, *see* Fed. R. Civ. P. 12(a)(2), and did not provide any required disclosures. Sverdlov Decl. ¶¶ 3–5. And "[a] party's failure to disclose information as required by Rule 26(a) triggers Rule 37." *Williams v. United States Dep't of Veterans Affs.*, No. 2020 WL 1323305, at *8 (D.D.C. Mar. 20, 2020). That Rule, in turn, precludes a party from using a "witness to supply evidence on a motion" if they failed to "identify [the] witness as required by Rule 26(a) or (e)," unless "the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c). This Rule is unequivocal: the "exclusion of non-disclosed evidence is automatic and mandatory." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004); *Goodman v. Staples The Off. Superstore*, LLC, 644 F.3d 817, 827 (9th Cir. 2011); *United States v. Honeywell Int'l Inc.*, 337 F.R.D. 456, 461 (D.D.C. 2020). Avoiding exclusion requires a party to "show[] that the failure to disclose the evidence was substantially justified or is harmless." *Williams*, 2020 WL 1323305, at *8 (citing *Moore v. Napolitano*, 926 F. Supp. 2d 8, 25 n.12 (D.D.C. 2013)); *Stoyas v. Toshiba Corp.*, 2022 WL 19406, at *2 (C.D. Cal. Jan. 3, 2022). Plaintiff cannot satisfy this standard.

There was no justification for Plaintiff's reliance on non-disclosed evidence as part of its summary-judgment motion. "Substantial justification exists where parties could reasonably differ as to whether disclosure was required or if there exists a genuine dispute concerning compliance." *Colon v. Linchip Logistics LLC*, 330 F.R.D. 359, 366 (E.D.N.Y. 2019); *see Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 35 (D.D.C. 2013) (finding no substantial justification where failure to disclose "was not an innocent oversight"), *aff'd* 775 F.3d 425 (D.C. Cir. 2014). As discussed above, expert disclosures were required—along with an opportunity for Defendants to test the witness and rebut that evidence—before Plaintiff could seek summary judgment. That's what discovery is for. And that's why "a motion for summary judgment is rarely considered before discovery" if an evidentiary record (rather than, say, an administrative record) is needed. *Collision Commc'ns, Inc. v. Nokia Sols. & Networks OY*, 2021 WL 1124725, at *3 (D.N.H. Mar. 24, 2021); *Poitra v. Sch. Dist. No. 1 in the Cty. of Denver*, 311 F.R.D. 659, 663 (D. Colo. 2015) ("[D]isclosures are designed to accelerate the exchange of basic information and help focus the discovery that is needed, and facilitate preparation for trial or settlement."). Considering Plaintiff's expert testimony as part of an early summary judgment motion before Defendants have answered the complaint is not justified.[1]

Indeed, the purpose of disclosure requirements is "to prevent unfair surprise" and "to permit the opposing party to prepare rebuttal reports, to depose the expert, and to prepare for depositions and cross-examination at trial." *Iacangelo v. Georgetown Univ.*, 272 F.R.D. 233, 234 (D.D.C. 2011). So a failure to disclose evidence is far from harmless if the Court can enter judgment on the basis of such non-disclosed evidence. *Brightview Grp., LP v. Teeters*,

[1] Plaintiffs cite *Jeffries v. Barr*, 965 F.3d 843, 848 (D.C. Cir. 2020) in support of early summary-judgment filings. But nothing in *Jeffries* allows a movant to rely on non-disclosed expert testimony as part of such a filing. Of course, an early summary-judgment motion may be allowable under Rule 56(b). The D.C. Circuit's decision in *Jeffries* proves this point: the D.C. Circuit *reversed* the district court's denial of Jeffries' Rule 56(d) motion precisely because the lower court failed to appreciate certain facts. *Id.* at 857-58. As the *Jeffries* court noted, "summary judgment usually is premature unless all parties have had a full opportunity to conduct discovery." *Id.* at 855 (alterations and citation omitted).

2020 WL 8257751, at *2 (D. Md. June 10, 2020) ("[C]ourts have invoked the exclusionary sanction after a party has attempted to rely on evidence not previously disclosed in motions for summary judgment or at trial."); *Colon v. Linchip Logistics LLC*, 330 F.R.D. 359, 366 (E.D.N.Y. 2019) (finding that a failure to disclose was not harmless because the opposing party "was unable to depose [the witness] or to hire an expert of his own to address the same facts" and "was also unable to address any issues raised by [the witness's] affidavit in their opposition to [ ] summary judgment"); *Bush v. Gulf Coast Elec. Co-op.*, 2015 WL 3422336, at *6 (N.D. Fla. May 27, 2015) ("Where, as here, a party prepares its motion for summary judgment without knowledge of a potential witness, the failure to disclose the witnesses is not harmless."); *see also Poitra*, 311 F.R.D. at 671 (excluding testimony due to, among other things, inadequate initial disclosures); *Wyatt Tech. Corp. v. Malvern Instruments, Inc.*, 2010 WL 11505684, at *21 (C.D. Cal. Jan. 25, 2010) (excluding testimony where a party "disclosed them for the first time in opposition to [defendant's] summary judgment motion").

Because Plaintiff was required to disclose its witnesses—and subject them to the usual discovery process—before seeking summary judgment based on their testimony, this evidence should be excluded under Rule 37 and Plaintiff's motion should be denied.

CONCLUSION

For the reasons explained above, the Court should deny or defer Plaintiff's summary-judgment motion under Rule 56(d), or exclude the evidence from Plaintiff's non-disclosed witnesses and deny the motion.

DATED: March 11, 2022

Respectfully submitted,

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CITIZENS FOR CONSTITUTIONAL INTEGRITY, Plaintiff, v. THE CENSUS BUREAU, *et al.*, Defendants.	Case No. 1:21-cv-3045-CJN-JRW-FYP

DECLARATION OF ALEXANDER V. SVERDLOV
IN SUPPORT OF DEFENDANTS' RULE 56(d) MOTION

I, Alexander V. Sverdlov, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Trial Attorney of the Federal Programs Branch, an office within the Civil Division of the U.S. Department of Justice. I, along with another Trial Attorney, represent Defendants in this litigation.
2. Plaintiff, Citizens for Constitutional Integrity, filed its complaint in this case on November 17, 2021. ECF No. 1. Under Rule 12(a)(2) of the Federal Rules of Civil Procedure, Defendants' response to the complaint was due on January 24, 2022.
3. On January 14, 2022 Plaintiff filed a motion for summary judgment. ECF No. 14. The motion attached supporting exhibits, including declarations from four individuals who stated they were members of Citizens for Constitutional Integrity (ECF Nos. 14-22, 14-23, 14-24, 14-25) and a declaration from "Data Scientist" Ayush Sharma (ECF 14-5) who outlined the results of various statistical calculations.
4. At the time Plaintiff filed this motion, the Court had not set a discovery schedule in this matter.

5. Prior to filing the motion for summary judgment, Plaintiff did not provide counsel for Defendants any disclosure identifying its members who submitted declarations, as required under Rule 26(a)(1) of the Federal Rules of Civil Procedure. Likewise, prior to filing the motion for summary judgment Plaintiff did not disclose to counsel for Defendants the expert witness report that was attached to Plaintiff's motion, as required under Rule 26(a)(2) of the Federal Rules of Civil Procedure.

6. If Plaintiff's evidence is not excluded, then to oppose Plaintiff's motion for summary judgment, Defendants require facts regarding the basis and reliability of the testimony offered by Plaintiff's witnesses, especially Plaintiff's expert Ayush Sharma. Mr. Sharma opines on certain apportionment scenarios based on various voter-registration data, concluding that some seats should shift between States. *See* Sharma Decl. ¶¶ 7–16, ECF No. 14-5. Mr. Sharma's opinions rest on data sources and reports that have disclosed limitations, and disclosed and undisclosed margins of error. ECF 14-8; ECF 14-10. Defendants would seek a deposition of Mr. Sharma to ascertain Mr. Sharma's qualifications and calculations, including the underlying assumptions of his scenarios and limits of his data and analysis. Depending on the facts learned in his deposition, Defendants may seek to exclude the testimony of Mr. Sharma for reasons such as a lack of qualifications or use of an unsound methodology.

7. Defendants may also wish to use their own experts to rebut Mr. Sharma's methodology or to provide further information about the limits of data sources Mr. Sharma uses.

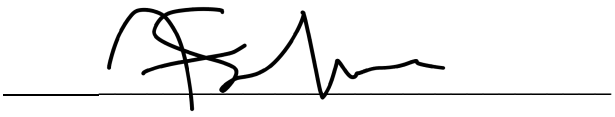
8. Defendants would likewise seek to depose the lay witnesses to determine the basis for the facts and views they express in their declarations, including their residency and knowledge of voting requirements across different States.

9. In addition to depositions, Defendants may also serve interrogatories and Requests for Admission about the scope of Plaintiff's claims that could focus the issues for any future summary-judgment motion or trial.

10. Defendants have been unable to accomplish any of these tasks prior to Plaintiff filing its summary judgment motion because Defendants were not aware of the identity of the lay witnesses who submitted declarations and were not provided with Mr. Sharma's expert report as required by Rule 26(a).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 11, 2022.



ALEXANDER V. SVERDLOV