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' REPLY IN FURTHER SUPPORT OF THEIR MOTION IN LIMINE AND RULE 56(d) MOTION

INTRODUCTION

Defendants previously asked this Court to defer or deny Plaintiff's premature summary-judgment motion under Rule 56(d)—or exclude its evidence under Rule 37 and concomitantly deny the motion—because 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. *See* Defs.' Mot. in Limine at 1–6, ECF No. 23. Plaintiff's response hinges on a mélange of misunderstandings, ranging from a mischaracterization of Defendants' need for discovery and past census litigation to a misconstruction of APA litigation and civil litigation more generally. Some of Plaintiff's arguments are premature, many are irrelevant, and all meritless. If the Court denies Defendants' motion to dismiss, it should grant relief under Rule 56(d) or Rule 37 and allow Defendants to both test Plaintiff's evidence and submit their own.

ARGUMENT

Even 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. Defs.' Mot. in Limine at 2–3. And Defendants already explained exactly what that would entail: Defendants would seek to depose Plaintiff's witnesses and determine the basis and reliability of their testimony, especially Plaintiff's expert Mr. Sharma; Defendants may use their own experts to rebut Mr. Sharma's barebones methodology; Defendants may serve Interrogatories and Requests for Admission about the scope of Plaintiff's claims; and Defendants may serve document requests. Defs.' Mot. in Limine at 2; Sverdlov Decl. ¶¶ 6–9, ECF No. 23-1.

Because Defendants have responded to Plaintiff's summary-judgment motion by arguing that they would need discovery about Plaintiff's *standing*—not the merits—many of Plaintiff's counter arguments are irrelevant. For example, Plaintiff's lead argument is that "this is an APA case" and therefore Defendants have "no right to discovery on the merits"

because it should be decided on the administrative record. Pl.'s Opp'n to Mot. in Limine at 11, *id.* at 20. Of course, this is not an APA case. *See* Defs.' Mot. to Dismiss at 12–13, ECF No. 24. But even if it were, discovery would still be allowed on *standing*, which is not unusual in census cases.[1] *See, e.g.*, *New York v. Dep't of Com.*, 351 F. Supp. 3d 502, 573 (S.D.N.Y. 2019) (noting, in a census-related APA case, that the government "concede[d] that the Court may, and indeed should, look at evidence beyond the Administrative Record to make findings of fact relevant to the standing inquiry"), *aff'd in part, rev'd on other grounds sub nom. Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019). So Plaintiff's argument that there should be no discovery on the *merits* misses the point.[2]

In fact, Plaintiff's actions demonstrate that extra-record evidence is required, as it attached an expert declaration and (now) five lay-witness declarations to support its summary-judgment motion. Plaintiff appears to believe that this is a one-way street, arguing that Defendants should simply analyze Plaintiff's evidence unaided by discovery, such as expert calculations that the Census Bureau can supposedly "check . . . easily and quickly." Pl.'s Opp'n to Mot. in Limine at 12–13. But that's the point of discovery. Defendants already explained that, in a deposition, they would seek to question Mr. Sharma's qualifications and calculations, including the underlying assumptions of his scenarios and limits of his data and analysis. Defs.' Mot. in Limine at 2. And Defendants may also want to use their own experts to rebut Mr. Sharma's barebones methodology or provide further information about the limits

[1] For the same reason (and the reasons explained below), Plaintiff is not exempt from initial disclosures under Rule 26(a)(1)(B); standing need not be decided on the administrative record. *Contra* Pl.'s Opp'n to Mot. in Limine at 10–11, ECF No. 26.

[2] If Defendants' motion to dismiss is denied and the parties proceed to discovery, they may also consider submitting evidence on the merits. But the Court need not address merits-related discovery at this time because Defendants' response to Plaintiff's summary-judgment motion is based on the need for standing-related discovery. And any dispute about merits-related discovery is premature. *See* Pl.'s Opp'n to Mot. in Limine at 9–10.

of Mr. Sharma's data sources. *Id.* Plaintiff can't bypass the usual course of civil litigation just because it likes its own evidence.

Plaintiff also cannot reach the same result by characterizing the declarations themselves as the required "disclosure" and then arguing that no rule requires "pre-disclosure disclosure." Pl.'s Opp'n to Mot. in Limine at 11. If that were true, parties could simply surprise each other at summary judgment with previously undisclosed testimony and claim the testimony itself satisfies their disclosure obligations. That is not only woefully inefficient, but would also flip discovery on its head, contravening the very purpose of disclosures "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); *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."). Unsurprisingly, Defendants cited a legion of cases debunking Plaintiff's theory. *See* Defs.' Mot. in Limine at 3–6.

To be sure, Rule 56(b) allows a party to file a summary-judgment motion "at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b); Pl.'s Opp'n to Mot. in Limine at 12. And that time may be shortly after the complaint is filed if, for example, the issues are purely legal or the material facts are undisputed.[3] But if the Court denies Defendants' motion to dismiss, then the standing issues are no longer purely legal and the underlying facts are certainly not undisputed. *See* Defs.' Mot. in Limine at 2–3. So where, as here, the nonmovant has shown "that, for specified reasons, it cannot present facts essential to justify

[3] In such circumstances, Rule 56(d) would not apply because there would be no "facts essential to justify its opposition" that the nonmovant would be unable to present in response to summary judgment. Fed. R. Civ. P. 56(d). And, of course, nothing about Rule 56 allows a party to forego its disclosure obligations under Rule 26, although when the issues are purely legal or material facts are undisputed, a lack of disclosure may be "substantially justified." *See* Fed. R. Civ. P. 26(a), 37(c).

its opposition, the court" should defer or deny the summary-judgment motion.[4] Fed. R. Civ. P. 56(d).

Plaintiff's remaining arguments are extraneous and premature. Plaintiff contends, for example, that "the discovery the Census Bureau seeks cannot develop any genuine dispute on any material fact" because Plaintiff "brought a procedural-violation claim." Pl.'s Opp'n to Mot. in Limine at 15–17. But this is simply a rehash of Plaintiff's motion-to-dismiss opposition, where he argues that he plausibly alleged standing for the same reasons. *See* Pl.'s Opp'n to Defs.' Mot. to Dismiss at 18–26, ECF No. 27. And the Court should resolve those legal issues in that context. Plaintiff also preemptively argues that Defendants should not be able to depose Plaintiff's members who submitted sworn declarations in support of its summary-judgment motion. Pl.'s Opp'n to Mot. in Limine at 17–20. But "it is axiomatic that when a party files an affidavit or declaration in support of a motion for summary judgment under Fed. R. Civ. P. 56, the opposing party has the right to depose the affiant or declarant on the assertions made." *Blackwell Pub., Inc. v. Excel Rsch. Grp., LLC*, 2008 WL 506329, at *1 (E.D. Mich. Feb. 22, 2008). And "[c]ourts across the country have recognized that 56(d) relief is warranted when the moving party files a declaration in support of summary judgment but does not make the declarant available for cross-examination to the non-moving party." *Converse v. City of Kemah*, 2021 WL 5811726, at *2 (S.D. Tex. Dec. 7, 2021) (quoting *Smith v. L.A. Unified Sch. Dist.*, 2017 WL 10562961, at *2 (C.D. Cal. June 9, 2017)). Defendants gave good reasons to depose the declarants here and should be allowed to do so. *See* Defs.' Mot. in Limine at 2. In any event, this dispute is premature and may be litigated if this case proceeds to discovery.

[4] For the same reasons, the Court should reject Plaintiff's bizarre contention that Defendants somehow "waived any right to jurisdictional discovery." Pl.'s Opp'n to Mot. in Limine at 13–15. Defendants believe this case should be dismissed because Plaintiff does not plausibly alleges standing or valid claims. But, if the Court disagrees, Defendants are asking for discovery. Contrary to Plaintiff's contention, this "procedural posture" "allow[s] for discovery." *Id.* at 14. And Defendants were not required to take jurisdictional discovery earlier just because Plaintiff filed an early summary-judgment motion. *Contra id.*

In the end, Plaintiff gives no reason this Court should deviate from the usual course of civil litigation if Defendants' motion to dismiss is denied.

CONCLUSION

For the reasons explained above and in Defendants' motion, 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 under Rule 37 and deny the motion.

DATED: June 24, 2022

Respectfully submitted,

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