IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

CITIZENS FOR CONSTITUTIONAL INTEGRITY, Plaintiff, v. THE CENSUS BUREAU, *et al.*, Defendants.	No. 21-cv-3045

PLAINTIFF'S POINTS AND AUTHORITIES IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

"[We] are facing the most significant test of our democracy since the Civil War," the President declared. Joseph Biden, Remarks on Protecting the Sacred, Constitutional Right to Vote (July 13, 2021). There, the President was referring to new laws in seventeen states that make voting harder. Civil War problems demand Reconstruction remedies. The Framers of the Fourteenth Amendment armed future citizens with tools to thwart the forces that seek to undermine democracy. The United States needs those tools now.

Incumbent politicians rationally seek to keep the voters who elected them or to choose voters more likely to reelect them. In the Fourteenth Amendment, Section 2 (the Amendment), the Framers discouraged politicians from choosing their voters by taking away seats in the U.S. House of Representatives from states who fail to allow all of their citizens to vote.

The Amendment's plain language requires Defendants, the Census Bureau, the Department of Commerce, Secretary of Commerce Gina Raimondo, and Census Bureau Director Robert Santos (collectively, the Census Bureau), to identify states that have denied or abridged "in any way" their citizens' rights to vote, and to discount those states' populations when apportioning seats.[1]

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[1] It states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

The Amendment does not limit any state's authority to define voting rights. No state's voting laws could violate the Amendment. The Amendment only provides consequences when states pass laws regardless of the state's reason and without showing any discriminatory purpose or effect. Whenever a state denies or abridges the right to vote to an over-eighteen, resident citizen, the Amendment requires the Census Bureau to recalculate that state's basis of representation to apportion seats.

Initially, the Census Bureau lacked sufficient data to implement the Amendment. Now, the Census Bureau has voluminous data. Nonetheless, in April 2021, when the Secretary and the Census Bureau sent the report to the President and apportioned seats among the states, they failed to complete the process the Amendment requires. *See* 2 U.S.C. § 2a; 13 U.S.C. § 141. If they had done so, the results could have moved seats to New York, Pennsylvania, and Virginia. The Census Bureau's failure to calculate any states' bases of representation violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Constitution.

The APA, the Act of Nov. 26, 1997 § 209(b), Pub. L. No. 105-119, 111 Stat. 2440, 2481 (codified at 13 U.S.C. § 141 note) (Section 209(b)), and the Constitution entitle Citizens for Constitutional Integrity to a routine APA remedy: to set aside the April

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> inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Nineteenth and Twenty-Sixth Amendments, respectively, deleted "male" and replaced "twenty-one" with "eighteen." *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1149 n.7 (2016) (Alito, J., concurring); *see also Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), *overruled on other grounds by Harper v. State Bd. of Elections*, 383 U.S. 663, 668-69 (1966).

report and to remand it to the Census Bureau to complete the analysis the Amendment requires. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973). The Parties can brief an appropriate interim remedy after the Court rules.

LEGAL BACKGROUND

Emerging from a devastating and bloody Civil War, the Framers of the Second Founding proposed a "fundamental" shift in apportioning representative seats. Report of the Joint Committee on Reconstruction XIII (Reconstruction Report), H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866); Sen. Rep. No. 112, 39th Cong., 1st Sess. (1866). The Framers felt a heavy responsibility: "Never before in the history of nations has a legislative body met charged with such duties and obligations as have been imposed upon us." *See* Cong. Globe, 39th Cong., 1st Sess. 781 (1866) (hereinafter "CGX" in which X denotes the page number). They pursued universal suffrage because they adhered to James Madison's faith in the "capacity of mankind for self-government." THE FEDERALIST No. 39, 240 (Random House, Inc. 2000); CG2459, 2767.

Madison found it "*essential*" for a democratic republic, which "derives its power directly or indirectly from the great body of the people," to derive that power "from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . ." THE FEDERALIST No. 39, 240. Otherwise, it does not qualify as a democratic republic.

Since the Declaration of Independence recognized that governments "deriv[e] their just powers from the consent of the governed," *see* CG429, the United States has moved ever closer to Madison's ideal of universal suffrage. Four other

amendments expanded voting rights by directly eliminating obstacles that states had erected. U.S. CONST. amends. 15 (race), 19 (gender), 24 (poll taxes), and 26 (ages 18-20). The Fourteenth Amendment's equal protection and due process clauses eliminated personal and real property prerequisites. *Hill v. Stone*, 421 U.S. 289, 292 (1975); *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 633 (1969). And the Voting Rights Act Amendments of 1970 eliminated literacy tests. *Oregon v. Mitchell*, 400 U.S. 112, 118, 131-34 (1970).

Nowhere, however, did the people of the United States make clearer their intention to attain universal suffrage than in the Amendment. It recognizes only three qualifications for suffrage: (1) citizenship, (2) residence, and (3) at least eighteen years old. If a state denies or abridges in any way the right to vote to anyone meeting those three qualifications (unless they committed crimes or participated in rebellion), the Amendment discounts that state's population when apportioning seats in the U.S. House of Representatives. "The point is that the person who is bound by the laws in a free Government ought to have a voice in making them. It is the very essence of republican government." CG2767.

The Framers wrote this equation into the Amendment (as amended by the Nineteenth and Twenty-Sixth Amendments):

$$\frac{\text{Basis of representation}}{\text{Residents}} = \frac{\begin{array}{c}\text{Citizens over eighteen years old whose rights}\\ \text{to vote the State did NOT}\\ \text{deny or abridge in any way}\\ \text{+ citizens denied because of criminal convictions}\\ \text{+ citizens denied because of rebellion participtions}\end{array}}{\text{Citizens at least eighteen years old}}$$

This equation replaced the equation the original Framers wrote as part of the Great Compromise to apportion representation based on "the whole Number of free Persons . . . and . . . three fifths of all other Persons." U.S. CONST. art. 1, sec. 2.

Conceptually, the Framers considered it "eminently just and proper" that, when a state denies or abridges its citizens' "right to vote" for their representatives, the Constitution shall abridge that state's representation in the House of Representatives. Reconstruction Report XIII. They sought to encourage states to allow all citizens to vote by discounting the state's apportionment population by the percentage of its citizens who could not vote.

Take 1870 North Carolina. Its population split roughly into two-thirds white people and one-third black people. *See* Census Bureau, Population of the U.S., Table 1 (June 1, 1870) (391,650/1,071,361 = 0.36), ECF No. 14-3. Immediately after the Civil War, North Carolina did not allow black citizens to vote. *See* Reconstruction Report, Virginia, North Carolina, South Carolina 174. The Amendment would have allowed Census Bureau to count only two-thirds of North Carolina's enumerated population when apportioning U.S. House of Representative seats (assuming for simplicity the census reflected citizens and that North Carolina did not disenfranchise anyone for criminal convictions or rebellion).

I. Every ten years, the Census Bureau counts United States inhabitants and apportions U.S. House of Representative seats.

The Constitution requires the United States to count inhabitants every ten years, via an "actual Enumeration" in "such Manner as" Congress directs, and to apportion seats so each state receives "at Least one Representative." Art. I, § 2, Cl.

3. Congress delegated responsibility for counting and apportioning to the Secretary. 13 U.S.C. § 141(a); *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996).

When apportioning 435 Representatives among fifty states, districts never divide evenly among state populations. Every method for apportioning representatives leaves states larger or smaller remainders of populations without equal representation. *Montana v. Dep't of Commerce*, 503 U.S. 442, 452 (1992) ("the fractional remainder problem"). Depending on the method for handling remainders, some states win, and some states lose. *See id.*

For about 130 years, Congress manually apportioned seats. *Id.* at 448-51. That system broke down when Congress failed to pass a statute apportioning seats after the 1920 census. *Id.* at 451-52. After this failure, Congress sought an automatic method for apportioning seats going forward, and it directed the National Academy of Science to recommend a method for solving the remainder problem. *Id.* at 451, 452 n.25. Among five possible methods, each with advantages and disadvantages, Academy mathematicians proposed the method of equal proportions because it "minimized the discrepancy between the size of the districts in any pair of States." *Id.* at 452-54. In 1941, Congress codified the method of equal proportions for apportioning seats. *Id.* at 451-52; Act of Nov. 15, 1941, § 1, 55 Stat. 761-762 (codified at 2 U.S.C. § 2a).

Based on the method of equal proportions, Congress requires the Census Bureau to report to the President "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several

States." 13 U.S.C. § 141(b). After the President receives the Secretary's report, the President sends Congress a statement that describes the results of the census and apportions seats. 2 U.S.C. § 2a. The Executive Branch recognizes the act of apportioning seats among the states as a "ministerial" duty. Br. for the Appellants 26, *Trump v. New York*, No. 20-366 (Oct. 30, 2020). This ministerial duty depends, of course, on the population figures the Census Bureau calculates.

II. The Framers carefully crafted the Amendment's equation to bring universal suffrage in response to the Thirteenth Amendment.

After the Civil War, the Framers saw that the Thirteenth Amendment, which outlawed slavery, perversely rewarded rebel states for the Civil War by increasing their number of seats in the House of Representatives. Reconstruction Report XIII. Before the Civil War, enslaved persons counted as *three*-fifths of a person; after the Civil War, those newly free persons counted as *five*-fifths of a person—and the Framers knew those rebel states would not let the newly freed people vote. *Id.*; *see* U.S. CONST. art. 1, sec. 2. The Thirteenth Amendment freed three million, six hundred thousand people in the rebel states, and that would have given the rebel states' leaders about thirteen additional seats without giving any formerly enslaved person a voice in their government. *See* CG74, 2767.

Civil war wounds still bled when the Thirty-Ninth Congress met to grapple with the practicalities of restoring rebel states to the United States. "[T]hese fallen rebels cannot at their option reenter the heaven which they have disturbed, the garden of Eden which they have deserted, and flaming swords are set at the gates to secure their exclusion . . . ." CG74. The Thirty-Eighth Congress had dissolved in March

1865: before the surrender at Appomattox on April 9 and the assassination of President Abraham Lincoln six days after that.

When the Thirty-Ninth Congress first convened in December 1865, rebel-state representatives immediately sought recognition. CG5, 10 (Dec. 4, 1865). Instead of admitting them, Congress decided to create a joint committee of nine representatives and six senators to "inquire into the condition of the [rebel] States." *Id.* at 46. They referred all motions and bills related to rebel states' representation to the Joint Committee on Reconstruction. *See*, *e.g.*, CG69.

In the rebel states the Committee saw a "spirit of oligarchy adverse to republican institutions" had arisen and led to the Civil War. Reconstruction Report XIII. They intended to avoid another civil war by expanding voting rights to formerly enslaved citizens and by curtailing that spirit of oligarchy. *Id.* The Framers rejected as not "just or proper" a situation that freed formerly enslaved people but confined "all the political advantages" to their former masters. *Id.* Moreover, the Committee believed that by encouraging states to give the new freemen access to the ballot-box, the power of democracy could more effectively protect them than anything else the Framers could devise. *Id.* One senator remarked: "give the people the ballot and the rulers are their servants, withhold it and the people exist at the will and sufferance of their rulers . . . ." CG2802. But the Framers saw no way to "secure the civil rights of all citizens of the republic" and to ensure "a just equality of representation" without adding provisions to the Constitution. Reconstruction Report XIII.

The Framers considered directly prohibiting states from denying the right to vote based on race but feared three-quarters of the states would not ratify an amendment like that. CG2766; CG704 ("What can pass?"). They doubted whether even a constitutional amendment would allow the United States to "prescribe the qualifications of voters in a state," but they knew the federal constitution had power over representation in the federal government. Reconstruction Report XIII. They left states complete authority to define voters' qualifications, but traded political power in the federal government for allowing "all to participate." *Id.* The Framers aimed to induce universal suffrage to give "all . . . through the ballot-box, the power of self-protection." *Id.* They decided to allot "political power . . . in all the States exactly in proportion as the right of suffrage should be granted . . . ." *Id.*

Joint Committee Co-Chair Thaddeus Stevens called Section 2 "the most important in the article." CG2459. He expected Section 2 would either "compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government . . . ." CG2459; *Evenwel*, 136 S. Ct. at 1140 (Thomas, J., concurring) ("The Fourteenth Amendment pressured States to adopt universal male suffrage by reducing a noncomplying State's representation in Congress. Amdt. 14, § 2.").

A. <u>The Amendment evolved its metrics and implementation over six months of debate and discussion.</u>

Of the five sections in the Amendment, the Framers spent the most time on Section 2 because they considered the increase in representation from formerly

enslaved people "the most important element in the questions arising out of" Reconstruction. Reconstruction Report XIII; *Evenwel*, 136 S. Ct. at 1128.

Initially, Representative Stevens proposed allocating seats based on "legal voters." CG10. That proposal met "fierce resistance" because different states had different proportions of voters, so some northern states would lose representation compared to the 1860 apportionment. *Evenwel*, 136 S. Ct. at 1128; CG357, 410. For example, because men were going west to find their fortunes, California and Vermont had respective populations of 358,110, and 314,369, but respective voters of 207,000 and 87,000. CG141, 357. Basing representation on voters would have shifted representation in ways other than removing them from rebel states.

The Joint Committee initially proposed a stand-alone amendment that would discount a state's population by the quantity of an entire group of race or color whenever a state denied or abridged the "elective franchise" to a single member. CG535. The House passed it, but the Senate rejected it. CG538 (passing the House 120 yeas to 46 nays), 1289 (failing in the Senate 25 yeas to 22 nays), 2459 (expressing Senator Stevens's "mortification at its defeat."). The Framers feared this initial method would discourage states from gradually extending suffrage and risked never extending suffrage to formerly enslaved people. *Id.* at 1224-28, 1275, 2502; *see* CG355. In response, the Framers refined the equation to allow gradual enfranchisement to gradually increase a state's number of seats and incorporated those refinements into the Fourteenth Amendment as Section 2. *See* CG2502.

As the Framers refined the Amendment, they worried endlessly about states evading the consequences for failing to allow universal suffrage. *See*, *e.g.*, *id.* at 377-79, 385, 406, 407, 410, 434, 707. The Framers clarified that they intended the Amendment to discount a state's representation "[n]o matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion." *Id.* at 2677. If "a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded;" race did not matter. *Id.*; Ethan Herenstein & Yurij Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y. L. Rev. 1021, 1039-40 (2021) (calling it "a results-based test: Any denial or abridgement of the right to vote would trigger the penalty, regardless of the state's motive.").

The Framers aimed to ensure that "no device, no ingenuity can defeat its practical effect." CG379. They approved the second version in June 1866. CG3149. In 1868, Secretary of State William H. Seward recognized that the states had ratified the Fourteenth Amendment. 15 Stat. 707.

B. The Framers implemented the Amendment to require voter registration in rebel states by oral oath.

Before the states ratified the Fourteenth Amendment, the 40th Congress defined a voting registration system to "enabl[e] the persons authorized to exercise the franchise . . . ." Cong. Globe, 40th Cong., 1st Sess. 63 (Mar. 11, 1867). The Framers knew control over voter registration could control the government: "Allow me to

designate who shall vote and to strike off from the register those who are politically opposed to me, and I will control the action of any State in the Union." Cong. Globe, 39th Cong., 2nd Sess. 1171 (Feb. 12, 1867).

The Thirty-Ninth Congress—the same Congress that drafted the Amendment—incorporated its work into the first Reconstruction Act by defining the same voter qualifications in rebel states: male, resident citizens twenty-one years or older (no criminal charges or participation in rebellion). An Act to provide for the more efficient Government of the Rebel States § 5, 14 Stat. 428, ch. 153 (Mar. 2, 1867). Congress defined "a class of persons who were per se eligible to vote, [and thereby] anticipated Southern disenfranchisement techniques." Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage during Reconstruction*, 82 N.C. L. Rev. 1581 (2004). Three weeks later, in the Second Reconstruction Act, the Fortieth Congress required states to register voters upon only an oral oath. Act of Mar. 23, 1867, ch. 6 § 1, 15 Stat. 2. Thus, the states ratified the Amendment knowing the low burden for voter registration that would trigger discounts to their bases of representation.

C. Insufficient data initially prevented Congress from implementing the Amendment.

The Framers anticipated difficulties when census-takers sought to determine whose voting rights a state denied or abridged. *See* CG10, 2943, 3038-39. Senator Howard cautioned that the agency would find the task "impossible" and warned the Amendment sets a standard "so uncertain" and "so difficult of practical application" that it risks the census results becoming "so inaccurate and unreliable as to be next

to worthless." *Id.* at 3038-39. For the technologies and capabilities of the 1870 census, those difficulties indeed proved insurmountable.

Then-Representative James Garfield spearheaded the House of Representatives Committee's oversight of the 1870 census. H.R. Rep. No. 41-3 (1870). The Committee recognized broad denials of the right to vote that would qualify under the Amendment, but saw no way to gather the statistics. It "could devise no better way" to gather the statistics required by the Amendment than by adding a "difficult" question to the census questionnaire. *See id.* at 53. The Committee knew it would "be difficult to get true and accurate answers." *Id.* To no one's surprise, that approach did not work.

In those days, the Census Board within the Department of the Interior compiled the figures sent by the United States marshals and assistant marshals—judicial branch officials—who traversed the territory. *Id.* at 48-49. Stopping at each house, the assistant marshal faced suspicions on why a judicial officer was visiting and impacts on taxes. *Id.* at 49. After defusing those questions, the marshal set forth a five-page questionnaire with questions that ranged from gender, birthplace, and occupation to real estate acres to health and disabilities. *Id.* at 49, 66-70. One marshal estimated an average visit took thirty minutes. *Id.* at 49.

On the 1870 census questionnaire, as the Committee suggested, one column asked respondents to enter the number of "Male citizens of the United States, 21 years of age, whose right to vote is denied or abridged on other grounds than rebellion or other crime." *Id.* at 53, 66. The Census Board received a poor response.

Of the 38 million United States inhabitants it counted, only about 43 thousand male citizens over twenty-one years old reported a state denying or abridging their rights to vote. Cong. Globe, 42nd Cong., 2nd Sess. 609-10 (Jan. 26, 1872).

No one trusted those numbers. One representative complained, "this whole table is utterly inaccurate; it is not reliable; it is not made in pursuance of any law; it is without weight." *Id.* at 79. He quoted the Superintendent of the Census for concluding that "'[t]he census is not the proper agency for such an inquiry. The questions of citizenship and of the denial of suffrage to rightful citizens, are mixed questions of law and fact, which an assistant marshal is not competent to decide.'" *Id.* (*quoting* Census Office Superintendent Francis A. Walker, *Report of the Superintendent of the Ninth Census* xxviii (Nov. 21, 1871), ECF No. 14-4). The Department of the Interior gave "little credit to the returns made by assistant marshals" because (1) the statistics did not reflect reality and (2) the question was too "difficult" for census respondents to answer. *Id.* at 610 (reproducing a letter from C. Delano, Secretary of the Interior, to James G. Blaine, Speaker of the House (Dec. 11, 1871)). Interior lamented that it lacked "power" to give accurate statistics on denials or abridgments on citizens' rights to vote. *Id.*

Six years after proposing the Amendment, Congress basically gave up on implementing it. Without reliable statistics, it had no way to do so. At the same time, the Fifteenth Amendment sapped the political will to implement it. *See* Cong. Globe, 42nd Cong., 2nd Sess. 66. The Fifteenth Amendment had accomplished directly part of what the Amendment tried to do indirectly: prohibit denying or

abridging the right to vote based on race, color, or prior condition of servitude. *See* CG2766.

Frustrated at its inability to implement the Amendment, Congress passed a statute, anyway. Act of Feb. 2, 1872 § 6, 17 Stat. 29 (codified at 2 U.S.C. § 6). Its sponsor, Joint Committee on Reconstruction member Senator Justin Morill, declared: "We must do nothing to impair the vitality of [the Amendment] or any other provision of the Constitution. *If not needed today, it may be tomorrow. It must not become a dead letter*." Cong. Globe, 42nd Cong., 2nd Sess. 670 (1872) (emphasis added); CG57. The statute, unfortunately, does not faithfully implement the Amendment. It discounts the number of representatives instead of calculating bases of representation. *See* George David Zuckerman, *A Consideration of the History and Present Status of* [*the Amendment*], 30 FORDHAM L. REV. 93 (1961).

D. No legal barriers that could have impeded litigation over the Amendment still stand.

As in other circumstances, "[i]t should be unsurprising that such a significant matter has been for so long judicially unresolved." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (collecting examples). Until 1941, Congress apportioned seats directly, so likely no lawsuit could enforce the Amendment against Congress. That year, Congress assigned the self-executing authority to calculate apportionment to the Census Bureau as it took the census. Act of Nov. 15, 1941.

But then, courts had no jurisdiction over lawsuits against the Census Bureau. Not until five years later did the APA give plaintiffs broad access to courts to challenge agency decisions. *See* Pub. L. No. 79-404, 60 Stat. 237 (June 11, 1946*)*;

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986). That year, however, the Supreme Court rejected an apportionment case based on the political question doctrine. *Colegrove v. Green*, 328 U.S. 549 (1946). That principle loomed for sixteen years until the Court rejected the articulation in *Colegrove*. *Baker v. Carr*, 369 U.S. 186 (1962).

Three years after *Baker*, Congress passed the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965) (codified as amended at 52 U.S.C. §§ 10301-10701), which led states to expand voter access, instead of denying or abridging it. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). In 1992, the Supreme Court rejected political question doctrine challenges to census determinations. *Montana*, 503 U.S. at 456-59 ("the political question doctrine does not place this kind of constitutional interpretation outside the proper domain of the Judiciary.").

In 1999, Congress opened the courts to all challenges to any census "counting method[]."*Utah v. Evans*, 536 U.S. 452, 463 (2002). It gave aggrieved parties a cause of action whenever the Census Bureau uses any "statistical method in violation of the Constitution . . . in connection with a . . . decennial census, to determine the population for purposes of the apportionment . . . of Members in Congress . . . ." Section 209(b).

Recent efforts to disenfranchise voters have made the Amendment more relevant than ever. The President identified seventeen states that enacted "28 new laws to make it harder for Americans to vote." Remarks on Protecting the Sacred, Constitutional Right to Vote. But no one could challenge the Census Bureau's

decision until the Secretary sent the report because the APA usually requires plaintiffs to wait for the final agency action for their claims to ripen. *See* 5 U.S.C. § 704; *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (dismissing a case as unripe because "the dispute will take a more concrete shape once the Secretary delivers his report under § 141(b).").

FACTUAL BACKGROUND

The APA allows courts to review agency decisions based on "those parts of [the administrative record] cited by a party . . . ." 5 U.S.C. § 706. Here, the Census Bureau admitted that it did not complete the analysis the Amendment required. Letter from Census Bureau Acting Director Ron S. Jarmin to Jared Pettinato (Oct. 1, 2021), ECF No. 1-2. It disclaimed responsibility for completing the Amendment process. *Id.*

In the letter, the Census Bureau explained its reason for declining to implement the Amendment. Consequently, "[t]he validity of the [agency] action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review." *Camp*, 411 U.S. at 143. Of course, the APA entitles plaintiffs to present extra-record evidence to demonstrate Article III standing. *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001).

I. The Census Bureau compiles voter registration statistics sufficient to implement the Amendment.

Every two years, the Census Bureau collects voter registration data along with demographic and economic data "to monitor trends in the voting and nonvoting behavior of U.S. citizens" as part of its current population survey. Current

Population Survey, Voting and Registration Supplement 1-1 (Nov. 2020), Ayush Sharma Decl., ECF No. 14-9. The Census Bureau considers it a "major source of information regarding national voting and registration." *Id.* In that survey, the Census Bureau produced, for each state, the numbers of citizens over eighteen years old and the percentage of those citizens whom the state had registered to vote. *Id.*; Table 4a. Reported Voting and Registration for States: November 2020, Sharma Decl., ECF No. 14-10.

The Census Bureau released that November 2020 data in April 2021—just as it was completing its counts of resident populations for the decennial census. *Compare* Census Bureau, Press Release, *2020 Presidential Election Voting and Registration Tables Now Available* (Apr. 29, 2021), ECF No. 14-20; *with* Census Bureau, Press Release, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment* (Apr. 26, 2021), ECF No. 14-21.

II. Wisconsin's strict photo voter ID law disenfranchised 300,000 of its registered voters.

In 2011, Wisconsin passed a strict photo voter ID law that disenfranchised 300,000 registered voters—nine percent of its registered voters. *Frank v. Walker*, 17 F. Supp. 3d 837, 842, 854, 884 (E.D. Wis. 2014), *overturned on other grounds* by 768 F.3d 745, 746 (7th Cir. 2014), *r'hrg en banc denied*, 773 F.3d 783, 785 (2014). The court reached that conclusion after a two-week trial and an exhaustive analysis of expert reports. *Id.* at 842, 880-884.

Under Wisconsin's law, only nine forms of photo ID qualify for voters to prove their identities: (1) driver's license, (2) temporary driver's license, (3) state ID card,

(4) temporary state ID card, (5) passport, (6) naturalization certificate, (7) tribal ID, (8) active-military ID, or (9) university ID. *Id.* at 843. Expired IDs do not count. *Id.* The district court counted 300,000 people who lacked one of these IDs. *Id.* at 854.

III. The mathematics of the Census Bureau's data shows denials and abridgments that would move representative seats.

Citizens engaged data scientist Ayush Sharma to calculate the effect of denials and abridgments via the method of equal proportions. He made those calculations by relying on (1) the Census Bureau's enumerated resident data, (2) its citizenship data, (3) its voter registration data, and (4) the Sentencing Project's data on disenfranchisement due to criminal convictions. Sharma Decl. ¶¶ 9-12. He found the Amendment would shift representative seats across the nation.

Sharma first confirmed his method reached the same results as the Census Bureau. *Id.* ¶¶ 13, 19. Then, he inserted the data into the Amendment's equation to calculate states' bases of representation under various scenarios. *Id.* ¶¶ 14-16.

Sharma concluded that the Census Bureau injured Citizens for Constitutional Integrity's Virginia members by failing to discount state populations based on their registration rates. *Id.* ¶ 21. If the Census Bureau had done so, Virginia would have received an additional seat in the U.S. House of Representatives. *Id.*

Separately, the Census Bureau injured Citizens for Constitutional Integrity's New York members by failing to discount Wisconsin's population based on its photo voter ID law, which disenfranchised 300,000 citizens. *Id.* ¶ 23. The Census Bureau apportioned Wisconsin one seat too many and New York one too few. *Id.*

Combining the denials by voter registration with the abridgments of Wisconsin's photo voter ID, the Census Bureau disenfranchised Citizens for Constitutional Integrity's Pennsylvania members by allocating it one seat too few. *Id.* ¶ 26.

STANDARDS OF REVIEW

I. State laws that restrict suffrage require exacting scrutiny.

The Supreme Court considers voting "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992). In other words, "other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). At the same time, "[s]tates have broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quotations omitted); *see* U.S. CONST. Art. I, sec. 4. The Supreme Court takes its responsibility as a guardian of democracy so gravely that it "carefully and meticulously scrutinize[s]" all "alleged infringement[s] of the right of citizens to vote . . . ." *Kramer*, 395 U.S. at 626; *Reynolds v. Simms*, 377 U.S. 533, 562 (1964). Courts complete an "exacting judicial scrutiny of statutes distributing the franchise." *Kramer*, 395 U.S. at 628.

The Amendment reaches more broadly than other amendments, but the Framers expected its "gentle and persuasive" effects would lead to an equal participation of all. Reconstruction Report XIII. The Fifteenth Amendment applies only to voting denials or abridgments based on race, color, or previous condition of servitude. The Nineteenth Amendment focuses on sex; the Twenty-Sixth on age between eighteen and twenty; and the Twenty-Fourth on poll taxes. In contrast, the Amendment

disregards intent or effect on citizens' characteristics or voting qualifications and focuses solely on the citizen's ability to vote.

The Amendment also operates differently from equal protection and due process. Those clauses force states to conform to federal standards. The Amendment, in contrast, does not care if a state has a rational basis for a particular voting abridgement. It looks "simply to the fact of the individual exclusion" and requires the Census Bureau to calculate the state's basis of representation after counting those exclusions. *See* CG2767.

II. The Administrative Procedure Act requires a thorough, probing, in-depth review of agency actions.

The APA enacted "generous" and "comprehensive provisions" for judicial review. *Webster v. Doe*, 486 U.S. 592, 599 (1988); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). When an agency action "adversely affect[s] or aggrieve[s]" a person, courts review the action for compliance with the law if it "represents a 'final agency action for which there is no other adequate remedy in a court.'" *Webster*, 486 U.S. at 599 (quoting 5 U.S.C. § 704). Congress passed the APA after "a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950). The Supreme Court directs courts "to give effect to [the APA's] remedial purposes where the evils it was aimed at appear." *Id.* at 41.

The APA directs both agencies and courts. It requires agencies not only to "examine the relevant data," but also to "articulate a satisfactory explanation for its action" that includes a "rational connection between the facts found and the choice

made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983). It assigns courts, as part of their judicial review obligations, to take a "thorough, probing, in-depth review" of the agency action. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *overruled on other grounds* by *Califano v. Sanders*, 430 U.S. 99, 104, 107 (1977). It requires courts to "decide all relevant questions of law, [to] interpret constitutional and statutory provisions, and [to] determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

Upon review, the APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that qualify as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

III. Summary Judgment

Federal Rule of Civil Procedure 56(b) allows a party to "file a motion for summary judgment at any time until 30 days after the close of all discovery." *See Jeffries v. Barr*, 965 F.3d 843, 848 (D.C. Cir. 2020) (remarking that the Department of Justice's early-filed summary judgment motion "may well" surprise the plaintiff). Courts consider claims on summary judgment if the evidence "shows that there is no genuine [issue] as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts decide APA claims as matters of law. *See Genus Med. Techs. LLC v. FDA*, 994 F.3d 631, 636 (D.C. Cir. 2021).

STANDING

Citizens have standing to bring this case because their procedural injuries meet the "triad of injury in fact, causation, and redressability . . . ." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998). In analyzing standing, courts assume the plaintiff succeeds on the merits of its claims and test the consequences of that success. *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (per curiam); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

An organization satisfies Article III standing when (1) one member shows individual standing, (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000). Citizens satisfies the second and third elements because it seeks to improve democratic elections, and because no member needs to participate in this lawsuit.

Citizens satisfies the first element, too. The Census Bureau injured Citizens' members by failing to complete the procedure the Amendment requires. *See* Sarah Banks Decl., ECF No. 14-22; Androniki Lagos Decl., ECF No. 14-23; Isabel Magnus Decl., ECF No. 14-24; Michael Carr Decl., ECF No. 14-25. When a plaintiff alleges injury from a faulty procedure, that plaintiff "never has to prove that if he had received the procedure the substantive result would have been altered." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (quotations omitted); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010) ("standing

does not require precise proof of what the [agency's] policies might have been in that counterfactual world."). Instead, a plaintiff satisfies Article III standing if success creates "some possibility" the agency will "reconsider the decision" that harmed the plaintiff. *Massachusetts*, 549 at 518; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.7 (1992).

In issuing its report, the Census Bureau failed to compete the procedures that the Amendment directs. A private plaintiff's "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999); *Utah*, 536 U.S. at 459-61.

For causation, voluminous facts demonstrate at least some possibility that if the Census Bureau completes the Amendment analysis, it will apportion more representatives to states where Citizens' members live. Sharma Decl., ¶¶ 21, 23, 26.

This Court can redress Citizens' injuries. Although the census report is complete, "courts can order the Secretary of Commerce to recalculate the numbers and to recertify the official census result," and the "practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Utah*, 536 U.S. at 459-64. If courts could not issue that relief, they could issue a writ of mandamus. *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Citizens easily demonstrate Article III standing. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) ("those

adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground.").

ARGUMENT

I. The Census Bureau failed to comply with the plain language of the Amendment.

The Census Bureau violated its duty by failing to complete its analysis of voting denials and abridgments before issuing its report that apportioned representative seats. The APA compels setting aside the Census Bureau's report.

The Census Act assigns the Census Bureau "a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quotations omitted). As part of that duty, the Amendment directs that, when apportioning representatives, the population "shall be reduced." That plain language mandates action. "[T]he mandatory 'shall' normally creates an obligation impervious to judicial discretion." *Shapiro v. McManus*, 136 S. Ct. 450, 454 (2015) (quotations and alteration omitted). The Amendment thus requires the Census Bureau to identify which states denied or abridged their citizens' voting rights "in any way" and to calculate those states' bases of representation when apportioning U.S. House of Representatives seats. *See Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) ("[Section 2] is as much a part of the [Fourteenth] Amendment as any of the other sections," and "what it means" is "important").

In its report, the Census Bureau completed no analysis of denials or abridgments when apportioning representative seats. It has no basis for its failure.

Courts "set aside agency action under the [APA] because of failure to adduce empirical data that can readily be obtained." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (citing *State Farm*). The United States no longer suffers from any lack of data as in 1870. The Census Bureau already counts most variables in the Amendment's equation.

The complexity of the task will require Census Bureau to rely on experts to complete the Amendment's analysis, but that does not excuse it from complying. "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 424 (1944). The APA easily accommodates any difficulties the Census Bureau may face. "It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52; *see also Wisconsin*, 517 U.S. at 23-24. The APA merely requires "the agency [to] explain the evidence which is available, and [to] offer a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52.

By failing to offer any explanation for its failure, the Census Bureau violated the APA and the Amendment. *See id.* at 48 (overturning the agency when it "did not even consider the possibility"). It acted "not in accordance with law," "contrary to constitutional right," and "without observance of procedure required by law." *See* 5 U.S.C. § 706; *Massachusetts*, 549 U.S. at 534. The APA requires setting aside that action and remanding the report for the Census Bureau to complete its duty. *See*

Massachusetts, 549 U.S. at 534; *Fla. Power Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Camp*, 411 U.S. at 143; *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment) (identifying "the cardinal principle of judicial restraint" as "if it is not necessary to decide more, it is necessary not to decide more"). In further briefing, the Court can consider an appropriate, interim remedy.

II. The Amendment requires the Census Bureau to calculate states' bases of representation to account for citizens not registered to vote.

Although the Court could simply remand the case as the Supreme Court did in *Massachusetts*, this Court could advance judicial economy by interpreting the Amendment's language now. When an agency makes an error of law, courts can correct it, describe the new legal standard, and then remand. *NRLB v. Enter. Ass'n Gen. Pipefitters*, 429 U.S. 507, 522, 522 n.9 (1977) (holding that, when an agency makes "an error of law," courts have a duty to "correct the error of law . . . , and after doing so to remand the case to the agency so as to afford it the opportunity of examining the evidence and finding the facts as required by law.") (quotations and alteration omitted). The Amendment discounts state populations for both unregistered voters and for abridging the voting rights of registered voters.

A. The Amendment requires the Census Bureau to count citizens unregistered to vote as denials of the right to vote.

By their plain text, voter registration statutes require the Census Bureau to calculate the basis of representation by counting unregistered citizens as denials of their rights to vote. The Amendment's plain text prohibits the Census Bureau from

delving into the state's motivation for passing the law or the reasons why citizens did not register.

1. The plain text of voter registration laws denies unregistered citizens their rights to vote.

In applying the Amendment, the plain text of states' voter registration laws denies unregistered citizens their rights to vote. *See*, *e.g.*, Ind. Code § 3-7-48-1 ("a person whose name does not appear on the registration record may not vote"); Kan. Stat. § 25-2302; N.C. Gen. Stat. § 163-54 ("Only such persons as are legally registered shall be entitled to vote . . . ."); S.C. Code § 7-5-110 ("No person shall be allowed to vote at any election unless he shall be registered as herein required."); Tex. Elec. Code § 11.002 ("'qualified voter' means a person who: . . . is a registered voter."); Wis. Stat. § 6.15; *see also* Cal. Elec. Code § 2000 (allowing qualified, registered voters can vote). If unregistered citizens show up at their polling place, states will not let them vote. If unregistered citizens request a mail-in ballot, states will not give them one. States thus created a category of citizens to whom they denied their right to vote. The plain language of the Amendment requires the Census Bureau to calculate each state's basis of representation by counting these unregistered citizens whom the state denied the right to vote. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("when the meaning of the statute's terms is plain, our job is at an end.").

States' reasons for failing to register voters do not matter. The Framers aimed to give each state "the choice simply, as we desire it should, of enfranchising its people or not having them counted in the basis of representation." CG434. "Experience has

shown that numbers and numbers only is the only true and safe basis . . . ." CG2767. The Constitution leaves no alternative. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35; *United States v. Classic*, 313 U.S. 299, 316 (1941) ("If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.").

The Framers expected as a "simple endeavor," the Census Bureau to calculate a state's basis of representation whenever a citizen "is excluded from the category of voters." CG2767, 432 (Bingham), 434 (Ward), 536 (Stevens). Using registration lists as the categories of voters makes that endeavor simple. Indeed, the Census Bureau already has data on voter registration rates.

The broad application of the Amendment's plain text and ordinary meaning finds solid moorings in the legislative history. *See Bostock*, 140 S. Ct. at 1750. Voter registration would have left a loophole large enough to drive a truck through the Amendment. But the Framers left no loophole. Senator Sumner anticipated them: "There are tricks and evasions possible, and the cunning slave-master will drive his coach and six through your amendment stuffed with all his representatives." CG647. The Framers held deep suspicions that states would seek to evade, restrict, limit, and use every unimaginable, unanticipated "device" or "ingenuity" to escape consequences from disenfranchising their citizens. *See*, *e.g.*, *id.* at 377-79, 385, 406,

407, 410, 434, 707.[2] They identified state actions as the "mischief we are aiming at." CG385. Specifically, they aimed to stop states from "go[ing] on, in great measure, as heretofore, excluding their people from suffrage and yet having them counted in the basis of their representation." *Id.*

The Framers wrote the Amendment so "that no considerable body of the people in any State can be disfranchised, *no matter on what account*, and still be numbered in her basis of representation." *Id.* (emphasis added), 2767. The Framers anticipated states preventing voters from voting by clever administrative burdens and qualifications, like property, faith, intelligence, ignorance, reading and writing, and "other disqualifying tests." *Id.* at 385, 407, 410, 2767. Voter registration laws collect the results of all disqualifying tests in one simple metric.

When seeking to implement the Amendment for the first time, Representative Garfield compiled a list of state constitution's voter tests that denied voting rights:

Reason for denying right to vote	Number of States
Race or color	16
Residing too little time in the state	36
Residing too little time in the United States	2

[2] [I]t is necessary, in amending the Constitution of the United States, to use plain, direct, and certain language—such language as cannot be evaded or perverted. . . . [T]his indirect attempt on the part of the committee to base representation upon the right of suffrage is subject to evasion and abuse, that it will be found impossible to so guard this provision that some device may not be originated which will defeat the object of it. If, on the other hand, the issue is clearly made—if the provision in the Constitution is plan and direct, that representation shall be based upon the number of those who are allowed to exercise political power in the several States, evasion or defeat of the object on the part of the Legislature or the people of any State will be entirely impossible.

CG378 (Statement of Rep. Sloan).

Residing on U.S. lands instead of state lands	2
Failing to hold property or to pay taxes	8
Failing to satisfy reading and writing tests	2
Failing a character test	2
Failing to serve in the army or navy	2
"[P]auperism, idiocy, or insanity"	24
Failing to recite oaths	5
Other reasons	2

H.R. Rep. No. 41-3 at 52-53, 71-93. The Census Bureau compiled no list like this when completing its April 2021 report.

History confirms the Framers' cynicism as states innovated beyond the Framers' wildest imaginings. Since the Civil War, states used voter registration requirements voluminously to deny citizens their rights to vote. *See S. Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966). They used property requirements and grandfather clauses, which allowed registration only if the voter's grandfather voted (before Thirteenth Amendment ratification). *Id.* States required registrants to interpret documents. *Id.* They leveraged their election officials' discretion to discriminate against racial minorities. *Id.* at 312. Election officials excused white registration applicants, gave them, "easy versions" of literacy tests, or outright helped them. *Id.* Some states required "good morals," which presented a standard "so vague and subjective that it ha[d] constituted an open invitation to abuse at the hands of voting officials." *Id.* at 312-13.

Most often, southern states did not need to discriminate by stopping black voters at the polls because they already stopped black people from registering to vote in the first place. *See* U.S. Comm'n on Civil Rights, *Political Participation* 7 (1968), ("intimidation by violence became less and less necessary to assure that the Negro

would stay away from the polls and cease to run for office . . . ."), ECF No. 14-26. For example, in 1896, Louisiana listed 164,088 white people and 130,344 black people on the voter registration list. John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 Notre Dame L. Rev. 105, 107 (1972). Four years later, after Louisiana adopted a new constitution, it listed only 5,320 black people. *Id.* By 1940-1944, eleven southern states had registered only five percent of black people. *Id.* at 108-09. Those efforts persist. *See Shelby Cnty.*, 570 U.S. at 536 ("voting discrimination still exists; no one doubts that.").

Many states still restrict the right to vote for reasons beyond residence, citizenship, age eighteen years or greater, not convicted of crime, and not convicted of participating in rebellion. The Arkansas Constitution, for example, denies registration to "idiot[s]," "insane person[s]," and soldiers stationed in Arkansas. ARK. CONST. art. 3, secs. 5, 7. California statutes deny registration to citizens who pleaded not-guilty by reason of insanity and to citizens "incompetent to stand trial." Cal. Elec. Code § 2211(a). These disqualifying tests counted as denials in 1870, and they count the same way now. *See* H.R. Rep. No. 41-3 at 52-53; *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793, 805-06, 827 (1995) ("the Framers inte[nded] that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."); *Powell v. McCormack*, 395 U.S. 486, 520 (1969) ("the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution").

Some states require weeks of residency before voter registration. Pennsylvania denies the right to vote to citizens who move among election districts within thirty days before an election—even the citizen lived within the state for more than thirty days. 25 Pa. Cons. Stat. § 1301(a) (2021) (requiring residence "in this Commonwealth and the election district where the individual offers to vote for at least 30 days prior to the next ensuing election"). One member of Citizens for Constitutional Integrity lived in Pennsylvania for three months before the November 2020 election, but Pennsylvania would not allow her to vote because she moved within the state too close to Election Day. Banks Decl. ¶ 1.

The Framers never conceived of states discriminating based on race at the primary election stage, or by gerrymandering city boundaries to cut out black voters, or by prohibiting a new voter from registering until another, already registered, white voter vouched for the new voter's qualifications. *See Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927); *United States v. Logue*, 344 F.2d 290 (5th Cir. 1965). No matter. In the Amendment, they cast the broadest net to catch every clever trick or evasion: count the citizens who can vote; that catches every denial. CG436, 2767; *see Bostock*, 140 S. Ct. at 1752. The Amendment requires the basis of representation to count unregistered citizens as denials of the right to vote.

2. The Framers set the ceiling for voter registration requirements.

States may seek to defend themselves from the Amendment's consequences by thrusting responsibility to register to vote onto their citizens. But in the Second Reconstruction Act, the Framers defined the ceiling for voter registration

requirements as an oral oath; any more onerous voter registration requirement triggers the Amendment for each unregistered citizen. *See* 15 Stat. 2. In other words, if states adopt an oral oath like the one Congress passed, the Amendment would not consider as denials any citizens who did not take the oral oath. But if states adopt more onerous requirements, the Amendment counts unregistered citizens as denials of their rights to vote. *Cf. U.S. Term Limits*, 514 U.S. at 831 ("allowing States to evade the Qualifications Clauses by dressing eligibility to stand for Congress in ballot access clothing trivializes the basic principles of our democracy that underlie those Clauses." (quotations and alteration omitted)).

The Framers expected easy voter registration. They intended states to allow illiterate and ignorant citizens to vote. CG410 ("prevent any State from disfranchising its citizens by reason of their ignorance"), 2767 ("whether they can read and write or not"). When implementing the Amendment in the rebel states under the Reconstruction Acts, they required states to register citizens as voters by a simple, oral oath. 15 Stat. 2.

The Amendment operates differently than equal protection, the Fifteenth Amendment, or the Voting Rights Act, so the standards under those provisions do not apply. The Framers intended that result. Those other amendments and statutes compel states to act within set parameters. In the Amendment, however, the Framers sought a more "gentle and persuasive" approach to induce states to "allow all to participate in [the] exercise" of the state's political power. Reconstruction Report XIII. They left states autonomy to define voter qualifications and burdens.

They doubted "whether the States would consent to surrender a power they had always exercised, and to which they were attached." *Id.* Other clauses in the Constitution compel states to conform to federal standards, but the Amendment compels nothing. In contrast those other clauses, the Amendment requires no deference to a state's election-logistics laws whether they cause a "substantial burden[] the right to vote" or not. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality). The Amendment granted states absolute flexibility not to abide by its qualifications. But in exchange, it made sure "[t]he penalty of refusing will be severe." CG2767.

As a result, the Amendment restricts no sovereign state action. States never violate the Amendment by setting whatever voter registration requirements they like. The Amendment only imposes consequences when states decide, in their sovereign powers, to deny or to abridge their citizens' voting rights.

For these reasons, the Amendment compels no particular voter registration method. But when states make registering to vote more onerous than the Framers intended, and then deny those citizens the right to vote for failing to register, the Amendment's severe consequences apply. Just as the First Congress shines a light into the meaning of the Constitution, so does the same or next Congress that proposed an Amendment. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). When the Framers set an oral-oath voter registration requirement in the Reconstruction Acts, they defined the ceiling for states to require proof before

registering citizens to vote. *See* 15 Stat. 2. The Amendment counts any more-onerous voter registration requirement as denying impacted citizens' rights to vote.

If states find voter fraud or perjury in the oral oath, they can revoke a citizen's voter registration by proving the registered voter does not meet the Amendment's qualifications. Instead of requiring citizens to bear the burden at the front end to register, the Amendment shifts the burden to states to prove those voters ineligible before taking them off the voter registration rolls. *See Powell*, 395 U.S. at 548, 550 (requiring houses of Congress to seat duly elected members who meet the Constitution's three express qualifications, and recognizing each house can protect its institutional integrity by punishing and expelling members). If states do not follow this procedure, the Amendment requires the Census Bureau to count unregistered citizens as denials.

B. The Census Bureau failed to calculate Wisconsin's basis of representation by subtracting 300,000 citizens as abridged by its photo voter ID law.

The Amendment applies to photo voter ID laws because they abridge registered citizens' rights to vote. In addition to discounting voters based on *denials* of the right to vote, the Amendment's plain text directs the Census Bureau to apply it whenever states *abridge* "in any way" their citizens' "right to vote." Even after voters overcome the barriers of registering to vote, some states abridge their registered voters' rights by enacting new voting barriers. "Practically all qualifications imposed on the exercise of the franchise constitute deprivations or abridgments within the contemplation of [the Amendment]." Arthur Earl Bonfield,

Right to Vote and Judicial Enforcement of [*the Amendment*], 46 Cornell L. Rev. 108, 115 (1960).

Wisconsin's photo voter ID law stopped even its registered citizens from voting if they did not possess one of nine, unexpired, photo IDs. *Frank*, 17 F. Supp. 3d at 843. During a two-week trial, the district court heard testimony from people who wanted to vote, but did not have a qualifying ID. They faced obstacles like errors on their birth certificates; no birth certificates; inability to afford birth certificates; or no reason to compile the documentation just for voting when they could accomplish everything else in their lives with other IDs, like Veterans' IDs. *Id.* at 854-55.

The District Court found that many voters have incomes far below the poverty line or no high school diploma. *Id.* at 855. Therefore, "even small increases in the costs of voting can deter a person from voting, since the benefits of voting are slight." *Id.* at 862; 773 F.3d at 792 (Posner, J., dissenting from denial of petition for review en banc). It found that the Wisconsin photo voter ID law disenfranchised 300,000 voters. *Frank*, 17 F. Supp. 3d at 842, 854, 884. The Amendment, therefore, compels the Census Bureau to calculate Wisconsin's basis of representation and to count these disqualifying tests as abridgments of 300,000 Wisconsin citizens' rights to vote.

1. Abridgments include any act that lessens or diminishes the right to vote compared to the 1866 baseline.

The ordinary, 1866 meaning of "abridging" the "right to vote" applies the Amendment to any law that "lessens" or "diminishes" that right. The Amendment discounts populations not only for "deny[ing]" the "right to vote," but also for

"abridg[ing]" that right "in any way." Interpreting "abridge" as equal to "deny" would violate the rule against surplusage. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) (rejecting statutory constructions that leave "any clause in the constitution . . . without effect . . . ."); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Abridge must mean something more than deny. Dictionary definitions, Supreme Court precedent, and legislative history demonstrate the word "abridge" refers to any law that lessens or diminishes the right to vote compared to any earlier right to vote.

Voting rights have no natural definition, and they exist only in positive law as constitutions or statutes define those rights. *Yick Wo*, 118 U.S. at 370 ("[T]he political franchise of voting is . . . a privilege merely conceded by society according to its will, under certain conditions . . . ."). Because an abstract "right to vote" lacks inherent definition and boundaries, any prohibition on lessening or diminishing that right makes no sense without a comparison. *Reno*, 528 U.S. at 334 ("It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice."). Therefore, the Supreme Court implements prohibitions on voting-right abridgments, like this one, by comparing new laws to prior laws. *Id.* at 333-34 ("The term 'abridge' . . . necessarily entails a comparison.").

In *Reno*, the Supreme Court read the 1950 Webster's New International Dictionary and the American Heritage Dictionary to interpret the Voting Rights Act's use of "abridge" to mean "shorten." *Id.* at 328. Upon that basis, it held that Congress intended to create an "antibacksliding," "nonretrogression," one-way

ratchet that allowed covered jurisdictions to change election laws only in ways that expand citizens' voting rights. *Id.* at 338, 341.

According to that mode of analysis, when the Amendment applies to abridgments of the right to vote "in any way," it also creates a one-way ratchet against backsliding or retrogression. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.") (quotations and alterations omitted). Webster's 1865 Dictionary defined "to abridge" as "To lessen; to diminish; as, to *abridge* labor; to *abridge* power or rights." NOAH WEBSTER ET AL., AM. DICTIONARY OF THE ENGLISH LANGUAGE 6 (Springfield, Mass. G. & C. Merriam 1865), ECF No. 14-27; *see* Cong. Rec. 42nd Cong., 2nd Sess. 108 (Dec. 13, 1871) (statement of Rep. Cox) (quoting the Webster definition to interpret the Amendment). In contrast with the Voting Rights Act that requires courts to compare new laws to 1965 status-quo baselines, the Amendment uses voting rights in 1866 as the baseline. *See Reno*, 528 U.S. at 333-34.

2. The phrase "in any way" reaches broadly to all incremental abridgments.

The Amendment's plain text does not stop at mere "abridgments." It reaches broadly to abridgments "in any way." No other amendment or phrase in the Constitution contains that broad language. When Congress uses the phrase "in any way," it "manifest[s]" a "broad" objective to use all of its power. *Stirone v. United States*, 361 U.S. 212, 215 (1960); *see also Solorio v. United States*, 483 U.S. 435, 446 n.11 (1987). At least twenty-nine criminal laws use the phrase "in any way" to

encompass unforeseeable details Congress intended to reach. *See* 18 U.S.C. §§ 33, 209, 224, 229, 231, 709, 891, 894, 1007, 1010, 1014, 1026, 1028A, 1362, 1542, 1581, 1583, 1584, 1590, 1591, 1592, 1597, 1951, 1956, 2332i, 2721, 3664, 4125.

As in the Civil Rights Act of 1964, a statute's applicability to "situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (quotations and alterations omitted). Thus, the plain text, ordinary meaning of the Amendment reaches any statute that lessens or diminishes the right to vote in any way compared to the right each state extended to its citizens in 1866. In other words, every incremental barrier to voting since 1866 qualifies as an abridgment for the Census Bureau to count in determining the state's basis of representation.

The Framers rejected a proposal to strike the words "or in any way abridged" because they feared creating loopholes. Senator Howard had proposed that deletion because he did "not know, and [he had] not yet been able to find any gentleman who did know, what an abridgment of the right to vote really is." CG3039. He understood the right to vote as an "indivisible" unit "incapable of abridgment." *Id.* Therefore, he contended, "[i]f a man possesses the right to vote, he possesses it in its entirety. . . . I am not able to see how this right can be abridged." *Id.* Senator Howard called the language incomprehensible and expressed concern that it added "confusion and uncertainty" and invited "questions of construction." *Id.* The Senate soundly rejected his attempt to delete the language. *Id.* at 3040.

Indeed, history shows Senator Howard simply lacked sufficient imagination. The Supreme Court has recognized, however, that states can erode the right to vote in creative ways other than denying it directly: "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.

By specifically keeping the phrase "or in any way abridged" in the Amendment, the Framers recognized the limitations of their imaginations. They intended to reach every limitation or diminishment of citizens' rights to vote that no one could foresee or predict. "The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." *U.S. Term Limits*, 514 U.S. at 829 (quotations omitted). Consequently, the Amendment requires the Census Bureau to count, as any abridgment of that citizen's right to vote, any state's voting law that lessens or diminishes any citizen's right to vote, compared to the 1866 laws, or compared to any more expansive law passed since. *See Reno*, 528 U.S. at 333-34.

3. Photo voter ID laws qualify as abridgements of citizens' rights to vote.

Photo voter IDs exemplify post-Amendment laws that abridge rights by erecting barriers to vote. Photography did not widely exist in 1866, so no state laws required photo voter IDs. If it had, Representative Garfield would likely have found it in his comprehensive list. *See* H.R. Rep. No. 41-3 at 52-53, 71-93. Consequently, every photo voter ID law adds a burden to the right to vote beyond what existed in 1866, and every photo voter ID law lessens or diminishes citizens' rights to vote, compared to those rights in 1866. For those abridgments, the Amendment requires

the Census Bureau to count as abridgments the citizens who cannot vote because of the photo voter ID laws.

Those laws in Wisconsin prohibit 300,000, or nine percent of its registered voters, from voting for lack of photo identification that the states required. *Frank*, 17 F. Supp. 3d at 842, 854, 884. The Amendment requires the Census Bureau to calculate Wisconsin's basis of representation and, when it does so, to subtract 300,000 from Wisconsin's citizens who can vote.

III. If the APA does not apply, the All Writs Act and the Constitution require the Court to issue a writ of mandamus and declaratory relief.

If not through the APA, the All Writs Act and the Constitution authorize this Court to issue injunctive and declaratory relief against the Secretary of Commerce and the Census Bureau Director. The All Writs Act authorizes "all courts . . . [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The statute commonly known as the Declaratory Judgment Act, Act of June 14, 1934, Pub. L. No. 73-343, 48 Stat. 955 (1934) (codified at 28 U.S.C. §§ 2201-02), grants authority to issue declaratory judgment. Even outside the APA, courts have power to issue "injunctive relief against executive officials like the Secretary of Commerce . . . ." *Franklin*, 505 U.S. at 802; Section 209(b).

To obtain a writ of mandamus, "the person applying for it must be without any other specific and legal remedy." *Marbury*, 5 U.S. at 169. But when law directs a federal officer "to do a certain act affecting the absolute rights of individuals," courts

have a "duty of giving judgment that right be done to an injured individual . . . ." *Id.* at 170-71.

Two circumstances, (1) the Census Bureau's failure to comply with the Constitution's direction for over 150 years and (2) a legal violation lying outside the broad and generous provisions of APA, together, compel a writ of mandamus. "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924). If the APA does not authorize the Court to enjoin the Census Bureau, the All Writs Act, the Declaratory Judgment Act, and the Constitution compel declaratory relief and a writ of mandamus to complete the analysis the Amendment requires. *See Franklin*, 505 U.S. at 802; Section 209(b).

CONCLUSION

For these reasons, the APA, Section 209(b), the All Writs Act, the Declaratory Judgments Act, and the Constitution entitle Citizens to summary judgment, to declaratory relief, to remand, and to an injunction, and to a writ of mandamus. Citizens respectfully request oral argument and an opportunity to brief an interim remedy afterward.

Dated April 1, 2022,

/s/ Jared S. Pettinato
JARED S. PETTINATO