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 RESPONSE TO DEFENDANTS' MOTION IN LIMINE

ORAL ARGUMENT REQUESTED

JARED S. PETTINATO, DC Bar No. 496901
The Pettinato Firm
3416 13th St. NW, #1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com

Attorney for Plaintiff

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INTRODUCTION

Defendants, the Census Bureau, the Commerce Department, Commerce Secretary Gina Raimondo, and Census Bureau Director Robert Santos (collectively, the Census Bureau) are again "trying mightily to avoid a ruling on the merits of these claims." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 515 (S.D.N.Y. 2019). The Census Bureau has no defense on the merits. It confessed it did not comply with the Constitution's Fourteenth Amendment, Section 2 (the Amendment). Letter from Census Bureau Acting Director Ron S. Jarmin to Jared Pettinato (Oct. 1, 2021), ECF No. 1-2. It has no right to delay the inevitable. Congress assigned this Court to "expedite to the greatest possible extent the disposition" of this case. Act of Nov. 26, 1997 § 209(e)(2), Pub. L. No. 105-119, 111 Stat. 2440, 2481 (codified at 13 U.S.C. § 141 note) (Section 209(e)(2)).

The Census Bureau objects to Citizens for Constitutional Integrity (Citizens) moving for summary judgment before formal discovery under Federal Rule of Civil Procedure 56(b). Although the Department of Justice used the rule that way, *Jeffries v. Barr*, 965 F.3d 843, 854 (D.C. Cir. 2020), now, it wants to preclude other parties from doing the same thing. The Rules do not permit that hypocrisy.

The Census Bureau seeks delay based on misapprehensions about the discovery available in Administrative Procedure Act (APA), 5 U.S.C. § 701-706, cases. No party has any automatic right to discovery, and no parties exchange initial disclosures. Fed. R. Civ. P. 26(a)(1)(B)(i). The Census Bureau creates an extra-textual initial-disclosure obligation and seeks Rule 37 sanctions for violating it. It is way out of bounds.

Ultimately, the Census Bureau's lack of effort demonstrates it has no genuine interest in discovery. Since Citizens filed their apportionment calculations in January, the Census Bureau has not even attempted to replicate the calculations with its own statisticians. If it wanted jurisdictional discovery on Article III standing, it could have sought that before moving to dismiss—twice. Now, it waived that right. Finally, the discovery it seeks will not result in any genuine dispute about any material fact because the Article III standard in procedural injury cases requires Citizens to prove only some possibility the Amendment process would cure their vote-dilution injury. *See generally* Pls.' Opp. to Defs.' Mot. to Dismiss. Federal Rule of Civil Procedure 56(d) compels denying the motion in limine.

LEGAL BACKGROUND

After the bloody, devastating Civil War, the Framers of the Second Founding saw the Thirteenth Amendment, which outlawed slavery, perversely rewarding rebel states for that Civil War by increasing their number of seats in the U.S. 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. *Se See* Cong. Globe, 39th Cong., 1st Sess. 74, 2767 (1866) (hereinafter "CGX" in which X denotes the page number).

In response, the Framers made 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). They 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* CG781.

The Constitution initially 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; 13 U.S.C. § 141(a); *Dep't of Commerce v. Montana*, 503 U.S. 442, 452 n.25 (1992). When apportioning 435 Representatives among fifty states, districts never divide evenly among state populations. Every apportionment method leaves states larger or smaller remainders of populations without equal representation. *Montana*, 503 U.S. at 452 ("the fractional remainder problem"). Congress directed the Census Bureau to use the method of equal proportions to apportion seats. 2 U.S.C. § 2a(a).

The Amendment requires replacing some states' actual enumeration with their bases of representation. The Framers wrote this equation into the Amendment[1] (as amended by the Nineteenth and Twenty-Sixth Amendments):

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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

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

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.

The Amendment recognizes only three qualifications for suffrage: (1) citizenship, (2) residence, and (3) at least eighteen years of age. If a state denies or abridges in any way the right to vote to anyone meeting those qualifications (unless they committed crimes or participated in rebellion), the Amendment discounts that state's population when apportioning representative seats. "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.

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

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> the members of the Legislature thereof, is denied to any of the male 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).

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. Assuming for simplicity the census reflected citizens and that North Carolina did not disenfranchise anyone for criminal convictions or rebellion, the Amendment would have allowed the Census Bureau to count only two-thirds of North Carolina's enumerated population when apportioning seats.

Joint Committee Co-Chair Thaddeus Stevens called Section 2 "the most important in the [proposed Fourteenth Amendment]." 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.").

FACTUAL BACKGROUND

Citizens engaged Data Scientist Ayush Sharma to calculate the effect of one denial and one abridgment on apportioning seats. Mr. Sharma has two Master's Degrees: one in Statistics and Analytics, and one in Electrical and Computer Engineering. Ayush Sharma Decl. ¶¶ 2, 5, ECF No. 20-3. He relied on the Census Bureau's data, the Sentencing Project's expert report, and a district court's conclusions after a two-week trial. *Id.* ¶¶ 9-12. Mr. 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 three more scenarios, and apportioned seats. *Id.* ¶¶ 14-16.

First, Sharma's calculations show the Census Bureau injured Citizens' 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. *Id.*

Second, the Census Bureau injured Citizens' 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.*

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

PROCEDURAL BACKGROUND

Citizens filed their complaint in November 2021. ECF No. 1. They moved for summary judgment in January 2022. ECF No. 14. To that filing, they attached their mathematical calculations that applied the Amendment's equation, and the method of equal proportions. *See id.* They also attached declarations by which to establish their members' vote-dilution injury, as Article III requires. *See* Sarah Banks Decl. ¶¶ 2, 10, ECF No. 14-22; Androniki Lagos Decl. ¶¶ 1, 7, ECF No. 14-23; Isabel Magnus Decl. ¶¶ 1, 2, 6, ECF No. 14-24. They are attaching another one here. Kristin Keeling Decl. ¶ 2, Ex. 1. In March, the Census Bureau moved to dismiss and moved in limine to stay summary judgment. ECF Nos. 17 and 18.

Because the Census Bureau ignored Citizens' voluminous evidence on calculating the impacts of failing to implement the Amendment, Citizens filed an amended complaint, as of right, and attached the mathematical calculations and exhibits. ECF No 20; see Fed. Rs. Civ. P. 12(a)(1)(B), 10(c). Citizens moved again for summary judgment. ECF No. 22. The Census Bureau moved again to dismiss and moved again in limine. ECF Nos. 23, 24.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure 56(a) allows parties to move for summary judgment by showing "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Courts resolve APA claims via summary judgment because "[t]he entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Therefore, this Court will hold no "trial *de novo*." *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001); *Cronin v. USDA*, 919 F.2d 439, 443 (7th Cir. 1990). Instead, under the APA, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985).

In APA cases, courts do not "find" underlying facts, so discovery will not produce no material facts essential to courts resolving those cases on the merits. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Instead, the administrative record contains the "facts" for resolving APA cases. "[W]hen there is a contemporaneous explanation of the agency decision, the validity of that action must stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of

review [and based] . . . on the administrative record made . . . ." *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (quotations omitted)).

Nevertheless, the administrative record does not usually contain evidence of plaintiffs' Article III standing. *Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997). Therefore, plaintiffs are "entitled on appeal [in court] to supplement the agency record in order to demonstrate standing." *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

If a party opposes summary judgment and "cannot present facts essential to justify its opposition," it can move for protection under Rule 56(d). That rule allows a court to "(1) defer considering the motion or deny it; "(2) allow time to obtain affidavits or declarations or to take discovery; or "(3) issue any other appropriate order." Fed. R. Civ. P. 56(d). Courts require the 56(d)-moving party

1. (1) to "outline the particular facts" it intends to discover and to "describe why those facts are necessary to the litigation,"
2. (2) to "explain why the party could not produce those facts in opposition to the pending summary-judgment motion," and
3. (3) to "show that the information is in fact discoverable."

Jeffries, 965 F.3d at 855 (quotations and alterations omitted). Rule 56(d) gives a plaintiff no right to discovery if it "offer[s] no specific reasons for demonstrating the necessity and utility of discovery to enable [it] to fend off summary judgment . . . ." *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (Bader Ginsberg, J.).

ARGUMENT

I. The Census Bureau has no right to discovery on the merits in this administrative record case.

The Census Bureau moved under Federal Rule of Civil Procedure 56(d) to delay summary judgment because, it argues, it has a right to discovery "in the normal course of litigation." Defs.' Mot. in Limine and R. 56(d) Mot. (Defs.' Mot.), ECF No. 23. Here, the "normal course of litigation" in APA cases precludes discovery. The Census Bureau avoids that conclusion by failing to acknowledge this as an APA case. *But see* Am. Compl. ¶¶ 2, 6, 7, 10, 34-36, 64-66, ECF No. 20. It has no right to discovery on the merits.

In an APA case, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Therefore, "[t]he factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking." *Id.* at 744. Courts decide the merits of a plaintiff's claims based solely on the administrative record the agency submits "except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

Even under Citizens' claim for a writ of mandamus, the same rules apply. Courts require purported plaintiffs to exhaust their administrative remedies before seeking writs of mandamus, *Heckler v. Ringer*, 466 U.S. 602, 616 (1984), and that process

ensures the agency can "compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Therefore, "in considering a petition for a writ of mandamus the district court in these cases may not look beyond the administrative record." *Ragoni v. United States*, 424 F.2d 261, 263 (3d Cir. 1970); *Shaw v. Chater*, 221 F.3d 126, 131 (2d Cir. 2000).

The Census Bureau filed its first motion to dismiss on March 11, 2022, so the "certified list of the contents of the administrative record" was due that day. *See* LCvR 7(n)(1); ECF No. 18. The Census Bureau never filed it. Regardless, the whole administrative record is not necessary here because the Census Bureau's contemporary calculations reveal that it did not apply the Amendment. ECF Nos. 14-6, 14-7. Moreover, when Citizens exhausted their administrative remedies, the Census Bureau confirmed it did not apply the Amendment. *See* Letter, ECF No. 1-2. Consequently, this Court does not need the whole administrative record. *See* 5 U.S.C. § 706 (allowing courts to review "review . . . those parts of [the record] cited by a party."); LCvR 7(n) (allowing the parties to file only documents in "the administrative record that are cited or otherwise relied upon").

The Census Bureau complains that Citizens moved for summary judgment without producing initial disclosures under Rule 26—and that the deadline has not even arisen. Defs.' Mot. 3-4. Rule 26 requires no initial disclosures in APA cases. "The following procedures are exempt from initial disclosure: (i) an action for review on an administrative record . . . ." Fed. R. Civ. P. 26(a)(1)(B). And the Rule 26(f) conference, which triggers the deadline, will never happen. This Court's local rules

declare "[t]he requirements of . . . Fed. R. Civ. P. . . . 26(f), . . . shall not apply in . . . an action for review on an administrative record . . . ." LCvR 16.3(b). Again, nothing required or will require Citizens to provide initial disclosures.

The Census Bureau seeks sanctions under Rule 37 for that violation, but as shown above, it created that extra-textual initial disclosure obligation. Rule 37(a)(3)(A) applies to "fail[ures] to make a disclosure required by Rule 26(a)," but Rule 26(a) required no disclosures for this APA case. It is way over the line in seeking sanctions for failing to meet an obligation that does not exist.

The Census Bureau objects that Citizens did not provide a report under Rule 26(a)(2)(B). Defs.' Mot. 4. But Data Scientist Sharma submitted a detailed declaration, ECF No. 20-3, and the Supreme Court approved that procedure: "appellees submitted [an] affidavit . . . [u]tilizing data published by the [Census] Bureau . . . [that] concluded that 'it is a virtual certainty that Indiana will lose a seat . . . .'" *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999). If the Census Bureau had identified a particular deficiency in that declaration, it never notified Citizens except to object that Citizens moved for summary judgment too soon. *But see* Fed. R. Civ. P. 37(a)(1) (requiring meet and conferrals on sanctions motions).

The Census Bureau objects to Citizens filing "non-disclosed evidence as part of its summary-judgment motion," Defs.' Mot. 5, but Citizens disclosed their witnesses and evidence—by attaching exhibits to their summary judgment motion. The Census Bureau identifies no rule that requires pre-disclosure disclosure. It cites

several cases that sanction parties for failing to disclose discovery "by the deadline"—not *before* any deadline even exists. Defs.' Mot. 4-6; *see*, *e.g.*, *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757 (7th Cir. 2004) ("The deadline [for expert disclosures] for the Mussers was set at June 1, 2002. *Despite this deadline*, the Mussers *did not disclose* or identify any witness as an expert nor did they ever exchange or file expert reports." (emphases added)). Sanctions do not make any sense. Rule 56(b) specifically allows Citizens to move for summary judgment "at any time until 30 days after the close of all discovery."

At bottom, the Census Bureau objects to the surprise of seeing summary judgment early in a case. Its problem lies not with Citizens, but with the Rules. The Department of Justice took advantage of Rule 56(b) in *Jeffries*, but it wants to prohibit other parties from doing the same thing. There, the Department of Justice filed a motion "before any formal discovery had taken place" and attached its own "sixty-two exhibits and Jeffries's sixty-six." 965 F.3d at 848, 854.

For their part, Citizens produced simple arithmetic with a declaration, and they expected "the Census Bureau, a statistical agency housed within the Department of Commerce," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019), to check the figures easily and quickly, so the Parties could brief cross-motions. In other census cases, the parties have agreed on the method of equal proportions calculations, or the Supreme Court has relied on the plaintiff's calculations. *Utah v. Evans*, 536 U.S. 452, 458 (2002) ("the parties agree that that difference [resulting from different apportionment methods] means that North Carolina will receive one

more Representative"); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) ("Appellees [plaintiffs] have shown that Massachusetts would have had an additional Representative if overseas employees had not been allocated at all."); *Montana*, 503 U.S. at 445 (stating undisputed results of different apportionment methods).

Since January, when Citizens filed their calculations, the Census Bureau could have completed its own calculations and reviewed Citizens' calculations. That lengthy opportunity requires denying the Census Bureau's Rule 56(d) motion. *See Russell v. Harman Int'l Indus., Inc.*, 773 F.3d 253, 257 (D.C. Cir. 2014) (upholding discovery denial when the party seeking discovery "had every opportunity and incentive to produce the evidence sufficient to rebut the ample evidence . . . ." (quotations omitted)). It has failed to explain why it "could not produce those facts in opposition to the pending summary-judgment motion." *Jeffries*, 965 F.3d at 855. Indeed, if it had done its work, it may not have filed this motion.

II. The Census Bureau waived any right to jurisdictional discovery.

The Census Bureau already twice moved to dismiss for lack of Article III standing without seeking leave to conduct jurisdictional discovery. ECF Nos. 18, 22. It has no right to make one argument on standing, take more discovery, and then make a new argument on standing when it has the evidence before it.

Article III requires individual plaintiffs to demonstrate (1) injury in fact that is concrete, particularized, actual, imminent, and not conjectural or hypothetical, (2) that the injury is "fairly traceable to the challenged action of the defendant," and (3) that it is "likely that a favorable judicial decision will prevent or redress the injury."

Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). Citizens filed declarations with their summary judgment brief as the Supreme Court directs in APA cases. When parties brief summary judgment under the APA, Rule 56(e) requires plaintiffs to "set forth by affidavit or other evidence specific facts [of standing], which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (quotations and citations omitted).

Against those default rules, "[t]o get [jurisdictional] discovery . . . one must ask for it." *Second Amend. Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001). When a procedural posture does not allow for discovery, and a party states its intention to wait until discovery to obtain that information, it waives its right to seek jurisdictional discovery. *See id.*; *see also United States v. SCRAP*, 412 U.S. 669, 690 n.15 (1973) ("If the railroads thought that it was necessary to take evidence [on Article III standing] . . ., they could have moved for such relief."). The Census Bureau waived its opportunity for jurisdictional discovery.

As the Supreme Court has recognized, "[t]he reason for the [waiver] rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a winnowing process, and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486-487 n.6 (2008) (quotations omitted). The Census Bureau had two opportunities to take jurisdictional discovery. It waived any right to it.

Without any right to discovery on the merits, and without any right to jurisdictional discovery, the Census Bureau has no discovery to undertake. Rule 56(d) requires the Court to deny the Census Bureau's motion.

III. Even the Census Bureau's discovery would not produce a genuine dispute on a material fact over Article III standing.

Even if this Court allowed the Census Bureau to take discovery, the discovery the Census Bureau seeks cannot develop any genuine dispute on any material fact. Rule 56(d) requires a movant not only to "describe why those facts are necessary to the litigation," but also "how the information [it] seeks would assist [it] in creating a genuine issue of material fact." *Jeffries*, 965 F.3d at 856 (quotations omitted). The Census Bureau puffs up its anticipated discovery requests in its effort to stop summary judgment briefing, but it never connects its discovery to the legal standard or explains how the discovery could create a dispute of material fact.

The Census Bureau misapprehends Citizens' burden of proof for Article III standing. Citizens brought a procedural-violation claim, so they can establish Article III standing by showing "some possibility" that the Amendment process could move seats to their home states and cure their vote-dilution injury. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *U.S. House of Representatives*, 525 U.S. at 331; *Utah*, 536 U.S. at 459-64; Pls.' Opp. to Defs.' Mot. to Dismiss.

The Census Bureau effectively admits that completing the Amendment's procedure could change the apportionment. It argues that even small changes in states' bases of representation could affect New York's delegation because New York lost a seat by about 100 residents. Mem. of Law in Supp. of Defs.' Mot. to Dismiss

10-12, ECF No. 24-1. By the Census Bureau's own recognition, then, replacing some states' populations with bases of representation calculated under the Amendment has "some possibility" of moving seats to Citizens' home states. No calculations required. *See Johnson v. Perez*, 823 F.3d 701, 705 (D.C. Cir. 2016) ("if one party presents relevant evidence that another party does not call into question factually, the court must accept the uncontroverted fact."). The Census Bureau has a difficult road to negate that possibility because, "as a practical matter it is never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). Citizens demonstrated Article III standing, and nothing the Census Bureau produces can undermine that conclusion.

A. The Sharma Declaration accords with Supreme Court precedent.

Even if this Court needs more proof on the effects of implementing the Amendment, which it does not, Citizens' expert confirmed the results. The Census Bureau sets the wrong legal standard. It seeks complete proof of how its apportionment would result in the counterfactual world if it cured all of its legal violations for every state, and then reapportioned seats. Defs.' Mot. 3. But the Supreme Court rejected that legal standard in *Franklin*. There, it recognized Article III standing when the plaintiff's calculations proved the state "would have had an additional Representative if" the Census Bureau had followed the plaintiff's legal interpretation. 505 U.S. at 802; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010) (recognizing that Article III "standing does not require precise proof of what the [agency's] policies might have been in that counterfactual world.").

Citizens went above and beyond the legal standard by providing calculations to demonstrate that inarguable possibility of moving seats. Data Scientist Ayush Sharma demonstrated that, if the Census Bureau cured its legal violations in either of two ways, it would move seats to Citizens' home states. Sharma Decl. ¶¶ 21-27. Any contrary evidence the Census Bureau could produce will never rise to a genuine dispute over a material fact. Rule 56(d) gives no right to discovery.

B. Allowing the Census Bureau to depose Citizens' members would abuse the discovery process and produce no genuine dispute on a material fact.

The Census Bureau seeks to waste this Court's time and to abuse the discovery process by seeking to depose Citizens' members. Defs.' Mot. 2. This Court has "broad discretion to tailor discovery narrowly." *Gilmore v. Palestinian Interim Self-Government Auth.*, 843 F.3d 958, 968 (D.C. Cir. 2016) (quotations omitted). The 2015 amendments to Rule 26(b)(1) prohibit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." It assigns this Court a duty to "limit the frequency or extent of discovery otherwise allowed if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive . . . ." *Id.* The Census Bureau has no likelihood of discovering relevant, material information by deposing Citizens' members.

For standing, the "presence of one party with standing assures that controversy before [the] Court is justiciable." *U.S. House of Representatives*, 525 U.S. at 330-32.

Here, Citizens have provided four member declarations.[2] To disprove Article III injury, therefore, the Census Bureau bears the burden of proving (1) that every member does *not* live in his or her home state and (2) that every member does *not* plan to vote in the future—all directly contrary to the filed declarations. *See U.S. House of Representatives*, 525 U.S. at 331. But "[w]ithout some reason to question the veracity of the affiants, . . . [the party's] desire to test and elaborate affiants' testimony falls short [of showing why discovery is necessary]; h[is] plea is too vague to *require* the district court to defer or deny dispositive action." *Dunning v. Quander*, 508 F.3d 8, 10 (D.C. Cir. 2007) (quoting *Strang*, 864 F.2d at 861).

More importantly, the Census Bureau can discover Citizens' voter information via the public voter rolls—without depositions. *See* N.Y. Elec. Law § 5-602 (requiring the board of elections to make "a complete list of names and residence addresses of the registered voters" and to allow "public inspection"); 25 Pa. C.S. § 1207 ("Official voter registration applications" are "open to public inspection . . . ."); Va. Code § 24.2-444 ("The Department shall provide to each general registrar . . . lists of registered voters . . . [that] . . . shall contain the name, address, year of birth, gender and . . . shall be opened to public inspection at the office of the general registrar when the office is open for business."). The Census Bureau's failure to do its factual research fatally undermines the discovery and Rule 56(d) delay it seeks.

[2] One Citizens member, Michael Carr, moved away from Virginia on or about May 24, so Citizens are providing another declaration from another Citizens member from Virginia. Kristin Keeling Decl., Ex. 1 (signed May 20). Citizens, of course, commits to informing the Court of any further residence changes of declarants—without any need for discovery.

See Fed. R. Civ. P. 26(b)(C)(i) (requiring courts to limit discovery of information that "can be obtained from some other source that is more convenient or less burdensome. . . ."); *Mannina v. Dist. of Columbia*, No. 1:15-cv-931-FYP-RMM (D.D.C. Mar. 31, 2022). The Census Bureau has no right to delay under Rule 56(d) because it failed to "describe why those facts [from depositions] are necessary to the litigation . . . ." *Jeffries*, 965 F.3d at 855.

The Census Bureau can only be seeking to intimidate Citizens' members by questioning them on irrelevancies. That qualifies as discovery abuse. The Census Bureau states it intends to grill Citizens about "the basis for their views" and their "knowledge of voting requirements across the states." Defs.' Mot. 2. Those questions are irrelevant for Article III standing, and they do not belong in an administrative record for an APA case. The scope of discovery excludes those irrelevant facts. *See* Fed. R. Civ. P. 26(b)(1) (allowing discovery only if the information is "relevant to any party's claim"). The Supreme Court requires "the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where justice requires protection for a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (quotations and alterations omitted). This Court has a responsibility to police the discovery process to prevent those abuses. "[J]udges should not hesitate to exercise appropriate control over the discovery process." *Id.*

Even if the Census Bureau could demonstrate some right to jurisdictional discovery on Citizens' standing, it has no right to depose Citizens' members under Rule 26. It thus has no right under Rule 56(d) to delay summary judgment because it can show no likelihood of demonstrating a genuine dispute about material facts.

C. The APA prohibits interrogatories, requests for admission, and document requests.

The Census Bureau states its plans for other voluminous, time-consuming discovery: interrogatories and requests for admission "about the scope of Plaintiff's claims," and document requests for unspecified reasons. Defs.' Mot. 2; Decl. of Alexander V. Sverdlov, ECF No. 23-1. It does not acknowledge that APA cases prohibit those discovery tools. *See Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012) ("the standard discovery tools of civil litigation—including depositions, interrogatories, and, germane here, wide-ranging document production of materials that may potentially lead to admissible evidence—do not apply."). Because that information is not discoverable, the Census Bureau's Rule 56(d) motion has no basis. *See Jeffries*, 965 F.3d at 855 (allowing relief under Rule 56(d) only if information is "discoverable").

Even if the Census Bureau obtained discovery, its declaration only describes a fishing expedition. *See Russell*, 773 F.3d at 257 (declining to remand a case for discovery that "would amount to nothing more than a fishing expedition because appellant is unable to offer anything but rank speculation" (quotations omitted)).

CONCLUSION

The Census Bureau seeks to delay this litigation despite Congress's assignment to expedite this case. Section 209(e)(2). It has failed to demonstrate any Rule 56(d) right to discovery before briefing summary judgment because it never showed how its requested discovery could create a genuine issue of disputed fact under Article III. Citizens request the Court to deny this motion and to set the deadline for the Census Bureau's response brief within three weeks of ruling on this motion.

Respectfully submitted, May 27, 2022,

/s/ Jared S. Pettinato
JARED S. PETTINATO