THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff,

v.

THE CENSUS BUREAU, *et al.*,

Defendants.

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

REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff's reply fails to remedy the Complaint's substantial defects. To begin, Plaintiff fails to plausibly demonstrate that its members have actually suffered any "vote dilution" injury. As Defendants detailed in their motion to dismiss, the calculations that Plaintiff proffers to demonstrate that its members would receive greater representation under its reading of the law suffer from incurable analytical shortcomings, and rely on data that is insufficiently precise to support this Court's jurisdiction. *See* Defs. Mot. Dismiss, ECF 24-1 at 7-11 (Defs. MTD). Plaintiff cannot escape this difficulty by characterizing its injury as "procedural" or making observations about courts "routinely" evaluating malapportionment claims. Pl. Resp. Br., ECF 27 at 26 (Pl. Br.). As the Second Circuit recognized in a similar case, the fact that "standing might be exceedingly hard to establish" in a Reduction Clause challenge does not grant the Court license to exceed Article III limitations by dispensing with the injury-in-fact requirement. *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971).

Nor can Plaintiff overcome the fatal flaws in its substantive legal theories. The Supreme Court's decision in *Franklin v. Massachusetts* squarely forecloses this Court from reviewing the Census Bureau's apportionment calculations under the Administrative Procedure Act (APA). 505 U.S. 788, 797 (1992). Plaintiff attempts to end-run this decision by invoking a later-enacted statute. *See* 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)). But that law provides a cause of action for an entirely different sort of challenge and neither abrogates *Franklin* nor authorizes post-apportionment relief. Likewise, Plaintiff's claim to a writ of mandamus fails to identify any constitutional or statutory source of authority that creates a "clear duty" by Defendants to take the actions that Plaintiff requests.

Plaintiff's "sincere effort, an effort which we respect, to rectify what [it] considers a grave constitutional mistake is not enough." *Sharrow*, 447 F.2d at 97. Because Plaintiff has failed to articulate a jurisdictional basis for this Court to act or a cause of action that states a claim for relief, Plaintiff's complaint should be dismissed.

ARGUMENT

I. Plaintiff's allegations do not plausibly establish standing.

Plaintiff's response does not—and cannot—remedy the standing deficiencies identified in Defendants' motion. To establish standing, it not enough for Plaintiff merely to claim that its members in New York, Pennsylvania, and Virginia would receive more representatives if the population bases of *other* states were reduced. Pl. Br. at 22. Rather, as the other courts that have analyzed Reduction Clause challenges have explained, Plaintiff must plausibly establish "the apportionment [its] interpretation of [the Reduction Clause] would yield, not only for New York[,] [Pennsylvania, and Virginia] *but for every other State as well*." *Sharrow*, 447 F.2d at 97. This "necessitate[s] a state-by-state study of the disenfranchisement of adult [men and women], a task of great proportions," *id.*, which Plaintiff has not done.

This failure is most glaring with respect to Plaintiff's allegations that its members would gain a representative if Wisconsin's—and only Wisconsin's—apportionment base were adjusted to account for the people allegedly disenfranchised by that State's voter-identification law. Pl. Br. at 26-27. Plaintiff insists that accounting for other States' voter-identification laws is beyond the scope of its lawsuit. *Id.* at 27-28. But Plaintiff identifies no case that has sanctioned applying apportionment formulas in such an ad-hoc and piecemeal fashion. *See generally id.* To the contrary, courts have repeatedly taken it as axiomatic that apportionment must be calculated using nationally uniform standards. *See, e.g.*, *Franklin*, 505 U.S. at 802 (finding standing based on evidence that a state would gain a Representative "if overseas employees has not been allocated at all"); *Utah v. Evans*, 536 U.S. 452, 458 (2002) (use statistical method applied nationwide indisputably led North Carolina to gain a Representative and Utah to lose one). That is as true for the Reduction Clause as it is for any other apportionment challenge: if Plaintiff's members' States "disenfranchised a portion of [their] adult[s], [their] representation [might] not be increased" and Plaintiffs would suffer no injury. *Sharrow*, 447 F.2d at 97. Indeed, Plaintiff admits that "[e]ach state's laws have their own idiosyncrasies and effects" that could play into this analysis. Pl. Br. at 28. But Plaintiff does

not even attempt to account for how the "idiosyncrasies and effects" of laws in New York, Pennsylvania, and Virginia compare to those of Wisconsin. *Id.* at 26-28. So its allegations of "vote dilution" on the basis of Wisconsin's voter-identification law fail to plausibly establish any injury.

A similar problem forecloses Plaintiff's effort to show that Virginia would gain a representative if all States had their apportionment base reduced to account for their voter-registration rates. As Defendants observed in their motion to dismiss, such blunt-force calculations fail to account for the different requirements for registration that states have enacted. Defs. MTD at 10. Because state requirements differ, some may not implicate the Reduction Clause or trigger its penalty. *See, e.g.*, *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (observing that "[r]esidence requirements, age, [and] previous criminal record . . . are obvious . . . factors which a State may take into consideration in determining the qualifications of voters" without improperly abridging the "right to vote" specified in the Reduction Clause). Plaintiff offers no rebuttal to this fact. *See* Pl. Br. at 26–28. And because its calculations indisputably fail to take account of how the allocation of Representatives may be affected by the differences in States' apportionment bases, it falls far short of establishing a plausible injury.

Beyond these analytical failings, Plaintiff's claims of injury are undermined by the significant margins of error in the data sets that Plaintiff's expert used in his calculations. *See* Defs. MTD at 11. Plaintiff attempts to brush off this problem by claiming that (at least some of) the data sets are of the Census Bureau's own creation, and that the margins of error are within what the Supreme Court has found permissible in one-person, one-vote cases. Pl. Br. at 25 (citing *Ala. Black Legislative Caucus v. Alabama*, 575 U.S. 254, 259 (2015)). But those cases did not concern apportionment of representatives *among* states—and the Supreme Court has repeatedly rejected attempts to apply inter-state redistricting precedent to Congressional apportionment. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 463-64 (1992) (declining to apply standards for inter-state apportionment to apportionment of Representatives among

the states); *see also Wisconsin v. City of New York*, 517 U.S. 1, 17-18 (1996) (declining to apply "'one person-one vote' standard" in the context of census methodology). As Defendants observed, Congressional apportionment requires high level of precision, because states can gain or lose seats by the smallest margins. *See* Defs. MTD at 11. For this reason, the Census Bureau expends significant time and resources to ensuring that the apportionment data it compiles is fit for that use. The Census Bureau made no similar designation for the data used by Plaintiff's expert. In a census where the number of some states' Representatives were determined by margins of less than a hundred people, Plaintiff proffers calculations based on data sets with margins of error in the hundreds of *thousands*. *Id.* Errors of such magnitude cannot plausibly establish that Plaintiffs' members were harmed.

Plaintiff's repeated characterizations of its injury as "procedural" does not alter this calculus. Pl. Br. at 18-19. As the Supreme Court has made clear in recent years, mere allegation that an agency failed to follow proper procedures does not qualify as an injury; a Plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing"); *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13–14 (D.C. Cir. 2020) (explaining that procedural injury "cases recogniz[e] a more relaxed redressability requirement" but still require establishing a concrete injury). To show standing, Plaintiff must plausibly establish that applying the Reduction Clause in its preferred way would alter apportionment in favor of its members. Notwithstanding its protestations about the plausibility of its "arithmetic," Pl. Br. at 21, Plaintiff has come up short.

Plaintiff's failure to establish a procedural injury is compounded by the fact that it challenges only the Secretary's report to the President, which has no legal impact on apportionment in the first instance, much less after an apportionment has already occurred. *See Franklin*, 505 U.S. at 799 (explaining that "[t]he President, not the Secretary, takes the final

action that affects the States" in the normal course); *Silver v. Internal Revenue Serv.*, 531 F. Supp. 3d 346, 359 (D.D.C. 2021) (collecting cases for the proposition that "a court must look at the underlying concrete interest when assessing redressability of a procedural injury"). When a plaintiff's ultimate relief is targeted at an already completed action (like apportionment or a treaty), especially by another government actor, an alleged "procedural" injury does not confer standing. *See Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008); *see also Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020); *Humane Soc'y of the United States v. Babbitt*, 46 F.3d 93, 100–101 (D.C. Cir. 1995). So even if Plaintiff attempts to spin its injury as "procedural," it is no closer to establishing standing.

II. Plaintiff does not challenge any final agency action and therefore has no cause of action under the APA.

It is undisputed that the Supreme Court's decision in *Franklin* straightforwardly bars Plaintiff's APA claim because the Secretary's report to the President is not final agency action challengeable under the APA. *Compare* Defs. MTD at 12–13 *with* Pl. Br. at 29. The only question is whether a provision of the 1998 Appropriations Act—a provision that addresses neither *Franklin* nor the Reduction Clause—somehow abrogates *Franklin* and allows Plaintiff to bring an APA claim. It does not.

Section 209(b) of the 1998 Appropriations Act allows "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law" that is used to "determine the population for purposes of the apportionment or redistricting of Members in Congress" to bring "a civil action" for "declaratory, injunctive, and any other appropriate relief against the use of such method." Pub. L. No. 105-119 § 209(b) (1997), codified as 13 U.S.C. § 141 Note. "Congress clearly intended section 209 to provide a vehicle for expedited review of the methods chosen by Defendants for use in the 2000 census prior to the actual undertaking and completion of the census." *Utah v. Evans*, 182 F. Supp. 2d 1165, 1173 (D. Utah 2001) (three-judge court), *aff'd,* 536 U.S. 452 (2002). In particular, Congress was

focused on statistical sampling for the 2000 Census because "the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census." Pub. L. No. 105-119 § 209(a)(7). Plaintiff's reliance on this statute is misplaced for three reasons.

First, Plaintiff—"a nonprofit organization that researches and advocates for legislation, regulations, and government programs," Compl. ¶ 14—is not an "aggrieved person" within the meaning of Section 209. The statute defines an "aggrieved person" as "(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; (2) any Representative or Senator in Congress; and (3) either House of Congress." Pub. L. No. 105-119 § 209(d). A nonprofit organization fits none of those categories. As another three-judge court recently explained in rejecting a Section 209 claim, "of the three potential aggrieved persons, the statute does confer a cause of action on one inanimate entity—either House of Congress." *Alabama v. U.S. Dep't of Com.*, 546 F. Supp. 3d 1057, 1068 (M.D. Ala. 2021) (three-judge court). "Had Congress intended to include other inanimate bodies in its definition of 'aggrieved person[s],'" like organizations, "it would have done so expressly." *Id.*

Second, Plaintiff is not challenging the use of any "statistical method" within the meaning of Section 209. For starters, Plaintiff is challenging Defendants' *lack* of adjustment under the Reduction Clause, not the affirmative "*use* of any statistical method," like statistical sampling or imputation. *Compare* Pub. L. No. 105-119 § 209(b) (emphasis added) *with* Pl. Br. at 33 ("Here, the Census Bureau used no valid statistical method to implement the Amendment."). This distinction is significant because the *use* of statistical methods in apportionment is suspect in a way that the lack of such methods is not. *See Utah*, 536 U.S. at 475; *id.* at 493 (Thomas, J., concurring in part and dissenting in part) ("[A]t the time of the founding, 'conjecture' and 'estimation' were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause."); *Dep't of Com. v. U.S. House of Representatives*, 525 U.S.

316, 363 (1999) (Stevens, J., dissenting) ("The words 'actual Enumeration' require post-1787 apportionments to be based on actual population counts, rather than mere speculation or bare estimate.").

More fundamentally, though, the statute defines a "statistical method" as "an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference." Pub. L. No. 105-119 § 209(h)(1). Plaintiff does not advocate—and Defendants certainly have not used—a "statistical procedure . . . to . . . subtract counts . . . from the enumeration of the population *as a result of statistical inference*." Pub. L. No. 105-119 § 209(h)(1) (emphasis added).

Finally, Section 209 allows only pre-census challenges, not post-census challenges like Plaintiff's lawsuit here. *See Utah*, 182 F. Supp. 2d at 1173 (three-judge court), *aff'd,* 536 U.S. 452 (2002). The statutory language "evidences congressional intent to facilitate a prospective remedy for any constitutional or statutory infirmity in a procedure Defendants propose to use in a decennial census *before* the procedure is actually used." *Id.* (emphasis added). As one three-judge court explained, "the remedy set out in section 209(b) specifically contemplates only a prospective relief: 'declaratory, injunctive, and any other appropriate relief *against the use of*' any statistical method that violates the Constitution or any other provision of law." *Id.* (quoting Pub. L. No. 105-119 § 209(b)). And the congressional findings underlying the statute explicitly recognize that prospective relief is necessary because "it would be impracticable for the courts of the United States" to provide "meaningful relief *after* [an unconstitutional] enumeration has been conducted." *Id.* at 1173–74 (quoting Pub. L. No. 105-119 § 209(a)(8)). So Plaintiff cannot bring its post-apportionment challenge through Section 209.[1]

[1] That holding was affirmed by the Supreme Court in *Utah*, 536 U.S. at 461–64. And contrary to Plaintiff's argument, the *Utah* Court neither scrutinized Section 209 nor equated its specific statutory definitions with general "counting method[s]," Pl. Br. at 32.

Whether Plaintiff attempts to use Section 209 as a standalone claim or as a means of procuring APA review, the Court should reject Plaintiff's reliance on that inapposite statute.

III. Plaintiff is not entitled to an extraordinary writ of mandamus

Plaintiff fares no better in its claim for a writ of mandamus. To preserve its status as an "extraordinary remedy," courts have limited mandamus "through a narrow definition of the term 'duty.'" *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). "According to traditional doctrine, a writ of mandamus will issue 'only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined.'" *Id.* (internal quotes and citation omitted). These limitations are designed to avoid "the potential conflict between the branches of government" that would be engendered if courts micromanaged Executive Branch officials or compelled them to act absent clear and well-defined directives. *Id.*; *see also In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) ("[I]f there is no clear and compelling duty under the statute as interpreted, the district court must dismiss the action.").

Here, Plaintiff falls far short of its burden to establish that a "clearly defined" duty rests on Defendants. *See Lovitky v. Trump*, 949 F.3d 753, 759-60 (D.C. Cir. 2020) (explaining that "the party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable"). Notwithstanding its allegations about statutory authorization for mandamus, Pl. Br. at 34–36, nowhere in its brief does Plaintiff contend that either the Census Act, 2 U.S.C. § 2a, or any other statute grants Plaintiff a "clear and indisputable right to" have any of the Defendants conduct a new apportionment reflecting the Reduction Clause, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Nor, for that matter, does Plaintiff identify a statute that imposes on the Census Bureau "a clear duty" to adjust the population totals to account for variations in voting laws across states. *Id.*; *cf. Lovitky*, 949 F.3d at 760 (noting that courts "often" analyze "the first two jurisdictional elements for mandamus-type relief — clear right to relief and clear duty to act — concurrently").

No such obligation can be found in Section 209. As discussed above, Section 209's authorization to challenge "statistical methods" does not encompass making the kind of adjustments to states' apportionment bases that Plaintiff is seeking. Neither Section 209 nor any other statutory provision Plaintiff identifies "makes any reference to, let alone imposes a duty upon, [any] of the defendants with respect to" implementing the Reduction Clause. *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C. 1965). Rather, Plaintiff contends that its right to relief—and the "clear duty" on Defendants to act—emanates directly from the Fourteenth Amendment. Pl. Br. at 37. Not one of the handful of cases touching on the Reduction Clause's meaning have ever intimated that such a "clear duty" exists, let alone that such a duty rests with Defendants. *See, e.g.*, *Dennis v. United States*, 171 F.2d 986, 993 (D.C. Cir. 1948), *aff'd*, 339 U.S. 162 (1950) (discussing historical sources regarding enforcement of the Reduction Clause); *Saunders v. Wilkins*, 152 F.2d 235, 238 (4th Cir. 1945) *cert. denied*, 328 U.S. 870 (1946). Plaintiff never claims otherwise.

Indeed, as Defendants detailed in their motion, prior to the modern Census Act, Congress never adjusted the apportionment bases to account for the Reduction Clause. *See* Defs' MTD at 4-5. And in promulgating that Act, which streamlined and automated the apportionment process, Congress specifically considered, and rejected, amendments that would have created a duty for the Census Bureau to implement the Reduction Clause. *Lampkin*, 239 F. Supp. at 765. Plaintiff fails to explain how Defendants' duty to enforce the clause can thus be "clearly defined" and "ministerial." *13th Reg'l Corp.*, 654 F.2d at 760; *see NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (noting that the Supreme Court has long adhered to James Madison's view that "a regular course of practice" may "liquidate & settle the meaning" of constitutional provisions); *id.* at 572 (Scalia, J., concurring the judgment) ("[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.").

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). For this reason, "mandamus does not create or expand duties, but merely enforces clear, non-discretionary duties *already in existence*." *Randall D. Wolcott, M.D., P.A.*, 635 F.3d at 768 (emphasis added). Without any statutory or legal support, Plaintiff rests its claim entirely on naked text from the Fourteenth Amendment. Such a showing is plainly insufficient to establish that a "clear duty" exists on Defendants or that Plaintiff has a "clear and indisputable" right to mandamus relief. *Lovitky*, 949 F.3d at 759.

CONCLUSION

For these reasons, the Court should dismiss Plaintiff's amended complaint.

DATED: June 24, 2022

Respectfully submitted

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