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 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Since 1964, courts have routinely ruled on congressional malapportionment claims. *See Wesberry v. Sanders*, 376 U.S. 1, 5-7 (1964). Here, Citizens for Constitutional Integrity claim that Defendants the Census Bureau, the Commerce Department, Commerce Secretary Gina Raimondo, and Census Bureau Director Robert Santos (collectively, the Census Bureau) malapportioned seats in the U.S. House of Representatives by violating the Fourteenth Amendment, Section 2 (the Amendment). Citizens mainly seek remand to the Census Bureau to complete its duty under the Constitution. It makes no difference that Citizens for Constitutional Integrity's (Citizens) claims arise from the 2020 census. The Supreme Court effectively held in 2019 that "*all* the Secretary's census-related decisions are suitable for judicial review . . . ." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2604 (2019) (Alito, J., concurring in part and dissenting in part).

Citizens' Article III standing is indisputable. The Supreme Court has repeatedly recognized Article III standing when plaintiffs (1) allege legal violations on the census that diluted their votes and (2) calculate reapportionments that would cure their injuries. *Utah v. Evans*, 536 U.S. 452, 458 (2002); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-31 (1999); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Dep't of Commerce v. Montana*, 503 U.S. 442, 445 (1992). Citizens have proven injury, traceability, and redressability. The Census Bureau fails to recognize that Citizens are claiming a procedural injury, which relaxes standing requirements. As the Amendment requires, the United States "shall" reduce states' "bases of representation" for apportioning seats in the U.S. House of

Representatives when those states deny or abridge, in any way, their citizens' rights to vote (except for crimes and participation in rebellion).[1] The Census Bureau did not complete the Constitution's required procedure for the 2020 census. That procedural failure led to the apportionment and Citizens' vote-dilution injuries. The Court can remand the results to the Census Bureau. Citizens' satisfied Article III.

The Census Bureau asserts the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, does not apply because *Franklin*, 505 U.S. at 801, rejected that approach. Five years later, however, Congress passed a statute specifically making the Census Bureau's apportionment reviewable. 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)).[2] The APA provides the mechanism for reviewing those agency actions. 5 U.S.C. § 704.

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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 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).

[2] That section states:

> Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with

Finally, the Census Bureau argues this Court lacks jurisdiction to issue a writ of mandamus because Citizens' remedy lies with the other branches. The Supreme Court already rejected that political question doctrine argument for census cases. *Montana*, 503 U.S. at 458-59. If this Court can issue no other relief, it can issue a writ of mandamus. *See Franklin*, 505 U.S. at 801. For ninety years, the Census Bureau failed its duty. The Constitution compels enforcing that duty, protecting Citizens, and denying the motion to dismiss.

LEGAL BACKGROUND

Emerging from a devastating and bloody Civil War, the Framers of the Second Founding 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* Cong. Globe, 39th Cong., 1st Sess. 781 (1866) (hereinafter "CGX" in which X denotes the page number). They pursued universal suffrage because they held James Madison's faith in the "capacity of mankind for self-government." THE FEDERALIST No. 39, 240 (Random House, Inc. 2000); CG2459, 2767.

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

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> the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

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):

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

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. 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. 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 U.S. House of Representative seats.

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; 13 U.S.C. § 141(a); *Montana*, 503 U.S. at 452 n.25. 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*, 503 U.S. at 452 ("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 made the "reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census . . . ." *Id.* at 451, 452 n.25. It

consulted with the National Academy of Sciences. *Id.* 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 that report (the Commerce Report), the President sends Congress a statement (the President's Statement) that relays the results of the census and apportionment. 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).

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

In contrast with Article I, Section 2, Clause 2, the Amendment does not require any "actual enumeration" of denials and abridgments. 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. By freeing three million, six hundred thousand people in the rebel states, the Thirteenth Amendment 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.

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.").

A. 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 Jacob Howard cautioned that the agency could 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.

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 it lacked "power" to give accurate statistics on denials or abridgments on citizens' rights to vote. *Id.* Now, it has voluminous statistics.

B. No legal barriers that 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 1929, Congress apportioned seats directly, so likely no lawsuit could enforce the Amendment against Congress. *See* Act of June 18, 1929, § 2, 46 Stat. 21; *see* Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1018 (1929). That year, Congress assigned to the Census Bureau to "tabulat[e]" apportionment as it took the census. Act of June 18, 1929, § 2; *see Congressional Reapportionment*, 42 Harv. L. Rev. at 1047 (advocating for a "permanent plan," so "[r]eapportionment will be taken out of politics.").

In 1929, courts had no jurisdiction over lawsuits against the Census Bureau. Not until 1946 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 overturned that interpretation of the political question doctrine. *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 that could lead to vote-dilution. *Montana*, 503 U.S. at 456-59.

In 1997, with Section 209(b), Congress opened the courts to all challenges to any census "counting method[]."*See Utah*, 536 U.S. at 463. Section 209(b) gave aggrieved parties a remedy 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 . . . ."

Recent efforts to disenfranchise voters have made the Amendment more relevant. 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 (July 13, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/13/remarks-by-president-biden-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 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 census challenge as unripe

because "the dispute will take a more concrete shape once the Secretary delivers his report under § 141(b).").

FACTUAL BACKGROUND

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 even disclaimed responsibility for completing the Amendment process. *Id.*

The Census Bureau compiles voter registration statistics sufficient to implement the Amendment. Every two years as part of its current population survey, 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." Current Population Survey, Voting and Registration Supplement 1-1 (Nov. 2020), 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: Nov. 2020, ECF No. 20-3.

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.

Separately, 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 nine percent, or 300,000 already registered—not unregistered—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). 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.* After a two-week trial and an exhaustive analysis of expert reports, the district court counted 300,000 people who lacked one of these IDs. *Id.* at 842, 854, 880-84.

Citizens engaged Data Scientist Ayush Sharma to calculate the effect of these denials and abridgments via the method of equal proportions. Data Scientist Sharma has two Master's Degrees: one in Statistics and Analytics, and one in Electrical and Computer Engineering. Ayush Sharma Decl. ¶¶ 2, 5. Under four scenarios, he relied on the Census Bureau's enumerated data, the Sentencing Project's expert report, and the *Franks* court's findings. *Id.* ¶¶ 9-12. Data Scientist 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 and calculated each states' bases of representation, via the method of equal proportions, under three more scenarios. *Id.* ¶¶ 14-16.

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 on applying the Amendment's equation and the method of equal proportions. *See id.* 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) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Citizens moved again for summary judgment. ECF No. 22. The Census Bureau moved again to dismiss and moved in limine. ECF Nos. 23, 24.

STANDARD OF REVIEW

In ruling on motions to dismiss, courts "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). To rule on a motion to dismiss for failure to state a claim, courts look to the pleading standards in Federal Rule of Civil Procedure 8(a)(2). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007). That Rule only requires plaintiffs to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Courts deny motions to dismiss when a complaint "give[s] the defendant fair notice of what the claim is and the grounds

upon which it rests." *Id.* at 555 (quotations and alterations omitted). In deciding whether to dismiss an action failing to state a claim under Rule 12(b)(6), courts assume the factual allegations in complaints as true—even if the court doubts them. *Id.* at 555-56.

Motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) require this Court to consider whether a plaintiff has met its burden of establishing the Court's jurisdiction over the claim. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). At this stage, a plaintiff need not make detailed allegations because courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

ARGUMENT

Congress assigned the Census Bureau the "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." *New York*, 139 S. Ct. at 2568-69 (quotations omitted) (citing 2 U.S.C. § 2a and 13 U.S.C. § 141). Despite that duty, the Census Bureau admitted it did not complete the Amendment's process. ECF No. 20-1.

Of course, the Constitution prohibits Congress from assigning agencies to accomplish objectives in unconstitutional ways. "When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935); *see St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936) ("Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that

the agent has kept within that limitation."); *see also N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) ("when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies . . . . No comparable justification exists, however, when the right being adjudicated is not of congressional creation."). Thus, when Congress made the apportionment process self-executing, it required the Census Bureau to comply with the Amendment. The Constitution compels these intransigent agencies to satisfy their constitutional duties.

I. Citizens showed some possibility that completing the Amendment process would remedy members' vote dilution.

The Census Bureau claims the Amended Complaint's allegations fail to demonstrate Article III standing. But the Supreme Court recognizes standing when plaintiffs calculate a reapportionment based on a different legal interpretation. *Franklin*, 505 U.S. at 802; *see U.S. House of Representatives*, 525 U.S. at 330-31.

The Census Bureau does not acknowledge Citizens' procedural-injury claim. Citizens demonstrated Article III standing by connecting the flawed procedure and Citizens' vote-dilution injury. "When a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (emphasis added).

If the Census Bureau completed the Amendment's process by calculating bases of representation for Wisconsin's photo voter ID law and for every state's voter registration rate, it would reconsider its apportionment, and some possibility exists

that it could apportion additional seats to Citizens' home states. Article III "standing does not require precise proof of what the [agency's] policies might have been in that counterfactual world." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010). This Court can remedy Citizens' injury by setting aside the Census Bureau's apportionment and directing it to redo the calculations. *See Utah*, 536 U.S. at 459-64. Article III requires nothing more.

An organization like Citizens 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 satisfy the second and third elements because they seek to improve democratic elections, and because no member needs to participate in this lawsuit. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).

The Census Bureau challenges the first element. Mem. of Law in Supp. of Defs.' Mot. to Dismiss (Defs.' Br.) 7-12, ECF No. 24-1. Under 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). In analyzing standing, courts assume plaintiffs succeed on the merits of their legal 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 Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *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").

A motion to dismiss on Article III standing thus requires courts to assume plaintiffs are correct on the facts *and* correct on the law. *See Twombly*, 550 U.S. at 555. To test Article III standing here, this Court will assume

- The Amendment requires the Census Bureau to calculate bases of representation,
- Wisconsin's photo voter ID law abridges its citizens' rights to vote, and
- Voter registration laws deny unregistered citizens their rights to vote.

Am. Compl. ¶¶ 59-68. It will assume Mr. Sharma's calculations demonstrate that implementing the Amendment could add seats to Citizens' home states. Those assumptions compel the conclusion that Citizens demonstrated Article III standing.

A. The Supreme Court recognizes census-driven vote dilution as injury.

For their concrete injury, Citizens allege a routine vote-dilution injury. 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." *U.S. House of Representatives*, 525 U.S. at 331; *Utah*, 536 U.S. at 459-61. Voting is "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Citizens allege the Census Bureau diluted Citizens' votes because the Amendment entitles their home states to additional seats. *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; Kristin Keeling Decl. ¶ 2. Those facts demonstrate injury. *See U.S. House of Representatives*, 525 U.S. at 330-31.

B. Citizens demonstrate traceability because the Amendment process connects to apportionment, and apportionment connects to Citizens' vote-dilution injury.

Article III recognizes Citizens' injury fairly traces to the Amendment because Citizens allege the procedural flaw (failing to implement the Amendment) connects to the apportionment, and the apportionment connects to Citizens' vote-dilution injury. Citizens need only show two connections: (1) between the procedure and the decision and (2) between the decision and the injury. *WildEarth Guardians*, 738 F.3d at 306; *see Massachusetts v. EPA*, 549 U.S. at 518; *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

The Census Bureau effectively admits that completing the Amendment process could change the apportionment in the Commerce Report. It recognizes that even small changes could move seats to New York, which lost a seat by only 100 residents. Defs.' Br. 11. That admission connects the procedural violation to the apportionment decision. The apportionment determines the number of seats in each state via the method of equal proportions, and thereby connects to Citizens' vote-dilution injury. *See* 2 U.S.C. § 2a(a). Those two connections satisfy the fair traceability requirement in Article III—even without any mathematical calculations. *See Massachusetts v. EPA*, 549 U.S. at 518; *WildEarth Guardians*, 738 F.3d at 306; *Sugar Cane Growers*, 289 F.3d 89, 94-95.

The natural analogy arises from environmental impact statements under National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 to 4370m-12.

NEPA claims present the "archetypal procedural injury: an agency's failure to prepare a statutorily required environmental impact statement before taking action with potential adverse consequences to the environment." *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). In procedural injury cases, the plaintiff need not "demonstrate that (1) the agency action would have been different but for the procedural violation, [or] (2) that court-ordered compliance with the procedure would alter the final result." *Id.*

Summers presents an example of a minor procedural injury for which the Supreme Court recognized Article III standing. 555 U.S. at 497. There, the plaintiffs claimed (1) that the Forest Service illegally denied their right to comment on (2) a decision to approve a timber sale project in which (3) the approval would harm the plaintiffs' "concrete plans to observe nature in that specific area." *Id.* Although the Supreme Court did not expect plaintiffs' comment to make any difference in the decision, it recognized those plaintiffs' standing because the procedural violation connected to the decision, and the decision connected to the injury. *Id.* Nonetheless, a settlement had resolved the injury before the lawsuit reached the Supreme Court, so the Court dismissed the case. *Id.* at 494-95.

Here, like there, Citizens need not prove the Census Bureau would have reached a different result if it had complied with the Amendment, and it need not demonstrate that completing that process would cure Citizens' injuries. The Census Bureau attacks Citizens' proof on those two issues, but those arguments are irrelevant. Citizens easily satisfy Article III.

The Census Bureau quotes *National Law Center on Homelessness v. Kantor*, 91 F.3d 178 (D.C. Cir. 1996), to require plaintiffs to show "what effect any methodology for counting the homeless would have on the" alleged injury. Defs.' Br. 9. That 1996 case flipped the Article III burden. In *Kantor*, the court dismissed the case for lack of Article III standing because it was (a) "not clear" that the requested process would change the result, (b) "likely" even a better process would make "absolutely no difference," and (c) possible the plaintiffs "may have gained nothing" after the process. 91 F.3d at 183-86. That case applies the wrong standard of review. Article III does not require plaintiffs to define precisely an agency's policies in the "counterfactual world," or how those policies would affect the plaintiffs. *Free Enter.*, 561 U.S. at 512 n.12. It only requires plaintiffs to show "some possibility" that they may gain something. *Massachusetts v. EPA*, 549 U.S. at 518 ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." (quotations omitted)); *Summers*, 555 U.S. at 497.

To refute Article III standing, the "some possibility" standard requires the Census Bureau to prove the negative: completing the Amendment's procedure could never cure Citizens' vote-dilution injury. Of course, "as a practical matter it is never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). The Census Bureau does not even try to meet its burden. It just seeks to undermine Citizens' proof, which only confirms the logical results.

1. Mr. Sharma calculated reapportionment according to the Amendment.

Instead of seeking to demonstrate no possibility the Amendment process could ever result in more seats in Citizens' home states, the Census Bureau asserts five times that the facts underlying Citizens' Article III standing are not "plausible." Defs.' Br. 2, 8, 9, 10. If arithmetic cannot prove plausibility, nothing can.

As shown above, Article III does not require those calculations. Nonetheless, the calculations confirm the connection between the apportionment and Citizens' vote-dilution injuries. To make those calculations, Data Scientist Ayush Sharma relied on the Census Bureau's data and apportionment method. Sharma Decl. ¶¶ 8-10. Thus, the Census Bureau is assaulting the integrity of its own data and methods. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019) (recognizing Article III standing based on the Census Bureau's "own documents" and "expert testimony, based in large part on the Census Bureau's own analyses of past censuses"). Ultimately, the simple, easily reproduceable, arithmetic results confirm some possibility that completing the Amendment process could cure Citizens' vote-dilution injuries.

Mr. Sharma confirmed the connection between the Amendment and Citizens' vote-dilution injury by calculating the apportionment based on three scenarios. In each scenario, he used the Amendment's equation to calculate the respective states' bases of representation, and then apportioned seats using the method of equal proportions. *Id.* ¶¶ 8-16; *see U.S. House of Representatives*, 525 U.S. at 330-31 (approving that method to show standing). He input the Census Bureau's own data, a study by the Sentencing Project, and a U.S. District Court's factual finding. *Id.*

Data Scientist Sharma's declaration describes his step-by-step analysis that Census Bureau statisticians could easily replicate.

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 in the U.S. House of Representatives. *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. Each set of calculations, independently, proves the connection between the Census Bureau's illegal process and the vote-dilution injury. That satisfies traceability. *See Massachusetts v. EPA*, 549 U.S. at 518; *WildEarth Guardians*, 738 F.3d at 306; *Sugar Cane Growers*, 289 F.3d 89, 94-95.

2. Courts routinely rely on mathematical calculations in apportionment and census cases.

Without evidence or analysis, the Census Bureau argues this Court can simply reject mathematical calculations. It argues that "any calculation . . . should be rejected out of hand," "the calculation . . . is unreliable," and Data Scientist Sharma's calculations reflect "little more than statistical guesswork." Defs.' Br. 9,

11, 12. But mathematical calculations always form the basis of apportionment cases. *Reynolds v. Sims*, 377 U. S. 533, 566 (1964) ("our oath and our office require no less of us" than to brave mathematical calculations). In other census cases, the parties have agreed on method of equal proportions calculations, or the Supreme Court has relied on the plaintiff's calculations. *Utah*, 536 U.S. at 458 ("the parties agree that that difference [resulting from different apportionment methods] means that North Carolina will receive one more Representative"); *Franklin*, 505 U.S. at 802 ("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).

The Census Bureau fails to carry its burden of demonstrating that completing the Amendment procedure would never move seats to Citizens' home states.[3] *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 604 (rejecting the Census Bureau's "ambitious objections to traceability"). Although a court determines plausibility by "draw[ing] on its experience and common sense," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), arbitrary disbelief in arithmetic does not qualify as "common sense." *See Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (recognizing courts competently enforce "mathematical or logical"

[3] The Census Bureau relies on *Sharrow v. Brown*, for a requirement that a plaintiff "show, at least approximately, the apportionment his interpretation of [the Amendment] would yield, not only for New York but for every other State as well." 447 F.2d 94, 97 (2d Cir. 1971); Defs. Br. 9-10. Mr. Sharma's calculations do just that in three scenarios. Sharma Decl. ¶¶ 21-26.

limits) (*quoted approvingly by Buckley v. Valeo*, 424 U.S. 1, 83 n.111 (1976)). Citizens' detailed, "well-pleaded factual allegations" compel this Court to "assume their veracity . . . ." *Iqbal*, 556 U.S. at 679. Assuming the mathematical calculations are true, as this Court must, they confirm some possibility that the Census Bureau's failure to complete the process in the Amendment could apportion more seats to Citizens' home states. *See Massachusetts v. EPA*, 549 U.S. at 518.

The Census Bureau contends that "careful calibration is required" for the census because small changes can move seats. Defs.' Br. 11. It refers to the "100 people" that cost New York a seat. *Id.* That thin error only magnifies the likelihood that implementing the Amendment would increase New York's number of seats. *See A Cmty. Voice v. EPA*, 997 F.3d 983, 993 (9th Cir. 2021) ("Courts have recognized that an agency cannot rely on uncertainty as an excuse for inaction.").

The Census Bureau demands scrutiny to ensure that the claims "were not based on mere guesswork." Defs.' Br. 11. It mixes up its case law. The Supreme Court applies the term "guesswork" to *pre*-apportionment—not *post*-apportionment—litigation. *Trump*, 141 S. Ct. at 536. This completed apportionment clears up the "contingencies and speculation that impede judicial review." *See id.* at 535. The Census Bureau relies on two pre-apportionment cases (*New York*, 139 S. Ct. at 2565, and *U.S. House of Representatives*, 525 U.S. at 330), and one case in which the parties agreed on the reapportionment calculations (*Utah*, 536 U.S. at 458). Defs.' Br. 11. In contrast, the completed 2020 apportionment here makes demonstrating injury easier because it does not depend on so many "contingent" predictions.

Trump, 141 U.S. at 535-37.[4] By awaiting the final apportionment, Citizens let "the Executive Branch's decisionmaking process run its course," and that brought "more manageable proportions to the scope of the parties' dispute . . . ." *Trump*, 141 S. Ct. at 536 (quotations and citations omitted).

The Census Bureau argues that the margins of error in its own data makes its own "reports for the purposes of estimating apportionment . . . highly dubious." Defs.' Br. 11; *but see New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 582 ("[the Census Bureau's] argument fails because it relies heavily on misguided criticism of the Census Bureau's own research."). The Supreme Court already rejected that argument: "mathematical exactness is not required" for apportionment plans—even when apportioning government agencies have broad access to voluminous data and resources. *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Wesberry*, 376 U.S. at 18 ("it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective . . . ."). It recently approved, as "generally permissible," margins of error of five percent from the one-person, one-vote "ideal." *Ala. Black Legislative Caucus v. Alabama*, 575 U.S. 254, 259 (2015). The Census Bureau has failed to prove the margins of error here prevent it from complying with the Constitution. Crediting its

[4] The Census Bureau relies on *Federation for Am. Imm. Reform v. Klutznick*, 486 F. Supp. 564, 574 (D.D.C. 1980), as an example of plaintiffs only speculating as to which states might gain and lose representation. But in that pre-apportionment case, the court specifically recognized the plaintiffs could prove standing post-apportionment. *Id.*

argument would not meet "the high standard of justice and common sense which the Founders set for us." *Wesberry*, 376 U.S. at 18.

The Census Bureau argues that "deliberate imprecision" could "eliminat[e] the injury-in-fact requirement in census and apportionment cases." Defs.' Br. 12. Its slippery-slope argument finds no purchase. Federal courts routinely rule on apportionment claims, and the Census Bureau has shown no bad faith or courts' inability to address bad-faith allegations. Moreover, the Census Bureau identified no deliberate imprecision here. Citizens relied on the Census Bureau's data and the Census Bureau's method, one expert study, and a district court's findings after a two-week trial. Sharma Decl. ¶¶ 8-12; *Frank*, 17 F. Supp. 3d 837, 842. Its speculative doomsday predictions have no place in apportionment cases.

3. Article III requires recognizes injury from asserting one state's laws required the Census Bureau to act.

The Census Bureau contends that, to prove redressability, the Constitution requires Citizens to complete a fifty-state survey of all voter-eligibility laws, to calculate exactly how many citizens states denied or abridged their rights to vote, and then to complete the mathematics to reapportion the seats according to the method of equal proportions. Defs.' Br. 9. The Supreme Court used a lower burden 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. It did not require the plaintiff to prove exactly what would happen if the Census Bureau reapportioned to cure the alleged legal violation. *Id.*

The Census Bureau applies the wrong standard. As in *Franklin*, the Supreme Court rejects any requirement for demanding proof of a "counterfactual world." *Free Enter.*, 561 U.S. at 512 n.12; *Massachusetts v. EPA*, 549 U.S. at 518. No one can know the results of the Census Bureau's implementation of the Amendment because it never completed that process. As shown above, the Amendment process connects to apportionment, and apportionment connects to Citizens' vote-dilution injuries. Mr. Sharma's calculations confirm "some possibility" that completing the Amendment's process could cure Citizens' vote dilution. That is all Article III requires. *See Massachusetts*, 549 U.S. at 518; *Summers*, 555 U.S. at 497.

The Census Bureau disputes Citizens proved injury from failing to classify Wisconsin's photo voter ID law as an abridgment. Defs.' Br. 9. Pointing to twenty other states with photo voter ID laws, the Census Bureau contends that Article III requires Citizens to account for all of them—as if a more legally flawed process makes Article III standing more difficult to establish. It makes no sense for an agency to escape justice by contending it is violating the law in even more ways than plaintiffs contend. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 622 ("it would be perverse to suggest that merely because the background context . . . will *exacerbate* its negative effects, that the decision is somehow not itself a cause of those effects").

Citizens need not prove anything about the Census Bureau's failure to designate, as abridgements, states' photo-voter-ID requirements beyond Wisconsin because Citizens do not make those legal arguments. As the masters of their

complaint, nothing requires Citizens to make legal challenges they are not making. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 n.7 (1987). Each state's laws have their own idiosyncrasies and effects. *See Frank*, 773 F.3d at 784-85 (Posner, J., dissenting from a denial of a petition for rehearing en banc) (listing the "not trivial differences between" Wisconsin's laws and Indiana's laws). The Census Bureau is speculating that applying the Amendment to all states would have different results, and Citizens need not refute that speculation to demonstrate Article III standing. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 78 (1978) ("Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate . . . speculative and hypothetical possibilities . . . to demonstrate the likely effectiveness of judicial relief.").

Even if this Court for some reason requires more proof than a simple connection between the apportionment and Citizens' vote-dilution injuries to require a ruling on their two claims, Mr. Sharma's calculations demonstrate standing based on their argument that voter registration requirements qualify as abridgments. Sharma Decl. ¶ 14, 21-22; Am. Comp. ¶ 61; *see Massachusetts v. EPA*, 549 U.S. at 518. That proof allows Citizens to bring their arguments over Wisconsin, too. Article III does not allow the Census Bureau to divide and conquer the arguments over a single claim. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."). If Citizens have standing to make the voter registration *arguments*, they can make

every argument in support of their *claim* that the Amendment required the Census Bureau to calculate bases of representation. *See id.*

At bottom, because Citizens brought a procedural violation claim that connects to a decision, and that decision connects to their vote-dilution injury, voluminous precedent prohibits courts from requiring Citizens to prove the apportionment if the Census Bureau satisfied its duty under the Constitution. *See Massachusetts v. EPA*, 549 U.S. at 518; *WildEarth Guardians*, 738 F.3d at 306; *Nat'l Parks Conservation Ass'n*, 414 F.3d at 5; *Sugar Cane Growers*, 289 F.3d 89, 94-95.

C. The Supreme Court concluded that courts can redress harms fairly traced to Commerce Reports.

For the redressability element of Article III standing, the Supreme Court already decided that courts can redress claims the Census Bureau issued an incorrect apportionment report. After 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. That possible outcome here satisfies Article III redressability. *See id.*

II. The APA provides the framework for reviewing the Census Bureau's final agency actions under Congress's 1997 Act.

The Census Bureau argues that, in the 1992 case of *Franklin*, the Supreme Court concluded that the Commerce Report on apportionment to the President under 13 U.S.C. § 141 does not qualify as a final agency action under the APA. Defs.' Br. 12-13. But the Census Bureau does not account for Congress passing a

statute five years later, Section 209(b) in 1997, to give plaintiffs like Citizens a cause of action to challenge the Commerce Report. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) (recognizing that Supreme Court "interpretive decisions, in whatever way reasoned" are subject "to congressional change."). Under the APA, the Census Bureau bears the burden of demonstrating that, under the new statute, Section 209(b), Congress intended to prohibit Citizens from bringing this claim under the APA. *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (recognizing "the strong presumption in favor of judicial review," and, requiring to overcome that presumption, a "clear and convincing indication that Congress meant to foreclose review" (quotations omitted)). Section 209(b) demonstrates the exact opposite; it shows Congress intended to expand judicial review.

The APA applies not only to final agency actions, but also to "[a]gency action made reviewable by statute." 5 U.S.C. § 704; *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 285 n.9 (D.C. Cir. 1983) ("5 U.S.C. § 704 makes judicial review available for two categories of agency action"). Section 209(b) makes the 2020 census an agency "action reviewable by statute." The APA applies.

As the Supreme Court overturned a Census Bureau decision a few years ago, it observed that the APA "embodies a basic presumption of judicial review . . . ." *New York*, 139 S. Ct. at 2567 (quotations omitted). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. 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. "[L]egal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

"The APA was meant to bring uniformity to a field full of variation and diversity." *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). As its "central purpose," the APA "provid[es] a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). To that end, the APA contains "generous" and "comprehensive provisions" for judicial review. *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting 5 U.S.C. § 704); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("the [APA's] generous review provisions must be given a hospitable interpretation." (quotations omitted)).

Here, Congress's process contains two parts: one agency action, the Commerce Report to the President, 13 U.S.C. § 141, and one presidential action, the Presidential Statement to Congress. 2 U.S.C. § 2a(a). In *Franklin*, five justices held that the two statutes made these two processes effectively the same action: a recommendation by the Census Bureau, and a determination by the President. 505 U.S. at 796-801. Because the APA does not allow plaintiffs to challenge the

President's actions, the Court concluded, plaintiffs could not challenge the Commerce Report as a final agency action. *Id.* Nonetheless, the Court held that it could review the constitutional claims directly. *Id.* at 801. It reviewed the agency action on the merits because the plaintiff's vote-dilution "injury alleged is likely to be redressed by declaratory relief against the Secretary alone." *Id.* at 803.

Franklin carries no weight on Section 209(b) because that 1997 statute did not exist in 1992. Since *Franklin*, Congress re-divided the two processes. It expanded access to courts so that, in 2019, the Supreme Court recognized that "courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *New York*, 139 S. Ct. at 2568. Regardless of *Franklin*, the plain text of the APA and the plain text of Section 209(b) require this Court to apply the APA to Citizens' claims.

Section 209(b) applies here because the Census Bureau used an invalid counting method of apportioning seats in the U.S. House of Representatives. Congress 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). The Supreme Court interprets that section to refer to any "counting method[]." *See Utah*, 536 U.S. at 463. Determining the apportionment without completing the Amendment process qualifies as a counting method. Therefore, Section 209(b) entitles Citizens to "a civil action [to]

obtain declaratory, injunctive, and any other appropriate relief against the use of such method." *See id.* at 462-63.

Section 209(b) does not direct any particular method of review, so the APA acts as the default procedure. By its plain text, the APA applies not only to final agency actions, but also to "[a]gency actions made reviewable by statute," like this one. 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *Abbott Labs.*, 387 U.S. at 140. "[O]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. Here, Congress did not intend to *restrict* access to judicial review in Section 209(b), but intended to *expand* plaintiffs' access to courts. The APA requires this Court to analyze Section 209(b) claims under the APA. *See* 5 U.S.C. § 704.

III. If the APA does not compel relief, the Constitution, Section 209(b), and the Mandamus Act entitle Citizens to a writ of mandamus.

The Census Bureau also argues that this Court has no jurisdiction to issue a writ of mandamus because the Census Bureau owes Citizens no non-ministerial duty. To the contrary, if the APA does not apply, this Court has jurisdiction under the Constitution, Section 209(b), and the Mandamus Act, 28 U.S.C. § 1361, separately and independently, to issue a writ of mandamus. *See* Fed. R. Civ. P. 8(d)(2) ("If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

Franklin recognized a general constitutional claim to challenge census decisions. 505 U.S. at 801 ("Constitutional challenges to apportionment are justiciable."). The Supreme Court recognized that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power . . . ." *Id.* at 802. The Census Bureau can never defeat that cause of action arising directly under the Constitution. *See id.* It does not even try. It quibbles over procedural mechanics, but that does not entitle it to dismissal.

Two statutes also provide a cause of action. Section 209(b) authorizes a writ of mandamus by its plain text. It allows plaintiffs to "obtain declaratory, injunctive, and any other appropriate relief against" the Census Bureau using an unconstitutional statistical method "to determine the population for purposes of the apportionment or redistricting of Members in Congress." Here, the Census Bureau used no valid statistical method to implement the Amendment. The Amendment directs that the United States "shall" reduce a state's "basis of representation" when that state denies or abridges (except for participation in rebellion, or other crime) its citizens' rights to vote. The Census Bureau has no discretion to decline to complete that process. *See SAS Inst.*, 138 S. Ct. at 1354 ("The word 'shall' generally imposes a nondiscretionary duty."). Under Section 209(b), a writ of mandamus qualifies as "injunctive" or "other appropriate relief" against the Census Bureau. This Court need look no farther than that.

The Mandamus Act also authorizes district courts, "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to

perform a duty owed to the plaintiff." 28 U.S.C. § 1361. To obtain a writ of mandamus, "the person applying for it must be without any other specific and legal remedy." *Marbury v. Madison*, 5 U.S. 137, 169 (1803). If the APA does not apply, then Citizens have no other specific and legal remedy.

Recognizing jurisdiction to issue a writ of mandamus here will "avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quotations omitted). Usually, the APA catches every residual claim "for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Japan Whaling*, 478 U.S. 221, 230 n.4. For that reason, courts usually have no need to resort to writs of mandamus to agencies. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). But if no claim lies under the APA,the Constitution, Section 209(b), and 28 U.S.C. § 1361 separately and individually authorize this Court to issue a writ of mandamus. *See Franklin*, 505 U.S. at 801 ("Although the reapportionment determination is not subject to review under the standards of the APA, that does not dispose of appellees' constitutional claims.").

The Census Bureau argues that Citizens have not exhausted their other avenues of relief by "attempt[ing] to persuade Congress and the Executive to redo apportionment." Pls.' Br. 15. It relies on *Heckler v. Ringer*, but that case only required plaintiffs to exhaust their administrative remedies. 466 U.S. 602, 616 (1984). Citizens exhausted their administrative remedies by sending a letter to the Census Bureau, which rejected their request out of hand. ECF No. 1-2. Regardless,

courts require no exhaustion of constitutional claims. "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Contrary to the Census Bureau's contention, Defs.' Br. 15, nothing in *Heckler* requires resort to Congress before obtaining a writ of mandamus because Congress already resolved these issues. Congress "made the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census." *Montana*, 503 U.S. at 452. The Census Bureau cites no authority that requires more.

By asking this Court to dismiss because the Constitution assigned responsibility for the Amendment to the other, political branches, the Census Bureau makes a political question doctrine argument. *See Zivotofsky v. Clinton*, 566 U. S. 189, 195 (2012). But the Supreme Court rejected both arguments (1) that apportionments present political questions and (2) that census calculations do. *Baker*, 369 U.S. 217; *Montana*, 503 U.S. at 458-59. This argument has no legal basis.

The Census Bureau contends that the writ only applies in extraordinary circumstances, and these do not qualify. Defs.' Br. 13-14. They fail to apprehend the magnitude of their legal violations. The Census Bureau has failed to comply with the Constitution since Congress made the process self-executing in 1929. Act of June 18, 1929, § 2. Courts have never substantively addressed the Census Bureau's egregious lapse of duty. Moreover, very few legal violations lie outside the broad,

generous, and hospitable provisions of the APA, and if no jurisdiction lies under that statute, that would also make this situation extraordinary. *See Franklin*, 505 U.S. at 801; *Abbott Labs.*, 387 U.S. at 141. This case compels a writ of mandamus to force the Census Bureau finally to comply with its duty. *See Franklin*, 505 U.S. at 801; *Weyerhaeuser*, 139 S. Ct. at 370 (asserting broad jurisdiction to cure agency errors, because, otherwise, agencies may never act).

The Census Bureau argues that the Census Bureau owes no duty to Citizens. Defs.' Br. 14. By referring to "Defendants' only statutory duty" in 13 U.S.C. § 141, it ignores its constitutional duty. *Id.* By using the word "shall," the Amendment assigned a duty to the Census Bureau and to every agency and branch of the United States government to reduce states' bases of representation when states deny or abridge their citizens' rights to vote. *See SAS Inst.*, 138 S. Ct. at 1354 (holding the word "shall" imposes a duty). The Framers passed the Amendment to strengthen union states' representation in the U.S. House of Representatives if rebel states did not enfranchise all of their citizens. "[R]epresentation does not belong to those who have not political existence, but to those who have. The object of the amendment is to enforce this truth." CG358.

The Census Bureau relies on *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C. 1965), for the proposition that the census statutes do not assign the Census Bureau any duty to Citizens. Defs.' Br. 15. That case contradicts *Marbury v. Madison* and fails to account for the 1997 statute. Under the writ, 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 . . . ." *Marbury v. Madison*, 5 U.S. at 170-71. Implementing the Amendment would affect Citizens' individual voting rights. The "rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual . . . ." *Reynolds*, 377 U.S. at 562 n.39 (quotations omitted). The Framers intended to protect voters by apportioning more seats to states that allow more citizens to vote. CG358. The Amendment thus assigned a duty to the Census Bureau to protect Citizens' votes against vote-dilution. Under *Marbury v. Madison*, courts have a duty to issue the writ.

In addition, the 1997 Congress assigned the Census Bureau a statutory duty in Section 209(d). Act of Nov. 26, 1997 § 209(d). Congress defined "an aggrieved person" to include "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" under Section 209(b). Congress assigned the Census Bureau a duty.

The Census Bureau mischaracterizes Citizens' request as asking this Court to act "as a 'super agency' controlling or overseeing the discretionary affairs of" the Census Bureau. Defs.' Br. 15 (quotations omitted). Citizens seeks nothing like that. They ask this Court to mandate the Census Bureau to complete the Amendment procedure—not to reach a particular outcome. Courts can issue writs of mandamus to direct agencies to act "without directing how the agency shall act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) (quotations and alterations omitted).

The Census Bureau contends that mandamus lies only for ministerial duties for which the agency lacks discretion. Defs.' Br. 15. But it already acknowledged

calculating apportionment as a ministerial duty. Br. for the Appellants 26, *Trump*, No. 20-366. Moreover, the Supreme Court rejects similar arguments. It held that "mandamus will lie even though the act required involves the exercise of judgment and discretion." *Norton*, 542 U.S. at 66 (quotations and alterations omitted); *Roberts v. United States*, 176 U.S. 221, 231 (1900) ("Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one.").

If the APA does not provide relief, the Constitution, Section 209(b), and the Mandamus Act entitle Citizens to a writ of mandamus for this blatant violation of the Constitution. *See Franklin*, 505 U.S. at 801-02; *Roberts*, 176 U.S. at 231 ("Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted.").

CONCLUSION

For the foregoing reasons, Citizens have demonstrated Article III standing, that the APA applies to their claims, and that this Court can issue a writ of mandamus. The Court can only deny the Census Bureau's motion to dismiss.

Respectfully submitted, May 27, 2022,

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