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

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Section 2 of the Fourteenth Amendment provides that if States "den[y] . . . or in any way abridge[]" the "right to vote" they shall have their apportionment base (and very likely their number of Representatives) proportionally reduced. U.S. Const. amend. XIV, § 2. This provision was initially designed to prevent former Confederate "States from acquiring too much power in the National Government." *Evenwel v. Abbott*, 578 U.S. 54, 102 (2016) (Alito, J., concurring). To this day, however, the provision has never been enforced. Congress, of course, remains free to change that. Just as Congress has exercised its power under the Fifteenth Amendment to protect against race-based discrimination in voting, Congress could exercise its power to enforce the Fourteenth Amendment's § 2.

But Congress's inaction is not a basis for this Court to issue a decision forcing the Secretary of Commerce to revise her report on the decennial census—which has already been used to calculate the number of Representatives apportioned to each State for the next decade—in the hope that Congress and the President will give effect to that revised report. A similar attempt was rejected almost 60 years ago. *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C 1965), *aff'd,* 360 F.2d 505 (D.C. Cir. 1966). And this Court should reject it again.

As a threshold matter, there is a substantial question whether § 2 of the Fourteenth Amendment is enforceable by the courts. Multiple Circuits have concluded that the enforceability of that provision is a non-justiciable political question. *Dennis v. United States*, 171 F.2d 986, 993 (D.C. Cir. 1948), *aff'd*, 339 U.S. 162 (1950); *Saunders v. Wilkins*, 152 F.2d 235, 238 (4th Cir. 1945), *cert. denied*, 328 U.S. 870, (1946). In any event, Plaintiff lacks standing to bring this claim because its injuries are highly speculative.[1]

[1] Defendants reserve the right to address other justiciability deficiencies with Plaintiff's complaint, including the political question doctrine and redressability. *See, e.g.*, *Dennis*, 171 F.2d at 993; *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020).

Standing aside, Plaintiff brings a claim under the Administrative Procedure Act and asks for an extraordinary writ of mandamus, but neither is a viable route to remaking the House of Representatives by judicial fiat. On the former, the Supreme Court's decision in *Franklin v. Massachusetts* straightforwardly bars APA review of the Secretary's decennial-census report. 505 U.S. 788, 797 (1992). "After receiving the Secretary's report, the President is to 'transmit to the Congress a statement showing the whole number of persons in each State as ascertained under the decennial census of the population." *Id.* (quoting 2 U.S.C. § 2a(a) (alterations omitted)). And "[b]ecause it is the President's personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge." *Id.* at 799. Plaintiff's mandamus claim suffers similarly incurable obstacles. Not only does Plaintiff fail to meet the mandamus factors—a clear right to relief, defendants' clear duty to act, no other adequate remedy, and compelling equitable grounds—but the plain terms of the mandamus statute do not apply because no "officer or employee of the United States or any agency thereof" owes a duty "to the plaintiff." 28 U.S.C. § 1361.

The Court should dismiss Plaintiff's complaint for lack of standing or, in the alternative, for failure to state a claim and lack of jurisdiction to invoke mandamus.[2]

BACKGROUND

I. The Constitution's, and Congress's, chosen method of apportionment.

The Fourteenth Amendment requires apportionment of Representatives among the several States "according to their respective Numbers." U.S. Const. amend. XIV, § 2. "Because the Constitution provides that the number of Representatives apportioned to each State determines in part the allocation to each State of votes for the election of the President," this apportionment "also affects the allocation of members of the electoral college." *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996). The Framers "believed the correct apportionment of

[2] As the Court is aware, Plaintiff has now moved for summary judgment on its claims. *See* Pls. Mot. Sum. J., ECF No. 14. Defendants are responding to that motion in a concurrent filing. In the interest of judicial economy, the Court should defer ruling on Plaintiff's summary-judgment motion until it has resolved this motion to dismiss.

political power would be the 'fundamental [] instrument' of [a] republican government." *Nat'l Ass'n for Advancement of Colored People v. Bureau of Census*, 382 F. Supp. 3d 349, 356 (D. Md. 2019) (internal quotes and citation omitted). To "ensure that entrenched interests in Congress did not stall or thwart needed reapportionment," *Franklin*, 505 U.S. at 791, the Framers required an "actual Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct," U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV § 2. Under these provisions, Congress has "virtually unlimited discretion in conducting" this required "decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19 (quoting U.S. Const. art. I, § 2, cl. 3).

Just as Article I leaves to Congress the choice how to conduct the census, so too it leaves to Congress the task of apportionment. Prior to the enactment of the Fourteenth Amendment, Article I specified only that "the number of Representatives shall not exceed one for every 30,000 persons; [that] each State shall have at least one Representative; [that] district boundaries may not cross state lines," and—infamously—that enslaved people shall be counted for less that whole persons. *U.S. Dep't of Com. v. Montana*, 503 U.S. 442, 447–48 (1992). The exact manner of calculating apportionment under those parameters was not specified—and Congress varied its methods over time, passing special apportionment acts after each census. *Id.*

Following the Civil War and the enactment of the Thirteenth Amendment, Congress sought ways to restrict the Congressional power of the Confederate states upon their readmission. *See Evenwel*, 578 U.S. at 99–101 (Alito, J., concurring). During debates on the draft of the Fourteenth Amendment, Congress considered various methods by which apportionment could be recalculated to ensure that Southern States did not gain seats in Congress while continuing to deny their newly freed citizens the right to vote. *Id.* Ultimately, Congress settled on language that became § 2 of the Amendment. This language providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State," but specifies that "when the right to

vote at any" specified election "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" proportionally. U.S. Const. amend. XIV, § 2 (emphasis added).

From the start, however, Congress could not agree on how to implement the provision—or even what data should be collected to do so. *See* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. Chi. Legal F. 279, 324-28 (2015).[3] Following the ratification of the Fourteenth Amendment, the House Select Committee on the Census produced a report identifying various types of voting restrictions across the different states. H.R. REP. NO. 41-3, at 52-53, 71-93 (1869-70); Pls. Mot. Sum. J Br., ECF No. 14-1 at 30 (Pls. Br.). Notably, as historians have observed, the categories identified by the committee were but a subset of "procedural requirements" that were prevalent at the time, such as "cumbersome registration procedures," and requirements concerning "proof of citizenship." Morley, 2015 U. Chi. Legal F. at 327 (internal quote and citation omitted). Moreover, the committee reported a bill requiring the Interior Department to count the number of eligible voters affected by these requirements as part of the 1870 census and reduce States' bases for representation accordingly. CONG. GLOBE, 41st Cong., 2d Sess. 38 (Dec. 8, 1869) (statement of Rep. Garfield); *Id.* at 40 (Dec. 8, 1869) (statement of Rep. Hoar). Yet that requirement was not enacted. CONG. GLOBE, 41st Cong., 2d Sess. 40 (Dec. 8, 1869) (statement of Rep. Hoar); *id.* at 127 (Dec. 14, 1869). And when the Secretary nevertheless reported his own statistics for how many citizens he determined to have been improperly disenfranchised, Congress refused to give those numbers effect. *See* CONG. GLOBE, 42nd

[3] Members of Congress did not appear to view § 2 as self-executing. Representative Thaddeus Stevens, a staunch supporter of § 2 who viewed it as "the most important" part of the Fourteenth Amendment, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (May 8, 1866), noted that it "will not execute itself." *Id.* at 2544 (May 10, 1866). Once the amendment "becomes a law," he admonished, Congress "must legislate to carry out many parts of it . . . [and] must legislate for the purpose of ascertaining the basis of representation." *Id.*

Cong., 2d Sess. 670 (Jan. 29, 1871) (statement of Sen. Morrill). So following the 1870 census, Congress reapportioned without discounting any State's apportionment base for reported denials or abridgement of the right to vote. *See* Morley, 2015 U. Chi. Legal F. at 327.

Similar fate awaited legislative proposals at the turn of the 20th century that would have required the director of the census to furnish statistical information for purposes of implementing § 2. Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 Ala. L. Rev. 433, 474-77 (2015) (discussing three efforts to implement § 2). Those proposals also failed "[d]espite the wealth of evidence that hundreds of thousands of voters were being disenfranchised" across the Southern states. *Id.* at 477. In the face of massive voter disenfranchisement, Congress continued to apportion without implementing § 2 or defining its requirements. *Id.* at 468-73 (describing some of the laws that Southern states implemented that restricted voting); *see generally Evenwel*, 578 U.S. at 102–03 (Alito, J., concurring). Indeed, between 1870 and 1920 Congress passed special legislation after each census that set the apportionment without making any adjustment for § 2 or setting any standard for when the section might apply. *See generally Montana*, 503 U.S. at 451.

Following the 1920 census, Congress could not come to agreement about the appropriate apportionment methodology. *Id.* at 451–52. Ultimately, Congress solicited the help of a committee of mathematics, who "recommended the adoption of the 'method of equal proportions'" to divide seats. *Id.* Congress then passed a special Act adopting that method for the 1930 census—but still did not seek to implement § 2. *See* Act Providing for the Fifteenth Census and for the Apportionment of Representatives in Congress (June 18, 1929) (P.L. 71-12). And Congress subsequently codified this method of equal proportions in the Census Act, which "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; 13 U.S.C. § 141(a); 13 U.S.C. §§ 2, 4.

Under this Act, the Secretary of Commerce, with the assistance of the Census Bureau, takes the census "in such form and content as he may determine." 13 U.S.C. § 141(a). "The

tabulation of *total* population by States . . . as required for the apportionment of Representatives in Congress" is to "be completed within 9 months after the census [starts] and reported by the Secretary to the President of the United States." 13 U.S.C. § 141(b) (emphasis added). After receiving the Secretary's report, the President is required to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. § 2a(a). The Act provides that "[e]ach State shall be entitled . . . until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown" in the President's statement, and the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b).

II. The massive undertaking of the 2020 Census and apportionment.

The 2020 census presented unique challenges. An enormously complex undertaking, costing over $15 billion, the census was planned for over a decade. *Nat'l Urb. League v. Ross*, 977 F.3d 770, 774 (9th Cir. 2020). Before the count ever started the Bureau was subject to numerous lawsuits challenging its planned methodology. *See Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *Nat'l Ass'n for Advancement of Colored People v. Bureau of Census*, 382 F. Supp. 3d 349 (D. Md. 2019). And when the Census Bureau did start counting, the COVID-19 pandemic arrived.

As was the case for many private and public functions, the pandemic introduced onerous and novel burdens for the census. "The Census Bureau, and its hundreds of thousands "of field representatives, had the bad luck of having to carry out the decennial census during this pandemic, which significantly delayed its field operations and the processing of census data." *Alabama v. United States Dep't of Com.*, 546 F. Supp. 3d 1057, 1065–66 (M.D. Ala. 2021). "Despite the Bureau's efforts to obtain" additional time to complete its operations "Congress

did not extend the deadline." *Id.* at 1065–66. And new litigation seeking to alter census timelines further disrupted the Bureau's work. *See Ross v. Nat'l Urb. League*, —— U.S. ——, 141 S. Ct. 18 (2020).

The Bureau ultimately reported results of the 2020 Census on April 26, 2021. *See* U.S. Census Bureau, 2020 Census Apportionment Results (April 26, 2021), *available* here. The Secretary reported those results to the President and the President transmitted them to the Congress the same day. *See* U.S. Census Bureau, 2020 Census Apportionment, at 12, available here. The apportionment calculation showed that several States lost or retained seats by the slimmest margins. *See id.*at 21 (noting that New York lost a seat by 89 people). Congress accepted the results of the census. And States have, to date, accepted their apportionment.

Plaintiff is the first entity to challenge the apportionment completed after the 2020 Census. A "nonprofit organization" that characterize its aims as "improving the United States Constitution's integrity, democratic elections, and government accountability," Plaintiff filed a complaint on November 17, 2021. Compl. ¶¶ 14-15, ECF No. 1. The complaint asserts that Defendants (the Commerce Department, Census Bureau, and the heads of both agencies) "failed to implement its duties under the Fourteenth Amendment" by not resurrecting the Fourteenth Amendment's § 2 for their apportionment calculation. *Id.* ¶¶ 55–58. In so failing, Plaintiff says, Defendants violated the APA, *id.* ¶ 60, and, in the alternative, the Court should issue an extraordinary a writ of mandamus, *id.* ¶ 64. As evidence of how Defendants have violated the Fourteenth Amendment, Plaintiff alleges that apportionment is based on (1) States that deny unregistered voters the right to vote, *id.* ¶ 43, and (2) a State (Wisconsin) that requires photo identification for voting, *id.* ¶ 49. Defendants now move to dismiss.

LEGAL STANDARDS

A complaint must be dismissed under Rule 12(b)(1) if the Court lacks subject-matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter . . . 'is inflexible and without exception.'" (citation omitted)). "[T]he party invoking federal jurisdiction bears the burden

of establishing its existence." *Id.* at 104. This Court must determine whether it has subject matter jurisdiction before addressing the merits of the complaint, *see id.* at 93-95, and should "presume that [it] lack[s] jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted).

In reviewing a motion to dismiss under Rule 12(b)(1), a Court must construe the complaint liberally, giving plaintiffs the benefit of inferences that can be derived from the facts alleged. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004). The Court need not, however, "accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiffs' legal conclusions." *UnitedHealthcare Ins. Co. v. Price*, 248 F. Supp. 3d 192, 198 (D.D.C. 2017) (internal quotes and citations omitted).

ARGUMENT

I. Plaintiff Lacks Article III Standing

Article III requires that Plaintiff establish "injury in fact" by showing that it "has sustained or is immediately in danger of sustaining a direct injury" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016). The injury must be "concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and not "merely 'conjectural' or 'hypothetical' or otherwise speculative," *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009). And mere allegation of an agency failing to follow proper procedures do not qualify: a Plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo*, 578 U.S. at 341; *Summers*, 555 U.S. at 496 ("[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).

Here, the underlying injury Plaintiff alleges is that its members residing in New York, Pennsylvania, and Virginia have all "los[t] a representative seat" in Congress and suffer improper "dilut[ion]" of their votes. Compl. ¶ 15. In support of this allegation, Plaintiff purports to calculate the number of Representatives its members *could* receive if the Fourteenth Amendment's § 2 were fully implemented. *Id.* ¶¶ 48, 53-54.[4] Plaintiff offers three scenarios for such implementation. In the first of these, the apportionment base for each state would be discounted by the number of otherwise-eligible voters who were not registered to vote. *Id.* ¶ 48. In the second, the apportionment base for Wisconsin would be adjusted by the number of people estimated to have been disenfranchised by the State's voter-ID law. *Id.* ¶ 53. And the third would combine the two methods, adjusting all states' apportionment population based on voter registration and making a special adjustment for Wisconsin alone. *Id.* ¶ 54. But these scenarios all fail to plausibly establish that Plaintiff members' votes have been diluted against a hypothetical alternative.

That's because any effort to show vote dilution relative to what would occur if Wisconsin's apportionment base were adjusted to account for "300,000 people" allegedly "disenfranchised by [the State's] photo voter identification" law, *id.* ¶¶ 15-16, should be rejected out of hand. When it comes to apportionment methodologies or calculations, whatever standard applies to one state must be applied to others as well. And Wisconsin's imposition of a penalizable voter-ID law may be immaterial if a similar law exists in other states or if those states are found to have other types of restrictions that bring on a § 2 sanction. *See, e.g.*, *Nat'l L. Ctr. On Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996); *see generally* Ballotpedia, *Voter Identification Laws by State*, *available* here (last visited March 11, 2022) (identifying 20

[4] These allegations track the declaration of a "Data Scientist" that Plaintiff proffers as an expert report in support of its motion for summary judgment. ECF No. 14-5, ¶¶ 1, 14-16 (Sharma Decl.). The Court should strike that declaration for reasons articulated in Defendants' motion in limine, filed concurrently with this motion. In any event, considering an expert report proffered by Plaintiff is neither necessary nor appropriate at the motion-to-dismiss stage.

states that have voter-ID laws). So to show standing, Plaintiff must plausibly allege that, taking into account those *other* States' voting laws would still provide its members with additional representatives. *Kantor*, 91 F.3d at 185 (no standing because court could not determine "what effect any methodology for counting the homeless would have on the federal funding of any particular appellant," since "if a more accurate count would have enlarged some communities' shares, it likely would have reduced the shares of other communities"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (no standing because "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" since plaintiffs "can do no more than speculate as to which states might gain and which might lose representation," which depends on "the interplay of all the other population factors which affect apportionment"); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (no standing to challenge apportionment method because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York but for every other State as well" (emphasis added)). Indeed, in prior cases, courts rejected attempts to enforce § 2's provisions precisely because plaintiffs failed to demonstrate how their preferred implementation of § 2 would affect apportionment bases across different states. *See Lampkin*, 239 F. Supp. at 760–61. The same failure dooms Plaintiff's effort to establish standing based on Wisconsin's voter ID law.

That leaves Plaintiff's allegation that Virginia (though, notably, not the other States where Plaintiff asserts it has members) would receive an additional representative if *all* states' bases for representation were adjusted to reflect voter their registration rates. Compl. ¶ 48. But this theory fares no better. As Plaintiff's complaint acknowledges, the calculation showing that Virginia would receive an addition seat relies on two underlying reports: statistics of state-specific voter registration rates collected by the Census Bureau and a report of felon disenfranchisement by the non-profit Sentencing Project. *Id.* ¶¶ 47–48. But each of these underlying reports have notable margins of error. The Census Bureau's voter registration table includes "[m]argin of error" rates that amount to hundreds of thousands of people for some

of the bigger states. ECF No. 14-8 (noting margins of error between 1 and 2 percent for California, New York, and Texas). And the Sentencing Project report merely provides "*estimates*" on the number of citizens that cannot vote due to criminal convictions, which it notes "must be interpreted with caution." ECF No. 14-10 at 1, 7. As the report explains, "data on correctional populations are currently available only through year-end 2018," meaning that various assumptions are required to create a "trend line." *Id.* at 7 (identifying assumptions about "recidivism" and "mortality rate for people convicted of felony offenses"). Using such reports for purposes of estimating apportionment is highly dubious.

In the census context, the Supreme Court has consistently scrutinized claims of harm to ensure that they were not based on mere guesswork. *See, e.g.*, *New York*, 139 S. Ct. at 2565 (finding standing after trial where plaintiffs would "lose out on federal funds" "if noncitizen households [were] undercounted by as little as 2%" due to inclusion of a citizenship question on the census questionnaire); *Utah v. Evans*, 536 U.S. 452, 458 (2002) (noting that the challenged methodology indisputably changed which state received a Representative); *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (noting that plaintiffs produced evidence showing that under the challenged plan a State would lose a representative compared to the prior method). The reason is obvious. In a realm where a State can lose out on an additional representative by fewer than 100 people, as New York did following the 2020 census, careful calibration is required. Were it otherwise, virtually anyone could claim injury on the basis of error-prone calculations or by deliberate imprecision. That would, in effect, eviscerate the injury-in-fact requirement in census and apportionment cases.

Plaintiff's allegations of vote dilution thus invite the Court to venture into the task of assessing § 2's implementation based on little more than statistical guesswork. Such guesswork does not support jurisdiction. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (no Article III standing exists if a plaintiff's theory of injury rests on an "attenuated chain of inferences necessary to find harm"). While Plaintiff may believe "that the law . . . has not been followed," a "generalized grievance about the conduct of government" does not

give it standing to invoke the jurisdiction of this Court. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

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

Putting aside the significant justiciability defects, Plaintiff cannot assert a claim under the APA. "The APA limits judicial review to 'final agency action for which there is no other adequate remedy in a court.'" *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting 5 U.S.C. § 704). Without final agency action, Plaintiff has no cause of action under the APA. *Id.* "To qualify as 'final,' agency action must (1) 'mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature' and (2) constitute action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 938 (D.C. Cir. 2021) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Here, Plaintiff's APA claim challenges the "tabulation of total population by States" that was compiled by the Census Bureau and reported to the President by the Secretary of Commerce. Compl. ¶¶ 56–62; 13 U.S.C. § 141(b). But Supreme Court precedent squarely forecloses any such claim because the Secretary's report is not final agency action challengeable under the APA.

As the Supreme Court explained in *Franklin*, "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." 505 U.S. at 797. "After receiving the Secretary's report, the President is to 'transmit to the Congress a statement showing the whole number of persons in each State as ascertained under the decennial census of the population." *Id.* (quoting 2 U.S.C. § 2a(a) (alterations omitted)). But "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy deci-

sions reflected in the Secretary's report." *Id.* at 799. So "[f]or potential litigants," the "'decennial census' still presents a moving target, even after the Secretary reports to the President." *Id.* at 797. "It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives." *Id.* at 798.

Put simply, "[b]ecause it is the President's personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge." *Id.* at 799. In contrast, "the Secretary's report to the President carries no direct consequences for the reapportionment," so "it serves more like a tentative recommendation than a final and binding determination" and is therefore "not final and therefore not subject to review." *Id.* "The President, not the Secretary, takes the final action that affects the States." *Id.* at 798. So Plaintiff's APA claim—based entirely on the Secretary's report—should be summarily rejected.

III. Plaintiff is not entitled to an extraordinary writ of mandamus because a new apportionment is neither required nor ministerial.

Nor can Plaintiff obtain a writ of mandamus. Under 28 U.S.C. § 1361, district courts have jurisdiction to enter writs of mandamus "compel[ling] an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." But "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Lovitky v. Trump*, 949 F.3d 753, 759 (D.C. Cir. 2020). And "[a] court may grant mandamus relief only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Id.* This is no small task, as "the party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." *Id.* at 759–60. That is, "[t]he law must not only authorize the demanded action, but require it." *Inogen, Inc. v. Becerra*, 2021 WL 2477172, at *5 (D.D.C. June 17, 2021) (Nichols, J.) (quoting *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C.

Cir. 1980)). And "[e]ven then, a court may grant relief only when it finds compelling equitable grounds." *Id.* (quoting *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005)). Here, mandamus does not apply and, even if it does, Plaintiff cannot come close to meeting its burden.

For starters, Plaintiff's reliance on mandamus is misplaced because Defendants do not owe any duty to Plaintiff. Congress has permitted mandamus in narrow circumstances where "an officer or employee of the United States or any agency thereof" must perform "a duty owed *to the plaintiff*." 28 U.S.C. § 1361 (emphasis added). For certain statutes, it is clear that the duty of governmental officials is owed to the plaintiff, as where a healthcare provider sues because the Department of Health and Human Services did not abide by the statutorily defined Medicare-appeals process, which determines reimbursement to healthcare providers for certain services. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016); *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 771 (5th Cir. 2011). But Defendants' only statutory duty here is to conduct the decennial census and pass the results to the President. *See* 13 U.S.C. § 141(b); *Franklin*, 505 U.S. at 797–99. That is not a duty "owed to the plaintiff" within the meaning of the mandamus statute; it is a duty owed to the President and, ultimately, to Congress. So Plaintiff cannot seek mandamus relief at all.

In any event, even if mandamus does apply, Plaintiff does not have a clear right to relief and Defendants do not have a clear duty to act. *Lovitky*, 949 F.3d at 759 (analyzing these two elements together "as [the court] often does"). These requirements further the separation of powers by "preclud[ing] the judiciary's arrogation of authority as a 'super agency' controlling or overseeing the discretionary affairs of an agency established to aid one of the other branches of government." *Carpet, Linoleum & Resilient Tile Layers, Loc. Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981). As discussed above, Congress never articulated a standard for the Fourteenth Amendment's representation-reduction clause. It has not enacted legislation to implement the provision, and as one court in this District recognized long ago, "neither section 141 of Title 13 U.S.C., nor any other statutory provision cited by plaintiffs

makes any reference to, let alone imposes a duty upon, [any] of the defendants with respect to computing the apportionment of Representatives." *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C 1965), *aff'd,* 360 F.2d 505 (D.C. Cir. 1966). "[M]andamus does not create or expand duties, but merely enforces clear, non-discretionary duties already in existence." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011). And none exists here.

Mandamus relief is also foreclosed because Plaintiff has another adequate remedy: it can attempt to persuade Congress and the Executive to redo apportionment. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (explaining that mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief"); *Kamal v. Gonzales*, 547 F. Supp. 2d 869, 877 (N.D. Ill. 2008) (finding no "other adequate remedy" where the plaintiff "made regular inquiries with the [agency], met personally with [agency] officers, and sought assistance from multiple members of Congress"). That is not just an "adequate" remedy but it is the *only* remedy available anyone who dislikes the 2021 apportionment.

Finally, Plaintiff cannot meet its burden to show compelling equitable grounds for mandamus. The only "extraordinary circumstances" here, *Lovitky*, 949 F.3d at 759, would be an advisory opinion from this Court resurrecting a 150-year-old provision understood to be operationalized only by Congress. *See* Background Section I., *supra*. Especially because, as Plaintiff readily admits, the other Branches are well aware of state voting requirements and are well positioned to take action if they see fit.[5] *See* Pl.'s Mot. at 1 (citing President Biden's remarks about new voter requirements); *id.* at 16 (noting that "Congress passed the Voting

[5] Troublingly, reapportionment could force some of the 46 States that already redistricted to quickly redistrict again before the 2022 elections due to gained or lost Representatives, violating "a bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring). Such late "tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* So, if anything, the Court has compelling equitable grounds *not* to grant mandamus.

Rights Act of 1965, which led states to expand voter access"). So the Court can deny mandamus for lack of "compelling equitable grounds" alone. *Inogen*, 2021 WL 2477172, at *5 (Nichols, J.).

As courts have repeatedly observed, "mandamus is inappropriate except where a public official has violated a 'ministerial' duty." *Consol. Edison Co. of N.Y., Inc. v. Ashcroft*, 286 F.3d 600, 606 (D.C. Cir. 2002). "A ministerial duty is one that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). Section 2 of the Fourteenth Amendment is not ministerial. As a result, Plaintiff is entitled to no relief.

CONCLUSION

For the reasons explained above, the Court should dismiss Plaintiff's complaint. And in the interest of judicial economy, the Court should defer ruling on Plaintiff's summary-judgment motion until it has resolved this motion to dismiss.

DATED: March 11, 2022

Respectfully submitted,

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