**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

Every ten years, the Constitution requires the "apportion[ment]" of Representatives "among the several States according to their respective numbers." U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 2. The Reduction Clause of the Fourteenth Amendment further provides that if States "den[y] . . . or in any way abridge[]" the "right to vote" they shall have their apportionment base (and likely their representation in the House) proportionally reduced. U.S. Const. amend. XIV, § 2. Plaintiff asserts that this Court should issue an order to the Secretary of Commerce that invalidates the post-2020 Census apportionment under the Reduction Clause, even though, "notwithstanding the plethora of lawsuits that inevitably accompany each decennial census," *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996), the Supreme Court has *never* invalidated a post-census apportionment.

From the Fourteenth Amendment's ratification through the 1910 census, Congress passed special legislation every ten years to set the apportionment of legislative seats. *See generally Dep't of Comm. v. Montana*, 503 U.S. 442, 451 (1992). But Congress failed to reach agreement about the appropriate apportionment methodology following the 1920 census. *Id.* at 451–52. After much debate, Congress codified a 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. Neither the Census Act (nor any of the pre-1920 apportionment statutes) specifies a procedure for implementing the Reduction Act.

As amended, Plaintiff's complaint alleges that the Census Bureau violated the Administrative Procedure Act and the Fourteenth Amendment by tabulating population counts that did not "discount every state's basis of representation when those states denied their citizens' right to vote by failing to include them on the list of registered voters," and likewise by failing to reduce the population attributed to Wisconsin on account of that state's "photo voter ID law." Am. Compl. ¶¶ 56, 61-62, 66, ECF 20. The amended complaint further alleges that a writ of mandamus should issue to the Secretary of Commerce, directing her to "complete the

analysis of abridgments and to reissue" the apportionment report "according to that analysis." *Id.* ¶ 68. Plaintiff also names the Department of Commerce and the Director of the Census Bureau as Defendants, but does not identify any causes of action that it seeks to assert against them.

Plaintiff's amended complaint is not justiciable because Plaintiff fails to demonstrate an injury-in-fact that satisfies its obligation to allege Article III standing.[1] Plaintiff's apparent theory is that the States should have their representation reduced when they require voters to register to vote, and, in Wisconsin's case, when they require registered voters to present photo identification at the polls. Setting aside the viability of those legal claims, Plaintiff would need to show that, if the "correct" standard had been applied, its members would have been better off. Instead, Plaintiff engages in a series of cherry-picking exercises: computing statistics that do not align with its legal claims, and revising some calculations while leaving others intact. Because of these flaws, Plaintiff's calculations offer no plausible basis on which to conclude that Plaintiff has sustained an injury-in-fact as needed to satisfy Article III.

Even if Plaintiff's claims were justiciable, they suffer from additional defects. Plaintiff brings a claim under the Administrative Procedure Act (APA) and asks this Court to issue a writ of mandamus, but neither is a viable route to reapportion the House of Representatives. The Supreme Court's decision in *Franklin v. Massachusetts* establishes that the Secretary's decennial-census report is not subject to APA review. 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)). The President's actions are outside the purview of the APA. *Id.* at 800–01. And "[b]ecause it is the President's personal

[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 v. United States*, 171 F.2d 986, 993 (D.C. Cir. 1948); *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020).

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 also fails. Not only does Plaintiff fail to meet the mandamus standard—a clear right to relief, defendants' clear duty to act, no other adequate remedy, and compelling equitable grounds—but the statutory requirements for mandamus relief are not satisfied 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 therefore dismiss Plaintiff's amended complaint for lack of jurisdiction and/or failure to state a claim.[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*, 517 U.S. at 5. The Framers "believed the correct apportionment of 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.

[2] As the Court is aware, Plaintiff has amended its complaint and again moved for summary judgment on its claims. *See* Am. Compl., ECF No. 20; Pls. Mot. Sum. J., ECF No. 20. 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.

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 than whole persons. *Montana*, 503 U.S. at 447–48. 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 v. Abbott*, 578 U.S. 94, 99–101(2016) (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 the 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).

Between 1870 and 1920, Congress passed special legislation after each census that set the apportionment without making any adjustment for the Reduction Clause. *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 mathematicians, 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. *See* Act Providing for the Fifteenth Census and for the Apportionment of Representatives in Congress (June 18, 1929) (P.L. 71-12). 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 must "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). 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.

The Bureau ultimately reported state-level population counts resulting from 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 President Biden, who transmitted them to the Congress the same day. *See* U.S. Census Bureau, 2020 Census Apportionment, at 12, *available* here. The April 2021 apportionment calculation showed that several States lost or retained seats by the slimmest margins in modern census history. *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 the reapportioned numbers of Representatives.

Plaintiff is the first entity to challenge the apportionment completed after the 2020 Census. A "nonprofit organization" that characterizes its aims as "improving the United States Constitution's integrity, democratic elections, and government accountability," Plaintiff filed a complaint on November 17, 2021 and an amended complaint on March 21, 2022. Am. Compl. ¶¶ 14–15, ECF No. 20. The amended complaint asserts that Defendants (the Commerce Department, Census Bureau, and the heads of both agencies) "failed to implement [their] duties under the Fourteenth Amendment" by failing to apply the Reduction Clause to the apportionment calculation. *Id.* ¶¶ 60–65. Plaintiff therefore claims Defendants violated the APA, *id.* ¶¶ 64–65, and, in the alternative, that the Court should issue an extraordinary writ of mandamus, *id.* ¶ 68. As evidence of how Defendants have purportedly 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.* ¶ 51. Plaintiff has now moved for summary judgment, to which Defendants respond separately. 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 Env't*, 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 amended 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). Likewise, a complaint survives a Rule 12(b)(6) motion to dismiss only if it "contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *United States ex rel. Cimino v. Int'l Bus. Machs. Corp.*, 3 F.4th 412, 421 (D.C. Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "To qualify as plausible, the pleaded facts must 'allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

## ARGUMENT

### I. Plaintiff lacks Article III standing.

The amended complaint should be dismissed because Plaintiff has failed to meet the "irreducible constitutional minimum" prescribed by Article III. That well-established standard requires a plaintiff to demonstrate a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v.*

*Texas*, 141 S. Ct. 2104, 2113 (2021) (citation omitted). Plaintiff bears the burden to plausibly allege each of these elements. *Id*. The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Yet Plaintiff here has failed to establish that it "has sustained or is immediately in danger of sustaining a direct injury," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016), that is "concrete and particularized," *Lujan v. Defs. 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).

The underlying injury Plaintiff alleges in this matter 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 Reduction Clause were fully implemented. *Id.* ¶¶ 48, 53-54.[3] Plaintiff offers three scenarios for such implementation. In the first of these, (1) 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, (2) 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 (3) would combine the two methods, adjusting all states' apportionment population based on voter registration and making a special adjustment for Wisconsin alone. *Id.*

[3] These allegations track the declaration of Ayush Sharma, a Data Scientist that Plaintiff proffers as an expert report in support of its motion for summary judgment. ECF 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.

¶ 54. But these scenarios all fail to plausibly establish that Plaintiff members' votes have been diluted against a hypothetical alternative.

As an initial matter, any calculation purporting 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. *See Lampkin v. Connor*, 239 F. Supp. 757, 760–61 (D.D.C. 1965). And Wisconsin's imposition of a penalizable voter-ID law may be immaterial to Plaintiff's claims if a similar law exists in States where Plaintiff's members reside or if those States are found to have other types of restrictions that bring on a Reduction Clause sanction. *See, e.g.*, *Nat'l L. Ctr. On Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996); *see generally Voter Identification Laws by State*, Ballotpedia, https://ballotpedia.org/Voter_identification_laws_by_state (last visited March 9, 2022) (identifying 20 states that have voter-ID laws). So to show standing, Plaintiff must plausibly allege that, taking into account similar voting laws in New York, Pennsylvania, and Virginia would still provide its members with additional representatives. *Kantor*, 91 F.3d 178 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)). Yet Plaintiff provides no allegations along these lines; if anything, its complaint appears to allege that Pennsylvania has unduly restrictive voting. *See, e.g.*, Am. Compl. ¶ 46 (discussing Pennsylvania's restrictions on voting for people "who move district within thirty days before an election"). In prior cases, courts rejected attempts to enforce the Reduction Clause precisely because plaintiffs failed to demonstrate how their preferred implementation of that Clause 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 assertion 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 registration rates. Am. Compl. ¶ 48. But this theory of injury fares no better. Plaintiff has not established that every state's voter registration requirements are more onerous than what it alleges the Reduction Clause permits: namely, verification of "residence, citizenship, age eighteen years or greater, not convicted of crime, and not convicted of participating in rebellion," Am. Compl. ¶ 45. For any state where the voter registration requirements track what Plaintiff alleges is the permissible standard, an eligible voter's failure to register would be an independent choice *by that voter* not to participate in the political process. But under the computation proffered by Plaintiff, even a State that permitted voters to attest to their eligibility at polling sites, without imposing any restrictions deemed impermissible by Plaintiff, would be penalized when individuals choose not to exercise their right to vote. Plaintiff's legal theory does not contemplate wielding the Reduction Clause to penalize States for such independent choices. And because Plaintiff's calculations fail to account for those independent choices, those calculations fail to plausibly establish an injury-in-fact. *Id.* ¶ 49 & Exh. 7 (ECF No. 20-10) (computing a "Fourteenth Amendment basis of representation" based on eligible voters who have not *registered*, as calculated by the difference between the number of citizens registered to vote and the number eligible to vote).

Aside from this theoretical shortcoming, the calculation on which Plaintiff bases its allegation of vote dilution is also unreliable. As Plaintiff's amended complaint acknowledges, the calculation showing that Virginia would receive an additional 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 material 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. 20-6 (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. 20-8 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 speculative. *See, e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (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. Given that 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

an apportionment-related injury on the basis of erroneous calculations or by deliberate imprecision, eliminating 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 the Reduction Clause's implementation based on little more than statistical guesswork. Such guesswork does not support jurisdiction. *See Clapper*, 568 U.S. at 414 n.5 (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.

Even if its claim were justiciable, 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. Am. Compl. ¶¶ 59–66; 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 decisions 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.* at 798. "The President, not the Secretary, takes the final action that affects the States." *Id.* at 799. So Plaintiff's APA claim—based entirely on the Secretary's report—should be summarily rejected.

## III. Plaintiff is not entitled to mandamus relief because a new apportionment is neither required nor ministerial.

Nor can Plaintiff obtain mandamus relief. Under 28 U.S.C. § 1361, district courts have jurisdiction to enter relief in the nature 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) (citation omitted). 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.* (citation omitted). The bar to obtaining mandamus relief is a high one: "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, Plaintiff does not have a clear right to relief and Defendants do not have a clear duty to act. *Lovitky*, 949 F.3d at 760 (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 has not enacted legislation to implement the Reduction Clause. On the contrary, one court in this District concluded long ago that "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*, 239 F. Supp. at 764. "[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.*, 635 F.3d at 768. 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"). That is not just an "adequate" remedy but it is the *only* remedy available to anyone who dislikes the 2021 apportionment.

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). The Reduction Clause 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.

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Respectfully submitted,

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