[ORAL ARGUMENT NOT YET SCHEDULED]

No. 23-5140

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff-Appellant,

v.

CENSUS BUREAU, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff in district court, and appellant here, is Citizens for Constitutional Integrity. Defendants in district court, and appellees here, are the Census Bureau, the Department of Commerce, Gina M. Raimondo, in her official capacity as Secretary of Commerce, and Robert Santos, in his official capacity as Census Bureau Director. There are no amici or intervenors at this time.

B. Ruling Under Review

The ruling under review is the opinion and order entered on April 18, 2023 (ECF Nos. 36, 37), *see Citizens for Constitutional Integrity v. Census Bureau*, No. 1:21-cv-3045 (D.D.C.) (Walker, Pan, Nichols, JJ.).

C. Related Cases

The case on review has not previously been before the Court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Sarah J. Clark
Sarah J. Clark

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GLOSSARY

APA	Administrative Procedure Act
Citizens	Citizens for Constitutional Integrity
Mandamus Act	28 U.S.C. § 1361
Reduction Clause	U.S. Const. amend. XIV, § 2, cl. 2
Section 209	Act of Nov. 26, 1997, Pub. L. No. 105-119, § 209, 111 Stat. 2440, 2481 (codified at 13 U.S.C. § 141 note)

STATEMENT OF JURISDICTION

Plaintiff Citizens for Constitutional Integrity asserted subject-matter jurisdiction in district court under 28 U.S.C. § 1331 (the federal question statute), 28 U.S.C. § 1361 (the Mandamus Act), and the Act of November 26, 1997, Pub. L. No. 105-119, § 209, 111 Stat. 2440, 2481 (codified at 13 U.S.C. § 141 note). *See* App-128-29. A three-judge district court panel dismissed the case for lack of standing on April 18, 2023. App-162. Citizens for Constitutional Integrity filed a notice of appeal on June 19, 2023. App-163. This Court has jurisdiction under 28 U.S.C. § 1291. *See Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 100 (1974); *LaVergne v. U.S. House of Representatives*, 847 F. App'x 1, 5 (D.C. Cir. 2021).

STATEMENT OF THE ISSUES

Citizens for Constitutional Integrity brings Administrative Procedure Act and Mandamus Act claims against the Commerce Department and the Census Bureau, challenging the Secretary of Commerce's report to the President following the 2020 census. The issues presented are:

1. Whether Citizens for Constitutional Integrity has standing to challenge the Secretary of Commerce's report to the President following the 2020 census.

2. Whether, if Citizens for Constitutional Integrity has standing, dismissal was nevertheless warranted given the absence of a viable claim under the Administrative Procedure Act or the Mandamus Act.

PERTINENT STATUTES

The pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Legal Background

1. The 435 seats in the House of Representatives are apportioned among the states according to their population as determined by the decennial census. From the Founding to the Civil War, a state's population for apportionment purposes was based on the whole number of free persons there, plus three-fifths of the enslaved persons. *See* U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment superseded this infamous compromise and requires apportionment of representatives among the states "according to their respective numbers, counting the whole number of persons in each State." *Id.* amend. XIV, § 2, cl. 1.[1]

[1] Article I and the Fourteenth Amendment both "exclud[e] Indians not taxed" from state populations for apportionment purposes. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2, cl. 1. Indians have been subject to federal income tax since 1924, when Congress granted them United States citizenship. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956); Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253.

Responding to the concern that southern states would gain representation while denying newly freed people the right to vote, the Reduction Clause of the Fourteenth Amendment provides that if "the right to vote" of "any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States" is "denied . . . or in any way abridged, except for participation in rebellion, or other crime," then "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." U.S. Const. amend. XIV, § 2, cl. 2; *see Evenwel v. Abbott*, 578 U.S. 54, 102 n.7 (2016) (Alito, J., concurring in the judgment) ("Needless to say, the reference in this provision to 'male inhabitants . . . being twenty-one years of age' has been superseded by the Nineteenth and Twenty-sixth Amendments." (alteration in original)). Thus, if a state denies or abridges the right to vote of some portion of its otherwise-eligible citizens, the Reduction Clause directs that the state's representation be reduced proportionally. If a state were to improperly disenfranchise 10% of its voting population, only 90% of its total population would count for apportionment purposes.

2. The Constitution requires Congress to conduct a decennial census—an "actual Enumeration" of the population every ten years, to be made "in such Manner" as Congress "shall by Law direct," U.S. Const. art. I, § 2, cl. 3.

Congress has directed that the Secretary of Commerce, with the assistance of the Census Bureau, take the census "in such form and content as [the Secretary of Commerce] may determine." 13 U.S.C. § 141(a). Once the Census Bureau has completed "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States," the Secretary must report that tabulation to the President. *Id.* § 141(b). The President must then "transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . census . . . , 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, no State to receive less than one Member." 2 U.S.C. § 2a(a). Each state is then "entitled[] . . . to the number of Representatives shown" in the President's statement. *Id.* § 2a(b).

B. Factual and Procedural Background

1. In April 2021, the Secretary of Commerce delivered her report on the 2020 census to President Biden. *See* App-165. President Biden transmitted his statement to Congress the same day. *See* Letter to Congressional Leaders Transmitting a Statement Showing Apportionment Population for Each State (Apr. 26, 2021), https://perma.cc/667Z-2ALZ. States have since held elections under the new apportionment.

2. Citizens for Constitutional Integrity (Citizens) is a nonprofit organization with members in New York, Pennsylvania, and Virginia. App-130. Under the 2020 apportionment, among other changes, New York and Pennsylvania each lost one representative, while Virginia's number of representatives stayed the same. *See* App-24; App-55; App-130-31.

Citizens challenges the Secretary of Commerce's report to the President, arguing that the Secretary should have reduced some or all of the states' bases of representation to account for their alleged denials or abridgements of the right to vote. *See* Br. 2; App-126-27.

Citizens identifies two alleged denials or abridgements in its complaint: First, Citizens asserts that "[m]any states . . . have registration requirements" that deny the right to vote to unregistered voters. App-139-40; App-180. In Citizens' view, existing voter registration requirements deny the right to vote to anyone who would have been eligible to vote absent their failure to register. *See* App-182-83. Second, Citizens asserts that "[s]ome states" abridge the voting rights of registered voters "by narrowing the list of documents by which voters can prove their identity." App-143. Citizens alleges that Wisconsin "may have the strictest" voter identification law. App-143.

Because Citizens challenged the constitutionality of the apportionment of congressional districts, the district court convened a three-judge panel to

adjudicate the case. *See* App-4; 28 U.S.C. § 2284(a). Citizens moved for summary judgment and the government moved to dismiss, arguing that Citizens lacked standing, had no cause of action under the Administrative Procedure Act (APA), and was not entitled to mandamus relief. *See* App-4; App-6-7.[2]

3. The district court panel dismissed the case for lack of standing. App-8; App-162. The court explained that even if Citizens could "show that the Census Bureau counted incorrectly, that [did] not mean that a corrected recount would lead to an apportionment more favorable to" Citizens. App-156. And Citizens had "fail[ed] to show that any of the states in which its members reside would have had an additional representative if the Reduction Clause had been applied according to [Citizens'] legal theory." App-156.

The court addressed various "scenarios" posited by Citizens that assertedly might have resulted in increased representation for at least one state in which a Citizens member resides. The court explained that even assuming that the facts posited in the scenarios were accurate, the scenarios told "an incomplete story." App-158. For example, although Citizens alleged that multiple states had impermissible voter identification laws, it only accounted for Wisconsin's identification law in its calculations. App-158; *see also* App-144;

[2] Citizens filed its operative complaint (its second amended) after the motions briefing. The district court panel granted the parties' joint motion to deem the filed motions to apply to the operative complaint. *See* App-8.

App-180. "By taking only Wisconsin into account," Citizens "fail[ed] to provide [the court] with a scenario that illustrates what apportionment might look like if Citizens's legal theory is correct." App-158. Citizens' argument left the court with "no way of knowing" if the alleged legal error "led to fewer representatives in Pennsylvania, New York, or Virginia." App-159.

The district court also explained that Citizens could not demonstrate standing by arguing that it had been denied a procedural right because the Reduction Clause confers no procedural rights on Citizens. App-160-61.

SUMMARY OF ARGUMENT

I. The three-judge district court correctly concluded that Citizens lacks standing. Citizens has not established that its alleged injury—premised on its New York and Pennsylvania members' loss of representation following the 2020 apportionment—is traceable to defendants' challenged conduct. To start, the Census Bureau is not authorized to undertake the actions Citizens believes are required, and a court could not properly order the relief that it requests. The Census Bureau is required to provide an enumeration of the total population. It is not authorized to reduce those totals. Nor does it have the authority or expertise to evaluate state voting laws, determine which laws constitute disenfranchisement, and then determine the total number of persons thus disenfranchised.

As the district court explained, Citizens' argument fails even on its own terms. Citizens sought to establish causation based on alternative "scenarios" resulting in different population counts and apportionments. Even assuming the accuracy of the figures used in the scenarios, the scenarios are fatally flawed. Citizens' scenarios do not provide a complete picture of what apportionment would have looked like if Citizens' legal theories were correct. For example, although Citizens alleges that many states have voter identification laws that deny or abridge their citizens' right to vote, Citizens only takes into account one such law—Wisconsin's. It does not even attempt to incorporate any others into its predictions.

Nor has Citizens established that its alleged injury is likely to be redressed by the relief it seeks. Citizens requests an array of relief, including vacatur of the Secretary's report, a remand to the agency, and an injunction requiring defendants to implement the Reduction Clause. Even assuming these remedies are within the Court's power, they are not likely to redress Citizens' alleged injury. Vacatur of the report, for example, would not cause the 2010 apportionment to simply spring back into effect. And commands to defendants to make adjustments under the Reduction Clause would run into significant legal and practical barriers.

Citizens cannot escape this conclusion by recharacterizing this as a procedural-rights case. Citizens has not established that it was denied a procedural right. It does not and cannot identify any statute or source of law that defendants, or any other government entity, is required to follow in determining population totals for apportionment purposes.

II. Even if Citizens had standing, dismissal is warranted because Citizens does not have a cause of action under the APA or the Mandamus Act. Citizens challenges the Secretary's report to the President. But the Supreme Court has held that the Secretary's report is not final agency action and is therefore not subject to challenge under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796-99 (1992). Nor did Congress provide for judicial review of such claims in "Section 209." That provision, codified in the notes to 13 U.S.C. § 141 in 1997, creates a cause of action for a "person aggrieved by the use of any statistical method" in the census for purposes of apportionment. Citizens is not a "person aggrieved" as defined by the statute, nor is it aggrieved "by the use of any statistical method." Citizens also is not entitled to relief under the Mandamus Act because it does not have a clear right to relief and defendants do not have a clear duty to perform a ministerial action.

STANDARD OF REVIEW

A district court's dismissal for lack of standing is reviewed de novo. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015).

ARGUMENT

I. Citizens lacks Article III standing to challenge the Secretary of Commerce's report.

To demonstrate standing, a plaintiff must "show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

The plaintiff bears the burden of demonstrating standing. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). Although, on a motion to dismiss, a plaintiff's factual allegations are accepted as true, courts may "not assume the truth of legal conclusions, nor . . . accept inferences that are unsupported by the facts set out in the complaint." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)). And "[w]hen considering any chain of allegations for standing purposes," the Court "may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by

third parties)." *Id.* (alteration in original) (quotation marks omitted) (quoting *Arpaio*, 797 F.3d at 21).

A. Citizens has not alleged an injury that is caused by the challenged conduct.

Citizens alleges that two of its members were injured because their states (New York and Pennsylvania) each lost a seat in the 2020 apportionment, thereby diluting those members' votes. Br. 32; App-130-31; *see also* App-35; App-39. But Citizens has not established that those lost seats were caused by the actions of defendants (referred to collectively herein as the Census Bureau).

1. As an initial matter, Citizens fundamentally misunderstands the Census Bureau's authority. Congress has directed the Secretary to "report[]" the "tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). It has not directed the Secretary to report population counts that are less than the "total population."

A second statute, 2 U.S.C. § 6, likewise imposes no such requirement and does not authorize the Census Bureau to exclude individuals from the census count. That statute provides that "the number of Representatives apportioned to such State" should be reduced in proportion to the percentage of disenfranchised

voters.[3] *Id*. The Census Bureau is required to report the total population, but it is not empowered to calculate the percentage of the voting population that is disenfranchised and reduce the total population or number of representatives accordingly.

In any event, Citizens alleges not a failure to perform a ministerial duty but a failure to make judgments about what state laws or practices should be deemed to disenfranchise individuals within the meaning of the statute and to further determine precisely how many persons have been subject to those laws or practices. The Census Bureau is not authorized to investigate voting rights violations, and it has no special expertise in evaluating what might constitute a denial or abridgment under the Reduction Clause. *See* App-11. Nor does it have information on, for example, the nature of each state's voter identification laws or on how many registered voters in each state have a qualifying form of identification.

[3] That provision, enacted in 1872, states in full: "Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article 14, section 2, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State." 2 U.S.C. § 6.

Citizens notes that the Census Bureau gathers information on the number of registered voters—but that data does not indicate what percentage of the population has been disenfranchised. In any event, the voter registration data on which Citizens relies could not properly be used for apportionment. Citizens recognizes that the Census Bureau gathers data on citizenship and voter registration through the Current Population Survey—not the census. Br. 21. The Current Population Survey uses statistical sampling. *See, e.g.*, U.S. Census Bureau, *Methodology*, https://perma.cc/78CN-2264 ("The [Current Population Survey] is administered by the Census Bureau using a probability selected sample of about 60,000 occupied households."). And Congress has forbidden the use of sampling in determining state populations for apportionment purposes. 13 U.S.C. § 195; *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 340 (1999).[4] Data from the Current Population Survey thus cannot be used to reduce population totals for apportionment purposes.

[4] There is also a substantial question whether using statistical sampling for apportionment purposes would comport with the Constitution's requirement that apportionment be based on an "Enumeration" of the population. *See* U.S. Const. art. I, § 2, cl. 3; *Utah v. Evans*, 536 U.S. 452, 479 (2002) (explaining that where, *inter alia*, "the methods used consist not of statistical sampling but of inference," the Enumeration Clause's limits were not exceeded); *Department of Commerce*, 525 U.S. at 346 (Scalia, J., concurring in part) ("It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling.").

2. As the district court explained, even assuming that the Census Bureau had the authority to perform the functions Citizens deems necessary, Citizens would still be unable to demonstrate causation, much less redressability. Citizens' attempt to rely on several alternative "scenarios" fails on its own terms.

Citizens identifies two types of state laws that, in its view, deny or abridge the right to vote within the meaning of the Reduction Clause: voter registration requirements and voter identification requirements. App-139-45. To establish causation, Citizens would need to show that, if its view were accepted, New York or Pennsylvania would not have lost a seat in the 2020 apportionment. *See, e.g.*, *National Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 183 (D.C. Cir. 1996) (explaining that, to establish causation, "appellants must show that the homeless were improperly undercounted by the S-Night methodology *as compared to a feasible, alternative methodology*"). Citizens has not done so. The district court rightly concluded, therefore, that Citizens had not "show[n] that the Bureau's failure to implement the Clause caused [Citizens'] injury." App-156.

Citizens generated three alternative scenarios that purport to apply the Reduction Clause to the 2020 apportionment: Scenario 2 took voter registration laws into account, Scenario 3 took Wisconsin's voter identification law into account, and Scenario 4 took both into account. App-46-47; App-142; App-145.

For Citizens' New York member, only Scenario 3 is helpful—in that variation, New York would have kept the same number of representatives rather than losing one. *See* App-50; App-144. (Under Scenarios 2 and 4, New York would have lost two seats instead of just one. App-49; App-52.) For Citizens' Pennsylvania member, only Scenario 4 is helpful because only in that scenario would Pennsylvania have kept the representative that it lost in reality and in the other two variations. *See* App-52; App-145.

As a preliminary matter, the data that Citizens uses inject serious uncertainty into its scenarios. The Census Bureau data on voter registration rates—which Citizens uses in Scenarios 2 and 4—is subject to margins of error that can amount to hundreds of thousands of people. *E.g.*, App-67 (margin of error for percentage of New York state citizens registered to vote was 1.7%, which would be well over 200,000 people). In all three scenarios, to calculate the number of citizens whose voting rights have been denied "for participation in rebellion, or other crime," Citizens uses a Sentencing Project report that merely estimates the number of citizens that cannot vote based on criminal convictions. *See* Br. 10, 22; ECF No. 20-8, at 7. And the number that Citizens uses in Scenarios 3 and 4 for Wisconsin voters without a qualifying form of identification is an estimate as well, derived from dueling expert witness

testimony. *See* Br. 21-22; *Frank v. Walker*, 17 F. Supp. 3d 837, 842, 854, 880-84 (E.D. Wis.), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014).

Citizens does not account for the effects of these uncertainties on its apportionment scenarios—a failure which is especially problematic in light of the fact that very minor shifts in population count can make a difference in apportionment. If New York had counted 89 more people in the 2020 census, for example, it would not have lost a seat. Paul LeBlanc, *New York to lose House seat – and an Electoral College vote – after falling 89 residents short in census count*, CNN (Apr. 26, 2021), https://perma.cc/FN3P-C4JB. (Citizens suggests in passing that New York is likely to retain its seat if the Reduction Clause is applied because it narrowly missed out on doing so in the actual 2020 apportionment. Br. 61-62. But Citizens' own scenarios show that, when reductions are applied across many states, the results are not predicted by which state is "first on the list," Br. 61.)

Even accepting the accuracy of the data used in each of Citizens' scenarios, they "tell[] an incomplete story." App-158. As the district court explained, the most glaring defect is Citizens' failure to account for any state's voter identification law other than Wisconsin's. App-158. Citizens alleges in its complaint that "[s]ome states" abridge registered voters' rights to vote "by narrowing the list of documents by which voters can prove their identity." App-

143; *see also* Ballotpedia, *Voter identification laws by state*, https://perma.cc/M5EN-JMG3 (noting that, as of August 2023, 23 states require photo identification to vote). In Citizens' own view, Wisconsin is not the only state with a voter identification law that the Census Bureau would need to take into account in order to comply with Citizens' understanding of the Bureau's responsibilities under the Reduction Clause. A scenario that takes only one of these states into account therefore provides no meaningful analysis. Citizens has not even hypothesized how many citizens in other states have had their voting rights denied or abridged by a voter identification law, much less what apportionment would look like if those denials were taken into account. *See* App-158. "Without knowing how voter-ID laws in other states might affect the basis of representation in those states, it is impossible for us to know how representatives might be apportioned if Citizens' legal theory is correct." App-158-59.

Scenarios 3 and 4—the two that reflect only a partial reckoning of the effects of voter identification laws—therefore cannot be the basis for standing. Because those are also the only two scenarios that would have helped Citizens' New York and Pennsylvania members, Citizens cannot show that either of those members' injuries are traceable to the alleged constitutional violation.

The Supreme Court's decisions in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Utah v. Evans*, 536 U.S. 452 (2002), on which Citizens attempts to rely, underscore the absence of standing here. In *Franklin*, the Court held that Massachusetts had standing to challenge the Secretary's decision to allocate overseas employees to state populations in the 1990 census. 505 U.S. at 802 (plurality opinion); *see also id.* at 807 (Stevens, J., concurring in part and concurring in the judgment) (four-justice concurrence addressing the merits but not standing). The plurality opinion explained that, because Massachusetts had shown that it "would have had an additional Representative" if the Secretary had not allocated overseas employees at all, it had shown that its injury was caused by the Secretary's decision to allocate them. *Id.* at 802 (plurality opinion). Massachusetts had not, by contrast, established causation for its claim that the Secretary had used inaccurate data in performing the allocation because Massachusetts had not shown that it "would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data." *Id.*

In *Utah v. Evans*, Utah challenged the Census Bureau's use of a statistical method known as "imputation" in the 2000 census and North Carolina intervened, arguing that Utah lacked standing. 536 U.S. at 459. In that case, "the parties agree[d] that . . . Utah will receive one less Representative, than [it would

have] if the Bureau had not used imputation." *Id.* at 458; *cf. U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 455 (1992) (noting that, in Montana's challenge to the use of the method of equal proportions to apportion representatives, there was no dispute that, "[i]f either the method of smallest divisors or the method of the harmonic mean" (the methods preferred by Montana) "had been used after the 1990 census, Montana would have received a second seat"). There is no such agreement here.

Citizens argues that *Franklin* established a "higher burden of causation" for cases where the plaintiff alleges the improper denial of an additional seat than for cases where the plaintiff alleges the improper loss of a seat. *See* Br. 37 ("This case differs from cases in which plaintiffs seek *additional* seats. The Report harmed Citizens by *eliminating* a seat."). Citizens does not explain what rationale would justify different burdens, and *Franklin* made no such distinction. Nor did the Court have occasion to do so: Massachusetts' asserted injury was that it had lost a seat in the 1990 apportionment. *See Franklin*, 505 U.S. at 790 ("[A]s a result of the 1990 census and reapportionment, Massachusetts lost a seat in the House of Representatives."); U.S. Census Bureau, *Historical Apportionment Data (1910-2020)* (Apr. 26, 2021), https://perma.cc/5HY7-VC5T (showing that Massachusetts had 11 representatives in the 1980 apportionment and 10 in the 1990 apportionment). The "additional Representative" that Massachusetts

showed it could obtain if its legal theory prevailed was the representative it had lost.

B. Citizens has not established that its asserted injury is likely to be redressed by the relief it seeks.

Even if Citizens' asserted injury were caused by the challenged conduct, it has not shown that that injury is likely to be redressed by the relief it seeks.

Citizens' complaint asks the court for declaratory relief, as well as to "[v]acate and set aside" the Secretary's report and the President's statement following the 2020 census, "restore the 2010 apportionment," command the Department of Commerce and Census Bureau to "complete the analysis the Fourteenth Amendment requires and to reissue the Report," set a deadline for Department of Commerce and Census Bureau to do so, "[r]eapportion one seat from Wisconsin to New York," and "[r]eapportion seats according to Census's data of citizens and voter registration rates." App-148. Citizens argues that this could be accomplished by a writ of mandamus, an injunction, or a declaration that defendants have violated the Reduction Clause. *See* Br. 60-66, 68-69. It also suggests that a court could vacate and "set aside" the Secretary's report under the APA. Br. 67. (As discussed in Section II of the Argument, the APA cannot provide a basis for Citizens' suit.)

1. For the reasons discussed above, the Census Bureau has neither the authority nor the tools to undertake the tasks Citizens deems necessary. In

addition, even assuming that the Secretary would have had the authority and the ability to make Reduction Clause adjustments in her report to the President, it is far from clear that she would have authority to withdraw her report on the 2020 census at this point in time. *See Utah*, 536 U.S. at 462. Nor could a court take the extraordinary step of requiring the President to withdraw his previous statement to Congress and submit a new one in its place. *See Franklin*, 505 U.S. at 802. And the APA clearly would not authorize a directive to the President to transmit a new statement to Congress. *See id.*

Citizens argues that "courts can order the Secretary of Commerce to recalculate the numbers and to recertify the official census result." Br. 60 (quoting *Utah*, 536 U.S. at 461). But the *Utah* Court's conclusion that a court could issue such an order turned on the circumstances of that case. 536 U.S. at 463. The Court stated that, if "a clerical, a mathematical, or a calculation error[] . . . is uncovered before new Representatives are actually selected, and its correction translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment, such mechanical revision makes good sense." *Id.* at 462; *accord id.* at 463 (explaining that relief is not "necessarily 'impracticable'" if "a lawsuit is brought soon enough after completion of the census and heard quickly enough"). In *Utah*, new Representatives had not yet been selected—"several months . . . remain[ed]

prior to the first post-2000 census congressional election." *Id.* at 463. In addition, the process of recalculation in *Utah* would have been mechanical because the parties agreed on the precise effect of the Secretary's use of imputation and thus on the population counts that would result if the Secretary had not used imputation. *Id.* at 458 ("[I]mputation increased North Carolina's population by 0.4% while increasing Utah's population by only 0.2%."). "Under these circumstances," the Court held, it was substantially likely that the relief would redress the injury. *Id.* at 463-64.

Here, by contrast, new elections have been held and new representatives have been seated. And even if that were not so, applying Citizens' theory would be anything but "mechanical." *Utah,* 536 U.S. at 463-64. Indeed, Citizens has highlighted the absence of redressability (as well as causation) in its repeated acknowledgments that it is unaware of the nature and extent of statutes that would constitute disenfranchisement and that it has no idea as to how the Census Bureau would accomplish the tasks it proposes. *See, e.g.*, App-180 (Citizens' counsel explaining that he does "not know all of the abridgment and denials that the states have passed" and that that "is the Census Bureau's job"); Br. 66 ("Article III does not require Citizens to prove how the Census Bureau would have implemented the Amendment in a 'counterfactual world.'"). Citizens has thus identified no workable relief targeted to specific alleged

failures. This Court identified a similar problem in *Kantor*, 91 F.3d 178, where the Court held that various plaintiffs lacked standing to challenge the Census Bureau's method for counting of homeless persons during the 1990 census. *Id.* at 179. The plaintiffs argued that the Bureau had undercounted homeless persons and "suggested some steps that the Bureau could have taken" to improve its count. *Id.* at 183. But the plaintiffs did "not even ask that the alternative methodologies suggested in their affidavits be employed in a recount," instead suggesting that the methodology be selected by a newly appointed commission. *Id.* As the Court explained, it could "hardly assume that a commission of as-yet unnamed persons, using as-yet unidentified methodologies, will devise a better homeless count that will redound to [the plaintiffs'] benefit." *Id.*

Citizens also mistakenly assumes that the 2010 apportionment would simply spring back into effect upon vacatur of the report. Neither the APA nor the Census Act provides a basis for that assumption. Citizens argues that "[c]ontinuing a prior apportionment has happened before." Br. 67 (referring to the continuation of the 1910 apportionment in the 1920s, when Congress could not agree on the 1920 apportionment). But Congress' decision to continue a current apportionment until a new one can be approved is far afield from reverting—by court order—to an old apportionment after the new one has taken

effect. Moreover, if Citizens' legal theory were correct, it would make no sense to revert to the 2010 apportionment, because that apportionment too would have violated the Reduction Clause. So even if vacatur could redress the bare injury of losing a representative, it would not yield an apportionment that complies with Citizens' legal theory.

2. Citizens asserts that it has suffered a procedural injury and is therefore "entitle[d] . . . to a lower redressability burden." Br. 38; *see also* Br. 4-5, 27-28. According to Citizens, it has a procedural right because it is within the zone of interests of the legal provisions it cites and, because it has a procedural right, it need only show that its requested relief could redress its injuries. *See* Br. 37-38, 47. But Citizens has not established that it was denied a procedural right. Citizens argues that defendants have "violated the Amendment's procedure" by not adjusting population counts under the Reduction Clause. Br. 49; *see also* Br. 5, 28. But Citizens' grievance is that defendants did not report adjusted state population totals. That is a substantive, not a procedural, concern. Nor can Citizens generate a procedural right by arguing that Citizens or its members are within the zone of interests of Article I, the Reduction Clause, 13 U.S.C. § 141(b), or Section 209. *See* Br. 47. Contrary to Citizens' suggestion, it is not the case that, whenever a party is within the zone of interests of a law, a procedural right springs into existence. Rather, "a party within the zone of interests of any

substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority, at least if the procedure is intended to enhance the quality of the substantive decision." *International Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994).

In any event, Citizens has failed to meet even a more lenient standard of redressability. Given the legal and practical barriers—not least the lack of an obvious source of authority or the necessary information to make accurate adjustments, compounded by the impracticability of unwinding an apportionment that is already in place—Citizens has not established that ordering defendants to engage in the "procedure" of making Reduction Clause adjustments could redress Citizens' members' asserted injury.

II. Dismissal would be warranted even if Citizens had demonstrated standing because Citizens lacks a cause of action under the APA or the Mandamus Act.

Even if Citizens had standing, its claims would be properly dismissed. As explained below, Citizens lacks a cause of action under the APA and is not entitled to mandamus relief.

A. Citizens lacks a cause of action under the APA.

Citizens lacks a cause of action under the APA, which limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If there is no final agency action, then there is no cause

of action under the APA and the claim must be dismissed. *See Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940, 943 (D.C. Cir. 2012). "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, 177 (1997)).

Citizens' APA claim challenges the Secretary of Commerce's report on apportionment, which the Secretary of Commerce delivered to the President in April 2021. *See e.g.*, Br. 2; *see also* App-146-47. But the Supreme Court held in *Franklin*, 505 U.S. 788, that the Secretary's report is not final agency action and is therefore not subject to challenge under the APA. As the Supreme Court recognized, "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." *Franklin*, 505 U.S. at 797; *see* 2 U.S.C. § 2a (directing the President 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

. . . by the method known as the method of equal proportions"). The President "is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Franklin*, 505 U.S. at 799. And it is "not until the President submits the information to Congress that . . . the States [are] entitled by § 2a to a particular number of Representatives." *Id.* at 798. The Secretary's report thus "carries no direct consequences for the reapportionment" and "serves more like a tentative recommendation than a final and binding determination." *Id.* "Because 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 short, "the final action complained of is that of the President," *id.* at 796—the Secretary's report is "not final and therefore not subject to review," *id.* at 798.[5]

Citizens argues that Section 209 "restored courts' abilities to review" claims against the Secretary of Commerce regarding apportionment. Br. 19 (referring to Act of Nov. 26, 1997, Pub. L. No. 105-119, § 209, 111 Stat. 2440,

[5] Citizens suggested in district court that this position did not command a majority of the Court because Justice Scalia would have dismissed the case for lack of standing. *See* App-200-01; *Franklin*, 505 U.S. at 824 (Scalia, J., concurring in part and concurring in the judgment). But Justice Scalia joined Part II of the Court's opinion—the portion on final agency action—and expressly stated that he "agree[d] with the Court that appellees had no cause of action under the judicial-review provisions of the" APA. *Franklin*, 505 U.S. at 823 (Scalia, J., concurring in part and concurring in the judgment).

2481 (codified at 13 U.S.C. § 141 note)). Section 209 creates a cause of action for "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law . . . , in connection with the . . . decennial census, to determine the population for purposes of the apportionment . . . of Members in Congress," permitting such a person to obtain equitable relief "against the use of such method." Pub. L. No. 105-119, § 209(b), 111 Stat. at 2481.

Citizens' complaint does not assert a claim under Section 209. *See* App-146-47. Nor does Citizens' complaint concern the use of a statistical method. Section 209 defines a "statistical method" as "an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference." *Id.* § 209(h)(1), 111 Stat. at 2483. That definition reflects Congress' concern that "the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census . . . poses the risk of an inaccurate, invalid, and unconstitutional census." *Id.* § 209(a)(7), 111 Stat. at 2481; *accord* 13 U.S.C. § 195 (permitting the Secretary to "authorize the use of the statistical method known as 'sampling'" "[e]xcept for the determination of population for purposes of apportionment"). In other words,

Section 209 addressed the risk that the use of a statistical method would undermine the accuracy of the census—it did not open up any and all aspects of the census to suit.

Citizens does not allege that the government has used "representative sampling, or any other statistical procedure" to "subtract counts . . . from the enumeration of the population as a result of statistical inference." *See* Pub. L. No. 105-119, § 209(h)(1), 111 Stat. at 2483. It therefore is not challenging "the use of any statistical method." § 209(b), 111 Stat. at 2481.

In addition, Citizens does not fall with Section 209's definition of persons entitled to bring suit. The definition is limited to "(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; (2) any Representative or Senator in Congress; and (3) either House of Congress." Pub. L. No. 105-119, § 209(d), 111 Stat. at 2482. Organizations such as Citizens therefore have no cause of action under Section 209. *See Alabama v. U.S. Dep't of Commerce*, 546 F. Supp. 3d 1057, 1067-69 (three-judge court) (concluding that Alabama lacked a cause of action under Section 209 because it did not fall within Section 209's definition of an aggrieved person).

B. Citizens is not entitled to relief under the Mandamus Act.

Citizens' contention that it is entitled to mandamus relief fares no better. The Mandamus Act provides that "district courts shall have original jurisdiction of any action 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. Under that statute, "[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." *Muthana v. Pompeo*, 985 F.3d 893, 910 (D.C. Cir. 2021) (alteration in original) (quoting *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 62 (D.C. Cir. 2010)). "These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction." *Id.* (quoting *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016)).[6]

Citizens does not have a clear right to relief and defendants do not have a clear duty to act, much less a duty owed to Citizens in particular. *See* 28 U.S.C.

[6] Citizens' complaint refers to 28 U.S.C. § 1361 as the All Writs Act. *See* App-130 (stating that "28 U.S.C. § 1361, colloquially known as the All Writs Act, grants this Court authority to issue writs of mandamus"); *see also* App-147. The All Writs Act is codified at 28 U.S.C. § 1651—28 U.S.C. § 1361 is the Mandamus Act. *See In re National Nurses United*, 47 F.4th 746, 752 & n.4 (D.C. Cir. 2022) (noting the difference). Citizens' briefing in district court and this Court consistently refer only to the Mandamus Act, 28 U.S.C. § 1361. *See, e.g.*, Br. 20, 23, 27; *see also* Mot. to Dismiss Opp'n 33-35, ECF No. 27.

§ 1361 (mandamus would direct a defendant to "perform a duty owed to the plaintiff"). Mandamus is permitted "only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined." *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)). No statute or constitutional provision creates a clearly defined, ministerial duty on the part of the Secretary of Commerce to modify the population counts in the report she delivers to the President. Congress has not specified which, if any, agency must make Reduction Clause adjustments, much less clearly assigned that responsibility to defendants. Congress has not directed that such adjustments be included in the Secretary's report to the President—13 U.S.C. § 141 is silent on that front. Congress certainly has not provided specific direction about how such adjustments might be made, which forecloses any argument that Citizens in particular has a clear right to relief or that defendants have a clearly defined duty to act. And the Reduction Clause provides no further guidance as to responsibility or implementation. Citizens' Mandamus Act claim must therefore be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,280 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Sarah J. Clark
Sarah J. Clark

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Sarah J. Clark
Sarah J. Clark

ADDENDUM

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2 U.S.C. § 2a

§ 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent 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, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of

districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 6

§ 6. Reduction of representation

Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article 14, section 2, except for participation in the rebellion or other crime, the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

13 U.S.C. § 141

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to

the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)

(1) If—

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

13 U.S.C. § 141 note

Pub. L. 105-119, title II, § 209. Statistical sampling or adjustment in decennial enumeration of population

(a) Congress finds that—

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be 'apportioned among the several States according to their respective numbers, counting the whole number of persons in each State';

(4) article I, section 2, clause 3 of the Constitution clearly requires an 'actual Enumeration' of the population, and section 195 of title 13, United States

Code, clearly provides 'Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.';

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;

(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects—

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act [see Tables for classification]), in connection with 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.

(c) For purposes of this section—

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105–18 [111 Stat. 217] and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes—

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress.

(e)

(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement

shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Congress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210 [formerly set out below]—

(1) the term 'statistical method' means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term 'census' or 'decennial census' means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census

to plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94–171 [amending this section] data file released for use in redistricting; (3) the Summary Tabulation File One (STF–1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.

13 U.S.C. § 195

§ 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

28 U.S.C. § 1361

§ 1361. Action to compel officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action 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. § 2284

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.