[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.

THE CENSUS BUREAU, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-3045-CJN-JRW-FYP
The Honorable Judges Justin R. Walker, Florence Y. Pan, and
Carl J. Nichols

PLAINTIFF-APPELLANT'S REPLY

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GLOSSARY

The Amendment	The 14th Amendment, Section 2
APA	The Administrative Procedure Act, 5 U.S.C. §§ 701-706
The Census Bureau	Federal Defendants the Census Bureau, the U.S. Department of Commerce, the Secretary of Commerce, and the Director of the Census Bureau
Citizens	Citizens for Constitutional Integrity
CGXXX	Cong. Globe, 39th Cong., 1st Sess. XXX (1866)
NEPA	The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-12
Reconstruction Report	Report of the Joint Committee on Reconstruction XIII, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866); Sen. Rep. No. 112, 39th Cong., 1st Sess. (1866)
Report	The Secretary of Commerce's 2021 report on apportionment to the President under 13 U.S.C. § 141(b), App-165
Section 209	Act of Nov. 26, 1997 § 209, Pub. L. No. 105-119, 111 Stat. 2440, 2480 (codified at 13 U.S.C. § 141 note)

INTRODUCTION

The Census Bureau[1] does not defend the logical fallacies by which the district court dismissed Citizens for Constitutional Integrity's claims for lack of Article III standing. Instead, it adds cause-of-action arguments, which effectively concede the standing arguments' weakness. Ultimately, the Census Bureau cannot deny that a court can order an agency "to take action upon a matter, without directing *how* it shall act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (quotations omitted). This Court has issued writs of mandamus to decide whether to issue a nuclear waste disposal plant license, to justify internet service provider fees, and to interpret Iranian law. It can remand or issue a writ of mandamus to order the Census Bureau to calculate voting denials and abridgments as the 14th Amendment, Section 2 (the Amendment), requires. The Constitution demands action.

The Declaration of Independence held that "Governments . . . deriv[e] their just powers from the consent of the governed . . . ." After the Civil War, Senator Charles Sumner declared, "A failure to perform these

[1] The term "Census Bureau" also references Appellees the U.S. Department of Commerce, Secretary of Commerce Gina Raimondo, and Census Bureau Director Robert Santos.

promises is moral and political bankruptcy." Cong. Globe, 39th Cong., 1st Sess. 674. Therefore, the Framers sewed that principle into the Constitution's fabric. Yet the Census Bureau ignores the Amendment. The United States exercises unjust powers by governing citizens without consent. States took away their constitutional rights to vote.

Citizens' Article III standing arises from undisputed facts and principles. The Census Bureau does not dispute it failed to comply with the Amendment. It does not dispute these principles:

- For injury, Citizens' members' states lost seats in the U.S. House of Representatives, and that qualifies as vote-dilution injury.
- For causation, the Secretary of Commerce's 2021 report to the President, App-165 to -166 (the Report) states "-1" next to New York and Pennsylvania's apportionments, and the Report was a but-for cause of Citizens' injury.
- For redressability, Citizens' injuries bring them within the zone of interests of constitutional provisions and statutes. For their procedural rights, Article III recognizes redressability if Citizens request a judicial remedy that could redress their injury.

Courts have broad power to redress their injuries. These key principles demonstrate Citizens' standing.

Although the district court addressed only standing, the Census Bureau seeks to replace that jurisdictional dismissal (without prejudice) with a cause-of-action dismissal (with prejudice). But because it did not

cross-appeal, the cross-appeal rule precludes this Court from considering those arguments. Even if this Court reached them, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and Section 209[2] provide a cause of action. If not, Citizens have a right to a writ of mandamus to compel the process.

Several Supreme Court justices recently expressed a preference that judges make mistakes instead of "perpetuat[ing] something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) (Gorsuch, J., delivering an opinion). In 1965, this Court stood ready to enforce the clear language of the Amendment, but stayed its hand to see if the Voting Rights Act cured the problems. *Lampkin v. Connor*, 360 F.2d 505, 511 (D.C. Cir. 1966). It did not. A failure to act now would concede that "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Article III and the Amendment compel reversing and remanding this case to the district court.

[2] Act of Nov. 26, 1997 § 209, Pub. L. No. 105-119, 111 Stat. 2440, 2480 (codified at 13 U.S.C. § 141 note).

ARGUMENT

I. Citizens demonstrated Article III standing to bring their procedural rights claims.

In their brief, Citizens demonstrated Article III standing because (a) they suffered vote-dilution injuries; (b) the Report was a but-for cause of those injuries; and (c) Citizens request relief that could redress their injuries.

A. Citizens' members suffered vote-dilution injuries from lost seats.

Citizens showed that New York and Pennsylvania have one fewer seat in the U.S. House of Representatives than under the 2010 census, and that qualifies as vote-dilution injury. Pl.-Appellant's Br. (Citizens' Br.) 32-35. The Census Bureau does not dispute that injury.

B. The Report caused New York and Pennsylvania to lose those seats.

Citizens explained in their brief that the Report serves as a but-for cause of their members' vote-dilution injury. *Id.* 36-38. Absent the Report, New York and Pennsylvania would each have one more seat. *See Burrage v. United States*, 571 U.S. 204, 211 (2014) (explaining but-for causation as requiring "proof that the harm would not have occurred in the absence of—that is, but for—the . . . conduct." (quotations omitted)). That proves but-for causation. *See FEC v. Ted Cruz for*

Senate, 142 S. Ct. 1638, 1647 (2022). The Census Bureau never disputes but-for causation.

1. Congress cannot excuse the Census Bureau from its duty to comply with the Constitution.

The Census Bureau denies responsibility for completing the Amendment process. It blames Congress for not "direct[ing]," "empower[ing]," or "authoriz[ing]" it to comply. Br. for Appellees (Gov't Br.) 7, 11-13. That argument fundamentally misunderstands the Constitution. The Constitution prohibits Congress from delegating a duty the Census Bureau can accomplish only by violating the Constitution. *See Lebron v. Nat'l RR Passenger Corp.*, 513 U.S. 374, 392 (1995) ("congressional pronouncement . . . can no more relieve [a government entity] of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment."). The clear language in the Amendment required the Census Bureau to comply. *See id.* ("The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'").

Blaming Congress also makes no sense because Congress took itself out of the apportionment process in 1941. *Dep't of Commerce v.*

Montana, 503 U.S. 442, 452 n.25 (1992) (recognizing Congress made the "reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census . . . ."). It delegated its "broad authority" over the census and assigned the Census Bureau a duty to "fairly account[] for the crucial representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566, 2569 (2019) (quotations omitted). Here, no injury would have happened but-for the Census Bureau's Report. The Census Bureau violated the Constitution, and blaming Congress does not excuse its violation.

The Census Bureau complains the Amendment process is too difficult, so it does not have to comply. Gov't Br. 12. Sixty years ago, the Supreme Court rejected that excuse to malapportionment claims. Even if implementing the Amendment may not be "possible . . . with mathematical precision, that is no excuse for ignoring our Constitution's plain objective . . . ." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). The Constitution only requires a practicable implementation. *See Yakus v. United States*, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the

impossible or the impracticable."). The Census Bureau has failed to explain why no practicable implementation is possible. *Cf. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1121 (D.C. Cir. 1971) ("It seems an unfortunate affliction of large organizations to resist new procedures and to envision massive roadblocks to their adoption."). It has no excuse for breaching the duties the Constitution assigned. *Cf. Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984) ("Nothing in the statute authorizes the Secretary to adopt a position of impossibility.").

2. Article III uses a but-for test of causation.

The Census Bureau ignores but-for causation and instead disputes whether Citizens identified denials and abridgments that caused their vote-dilution injuries. Gov't Br. 14-20. It focuses on the wrong causal link. Article III requires no proof the *legal violation* caused the plaintiff's injury, but only proof the *agency action* caused the injury. 5 U.S.C. § 702 ("aggrieved by agency action."); *Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1970) (asking whether "the challenged action has caused [the plaintiff] injury in fact . . . ."); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013) (rejecting this argument from

another agency because the agency "sliced the salami too thin."). The Report was a but-for cause of Citizens' injuries. That satisfies Article III.

The Census Bureau relies on two cases to argue that Article III requires Citizens to prove that the particular voting-right denials and abridgments Citizens identified caused their injuries. Gov't Br. 14, 18-20. Those cases do not apply because those plaintiffs did not plead the new agency action reduced their apportionment compared to the prior apportionment. Even assuming for the sake of argument that the cases apply, *Swann v. Adams*, 385 U.S. 440, 445-46 (1967), controls as the only binding Supreme Court precedent on point. It confirms Citizens' standing. Citizens' Br. 64.

In *Franklin v. Massachusetts*, 505 U.S. 788, 802, 820-23 (1992), eight justices confirmed Massachusetts had standing to claim the Constitution required the Census Bureau to count overseas federal employees differently. Four justices would have dismissed part of Massachusetts' claim where it argued the Census Bureau "erred in

using inaccurate data."[3] Those four justices concluded that Massachusetts failed even to "allege[]" that more accurate data could have changed the apportionment. *Id.* at 802. Massachusetts tackled a steeper hill than necessary. It set the 1990 (not the 1980) apportionment as the baseline, and it argued for an additional seat under a different 1990 apportionment. *See id.* Citizens pleaded an injury easier to prove. They used the 2010 apportionment as the baseline and alleged injury because the 2020 Report caused members' states to lose seats. App-37; App-39, App-130 to -131; App-166. Citizens proved but-for causation. *See Ted Cruz*, 142 S. Ct. at 1647.

Regardless, a majority of the Supreme Court set the appropriate test for malapportionment standing in *Swann*, 385 U.S. at 445-46. *Swann*

[3] This part of this opinion has little weight. Four justices split Massachusetts' claim in two; four justices recognized standing for the entire claim; and one justice would have dismissed for lack of redressability. *Id.* at 789-90, 802 (Opinion of O'Connor, J.), at 820-23 (Stephens, J., concurring), 824 (Scalia, J.). Only a complicated analysis under *Marks v. United States*, 430 U.S. 188 (1977), could identify the narrowest grounds for the decision. It does not matter because *Swann* controls. The Census Bureau points out that, at oral argument, Citizens' counsel mixed up the vote-counts for Sections II and III of that fractured opinion. Gov't Br. 27. Citizens' counsel regrets the error. The further colloquy clarified the votes. App-206.

compels recognizing Citizens' standing because Citizens presented three apportionments that, even if not perfect, provided a "closer approximation" to the Amendment's requirement than the Census Bureau's abject failure. *Id.*; Citizens' Br. 64; App-43 to -53; *cf. Allen v. Milligan*, 143 S. Ct. 1487, 1507 (2023) ("our cases have consistently focused . . . on the specific illustrative maps that a plaintiff adduces.").

The Census Bureau also relies on the *National Law Center on Homelessness v. Kantor*, 91 F.3d 178, 187 (D.C. Cir. 1996), which dismissed plaintiffs' lawsuit seeking a "'better' homeless count." Gov't Br. 14, 23. *Swann* controls *Kantor*, too. The *Kantor* plaintiffs provided only speculation. *Id.* Citizens, however, provided mathematical calculations for scenarios with closer approximation to the Amendment's requirement that remedied their injuries. App-43 to-53. That showing satisfied Article III. *See Swann*, 385 U.S. at 445-46.

3. Article III does not put Citizens in a Catch-22 or require proof by counterfactuals.

The Census Bureau assails Citizens' scenarios that show implementing the Amendment would apportion additional seats to New York and Pennsylvania. Gov't Br. 14-20. The Census Bureau argues in essence that no one can claim it violated the Amendment until the

Census Bureau completes that process, and it refuses to do so. Article III relaxes the burden of proof for procedural rights to allow claims, like here, when agencies fail to complete required processes. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

The Census Bureau is correct that its resources vastly outweigh Citizens' resources. Citizens do not have the Census Bureau's funding, countless statistical experts, or voluminous data. But Article III does not require Catch-22 proof or proof of counterfactuals. Citizens' Br. 62-66. Requiring Citizens to bear the burden of showing harm from an inadequate process is "especially inappropriate because the inadequate [process] may well make doing so impossible." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 535 (D.C. Cir. 2018) (Garland, C.J.).

For that reason, Article III recognizes Citizens' procedural rights give them standing upon demonstrating a "possibility" that implementing the Amendment would restore New York and Pennsylvania's seats. *See* Citizens' Br. 47-58; *Dep't of Educ. v. Brown*,

143 S. Ct. 2343, 2352 (2023).[4] Citizens demonstrated that possibility by engaging a data scientist who relied on the Census Bureau's data, a court's factual findings, and an expert report. App-43 to -53. Citizens' expert used the method of equal proportions to redistribute the seats and showed additional seats in members' states. *Id.* Citizens thus demonstrated the possibility that completing the Amendment procedure could remedy their injuries.

Because of their procedural rights, Citizens can establish causation with "'two links: [1] one connecting the omitted [procedure] to some substantive government decision that *may have been* wrongly decided because of the lack of [the procedure] and [2] one connecting that substantive decision to the plaintiff's particularized injury.'" *WildEarth Guardians*, 738 F.3d at 306 (quotations omitted, emphasis added). Citizens allege both links. First, they allege that failing to complete the Amendment reductions led the Census Bureau to issue a Report that

[4] The Supreme Court dismissed the *Brown* case based on a lack of causation because the agency action was not a but-for cause of any harm to the plaintiffs. *Id.* at 2352-55. The plaintiffs argued the action illegally helped other people; they wanted remand because they hoped the agency would issue a different decision to help them. *Id.* Here, the Report was a but-for cause of Citizens' injury.

was wrongly decided. App-131. Second, the Report connects to Citizens' states receiving fewer seats. App-26. Those connections prove causation.

The Census Bureau contends Citizens' calculations, which rely on statistical sampling, are not "feasible" because a statute prohibits the Census Bureau from relying on statistical sampling. Gov't Br. 13-14. That is nonsense. In *Marbury v. Madison*, the Supreme Court rejected the argument that a statute could override the Constitution as "an absurdity too gross to be insisted on." 5 U.S. 137, 177 (1803). If the only way to implement the Amendment relies on sampling, the Constitution will require sampling—regardless of Congress's contrary directions. *See id.*; *Wesberry*, 376 U.S. at 18.

Ultimately, Citizens assert a procedural right, and Article III requires no proof the result would have been different. *See Brown*, 143 S. Ct. at 2354; *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002). Citizens alleged and demonstrated causation.

C. The APA, the Mandamus Act, and the Declaratory Judgment Act give this Court ample power to redress Citizens' injuries.

Citizens explained in their brief that their injuries bring them within the zone of interests of two provisions of the Constitution and two statutes; that satisfying the zone-of-interests test gives them procedural

rights; and that Article III therefore recognizes Citizens' standing if the remedies they seek could redress their injuries. Citizens' Br. 38-60. This Court already recognized it has power to issue declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201-2202. *Lampkin*, 360 F.2d 505, 506. Courts also have broad equitable powers of remand, vacatur, injunctive relief, and writs of mandamus. Citizens' Br. 60-69. After the merits phase, the district court will hold a remedy phase to decide what remedy to issue. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152 (2010). For the threshold inquiry here, Citizens established redressability because courts have power to remedy Citizens' injuries. *See Utah v. Evans*, 536 U.S. 452, 459 (2002).

The Census Bureau does not contest that Citizens' injuries bring them within the zones of interest for Article I, 13 U.S.C. § 141, and Section 209. Instead, it asks this Court to ignore Citizens' procedural right under the Amendment because, it contends, Citizens' actual "grievance" is "a substantive, not a procedural" injury because Citizens want the Census Bureau to "adjust[] population totals." Gov't Br. 24. The Census Bureau misapprehends procedural rights. Procedural rights ask whether the "*procedure* is intended to enhance the quality of the

substantive decision . . . .” *See Int’l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1484 (D.C. Cir. 1994) (emphases added). Citizens pleaded that the Amendment *procedure* is intended to enhance the quality of the *substantive* Report by making it conform to the Constitution. App-130, -131. Citizens established their procedural right to the Amendment process.

The Census Bureau asserts it might not be able to withdraw the Report. Gov’t Br. 21. It focuses on the wrong actor. Article III asks whether “*courts* have the power to ‘redress’ the ‘injury’ . . . .” *Utah*, 536 U.S. at 459 (emphasis added). When officials violate “federally protected rights,” courts can “grant the necessary relief” and “may use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S. 678, 684 (1946). Courts have power to remedy Citizens’ injuries. Citizens’ Br. 60-69.

The Census Bureau complains it is too late to grant Citizens a remedy. It points to the easy remedy in *Utah v. Evans*, because there, the first election under the 2000 apportionment had not happened. Gov’t Br. 21-23. During a lawsuit, of course, “[n]o court can make time stand still.” *Nken v. Holder*, 556 U.S. 418, 421 (2009) (quotations

omitted). But courts do not issue "justice on the fly" just to satisfy an agency's preferences. *Id.* If Citizens had filed before the Report, the Census Bureau would have argued the case was not ripe. *See Trump v. New York*, 141 S. Ct. 530, 537 (2020). Citizens filed just seven months after the Report, *compare* App-2, *with* App-165, and the litigation has taken time. If courts lacked power to remedy malapportionment after a particular date, the Supreme Court would have dismissed all outstanding malapportionment cases by now, too. It did not. *See*, *e.g.*, *Allen*, 143 S. Ct. 1487. And of course, this case is not moot. Citizens' injuries will continue until at least 2032.

After the district court rules on the merits, it will balance the equities to craft an appropriate remedy. "'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see* 5 U.S.C. § 702 (recognizing power to issue "mandatory or injunctive decree[s]"). In cases that affect the public interest, like this one, courts have even broader powers. *See Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much

farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

For the most obvious option available to the district court, it could set aside the Report while the Census Bureau complies with the Constitution. The Census Bureau contends that vacating the Report "would not cause the 2010 apportionment to simply spring back into effect." Gov't Br. 8, 23. To the contrary, the APA works just like that. *See Action on Smoking and Health v. Civ. Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (cited by Citizens' Br. 67). During the remedy phase, the district court may decide not to vacate. *See Allied-Signal, v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). But because courts have the power to vacate, and because vacating would restore New York's and Pennsylvania's seats and redress Citizens' injuries, Citizens demonstrated redressability and satisfied Article III. *See Utah*, 536 U.S. at 459.

II. The plain text of the APA and Section 209 give Citizens a cause of action; if not, the Mandamus Act gives them one.

The Census Bureau has so little faith in the district court's ruling that it raised cause-of-action arguments, too. It overreached. It did not

cross-appeal, so this Court cannot address those arguments. Even if it analyzed them, the plain text of the APA and Section 209 give Citizens a cause of action. If not, Citizens have a right to a writ of mandamus.

A. The cross-appeal rule prohibits this Court from reaching the cause-of-action issues.

The Census Bureau did not cross-appeal. Therefore, the cross-appeal rule precludes litigation of cause-of-action issues that would enlarge the judgment to give it res judicata effect. *See Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 10290 (D.C. Cir. 2020).

Of course, courts routinely rule on threshold arguments for affirmance on other grounds. But when appellees do not cross-appeal, appellate courts do not enlarge a district court order's effect. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (recognizing this "'inveterate and certain'" requirement). That rule protects "the orderly functioning of the judicial system" by "putting opposing parties and appellate courts on notice of the issues to be litigated . . . ." *Id.* at 482.

A dismissal for lack of jurisdiction qualifies as dismissal without prejudice. *Jibril v. Mayorkas*, 20 F.4th 804, 813 (D.C. Cir. 2021). But "the existence of a cause of action under the APA goes to the merits." *Schieber v. United States*, 77 F.4th 806, 809 (D.C. Cir. 2023). A

dismissal on the merits, with prejudice, would "trigger[] the doctrine of res judicata or claim preclusion." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001). Therefore, an order on the cause-of-action issues would enlarge the district court's order from one dismissing *without* prejudice to one dismissing *with* prejudice and res judicata effect. *See Shatsky*, 955 F.3d at 1028-29. Because the Census Bureau did not cross-appeal, this Court may not address its cause-of-action arguments. *See id.*

B. The APA provides a cause of action because Section 209 makes the Report reviewable.

Even if this Court reaches the cause-of-action issues, it will see the APA provides a cause of action. Contrary to the Census Bureau's base assumption, Gov't Br. 25, the APA's text allows claims not only over "final agency actions," but also over "[a]gency actions made reviewable by statute." 5 U.S.C. § 704. Section 209 makes the Report reviewable.

The Census Bureau fails to carry its "heavy burden" of overcoming the "strong presumption" in favor of judicial review by demonstrating a "congressional purpose to prohibit judicial review" of Citizens' claims. *See Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). The Supreme Court recognizes that "legal lapses and violations occur, and especially so

when they have no consequence," and for that reason, it has "long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). It presumes Congress legislates "with knowledge of th[at] presumption . . . ." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (quotations omitted). Courts allow judicial review unless the government produces "'clear and convincing evidence'" that Congress intended to preclude review. *Id.* The presumption holds even if Congress did not "g[i]ve thought to the matter of the preclusion of judicial review." *Dunlop*, 421 U.S. at 567. When two interpretations are reasonable, courts use the interpretation that allows judicial review. *Kucana*, 558 U.S. at 251. Citizens' reasonable interpretation of Section 209 preserves judicial review of their claim.

1. The APA provides a cause of action if another statute makes the agency action reviewable.

Both the APA and Section 209 expand judicial review. No evidence shows any intent to preclude this lawsuit. The Census Bureau relies on *Franklin* to argue the APA only applies to final agency actions, and the Report does not qualify. Gov't Br. 25-27. It misses the point. The APA

allows this cause of action over an "action made reviewable by statue." 5 U.S.C. § 704.

In 1992, *Franklin* found two parts of a single apportionment process: (1) a recommendation by the Census Bureau, 13 U.S.C. § 141, and (2) a Presidential Statement to Congress apportioning the seats, 2 U.S.C. § 2a(a). 505 U.S. at 796-801. The Supreme Court concluded the President's actions do not qualify as an *agency* action, so the APA did not apply; and the report had no legal effect, so it did not qualify as a final agency action. *Id.*

Citizens do not contend the Report qualifies as a "final agency action." The Report qualifies instead as an "[a]gency action made reviewable by statute." 5 U.S.C. § 704. Section 704 "makes judicial review available for two categories of agency action . . . ." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 285 n.9 (D.C. Cir. 1983); *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1370 n.5 (Fed. Cir. 2010) (en banc) (collecting cases). Five years after *Franklin*, in Section 209, Congress made the Census Bureau's reports reviewable again under the APA.

2. The plain text of Section 209 allows Citizens' claims.

In Section 209, Congress broadly expanded judicial review. It aimed to ensure the Census Bureau "perform[ed] the entire range of constitutional census activities . . . ." Section 209(a)(9). It specifically referenced the apportionment requirements in "section 2 of the 14th article of amendment to the Constitution." Section 209(a)(3). Citing one of Congress's nine purposes in Section 209(a), the Census Bureau infers Congress created a cause of action only for claims over statistical sampling. Gov't Br. 27-29. It ignores Congress's other eight, broader goals that included enforcing the Constitution. Ultimately, the plain text of Section 209 allows judicial review of the Report. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

The Census Bureau argues the text supports its interpretation because Citizens' claim does not "concern the use of a statistical method," as Section 209(h)(1) defines that term. Gov't Br. 28. It misreads the statute. The text encompasses the Report because it

relates to underlying statistical inferences called "Count Review," by which the Census Bureau adds counts to the enumeration by statistical inferences "through remediating potential gaps in coverage." 2020 Census Operational Plan 13 (Feb. 1, 2019).[5] That imputation does not qualify as "sampling," but it qualifies as a statistical inference. *See Utah*, 536 U.S. at 465-73, 470, 479 (allowing some statistics, and describing some Census Bureau methods as "not of statistical sampling but of inference").

Substituting the Section 209(h)(1) definition into subsection (b) confirms a broad set of reviewable activities:

> "Any person aggrieved by the use of *any* [*activity related to* the . . . implementation of . . . *any* . . . *statistical procedure* . . . to add . . . counts to . . . the enumeration of the population as a result of statistical inference] . . . ."

(Emphases added.) The Report qualifies as an "activity" that "relate[s] to" the Count Review "statistical procedure," which adds counts to the enumeration as a result of statistical inference. The Report aggrieved Citizens. Citizens' Br. 40-42. Thus, Section 209's plain text makes the Report reviewable, and the APA provides a cause of action.

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[5] At census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4-and-memo.pdf.

The Census Bureau argues that Congress "did not open up any and all aspects of the census to suit." Gov't Br. 29. But it cites no evidence of congressional intent to preclude this lawsuit. Section 209's literal text controls. When Congress uses "expansive language" to allow challenges to agency actions, courts apply its "literal" effect. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 n.6 (1980). Section 209(h)(1) uses the phrase "related to," and the Supreme Court interprets that phrase as giving a "'broad scope'" and an "'expansive sweep.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). As in *Harrison*, "[t]his expansive language offers no indication whatever that Congress intended [a] limiting construction . . . ." 446 U.S. at 589. *Harrison* makes Citizens' literal reading controlling.[6]

Citizens' textual and reasonable interpretation allows judicial review of the Report. The strong presumption in favor of judicial review controls over the Census Bureau's interpretation, which lacks clear and convincing evidence of any intent to exclude this lawsuit. *See Kucana*,

[6] No text in Section 209 requires any causal link between the statistical inference and the aggrievement. *See Burrage*, 571 U.S. at 210-16 (identifying but-for causation as "'the minimum concept of cause,'" and identifying phrases that suggest but-for causation).

558 U.S. at 251; *Harrison*, 446 U.S. at 589. The APA and Section 209 give Citizens a cause of action.

The Census Bureau also objects to Citizens' standing because Section 209 does not list "[o]rganizations" among aggrieved parties. Gov't Br. 29. But Citizens established associational standing to represent member residents who qualify under Section 209(d)(1). Citizens' Br. 29-30; *see Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977). The Census Bureau cites Alabama as an example of an illicit plaintiff. Gov't Br. 29. Indeed, states have no right to represent citizens because they are not voluntary associations of citizen "'members,'" and they have no right to bring *parens patriae* claims against the United States. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002). Citizens demonstrated a cause of action under the APA and Section 209.

C. If Citizens have no APA cause of action, they have a cause of action for a writ of mandamus.

The Census Bureau has delayed implementing the Amendment for eighty years—ever since Congress delegated responsibility to calculate apportionments in 1941. *See Montana*, 503 U.S. at 452 n.25. That egregious delay calls for a writ of mandamus under 28 U.S.C. § 1361.

See In re Core Comm., Inc., 531 F.3d 849, 850 (D.C. Cir. 2008) (Garland, J.) (six-year delay qualifies as "egregious").[7]

Because the Census Bureau brought no cross-appeal, however, it has no right to raise this cause-of-action issue. It labels this as a jurisdictional argument. Gov't Br. 30. Applying *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), however, shows jurisdiction easily. If the jurisdiction and cause-of-action inextricably intertwine, courts assume subject matter jurisdiction if, under one construction, the plaintiffs have a right to recover, and under another construction, no right. *Id.* If this Court agrees with Citizens' interpretation of the Amendment and the writ of mandamus statute, it will issue the writ; if not, it will decline the writ. This Court has jurisdiction. *See id.* The cross-appeal rule precludes this argument.

Even if this Court reaches this issue, Citizens demonstrated their right to a writ of mandamus. Courts issue writs if "'(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3)

[7] Citizens technically seek relief "in the nature of a writ of mandamus" because Federal Rule of Civil Procedure 81(b) eliminated the writ. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 164 n.2 (D.C. Cir. 2017).

there is no other adequate remedy available to plaintiff.'" *N. States Power Co. v. U.S. Dept. of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997). Citizens established all three elements.

1. Citizens have a clear right to relief because their injuries bring them within two constitutional provisions' and two statutes' zones of interest.

Citizens have a right to relief. The Supreme Court uses the zone-of-interests test as the "appropriate tool for determining who may invoke" a cause of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). Courts use it for petitions for writs of mandamus. *Silveyra v. Moschorak*, 989 F.2d 1012, 1014 n.1 (9th Cir. 1993). In their brief, Citizens explained their injuries bring them within the zone of interests for Article I, the Amendment, 13 U.S.C. § 141(b), and Section 209. Citizens' Br. 42-46. Satisfying the zone-of-interests test gives Citizens a right to relief.

2. The Amendment assigns the Census Bureau a clear duty to act.

The clear language of the Amendment assigned every branch of the United States government a duty to implement it. In 1870, the Census Office admitted its duty. Francis A. Walker, Superintendent of the

Census, The Statistics of the Population of the United States xxviii (1872).[8] It breached its duty in the Report.

The Amendment directs, "the basis of representation [of a state] shall be reduced" when that state denies or abridges "in any way" its citizens' rights to vote (with exceptions). The word "shall" makes the duty mandatory. *See Shapiro v. McManus*, 577 U.S. 39, 43 (2015) ("the mandatory 'shall' normally creates an obligation impervious to judicial discretion." (alterations and quotations omitted)).

The phrase "shall be reduced" uses passive voice, and "the natural breadth of the passive voice" demonstrates the Framers intended to cover all possible actors. *See Bartenwerfer v. Buckley*, 143 S. Ct. 665, 673 (2023). In the 1860s, every branch participated in the apportionment process. Congress (the Legislative Branch) directed the marshals (Judicial Branch officials) to collect census information and to transmit it to the Department of the Interior (Executive Branch officials). Act of May 23, 1850, 9 Stat. 428. Of course, the Legislative

[8] At https://www2.census.gov/library/publications/decennial/1870/population/1870a-01.pdf.

Branch was never going to catalog voting denials and abridgments itself. The Framers expected the Executive Branch to execute the Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2942-43, 3038 ("The census-taker will find it necessary . . . to ascertain . . . who are capacitated to vote . . . ."). Congress used passive voice to give their delegation breadth. Ultimately, "we must never forget that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (Marshall, C.J.).

The Census Office recognized its duty in 1870, but it botched the execution. Citizens' Br. 14-15. Its failure does not dissolve its duty under the Constitution. The Amendment assigned the Census Bureau a clear duty to execute it.

3. If Citizens have no APA cause of action, they have no alternative to a writ of mandamus.

If the APA provides no cause of action, then Citizens have no other recourse than a writ of mandamus. Writs of mandamus claims are rare because the APA usually provides a cause of action. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986) (construing a mandamus claim as a claim under the APA); *Indep. Mining Co., Inc. v.*

Babbitt, 105 F.3d 502, 507 (9th Cir. 1997). Without the APA, Citizens have no other statutory recourse.

4. The Amendment assigned a clear, ministerial duty.

The Census Bureau argues that the Amendment does not assign a "clearly defined, ministerial duty" because Congress has not given "specific direction." Gov't Br. 31. The Census Bureau provides no example of any court excusing compliance with the Constitution for that reason. If a statute or constitutional provision requires some interpretation, it nonetheless assigns a ministerial duty when, after completing the interpretation, the law obligates the officer to act. *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). After the Census Bureau interprets the words "denied" and "abridged," the Amendment obligates it to calculate the bases of representation. Thus, the Amendment assigns a ministerial duty.

Courts issue writs of mandamus to complete duties even when courts may not "specify what the action must be." *Norton*, 542 U.S. at 64; *Virginian Ry.*, 300 U.S. at 551. This Court has issued writs to complete more complicated duties than Citizens request. In one case, this Court issued a writ directing an agency to analyze a nuclear waste storage

license application. *In re Aiken Cnty.*, 725 F.3d 255, 258 (D.C. Cir. 2013). In another, it issued a writ directing an agency to justify "rules governing intercarrier compensation for telecommunications traffic bound for Internet service providers . . . ." *Core Commc'ns*, 531 F.3d at 850. In a third, it issued a writ directing the Social Security Administration to "adopt realistic means for determining the content of Iranian law" after the revolution, so it could provide benefits. *Ganem*, 746 F.2d at 853. The rule is clear: "[w]hen the Secretary refuses to perform her statutory [or constitutional] duties, mandamus is an appropriate remedy to force her to do so." *Id.* at 854.

Citizens seek a writ of mandamus directing the Census Bureau to calculate states' bases of representation as the Constitution directs. The Constitution prohibits the Census Bureau from ignoring it. *See Lebron*, 513 U.S. at 392. Although the Census Bureau seeks to render the Amendment a dead letter, the Constitution prohibits that outcome. "It cannot be presumed that any clause in the constitution is intended to be without effect . . . ." *Marbury v. Madison*, 5 U.S. at 174. The Amendment presents exactly the type of "'specific, unequivocal command'" that qualifies as a discrete, ministerial, non-discretionary

act. *See Norton*, 542 U.S. at 64. When, like here, an agency admits it has "no current intention of complying with the law," *Aiken Cnty.*, 725 F.3d at 258, its "complete abnegation" of its duty compels a writ of mandamus. *See Ganem*, 746 F.2d at 846. The Constitution compels a writ of mandamus to complete the Amendment process.

CONCLUSION

Citizens demonstrated Article III standing. The Constitution requires reversal and remand to the district court for further proceedings.

Dated: January 29, 2024,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Federal Rule of Civil Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 6,265 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced typeface, 14-point Century Schoolbook in MS Word 365.

Dated: January 29, 2024,

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CERTIFICATE OF SERVICE

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