No. _____

In the Supreme Court of the United States

CITIZENS FOR CONSTITUTIONAL INTEGRITY
PETITIONER
v.
CENSUS BUREAU, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To apportion U.S. House of Representatives seats, the 14th Amendment, Section 2 (the Reduction Clause), and 2 U.S.C 6 require an additional procedure after the "actual Enumeration" in Article I, Section 2. The Reduction Clause directs, with exceptions, each state's "basis of representation . . . shall be reduced" to the extent that state denies or abridges its citizens' rights to vote. Congress delegated responsibility to the Secretary of Commerce, every decade, to report on "the apportionment." 13 U.S.C. 141(b). No one can deny that some states have denied or abridged some citizens' rights to vote, yet the Secretary's 2021 Report did no reducing. It ultimately apportioned one fewer seat to two states where Citizens for Constitutional Integrity's members reside and vote. The questions presented are:

1. Whether the Administrative Procedure Act and the Mandamus Act gave Citizens procedural rights to claim the Secretary failed to complete the 14th Amendment, Section 2, and 2 U.S.C. 6 procedure when issuing the 2021 Report.
2. Whether, when a plaintiff demonstrates agency action apportioned fewer Congressional seats to states where the plaintiff's members reside and vote, the plaintiff established fair traceability to claim the agency based that action on an improper legal ground.

PARTIES TO THE PROCEEDING

Petitioner Citizens for Constitutional Integrity was the plaintiff in the district court and the appellant in the court of appeals.

Respondents the Census Bureau, the U.S. Department of Commerce, the Secretary of Commerce, and the Director of the Census Bureau (collectively, the Census Bureau) were defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a nonprofit corporation without stock. No parent or publicly held company owns ten percent or more of its stock.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Citizens for Constitutional Integrity v. *Census Bureau*, No. 1:21-cv-03045-CJN-JRW-FYP (Apr. 18, 2023)

United States Court of Appeals (D.C. Cir.):

Citizens for Constitutional Integrity v. *Census Bureau*, No. 23-5140 (Sept. 10, 2024) (initial panel opinion)

Citizens for Constitutional Integrity v. *Census Bureau*, No. 23-5140 (Jan. 24, 2025) (rehearing en banc denial and panel rehearing denial)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Citizens for Constitutional Integrity respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) in this case.

OPINIONS BELOW

The D.C. Circuit's opinion, with Judge Wilkins's concurring opinion, is reported at 115 F.4th 618 (D.C. Cir. 2024). App. 1a-36a. The district court's memorandum opinion is reported at 669 F. Supp. 3d 28 (D.D.C. 2023). App. 37a-50a.

STATEMENT OF JURISDICTION

The D.C. Circuit entered judgment on September 10, 2024. It denied the petition for panel rehearing and for rehearing en banc on January 24, 2025. App. 59a-60a; 61a-62a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the pertinent constitutional and statutory provisions. App. 63a-80a.

STATEMENT

This petition involves the long-neglected yet "most important" clause in the Fourteenth Amendment, and it provides this Court an opportunity to provide needed guidance on recognizing procedural rights and determining Article III fair traceability. See Report of the Joint Committee on Reconstruction XIII, H.R.

Rep. No. 30, 39th Cong., 1st Sess. (1866) (Reconstruction Report). The Reduction Clause states, "when the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation [in that state] shall be reduced." This Court called it "as much a part of the [Fourteenth] Amendment as any of the other sections." *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974). Justice Brennan called its objective one of "critical importance" and its operation sometimes "indispensable." *Oregon v. Mitchell*, 400 U.S. 112, 277 (1970) (concurring in part and dissenting in part). Yet it is languishing.

The concurring opinion called the Reduction Clause "essentially a dead letter." App. 30a. "It is as if the Reduction Clause were written in invisible, rather than indelible, ink." App. 34a. Congress feared this outcome and passed a statute to preclude it. Joint Committee on Reconstruction member Senator Justin Morill urged passing 2 U.S.C. 6, to execute the Reduction Clause in statute, because "[w]e must do nothing to impair the vitality of [the Reduction Clause] or any other provision of the Constitution. If not needed today, it may be tomorrow. *It must not become a dead letter*." Cong. Globe, 42nd Cong., 2nd Sess. 670 (1872) (emphasis added).

Despite Congress's effort, lower courts for decades have avoided the merits in every Reduction-Clause lawsuit. Citizens for Constitutional Integrity's case cured the defects that plagued earlier cases. But as the case moved toward the merits, the lower courts blinked, moved the goalposts, and dismissed the case.

The D.C. Circuit diverged from ten other circuit courts and created a new test for procedural rights. It uses plaintiffs' demonstration of concrete harm to prove plaintiffs have no procedural rights. Citizens

claimed the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Mandamus Act, 28 U.S.C. 1361, gave them procedural rights to assert the Census Bureau violated the Reduction Clause. Procedural rights allow a plaintiff to demonstrate Article III standing "without meeting all the normal standards for redressability and immediacy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Procedural rights are "special," *id.*, because they prevent "'arbitrary'" and "'oppressi[ve]'" government actions. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Due Process Clause, based on the Magna Carta, requires the Government to follow every procedure the law requires before taking rights from citizens. The D.C. Circuit effectively eliminated those rights. It held that, when a court can find, in the "heart" of a complaint, the plaintiff seeking to remedy substantive injury, the plaintiff has no procedural-right claim. But Article III always requires plaintiffs to prove they are seeking redress for concrete injury. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). The D.C. Circuit's test thus uses proof of concrete injury to preclude procedural-rights claims.

The D.C. Circuit also ignored Citizens' demonstration of fair traceability. The Report caused Citizens vote-dilution injury by *removing* seats from members' states. Yet the D.C. Circuit demanded a second showing: that the Census Bureau's future report, after remand, would give members' states *additional* seats. When plaintiffs demonstrate fair traceability once, Article III prohibits courts from creating new jurisdictional hurdles to require proving fair traceability a second time.

This case calls for the United States to live up to its commitments to democracy that the Framers set forth in the Reduction Clause. It calls for this Court to

hold the Census Bureau accountable to the Constitution. It merits a writ of certiorari.

I. Legal Background

14th Amendment, Section 2, and 2 U.S.C. 6

Emerging from a bloody Civil War, the Framers saw the Thirteenth Amendment had freed 3.6 million formerly enslaved persons in the rebel states. Cong. Globe, 39th Cong., 1st Sess. 74, 2767 (1866). The Framers recognized that Article I, section 2, required apportioning representative seats by counting those newly-free persons as whole persons instead of "three fifths" of a person. Reconstruction Report XIII. But they knew the "oligarch[s]" in the rebel states would not let the formerly enslaved people vote. *Id.* If nothing changed, Article I, section 2, would give those oligarchs about thirteen additional seats in the U.S. House of Representatives as a reward for starting the Civil War. *Id.*; Cong. Globe, 39th Cong., 1st Sess. 74; *Evenwel v. Abbott*, 578 U.S. 54, 99 (2016) (Alito, J., concurring). The Civil War victors could not let that injustice stand.

The Framers intended a "fundamental" shift in apportioning seats in the U.S. House of Representatives. Reconstruction Report XIII. The Reduction Clause requires each state's "basis of representation . . . shall be reduced" to the extent the state denies or abridges its citizens' "right to vote."[1] The word "shall" makes the reduction mandatory. See *Shapiro v. McManus*, 577 U.S. 39, 43 (2015). The passive-voice construction "shall be reduced" makes

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[1] The text references males, twenty-one years and older, but the Nineteenth and Twenty-Sixth Amendments amended it. *See Evenwel*, 578 U.S. at 102 n.7 (Alito, J., concurring).

every branch of the United States responsible. See *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 276, 279 (2024). Thus, the Reduction Clause requires the United States to calculate, for each state, the percentage of resident citizens eighteen years old and older who can vote (with exceptions), to multiply that percentage by the state's population, and to use that new basis of representation to apportion seats. See Reconstruction Report XIII.

Take 1870 North Carolina. Its population split roughly into two-thirds white people and one-third black people. Immediately after the Civil War, North Carolina did not allow black citizens to vote. See Reconstruction Report, Va., N. Carolina, S. Carolina 174. Assume for simplicity the census reflected citizens and North Carolina did not disenfranchise anyone for criminal convictions or rebellion. Then, when apportioning seats, the Reduction Clause would have allowed counting only two-thirds of North Carolina's enumerated population.

The United States has never implemented the Reduction Clause. For the 1870 census, the Executive Branch produced "utterly inaccurate" and "confessedly unreliable" results. Cong. Globe, 42nd Cong., 2nd Sess. 79, 609-10 (1872). Congress passed 2 U.S.C. 6 to "carry out" the Reduction Clause. *Id.* at 610.[2] That statute, effectively, implements the Reduction Clause by repeating much of the language.

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[2] Three circumstances compel a different result here than in *Trump v. Anderson*, 601 U.S. 100, 109, 112 (2024). That case dismissed Fourteenth Amendment, Section 3, claims to disqualify federal candidates because Congress had implemented no remedy, and it could not have left the states to enforce the section. *Id.* at 110, 116-17. First, Congress implemented the Reduction Clause by statute, 2 U.S.C. 6. Second, the United

The Apportionment Process

In 1941, Congress delegated its "broad authority" over the census and assigned the Census Bureau the duty to "fairly account[] for the crucial representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 588 U.S. 752, 769, 773 (2019) (quotations omitted); *Dep't of Commerce v. Montana*, 503 U.S. 442, 452 (1992). Congress made the apportionment "process self-executing." *Montana*, 503 U.S. at 452 n.25. Congress requires the Secretary of Commerce to report to the President the "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress." 13 U.S.C. 141(b).

Procedural Rights and Standing

Plaintiffs have a "procedural right" when a statute allows them to claim the government (a) failed to complete a mandatory procedure or (b) completed a procedure arbitrarily and capriciously when causing concrete injury. See *Massachusetts v. EPA*, 549 U.S. 497, 517-18, 520 (2007). The APA includes an explicit procedural right. It requires courts to "hold unlawful and set aside agency action, findings, and conclusions" made "without observance of procedure required by law." 5 U.S.C. 706(2)(D). The Mandamus Act gives a separate procedural right "to compel an officer or employee of the United States or any agency thereof

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States has responsibility for apportioning seats. Third, the Reduction Clause restricts states' authorities. *See id.* at 112-13 (citing the Reduction Clause as an example of restrictions on states).

to perform a duty owed to the plaintiff." 28 U.S.C. 1361.

Article III assigns federal courts jurisdiction when individual plaintiffs demonstrate injury, fair traceability, and redressability. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). For this threshold analysis, courts assume the correctness of plaintiff's positions on the legal merits. *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022).

This Court recognized procedural rights as "special," but it never explained why. *Lujan*, 504 U.S. at 572 n.7. Procedural rights are special because they arise from the Due Process Clause. "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (plurality). Among other rights, the Due Process Clause protects voting rights. *Minor v. Happersett*, 88 U.S. 162, 176 (1874), *superseded on other grounds by* U.S. CONST. amend. XIX.

Plaintiffs establish concrete injury when they show their state lost a representative. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999) (pre-census claim); *Utah v. Evans*, 536 U.S. 452, 459-61 (2002) (post-census claim).

Plaintiffs demonstrate fair traceability when the agency action causes the concrete injury. *Ted Cruz for Senate*, 596 U.S. at 297. Article III does *not* require plaintiffs to prove the alleged *legal violation* caused their injury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006); *FEC v. Akins*, 524 U.S. 11, 25 (1998).

When a statute gives a plaintiff procedural rights, the plaintiff can establish redressability "without meeting the usual 'standards for redressability.'" *Dep't of Educ. v. Brown*, 600 U.S. 551, 561 (2023) (quoting *Lujan*, 504 U.S. at 572 n.7). Article III "tolerate[s] uncertainty over whether observing certain procedures would have led to (caused) a different substantive outcome." *Id.* at 565. A plaintiff "never has to prove that if he had received the procedure the substantive result would have been altered." *Massachusetts v. EPA*, 549 U.S. at 518 (quotations omitted). Plaintiffs need only show "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.*

II. Factual and Procedural Background

A. In April 2021, the Census Bureau finalized its Report that apportioned seats.

The Census Bureau issued the Report and apportionment in April 2021. App. 51a. In the attached table, under the heading "Change from 2010 Census Apportionment," the Report states for Pennsylvania "-1," for New York, "-1," and for Virginia, "0." App. 54a, 55a. Citizens sent a letter requesting the Census Bureau to complete the Reduction Clause procedure. App. 41a; cf. 5 U.S.C. 553(e). The Census Bureau responded that it lacked authority to do so. App. 58a. It "suggest[ed] that [Citizens] reach out to the Civil Rights Division of the Department of Justice regarding enforcement of the Fourteenth Amendment or any civil or voting rights law." *Id.*

B. Citizens showed the Report apportioned fewer representatives to two members' states.

Within weeks, Citizens filed claims under the APA and the Mandamus Act for declaratory relief, injunctive relief, vacatur, and mandamus.[3] Citizens challenged the Report and alleged it violated the Reduction Clause. The district court judge empaneled a three-judge panel.

Citizens moved for early summary judgment. Members from New York and Pennsylvania declared they suffered vote-dilution injury from having fewer representatives for their states, and a Virginia member sought an additional representative.

To prove "some possibility" of redress under Article III, see *Massachusetts v. EPA*, 549 U.S. at 518, Citizens also attached a declaration from Data Scientist Ayush Sharma. Sharma provided mathematical calculations that showed different possible results of the Census Bureau completing the Reduction Clause procedure, in three scenarios. For one scenario, Sharma based his figures on the Census Bureau's voter registration statistics for each state. Based on this approach, Virginia would have gained a seat. For a second scenario, Sharma relied on a court's finding that Wisconsin's 2011 photo voter identification law disenfranchised 300,000 registered voters. *Frank v. Walker*, 17 F. Supp. 3d 837, 842, 854, 884 (E.D. Wis. 2014), overturned on other grounds by 768 F.3d 745, 746 (7th Cir. 2014), r'hrg en banc denied, 773 F.3d 783 (2014). Accounting for that

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

abridgement would have moved a seat from Wisconsin to New York. For a third scenario, Sharma combined both of the other scenarios. Under that approach, Pennsylvania would have gained a seat.

Citizens never claimed the Census Bureau would apportion seats exactly according to their scenarios. As the U.S. Department of Justice explained in another malapportionment context, "[e]ven if a [Voting Rights Act] Section 2 violation is proven, the defendant [government] need not adopt one of those maps; instead, it has wide latitude to adopt any map that remedies the violation." Br. for the U.S. as Amicus Curiae in Supp. of Appellees and Resp'ts 27, *Merrill v. Milligan*, Nos. 21-1086 and 21-1087 (July 2022), renamed *Allen v. Milligan*, 599 U.S. 1, 36 (2023).

C. The three-judge district court recognized the Report apportioned fewer representatives to two of Citizens' members' states, but denied the Reduction Clause was "designed to protect" Citizens and required Citizens to prove fair traceability a second way.

The district court dismissed the case for lack of Article III standing. App. 38a. It concluded Citizens had no procedural right because Citizens failed to show the Reduction Clause procedure was "designed to protect" their interests. It held that those "procedures are *usually* found in statutory provisions that give private parties a right to participate in a government process." App. 49a (emphasis added). It never identified what other situations also give procedural rights—or whether this qualified as an "unusual" situation.

Because Citizens could not rely on any procedural rights, the district court held, Citizens failed to

establish fair traceability. App. 44a. The district court admitted, "the 2020 apportionment *did* decrease the number of representatives in two states in which Citizens's members reside — both New York and Pennsylvania." App. 42a-43a. But it held that Citizens' proof of vote-dilution injury was insufficient for standing because, "in this context," Article III requires Citizens to determine the denials and abridgments "in *all* states . . . to provide us with a scenario that illustrates what apportionment might look like if Citizens's legal theory is correct." App. 46a. Citizens had argued that Article III "standing does not require precise proof of what the [agency's] policies might have been in that counterfactual world." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010). Yet the district court required proof of that counterfactual: "we have no way of knowing if the Bureau's failure to apply the [Amendment], in accordance with Citizens's legal theory, led to fewer representatives in Pennsylvania, New York, or Virginia." App. 47a.

D. The D.C. Circuit denied Citizens' claims they had a procedural right because *Citizens sought relief for "substantive" injuries; and although the Report apportioned fewer representatives to two of Citizens' members' states, it required Citizens to prove fair traceability a second way.*

On appeal to the D.C. Circuit, Judge Wilkins authored the majority opinion, which upheld the dismissal, and a concurring opinion, which rejected the Census Bureau's merits defenses.

1. The D.C. Circuit upheld the conclusion that Citizens lacked procedural rights, but for different reasons. It concluded there was "no established test in this Circuit for determining whether a claimed right

is procedural or not." App. 13a. The D.C. Circuit found the "heart" of Citizens' challenge "substantive" because Citizens seek redress for substantive injury. App. 14a. Therefore, it concluded Citizens lacked procedural rights. App. 17a.

The D.C. Circuit proceeded to determine Article III standing without a procedural right. It recognized that "the Report reduces the seat allocation for New York and Pennsylvania." App. 20a. But like the district court, it held that Citizens' "factual allegations are not enough to establish" fair traceability. App. 19a. It found Citizens' calculations "premised on a selective enforcement of the Reduction Clause with respect to only one state—Wisconsin," without analyzing New York's, Pennsylvania's, or Virginia's voting requirements. *Id.* It held that, because Citizens did not provide "the entire story," by providing a "'feasible, alternative methodology'" that accounted for all of the denials and abridgments in those states and showed Citizens' members' states would receive a new seat, they had not established fair traceability. App. 20a.

2. Judge Wilkins filed a concurring opinion that excoriated the Census Bureau for contending it had no responsibility to comply with the Reduction Clause. He stated, "The Bureau's response, put colloquially, was, 'Not it.'" App. 24a. Judge Wilkins placed responsibility on the Executive Branch to faithfully execute the Reduction Clause. App. 23a-24a. He showed the Census Bureau's position contradicted the agency's earlier position, which in 1870 had recognized the agency's obligation to implement the Reduction Clause. App. 24a, 27a-29a, 35a. He rejected the possibility that the Census Bureau's 1870, "slapdash, one-time attempt" to implement the Reduction Clause could "justify the agency's ongoing

failure to even try to ensure that states denying or abridging the right to vote are appropriately held to account." App. 35a.

Judge Wilkins even described how the Census Bureau could complete the procedure that Citizens sought: "The Bureau has several tools at its disposal to identify ways to implement the provision; it can promulgate rules, engage in notice and comment, seek out implementation input from experts, or generate reports for submission to the President and Congress." *Id.*

Ultimately, he rejected the Census Bureau's excuses that compliance was too hard. "Many constitutional provisions are difficult to enforce, like the Second Amendment, the preservation of the right to trial by jury, and the guarantee of equal protection." 35a-36a. Yet, he concluded, "the government has a duty to enforce all of the Constitution, not just some of it, and it is time that the government stop treating the Reduction Clause as an afterthought." *Id.*

3. Citizens petitioned for panel rehearing and rehearing en banc. The D.C. Circuit denied the petitions without comment. App. 59a-60a; 61a-62a.

REASONS FOR GRANTING THE PETITION

The courts of appeals disagree on how to identify procedural rights, and this case illuminates these conflicts clearly. Moreover, lower courts are requiring more proof than Article III requires and are denying jurisdiction when the Constitution assigns it, and that results in agencies making arbitrary and oppressive decisions without consequences. Finally, the momentous context requires this Court's input on grave impacts of the Framer's fundamental

democratic principles. The courts of appeals need this Court's further guidance.

I. Certiorari is needed to resolve a conflict over the D.C. Circuit's outlier test for determining procedural rights, which ten other courts of appeals do not apply.

The D.C. Circuit created a new Article III standing test to determine when a litigant establishes procedural-rights standing, and that test effectively eliminates procedural rights. No other court of appeals uses any similar test. That makes the D.C. Circuit an extreme outlier.

1. The D.C. Circuit held that it had "no established test" for determining when plaintiffs have procedural rights. App. 13a. It created a new test by asking whether, in the "heart" of the complaint, the plaintiffs seek "substantive" or "procedural" relief. App. 14a.

Ten other courts of appeals recognize procedural-rights standing when (1) a plaintiff asserts an agency violated a mandatory procedure, and (2) Congress or the Framers "designed [the statute or constitutional provision] to protect" people like the litigants. See *K. J. ex. rel. Johnson v. Jackson*, 127 F.4th 1239, 1252 (9th Cir. 2025); *Desuze v. Ammon*, 990 F.3d 264, 268-69 (2d Cir. 2021); *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 543 (5th Cir. 2019); *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017); *New Mexico v. Dep't of the Interior*, 854 F.3d 1207, 1215-16 (10th Cir. 2017); *Salmon Spawning & Recovery All. v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1132 (Fed. Cir. 2008); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 26-28 (1st Cir. 2007); *Sierra Club v. Johnson*, 436 F.3d 1269, 1278 (11th Cir. 2006); *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 951-53 (7th Cir. 2005); *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002).

These tests derive from *Lujan*, which recognized Article III allows litigants to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." 504 U.S. at 573 n.8.[4] The D.C. Circuit is an outlier. This clear circuit split requires certiorari to resolve it.

2. This circuit split raises grave concerns because it effectively eliminates all procedural rights in the D.C. Circuit, which reviews innumerable agency actions. The D.C. Circuit's test uses plaintiffs' demonstration of concrete harm to prove they have no procedural right. App. 14a. It creates two categories of dismissals for procedural-rights cases:

- *Category 1*: Plaintiff demonstrates a procedural right, but no concrete injury. No standing. *TransUnion*, 594 U.S. at 417 ("No concrete harm, no standing.").
- *Category 2*: Plaintiff demonstrates concrete injury. Then, Plaintiff cannot establish a procedural right. App. 14a. No standing.

By effectively eliminating procedural-rights, this result contradicts this Court's repeated holdings that procedural rights exist. See, *e.g.*, *Dep't of Educ.*, 600 U.S. at 561-62; *Lujan*, 504 U.S. at 573 n.8 (collecting cases).

The doctrines on procedural-rights standing need clearer rules, so courts can hold agencies accountable. "[C]ourts benefit from straightforward rules under

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[4] The "designed to protect" standard adopts the zone-of-interests test. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 n.5 (2014); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990) (using the "designed to protect" language for the zone-of-interests test).

which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Without addressing this split, the Government will harm more people without courts taking jurisdiction. "In *this* world, real people are injured by actions taken without lawful authority." *Collins v. Yellen*, 594 U.S. 220, 279 (2021) (Gorsuch, J., concurring in part). The D.C. Circuit created an outlier test for determining procedural rights, and it effectively precludes procedural-rights standing. The courts of appeals need this Court's guidance.

II. Certiorari is necessary to provide guidance on whether, after plaintiffs demonstrate an agency action caused them concrete harm, Article III allows courts to require plaintiffs to establish fair traceability a second way before claiming the agency based its action on an improper legal ground.

Article III gives courts no power to add additional standing requirements. Plaintiffs can often prove standing "in various ways." See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011). When litigants carry their burden, Article III requires courts to assert jurisdiction and to consider the merits. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989); *Hyde v. Stone*, 61 U.S. 170, 175 (1857) ("the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends."). Article III prohibits courts from dismissing cases because the plaintiff did not prove standing in the way the court would have preferred. See *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed

to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.").

1. Citizens proved an agency action caused their concrete injury, and that demonstrates fair traceability. When a plaintiff alleges a defendant's action caused them concrete injury, and when the defendant based that action "upon an improper legal ground," the plaintiff has demonstrated fair traceability. *Akins*, 524 U.S. at 25; see *Ted Cruz for Senate*, 596 U.S. at 297 ("an injury resulting from the application . . . of an unlawful enactment remains fairly traceable to such application."); *Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1970) (recognizing standing if "the challenged action has caused [the plaintiff's] injury in fact."); see also *Collins*, 594 U.S. at 264 (Thomas, J., concurring) (recognizing fair traceability when "the shareholders allege the Government acted unlawfully, [and] their alleged injury can be traced to those allegedly unlawful actions . . . .").

Citizens demonstrated fair traceability because the Report caused Citizens' New York and Pennsylvania members' vote-dilution injuries by stating "-1" next to those states' apportionments. App. 54a, 55a. A single citizen's "loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce*, 525 U.S. at 331; *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

No one disputed that chain of causation here. Both courts admitted the Report caused Citizens' members' states to lose seats. App. 21a; App. 38a. That injury will last until at least the next reapportioned legislature sits in 2033. Proving that causation

neither requires speculation nor involves any third party. This straightforward chain of causation establishes fair-traceability under Article III.

2. Both lower courts demanded a second demonstration of fair traceability from the *legal violation* to the injury. App. 18a-20a ("we cannot conclude from Citizens's allegations that its injury is plausibly connected to the Bureau's failure to incorporate the Reduction Clause into its methodology"); App. 44a (same). Article III, however, does not require plaintiffs to prove that in addition to showing the agency action cause the concrete injury.

When a plaintiff establishes "standing to request invalidation of a particular agency action," it may raise "*all grounds on which the agency may have failed to comply with its statutory mandate*." *DaimlerChrysler*, 547 U.S. at 353 n.5 (quotations omitted, emphasis added). Every National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347, case proceeds on this basis. The agency decision (like building a dam) causes the injury, *Lujan*, 504 U.S. at 572 n.7, but the legal violation happens earlier—when the agency fails to give an opportunity to comment, *Summers*, 555 U.S. at 497, or when it fails to develop mitigation measures for environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). The lower courts required the wrong proof of fair traceability.

3. Effectively, the lower courts required Citizens to prove the findings the Census Bureau would make in a counterfactual world. But Article III does not require that proof. See *Seila L. LLC v. CFPB*, 591 U.S. 197, 211 (2020); *Free Enter.*, 561 U.S. at 512 n.12 ("petitioners' standing does not require precise proof of what the Board's policies might have been in that

counterfactual world."). The district court rejected Citizens' proof of fair traceability as insufficient because they did not "show that their states would have had an additional representative but for the government's error." App. 43a. The D.C. Circuit also concluded Citizens' "factual allegations are not enough." App. 19a. It demanded more proof to "establish that there is a comparable 'feasible, alternative methodology' that would have produced a different result" and accounted for "the entire story." App. 19a-20a. It demanded Citizens also show the impacts of the Reduction Clause on New York, Pennsylvania, and Virginia and show, for a counterfactual world, that New York and Pennsylvania would not have lost a seat, anyway. App. 18a-19a. When Citizens did not provide that evidence—because they already demonstrated fair traceability—the D.C. Circuit dismissed the case. App. 19a-22a.

This Court has rejected arguments that Article III requires malapportionment plaintiffs to prove the new apportionment would cure their injury. *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it."); cf. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 463-64 (2017) ("Of course, the lawsuit—like any lawsuit—*might* prove fruitless, but the mere *possibility* of failure does not eliminate the value of the claim or petitioners' injury in being unable to bring it."). Moreover, this Court affirms plaintiffs' standing for malapportionment claims when they "placed before the court their own plan" that demonstrated a "closer approximation" to the legal ideal—even if "their

suggested amendments to the legislative plan might have been infirm in other respects." *Swann v. Adams*, 385 U.S. 440, 445 (1967). The lower courts thus demanded Citizens prove a counterfactual that Article III does not require.

4. Article III prohibits courts from moving the goalposts to add new jurisdictional requirements. Article III assigns federal courts a "'virtually unflagging'" responsibility to hear cases within their jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Allowing courts to set their own jurisdictional boundaries would allow lower courts to dismiss cases based on "doubts" or "difficulties." *Id.* Giving judges discretion over what cases to take would undermine the Constitution's design.

Citizens demonstrated fair traceability between the agency action and their vote-dilution injury, and that satisfied the "constitutional minimum." *Lujan*, 504 U.S. at 560. Article III prohibited the lower courts from ignoring that demonstration, demanding a second demonstration, and dismissing the case when the litigant fails to provide it. *One* demonstration of fair traceability satisfies Article III, and Article III prohibits courts from demanding *two*. Because the D.C. Circuit assumed broad authorities to dismiss cases although the plaintiffs complied with the Constitution, this case merits a writ of certiorari.

III. This case provides a good vehicle to resolve these issues because the agency action's text presents a clean, irrefutable demonstration of fair traceability, because this case presents no other justiciability issues, and because of the Reduction Clause's importance to United States democracy.

This case squarely presents Article III procedural-rights and fair traceability issues for this Court's review. The merits implicate the "most important" Fourteenth Amendment clause. Reconstruction Report XIII. Judge Wilkins's concurrence illuminates the Census Bureau's weak position on the merits. If this Court does not clarify these threshold errors, it would leave the lower courts to deny a fair hearing on Citizens' "right to vote," which the Reduction Clause's plain text protects.

1. Few cases present clean, irrefutable demonstrations of fair traceability. Here, the agency action states on its face that it caused concrete injury to Citizens' members by removing seats from their states. App. 54a-55a. That clean causation provides a stark contrast against the complicated proof of future agency action results that the lower courts thought Article III also required.

2. Citizens satisfied Article III and every other justiciability requirement. They satisfied representational standing requirements. Article III allows organizations to prove standing either (a) via injury to themselves or (b) as representatives of their members with standing. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023). Citizens claim representational standing, so Article III requires no

proof of injury to the organization. See *id.* Organizations prove representational standing when (1) one member shows individual standing, (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Citizens satisfy the second and third elements because they seek to improve democratic elections, and because no member needs to participate in this lawsuit.

That leaves only showing their members have standing. Citizens demonstrated procedural rights, injury, and fair traceability, above. For redressability, Article III asks whether "courts have the power to 'redress' the 'injury.'" *Utah*, 536 U.S. at 459 (emphasis added). At a minimum, because a court can vacate and remand this case "to recalculate the numbers and recertify the official result" in a new Report, a court can redress Citizens' injuries. *See id.* at 460.

Citizens make no "generally available grievance about government." *Lujan*, 504 U.S. at 573. Instead, the members documented their particularized injuries, and claimed no generic, "every citizen's interest in proper application of the Constitution and laws." See *id.* The Report caused concrete vote-dilution injuries to citizens of only the seven states that lost seats in the 2021 apportionment. App. 53a-55a. When voters allege an action malapportioned and disadvantaged the district where they live, they always have standing to claim that decision violated the law. *Gill v. Whitford*, 585 U.S. 48, 66 (2018). Here, the malapportioned districts include New York, Pennsylvania, and Virginia, where Citizens' members reside. Citizens thus seek a remedy that benefits them

more than the "public at large." See *Lujan*, 504 U.S. at 574.

No other justiciability hurdles remain. This Court already rejected arguments that apportionments present political questions, *Baker*, 369 U.S. at 198, and it already rejected arguments that census calculations do. *Montana*, 503 U.S. at 457-59. Congress executed the Reduction Clause in 2 U.S.C. 6. The case is ripe because the Executive Branch completed its Report. See *Trump v. New York*, 592 U.S. 125, 134 (2020).

3. Ultimately, no case could present a more important vehicle for examining the requirements of procedural rights and fair traceability. Congress considers both census and apportionment cases important enough to empanel three-judge courts. 28 U.S.C. 2284(a) (unconstitutional apportionments); Act of November 26, 1997, Pub. L. No. 105-119, sec. 209(e), 111 Stat. 2440, 2481 (census claims). Moreover, Congress expects the Census Bureau to "perform the entire range of constitutional census activities." Act of November 26, 1997, sec. 209(a)(9). It did not.

Despite the importance of these issues, the lower courts continually resist reaching the merits of Reduction-Clause cases. Their actions show they want to know the outcome, first—but that political objective exceeds their role as enforcers of the Constitution. Those extra-legal considerations are causing legal distortions. Members of this Court have resisted the impulse "to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 590 U.S. 83, 111 (2020) (Gorsuch, J., delivering an opinion). No case has more importance for our democracy than requiring the Census Bureau to follow the directions the Framers wrote into the Constitution.

CONCLUSION

This case merits a writ of certiorari.

Respectfully submitted.

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April 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 11, 2024

Decided September 10, 2024

No. 23-5140

CITIZENS FOR CONSTITUTIONAL INTEGRITY,
APPELLANT

v.

CENSUS BUREAU, ET AL.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(No. 1:21-cv-03045)

Jared S. Pettinato argued the cause and filed the briefs for appellant.

Sarah J. Clark, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Mark B. Stern* and *Michael S. Raab*, Attorneys. *Anna O. Mohan*, Attorney, entered an appearance.

Before: SRINIVASAN, *Chief Judge*, WILKINS and CHILDS, *Circuit Judges*.
Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: Section 2 of the Fourteenth Amendment, which specifies that seats in the House of Representatives "shall be apportioned among the several States according to their respective numbers," also provides that the "basis of representation" for the apportionment of representatives to any state "shall be reduced" proportionately "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged." U.S. CONST. amend. XIV, § 2.[1] This constitutional provision, dubbed the Reduction Clause or the Penalty Clause, has been historically neglected save for a handful of efforts by members of Congress and intrepid plaintiffs to enforce it. *See* George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM

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[1] "[T]he reference in this provision to 'male inhabitants . . . being twenty-one years of age' has been superseded by the Nineteenth and Twenty-sixth Amendments" and the provision is read to encompass those that are "eligible" to vote now. *Evenwel v. Abbott*, 578 U.S. 54, 102 n.7 (2016) (Alito, J., concurring in judgment) (emphasis in original).

L. REV. 93, 107-24 (1961); *see also Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966).

Enter Appellant Citizens for Constitutional Integrity ("Citizens"), a non-profit organization with members in New York, Pennsylvania, and Virginia. Seeking to enforce the Reduction Clause, Citizens sued the Census Bureau, the Department of Commerce, the Secretary of Commerce (the "Secretary"), in her official capacity, and the Census Bureau Director, in his official capacity, (hereinafter referred to together as the "Bureau") over their collective failure to proportionately reduce the basis of representation for each of the 50 states when tabulating 2020 Census data in order to calculate the apportionment of representatives as part of the Bureau's statutorily mandated report to the President. In its complaint, Citizens asserted an Administrative Procedure Act ("APA") claim and a mandamus claim, alleging that the Bureau, by ignoring the Reduction Clause in the apportionment calculations that it turned over to the President, flouted its constitutional and attendant statutory responsibilities; unconstitutionally deprived New York, Pennsylvania, and Virginia of congressional representation; and impermissibly diluted the power of Citizens's members in those states.

A three-judge panel in the District Court dismissed Citizens's challenge for lack of standing. Citizens now appeals that ruling. Because Citizens is unable to establish that its vote dilution injury is traceable to the alleged deficiencies in the Secretary's report, it is necessarily unable to establish Article III standing with respect to that injury. Accordingly, we affirm.

I.

A.

Representatives are apportioned "among the several [s]tates" according to the "actual [e]numeration[,]" or population, for each state. U.S. CONST. art. I, § 2. Specifically, Article I, Section 2 of the Constitution provides that the number of representatives "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." *Id.* The aforementioned "other persons" was a euphemism for persons of African descent, who were only fractionally represented in the House of Representatives because the framers of the original Constitution "view[ed] them in the mix[ed] character of persons and of property," THE FEDERALIST NO. 54, at 276 (James Madison) (Bantam Books 1982), and did not consider them worthy of United States citizenship, *see Dred Scott v. Sandford*, 60 U.S. 393, 419-20 (1857). Following the Civil War, Congress passed the Fourteenth Amendment to declare that all persons born in the United States, including those of African descent, are United States citizens, U.S. CONST. amend. XIV, § 1, and to provide "adequate security for future peace and safety" before the Confederate states were to be again "entitled to representation" in Congress, J. COMM. ON RECONSTRUCTION, 39TH CONG., 1ST. SESS., REP. OF J. COMM. ON RECONSTRUCTION 15 (Comm. Print 1866). Section 2 of the Fourteenth Amendment modified the then-existing apportionment procedure in Article I, including its ignominious three-fifths clause, providing the following in full:

> Representatives shall be apportioned among the several States according to their respective

> numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial offices of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2; *see Evenwel*, 576 U.S. at 102 n.7 (Alito, J., concurring in judgment).

Today, the "actual [e]numeration" of the apportionment population is ascertained through the decennial census, which is administered by Congress in the manner that body by law directs. U.S. CONST. art. I, § 2. Congress, in turn, has delegated the census administration responsibility to the Secretary with broad implementation discretion. 13 U.S.C. § 141(a). Once the decennial census is complete, the Secretary is charged with "tabulat[ing] . . . [the] total population by States under [Section 141(a)] as required for the apportionment of Representatives," to be "reported by the Secretary to the President of the United States." 13 U.S.C. § 141(b). The President then "transmit[s] to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial 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." 2 U.S.C. § 2a(a).

Congress set the number of Representatives at 435 in the Apportionment Act of 1911. Act of Aug. 8, 1911, Pub. L. No. 62-5, §§ 1-4, 37 Stat. 13-14 (1911). The calculation of the apportionment of those 435 seats occurs in two steps. First, per the Constitution, each state receives one seat, leaving 385 seats to be distributed. U.S. CONST. art. 1, § 2. Second, "seats 51 through 435" are awarded according to the method of equal proportions, which is a "mathematically determined priority listing of states . . . . [that] results in a listing of the states according to a priority value—calculated by dividing the population of each state by the geometric mean of its current and next seats." *About Congressional Apportionment*, U.S. CENSUS BUREAU (Nov. 22, 2021), https://www.census.gov/topics/public-sector/congressional-apportionment/about.html [perma.cc/6465-FARL]. That method works by first calculating the multipliers for each additional seat—where the second seat multiplier is $\frac{1}{\sqrt{2(2-1)}}$ or .70710678, the third seat multiplier is $\frac{1}{\sqrt{3(3-1)}}$ or .40824829, the fourth seat multiplier is $\frac{1}{\sqrt{4(4-1)}}$ or .288675134, and so on—until the appropriate number of multipliers have been calculated. Computing Apportionment, U.S. Census Bureau (Nov. 22, 2021), https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html [perma.cc/WKH6-HDRF]. These multipliers are then each multiplied by the total apportionment population for each of the 50 states, which results in a list of

"priority values" that are then ordered from highest to lowest value. *Id.* Finally, the remaining seats are assigned according to the resulting priority values, starting with the 51st seat, until all remaining seats are assigned.[2] *Id.*

B.

On April 26, 2021, in accordance with Section 141(b), the Secretary sent President Biden a statement showing the "apportionment population for each of the 50 states on April 1, 2020" (the "Report"), as ascertained by the 2020 Census. A. 165. The Report listed three values for each state: (1) the apportionment population, (2) the number of apportioned representatives based on the 2020 Census and calculated according to the method of equal proportions, and (3) the change in apportioned representatives between the 2020 apportionment and the previous apportionment based on the 2010 Census. Compared to the 2010 apportionment, the 2020 apportionment reduced the number of

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[2] The 2020 Census apportionment provides a concrete example of how the method of equal proportions works. For the 2020 apportionment, the Bureau assigned the 51st seat to California because, after multiplying the second seat multiplier (.70710678) by California's apportionment population, the priority value (27984993.2520723) was higher than any other state's priority value in the list. A. 57. The Bureau then assigned the 52nd seat to Texas after multiplying the second seat multiplier by Texas's apportionment population, which resulted in a priority value of 20635702.2563336. *Id.* The Bureau then assigned the 53rd seat to California because the priority value (16157143.3873536) that resulted from multiplying the third seat multiplier (.40824829) by California's apportionment population was still higher than any other state's apportionment population multiplied by the second seat multiplier. *Id.*

representative seats for New York and Pennsylvania by one each and maintained the same number of seats for Virginia.

Nearly six months after the Secretary sent the President the Report, Citizens sued the Bureau on behalf of its members in New York, Pennsylvania, and Virginia to challenge the issuance of the Report, theorizing that, by failing to proportionately "discount . . . [the] basis of representation" for each state based on the number of voters denied access to the vote by voter registration and voter identification laws, the Bureau had unconstitutionally deprived voters in those three states of congressional representation and diluted the power of Citizens's members in those same three states. A. 146. Citizens raised two claims in connection with this theory. In the first, Citizens alleged that the Bureau's issuance of the Report to the President was arbitrary, capricious, and otherwise contrary to law in violation of the APA because, in failing to implement the Reduction Clause, the Bureau had failed to "consider an important aspect of the problem" or otherwise misinterpreted the law. *Id.* (quoting *Motor Vehicle Mfrs.' Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In the second, Citizens urged that the Bureau's alleged Fourteenth Amendment violation compelled a writ of mandamus to remedy its injury.

To support its theory of injury, Citizens submitted a declaration from a data scientist "that purported to demonstrate what apportionment would look like if the Bureau had accounted for state voter-registration requirements and voter- ID laws." *Citizens for Const. Integrity v. Census Bureau*, 669 F. Supp. 3d 28, 33 (D.D.C. 2023). To show this, the declarant calculated the distribution of seats in the House of Representatives that would have followed if the basis

of representation for different states had been adjusted to account for certain populations denied access to the vote because of such laws and requirements. The first scenario tested the declarant's algorithm by replicating the Bureau's application of the method of equal proportions in the Report and resulted in an exact replication of the 2020 Census apportionment count. The second scenario replaced the actual population enumeration from the 2020 Census the Bureau had used for the apportionment population value with a "basis of representation" value. A. 46. The declarant calculated the latter value by multiplying "the proportion of citizens who can vote"—which the declarant calculated as a ratio of citizens that can vote and citizens who cannot register because of a criminal conviction to the total number of citizens—and "the Census's actually enumerated population statistic." *Id.* In that scenario, as compared to the Report, New York lost a seat, Pennsylvania received the same number of seats, and Virginia gained a seat. For the third scenario, the declarant kept almost all values from the first scenario but only replaced the value the Bureau used for Wisconsin with a basis of representation that reduced the "proportion of citizens who can vote" based on the number of people the declarant determined had been disenfranchised by the state's voter photo identification law. In the third scenario, the declarant found Wisconsin would have lost a seat while New York would have gained a seat. Finally, for the fourth scenario, the declarant mimicked his calculation for the second scenario but also reduced Wisconsin's basis of representation alone based on the number of voters impacted by the state's voter photo identification law. In this last scenario, the declarant concluded that Wisconsin and New York

each would have lost a seat, but Pennsylvania and Virginia each would have gained a seat.

The District Court panel dismissed Citizens's challenge for lack of Article III standing. *Citizens for Const. Integrity*, 669 F. Supp. 3d at 30. The panel concluded that Citizens fell short of demonstrating an injury that was traceable to the Bureau's failure to apply the Reduction Clause. *Id.* To satisfy the traceability requirement, the District Court explained, Citizens needed to "show that their states would have had an additional representative but for the government's error." *Id.* at 32. On the District Court's read, "pointing out the government's alleged failure to follow the Reduction Clause" was not enough because that, without more, "does not mean that a corrected recount would lead to an apportionment more favorable to the plaintiff." *Id.* The District Court further found the data scientist's declaration unpersuasive because it did not "even attempt to approximate the number of citizens in each state who have been disenfranchised by voter-ID requirements" and "fail[ed] to provide [the District Court] with a scenario that illustrates what apportionment might look like if Citizens's legal theory is correct." *Id.* at 33.

Responding to Citizens's argument below that it need not "show what apportionment would look like under its legal theory" because the traceability and redressability requirements are relaxed in procedural rights cases, *id.* at 34, the District Court held that the Reduction Clause does not establish a procedural right to which Citizens is entitled or for which Citizens's required showing for traceability or redressability would be relaxed, *id.* at 35.

Citizens timely appealed, raising three arguments. It argues, first, that it demonstrated a concrete vote dilution injury. Next, it contends that the Report

caused that injury. Finally, it urges that it has proven that a new Report could redress its injury, particularly under the relaxed procedural injury standing burden for traceability and redressability. Citizens invoked the subject matter jurisdiction of the District Court pursuant to 28 U.S.C. §§ 1331 and 1361, as well as the Act of November 26, 1997, Pub. L. No. 105-119, § 209, 111 Stat. 2440, 2481. We review the District Court's dismissal for lack of standing *de novo*. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015).

II.

In general, the "irreducible constitutional minimum of [Article III] standing" requires a plaintiff to demonstrate: "(1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560). We address each of Citizens's claims in turn.

A.

i.

Taking the first claim first, Citizens challenged the Bureau's issuance of the Report before the District Court under three different sections of the APA: Section 706(2)(A), which permits us to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); Section 706(2)(B), which permits us to do the same when an agency action is "contrary

to constitutional right, power, privilege, or immunity," *id.* § 706(2)(B); and, finally, Section 706(2)(D), which instructs us to set aside agency action found to be "without observance by procedure required by law," *id.* § 706(2)(D). *See* A. 137, 147. On appeal, Citizens homes in on Section 706(2)(D) in particular to assert that, where an agency fails to observe a "*procedure required by law*," there is a "procedural right to [levy a] claim [against] an agency." Appellant's Br. at 19 (emphasis in original).

Classifying this action as a procedural-rights case is important to Citizens because, in such cases, "[a] litigant may establish Article III jurisdiction without meeting the usual 'standards for redressability and immediacy.'" *Dep't of Educ. v. Brown*, 600 U.S. 551, 561 (2023) (quoting *Lujan*, 504 U.S. at 572 n.7); *see also Ctr. for Biological Diversity v. Env't Prot. Agency*, 861 F.3d 174, 182 (D.C. Cir. 2017) ("In a case alleging a procedural injury, we 'relax the redressability and imminence requirements' for standing." (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013))). Plaintiffs in procedural-rights cases may proceed under the relaxed standard when "a statute affords [the] litigant 'a procedural right to protect his concrete interests.'" *Brown*, 600 U.S. at 561 (quoting *Lujan*, 504 U.S. at 572 n.7). Usually, this standard is applied in cases where a plaintiff has pleaded a procedural injury, and thus "must show *both* (1) that their procedural right has been violated, *and* (2) that the violation of that right has resulted in an invasion of their concrete and particularized interest" in order to demonstrate their procedural injury meets Article III muster. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005) (emphasis in original). Here, however, the typical two-step procedural injury inquiry is irrelevant because we are

not being asked to determine whether Citizens's claimed procedural injury suffices as an injury for Article III purposes; instead, since Citizens's claimed vote dilution injury is substantive, we are being asked to determine whether the procedural deficiency Citizens alleges transforms this action into a procedural-rights case.

We hold that it does not. There is no established test in this Circuit for determining whether a claimed right is procedural or not, but the inquiry for ascertaining whether a rule qualifies for the APA's "procedural exception" to notice and comment requirements is instructive here. *AFL-CIO v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023); *see* 5 U.S.C. § 553(b)(A). Under that inquiry, "[w]e treat rules as procedural if they are 'primarily directed toward improving the efficient and effective operations of an agency.'" *AFL-CIO*, 57 F.4th at 1034 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014)). "The critical feature" of a procedural rule "is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Id.* (quoting *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000)). A rule that imposes "substantive burden[s]," *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1052 (D.C. Cir. 1987), "encodes a substantive value judgment," *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002) (quoting *Am. Hosp. Ass'n*, 834 F.2d at 1047), "trenches on substantial private rights [or] interests," *Mendoza*, 754 F.3d at 1023 (quoting *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980)), or otherwise "alter[s] the rights or interests of the parties," *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014)

(quoting *Glickman*, 229 F.3d at 280), is not procedural for Section 553 purposes. *See AFL-CIO*, 57 F.4th at 1034-35.

Adopting here the qualifications used to determine whether a rule is procedural, we cannot categorize Citizens's challenge as concerning a procedural right. The "agency action" that Citizens challenges is the Bureau's issuance of the Report. The heart of that challenge is substantive; Citizens does not challenge the issuance of the Report from an "operation[al]" standpoint, *AFL-CIO*, 57 F.4th at 1034, but instead goes after the Bureau's alleged failure to take certain substantive considerations into account when conducting the analysis for the Report, which analysis involves "substantive value judgment[s]," *Pub. Citizen*, 276 F.3d at 640. Moreover, Citizens's claimed vote dilution injury itself is a concession that the organization's concern about the Report is related to its impact on "the rights and interests" of the organization and its members. *AFL-CIO*, 57 F.4th at 1034.

Our conclusion is consistent with the reasoning of the Court in *National Association of Home Builders v. Defenders of Wildlife*. 551 U.S. 644 (2007). There, the Court construed Section 7(a)(2) of the Endangered Species Act, which provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" endangered or threatened species or their habitats. *Id.* at 652 (quoting 16 U.S.C. § 1536(a)(2)). In doing so, the Court explained that the language of Section 7(a)(2) requiring agency "consultation" with the Secretary was a procedural requirement, while the language requiring the agency to "insure that any action . . . is not likely to jeopardize"

an endangered species was "substantive." *Id.* at 661-62; *see also id.* at 667 (Section 7(a)(2) "imposes a substantive (and not just a procedural) statutory requirement"); *id.* at 693 n.13 (Stevens, J., dissenting) (agreeing that Section 7(a)(2) of the Endangered Species Act contains a "substantive requirement").

The substantive nature of Citizens's challenge is further betrayed by the cases it cites in its complaint, all of which concern review of substantive agency actions. First, Citizens alleges that the Bureau violated the APA by failing to "implement the Fourteenth Amendment," A. 146, and cites to *State Farm* for its disapproval of agency action caused by an agency that "entirely failed to consider an important aspect of the problem," 463 U.S. at 43. But in that case, the Supreme Court held that failure to consider an "important aspect of the problem" was cause for a court to deem an "agency rule . . . arbitrary and capricious." *Id.* Arbitrary and capricious review under Section 706(2)(A) is inherently designed for review of substantive agency actions and, by relying on *State Farm*, Citizens functionally concedes that review of the substantive content of the Report is what the organization seeks.

Next, Citizens relies on *NLRB v. Brown*, 380 U.S. 278 (1965), and *SEC v. Chenery*, 318 U.S. 80 (1943), to support its allegation that the Bureau's "misinterpret[ation]" of the Fourteenth Amendment violates the APA. A. 146. In *NLRB v. Brown*, however, the Supreme Court concluded that courts must "set aside . . . decisions which rest on an erroneous legal foundation" as part of its reasoning in reviewing a substantive agency determination about whether a party's conduct "carried . . . [the] badge of improper motive." 380 U.S. 278, 292 (1965) (internal quotation omitted). Similarly, the *Chenery* declaration that "an

order may not stand if the agency has misconceived the law" was made as part of concluding that judicial review of agency conduct "requires that the grounds upon which the administrative agency acted [be] . . . clearly disclosed and adequately sustained"—a plea for agencies to make plain their substantive bases for decisionmaking. 318 U.S. 80, 94 (1943).

ii.

Citizens is adamant that it presents a procedural-rights challenge that should be evaluated under the relaxed Article III standard. The organization objects to the District Court's holding that Citizens was "never *entitled* to a procedure" under the Reduction Clause, calling the determination erroneous because the District Court failed to apply the zone of interests test. Appellant's Br. 47 (quoting *Citizens for Const. Integrity*, 669 F. Supp. 3d at 35) (emphasis in original). Citizens's argument, however, is unpersuasive because it demands application of the wrong test.

We employ the zone of interests test, which asks whether a plaintiff's alleged injuries "are 'arguably within the zone of interests to be protected or regulated by the statute,'" to ascertain whether the plaintiff may raise a particular claim. *CSL Plasma Inc. v. U.S. Customs & Border Protection*, 33 F.4th 584, 589 (D.C. Cir. 2022) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) ("Whether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." (citation omitted)). "[This] is a merits issue, not a jurisdictional one." *CSL Plasma*, 33 F.4th at 586. Whether an injury

is attendant to the violation of a procedural right, however, is connected to the Article III standing injury inquiry—a "threshold [jurisdictional] question" that relies on a separate assessment, as described above. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Moreover, *Lexmark*, which marked a sea change in how courts delineate between Article III standing and "standing" to raise a cause of action, bolsters the distinction between the Article III standing inquiry and the zone of interests test. In that case, the Supreme Court, as Citizens acknowledges, applied the zone of interests test to determine whether plaintiffs "ha[d] a cause of action under the statute," 572 U.S. at 128, and also, importantly, recognized that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case," *id.* at 128 n.4 (citation omitted). The remaining cases Citizens cites in support of this argument predate *Lexmark* and so are largely unhelpful for Citizens's point.

B.

i.

Having established that this is not a procedural-rights case that relaxes the Article III traceability and redressability requirements, we next consider whether Citizens has established traceability under the regular Article III standards. We conclude that it has not.

Traceability requires a showing "that the [alleged] injury was likely caused by the defendant." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). If a plaintiff cannot show that the government's action or inaction is "causally connected to the plaintiff's injury," they cannot demonstrate Article III standing. *California v. Texas*, 593 U.S. 659, 660 (2021); *see also*

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998). To establish traceability for a vote dilution injury occasioned by an apportionment calculation based on a faulty analysis or "inaccurate data," *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality), a plaintiff must show the relevant population was improperly counted "by the [chosen] methodology *as compared to a feasible, alternative methodology*," *Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 183 (D.C. Cir. 1996) (emphasis in original) (citing *Franklin*, 505 U.S. at 802 (plurality)).

Citizens's traceability showing fails because it has not shown that the populations of New York, Pennsylvania, and Virginia were improperly counted "by the [chosen] methodology as compared to a feasible, alternative methodology." *Kantor*, 91 F.3d at 183 (emphasis omitted); *see also Franklin*, 505 U.S. at 802 (plurality). The methods it does present in its declaration, which Citizens says show that "the 2020 [C]ensus harmed" Citizens's members "by taking seats from their states," Appellant's Br. 23, are not feasible alternative approaches. There is one scenario in which New York gained a seat, and another, separate scenario in which Pennsylvania and Virginia gained a seat, but those scenarios are not feasible because the declaration only accounted for Wisconsin's voter identification laws and not any voter registration or voter identification laws that are or may have been in force in New York, Pennsylvania, or Virginia. *See* A. 50, 52. By omitting any information about the voting rights landscape in these states, we are left to speculate whether voter identification laws in New York, Pennsylvania, or Virginia, if accounted for in the apportionment calculation, would have revealed that those states

were entitled to any more seats than the Report assigned them. Citizens's allegations of traceability are thus not plausible because they are premised on a selective enforcement of the Reduction Clause with respect to only one state—Wisconsin—whereas, in reality, New York, Pennsylvania, and Virginia could also be affected if their voter registration and voter identification laws were scrutinized in the same manner. *Cf. Bush v. Gore*, 531 U.S. 98, 110 (2000) (halting the vote recount ordered by the Florida Supreme Court because it lacked even "some assurance that the rudimentary requirements of equal treatment and fundamental fairness" would be satisfied).

ii.

Citizens counters that its members would not have suffered a vote-dilution injury "[b]ut-for" the Report. Appellant's Br. 36. On its read, the fact that the law requires (1) the Secretary to send a report to the President that includes the apportionment population, (2) the President to send a statement to Congress with the total population and the number of Representatives to which each State would be entitled, and (3) each state to be entitled to the number of Representatives shown in the President's statement, establishes Citizens's injury is traceable to the Report. To be sure, the causal chain Citizens lays out describes how an injury *could* be caused by a report on the apportionment population from the Secretary in the abstract. The problem Citizens faces, however, is that its factual allegations are not enough to establish that there is a comparable "feasible, alternative methodology" that would have produced a different result. *Kantor*, 91 F.3d at 183. Because Citizens, as explained, did not take into account the voter registration and voter identification laws of

New York, Pennsylvania, or Virginia, Citizens has failed to provide that kind of "feasible, alternative methodology." Without the entire story before us we cannot conclude from Citizens's allegations that its injury is plausibly connected to the Bureau's failure to incorporate the Reduction Clause into its methodology.

Citizens further urges that *Kantor* does not apply here because that case did not involve a plaintiff asserting that a new agency action reduced their states' apportionment compared to the prior apportionment. Instead, Citizens asserts that *Swann v. Adams*, 385 U.S. 440 (1967), controls the test for malapportionment standing, and reads it to only require a plaintiff to provide a plan "that [is] . . . closer to the legal ideal than" the existing plan. Appellant's Br. 64. *Swann*, however, concerned the degree of population variation in state legislative district apportionment that was constitutionally permissible and has no discernible bearing on Citizens's Fourteenth Amendment apportionment claims, upon which the holding in *Kantor* was based.

Next, Citizens contends that all that is necessary to prove traceability is recognizing that the Report reduces the seat allocation for New York and Pennsylvania. Citizens compares itself to the plaintiff in *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442 (1992), to support its point. In that case, the State of Montana challenged the constitutionality of the method of equal proportions and the Supreme Court considered "[t]he application of the method of equal proportions to the 1990 census [to have] caused . . . 13 States to lose" seats in the House of Representatives. *Id.* at 445. Citizens is correct that it alleges a vote dilution injury and that the Report recorded the reduction in the seat allocations for New York and

Pennsylvania. *See* Appellant's Br. 37. But this case diverges from *Montana*. There, the plaintiff challenged a wrongly implemented formula and so could more easily trace the injury to that formula. Montana's evidence demonstrated that it would have received an additional representative if the Bureau had used its preferred method of apportionment rather than the method of equal proportions. *Id.* at 460-61. Thus, Montana clearly proved traceability based on its claim that the Bureau was required to employ the alternative method of apportionment. Here, while the Report reduces the seat allocation for New York and Pennsylvania, that does not meaningfully demonstrate that another methodology that incorporated the Reduction Clause would have, if uniformly applied, rendered a different result.

Finally, and more generally, Citizens goes for the Hail Mary, arguing that it is inherently entitled to standing because it challenges the Secretary's census methodology. To make this argument, Citizens relies on *Utah v. Evans*, which held that Utah had standing to challenge the Secretary's 2000 Census methodology as legally improper. *See* 536 U.S. 452, 460-61 (2002). *Utah*, however, is not helpful to Citizens because, in that case, the Court noted that the parties agreed that the challenged census practice (referred to as "imputation") caused Utah to receive one less Representative than it would have received if the practice had not been used. *Id.* at 458. In other words, the evidence in *Utah* demonstrated traceability in a manner not present here.

Since we dispose of this claim on traceability grounds, we need not address the Bureau's broader arguments about whether Citizens's APA claim is redressable. Moreover, since "standing is not dispensed in gross" and plaintiffs "must demonstrate

standing for each claim [they] seek[] to press and for each form of relief that is sought," we note that the foregoing Article III standing analysis applies equally to Citizens's mandamus claim. *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

* * * * *

For the foregoing reasons, we affirm the District Court.

So ordered.

WILKINS, *Circuit Judge*, concurring: The Fourteenth Amendment was adopted in 1866 and ratified in 1868—over 150 years ago. CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866); *see also* Act of July 28, 1868, 15 Stat. 708-10 (1868) (ratifying the Fourteenth Amendment). Since then, while several other amendments to the Constitution have been robustly enforced, members of Congress and agency officials have undertaken shamefully few actions to implement the Amendment's Reduction Clause, and none have resulted in any meaningful, much less robust, enforcement of the penalty contemplated by that provision. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 107-24 (1961).

In this case, the Bureau argued that Citizens's claims are not redressable because the Bureau "neither [has] the authority nor the tools" to implement the Reduction Clause and because "it is far from clear that [the Secretary] would have authority to withdraw her [R]eport on the 2020 census at this point." Appellee's Br. 20-21; *see* Oral Argument Tr. 21-22. At argument, the Bureau was asked how, under its theory, any plaintiff would have standing to enforce the Reduction Clause. *Id.* at 23-24. "I'm not sure," replied counsel for the Bureau, "[i]t's not clear because of the way that the [R]eduction [C]lause and the statutory scheme exist . . . there is no obvious . . . answer to that question." *Id.* at 23. When pressed further about which government actor is responsible for enforcing the Reduction Clause, if not the Bureau, the Bureau took no position, abdicating any responsibility for implementing the provision without

some other congressional action. *Id.* at 26-28. The Bureau's response, put colloquially, was, "Not it."

This is an unacceptable position from an agency of the Executive Branch that is tasked with the responsibility, and empowered with the authority, to "take [c]are that the [l]aws be faithfully executed." U.S. CONST. art. II, § 3. The Reduction Clause, which has been codified in statute since 1872, is just as important as any other constitutional provision, having been passed following intense deliberations about how to reunite a nation fractured by war and facing political differences that threatened to leave four million formerly enslaved Black Americans with "no political existence" while Southerners gained a profound increase in political power. W.E.B. DU BOIS, BLACK RECONSTRUCTION 290 (Free Press 1998) (1935); *see id.* at 295, 330. Equal treatment must be afforded not just to people but to the laws in place to protect their rights; it is high time, after 150 years, that the Reduction Clause receive the respect it deserves.

I.

Following the Civil War, the Joint Committee on Reconstruction (the "Committee") was tasked with "inquir[ing] into the condition of the [Confederate] States . . . and report[ing] whether they or any of them are entitled to be represented in either house of Congress." J. COMM. ON RECONSTRUCTION, 39TH CONG., 1ST SESS., REP. OF J. COMM. ON RECONSTRUCTION 1 (Comm. Print 1866). The Committee proposed the Fourteenth Amendment based on its findings. *Id.* at 15, 29. The originally stated purpose of the Amendment was to protect "the civil rights and privileges of all citizens in all parts of the republic" and to "place representation on an equitable basis[.]" *Id.* at 15. Adoption of the Reduction

Clause specifically, however, was motivated by "[t]he Republicans who controlled the 39th Congress," who "were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken [the Republicans'] own political dominance." *Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting). The omission of any mention of race or color in the final version of the Reduction Clause was occasioned by a fear that, by cabining it to race-based disenfranchisement, Congress would inadvertently "enable circumvention of the congressional purpose via imposition by the states of unpenalizable education or property qualifications." Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 112 (1960). In effect, however, they put "Southern States to a choice—enfranchise Negro voters or lose congressional representation." *Richardson*, 418 U.S. at 74 (Marshall, J., dissenting); *see* H.R. REP. NO. 39-11, at 3 (1st Sess. 1866) (minority report explaining that "[t]he object of [the Fourteenth A]mendment is to establish universal and unqualified negro suffrage throughout the whole Union; and instead of boldly and openly meeting that issue, it attempts to deceive the people by inflicting a severe penalty upon the States that refuse unqualified suffrage to the colored race").

The government first sought to enforce the Reduction Clause through the 1870 Census. Senator James Harlan of Iowa proposed a resolution on December 19, 1868, directing the Senate Judiciary Committee to "prepare a bill for the apportionment of Representatives in compliance with" the Reduction Clause. Zuckerman, *supra*, at 107 (citing CONG.

GLOBE, 40th Cong., 3d Sess. 158 (1868)). That resolution died on the vine when the short session of Congress that year terminated, but the House of Representatives took up the mantle soon after, appointing a Committee on the Ninth Census (the "Census Committee"), chaired by then-Representative Garfield of Ohio, to "ascertain the laws which restricted suffrage" and to "provide the census takers with this information to assist them in determining the number of adult male citizens whose right to vote was denied or abridged." *Id.* at 108; *see* H.R. REP. NO. 41-3, at 52-53 (1870). The Census Committee concluded, in relevant part, that

> The [T]hirteenth and [F]ourteenth [A]mendments of the national Constitution have radically changed the basis of representation and provided for a redistribution of political power . . . . The census is our only constitutional means of determining the political or representative population. The [F]ourteenth [A]mendment has made that work a difficult one. At the time of its adoption it was generally understood that the exclusion applied only to colored people who should be denied the ballot by the laws of their State. But the language of the article excludes all who are denied the ballot on any and all grounds other than the two specified. This has made it necessary to ascertain what are in fact the grounds of such exclusion . . . .

H.R. REP. NO. 41-3, at 52. The Census Committee went on to identify "nine general classes" of state constitutional provisions and laws that impermissibly abridged or denied the voting franchise on account of: (1) race or color; (2) "residence on lands of United

States," "residence less than required time in United States," "residence in State less than required time," and "residence in county, city, town, district"; (3) lack of "property qualifications" or non-payment of taxes; (4) lack of "literary qualifications"; (5) character or behavior; (6) army or naval service; (7) "pauperism, idiocy, and insanity"; (8) "[r]equiring certain oaths as preliminary to voting"; and (9) other causes. *Id.* at 52-53; *see id.* 71-93. To capture a count of the population subject to such laws, the Census Committee recommended "add[ing] . . . a column for recording those who are voters," and another for recording "Citizens of the United States, being twenty-one years of age, whose right to vote is denied or abridged on other grounds than rebellion or crime." *Id.* at 53.

At the outset, however, the Census Committee severely undermined its own proposal. After outlining its proposal for collecting population data on citizens whose right to vote had been denied or abridged, it asserted that, while this was "the best method that ha[d] been suggested," it might be "difficult to get true and accurate answers" to the relevant question because it would "allow the citizen to be a judge of the law as well as the fact." *Id.* The Commissioner of the Census, under direction of the Secretary of the Interior, nevertheless went ahead with changing the census schedule to incorporate the citizenship and suffrage questions. CONG. GLOBE, 42d Cong., 2d Sess. 79 (1872) ("[I]t was believed that . . . in order to carry out the requirements of the [F]ourteenth [A]mendment, the Department would not be clear if it neglected to make the attempt [to do so], it being the only executive organ through which, without such special provision, the information could be obtained "). To effectuate the collection of responses

to these questions, the Secretary informed Assistant U.S. Marshals at the time, who were responsible for taking the census, that "[m]any persons never try to vote, and therefore do not know whether their right to vote is or is not abridged," but that the question was intended to capture "not only those whose votes have actually been challenged, and refused at the polls for some disability or want of qualification" but also "all who come within the scope of any State law denying or abridging suffrage to any class or individual on any other ground than participation in rebellion, or legal conviction of a crime." DEP'T OF INTERIOR, INSTRUCTIONS TO ASSISTANT MARSHALS (1870), https://usa.ipums.org/usa/voliii/inst1870.shtml [perma.cc/D49N-XUMS].

Despite these instructions, the positive response rate to the question on denial or abridgement was abysmally low. Reports of voter disenfranchisement at the time were common. *E.g.*, TESTIMONY TAKEN BY THE SUBCOMM. OF ELECTIONS IN LA., H.R. MISC. DOC. NO. 41-154, pt. 2, at 188 (2d Sess. 1869) ("It was remarked by [General A. L. Lee and Governor Warmoth] that the better course would be to advise the colored people not to vote [in the 1868 election]. This was done, and hence the small republican vote cast in [New Orleans] and in many of the parishes of the State."). Yet, the Census Bureau reported that only 185 out of 159,037 male citizens over 21 in Louisiana— and only 40,380 out of 8,314,805 nationwide—had their right to vote abridged or denied. CONG. GLOBE, 42d Cong., 2d Sess. 83 (1872). This outcome led the Secretary himself to "give but little credit to the returns made by assistant marshals in regard to the denial or abridgement of suffrage."

CONG. GLOBE, 42 Cong., 2d Sess. 79. Members of the House of Representatives derided the results as "utterly inaccurate" and "not reliable" given that they reported so few disenfranchised voters. *Id.* The Superintendent of the Ninth Census further undermined the 1870 Census results by echoing the Census Committee's prior lack of confidence, reporting that "[t]he census is not the proper agency for . . . . questions of citizenship and of the denial of suffrage to rightful citizens" because they are "mixed questions of law and fact, which an assistant marshal is not competent to decide." FRANCIS A. WALKER, NINTH CENSUS – VOL. I, THE STATISTICS OF THE POPULATION OF THE UNITED STATES xxviii (1872). Incredibly, however, the Superintendent went on to deem "[t]he count . . . of the total number of male citizens above twenty-one in each State in the United States" to have been "carefully made," to be "as exact as most statistical results," and to have had "an important bearing upon political philosophy and political history in the United States." *Id.*

Based on these results, the representative population of the Southern states increased 13.92 percent. *Id.* at xiii. In the decade following, there were pervasive reports of voter disenfranchisement, but with the increase in political representation already in place, former slaveholding states received the same unwarranted political power the Reduction Clause was meant to prevent. *See* BENJAMIN GRIFFITH BRAWLEY, A SHORT HISTORY OF THE AMERICAN NEGRO 178 (Macmillan 1913) ("In the decade 1870-1880 intimidation; theft, suppression, or exchange of the ballot boxes; removal of the polls to unknown places; false certifications; and illegal arrests on the day

before an election were the chief means used by the South to make the Negro vote of little effect."); PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES, HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE, 1879 32 (Darby 1879) (reporting Colonel Robert Harlan's statement that "[a]t present there seems to be no alternative [but to migrate to the North]. The reaction has robbed Southern Republicans, both white and colored, of their votes and of their voices, and this has thrown the nation into the hands of our opponents, who are determined to strip us of the last measure of protection.").

II.

To this day, the government has failed to enforce the Reduction Clause despite having codified it into law. *See* Act of Feb. 2, 1872, 17 Stat. 28-29 (1872) (codified at 2 U.S.C. § 6). While the Fifteenth Amendment invalidated *de jure* disenfranchisement based on race, states remained able through the Civil Rights Era to exercise *de facto* disenfranchisement and "eas[ily] . . . deny the franchise to persons on account of their race" through "poll tax[es], literacy test[s], and other similar qualifications imposed on the exercise of the franchise" without any proportionate reduction in their congressional representation. Bonfield, *supra*, at 108-09. Indeed, "[B]lacks in the South," as well as other non-white groups, "were virtually disenfranchised from the end of the Reconstruction Period until 1965." U.S. COMM'N ON C.R., THE VOTING RIGHTS ACT SUMMARY AND TEXT 4 (1971). The Reduction Clause was essentially a dead letter, and it had no deterrent effect on these overt measures to disenfranchise Black citizens.

This occurred notwithstanding the intermittent but courageous efforts of a small number of congresspeople to jumpstart the Executive Branch's failed enforcement of the Reduction Clause. In 1901, prior to the apportionment pursuant to the Twelfth Census, Representative Shattuc of Ohio introduced a resolution that would have directed the "Director of the Census" to furnish the House of Representatives with information regarding the denial or abridgement of suffrage on account of illiteracy, "pauperism," polygamy, "property qualifications, or for any other reason." Zuckerman, *supra*, at 117 (quoting 34 CONG. REC. 556 (1901)). That resolution died in committee. *Id.* at 118. In 1904, Senator Platt of New York introduced a bill to amend Congress's 1901 Apportionment Act to acknowledge that "the right . . . to vote at some . . . elections since [1901] . . . has in fact been denied or abridged for causes not permitted by the Constitution," and to reduce the representation of several Southern states. Zuckerman, *supra*, at 119 (quoting S. 5747, 58th Cong. (3d Sess. 1904-1905)). That bill also died in committee. *Id.* In 1906, Representative Keifer of Ohio went further than anyone else had gone so far, introducing a bill to reduce the number of representatives of Southern states by 37—the number proportionate to the entire Black population in the South, which Keifer asserted was completely disenfranchised by "the use of fraudulent ballots, shotgun policies, dishonest registration policies, and intimidation at the polls." *Id.* at 120 (quoting 40 CONG. REC. 3885-86 (1905-1906)); *see id.* at 119-20. Keifer's bill, similarly, died in committee. *Id.* at 120. Over fifty years later, in 1957, Senator McNamara of Michigan proposed an

amendment to the bill that would ultimately become the Civil Rights Act of 1957, which detailed a plan for implementing the Reduction Clause through a joint committee that would have been responsible for identifying states that deny or abridge the right to suffrage and calculating the proportionate reduction in representation due to those states. *Id.* at 120-21. McNamara's proposal was rejected; he then reformulated the proposal into a standalone bill that—you guessed it—also died in committee. *Id.* at 121 (citing S. 2709, 85th Cong. (1st Sess. 1957)); 103 CONG. REC. 13703 (1957)).

Individuals have also sought to enforce the Reduction Clause's representation penalty through judicial action, albeit unsuccessfully. In *Saunders v. Wilkins*, Saunders, a prospective candidate for the House of Representatives in Virginia, sued the Secretary of the Commonwealth of Virginia over the latter's refusal to certify Saunders as a candidate despite his submission of a petition signed by 250 qualified voters. 152 F.2d 235, 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946). Saunders theorized that the Secretary's actions abridged the right "to vote for the choice of . . . Representatives in Congress" and that Congress's 1941 reapportionment, which did not reduce Virginia's representation proportionately, was invalid as a violation of the Reduction Clause. *Id.* at 236. The Fourth Circuit interpreted the "underlying purpose" of Saunders's Reduction Clause argument to be "abolition of the Virginia poll tax law," but then punted, finding that the question of whether the poll tax fell within the terms of the Reduction Clause was "a question political in its nature which must be determined by the legislative branch of the

government and is not justiciable." *Id.* at 237. In another case, *Lampkin v. Connor*, this Court affirmed the dismissal of a complaint filed against the Secretary of Commerce by voters seeking to enforce the Reduction Clause. 360 F.2d 505, 506 (D.C. Cir. 1966). Plaintiffs in that case fell into two categories—one group alleged potential vote dilution injury if the then-upcoming 1970 Census failed to implement the Reduction Clause and the other group alleged that they would be injured from the obstruction of their right to vote by state poll taxes and certain registration requirements.[1] *Id.* 506, 510. Our Court determined the first group's injury, alone, was too speculative to warrant adjudication and that adjudicating the claims of either group, in light of the Voting Rights Act of 1965 and the Twenty- Fourth Amendment to the Constitution banning poll taxes, would be "premature" unless "it c[ould] fairly be said that discrimination persists despite th[o]se new measures." *Id.* at 511. Nevertheless, this Court also made sure to say that, even though plaintiffs' timing might have rendered their complaint "unsuitable for

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[1] Notably, the *Lampkin* plaintiffs were represented by then-attorney William B. Bryant in their district court challenge, *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), who, mere months after the case was decided, was appointed to serve as a judge on the U.S. District Court for the District of Columbia and later served as the first Black Chief Judge for that court. *William B. Bryant*, HIST. SOC'Y D.C. CIR., https://dcchs.org/judges/bryant-william/ [perma.cc/5ZSR-DZSD]; *William B. Bryant Annex History*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/real-estate/gsa- properties/visiting-public-buildings/william-b-bryant-annex/whats- inside/history (Jan. 21, 2024) [perma.cc/836T-ASG8].

judicial disposition at [the] time," it was also "premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say." *Id.* at 512.

Despite these enforcement efforts and ongoing evidence of voter disenfranchisement, neither the Bureau nor any other member of the Executive Branch appears to have meaningfully attempted to figure out how to implement this constitutional provision. It is as if the Reduction Clause were written in invisible, rather than indelible, ink. Its sister provisions in the Fourteenth Amendment are summarily lauded—failure to enforce them causes hand wringing and outcry—and yet the abandonment of the Reduction Clause has been met with a shrug.

III.

Part of the Bureau's defense that it does not have the authority to implement the Reduction Clause is that, by statute, the Secretary is not "directed" to "report population counts that are less than the 'total population.'" Appellee's Br. 11. To be sure, 13 U.S.C. § 141 provides that the Secretary "shall . . . every 10 years . . . take a decennial census of population as of the first day of April of such year . . . in such form and content as [s]he may determine" and "report[]" the "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States . . . within 9 months after the census date . . . to the President of the United States." The Report delivered to President Biden in 2020, however, betrays the Bureau's argument in that it specifically calculated the "number of apportioned representatives based on [the] 2020 Census" according to the method of equal

proportions as provided for in 2 U.S.C. §§ 2a, 2b. A. 55 & n.2.

The Bureau cannot have it both ways. Contrary to the Bureau's representation at oral argument—that the Bureau only "count[s] the total number of people in the United States" and nothing else, Oral Argument Tr. 28—the Bureau demonstrates that it has the authority to provide the President with an apportionment count based on census data. It is thus the Bureau's responsibility to ensure that the apportionment count it is providing accords with the Reduction Clause as well as the Clause's statutory codification at 2 U.S.C. § 6.

The Bureau made a slapdash, one-time attempt to effectuate the Reduction Clause in 1870, but that failed attempt cannot now justify the agency's ongoing failure to even try to ensure that states denying or abridging the right to vote are appropriately held to account. *See* Oral Argument Tr. 27. The census remains the most natural established way of ascertaining the data necessary to effectuate the Reduction Clause, as both the House and Senate recognized in the late 1860s. *See* Zuckerman, *supra*, 107-08. The Bureau has several tools at its disposal to identify ways to implement the provision; it can promulgate rules, engage in notice and comment, seek out implementation input from experts, or generate reports for submission to the President and Congress. I concede that implementing the Reduction Clause might be difficult, but that is no excuse for the Executive Branch to abdicate its responsibility to give effect to this important part of the Constitution. Many constitutional provisions are difficult to enforce, like the Second Amendment, the preservation of the right

to trial by jury, and the guarantee of equal protection. But the government has a duty to enforce all of the Constitution, not just some of it, and it is time that the government stop treating the Reduction Clause as an afterthought. *Cf. Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) ("The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691 (1977) ("[T]he prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights.").

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:21-cv-03045

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff,

v.

THE CENSUS BUREAU, et al.,

Defendants.

MEMORANDUM OPINION

Before: WALKER and PAN, *Circuit Judges*, NICHOLS, *District Judge*.

Opinion of the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*: Every ten years, the government conducts a census to count the number of people living in the United States. U.S. Const. art. I, § 2; 13 U.S.C. § 141. The census helps determine the number of United States Representatives in each state. *Congressional Apportionment*, United States Census Bureau, https://www.census.gov/topics/public-

sector/congressional-apportionment.html. The more populous a state is in comparison to other states, the more representatives it receives. That process is called apportionment. *Id.*

Citizens for Constitutional Integrity says that in 2020, the Census Bureau failed to follow Section Two of the Fourteenth Amendment, which requires a state's population to be reduced for apportionment purposes when it abridges the voting rights of its citizens. Second Am. Compl. ¶¶ 60-62.

We cannot reach the merits of that claim because the "judicial Power" of the United States extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2. That means that a party seeking relief from a federal court must show that it was injured by the defendant and that an order from this court would redress its injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2015). Here, Citizens for Constitutional Integrity has failed to show that it was injured by the Census Bureau's alleged failure to follow Section Two of the Fourteenth Amendment.

True, Citizens's members reside in states, like New York and Pennsylvania, that lost representation in Congress after the 2020 census. *See* U.S. Census Bureau, 2020 Census Apportionment Results Presentation (April 26, 2021), 8. But Citizens failed to show that the loss in representation was caused by the Census Bureau's alleged failure to follow the Fourteenth Amendment. So we must dismiss this case for lack of jurisdiction.

I

A

After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments reshaped our Constitution to abolish slavery and extend rights to

those formerly enslaved. One such right is the right to be included as a person for apportionment purposes. U.S. Const. amend. XIV, § 2. Another is the right to vote. *Id.* amend. XV. To ensure that southern states could not deny freed slaves the right to vote while also claiming them as residents for apportionment purposes, the nation ratified Section Two of the Fourteenth Amendment. *See* Second Am. Compl. ¶¶ 29-33. Its original text reads:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2.[1]

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[1] "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-

Section Two has two clauses. The first clause says a state will be apportioned representatives in the House of Representatives based on the "whole number of persons" in that state. *Id.* The second clause, known as the Reduction Clause, imposes a penalty on states that deny or abridge the right to vote for any reason other than age, citizenship, participation in a rebellion, or the commission of another crime. When a state does so, the Clause requires the state's "basis of representation" to be "reduced" by the proportion of eligible voters who are wrongfully disenfranchised. *Id.*

Here's how it works. Imagine a state with 100 people, 80 of whom are citizens old enough to vote. The state wrongfully abridges the right to vote of 8 people, or 10% of eligible voters. Under the Reduction Clause, the State's basis of representation (100 people) should be reduced by 10%. When it comes time to apportion representatives to our hypothetical state, only 90 out of its 100 people will count. *Cf.* Ethan Herenstein & Yurij Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. Rev. 1021, 1040-41 (2021).

B

Citizens for Constitutional Integrity is a nonprofit organization with members in New York, Pennsylvania, and Virginia. Second Am. Compl. ⁋⁋ 14-15. It alleges that the Census Bureau is charged with implementing the Reduction Clause. It points out that, after completing the census, the Bureau prepares a report for the President with "[t]he

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sixth Amendments." *Evenwel v. Abbott*, 578 U.S. 54, 102 n.7 (2016) (Alito, J., concurring in the judgment).

tabulation of total population by States." *Id.* ¶ 24 (quoting 13 U.S.C. § 141(b)). Based on that report, the President sends a statement to Congress "that describes the results of the census and the distribution of Representative seats." *Id.*; *see also* 2 U.S.C. § 2a.

Citizens believes that some states' voter-ID and voter-registration requirements abridge the right to vote. *Id.* ¶¶ 43-46, 50-53. It thus claims that the Census Bureau failed to implement the Reduction Clause by refusing to account for those abridgments when it prepared its report for the President. Id. ¶ 66.

As a first step, Citizens sent a letter to the Census Bureau raising its concerns about the 2020 census. *See id.* ¶ 42; ECF No. 1-2 (Bureau response). The Bureau replied that it did "not have the authority to investigate whether states have violated voting rights laws." ECF No. 1-2. So Citizens filed this lawsuit asking the court to set aside the 2020 apportionment and issue an injunction requiring the Bureau to implement the Reduction Clause. Second Am. Compl. ¶ 69. The Court granted Citizens's request that the case be assigned to a three-judge panel under the Voting Rights Act. *See* Minute Order, Dec. 13, 2021; 28 U.S.C. § 2284(a).

The Bureau moved to dismiss Citizens's suit. The Bureau argued that Citizens has not shown that its members were injured by the Bureau's failure to implement the Clause, so it does not have standing to sue in federal court. Defs.' Mem. in Supp. of Mot. Dismiss 7-8.

By contrast, Citizens asserts that if the Bureau had properly implemented the Clause, New York, Pennsylvania, or Virginia would have been allocated an additional representative after the 2020 census.

Second Am. Compl. ⁋⁋ 48, 54-58. Thus, Citizens alleges that the Bureau's failure to implement the Clause harmed at least some of its members by diluting their voting power. *Id.* ⁋ 15.

II

A

To bring a lawsuit in federal court, a plaintiff must show that it has standing to sue. U.S. Const. art. III; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To do so, a plaintiff must show three things: (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, 578 U.S. at 338. An organization (like Citizens) cannot sue on behalf of its members if none of its members would have standing to sue as an individual. *Warth v. Seldin*, 422 U.S. 490, 516 (1975). When determining whether a plaintiff has standing at the motion to dismiss stage, we accept the plaintiff's factual allegations as true, and we "may consider materials outside the pleadings." *Jerome Stevens Pharmaceuticals, Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005).

Citizens alleges only one kind of injury: dilution of the voting power of its members. Pl's Opp. to Defs.' Mot. Dismiss 17. It says that the Bureau's failure to apply the Reduction Clause caused at least some of its members to have fewer representatives in their respective states. *Id.*

Vote dilution is an injury sufficient to satisfy the first element of standing. *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999). And the 2020 apportionment *did* decrease the number of representatives in two states in which Citizens's members reside — both New York and

Pennsylvania have one fewer representative than they did under the previous apportionment in 2010. Oral Arg. Tr. 4.

But to show standing, it is not enough for a plaintiff to merely allege vote dilution. It must also show that the dilution is "traceable to the challenged conduct of the defendant." *Spokeo*, 578 U.S. at 338. In other words, to have standing in this context, plaintiffs alleging vote dilution injuries must show that their states would have had an additional representative but for the government's error. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992).

That cannot be done merely by pointing out the government's alleged failure to follow the Reduction Clause. Representatives are distributed according to a complicated mathematical formula, prescribed by statute, and states might lose representatives for reasons unrelated to the Bureau's failure. *See* 2 U.S.C. § 2a(a) (requiring "the method of equal proportions"); *Computing Apportionment*, United States Census Bureau, https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html. So even if a plaintiff can show that the Census Bureau counted incorrectly, that does not mean that a corrected recount would lead to an apportionment more favorable to the plaintiff.

In *Franklin v. Massachusetts*, for example, it was not enough for the plaintiffs to allege that the Census Bureau used inaccurate data; they had to show "that Massachusetts would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data." 505 U.S. at

802.[2] And in *Utah v. Evans*, the Court held that Utah had standing to challenge the Bureau's use of a certain statistical counting method because Utah could show that it would have had an additional representative if the method had not been applied. 536 U.S. 452, 458, 460-61 (2002).

Here, Citizens fails 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 its legal theory. Thus, it does not show that the Bureau's failure to implement the Clause caused its injury.

B

Start with Citizens's legal theory, which we accept as true when asking whether it has standing. *American Federation of Government Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). Citizens believes that states are unlawfully abridging the right to vote in two ways — first, by requiring voters to register before voting; and second, by requiring voters to present identification at polling places. Second Am. Compl. ⁋⁋ 43-54. Citizens argues that those who could not vote due to voter-ID or voter-registration requirements must be deducted from a state's "basis of representation" according to the Reduction Clause. *Id.* ⁋⁋ 60-62; *see also* Pl's P. & A. in Supp. of Renewed Summ. J. 36.

To show that New York, Virginia, or Pennsylvania would have gained a seat if the Reduction Clause were

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[2] Though that part of the standing analysis appeared in a plurality opinion, the concurrences did not challenge the plurality's conclusion that the plaintiffs lacked standing to pursue their claims about the accuracy of the data.

applied according to its legal theory, Citizens offered a declaration by a data scientist. That declaration provided three apportionment "scenarios" that purported to demonstrate what apportionment would look like if the Bureau had accounted for state voter-registration requirements and voter-ID laws.

- Scenario 1: what apportionment would look like if the Bureau had accounted for voter-registration requirements and applied the Reduction Clause accordingly, Sharma Decl., ECF No. 20-3 ¶¶ 14, 21;
- Scenario 2: what apportionment would look like if the Bureau had accounted for Wisconsin's voter-ID law and applied the Reduction Clause accordingly, *id.* ¶¶ 15, 23;
- Scenario 3: what apportionment would look like if the Bureau had accounted for both voter-registration requirements and Wisconsin's voter-ID law and applied the Reduction Clause accordingly, *id.* ¶¶ 16, 26.

Each scenario produces an apportionment that is better for one of Citizens's member states than the actual apportionment that occurred. *See id.* ¶ ¶ 21, 23, 26. However, even when we accept the resulting apportionments in each scenario as true, the declaration tells an incomplete story.

Most glaringly, the declaration does not even attempt to approximate the number of citizens in each state who have been disenfranchised by voter-ID requirements. Instead, the declaration investigates the effect of voter-ID requirements in just one state: Wisconsin. *See id.* ¶ 12. In two of its apportionment scenarios, the declaration shows us what apportionment would look like if the Bureau reduced Wisconsin's basis of representation because of its

voter-ID law. *Id.* ¶¶ 15-16. But the declaration never provides a scenario that shows us what apportionment would look like if the basis of representation were reduced in each state with a similar law.

That is a significant mistake. If Citizens is right that voter-ID laws disenfranchise voters in a way that triggers the Reduction Clause, then the Clause would reduce the basis of representation in *all* states with those laws. Neither the declaration nor the complaint asserts that Wisconsin is the only state with such a requirement. In fact, the complaint briefly compares and contrasts different ID requirements in different states, admitting that Wisconsin is not alone. Second Am. Compl. ¶ 50. By taking only Wisconsin into account, the declaration fails to provide us with a scenario that illustrates what apportionment might look like if Citizens's legal theory is correct.

When the Bureau pointed out that error, Citizens responded that it is "master[ ] of [its] complaint" and may focus solely on Wisconsin's voter-ID law if it wishes. Pl's Opp. to Defs.' Mot. Dismiss 27-28. Fair enough — that is Citizens's choice. But if Citizens wants to be master of a *viable* complaint, it needs to do more. 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's legal theory is correct. *See* 2 U.S.C. § 2a (apportioning pursuant to a formula that accounts for the relative populations in each state).

Indeed, it might be that Citizens's voter-ID theory would *reduce* the "basis of representation" for some of Citizens's member states (Pennsylvania, New York, and Virginia). Given the lack of detail in Citizens's

complaint, we do not know whether such a reduction would occur, or how it would affect the number of representatives apportioned to those states. In fact, at oral argument, Citizens admitted as much. Oral Arg. Tr. 4 ("Conceivably, it is possible that when the Census Bureau complies with Fourteenth Amendment, Section 2, and decides where to move all of the seats, there is some possibility that New York could lose a seat.").

We don't doubt that it would be difficult and expensive for Citizens to show that the Bureau's failure to apply the Reduction Clause diluted the voting power of its members. Citizens would need to collect the data necessary to show what apportionment might look like if its legal theory is correct. But a plaintiff is not absolved from its duty to show a traceable injury just because it is hard to do so. *See Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (A plaintiff's "sincere effort . . . to rectify what he considers a grave constitutional mistake is not enough. He must establish that the failure to enforce [Section Two of the Fourteenth Amendment] has resulted in a detriment to his rights of representation in Congress.").

In sum, we have no way of knowing if the Bureau's failure to apply the Reduction Clause, in accordance with Citizens's legal theory, led to fewer representatives in Pennsylvania, New York, or Virginia. So Citizens has not shown standing.

C

As a fallback, Citizens argues that it was denied a procedural right and so does not need to show what apportionment would look like under its legal theory. Pl's Opp. To Defs.' Mot. Dismiss 15.

True, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). In procedural-rights cases, courts thus soften standing's traceability and redressability requirements. *National Parks Conservation Association v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). A litigant claiming the loss of a procedural right need not prove that the loss of the right was a but-for cause of his injury or that his injury would be cured if the proper procedure is followed. *Id.* He need show only that he was denied a procedure to which he was entitled and that he was harmed by a decision made without that procedure. *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992). If he makes that showing, he has standing so long as there is "some possibility" that the proper procedure would lead to a more favorable decision. *Massachusetts v. EPA*, 549 U.S. at 518.

Citizens argues the Bureau's failure to apply the Reduction Clause was a "flawed procedure." Pl's Opp. to Defs.' Mot. Dismiss 15. It then points out that the resulting apportionment figures caused New York and Pennsylvania to lose one seat in the House of Representatives. Oral Arg. Tr. 4. Thus, Citizens says it has standing so long as there is "'some possibility'" that apportionment would be more favorable had the Reduction Clause been followed. Pl's Opp. to Defs.' Mot. Dismiss 20 (quoting *Massachusetts v. EPA*, 549 U.S. at 518).

But relaxed standing principles do not apply every time a plaintiff alleges that the government failed to follow proper procedures. They apply only when "the

procedure at issue" is "one designed to protect a threatened interest of the plaintiff." *Renal Physicians Association v. U.S. Department of Health and Human Services*, 489 F.3d 1267, 1278 (D.C. Cir. 2007). Such procedures are usually found in statutory provisions that give private parties a right to participate in a government process. For example, the Supreme Court held that the Clean Air Act gave Massachusetts a "procedural right to challenge the [EPA's] rejection of its rulemaking petition." *Massachusetts v. EPA*, 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1)). Similarly, some statutes give "concerned public and private organizations" the right to "cooperat[e]" with an agency in preparing impact statements. *See*, *e.g.*, 42 U.S.C. §§ 4331, 4332; *Manson*, 414 F.3d at 5 ("[T]he archetypal procedural injury[ ] [is] an agency's failure to prepare a statutorily required environmental impact statement.").

The Reduction Clause does not accord to Citizens a right to participate in a government process. It does not, for example, give Citizens a procedural right to challenge the apportionment of United States Representatives. *Cf. Massachusetts v. EPA*, 549 U.S. at 520. Nor does it require the government to collaborate with Citizens. *Cf.* 42 U.S.C. § 4331. Nor does it provide Citizens with any opportunity to comment on the census or the resulting apportionment. *Cf. Summers v. Earth Island Institute*, 555 U.S. 488, 496-97 (2009) (characterizing an agency's denial of the "guaranteed right to comment" as a "deprivation of a procedural right"). Rather, it imposes a nondiscretionary obligation on the government, with no input by private parties.

In short, Citizens has not been *deprived* of a procedural right for the simple reason that it was

never *entitled* to a procedure. So it must show the typical elements of standing, including a traceable injury. But for the reasons explained above, it has failed to do so.

* * *

Citizens does not show that the Census Bureau's failure to implement the Reduction Clause caused an injury to Citizens and its members. Thus, Citizens fails to show standing, and we must dismiss this case. We also deny as moot the Bureau's Motion in Limine, and Citizens's Renewed Motion for Summary Judgment.

Date: April 18, 2023

/s/
JUSTIN R. WALKER
United States Circuit Judge

/s/
Florence Y. Pan
United States Circuit Judge

/s/
CARL J. NICHOLS
United States District Judge

APPENDIX C

UNITED STATES DEPARTMENT OF COMMERCE

The Secretary of Commerce

Washington, D.C. 20230

April 26, 2021

The President
The White House
Washington, DC 20500

Dear Mr. President:

In accordance with the provisions of Title 13, United States Code, Section 141(b), I am transmitting the statement showing the apportionment population for each of the 50 states on April 1, 2020, as ascertained by the Twenty-Fourth Decennial Census of the United States.

The enclosed table shows the apportionment population for each state, the number of Representatives to which each state is entitled based on the apportionment population, and the change (if any) since the 2010 Census in the number of Representatives for each state. The population of the District of Columbia is not included in the apportionment population.

The United States Census Bureau prepared these calculations using the existing size of the U.S. House of Representatives (435 members) and the Method of Equal Proportions, as provided for in Title 2, United

States Code, Section 2a, enacted in 1929 and thereafter amended, as well as Title 2, United States Code, Section 2b, enacted in 1941. Under Section 2a, you are to send this information to the 117th Congress.

Respectfully,
/s/
Gina Raimondo
Enclosure

U.S. Department of Commerce
U.S. Census Bureau

APPORTIONMENT POPULATION AND NUMBER OF REPRESENTATIVES BY STATE: 2020 CENSUS

STATE	APPORTIONMENT POPULATION (APRIL 1, 2020)	NUMBER OF APPORTIONED REPRESENTATIVES BASED ON 2020 CENSUS[1]	CHANGE FROM 2010 CENSUS APPORTIONMENT
Alabama	5,030,053	7	0
Alaska	736,081	1	0
Arizona	7,158,923	9	0
Arkansas	3,013,756	4	0
California	39,576,757	52	-1
Colorado	5,782,171	8	1
Connecticut	3,608,298	5	0
Delaware	990,837	1	0
Florida	21,570,527	28	1
Georgia	10,725,274	14	0

[1] [2 in original] The U.S. Census Bureau prepared these calculations using the existing size of the U.S. House of Representatives (435 members) and the Method of Equal Proportions, as provided for in Title 2, United States Code, Sections 2a and 2b.

Hawaii	1,460,137	2	0
Idaho	1,841,377	2	0
Illinois	12,822,739	17	-1
Indiana	6,790,280	9	0
Iowa	3,192,406	4	0
Kansas	2,940,865	4	0
Kentucky	4,509,342	6	0
Louisiana	4,661,468	6	0
Maine	1,363,582	2	0
Maryland	6,185,278	8	0
Massachusetts	7,033,469	9	0
Michigan	10,084,442	13	-1
Minnesota	5,709,752	8	0
Mississippi	2,963,914	4	0
Missouri	6,160,281	8	0
Montana	1,085,407	2	1
Nebraska	1,963,333	3	0
Nevada	3,108,462	4	0
New Hampshire	1,379,089	2	0
New Jersey	9,294,493	12	0
New Mexico	2,120,220	3	0
New York	20,215,751	26	-1
North Carolina	10,453,948	14	1
North Dakota	779,702	1	0
Ohio	11,808,848	15	-1

Oklahoma	3,963,516	5	0
Oregon	4,241,500	6	1
Pennsylvania	13,011,844	17	-1
Rhode Island	1,098,163	2	0
South Carolina	5,124,712	7	0
South Dakota	887,770	1	0
Tennessee	6,916,897	9	0
Texas	29,183,290	38	2
Utah	3,275,252	4	0
Vermont	643,503	1	0
Virginia	8,654,542	11	0
Washington	7,715,946	10	0
West Virginia	1,795,045	2	-1
Wisconsin	5,897,473	8	0
Wyoming	577,719	1	0
TOTAL APPORTIONMENT POPULATION[2]	331,108,434	435	0

[2] [1 in original] Includes the resident population for the 50 states, as ascertained by the Twenty-Fourth Decennial Census under Title 13, United States Code, and counts of U.S. military and federal civilian employees living overseas (and their dependents living with them overseas) allocated to their home state, as

reported by the employing federal agencies. The apportionment population excludes the population of the District of Columbia. The counts of overseas personnel (and dependents) are used for apportionment purposes only.

APPENDIX D

UNITED STATES DEPARTMENT OF COMMERCE
U.S. Census Bureau
Office of the Director
Washington, DC 20233-0001

October 1, 2021

Mr. Jared Pettinato
The Pettinato Firm
3416 13th Street, NW, #1
Washington, DC 20010

Dear Mr. Pettinato:

Thank you for your inquiry regarding the apportionment of seats in the U.S. House of Representatives and concerns regarding the Fourteenth Amendment.

Title 13, United States Code (U.S.C.), Section 141 requires the Secretary of Commerce to conduct a census of population and housing every ten years and deliver to the President a tabulation of total population by state based on that decennial census. Title 2, U.S.C., Section 2a requires the President to transmit to the Congress a statement showing the total population of each state, as enumerated in the decennial census, and the number of Representatives to which each state would be entitled under the apportionment of the seats in the House of Representatives. This process is self-executing and

provides for the finality of the decennial census enumeration and the resulting apportionment.

Congress has legislated the Method of Equal Proportions as the method for calculating the apportionment of seats in the House of Representatives among the states. 2 U.S.C. § 2a. In recent decades, the U.S. Census Bureau has applied the Method of Equal Proportions to the apportionment population counts from the decennial census, and the Secretary of Commerce has provided the apportionment results to the President when delivering the legally-required state population totals.

Because the congressionally mandated processes in 13 U.S.C. § 141 and 2 U.S.C. § 2a are complete, the U.S. Secretary of Commerce does not have the authority to alter or withdraw the statements showing the total population by states or the apportionment. Additionally, the U.S. Department of Commerce does not have the authority to investigate whether states have violated voting rights laws. Violations of civil rights or voting rights laws are within the purview of the U.S. Department of Justice. Therefore, we suggest that you reach out to the Civil Rights Division of the Department of Justice regarding enforcement of the Fourteenth Amendment or any civil or voting rights law. Also, you can use their webpage to report your concerns about the potential violation of civil rights.

Sincerely,
/s/
Ron S. Jarmin
Acting Director
United States Census Bureau census.gov

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5140

September Term, 2024

1:21-cv-03045-CJN-JRW-FYP

Filed On: January 24, 2025

CITIZENS FOR CONSTITUTIONAL INTEGRITY,
APPELLANT

v.

CENSUS BUREAU, ET AL.,
APPELLEES

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker*, Childs, Pan*, and Garcia, Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judges Walker and Pan did not participate in this matter.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5140

September Term, 2024

1:21-cv-03045-CJN-JRW-FYP

Filed On: January 24, 2025

CITIZENS FOR CONSTITUTIONAL INTEGRITY,
APPELLANT

v.

CENSUS BUREAU, ET AL.,
APPELLEES

BEFORE: Srinivasan, Chief Judge; and Wilkins and Childs, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on October 25, 2024, the response thereto, and appellant's unopposed motion to recuse, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED that the motion to recuse be dismissed as moot.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX G

1. The United States Constitution, Article I, Section 2, clause 3, provides:

   Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. The United States Constitution, Article III, Section 2, provides:

   The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public

Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

3. The United States Constitution, 14th Amendment, Section 2, provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of

electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

4. 2 U.S.C. 2a provides:

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.

5. 2 U.S.C. 6 provides:

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.

6. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

7. 13 U.S.C. 141 provides:

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.

8. 28 U.S.C. 1361 provides:

Action to compel an 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.

9. 28 U.S.C. 1253 provides:

Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

10. Act of November 26, 1997, Pub. L. No. 105-119, 111 Stat. 2440, 2480, provides:

(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-

(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.