

No. 26-205

IN THE
Supreme Court of the United States

UNIVERSITY OF SOUTH FLORIDA COLLEGE
REPUBLICANS, ET AL., *Appellants*,

v.

HOWARD W. LUTNICK, SECRETARY OF COMMERCE,
ET AL., *Appellees*,

ALLIANCE FOR RETIRED AMERICANS, ET AL.,
Intervenors-Appellees.

On Appeal from the United States District Court for
the Middle District of Florida

**Brief *Amicus Curiae* of
Citizens United,
Citizens United Foundation,
The Presidential Coalition, LLC,
America's Future,
Gun Owners of America,
Gun Owners Foundation, and
Conservative Legal Defense and Ed. Fund
in Support of Jurisdictional Statement**

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	September 17, 2026

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INTEREST OF THE *AMICI CURIAE*¹

Amici Citizens United, Citizens United Foundation, America's Future, Gun Owners of America, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. The Presidential Coalition, LLC is a political committee.

These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs in this Court addressing efforts to ensure the U.S. census performs an “actual enumeration,” including:

- *U.S. Department of Commerce v. U.S. House of Representatives* and *Clinton v. Glavin*, U.S. Supreme Court, Nos. 98-404 and 98-564, *Amicus Curiae* Brief of [Citizens United

¹ It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Foundation's] National Citizens Legal Network, et al. (Nov. 3, 1998)

- *Louisiana v. Bryson*, U.S. Supreme Court, No. 140 (Original), Brief Amicus Curiae of U.S. Border Control, et al. (Jan. 13, 2012);
- *Department of Commerce v. New York*, U.S. Supreme Court, No. 18-966, Brief Amicus Curiae of Citizens United, et al. (Mar. 6, 2019); and
- *Trump v. New York*, U.S. Supreme Court, No. 20-366, Brief Amicus Curiae of Citizens United, et al. (on Petition, Oct. 2, 2020) and Brief Amicus Curiae of Citizens United, et al. (on Merits, Oct. 30, 2020).

STATEMENT OF THE CASE

The Framers of our Constitution provided that “Representatives and direct Taxes shall be apportioned among the several States ... according to their respective Numbers,” based on an “actual Enumeration [which] shall be made” every 10 years. Art. I, Sec. 2, cl. 3. This enumeration is to be done “in such Manner as [Congress] shall by Law direct,” but whatever manner is chosen must constitute an “actual Enumeration.” *Id.* Implementing that provision, 13 U.S.C. § 141(a) authorizes the Secretary of Commerce to conduct the census “in such form and content as he may determine, including the use of sampling procedures and special surveys.”

To ensure the manner chosen by the Secretary of Commerce would be subject to judicial review, Congress created a cause of action permitting a variety

of plaintiffs to have the right to challenge census procedures. The findings on which this statute was based were that the Constitution “clearly requires an ‘actual Enumeration,’” and an “accurate” census “is one of the most critical constitutional functions our Federal Government performs.” Pub. L. No. 105-119, § 209(a)(4)-(6), 111 *Stat.* 2440, 2480 (1997). In addition, Congress found that “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.” *Id.* at § 209(a)(7). An “aggrieved person,” according to Congress, is “any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged,” along with “any Representative or Senator.” *Id.* at § 209(d).

Plaintiffs’ central allegation was that their votes were diluted, creating an underrepresentation of Florida in the House of Representatives, caused by this novel change in methodology, and but for the “imputation” of voters, Florida would have gained an additional congressional seat. *See* Jurisdictional Statement (“Statement”) at 9. In 2020, the Census Bureau took “a stark departure from normal census operations.” Ostensibly due to the COVID-19 pandemic, Defendants fundamentally altered the Department’s approach to data collection and processing: “[a]ssistance was scaled back; mailing materials were delayed; field enumeration operations were postponed; early non-response follow-up was eliminated entirely; door-to-door procedures were

revised to prohibit knocking; and field training was overhauled to minimize in-person contact.” *Id.* at 7.

Having undermined traditional methods to achieve an actual enumeration, the Bureau significantly:

increased their reliance on whole-person imputation, a form of “count imputation” that “uses administrative records or other ‘imputation methods’ based on people in a similar nearby household” to add to the census count.... In the 2020 census, Defendants used whole-person imputation to add (at least) 10.9 million people, 3.4% of the population — nearly double the numbers added in 2010 and 2000. [*Id.*]

As a result of this dramatic change in methodology, “the 2020 census produced statistically significant overcounts in eight States and undercounts in six.” *Id.* at 7-8. According to the Bureau itself, “Florida was undercounted by 3.48%, or about 760,000 people,” and, as a result, “Florida missed an additional congressional seat by just 171,561 people.” *Id.* at 8.

The Bureau’s new “imputation” methods were challenged by several Plaintiffs, including: Representative Byron Donalds (R-FL), the University of South Florida College Republicans and its then-President, and the Pinellas County Young Republicans and its President. Defendants are Commerce Secretary Howard Lutnick and the Census Bureau’s Director, as well as certain third-party individual and organizational intervenor-defendants.

A divided district court dismissed the complaint. *Id.* at 9-10. The court believed that Plaintiffs had failed to establish either causation or redressability. *Id.* Rather than taking the allegations of the complaint at face value as required, the court doubted whether the new imputation method actually had cost Florida a congressional seat. *Id.* at 8. The court also ruled that any injury could not be redressed, since congressional elections had been held in the current districts since the 2020 census. *Id.*

Finally, the court ruled that the complaint was time-barred. The court applied the four-year statute of limitations set out in 28 U.S.C. § 1658(a), refusing to use the standard six-year limitations period applicable to “every civil action commenced against the United States,” 28 U.S.C. § 2401(a), reasoning that § 1658(a) is the more specific statute, and the more recently enacted.

SUMMARY OF ARGUMENT

Plaintiffs’ Complaint provided the district court with an abundance of allegations that the statistical methods used in the 2020 Census resulted in significant overcounts in some states and undercounts in other states. Plaintiffs allege that due to the use of these methods, Florida’s representation in Congress and the Electoral College could be changed by the significant undercount in that State. These were not bare assertions, but rather, key allegations which were grounded in public admissions made by the Defendant Census Bureau. One key admission was that the census using those statistical methods resulted in

Florida being undercounted Florida by 3.48 percent, or about three-quarters of a million people. *See* ¶ 4.

Plaintiffs' Complaint demonstrates that the admitted undercounting utilizing statistical methods, "could" change Florida's representation in Congress. *See* ¶120; Public Law No. 105-119, § 209. Thus, in all ways, the Complaint's allegations (set out in 62 separate paragraphs in the Complaint) were more than sufficient to demonstrate standing and trigger review by the three-judge district court.

Nonetheless, a divided district court deemed the allegations "conclusory," and insufficient under the statute. It faulted Plaintiffs for not establishing a sufficient "causal connection," seemingly requiring proof which could have been achieved only after the case was litigated. It ruled that Plaintiffs lack standing, in a decision which is clearly at odds with this Court's holding in *United States v. Evans*, 536 U.S. 452 (2002). Its decision frustrated the Congressional statute designed to facilitate judicial review of the use of statistical adjustments. This decision gives every indication that the majority of the three-judge court did not want to decide this case, disregarding the "duty" which Justice Marshall long ago explained that every federal judges has.

Additionally, the district court also decided, in conflict with *Evans*, that redressability was not established by the Complaint because the President could disregard the revised census numbers adopted by a judgment favorable to Plaintiffs in this case. *Evans*

held that it is substantially likely that a President would abide by a judgment of a court.

Lastly, there is one statute of limitations that applies to suits against the government, 28 U.S.C. § 2401(a), which provides for a six-year period. The Court's reliance on another, shorter, statute of limitation was not supported.

ARGUMENT

I. PLAINTIFFS HAVE DEMONSTRATED THEY HAVE STANDING TO BRING THEIR CHALLENGE.

A. The Allegations Regarding Standing Were Not Conclusory.

The majority of the three-judge district court concluded that Plaintiffs had failed to establish standing because their allegations regarding the causal linkage between the Bureau's post-census survey and their claim that the population of Florida was undercounted were merely "conclusory." See Statement at 16a, 17a, and 34a n.15. To reach that decision, which was fatal to Plaintiffs' suit, the court relied on only two paragraphs of the Third Amended Complaint ("Complaint"): ¶¶ 103 and 146.² That conclusion was not only erroneous; it was also

² The majority ignored its own understanding that it was obliged to consider "the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss...." Statement at 13a.

inexplicable. There were many detailed allegations in the Complaint that specifically claimed Defendants' new methods to conduct of the 2020 census in Florida caused:

- (i) a significant undercounting of Florida's population;
- (ii) a significant overcounting of the population of other States; and
- (iii) the resulting lost opportunity for Florida to gain an additional congressional seat and an additional vote in the Electoral College.

There were 62 paragraphs in the Complaint with relevant allegations which the district court appears not to have noticed. *See* Complaint ¶¶ 49, 50, 53-69, 74-79, 82-86, 91-98, 103-26.

The two paragraphs (¶¶ 103 and 146) of the Complaint which the district court labeled merely "conclusory" were viewed in isolation — not in the context of the lengthy, detailed complaint. However, even in isolation, each alleged a fact that, if true, would show causation between the admissions in the Post Enumeration Survey ("PES") and the undercounting of the Florida population. Paragraph 103 stated that the Bureau had admitted in its PES to using the imputation method extensively in the 2020 Census, which produced statistically significant undercounting. But in context, the allegations tell a complete story. Paragraph 103 was accompanied by a similar admission in ¶ 79. The PES found that the enumeration undercounted the Florida population by almost 760,000. *See* Complaint ¶ 91. The inclusion in

¶ 103 of the admission by the Bureau, by itself, is an allegation of fact that must be taken as true. Paragraphs 103 and 146 must be considered together with the allegations in other paragraphs of the complaint which adequately establish that the extensive use of imputation as opposed to personal contact caused undercounting and overcounting. Combined with the allegations establishing how the undercount of the Florida population resulted in the State not gaining another seat in the U.S. House of Representatives and an additional vote in the Electoral College, the conclusion that Plaintiffs provided only conclusory allegations cannot be sustained. *See, e.g.*, ¶¶ 48-66, 76, 78, 89, 91, 98, 103, 104-26.

The district court ignored the detailed description in ¶¶ 104-26 of the effect of the use of imputation and its resulting errors on the apportionment process. While the 2020 census missed 171,561 Floridians (Complaint ¶ 116), it overcounted in other States. Complaint ¶ 117. This resulted in an apportionment in which Florida was denied an additional seat in the U.S. House of Representatives. It is difficult to understand how the majority of the district court panel could have overlooked these substantive paragraphs as they reached the conclusion that the complaint contained only conclusory allegations.

The complaint referenced several documents published by the Bureau of the Census that contain descriptions of the substantial and unprecedented modifications of procedures adopted during the conduct of the 2020 census that plainly demonstrate the causes

for the admitted undercounting and overcounting of people in various States. It is beyond doubt that the Bureau abandoned its past procedures designed to accomplish an actual enumeration of the population that relied on direct contact with households, substituting unproven statistical methods to fill in gaps when respondents were not contacted, sometimes deliberately (*see* Statement at 7 and 64a), or failed to respond.

When confronted with the COVID-19 pandemic in 2020, the Bureau chose to fundamentally alter the conduct of the 2020 census. *See* Complaint ¶¶ 48-66. It “failed to fulfill the fundamental task of ‘seek[ing] to reach each individual household.’” Complaint ¶ 65. The imputation method selected as a substitute for actual enumeration (¶¶ 66, 76, 78) led to the undercounting of the Florida population and, thus, vote dilution. Complaint ¶¶ 89, 91, 98, 103. The failure to gain an additional House seat obviously causes Floridians, including Plaintiffs, vote dilution. The detailed description in the complaint and the documents referenced in it of the Defendants’ altered conduct in 2020 and the resulting undercounting show the obvious error in the conclusion of the court below that the complaint provided only conclusory allegations in support of Plaintiffs’ standing.

The court below compounded the error in concluding that the complaint included only conclusory allegations regarding causation by relying on a statement in the PES that imputation had “very little impact on net coverage error estimates.” Statement

at 9a. However, this referred to the national effect, not the particular impact on the Florida count.

B. The Conclusion Below on Standing Is at Odds with this Court’s Decision in *Utah v. Evans*.

The holding below that the Plaintiffs lack standing was clearly at odds with this Court’s holding in *Utah v. Evans* and should be summarily reversed. There is no dispositive difference between that case and this.

Evans also involved a challenge to the use of imputation methodology in the conduct of a census. The *Evans* Court held that the plaintiffs in that case had standing. *See Id.* at 460-61. The fact that the challenge in that case was brought years after the census had been conducted was not a reason to dismiss the action. *Id.* at 463; *see Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996).

C. The Complaint Satisfies the Lower Standing Standard for Procedural Injury.

Although Congress has no authority to erase the Article III limitations on a federal court, it can provide that an assertion of a violation of a procedural right established by statute is sufficient to confer standing without the need to allege further harm. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016); *Hardin v. Ky. Utilities Co.*, 390 U.S. 1, 5 (1988).

Section 209(b) provides that “[a]ny person aggrieved by the use of any statistical method” may

obtain relief “against the use of such method.” The complaint alleges that Plaintiffs suffered such a procedural injury. Statement 114a-116a. The standard for establishing **causation** and **redressability** requires only that “the procedural step was **connected to the substantive result**.” *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (emphasis added). Plaintiffs have alleged sufficient facts to show that the relief sought would likely redress the violation of their procedural right. See *Dep’t of Education v. Brown*, 600 U.S. 551, 561 (2023).

Plaintiffs do not need to meet the more stringent standards for causation and redressability applied in cases other than those involving an asserted violation of a statutory procedural right. *Id.* The complaint asks for relief from the use by Defendants of methods other than actual enumeration in the form of declaratory and injunctive relief. Such relief, by definition, is likely to redress the violation of Plaintiffs’ procedural rights.

D. The Complaint Adequately Establishes that the Relief Sought Would Redress Plaintiffs’ Injuries.

The court below also erred in concluding that the Complaint does not allege that the relief sought would redress the injuries claimed. See Statement at 17a-19a. The test to be applied is whether there is a substantial likelihood that the vote-dilution and funding-loss injuries would be resolved by a favorable judgment. See *Evans* at 460. Contrary to the conclusion of the court below, it is not “pure

speculation” that the President would agree to accept new census numbers established by a final judgment. It is substantially likely that the President and other third parties would abide by a final judgment in this case granting the relief sought.

II. LOWER COURTS HAVE OFTEN USED DENIALS OF STANDING TO AVOID REACHING THE MERITS OF CONTROVERSIAL CASES.

A. The Plaintiffs Met All the Tests for Standing Established by Congress and the Constitution.

Congress did all that was in its power to write a law to ensure that the methods employed by the Secretary of Commerce to perform an actual “enumeration” could be judicially reviewed. Nevertheless, the district court chose to rule in a manner to negate those provisions of law. Section 209 first identifies the nature of the injury which a plaintiff must have to make the challenge presented here:

(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), 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. [Emphasis added]

The characteristics of such an aggrieved person are set out in subsection (d):

(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.
- [Emphasis added.]

Note that a non-Congressional plaintiff is only required to allege his residency in a state or district which “**could be changed**” by the challenged methodology. All individual Plaintiffs here meet the requirement of subsection (1) (*see* Complaint ¶¶ 14, 16, 17), and Congressman Byron Donalds obviously meets the sole requirement of subsection (2) (*see* Complaint ¶ 18).

In Complaint ¶ 4, Plaintiffs base their cause of action in part on revealing admissions that had been publically made by the Census Bureau.

Even Defendants admit that Florida was undercounted by a statistically significant

3.48% or about three-quarters of a million people. [Complaint ¶ 4 (citing a Census Bureau report).]

In their Complaint, Plaintiffs quite logically allege that because of this undercounting, the apportionment of Congress “could be changed” by the faulty statistical methods employed — which is the precise test set out in the statute. *See* § 209(d)(1). But the Court entirely disregarded these allegations based on a supposed lack of “causal connection” (Statement at 16a) raising the bar for standing so high it could not be met until the case was fully litigated.

Based on this and other allegations in the Complaint, it should have been entirely impossible for the court to rule that Plaintiffs had standing. The fact the court ruled otherwise gives rise to the distinct possibility that the two judges in the majority simply did not want to reach the merits for reasons other than the sufficiency of standing. The basic rules of standing were set out by Justice Scalia in 1992:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized.... Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not

before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”³

While stated clearly, these standards are subject to what some commentators have termed “manipulation.” The rules of standing certainly have been applied in many cases along ideological lines rather than constitutional ones. Yale professor Robert Pushaw has argued, “[u]nfortunately, the injury, traceability (*i.e.*, causation), and redressability standards are so malleable that they can be easily **manipulated depending upon whether a judge wishes to reach the merits.**”⁴ This is not a new problem, as 25 years ago, George Washington University Law School Professor Richard Pierce noted the difficulty of teaching his students how to fathom the law of standing, when it often appears unevenly applied:

I would like to be able to describe and to teach standing with reference to legal doctrines.... I would like to ... provide them with a doctrinal algorithm that they can use to predict judicial decisions with a reasonable degree of confidence. Unfortunately, ... [t]hey can predict judicial decisions in this area with

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

⁴ Robert Pushaw, “The Court Continues to Confuse Standing: The Pitfalls of Faux Article III ‘Originalism,’” 31 *Geo. Mason L. Rev.* 893, 894 (Spring 2024) (emphasis added).

much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: **judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges....**⁵

Standing can be manipulated by judges to achieve different results. For example, certain circuits which have historically been hostile to the Second Amendment have manipulated standing. As Judge Kleinfeld of the Ninth Circuit noted in a 2003 dissent, “[t]he panel opinion erases the Second Amendment from our Constitution as effectively as it can, by holding that no individual even has standing to challenge any law restricting firearm possession or use. This means that an individual cannot even get a case into court to raise the question.” *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of reh’g. en banc).

Other commentators have described the doctrine of standing as “either a judicial mask for the exercise of prudence to avoid decisionmaking or a sophisticated manipulation for the sub rosa decision of cases on their merits.”⁶ Professor Heather Elliott notes, “the common belief that standing is merely a means of

⁵ Richard J. Pierce, Jr., “Is Standing Law or Politics?,” 77 N.C. L. Rev. 1741, 1742-43 (June 1999) (emphasis added).

⁶ Steven Winter, “The Metaphor of Standing and the Problem of Self-Governance,” 40 Stan. L. Rev. 1371, 1373 (1988).

manipulation: courts will find standing lacking when they wish to avoid the merits of cases and ignore standing when they wish to reach the merits.”⁷

Nor is the concern limited to any particular side of the ideological spectrum. Professor Elliott notes that the judicial use of standing as a means of “judicial legislation” has affected the rights of citizens across the political divide. “The Article III standing doctrine ... is often criticized as a restriction that prevents liberal, but not conservative, plaintiffs from proceeding in the federal courts. Standing doctrine has, however, increasingly been an issue in many cases involving conservative litigants.” *Id.* at 17.

B. The Trend to Avoid Review of Election-Related Cases Should be Ended.

Additionally, it is possible that the triggering event for the recent sea change in election challenge standing can be found in this Court’s one-sentence order of December 11, 2020, refusing to entertain the Texas bill of complaint invoking this Court’s original jurisdiction in *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020). In a one-sentence opinion, this Court ruled: “Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”⁸ Irrespective of why the seven

⁷ Heather Elliott, “Further Standing Lessons,” 89 Ind. L.J. Supp. 17, 18 (2014).

⁸ In 2024, this Court had another opportunity to address the merits of an election challenge, and there adopted the opposite

justices who declined to hear the challenge took that position, a clear message was received: “stay out of the challenges to the 2020 election.” Since that date, the lower federal courts and state courts — with a shocking degree of uniformity — have refused to grant standing in election challenge cases based on new, heightened rules of standing.

Dissenting from the denial of consideration, Justice Alito stated: “[i]n my view, **we do not have discretion to deny** the filing of a bill of complaint in a case that falls within our original jurisdiction.” (Emphasis added.) Justice Alito then cited Justice Thomas’ prior dissent in *Arizona v. California*, 140 S. Ct. 684 (2020), involving the Court’s original jurisdiction, citing *Cohens v. Virginia*, 19 U.S. 264 (1821).

In 2021, the Democrat District Attorney of Shelby County, Tennessee, and former University of Memphis law professor Steven J. Mulroy surveyed how the law of standing had changed abruptly due to the politics surrounding the hotly contested Biden-Trump election of 2020:

[T]he courts in these cases seemed eager to decisively repudiate these election challenges which not only lacked merit or

position, *sub silentio*, now agreeing that: “in a Presidential election ‘the impact of the votes cast in each State is affected by the votes cast’ ... ‘for the various candidates in other States.’” *Trump v. Anderson*, 601 U.S. 100, 116 (2024) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

even advanced frivolous claims, but which also had the effect (if not the intent) of disrupting the orderly completion of the electoral process, undermining public confidence in the electoral system, and stoking baseless conspiracy theories among an already alarmingly aroused segment of the population. While this impulse was understandable, it may have resulted in **courts too cavalierly dismissing legitimate claims of standing**, confusing standing questions with merits questions, or both. These judicial misfires risk setting **bad precedent for future cases**.⁹

The case now before this Court is one of those “future cases” where relief was denied based not on the merits, but due to a dramatic shift in the law of standing brought on by the politics of the 2020 Presidential election.

In its effort to avoid reaching the merits of the case and potentially risk appearing to interfere in a hotly contested election, this Court may have inadvertently changed the law of standing, making challenges to election regulations almost impossible. Particularly if it was this Court that inadvertently created this problem of lower courts refusing to decide legitimate election-related challenges, a course correction is now desperately needed to ensure elections are conducted in accordance with law, as well as the census which

⁹ Steven Mulroy, “Baby & Bathwater: Standing in Election Cases After 2020,” 126 Dickinson L. Rev. 9, 13 (Fall 2021) (emphasis added).

affects elections for both the House and the Presidency.

C. The Court's Duty to Decide.

Two centuries ago, Chief Justice John Marshall explained that such actions were an abdication of the judicial duty:

We 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. **Questions may occur which we would gladly avoid; but we cannot** avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. [*Cohens* at 404 (emphasis added).]

Marshall echoed this theme in *Marbury v. Madison*. “It is emphatically the province **and duty** of the judicial department to say what the law is. Those who apply the rule to particular cases, **must** of necessity expound and interpret that rule.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added).

This Court has continued to acknowledge “the virtually unflagging obligation of the federal courts to

exercise the jurisdiction given them....” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Justice Harlan warned in 1961 that standing must not “become a catchall for an unarticulated discretion on the part of this Court to decline to adjudicate appeals involving Constitutional issues.” *Poe v. Ullman*, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting). And more recently, Justice Alito has cautioned that “the Court should not use a practice of selective silence to accept or reject prominently presented standing arguments on inconsistent grounds.” *United States v. Texas*, 599 U.S. 670, 725 (2023) (Alito, J., dissenting).

Justice Alito recently noted the problem of courts using standing to avoid important questions:

I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions. While it is important that federal courts heed the limits of their constitutional authority, it is equally important that they carry out their “virtually unflagging obligation ... to exercise the jurisdiction given them. [*Parents Protecting Our Child.*, *UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14-15 (2024) (Alito, J., dissenting from denial of certiorari) (*quoting Colorado River* at 817).]

The problem of denying standing has crept in to election-related cases, and the current case has strong

bearing on elections. Congress has made clear it should be decided, and Article III presents no bar.

III. THE APPROPRIATE LIMITATION PERIOD HERE IS PROVIDED BY 28 U.S.C. § 2401(A).

The court below held that this proceeding was barred by the application of the limitation period in 28 U.S.C. § 1658(a), which bars actions after a four-year period from the asserted injury. *See* Statement at 54a. That conclusion was erroneous. The text of 28 U.S.C. § 2401(a) plainly establishes that the six-year limitation period applies to all actions against the United States.¹⁰ That statute, therefore, establishes the appropriate limitation period.

The majority opinion asserted that 28 U.S.C. § 1658(a) (the four-year statute) is more appropriate because it is a more recently enacted statute and more specific than 28 U.S.C. § 2401(a) (the six-year statute). This argument fails on both grounds. The six-year statute, not the four-year statute, applies to actions against the United States. The four-year statute provides that its limitation period applies **unless** another statute contains a different limitation period. The fact that 28 U.S.C. § 2401(a) was enacted years before 28 U.S.C. § 1658(a) does not make the more recently enacted statute the appropriate statute to apply — particularly because the later-enacted statute

¹⁰ Actions against officers of the United States in their official capacity are actions against the United States. *See Lewis v. Clarke*, 581 U.S. 155, 162 (2017).

expressly **defers** to any previously enacted statute with a different limitation period.

For the same reason, 28 U.S.C. § 1658(a) does not provide the appropriate limitation period because it is arguably more specific than 28 U.S.C. § 2401(a). The express language of 28 U.S.C. § 1658(a) that its provisions apply unless another statute established a different limitation period is dispositive. The strong presumption that a later-enacted statute does not repeal or displace an earlier-enacted statute, particularly given the language expressly precluding the displacement of another statute with a different limitation period, means that the two statutes are not in conflict. *Epic System Corp. v. Lewis*, 584 U.S. 497, 510 (2018).

Lastly, in any event, 28 U.S.C. § 1658(a) is not more specific than 28 U.S.C. § 2401(a). The former is a statute of broad application, while the latter is limited to actions against the United States.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the district court's order or note probable jurisdiction.

Respectfully submitted,

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