

No. 26-205

In the Supreme Court of the United States

UNIVERSITY OF SOUTH FLORIDA COLLEGE
REPUBLICANS, MICHAEL FUSELLA, PINELLAS COUNTY
YOUNG REPUBLICANS, PARISA MOUSAVI, GRETCHEN
ZOELLER, AND BYRON L. DONALDS,
Appellants,

v.

SECRETARY OF COMMERCE,
ACTING DIRECTOR, U.S. CENSUS BUREAU, AND
THE UNITED STATES OF AMERICA,
Appellees,

ALLIANCE FOR RETIRED AMERICANS, MANUEL
GUERRERO, AND CAMERON DRIGGERS,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

**RESPONSE IN OPPOSITION
TO MOTIONS TO AFFIRM**

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Argument.....	1
I. Plaintiffs have standing.	1
II. The action was timely.....	6
III. This Court’s intervention is needed.....	11

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	3
<i>Bieneman v. City of Chicago</i> , 864 F.2d 463 (7th Cir. 1988).....	8
<i>Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.</i> , 603 U.S. 799 (2024).....	7, 8
<i>Ctr. for Biological Diversity v. Hamilton</i> , 453 F.3d 1331 (11th Cir. 2006).....	8
<i>Dep’t of Com. v. New York</i> , 588 U.S. 752 (2019).....	12
<i>Dep’t of Com. v. U.S. House of Representatives</i> , 525 U.S. 316 (1999).....	2, 3
<i>Dep’t of Educ. v. Brown</i> , 600 U.S. 551 (2023).....	5
<i>Fed. Election Comm’n v. Akins</i> , 524 U.S. 11 (1998).....	2
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992).....	2
<i>Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.</i> , 561 U.S. 477 (2010).....	12

<i>Gutierrez v. Saenz</i> , 606 U.S. 305 (2025)	5
<i>Lavery v. Marsh</i> , 918 F.2d 1022 (1st Cir. 1990)	8
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	3, 4
<i>M.G. v. Armijo</i> , 117 F.4th 1230 (10th Cir. 2024)	5
<i>Major v. Plumbers Loc. Union No. 5</i> , 370 F. Supp. 2d 118 (D.D.C. 2005)	9
<i>Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affs.</i> , 981 F.3d 1360 (Fed. Cir. 2020)	7
<i>Navarro v. Neal</i> , 716 F.3d 425 (7th Cir. 2013)	10
<i>Price v. Bernanke</i> , 470 F.3d 384 (D.C. Cir. 2006)	7
<i>Ross v. Nat’l Urb. League</i> , 592 U.S. 994 (2020)	9
<i>SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC</i> , 580 U.S. 328 (2017)	9
<i>Smith v. United States</i> , 507 U.S. 197 (1993)	8

<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016).....	4
<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021).....	4
<i>United States v. Mottaz</i> , 476 U.S. 834 (1986).....	7
<i>Utah v. Evans</i> , 536 U.S. 452 (2002).....	4, 5, 12
<i>Uzuegbunam v. Preczewski</i> , 592 U.S. 279 (2021).....	5
<i>Wisconsin v. City of New York</i> , 517 U.S. 1 (1996).....	6

STATUTES

13 U.S.C. § 141	5
28 U.S.C. § 1658	6, 7, 8
28 U.S.C. § 2401	6, 7, 8
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209, 111 Stat. 2440, 2480 (1997)	2, 4, 11, 12

OTHER AUTHORITIES

Defs.’ Mem., <i>Common Cause v. Trump</i> , No. 1:20-cv- 2023, Dkt.60, 2020 WL 9173050 (D.D.C. Sept. 2, 2020)	11
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Defs.’ Resp., <i>Alabama v. U.S. Dep’t of Com.</i> , No. 3:21-cv-211, Dkt.41, 2021 WL 6495843 (M.D. Ala. Apr. 13, 2021).....	11
FEC, <i>2022 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access</i> (May 19, 2022), https://perma.cc/H3XT-V2YC	12

Appellees demand summary affirmance even though they cannot agree with each other or the district court about why. The only unifying theme is that their arguments—like the district court’s holding—would practically preclude any challenge to the census. That view contradicts this Court’s precedents and would enshrine the census’s drift into statistical alchemy susceptible to manipulation. The Court should note probable jurisdiction or summarily reverse.

ARGUMENT

I. Plaintiffs have standing.

Plaintiffs sufficiently alleged injury, causation, and redressability. Appellees’ arguments to the contrary flout this Court’s precedents and impose an improperly high pleading standard.

1. On injury-in-fact, the district court did not question that Plaintiffs adequately alleged injury, and Intervenor’s agree that “Appellants alleged an injury—a lost House seat due to an alleged undercount of Florida’s population.” Int.9; *see* App.15a. The government, however, insists that Plaintiffs have only a “generalized grievance” because “[e]ven if Florida ‘lost’ a seat in the decennial census, that does not treat any individual Florida voter any worse than any other Florida voter.” Fed.12. But “[t]he loss of a House seat necessarily means that Florida Plaintiffs vote in larger congressional districts, thereby having their votes diluted” relative to those in other States. App.108a.

The government cites no precedent for its view that *intrastate* inequalities are “cognizable” as

injuries but *interstate* ones are not. Fed.13. This Court has already rejected that view: the “expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing” for a voter-plaintiff because “[w]ith one fewer Representative, [the State’s] residents’ votes will be diluted.” *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999); *see id.* at 365 (Ginsburg, J., dissenting).¹ And especially when an injury is “directly related to voting, the most basic of political rights,” “the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24–25 (1998); *see* § 209(d)(1).

2. On causation, Appellees repeatedly note “data showing that Florida had a higher imputation rate than the national average,” which they say “suggest[s] that Florida was not harmed, as alleged, by the use of imputation in the 2020 decennial census.” Fed.12; *see* Int.1, 10, 12, 14; Fed.11, 14, 17. Plaintiffs already addressed this point in detail: “Florida received some imputed residents—but nowhere near enough to offset the Bureau’s severe undercount of Floridians.” J.S.21–22. The complaint squarely alleges that “Florida would have gained an additional House seat and an additional vote in the Electoral College” “[b]ut for Defendants’ vast use of statistical methods.” App.108a; *see also* App.103a.

¹ The government omits that “registered voters” were also among the plaintiffs in *Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992). Fed.13.

Those allegations rest on specific facts. *See, e.g.*, App.102a–104a; *CitizensUnited*.8–10. At the pleading stage those facts are taken as true—and the Bureau’s own data support them. J.S.22; Florida.14–15; *see* Int.5 (agreeing these data are “incorporat[ed] by reference”). And at this stage, Plaintiffs need not “conduct[] a study” proving the point. Fed.12; *see, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (the Federal Rules “do[] not require ‘detailed factual allegations’”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice . . .”).²

Similar points dispose of Intervenor’s separate contention that Plaintiffs needed to prove the counterfactual results of an accurate actual enumeration. *See* Int.11–13.³ Such proof is never necessary at

² The decision cited by the government arose on summary judgment, “as opposed to a motion to dismiss.” *U.S. House*, 525 U.S. at 329. And the government’s dismissal of its own “post-enumeration survey” (Fed.11) is puzzling, especially since this Court has approved reliance on “precisely the same data that the Bureau uses to help it estimate expected error rates” in assessing standing. *U.S. House*, 525 U.S. at 331 (citation modified). As for Texas (Fed.10), the complaint alleges that Minnesota, New York, and Ohio were overcounted and that, “[h]ad the count been correct, Texas and Florida would have moved into the top 435 spots and gained seats.” App.104a.

³ Intervenor’s assert that “COVID-19” provides “an ‘obvious alternative explanation’ for the alleged undercount.” Int.13. No doubt, the Bureau used more imputation after invoking COVID-19, but Plaintiffs allege that the Bureau’s own “procedural changes and intra-agency methodological choices” “led to inaccurate results.” App.88a–91a, 98a. Plaintiffs also rebut “[a]ny attempt by Defendants to assign blame away from their

this stage, particularly in procedural-injury cases like this, where Congress itself has defined the chain of causation. Section 209(d) extends a cause of action to “any resident of a State whose congressional representation or district *could be changed* as a result of the use of a statistical method challenged” (emphasis added). Congress “has the power to define injuries and articulate chains of causation.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).⁴

Though Appellees dismiss procedural-injury precedents, they do not argue that those precedents have been overruled or meaningfully address *Utah v. Evans*’s application of them in a similar case. Compare Fed.18–19; Int.14–15, 19–21, with J.S.14–16. The government’s insistence that Plaintiffs’ challenge is “*substantive*” contradicts *Evans* and common sense. Fed.19. Plaintiffs assert a procedural right—§ 209’s protection against unlawful use of statistical methods—that protects their concrete interest in undiluted votes.

3. On redressability, Appellees insist that “it is implausible to presume that . . . the Bureau would be able to” contact the people it failed to count in 2020. Fed.14; see Int.16–18. But the Bureau’s 2020 efforts were deficient, see App.88a–91a, and the government

choice to use imputation,” including blaming COVID measures. App.99a.

⁴ Intervenor’s discussion of when Congress may “enact an injury into existence” is misplaced; they concede that vote dilution is an injury-in-fact. Int.9, 14–15 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021)).

has ample sources of information about where people lived, *see* App.7a–8a. It is enough that a proper procedure *could* “alter” the outcome. *Dep’t of Educ. v. Brown*, 600 U.S. 551, 566 (2023). Even “a partial remedy satisfies the redressability requirement.” *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021) (citation modified); *see* J.S.25. And a defendant’s protest that compliance would be difficult is no basis to deny standing. *Cf. Gutierrez v. Saenz*, 606 U.S. 305, 318 (2025) (lower court “erred in transforming the redressability inquiry into a guess as to whether a favorable court decision will in fact ultimately” produce the relief sought); *M.G. v. Armijo*, 117 F.4th 1230, 1237 (10th Cir. 2024) (questioning whether such a claim is “one of justiciability, rather than some kind of merits-based impossibility defense”).

Appellees also argue that “redress would require independent action by third parties not before the Court.” Fed.16; *see* Int.18–19. *Evans* disposes of this argument. 536 U.S. 452, 462 (2002). Appellees try to distinguish *Evans* based on the underlying correction, but that is irrelevant to whether a corrected report provides enough redress when the President and the Clerk must also act. *Compare* Fed.17, *with* J.S.18–19; *cf.* CEC.12–18. A corrected report here would have the same effect as the one contemplated in *Evans*. Nor was *Evans* limited to “a clerical, a mathematical, or a calculation error.” Fed.17; *see* J.S.25–26. And 13 U.S.C. § 141(e)(2) (Int.16, 30) governs “mid-decade census” information, not a corrected decennial report like the one *Evans* contemplated.

Appellees do not justify their arbitrary rule that *Evans* supports standing only before the first election.

See Fed.17–18. Even the district court refused to adopt that reading (App.24a), and for good reason: the census does not govern only the first election that follows it. And Appellees gloss over this Court’s decision in *Wisconsin v. City of New York*: Intervenor cite it to argue that late relief is impractical, yet this Court decided its merits about six years after the challenged 1990 census. 517 U.S. 1, 24 (1996); see Int.16; cf. CEC.19. Plaintiffs do not seek to unwind any election; they ask only that future elections use accurate census counts. They have adequately alleged standing.

II. The action was timely.

Plaintiffs’ complaint was also timely: it was filed within the six-year period for “every civil action commenced against the United States” under 28 U.S.C. § 2401(a). And Appellees’ laches theory could not bar claims within Congress’s statute of limitations—or supply a basis for dismissing at the complaint stage.

1. The United States—the party protected by any statute of limitations here—has abandoned its statute-of-limitations argument. Even as the government insists that the district court was “clearly correct” in holding the action untimely, it declines to defend the court’s ruling under 28 U.S.C. § 1658(a). Fed.9. The government concedes that “there is some force to appellants’ argument that Section 1658 by its terms does not apply where ‘otherwise provided by law,’ and that Section 2401 is such a ‘law.’” Fed.19.

Intervenor contends otherwise, though their lead argument departs from the district court’s reasoning.

According to Intervenor’s new theory, the four-year period in § 1658 and the six-year period in § 2401 “may be applied simultaneously.” Int.23. For unclear reasons, Intervenor’s “simultaneous” theory would limit Plaintiffs to the four-year period.

Nothing in the text of § 2401(a) suggests that another, shorter limitations period would bar some covered claims. And on their “simultaneous” reading, Intervenor’s offer no coherent account for why § 2401(a) would expressly exclude claims under “chapter 71 of title 41” from its six-year period. J.S.28. Intervenor’s concede that Congress subjected those claims to a shorter limitations period after prior precedents applied § 2401. Int.24–25. On Intervenor’s reading, that shorter period would govern without any exclusion, rendering the exclusion surplusage.

Precedent also opposes Intervenor’s theory. This Court has considered whether § 2401(a) is “displace[d]” by another applicable statute—rather than applying both periods simultaneously. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 808 (2024); *see, e.g., United States v. Mottaz*, 476 U.S. 834, 841–51 (1986). When § 2401(a) applies, it “alone governs the time limit.” *Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affs.*, 981 F.3d 1360, 1384 (Fed. Cir. 2020) (en banc).

Intervenor’s cite no decision adopting their “simultaneous” theory, and the cases they rely on (Int.23) asked what period to borrow for statutes that had none. *See Price v. Bernanke*, 470 F.3d 384, 386 (D.C. Cir. 2006). Those cases generally involved courts choosing *between* § 2401 and other provisions, undermining Intervenor’s theory that § 2401’s six-

year period “simultaneously” allows “application of another, shorter period.” Int.23; see *Lavery v. Marsh*, 918 F.2d 1022, 1026 (1st Cir. 1990); *Bieneman v. City of Chicago*, 864 F.2d 463, 468 (7th Cir. 1988). And whatever § 2401’s “jurisdictional status” (Int.24), it still provides a “six-year statute of limitations for suits against the United States.” *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006); see *Corner Post*, 603 U.S. at 813 (“[Section] 2401(a)’s plaintiff-focused language makes it an accrual-based statute of limitations.”). Intervenor’s final concern—about “*expand[ing]* the United States’ liability to suit” (Int.24)—is unshared by the United States here and disregards this Court’s refusal to “assume the authority to narrow the waiver [of sovereign immunity] that Congress intended.” *Smith v. United States*, 507 U.S. 197, 203 (1993).

Intervenor’s backup theory posits “a conflict between Sections 2401(a) and 1658(a)” and argues about how the general-specific canon should apply. Int.25. But Intervenor has no response to Plaintiffs’ showing that there is no conflict because “§ 1658(a) expressly subordinates itself to limitations periods ‘otherwise provided by law.’” J.S.29–30. None of the (mostly unpublished) decisions in Intervenor’s “wall of precedent” involved a statute that, like § 1658(a), yields to periods “otherwise provided by law.” Int.25–26.⁵ Thus, § 2401(a) applies to this action against the

⁵ Intervenor is also wrong that, even assuming a conflict, § 1658 is more specific. Int.26; see J.S.30–31. At a minimum, this issue “is not straightforward” (Fed.19) and so cannot support summary affirmance.

United States, and Plaintiffs’ action was filed within its six-year limitations period.

2. Appellees also invoke laches, a ground the district court did not reach. But the very decision cited by the government rejected “applying laches within a limitations period specified by Congress.” *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 335 (2017). Applying laches to this case—brought within Congress’s six-year limitations period—“would give judges a ‘legislation-overriding’ role that is beyond the Judiciary’s power.” *Id.*

Laches would not apply here anyway, especially at this early stage—as underscored by Appellees’ near-exclusive reliance on facts outside the complaint. *See, e.g., Major v. Plumbers Loc. Union No. 5*, 370 F. Supp. 2d 118, 128 (D.D.C. 2005) (“Because th[e] [laches] inquiry requires facts not in the pleadings, it is not appropriate to resolve at this time defendants’ laches defense.”).

Appellees’ assertion that delay in filing here was unreasonable contradicts their standing arguments demanding that precise proof of undercounts be pled in the complaint. *See, e.g., Fed.12* (Plaintiffs “have not conducted a study”). Courts dismissed earlier census challenges on standing or ripeness grounds or otherwise denied relief. J.S.33; *see Ross v. Nat’l Urb. League*, 592 U.S. 994 (2020). And Plaintiffs face continuing injuries with each election.⁶

⁶ Intervenor’s assert that Plaintiffs “acknowledged below that the ‘full scope’ of the challenged imputation was ‘apparent’ by no

Nor is there undue prejudice. The government claims that “requiring the Bureau to engage in the peculiar reconstruction of the 2020 decennial census demanded by appellants would consume critical agency resources.” Fed.21. But that would have been equally true in 2022—when the government says that Plaintiffs “were aware of all of the facts alleged in their complaint.” Fed.20; *cf.* Int.31 (“Appellants could have brought this case in 2023 or 2024”). And “disclosures about how extensive the use of whole-person imputations was in the 2020 census did not come until July 2023—after a round of nationwide redistricting and elections was complete.” J.S.32. Redistricting and elections remain ongoing, *see* App.106a, and Plaintiffs ask only for corrected or supplemental census data to govern prospective events.⁷

In sum, the fact-bound doctrine of laches—which does not apply to claims within Congress’s limitations period—is not a sound basis to summarily affirm a decision that did not find laches.

later than February 2022.” Int.28. Not so. Plaintiffs said (and still say) that “[t]he full scope of the Bureau’s reliance on imputation did not and could not become apparent until long after the 2020 Census was conducted,” and not “until February 4, 2022” “did state-level nonresponse and imputation rates *start coming to light*.” Dkt.103, at 23 (emphasis added). “[E]ven after that disclosure”—and the May 2022 data release—“Plaintiffs required time to analyze the data and appreciate the magnitude of the damage.” *Id.*

⁷ Laches therefore could not bar Plaintiffs’ claim for declaratory relief. *See* App.121a–122a; *Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013).

III. This Court's intervention is needed.

Together, the district court's deviations from this Court's precedents make it nearly impossible to enforce § 209 or ensure a constitutionally sound census. Neither set of Appellees meaningfully confronts the temporal trap created by the decision below and other recent decisions, which together "leave a prospective litigant an excruciatingly brief time, perhaps a matter of weeks, if any time at all" to challenge the census. J.S.33–34 (quoting App.72a (Merryday, J., dissenting)).

Indeed, Appellees do not identify a single day on which Plaintiffs could have sued and satisfied all of Appellees' requirements. *Cf.* CEC.6–10. The government told earlier challengers to wait for the census numbers. When Alabama challenged a 2020 method before the data were released, the government called the challenge "premature" and insisted that the document it now says put Plaintiffs "on notice" "was just the beginning of a[n] iterative process" and "not the consummation of decision-making."⁸ When Common Cause sued, the government said "Plaintiffs' challenge should await the actual apportionment."⁹ And to support their claim here that "earlier" claims "would have been straightforwardly redressable," Appellees cite only an injunction that the government simultaneously suggests was rightly *stayed*. Int.31; Fed.15, 20–21.

⁸ Defs.' Resp. 53, 59, *Alabama v. U.S. Dep't of Com.*, No. 3:21-cv-211, Dkt.41, 2021 WL 6495843 (M.D. Ala. Apr. 13, 2021); Fed.20.

⁹ Defs.' Mem. 10, *Common Cause v. Trump*, No. 1:20-cv-2023, Dkt.60, 2020 WL 9173050 (D.D.C. Sept. 2, 2020).

Plaintiffs did what the government said to do. They waited for the data. But now the government demands a “study” that would have required substantial time after state-level undercount data were publicly released in May 2022. Fed.12. Redistricting was done in Florida before May, primary elections had started in some States,¹⁰ and many people “might have moved or died” since 2020, Fed.14. On Appellees’ theory, that lapse of time destroys standing.

Perhaps the catch-22 is the point. On the government’s view, no court could tell it to comply with the law in conducting the census. Fed.15; *contra* § 209(b); *Evans*, 536 U.S. at 462; *Dep’t of Com. v. New York*, 588 U.S. 752, 772 (2019). And Intervenors readily endorse the widening gulf between the census and the “actual Enumeration” demanded by the Constitution, suggesting that such enumeration would be “much harder.” Int.32.

But “[c]onvenience and efficiency are not the primary objectives . . . of democratic government”—or of the census that lies at its core. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010); *see* Florida.3–10. And the problem will recur: the Bureau has already said it will use count imputation again in 2030. J.S.36. To ensure the sanctity of the census and preserve § 209, the Court should note probable jurisdiction or summarily reverse.

¹⁰ App.105a; FEC, *2022 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access* (May 19, 2022), <https://perma.cc/H3XT-V2YC>.

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