ORAL ARGUMENT HELD APRIL 11, 2024

No. 23-5140

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

CITIZENS FOR CONSTITUTIONAL INTEGRITY,

Plaintiff-Appellant,

v.

CENSUS BUREAU, et al.,

Defendants-Appellees.

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

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DEFENDANTS-APPELLEES' OPPOSITION TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

B. Ruling Under Review

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

C. Related Cases

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

/s/ Sarah Clark Griffin
Sarah Clark Griffin

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GLOSSARY

APA	Administrative Procedure Act
Citizens	Citizens for Constitutional Integrity
Reduction Clause	U.S. Const. amend. XIV, § 2, cl. 2

INTRODUCTION AND SUMMARY

The Fourteenth Amendment's Reduction Clause provides that, if a state abridges or denies its citizens' rights to vote, its population count will be reduced for purposes of apportioning seats in the House of Representatives. Citizens for Constitutional Integrity (Citizens) sued the Department of Commerce and the Census Bureau, asking the court to, *inter alia*, "restore the 2010 apportionment"; vacate the Secretary of Commerce's report on the 2020 census and the President's statement directing the 2020 apportionment; and compel the Secretary of Commerce to identify, quantify, and incorporate the number of vote denials and abridgements into a new report on the 2020 census. App-148.

This Court held that plaintiff had not demonstrated that its asserted vote-dilution injury was traceable to the Secretary's transmittal of the census report to the President. The Court did not reach the question of redressability.

In its rehearing petition, Citizens argues that the Court erred in rejecting its contention that its suit presented a procedural-rights claim subject to relaxed Article III standards for traceability and redressability. But the Court explained that "the heart of [Citizens'] challenge is substantive"—it attacks "the Bureau's alleged failure to take certain substantive considerations into account when conducting the analysis for the [Secretary's] Report." Op. 13. Plaintiff identifies no error in the Court's reasoning.

It also identifies no conflict with any decision of the Supreme Court, this Court or another circuit. The standing cases that plaintiff purports to identify generally involve rights that were clearly procedural and therefore only underscore the substantive nature of plaintiff's claims. And in *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966), the Court affirmed dismissal of a Reduction Clause challenge as a discretionary exercise of its jurisdiction under the Declaratory Judgment Act without reaching the questions of standing that formed the basis of the district court's decision. Nothing in the Court's decision in any way suggests that Court erred in finding that plaintiff here failed to establish standing.

STATEMENT

1. The Fourteenth Amendment provides that the seats in the House of Representatives are to be apportioned among the states "according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2, cl. 1. It further provides that if "the right to vote" of "any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States" is "denied . . . or in any way abridged, except for participation in rebellion, or other crime," then "the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age

in such State." U.S. Const. amend. XIV, § 2, cl. 2 (Reduction Clause). In other words, if a state were to deny or abridge the right to vote of 10% of its voting population, only 90% of the state's total population would count for apportionment purposes.

The Constitution also provides that Congress will conduct an "actual Enumeration" of the population every ten years, to be made "in such Manner" as Congress "shall by Law direct," U.S. Const. art. I, § 2, cl. 3. Congress has directed that the Secretary of Commerce and the Census Bureau take the census "in such form and content as [the Secretary of Commerce] may determine." 13 U.S.C. § 141(a). Congress has further directed that, once the Census Bureau has completed "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States," the Secretary must report that tabulation to the President. *Id.* § 141(b). The President must then "transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . census . . . , and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. § 2a(a). Each state is then "entitled[] . . . to the number of Representatives shown" in the President's statement. *Id.* § 2a(b).

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

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

Citizens brought Administrative Procedure Act (APA) and mandamus claims against the Department of Commerce and Census Bureau, challenging the Secretary of Commerce's 2021 report to the President on the basis that it did not reduce some or all of the states' population totals to account for their alleged denials or abridgements of the right to vote. *See* App-126-27. Citizens identified two alleged denials or abridgements: First, it asserted that "[m]any states . . . have registration requirements" that deny the right to vote to unregistered voters. App-139-40, 180-83. Second, it asserted that "[s]ome states" abridge the voting rights of registered voters "by narrowing the list of documents by which voters

can prove their identity." App-143. Citizens alleged that Wisconsin "may have the strictest" voter identification law. App-143.

3. The district court convened a three-judge panel, which dismissed the case for lack of standing. App-4, 8, 162. The court rejected Citizens' argument that it had been denied a procedural right. App-160-61. And it concluded that Citizens had not shown that its injury was traceable to the alleged violation under normal Article III principles. App-156. The court explained that even if Citizens could "show that the Census Bureau counted incorrectly, that [did] not mean that a corrected recount would lead to an apportionment more favorable to" Citizens. App-156. And Citizens had "fail[ed] to show that any of the states in which its members reside would have had an additional representative if the Reduction Clause had been applied according to [Citizens'] legal theory." App-156. Instead, Citizens presented alternative apportionment "scenarios," which told "an incomplete story." App-158. Most notably, although Citizens alleged that multiple states had impermissible voter identification laws, it only accounted for Wisconsin's identification law in its calculations. App-158; *see* App-144, 180. Citizens' argument thus left the court with "no way of knowing" if the alleged legal error "led to fewer representatives in Pennsylvania, New York, or Virginia." App-159.

4. This Court affirmed the district court's standing dismissal, agreeing that Citizens had failed to establish that its injury was traceable to the alleged deficiencies in the Secretary's report. Op. 3.

The Court first rejected Citizens contention that it had brought a procedural-rights case and could therefore avail itself of the relaxed standing requirements that apply in such cases. Op. 11-12. Citizens' challenge attacked "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].'" Op. 13 (alteration in original) (quoting *Public Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002)). The Court rejected Citizens' argument that it had a procedural right simply because as it was within the zone of interests of the statutory provisions whose enforcement it sought. Op. 15. That was "the wrong test," the Court explained, because it went to the merits of whether a plaintiff has a cause of action under a particular statute, not whether a plaintiff had invoked a procedural right for purposes of Article III standing. Op. 15-16. After analyzing the nature of Citizens' claim and analogizing to the APA test for whether an agency rule is procedural or substantive, the Court concluded that Citizens sought to vindicate a substantive right, not a procedural one. Op. 13.

The Court next concluded that Citizens had failed to establish traceability under customary Article III standards. Op. 16. At base, while the Secretary's report had "reduce[d] the seat allocation for New York and Pennsylvania, that [did] not meaningfully demonstrate that another methodology that incorporated the Reduction Clause would have, if uniformly applied, rendered a different result." Op. 20; *see also* Op. 16-19. In light of its holding, the Court did not reach questions of redressability.

ARGUMENT

The Court correctly concluded that Citizens must meet customary standing requirements because its challenge is substantive, not procedural. That conclusion does not conflict with any other decisions of the Supreme Court or this Court, including *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966)—a Reduction Clause case in which the Court declined to exercise its jurisdiction to provide declaratory relief and declined to decide whether the plaintiffs had standing.

1. Plaintiff's suit urges that the Department of Commerce and the Census Bureau failed to fulfill responsibilities under the Reduction Clause "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." Op. 3. In analyzing plaintiff's standing, the Court first considered

Citizens' assertion that it had brought a procedural-rights case and could therefore "establish Article III jurisdiction without meeting the usual standards for redressability and immediacy." Op. 11 (quoting *Department of Educ. v. Brown*, 600 U.S. 551, 561 (2023)) (internal quotation marks omitted). The Court explained that a plaintiff pleading a procedural injury "'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." Op. 12 (quoting *Center for Law & Educ. v. Department of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005)).

The Court further explained that in this case, "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." Op. 12. "[I]nstead, 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." Op. 12.

The Court correctly concluded that no such transformation had occurred. Op. 12. It explained that "[t]he 'agency action' that Citizens challenges is the Bureau's issuance of the Report." Op. 13. "The heart of that challenge is

substantive; Citizens does not challenge the issuance of the Report from an 'operation[al]' standpoint, 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].'" Op. 13 (alterations in original) (quoting *AFL-CIO v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023), and then *Public Citizen*, 276 F.3d at 640). The Court observed that "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." Op. 13 (quoting *AFL-CIO v*, 57 F.4th at 1034).

The Court also correctly rejected Citizens' contention that the principal consideration in determining whether a plaintiff seeks to vindicate a procedural right is whether the plaintiff falls within the zone of interests protected by a statute. The Court explained that "[w]e 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." Op. 15 (quoting *CSL Plasma Inc. v. U.S. Customs & Border Prot.*, 33 F.4th 584, 589 (D.C. Cir. 2022)) (internal quotation marks omitted). "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." Op. 16 (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Citizens purports to identify cases that conflict with this analysis and hold that Article III requirements are relaxed whenever the legal requirement in question "was designed to protect some threatened concrete interest of the plaintiff." Pet. 2-3 (quoting *City of Dania Beach v. Federal Aviation Admin.*, 485 F.3d 1181, 1185 (D.C. Cir. 2007); *id.* at 3-4. Those cases largely involved rights that were clearly procedural and only underscore the substantive nature of plaintiff's claims. *E.g.*, *Eagle County v. Surface Transp. Bd.*, 82 F.4th 1152, 1169 (D.C. Cir. 2023) (challenging adequacy of agency's Environmental Impact Statement); *City of Dania Beach*, 485 F.3d at 1185 (challenging agency's failure to engage in the required environmental review process); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 662 (D.C. Cir. 1996) (en banc) (challenging agency's failure to prepare an Environment Impact Statement).

Plaintiff mistakenly asserts that the decision here conflicts with *International Brotherhood of Teamsters v. Peña*, 17 F.3d 1478, 1483-84 (D.C. Cir. 1994), which considered a challenge to a regulation promulgated to implement a memorandum of understanding between the United States and Mexico regarding recognition of each country's commercial drivers' licenses. The Court

first concluded that the plaintiffs had sufficiently alleged that they would be injured by implementation of the regulation. *Id.* at 1483. The Court then considered whether plaintiffs had also met the "prudential" standing requirement that they fall within the zone of interests. *Id.* With regard to the claim that the regulation was invalid because it was promulgated without notice and comment, the court observed that "[s]tanding to assert procedural protections is . . . derivative," in that "a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority, at least if the procedure is intended to enhance the quality of the substantive decision." *Id.* at 1484. In other words, a claimed procedural injury may fall within the zone of interests of a statutory provision. That does not mean that any party within the zone of interests is asserting a procedural injury that would be subject to relaxed Article III requirements.

Plaintiff is quite wrong to declare that the Court's decision here "denied all procedural rights claims." Pet. 4. Nor did the Court hold that the existence of a concrete injury forecloses the possibility that a case involves procedural rights. Pet. 4, 19. The Court simply concluded that, in this case, Citizens sought to vindicate a substantive right, not a procedural one. Op. 13. It reached that conclusion not because Citizens had a concrete injury, but because Citizens

challenged the agency's substantive decisionmaking and had not established any injury caused by that decisionmaking. Op. 13; *supra* pp. 7-9.

2. Finally, there is no tension between the decision here and *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966), in which the district court dismissed for lack of standing plaintiffs' suit under the Declaratory Judgment Act seeking to enforce the Reduction Clause. *Id.* at 506-07. This Court did not reach the issue of standing and affirmed on the alternative ground that, in light of legislative developments like the Voting Rights Act, it would exercise its discretion under the Declaratory Judgment Act to deny relief. *Id.* at 508-12. The Court did not foreclose the possibility that the reasons animating its ruling might no longer preclude declaratory relief in a future case. *Id.* at 512. But the Court did not address questions of standing in the case before it, and it did not suggest that unspecified future plaintiffs bringing suit in unknown circumstances would have standing.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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NOVEMBER 2024

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2) because it contains 2,627 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Sarah Clark Griffin
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Sarah Clark Griffin
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