No. 21-3294

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *Appellant-Plaintiff*, v. GINA RAIMONDO, et al., *Appellees-Defendants*.	: : : : : : : :	On Appeal from the United States District Court for the Southern District of Ohio Western Division District Court Case No. 3:21-cv-64

REPLY BRIEF OF THE STATE OF OHIO

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The COVID-19 pandemic is not a trump card to be played by every government official who wants to do what the law forbids, or who wants not to do what the law requires. *See Tandon v. Newsom*, 593 U.S. — (Apr. 9, 2021) (*per curiam*); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020). So the Executive Branch cannot use the pandemic to justify actions it lacks authority to take. *See Tiger Lily, LLC v. United States HUD*, — F.3d —, 2021 U.S. App. LEXIS 9078, at *1 (6th Cir. Mar. 29, 2021). Nor may it "shelter in place" while its legal obligations go unfulfilled. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring). Ours is a country of laws, not of men, in pandemic and non-pandemic times alike.

If that principle remains true, this is an easy case. The Census Act *required* the Secretary of Commerce, aided by the Census Bureau, to share redistricting data with the States by March 31, 2021. *See* 13 U.S.C. §141(c). The Bureau refused. COVID-19, it said, made it too hard to follow Congress's command. And so, in the Bureau's February 12 Decision, it decided to ignore the Census Act's deadline and to instead release redistricting data on or around September 30, 2021.

Because the Bureau's illegal delay injures Ohio, and because the courts can redress Ohio's injuries, Ohio has standing to sue. The Bureau barely argues other-

wise. This Court should therefore reverse the District Court's decision dismissing this case for lack of standing. The Court should also go a bit further: because the Bureau's legal violation here is so clear, the Court's remand order should instruct the District Court to enter a preliminary injunction. At the very least, the Court should hold that Ohio will prevail on the merits and that the Bureau's delay is irreparably harming the State. It can then remand for the District Court to determine whether the remaining injunctive-relief factors support the issuance of an injunction.

I. Ohio has standing to challenge the February 12 Decision.

A plaintiff has Article III standing if it has suffered an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable ruling. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). The District Court dismissed this case at the pleading stage, implicitly holding that the State failed to allege *any* of these elements. The Bureau offers only a halfhearted defense of the District Court's ruling. Indeed, its standing argument is about as close to a confession of error as an argument for affirmance can be. This Court should hold, as the Bureau now apparently recognizes, that Ohio has suffered a redressable injury fairly traceable to the February 12 Decision. Ohio, in other words, has standing to sue.

A. Ohio suffered four distinct injuries in fact.

1. In its February 12 Decision, the Bureau decided not to comply with the Census Act. Instead of giving the States redistricting data by the statutory deadline of March 31, *see* 13 U.S.C. §141(c), the Bureau decided to release that data by September 30. That release date will come much too late for Ohio. Ohio's Constitution inflexibly requires the State's Redistricting Commission to finalize state legislative maps by September 1, and it requires the Commission to use census data. Ohio Const. art. XI, §§1(A), 3(A). The Commission may use alternative data (which the State must develop on its own) *only* as a backup option and *only* if census data is unavailable. *Id.*, §3(A). The Bureau's delay will make it literally impossible for the Commission to adopt new state legislative districts using census data—the delay, in other words, will force the State to depend on a constitutionally designated backup option when drawing state legislative districts.

The delay will also require the State to resort to backup options in adopting a *congressional* map. The General Assembly has only until September 30 to adopt a congressional map with supermajority, bipartisan support. *Id.*, art. XIX §1(a). And the General Assembly must use census data if it is available. *Id.*, §2(A)(2). Because of the Bureau's delay, the General Assembly now must either meet that deadline using alternative data or miss the deadline and rely on backup options that

allow the State to adopt a map without the legislature's input or with less bipartisan support.

In sum, the delay will deny the State the ability to use census data in meeting the September 1 and September 30 deadlines, forcing the State to use constitutionally designated backup options. That injures Ohio in at least four ways.

First, because the delay bars Ohio from carrying out redistricting using its constitutionally preferred method, the delay interferes with the effectuation of state law, injuring Ohio as a matter of law. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*).

Second, by forcing the State to choose alternative data to meet its constitutionally prescribed deadlines, the delay will expose the State to expensive, time-consuming litigation about the fairness of the data chosen. And that litigation, which will inspire litigants to portray the data chosen and the resulting redistricting process in the most negative light possible, will undermine the State's significant interest "in protecting public confidence in the integrity and legitimacy of representative government." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.) (quotation omitted); *see also Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020).

Third, Ohio will suffer an injury if it is denied information (the redistricting data) to which it is legally entitled and that it intends to use for a specific purpose. *U.S. House of Representatives v. U.S. Dep't of Com.*, 11 F. Supp. 2d 76, 85 (D.D.C. 1998); *FEC v. Akins*, 524 U.S. 11, 19–21 (1998).

Finally, the delay breaches the Census Bureau's commitment to timely provide redistricting data in exchange for the States' submission of "plan[s] identifying the geographic areas for which specific tabulations are desired." §141(c). The delay thus causes the same injury that attends every breach-of-contract case.

2. The Bureau does not dispute the validity of the latter two injuries. Instead, it argues only that the first and second injuries are not injuries at all. That would be irrelevant if it were true, since the third and fourth injuries each independently suffice. But it is not true.

Start with the first injury: the harm Ohio suffers from having to rely on constitutional backup options like the option to use non-census data. The Bureau contends that, because Ohio *can* use alternative data, the State does not strictly need census data to conduct redistricting. It calls the State's desire for census data a mere "preference" unmoored from any concrete need. Gov. Br.19 (quoting Order, R.26, PageID#391). That argument ignores the nature of the State's injury. Ohio "prefers" census data not out of some abstract desire; rather, the State needs that

data well in advance of September 1 to conduct redistricting in the manner *its constitution* prefers. True, the State can conduct redistricting without that data if need be. But the option to effectuate state law in some other way does not eliminate the injury that arises when the State is denied the option to pursue a legally designated first-best option. Ohio's opening brief illustrated the point using a hypothetical. In the hypothetical situation, a lower federal court enjoined Ohio from using census data during redistricting, effectively requiring the State to use alternative data. That would unambiguously constitute injury to the State—indeed, *irreparable* injury to the State—notwithstanding the option to use alternative data. *Maryland*, 133 S. Ct. at 3 (Roberts, C.J., in chambers); *Abbott*, 138 S. Ct. at 2324; *Thompson*, 959 F.3d at 812. It follows that the Bureau injured the State (irreparably so) by forcing it to employ constitutional backup options.

The Bureau offers no response to this hypothetical. Understandably so: the federal government, in future cases, will argue that it suffers an injury when a court enjoins a policy accomplishing something that can be accomplished in another way. For example, does the Bureau really dispute that a court order enjoining it from asking about citizenship on census forms inflicts no injury, as long as the Bureau has some other way to determine how many non-citizens are in the country? *See*

Dep't of Com. v. New York, 139 S. Ct. 2551 (2019). If not, what distinguishes this case? Nothing.

The Bureau's response to Ohio's second injury comes in a single paragraph. It starts with the premise that ordering an early release of the data will compromise accuracy. And it says that "Ohio's disregard of the goal of accuracy [is] at odds with its asserted concern to promote public confidence" in redistricting. Gov. Br.20. As an initial matter, this argument does not dispute the *existence* of Ohio's injury; it simply challenges the best way to go about curing the injury. Regardless, Ohio does not "disregard the goal of accuracy." The State contends that accurate data can be provided well in advance of the September 1 deadline. And to ensure adequate consideration of accuracy, the State asked for an injunction that forbids the defendants from delaying the release of redistricting data beyond a date the District Court deems equitable. Compl., R.1, PageID#16. As the State addresses below in the redressability section, it has adequately established, at this stage, the availability of such relief.

As an aside, the Bureau's new insistence that the American people must accept whatever delay the Bureau thinks is necessary to assure some undefined level of accuracy is completely at odds with what it told the Supreme Court mere months ago. Then, when it needed to say so to win relief, it insisted that it had to

meet statutory deadlines no matter what: "As the law stands, assessing any tradeoff between speed and accuracy is a job for Congress." Application for a Stay at 5, *Ross v. Nat'l Urban League*, 20A62 (U.S., Oct. 7, 2020), https://tinyurl.com/RossStayApp. The only thing that has changed is the Bureau's litigation needs.

B. Ohio's injuries are traceable to the February 12 Decision.

The Bureau does not address traceability, thus admitting that any injury Ohio will suffer from the delay is traceable to the February 12 Decision.

C. Ohio's injuries are redressable.

The Bureau insists that any injury suffered is not redressable because it is literally impossible to award Ohio any meaningful relief. Its arguments fail as a matter of law and rest on a misleading description of the lower-court proceedings.

1. At this point, it is no longer possible to enjoin the defendants from delaying the release of redistricting data beyond March 31. But the dispute remains live, and Ohio's injuries remain redressable, because Ohio can still win meaningful relief. In its complaint, Ohio specifically sought, in the alternative to an injunction forbidding any delay beyond March 31, an injunction forbidding "the defendants from delaying the release of data beyond the earliest possible date this Court determines equitable and that will allow the State to use the redistricting data during the redistricting process." Compl., R.1, PageID#16; *accord* Mem. in Support of

Prelim. Inj., R.6, PageID#63. And Ohio alleged facts showing that this alternative form of relief would meaningfully redress its injuries. For example, Ohio's complaint explains that the Ohio Redistricting Commission must finalize state legislative districts by September 1, while the General Assembly's first deadline for adopting a congressional map is September 30. Compl., R.1, PageID#8–9. With these allegations, Ohio alleged facts enabling the District Court to plausibly infer the possibility of redressing Ohio's injury, at least in part, through an injunction ordering the Secretary not to delay the release of redistricting data beyond some date after March 31 but before September 30.

One possibility is July 31, which is three months after the Bureau is planning to submit apportionment data to the President. The Census Act gives the Bureau a three-month window, following the deadline for submitting apportionment data to the President, in which to give the States their redistricting data. 13 U.S.C. §141(a), (c). The three-month window is inflexible: the Bureau "shall" release the redistricting data "as expeditiously as possible," and "*in any event*" within three months after the deadline for submitting apportionment data. §141(c) (emphasis added). Thus, Congress has already determined that the Bureau needs only three months after it submits apportionment data in which to finalize redistricting data. And events subsequent to the filing of this suit show that a three-month lag, mean-

ing a late July deadline, is indeed feasible. The Bureau now plans to gives States redistricting data in a legacy format by "mid to late August." Gov. Br.10 n.1. It is hard to believe the Bureau cannot move that date up a few weeks. Regardless, this case is at the pleading stage, and Ohio alleged more than enough to establish likely redressability at this point.

2. The Bureau tries to evade all this. First, it points to declarations that explore the various complexities of the census process. It then insists that, because the redistricting data "do not yet exist," it is impossible to provide that data to the States. Gov. Br.16. That is a *non sequitur*. If the data "do not yet exist," that proves only the impossibility of sharing the data now—it says nothing about whether the data can be turned over at some point before September 1 (or September 30). Indeed, the declarations barely speak to the possibility of expediting the release of Ohio's data to accommodate some alternative deadline: the declarants, like the District Court, largely ignored Ohio's alternative request for relief, and focused instead on the impossibility of providing data before or very soon after March 31. Further, the Bureau now says that the data may be ready "earlier than expected," Gov. Br.29, and that the legacy data discussed above will be available by August, Gov. Br.10 n.1. That would seem to constitute an abandonment of any argument that the alternative relief Ohio seeks is impossible to provide.

Regardless, this case is still at the pleading stage, and so the declarations are irrelevant—the relevant question is whether the State pleaded facts that, if true, establish standing. True enough, when "there is a factual attack on the subject-matter jurisdiction alleged in the complaint," a "district court must weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams, Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (cited by Gov. Br.17). It is not clear the Bureau made any such attack. It raised the issue of standing not in a Rule 12(b) motion, but rather in a preliminary-injunction brief, where it argued that Ohio would not likely prevail because it lacked standing. Even if the Bureau raised a factual attack, however, its invocation of this principle is misplaced and misleading.

The invocation is misplaced because the Bureau's declarations did not create any factual dispute about the possibility of awarding Ohio the alternative relief that it sought. The declarations, if true, establish only that it would be impossible to finalize the data by or close to the March 31 statutory deadline; the declarations do not say that it would be impossible to provide the data early enough for the State to use in meeting its September 1 and September 30 deadlines. Indeed, it is hard to imagine how the declarants, even if they had tried, could have established the impossibility of providing relief through an order tailored to secure the release of data

at "the earliest possible date" deemed "equitable" under all the circumstances. Compl., R.1, PageID#16. That request gave the District Court so much flexibility that it enabled it to award *some* relief almost as a matter of law.

The misleading aspect of the Bureau's argument is its implicit suggestion that Ohio dropped the ball by failing to develop evidence. That suggestion misrepresents what happened below. Here is what actually happened, in five steps.

Step 1: The same day Ohio filed its complaint, Ohio contacted the Bureau's lawyers to request the administrative record, or an abbreviated record consisting only of material the Bureau intended to rely on for its defense. That record would have contained information regarding the reasons for the Bureau's delay, which would likely have illuminated the possibility of providing redistricting data by some earlier date.

Step 2: At a preliminary hearing, the State told the District Court that it would need the administrative record. To avoid turning that record over, the Bureau assured the court that it planned to defend the February 12 Decision on the merits by raising purely legal arguments unrelated to the administrative record. Tr., R.31, PageID#410–11. It never mentioned a jurisdictional dispute that might require access to the record. (The Bureau did not ultimately restrict even its *merits* arguments to issues unrelated to the administrative record: it argued that its ac-

tions were not arbitrary and capricious, *see* Opp. to Prelim Inj., R.11, PageID#110–12, even though arbitrary-and-capricious challenges require analysis of the agency's reasoning as reflected in the administrative record, *see Michigan v. EPA*, 576 U.S. 743, 758 (2015); *John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007).) Based on the Bureau's representations to the District Court, the State acquiesced to a delay in the compiling of the administrative record. Tr., R.31, PageID#411.

Step 3: When the Bureau responded with a fact-based jurisdictional argument moments before its 11:59 PM Friday deadline, Ohio had no meaningful opportunity to gather evidence of its own before its Monday deadline to reply. So, in another conference that the District Court held partly to determine whether an evidentiary hearing was necessary, the State asked for a chance to test the declarants' assertions. More precisely, the State explained that, if the court wanted to entertain the newly introduced factual dispute regarding whether "it would be impossible to meet certain deadlines," the State needed an "opportunity to either examine [the declarants] or to depose them." Tr., R.32, PageID#417–18. The Bureau resisted; it said the court, instead of throwing "the doors open to discovery," should set aside the "narrow factual issue" of impossibility and instead rule for the Bureau on the purely "legal issues." *Id.*, PageID#419–20. Giving the State a chance to examine the declarants' assertions, the Bureau said, "would only further burden the

Census Bureau officials that are working hard to complete the census and the census data that Ohio is clamoring for." *Id.*, PageID#419. The hearing ended with no immediate resolution—the parties agreed to try and work out a deal.

Step 4: To accommodate the Bureau's resource concerns, the State and the Bureau jointly agreed to bifurcated proceedings. The parties agreed that the court could address "the legal issues of jurisdiction and liability on the papers and [the] record currently before it," leaving the factual dispute to be resolved only in the event it remained relevant. *See* Joint Letter, R.19, PageID#360.

Step 5: The District Court accepted the parties' agreement. Order, R.22, PageID#363. It then decided the factual issue anyway, without giving Ohio a chance to test the factual assertions that the Bureau introduced.

As all this shows, Ohio did not fail to produce evidence. Instead, it was denied any meaningful opportunity to develop evidence only because, out of respect for the declarants' time, it agreed to postpone the resolution of factual disputes until after the resolution of purely legal issues. So if it is indeed necessary to probe the facts relating to Ohio's standing, Ohio is entitled to a remand where it can test the factual assertions on which the Bureau's impossibility argument rests.

II. Ohio is entitled to a preliminary injunction.

The Bureau's arguments against awarding a preliminary injunction fare no better.

As an initial matter, the Court should reach this issue. The State and the Bureau agree that time is of the essence—any relief must come soon if it is to come at all. If the Court leaves all of the merits issues for the District Court, it risks allowing the Bureau to put off a final judgment long enough that awarding effective relief becomes impossible. So the Court should *at least* decide the purely legal issues presented by the State's request for a preliminary injunction—the question whether Ohio will succeed on the merits, and the question whether Ohio will suffer irreparable harm—before remand.

The risk that the Bureau might delay a resolution of further proceedings is very real. It has already delayed the disclosure of its administrative record by falsely insisting that it would not make arguments requiring review of that record. *See above* 12–13. And in recent months, the Department of Justice has taken a series of previously-unheard-of measures to evade rulings adverse to the Executive Branch's policy preferences. In one case, the Department stipulated to the dismissal of an appeal challenging a nationwide vacatur of an immigration rule—a rule the Supreme Court had already suggested passed legal muster, but that the current ad-

ministration did not like. Mtn. to Dismiss, *Cook Cnty. v. Wolf*, No. 20-3150, Doc.23 (7th Cir., March 9, 2021); *Wolf v. Cook Cnty.*, 140 S. Ct. 681, 681 (2020). In another case, it informed the Supreme Court that it would decline to defend a favorable judgment *on the day that its merits brief was due*, forcing the Court to appoint an *amicus* and to add a new argument date to avoid the risk of mootness. *See* Letter of Respondent United States, *Terry v. United States*, No. 20-5904 (U.S., March 15, 2021). And on another occasion, the Department stipulated to the dismissal of three consolidated cases in which the Supreme Court had already granted *certiorari*—including one in which the Department itself petitioned for review—apparently to keep proposed intervenors from having a chance to make an argument that, if successful, would thwart the Executive Branch's policy desires. *See* Joint Stipulation to Dismiss, *Am. Med. Ass'n v. Becerra*, No. 20-429 (U.S., Mar. 12, 2021) (consolidated with Nos. 20-454 and 20-539).

"Justice Holmes famously wrote that men must turn square corners when they deal with the Government. But it is also true … that the Government should turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (internal alterations, quotations, and citations omitted). Because the United States has demonstrated a troubling

willingness to cut corners in courts around the country, this Court should resolve all that it can now.

A. Ohio will prevail on the merits.

The Bureau silently concedes that it has violated the Census Act by delaying the release of redistricting data beyond March 31. *See* 13 U.S.C. §141(c). The only question, therefore, is whether Ohio is likely to prevail under the APA or the courts' inherent equitable authority to enjoin illegal conduct. It is.

The Bureau begins its contrary argument by insisting (for the first time on appeal) that Ohio is *really* seeking a permanent injunction, not a preliminary injunction. *See* Gov. Br.21. That would be irrelevant if it were true. The only difference between the standards is that a permanent injunction requires actual success on the merits, while a preliminary injunction requires proof of likely success on the merits. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987). As explained below, Ohio is certain to prevail on the merits. In any event, Ohio properly sought a preliminary injunction: it sought, for the duration of the suit, to preserve the pre-February 12 status quo by barring the Bureau from implementing its plan to delay a release of Ohio's redistricting data until September 30. It thus seeks to "prevent" the harm stemming from any "violation of [its] rights before the district court enters a final judgment." *Ohio v. EPA*, 969 F.3d 306, 309 (6th Cir. 2020).

Ohio now turns to the question whether it will prevail under either the APA or the judiciary's inherent equitable authority.

1. Ohio will prevail under the APA.

a. The APA forbids "final agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§704, 706(2)(A). The Bureau says the February 12 Decision is not "final agency action," 5 U.S.C. §704, and thus not subject to the APA at all.

That is incorrect. "An agency action must generally meet two conditions to be considered 'final' under the APA." *Berry v. U.S. Dep't of Labor*, 832 F. 3d 627, 633 (6th Cir. 2016) (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)). First, the "action must mark the consummation of the agency's decisionmaking process"; second, it "must determine rights and obligations of a party or cause legal consequences." *Id.*; *accord Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 495–96 (6th Cir. 2014). The February 12 Decision satisfies both conditions.

Consummation of decisionmaking process. The February 12 Decision unambiguously constitutes a final decision not to comply with the Census Act's March 31 deadline. *See* 13 U.S.C. §141(c). The Bureau made that clear when, in announcing the Decision, it said that it had "been able to *finalize* a schedule for the redistricting data" that entailed release by September 30. Compl., Ex.1, R.1-1, PageID#19 (em-

phasis added). Along the same lines, the press release accompanying the Decision trumpeted: the Bureau "*will* deliver the Public Law 94-171 redistricting data to all states by Sept. 30, 2021," not "by March 31, 2021." Compl., Ex.2, R.1-2, PageID#22 (emphasis added). It is hard to see how the Bureau could have been more definitive.

The Bureau nonetheless insists that the February 12 Decision was merely a "predictive update" with "no impact on the conduct of the census." Gov. Br.24. That characterization is at odds with the Bureau's own just-quoted statements. It is also at odds with the Bureau's brief to this Court, which acknowledges that the February 12 Decision constituted a "determination" to release all data at once in September (not by March 31). Gov. Br.36. There is no evidence to support the Bureau's attempt to portray the February 12 Decision as tentative or open to revision.

The Bureau, in characterizing the February 12 Decision as a finality-free "update," notes that it announced the decision in a press release. So what? Ohio is not challenging the press release, but rather the decision that the press release announces. No case says that an agency can evade APA scrutiny by announcing an otherwise-final action in a press release instead of a more formal document.

It is true that the Bureau might announce a further delay, or that it might decide to release the data before September 30. That does not change the finality of the February 12 Decision, however. For one thing, now that March 31 has passed, the finality of the decision to violate the March 31 deadline is unalterable. Further, an agency action can be final *even if* it is subject to change in the future—nearly all agency actions are—as long as it is "controlling in the field" at the moment. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–21 (D.C. Cir. 2000). Right now, the February 12 Decision controls. Indeed, the Bureau's entire brief is predicated on its belief that it *had to* miss the March 31 deadline, and that it is endeavoring to meet the new schedule that it "finalized" on February 12, Compl. Ex.1, R.1-1, PageID#19.

Determining Rights and Legal Obligations. The February 12 Decision satisfies the second condition for final agency action because it establishes rights and legal obligations. Specifically, it reflects a definitive decision to ignore the Census Act's March 31 deadline and (therefore) to deny Ohio its right of timely access to redistricting data. Op. Br.42–43. Although the Bureau's brief at one point disagrees with this conclusion, Gov. Br.23, it makes no argument to support its position. Any argument it might have made is now forfeited. *See Doe v. Mich. State Univ.*, 989 F.3d 418 (6th Cir. 2021).

b. The APA allows review of "final agency *action*." 5 U.S.C. §704 (emphasis added). The word "action" suggests that courts may review only "circumscribed" and "discrete" acts—the APA is not a license to conduct programmatic review of an agency's overall operation. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). Ohio's challenge complies with that requirement. It seeks review of a single "circumscribed" and "discrete" action, *id.*—namely, the decision not to comply with the Census Act's March 31 deadline. The Bureau does not argue otherwise at any length, though it hints at the issue when it suggests the relief Ohio seeks "inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." Gov. Br.28 (quoting *NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019)); *see also id.* at 34–35. Any such suggestion is false. Ohio agrees it would be improper for a court to tell the Bureau how to manage any new deadline; if Ohio prevails, the order should simply forbid the Bureau from delaying the release of Ohio's redistricting data beyond a certain date, leaving it to the Bureau to decide how best to meet the deadline. No hands-on management is required. As a result, the case is nothing like *NAACP*, where the plaintiffs challenged numerous aspects of the 2020 Census's overarching design and sought an injunction requiring the Bureau to "propose and implement, *subject to this Court's approval and monitoring*, a plan to ensure that hard-to-count popula-

tions" are properly counted. *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 419 (D. Md. 2019) (emphasis added). *That* is an improper programmatic attack. Ohio's suit is not.

c. Aside from insisting that the February 12 Decision is not a final agency action, the Bureau mounts no serious APA defense. It cannot, and so does not, argue that the delayed release of redistricting data is "in accordance with law." 5 U.S.C. §706(2)(A). Because the APA forbids final agency actions that are not in accordance with law, *id.*, Ohio prevails under the APA.

The Bureau does briefly suggest that its decision to release the data all at once, instead of on a rolling basis, was not arbitrary and capricious. *Contra* Op. Br.45–46. Because the February 12 Decision is "not otherwise in accordance with law," Ohio prevails under the APA *even if* the decision to adopt an all-at-once release was neither arbitrary nor capricious. But it was arbitrary and capricious. First, the Bureau's defense rests exclusively on prepared-for-litigation declarations, which cannot be considered during arbitrary-and-capricious review: whether an agency action is arbitrary and capricious must be assessed based on the reasons given *at the time of the decision* and memorialized in the administrative record (which the Bureau has yet to turn over). *Michigan*, 576 U.S. at 758; *John Doe*, 484 F.3d at 570. In any event, the declarations, as relevant here, say only that expediting the

release of Ohio's data will slow the release of other States' data. But the Bureau never suggests that those other States need the data as soon as Ohio, making the concern, standing alone, irrelevant.

2. If APA review is unavailable, the *ultra vires* February 12 Decision can be enjoined under the courts' inherent equitable authority.

If the APA does not apply to this case, the District Court can enjoin the February 12 Decision under its inherent equitable authority. In arguing otherwise, the Bureau says that the courts' inherent equitable authority "cannot be invoked 'as a cause-of-action-creating sword,' thereby circumventing Congress's express provision of remedies for challenges to administrative action." Gov. Br.35 (quoting *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014)). That principle has no bearing on this case. If the February 12 Decision is not a "final agency action," and thus immune from APA scrutiny, awarding relief under the courts' inherent equitable authority does not "circumvent" the APA.

The Bureau also claims that Ohio's request to "compel agency action" is an improper attempt to win "programmatic relief." Gov. Br.34. That argument fails for three reasons. First, Ohio seeks discrete relief, not programmatic relief, for the reasons discussed above. Second, the rule prohibiting an award of programmatic relief applies only to APA challenges, and is thus irrelevant to the question of how the courts may exercise their inherent equitable authority. Finally, Ohio's request

for injunctive relief no more attempts to "compel government action" than does any other request for an injunction requiring the government to stop violating the law. FOIA, for example, empowers courts "to enjoin [an] agency from withholding agency records" to which the plaintiff has a right. 5 U.S.C. §552(a)(4)(B). Ohio is not seeking to compel the Bureau to release redistricting data (the Bureau is committed to doing that), but rather to enjoin it from continuing to illegally delay the release of that data beyond a future date. An order along those lines would fall squarely within the courts' inherent equitable authority. (Because the State is no longer seeking an order compelling the Bureau to share redistricting data by the already-expired March 31 deadline, cases refusing to order agencies to comply with "a statutory deadline" when there is a "reasonable need for delay," are irrelevant. *See W. Coal Traffic League v. Surface Trans. Bd.*, 216 F.3d 1168, 1174 (D.C. Cir. 2000) (discussed at Gov Br.32.).)

One note before moving on: If the Court determines that Ohio cannot seek injunctive relief under either the APA *or* the judiciary's inherent equitable authority, Ohio will remain entitled to pursue its still-pending *mandamus* claim on remand. The District Court never ruled on that claim because it dismissed the case for lack of standing.

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Although the Bureau does not defend the *legality* of its conduct, it tries to justify morally its failure to do its job despite spending (as it proudly boasts) over $15 billion in taxpayer funds. Gov. Br.5. The moral justification is legally irrelevant. The Census Act's deadlines are "etched in stone" unless Congress modifies them. *Nat'l Urban League v. Ross*, 977 F.3d 698, 704 & n.1 (9th Cir. 2020) (Bumatay, J., dissenting). Because Congress chose to maintain existing deadlines, *see* Gov. Br.7, the Bureau has no choice but to follow them. It said so itself in its Supreme Court filings last year. Application for a Stay at 5, *Ross*, 20A62, https://tinyurl.com/RossStayApp. The many Americans for whom the Bureau works are not afforded the luxury of consequence-free delays in completing their most important work assignments. Nor are they entitled to disregard the law when it proves inconvenient. The Bureau should not be either.

On top of being legally irrelevant, the Bureau's excuses are hard to buy. The Census Bureau completed its field operations, which were undeniably complicated by COVID-19, on October 15, 2020. Gov. Br.7; Press Release: Census Bureau Statement on 2020 Census Data Collection Ending, U.S. CENSUS BUREAU (Oct. 13, 2020), https://bit.ly/3dhW22L. With the field operations wrapped up, the Bureau needed only to process the data—a desk job that the Bureau completes every

ten years. This year, the Bureau announced that it will complete apportionment data in April, four months after the statutory deadline of December 31. Gov. Br.23. Yet it gave itself *six* extra months after the statutory deadline of March 31 in which to finalize redistricting data. Why does the Bureau, this year only, need two extra months in which to process redistricting data after the submission of apportionment data?

The Bureau gives no satisfactory explanation. For example, it says that it needs to compile detailed information about households and resolve conflicting information. It does that every census, however, so compilation cannot explain the delay. Second, it plans to create data tables with new filters that the States might like. Gov. Br.28–29. But surely *that* does not meaningfully contribute to an extra two months of illegal delay. Finally, the Bureau is experimenting with a new privacy-protection measure. This "differential privacy" scheme is a novel, *optional* method of privacy protection, and introduces enormous errors into the data. *See* Compl., *Alabama v. Raimondo*, No. 21-cv-211, ECF No. 1 (M.D. Ala. Mar. 10, 2021). These excuses entirely fail to justify (or even to explain) why the Bureau needs five months to do what Congress has allowed it to accomplish in three.

B. Ohio will be irreparably harmed without an injunction.

The Bureau does not dispute that any injuries Ohio suffers from the delay will be irreparable. It has thus forfeited any contrary argument. The Court should thus resolve this legal issue prior to remand, in favor of the State.

C. The final factors favor the award of injunctive relief.

An injunction requiring an earlier release of the data will also satisfy the remaining two factors. *See* Op. Br.49–50. That appears to be *necessarily* true, because the injunction Ohio seeks would forbid the Bureau from delaying the release of the data beyond the earliest date that is equitable under all the circumstances. Thus, the District Court may tailor the relief in such a way that it accommodates the Bureau's concerns with accuracy and with effects on other States. Gov. Br. 35–38.

In any event, the most the Bureau has shown is that it would be proper to remand this case for an assessment of the final two factors relating to injunctive relief. Ohio has no objection to that resolution: the Court should hold that Ohio prevails on the merits, hold that the February 12 Decision irreparably harms Ohio (or that the Bureau forfeited any contrary argument), and remand for the District Court to decide whether it can craft an injunction that will not substantially harm others or be contrary to the public interest.

CONCLUSION

The Court should reverse the judgment below and remand with instructions to either award a preliminary injunction or to evaluate the final two factors relating to injunctive relief.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a reply brief and contains 6,328 words. *See* Fed. R. App. P. 32(a)(7)(B)(ii).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2021, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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