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

OPENING BRIEF OF THE STATE OF OHIO

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MAY DAVIS
KYSER BLAKELY
Deputy Solicitors General
BRIDGET C. COONTZ
Section Chief, Constitutional Offices
JULIE M. PFEIFFER
Assistant Section Chief, Constitutional Offices
30 East Broad Street, 17th Floor
614-466-8980
614-466-5087; fax
benjamin.flowers@ohioattorneygeneral.gov

Counsel for the State of Ohio

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STATEMENT REGARDING ORAL ARGUMENT

To ensure a speedy resolution of this matter, the State of Ohio waives its right to oral argument and asks that the case be decided on the briefs.

JURISDICTIONAL STATEMENT

The plaintiff in this case is the State of Ohio. The District Court had statutory jurisdiction under 28 U.S.C. §1331 to hear Ohio's claims. And the State had Article III standing for the reasons addressed in greater detail below. *See below* 19–36. The District Court entered final judgment on March 24, 2021. Judgment, R.27, PageID#396. The State timely appealed the same day. Notice of Appeal, R.28, PageID#397. This Court has statutory jurisdiction over the appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Does the State of Ohio have standing to challenge the Census Bureau's decision to unlawfully withhold information to which the State is entitled, and that the State needs to carry out redistricting in the constitutionally preferred manner?

2. The Census Act states that the Secretary of Commerce *shall* provide the States with redistricting data by March 31, 2021. 13 U.S.C. §141(c). The defendants concede that they will miss this deadline, and that they will violate the law by doing so. May the federal courts enjoin their concededly illegal delay?

INTRODUCTION

In 2015 and 2018, Ohioans went to the polls and overwhelmingly approved constitutional amendments to change the redistricting process. Those amendments, designed to prevent partisan gerrymandering, alter the process by which Ohio draws its legislative districts. As a result, the Ohio Constitution today includes numerous requirements to ensure that all maps the Ohio Redistricting Commission or the General Assembly adopt will enjoy significant bipartisan support.

The amended processes are set to be implemented for the first time this year, when the State draws legislative districts based on population data from the 2020 Census. But the State cannot use that data unless the Secretary of Commerce shares the data in time. That *should not* be a problem, because the Secretary is statutorily obligated to share the data no later than March 31, 2021. 13 U.S.C. §141(c). But it has become a problem nonetheless, because the Census Bureau—part of the Department of Commerce—recently announced that the Secretary will not be complying with the statutory deadline. The Bureau, in its "February 12 Decision," announced that, "because of COVID-19-related shifts in data collection and in the data processing schedule," it will "deliver" the redistricting data at issue in

§141(c) "to all states by Sept. 30, 2021." Compl., Ex. 2, R.1-2, PageID#22; *accord* Compl., Ex. 1, R.1-1, PageID#19–20.

In its briefing below, the Census Bureau admitted that the February 12 Decision is unlawful. In the Bureau's words, the "inability to deliver the redistricting data by March 31, 2021 is inconsistent with 13 U.S.C. §141(c)." Opp. to Prelim. Inj., R.11, PageID#110. Instead of defending the *legality* of its actions, the Bureau argued that there was nothing the courts could do to stop it: it claimed that Ohio lacked standing to sue, and that the courts lacked authority to grant relief regardless.

The District Court agreed with the Bureau that Ohio lacked standing to sue. On that basis, it denied Ohio's request for a preliminary injunction *and* dismissed the entire case, at the pleading stage, without ever reaching the merits of Ohio's claims. Because Ohio has standing to sue, this Court should reverse and remand the case for a ruling on the merits. Alternatively, it should reverse, hold that Ohio prevails on the merits as a matter of law, and remand for the District Court to award appropriate relief.

STATEMENT

1. "Ohio may have just ended gerrymandering; will others follow?" That was the headline in the Cincinnati Enquirer after a group of bipartisan legislators in

Ohio's General Assembly worked together to propose an amendment to the Ohio Constitution. *See* Jessie Balmert, *Ohio may have just ended gerrymandering; will others follow?*, CINCINNATI ENQUIRER 10A (Feb. 7, 2018); Jessie Balmert, *Everyone complains about congressional gerrymandering. Ohio just did something about it*, Cincinnati.com (Feb. 6, 2018), https://tinyurl.com/y6zqva6g. The proposed amendment would reform the redistricting process so as to require significant bipartisan support for new maps. *See* Substitute S.J. Res. No. 5, 132nd Gen. Assemb. (Ohio 2018). On May 8, 2018, the People of Ohio approved the proposed amendment by a 3-to-1 margin. This followed on the heels of an earlier, 2015 amendment that had already modified the process by which maps are drawn—an amendment that passed by similarly overwhelming margins. Ohioans will get their first chance to see the new redistricting process in action in 2021, when the State draws updated maps in response to the 2020 Census.

Today, the Ohio Constitution creates two redistricting processes, one for the drawing of state legislative districts and another for drawing congressional districts. The process for drawing state legislative districts is set out in Article XI of Ohio's Constitution. That article creates a bipartisan, seven-member Ohio Redistricting Commission, which the Constitution vests with the power to draw state legislative maps. *Id.*, §1(A). The Commission may approve a map only if the map receives

the "affirmative vote of four members of the commission, including at least two members of the commission who represent each of the two largest political parties represented in the general assembly." *Id.*, §1(B)(3). The group must reach agreement no later than "the first day of September of a year ending in the numeral one." *Id.*, §1(C). Before doing so, the Commission "shall conduct a minimum of three public hearings across the state to present the proposed plan and shall seek public input." *Id.*

The Ohio Constitution prescribes a different method for the drawing of congressional districts. *See id.*, art. XIX, §1. The General Assembly has until "the last day of September of a year ending in the numeral one" to adopt a congressional map. *Id.*, §1(A). Before that date, it must secure "the affirmative vote of three-fifths of the members of each house of the general assembly, including the affirmative vote of at least one-half of the members of each of the two largest political parties represented in that house." *Id.* If the General Assembly fails to meet that deadline, then the Ohio Redistricting Commission "shall adopt a congressional district plan not later than the last day of October of that year." *Id.*, §1(B). It can do so only with "the affirmative vote of four members of the commission, including at least two members of the commission" representing the "two largest political parties represented in the general assembly." *Id.* If the Commission is unable to reach

an agreement, then the General Assembly may adopt a plan by the end of November. This time, the plan must win the "affirmative vote of three-fifths of the members of each house, including the affirmative vote of at least *one-third* of the members of" the two largest parties. *Id.*, §1(C)(2) (emphasis added). Finally, and as a fourth option if all other options fail, the General Assembly may adopt a plan by the vote of a simple majority of the members of each house. *Id.*, §1(C)(3). To deter the legislature from relying on this fourth option, the Constitution specifies that any plans adopted through this option expire after "two general elections for the United States house of representatives." *Id.*, §1(C)(3)(e).

Both the Commission and the General Assembly are required to determine population using data from "the federal decennial census." Ohio Const. art. XI, §3(A); art. XIX, §2(A)(2). If and only if that data "is unavailable," the Commission and the General Assembly may determine population on another "basis" selected by the General Assembly. Ohio Const. art. XI, §3(A); art. XIX, §2(A)(2).

2. Ohio's redistricting process is heavily influenced by two principles of federal law. *First*, States must draw congressional districts equal in number to the number of seats they are apportioned based on their populations. *See* U.S. Const. art. I, §2, cl.3. *Second*, the one-person–one-vote principle requires States to draw legislative districts that are roughly equivalent in population. *See Evenwel v. Abbott*,

136 S. Ct. 1120, 1123–24 (2016). To abide by these principles, the States rely on data provided through the census. That is the data by which total population (and so congressional apportionment) is decided. And that is the data that States use to ensure their districts are sufficiently equal in population.

Congress passed the Census Act to ensure the provision of this data. That Act says that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" 13 U.S.C. §141(a). "The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2561 (2019).

One of the Secretary's most important census-related duties is codified at 13 U.S.C. §141(c). That section speaks to the Secretary's responsibility for providing the States with "tabulations of population" useful for drawing legislative districts. *Id.* It says that the Secretary "shall" complete those tabulations "as expeditiously as possible after the decennial census date." *Id.* At the very latest, however, "tabulations of population of each State … shall … be completed, reported, and transmitted to each respective State within one year after the decennial census date." *Id.* Because federal law defines the "decennial census date" as April 1, *see* §141(a),

the Secretary complies with her obligation to provide the information "within one year after the decennial census date" if she gives it to the States no later than March 31.

3. While Congress could have extended the deadline, it did not do so. *Ross v. Nat'l Urban League*, 141 S. Ct. 18, 19 (2020) (Sotomayor, J., dissenting from grant of stay). Nonetheless, the Census Bureau has decided not to comply with the March 31 deadline. To be sure, that was not always the case; the Bureau at one time planned to submit to the States the "redistricting data" that §141(c) requires "by March 31." Compl., Ex.2, R.1-2, PageID#22. In other words, the Bureau *had* planned to comply with the §141(c) deadline. Indeed, the Bureau and its lawyers at the Department of Justice repeatedly told courts that they had no choice but to comply with the congressionally imposed deadlines. They told the Northern District of California that the Census Bureau "cannot lawfully" implement a data reporting timeline that exceeds Congress's deadlines. Defs.' Notice of Mot. to Dismiss Second Amend. Compl. and Memo in Support at 14, *Nat'l Urban League v. Ross*, 5:20-cv-05799, Doc.354 (N.D. Cal., Nov. 10, 2020). And, in order to win a stay of a ruling enjoining a plan for timely completing the census, they told the Supreme Court that delay would "violate the governing statute" (the emphasis is theirs). Application for a Stay at 5, *Ross v. Nat'l Urban League*, 20A62 (U.S., Oct.

7, 2020), https://tinyurl.com/RossStayApp. Even if speed might compromise accuracy, they explained, "assessing any tradeoff between speed and accuracy is a job for Congress." *Id.*

But the Census Bureau quickly abandoned its plan to comply with the law. More specifically, the Bureau issued its February 12 Decision, announcing that it "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. The "Public Law 94-171 redistricting data" is the data covered by 13 U.S.C. §141(c). *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975). Thus, the Bureau's statement confirmed that the Secretary would not be meeting the March 31, 2021 deadline that §141(c) imposes. The Bureau further announced: "Different from previous censuses, the Census Bureau will deliver the data for all states at once, instead of on a flow basis." Compl., Ex.2, R.1-2, PageID#22.

4. On February 25, 2021, the State of Ohio filed this suit in the Southern District of Ohio. The complaint alleges that the Secretary will violate the Census Act, and in particular 13 U.S.C. §141(c), if she enforces the February 12 Decision and fails to release the data before March 31, 2021. The complaint additionally alleges that the defendants promulgated the February 12 Decision in violation of the Administrative Procedure Act. On the same day it filed its complaint, Ohio moved

for a preliminary injunction. Ohio asked the Court to *either* require the defendants to comply with the March 31 deadline or, in the alternative, to "enjoin 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. Though the parties briefed the preliminary-injunction issue, the defendants never filed an answer or a motion under Rule 12(b) of the Federal Rules of Civil Procedure.

5. The District Court determined that the State of Ohio lacked standing and dismissed the case. The court determined that Ohio's injuries are not redressable because "it is now impossible for the Census Bureau to meet the March 31 statutory deadline for providing census-based redistricting data." Order, R.26, PageID#387. The District Court additionally determined that the Census Bureau's delay did not result in sufficiently concrete harm because the State "does not actually need the Census Bureau's data to redistrict." *Id.*, PageID#389. In other words, the court found that Ohio was not injured by the absence of redistricting data, because it could conduct redistricting with alternative data. Finally, the District Court determined that any harm to the State was not traceable to the Census Bureau's conduct. *Id.*, PageID#392. Instead, the District Court found *Ohio itself* was responsible for the injury it suffered, because it adopted a constitutional process

"without the flexibility to accommodate the COVID-19 pandemic." *Id.*, PageID#393.

6. Ohio filed its notice of appeal on the same day, and this brief the next.

SUMMARY OF ARGUMENT

I. The State of Ohio adequately established all three elements of Article III standing: (1) it will suffer injuries in fact from the February 12 Decision; (2) the injuries are "fairly traceable" to the challenged conduct; and (3) the injuries will likely be redressed, at least to some degree, by the relief the State requested. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Injury in fact. Ohio suffered four distinct injuries in fact because of the February 12 Decision.

First, the February 12 Decision injures the State by interfering with its constitutionally prescribed redistricting process. The Ohio Constitution imposes September 1 and September 30 deadlines on the Ohio Redistricting Commission and the General Assembly—the Commission *must* complete state legislative maps by September 1, and the General Assembly relinquishes its authority to complete congressional legislative maps if it fails to adopt such a map by September 30. The Constitution also *requires* the Commission and the General Assembly to use census data during redistricting—if and only if that data is "unavailable" may they use al-

ternative data, which the General Assembly is charged with securing. Ohio Const. art. XI, §3(A); art. XIX, §2(A)(2). The February 12 Decision ensures that the data will not be available for the Commission or the General Assembly to use in meeting these deadlines. It thus prevents the State from effectuating state law in the constitutionally preferred manner. Just as a court-issued injunction forbidding Ohio from pursuing its constitutionally preferred process would irreparably harm Ohio, *see 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*), so too does an action by the Executive Branch, such as the February 12 Decision, that requires the State to conduct redistricting using its backup option.

Second, the February 12 Decision will injure Ohio by undermining 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). Forcing Ohio's leaders to decide which data to use in the immediate run-up to the redistricting process—when the likely beneficiaries of the data chosen will be easier to predict—will undermine the public's trust in the redistricting process they just adopted.

Third, Ohio will suffer an "informational injury" by being denied information to which it has a right and that it would use for some concrete purpose. *U.S. House of Representatives v. U.S. Dep't of Com.*, 11 F. Supp. 2d 76, 85 (D.D.C. 1998); *see FEC v. Akins*, 524 U.S. 11, 19–21 (1998)). True enough, an "asserted informational injury that causes no adverse effects cannot satisfy Article III." Order, R.26, PageID#392 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)). But the withholding of information to which a party is entitled and that it will use to accomplish some specific end—to "participate more effectively" in the political process, for example, *see, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *see also Akins*, 524 U.S. at 21—*does* constitute an Article III injury. Denying Ohio the redistricting data that it wishes to use in the redistricting process is precisely such an injury.

Finally, the February 12 Decision inflicted an injury akin to that caused by a breach of contract. Under the Census Act, the States submit "plan[s] identifying the geographic areas for which specific tabulations are desired," and the Secretary of Commerce, if she approves the plan, provides redistricting data consistent with the plan "within one year after the decennial census date." §141(c). The defendants have failed to hold up their end of the bargain, injuring Ohio. The District Court's opinion below completely ignores this fourth injury.

Traceability. Because the February 12 Decision will cause the just-discussed harms, those harms are "fairly traceable to the challenged conduct of the defendant[s]." *Spokeo*, 136 S. Ct. at 1547. The District Court disagreed, concluding that "any injury Ohio may suffer is fairly traceable to Ohio's independent decision to create a state redistricting timeline without the flexibility to accommodate the COVID-19 pandemic." Order, R.26, PageID#393 (alterations and quotation marks omitted). This argument fails, however, because it wrongly assumes that an Article III injury must be fairly traceable *only* to a defendant's conduct. That is not the law. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015). Because the February 12 Decision contributed to Ohio's injuries, the traceability requirement is satisfied.

Redressability. The State's injury is redressable by a court order requiring the defendants to give Ohio its redistricting data sufficiently far in advance of the Redistricting Commission's September 1 deadline (or even the General Assembly's September 30 deadline) to enable the data's use in redistricting. While Ohio's complaint asked for the data by the March 31 statutory deadline, it sought in the alternative an order requiring the data's disclosure at the earliest practicable date. Compl., R.1, PageID#16. The District Court found a lack of redressability on the ground that "it is now impossible for the Census Bureau to meet the March 31

statutory deadline." Order, R.26, PageID#387. That completely ignores the State's alternative request for an injunction ordering the data's release at the earliest practicable date. Nothing in the record or in the defendants' briefing below suggests that it would be literally impossible to provide the data to Ohio early enough to enable its use by the Redistricting Commission and the General Assembly.

II. While the Court could simply reverse the judgment below and remand for further proceedings, the State respectfully requests a ruling on the merits of its injunction request. This Court should hold that Ohio is entitled to an injunction and remand for the District Court to craft the injunction's terms.

As an initial matter, the State will prevail on the merits of its claim. The February 12 Decision is plainly illegal. As the defendants conceded below, delaying the release of redistricting data beyond March 31 violates the Census Act. *See* 13 U.S.C. §141(c); Opp. to Prelim. Inj., R.11, PageID#110. The February 12 Decision can thus be enjoined under the Administrative Procedure Act on the ground that it is "not in accordance with law." 5 U.S.C. §706(2)(A). Even if the APA did not apply, it would be appropriate to enjoin the February 12 Decision using the federal courts' inherent equitable power to enjoin state and federal officials "who are vio-

lating, or planning to violate, federal law." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

Ohio satisfies the remaining factors for injunctive relief. *First*, it will be irreparably harmed without an injunction. The injuries addressed above in connection with standing are irreparable; they cannot be cured if the data's release is delayed past the point at which the State might still use it. *Second*, the court can tailor any injunction to ensure that other parties and the census process itself are not unduly harmed. *Finally*, because the "public interest lies in a correct application of the" law, and "upon the will of the people … being effected in accordance with [the] law," *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006), an order limiting the defendants' conceded violations will serve the public interest.

STANDARD OF REVIEW

Standing. This Court "review[s] dismissals for lack of subject-matter jurisdiction, including those for lack of standing, de novo." *Phillips v. DeWine*, 841 F.3d 405, 413 (6th Cir. 2016) (citing *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 709 (6th Cir. 2015)). In doing so, the Sixth Circuit construes the complaint in the light most favorable to the State of Ohio and accepts all well-pleaded factual allegations as true. *Id.* Thus, plaintiffs need only *allege* standing at the pleading stage—they

need not prove standing. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

Preliminary injunction. Courts must balance "four factors … when considering a motion for a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emples. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (*per curiam*) (quotation omitted). "Whether the movant is likely to succeed on the merits is a question of law, which this court reviews de novo." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 385 (6th Cir. 2020). But the Court reviews "the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief for abuse of discretion." *Id.* (quotation omitted). "Under the abuse-of-discretion standard, this court may reverse the district court if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact." *Id.* (quotation omitted).

ARGUMENT

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

The District Court dismissed this case for one reason and one reason only: it held that Ohio lacked Article III standing to sue. Because that is incorrect, this Court should, at bare minimum, reverse the judgment below and remand for consideration of the merits.

A. Ohio has alleged facts sufficient to establish Article III standing.

Article III permits courts to hear only "Cases" and "Controversies." U.S. Const. art. III, §2. A "case" or "controversy" requires a plaintiff with standing to sue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, a plaintiff must show: (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury is "fairly traceable" to the challenged conduct, and (3) that the injury would likely be redressed by the requested judicial relief. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Ohio has satisfied all three elements. That is especially clear because this case is still at the pleading stage, meaning standing must be assessed based *exclusively* on the well-pleaded allegations in Ohio's complaint. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Lujan*, 504 U.S. at 561); *Phillips v. DeWine*, 841 F.3d 405, 413 (6th Cir. 2016).

1. Injury in fact. The February 12 Decision injures Ohio in four distinct ways.

Inability to use the Ohio Constitution's first-best option. First and foremost, the February 12 Decision injures Ohio by barring the State, just before redistricting is to commence, from drawing legislative districts in the constitutionally preferred manner. Again, the Ohio Constitution requires the Ohio Redistricting Commission to draw state legislative maps by September 1—the Ohio Constitution does not allow for any exceptions. And the Ohio Constitution *requires* the Commission to draw maps using census data. Only if the census data is "unavailable" may the Commission use other data, determined by the General Assembly. Ohio Const. art. XI, §3(A); art. XIX, §2(A)(2). From this, it follows that the February 12 Decision will harm Ohio: by delaying the release of redistricting data until September 30, the February 12 Decision makes it impossible for the State to undertake redistricting in its constitutionally preferred manner. The delay also makes it impossible for the General Assembly to use the data in meeting its September 30 deadline—it will either have to use alternative data, or else relinquish control to the Ohio Redistricting Commission on October 1. *See id.*, art. XIX, §1(B).

Forcing Ohio to forgo its constitutionally preferred redistricting scheme will injure Ohio as a matter of law. States suffer "a form of irreparable injury" every

time they are blocked "from effectuating" state law. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*). By barring the State from "effectuating" the constitutionally preferred method of redistricting—namely, redistricting based on the population figures determined with the decennial census—the February 12 Decision causes irreparable harm. An analogy helps illustrate the point. Imagine a court order enjoining Ohio from using census data in redistricting but leaving the State free to redistrict by determining population on "such other basis as the general assembly may direct." Ohio Const. art. XI, §3(A); *see also* art. XIX, §2(A)(2). That order would unambiguously constitute irreparable harm: because state law requires using decennial census data as a first-best option, and because the order would enjoin the use of the data, the order would irreparably injure the State by blocking it from "effectuating" state law. *King*, 133 S. Ct. at 3 (Roberts, C.J., in chambers); *accord Abbott*, 138 S. Ct. at 2324; *Thompson*, 959 F.3d at 812. Now return to this case. The February 12 Decision is practically indistinguishable from the hypothetical order enjoining the use of census data, and it therefore causes irreparable harm in precisely the same manner. The February 12 Decision, just like the hypothetical injunction, blocks the State from conducting redistricting in the constitutionally preferred manner, and thus blocks it

from best "effectuating" state law. *King*, 133 S. Ct. at 3 (Roberts, C.J., in chambers). That is harm—indeed, *irreparable harm*—as a matter of law. And it is irreparable harm without regard to the adequacy, as a factual matter, of the backup option to proceed without census data.

The defendants cannot seriously dispute this. Surely they would agree that an injunction forbidding the Census Bureau from conducting the census in one manner—by asking about citizenship, perhaps, *see Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019)—would cause it irreparable harm notwithstanding the availability of other options for conducting the census. And the defendants would presumably agree that if a State's law required it to first attempt redistricting by using an independent redistricting committee, and if the State's law allowed the legislature to adopt a map *only if* the committee is unavailable, a court order requiring the State to skip the independent-committee step would constitute irreparable harm. *Cf. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). This case is the same: while Ohio *can* carry out redistricting in a manner other than the one the state constitution prefers, its having to do so constitutes an injury—and an irreparable one at that.

Public confidence. The February 12 Decision also injures Ohio because the Commission's inability to use census data when drawing state legislative maps 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). The February 12 Decision came so late in the process that it ensured any debate about which data to use would occur in the immediate run-up to redistricting. The inevitable result will be high-stakes fights that politicize the entire process—precisely the sort of fights that Ohioans amended their constitution to prevent. Forcing Ohio's leaders to decide which data to use right before redistricting is to occur, when the likely beneficiaries of any chosen data set will be easier to predict, is sure to sow distrust in the fairness of Ohio's elections.

The distrust will be magnified by the sure-to-follow litigation challenging whatever alternative data the Ohio Redistricting Commission is forced to use in place of the census data. In each suit, politically motivated litigants will have a strong incentive to cast whatever data is chosen in the most negative possible light, further eroding the public's trust in the process. They may even cite the defendants' briefs in this case, which have described census data as the "gold standard," used by the Department of Justice "to enforce the Voting Rights Act." Opp. to Prelim. Inj., R.11, PageID#94, 99. This litigation and the resulting harm to the

State is certain, not speculative. Ohio, over the past decade, has faced a barrage of suits asking courts to become "entangled, as overseers and micromanagers, in the minutiae of" Ohio's "election processes" generally, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016), and its redistricting process in particular, *see, e.g.*, *Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101 (2019); *Wilson v. Kasich*, 981 N.E.2d 814 (Ohio 2012). It is inconceivable that litigants will not raise similar challenges here based on the difficulties caused by the defendants' (unlawful) failures to do their jobs.

Informational injury. Withholding information to which a party has a statutory right causes an injury for Article III purposes, at least in cases where the party seeks to use the withheld information for some concrete purpose. *U.S. House of Representatives v. U.S. Dep't of Com.*, 11 F. Supp. 2d 76, 85 (D.D.C. 1998); *see FEC v. Akins*, 524 U.S. 11, 19–21 (1998). Thus, by withholding the data until it is too late for Ohio to use in redistricting, the defendants caused an "informational injury" of the sort that confers Article III standing. *House of Representatives*, 11 F. Supp. 2d at 85.

Breach of commitment. Finally, the failure to timely release the data causes the same sort of injury that creates standing in a breach-of-contract case. The Census Act envisions a sort of agreement between the States and the federal govern-

ment: the States submit "plan[s] identifying the geographic areas for which specific tabulations are desired," and the Secretary of Commerce, if she approves the plan, provides redistricting data consistent with the plan "within one year after the decennial census date." §141(c). By shirking their obligations, the defendants injured Ohio.

2. Traceability. Because the February 12 Decision will cause the just-discussed harms, those harms are "fairly traceable to the challenged conduct of the defendant[s]." *Spokeo*, 136 S. Ct. at 1547. The fairly traceable element does not require a showing of sole cause, or even proximate cause. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 713 (6th Cir. 2015). Thus, even if some other factors are contributing to Ohio's injuries, the injuries are still fairly traceable to the February 12 Decision.

3. Redressability. Finally, the State's injuries are redressable. Ohio had initially hoped for an order requiring the Secretary to fulfill her obligations under 13 U.S.C. §141(c), which would mean giving Ohio its redistricting data by March 31. Looking only to the well-pleaded facts in Ohio's complaint—which is all the Court should look at, since this case is still at the pleading stage, *see Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008)—nothing shows that the defendant cannot meet that deadline. But even if the deadline cannot be met, Ohio's injuries would

still be redressable by a court order: the Court could enjoin the defendants from delaying the release of Ohio's data beyond some date that, while later than March 31, is sufficiently far in advance of the constitutionally imposed redistricting deadlines to permit the data's use. Ohio expressly sought this relief in the alternative, asking the District Court to enjoin "the Secretary from delaying the release of the data beyond a date this Court deems equitable and reasonable under all the circumstances." Mem. in Support of Prelim. Inj., R.6, PageID#63; *accord* Compl., R.1, PageID#16. That alternative request for relief is available by definition, meaning Ohio's injuries are redressable *to some degree* as a matter of law. At least, there is nothing in the pleadings (or the record generally) that suggests awarding alternative relief along these lines would be impossible.

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Because Ohio alleged four injuries in fact, all redressable by a court order and fairly traceable to the February 12 Decision, it has standing to sue.

B. The District Court's standing analysis is incorrect.

The District Court held that Ohio failed to establish *any* of the three necessary elements of standing. It erred.

1. Injury in fact. The District Court, in holding that Ohio lacked standing to sue, ignored entirely Ohio's argument that it has suffered an injury akin to that

suffered in a breach-of-contract suit. *See above* 24. The court did address Ohio's other arguments, but its reasoning does not withstand scrutiny.

Inability to use the constitutionally first-best option. The District Court acknowledged that the delay will prevent the Ohio Redistricting Commission from using census data to meet the September 1 deadline by which the Commission must adopt a map. Order, R.26, PageID#389. And it recognized that the Ohio Constitution *requires* the use of census data if that data is available. *Id.*; *see also id.*, PageID#384. But the Court still held that the withholding of the data causes no injury. Why not? Because "the State does not actually need the Census Bureau's data to redistrict," since the Ohio Constitution allows it to use alternative data in the event that census data is unavailable. *Id.*, PageID#389. Thus, the court concluded, the delay occasioned by the February 12 Decision will not "frustrate[] or render[] invalid" any state law. *Id.*, PageID#390. That, it suggested, distinguished this case from cases like *Maryland v. King*, 567 U.S. 1301 (Roberts, C.J., in chambers), and *Abbott v. Perez*, 138 S. Ct. 2305, which held that courts cause irreparable harm to States when they enjoin state laws.

The fact that Ohio has a backup option if its constitutionally preferred method is unavailable does not negate the injury it suffers from having to invoke that option. In *Abbott v. Perez*, for example, the Court held that an order enjoining a state

redistricting plan constitutes irreparable harm. *See* 138 S. Ct. at 2323–24. Of course, the State in that case could have adopted some other plan. But that did not matter: preventing the State from implementing its *preferred* plan constituted an (irreparable) injury. The same logic compels the same conclusion here. While the Ohio Constitution allows the Redistricting Commission and the General Assembly to use non-census data as a backup, *forcing* the State to resort to a backup option constitutes an injury. As explained above, the Executive Branch's delay in releasing the census data has precisely the same effect as would a judicial order *enjoining* Ohio from using census data in redistricting—both actions make it impossible to use the constitutionally preferred method. If the hypothetical injunction would inflict harm, so too does the Census Bureau's delay.

In concluding otherwise, the District Court seemed to think that parties suffer no Article III injury from the deprivation of a right if they can achieve their goals in another way. That is not the law. No court would say that a protester unconstitutionally denied access to a public forum would lack standing if he had the option to spread his message just as effectively from neighboring private property. Nor would any court conclude that a manufacturer lacked standing to sue for a buyer's breach of contract simply because the manufacturer could, with minimal effort, find another buyer elsewhere. Nor would a woman's undue-burden claim under

Planned Parenthood v. Casey, 505 U.S. 833 (1992), be dismissed *on standing grounds* simply because she retained the option to seek an abortion in some other, more-difficult way. These alternative options might change the plaintiffs' entitlement to relief, but they would not alter the standing analysis. So the fact that Ohio *could* conduct redistricting without the data to which it is statutorily entitled makes no difference. This insight helps to establish the irrelevance of the District Court's observation that Ohio never alleged that "census data is superior," in objective terms, "to any available alternatives." Order, R.26, PageID#390–91. While the other data may be just as good or even better on objective measures, it is a second-best option as far as the Ohio Constitution is concerned. Ohio suffers an Article III injury by being deprived its constitutionally preferred option.

The District Court additionally suggested that Ohio, if it fails to get the census data in time, may choose to draw districts *after* the deadlines but before the 2022 elections. Order, R.26, PageID#393. But Ohio law does not give the Commission that option. The Ohio Redistricting Commission *must* draw a map for state legislative districts by September 1, and the Ohio Constitution does not allow the Redistricting Commission to assemble again later and redraw the maps. In fact, the Commission "automatically dissolve[s]" "[f]our weeks after the adoption of a general assembly district plan or a congressional district plan, whichever is later."

Ohio Const. art. XI, §1(C). So drawing (or redrawing) the maps at some indeterminate point in the future is not an option.

Distrust in the redistricting process. The District Court next rejected Ohio's argument that the February 12 Decision, by forcing Ohio to decide which alternative data to use immediately before redistricting is to occur, will undermine trust in the redistricting process and spur expensive litigation. The court rejected these fears as unduly "speculative" and resting on a "highly attenuated chain of possibilities." Order, R.26, Page ID#391 (quotation omitted). That is simply not a correct characterization. As this Court well knows, it is a *certainty* that those who stand to benefit politically from doing so will have every incentive to sow distrust in the redistricting process, and to bring litigation further eroding such trust. To conclude otherwise would be to disregard the principle that courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 139 S. Ct. at 2575 (quotation omitted).

The District Court further asserted that, because "[a]ccuracy would seem to be the foundation of confidence," it is Ohio's attempt to speed up the data's release, not the delay, that will undermine public confidence. Order, R.26, Page-ID#391. That assertion goes to the appropriateness of awarding relief, not the question whether the delay injures Ohio. It is thus irrelevant for standing purposes.

It is also factually dubious: even the declarations that the defendants attached to their brief opposing preliminary relief did not claim that *every* change to the release schedule would compromise accuracy.

Informational injury. Finally, the Court rejected the State's argument that withholding data to which it is entitled constituted an injury in fact. The court relied on the principle that an "asserted informational injury that causes no adverse effects cannot satisfy Article III." Order, R.26, PageID#392 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)). That principle is true enough: parties cannot assert an informational injury based on mere curiosity. They must instead point to "downstream consequences" that would result from receiving the information. *Trichell*, 964 F.3d at 1004. For example, parties suffer an Article III injury when they are denied access to information that would enable them to "participate more effectively" in the political process, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989), or that "would help them … evaluate candidates for public office," *Akins*, 524 U.S. at 21. If those rather-abstract downstream consequences suffice to confer Article III standing—and they do, *see Trichell*, 964 F.3d at 1004—Ohio's concrete interest in using the withheld data in its redistricting process does, too.

2. Traceability. The court additionally held that Ohio "fail[ed] to establish an injury traceable to the decried conduct." Order, R.26, PageID#392. According to the court, "any injury Ohio may suffer is fairly traceable to Ohio's independent decision to create a state redistricting timeline without the flexibility to accommodate the COVID-19 pandemic that has resulted in the unique challenges in completing the census this year." *Id.*, PageID#393 (alterations and quotation marks omitted). The court went wrong here by assuming an Article III injury can only be fairly traced to a single cause. In fact, Article III's traceability requirement is satisfied even if the "defendant was one of multiple contributors to a plaintiff's injuries." *Parsons*, 801 F.3d at 714. Here, there is no doubt that the State's injuries are traceable to the Census Bureau's delayed release of redistricting data, even if they are *also* traceable to the State's constitutional deadlines.

3. Redressability. The District Court determined that Ohio's injuries are not "redressable" because it concluded that "it is now impossible for the Census Bureau to meet the March 31 statutory deadline." Order, R.26, PageID#387. The court made this determination based on two declarations by Census Bureau employees, which the defendants attached to their memorandum opposing a preliminary injunction. Both declarations asserted that "producing redistricting data by, or even close to, the statutory deadline of March 31, 2021, is not possible under any

scenario." Order, R.26, PageID#387 (quoting Whitehorne Decl. ¶12, R.11-2, PageID#150). Reasoning that an injury is not redressable if it can be cured only by "requir[ing] an agency to render performance that is impossible," the court concluded that Ohio failed to prove redressability. *Id.*, PageID#388 (quoting *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017). This analysis fails for two, independent reasons.

First, Ohio expressly asked the Court, in the event it deemed the March 31 date impossible to meet, to enjoin "the Secretary from delaying the release of the data beyond a date this Court deems equitable and reasonable under all the circumstances." Mem. in Support of Prelim. Inj., R.6, PageID#63; *accord* Compl., R.1, PageID#16. The defendants' self-serving declarations did not go so far as to say it would be literally impossible to provide data after March 31 but early enough for the State to use in meeting the September 1 and September 30 deadlines. And even an order requiring the data's release just a few weeks early—something the declarations said *was* possible, *see* Whitehorne Decl., R.11-2, PageID#156—would redress the State's harm to some degree, as it would make it easier for the General Assembly to use that data in meeting the September 30 date. The District Court's opinion completely ignores this alternative request for relief, which establishes redressability.

Second, the District Court did not merely deny the State's preliminary-injunction motion—it dismissed the case. That was an error because this case is still at the pleading stage, and because Ohio alleged that the court could redress its injury even with an order requiring the data's release at some point after March 31, 2021. Compl, R.1, PageID#16. The District Court's impossibility finding depends on its crediting declarations that two Census Bureau officials submitted and whom Ohio never had a chance to depose or otherwise examine. The court thus resolved a factual dispute at the pleading stage, without affording Ohio a chance to rebut the factual claims on which the court relied. Because Ohio adequately pleaded facts showing redressability, it was entitled to discovery before having the District Court make a factual finding on the matter. (The absence of discovery is particularly troublesome, because the defendants avoided having to disclose the administrative record by assuring the District Court and the State, during a preliminary hearing, that they would seek relief on purely legal grounds unrelated to the record.)

To make matters worse, Ohio had ample grounds for attacking the declarants' assertions of impossibility—particularly to the extent that declarants might assert that *any* pre-September 30 deadline would be impossible to meet. For one thing, the Census Act requires the Bureau to give the States their redistricting data three months after the completion of apportionment data, *see* 13 U.S.C. §141(a),

(c), and the Bureau has not previously struggled to meet that deadline. This year, the apportionment data will be released by April 30. *See* Opp. to Prelim. Inj., R.11, PageID#93. But the February 12 Decision puts off release of the redistricting data until September 30—*five months* after completing the apportionment data. Nothing in the declarations explains why it would be impossible for the Bureau to complete the redistricting data by July 30, three months after the apportionment data is finalized.

Ohio also had plausible bases for casting doubt on the declarants' credibility. The same defendants, when they needed to do so to win a case last fall, submitted a declaration from a Bureau official that stated: "the Census Bureau is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline," which was December 31. Decl. of Albert E. Fontenot, Jr. ¶91, *Nat'l Urban League v. Ross*, 5:20-cv-05799, Doc.81-1 (N.D. Cal., Sept. 4, 2020). The defendants made the same representation to the Supreme Court. *See* Application for a Stay at 5, *Ross v. Nat'l Urban League*, 20A62 (U.S., Oct. 7, 2020), https://tinyurl.com/RossStayApp. The government long ago missed that deadline. Before the declarants' assertions are assumed true, Ohio is entitled to investigate why the Bureau's perception of what is possible seems to shift with the relief it needs.

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The District Court's reasoning for finding that the State of Ohio did not adequately plead standing fails as a matter of law. This Court should reverse the judgment dismissing the case.

II. The State of Ohio is entitled to a preliminary injunction.

It bears repeating: the defendants in this case *concede* the illegality of the February 12 Decision. They defend themselves by insisting that the courts lack any authority to enjoin the illegality—according to them, Ohio lacks standing to vindicate its legal right to redistricting data, and the courts lack the power to enjoin the defendants' withholding of that data. The standing argument fails for the reasons already addressed. And the defendants' argument that the courts lack authority to enjoin the Census Bureau contradicts "a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). It also contradicts the foundational premise of our constitutional republic: that no one, not even the President, is "above the law." *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring). "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madi-*

son, 1 Cranch 137, 163 (1803). The States have a statutory right to receive, by March 31, the redistricting data from the Secretary. §141(c). In a government of laws, the courts may craft a remedy to either prevent, or at least remediate, the violation of that right.

The Court should reverse the District Court's decision dismissing this case for lack of standing for the reasons already addressed. If it does, the Court does not have to go any further—it can simply remand for further proceedings. But in the interest of expediting this case, Ohio respectfully requests a ruling on the merits of its request for a preliminary injunction. The Court should at least address the legal question whether Ohio will likely prevail on the merits, which would leave for the District Court only the issue of whether and what type of injunctive relief is appropriate.

A. Ohio will prevail on the merits of its challenge.

Ohio will prevail in its challenge to the February 12 Decision. The Decision violates the Census Act, violates the Administrative Procedure Act, and must be enjoined.

1. The February 12 Decision violates the Census Act.

a. The Census Act imposes mandatory deadlines. The States are entitled to representation in Congress based on their populations. Their populations are de-

termined using an "actual Enumeration" conducted every ten years. U.S. Const. art. I, §2, cl.3. That enumeration is to be conducted "in such Manner as [Congress] shall by Law direct." *Id.*

The Census Act is one of the laws through which Congress has provided the needed direction. That act imposes a number of census-related obligations on the Secretary of Commerce. It says that the "Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of the population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" §141(a). The statute then imposes one deadline of particular relevance here:

> The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may … submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired.… Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State *within one year after the decennial census date*.

13 U.S.C. §141(c) (emphasis added).

Breaking this down, the Secretary "shall" tabulate the population figures needed for redistricting "as expeditiously as possible after the decennial census

date," and the Secretary "shall … complete[], report[], and transmit[]" those tabulations "to each respective State within one year after the decennial census date." The "decennial census date" is April 1. *See* §141(a). Thus, to complete, report, and transmit the tabulations within one year after the decennial census date, the Secretary must do all that by March 31, 2021.

Section 141(c) imposes a mandatory March 31 deadline, not an aspirational target date. *See New York v. U.S. Dep't of Com.*, 315 F. Supp. 3d 766, 796 (S.D.N.Y. 2018). Again, that statute says that the Secretary "*shall*" complete, record, and transmit the tabulation of specific population areas to the States no later than March 31. §141(c) (emphasis added). The clearest indication that the law imposes a mandatory deadline is its use of "mandatory language: 'shall.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)); *accord Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013). In the Census Act, as in other statutes, "Congress used 'shall' to impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001).

b. The Secretary may not ignore mandatory deadlines. The Census Bureau's February 12 Decision announces that the Secretary will ignore the March 31

deadline imposed by §141(c). Instead of meeting that mandatory deadline, the Census Bureau announced, it "will deliver" the "redistricting data"—meaning the data required by §141(c)—"to all states by Sept. 30, 2021." Compl., Ex.2, R.1-2, PageID#22. In other words, the Census Bureau has granted itself (and so the Secretary) an extension of six months in which to meet the March 31 deadline that §141(c) imposes.

The Secretary's plan is illegal, and neither the Census Bureau nor the Secretary could plausibly contend otherwise. Indeed, the Bureau has not even gestured at a legal justification, offering instead a practical one: "COVID-19 delayed census operations significantly." Compl., Ex.1, R.1-1, PageID#19. Surely it is true that the pandemic has made the statutory deadlines harder to meet. That, however, is legally irrelevant. Section 141 creates no hardship exception. Indeed, the law contains no exception at all, and instead says that the redistricting data must be disseminated "*in any event*" within a year. §141(c). "The statute says what it says—perhaps better put here, does not say what it does not say." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018). And because the statute does not say that the mandatory deadlines can be ignored in the event of a pandemic or other unforeseen difficulties, the Secretary and the Bureau must adhere to those deadlines even in the midst of this pandemic.

2. The February 12 Decision violates the Administrative Procedure Act.

The Administrative Procedure Act, commonly known as the APA, requires courts to set aside "final agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The February 12 Decision is a "final agency action" that may be challenged under the APA. Because the Decision is not in accordance with law and arbitrary and capricious, it is invalid under the APA. The APA thus provides a second, independent basis—the first being the Court's inherent equitable authority—for setting aside the February 12 Decision and enjoining its enforcement.

a. The February 12 Decision is a "final agency action." The APA allows judicial review of "final agency action[s]." 5 U.S.C. §704. "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, the action must "determine rights and obligations of a party or cause legal consequences." *Id.* (internal citations omitted); *accord Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 495–96 (6th Cir. 2014). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that

will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). "An agency action is not final if it 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" *Jama*, 760 F.3d at 496. This is an inherently "pragmatic" inquiry; finality is determined with reference to the facts on the ground. *Hawkes*, 136 S. Ct. at 1815.

The February 12 Decision is final. *First*, it reflects the "consummation of the agency's decisionmaking process" on the question whether the agency will provide the States with the data to which they are entitled by the March 31, 2021 deadline. *Berry*, 832 F. 3d at 633. The agency expressly declared that it has "been able to *finalize* a schedule for the redistricting data." Compl., Ex.1, R.1-1, PageID#19. It further announced what that finalized schedule entails: "The U.S. Census Bureau … will deliver the [§141(c)] redistricting data to all states by Sept. 30, 2021." Compl., Ex.2, R.1-2, PageID#22. That is not a tentative conclusion or a warning that data *may be* delayed beyond the March 31, 2021 due date; it is a final determination that the release *will be* delayed.

Second, the February 12 Decision, by settling on a delayed release of the data and a commitment not to release the data by March 31, "cause[s] legal consequences." *Berry*, 832 F. 3d at 633. Specifically, the February 12 Decision guaran-

tees that the Secretary will breach her duty to meet the March 31 deadline that §141(c) imposes. That consequence affects not only the Secretary, but also the States, because the delay ensures that the federal government will violate the States' right, under §141(c), to receive redistricting data before March 31, 2021. The failure to give the States the data they are entitled to by the date they are entitled to it will have real-world effects. The Census Bureau itself acknowledged "the difficulties that this delayed delivery of the redistricting data will cause some states." Compl., Ex.1, R.1-1, PageID#19. Thus, this is not a case in which the harm to the State depends "on the contingency of future administrative action.'" *Jama*, 760 F.3d at 496 (quotation omitted). To the contrary, the February 12 Decision establishes *with certainty* that the States will be denied their right to receive redistricting data by March 31.

The February 12 Decision is precisely the sort of decision the Sixth Circuit has held constitutes final agency action. In *Berry*, for example, this Court held that the Department of Labor took a "final agency action" when it formally declined to reopen a claim under the Energy Employees Occupational Illness Program Act. The decision was "final," this Court held, because it was non-tentative and definitively established that the aggrieved party would not obtain compensation to which he claimed entitlement. *Berry*, 832 F.3d at 633–34. The same logic supports a fi-

nality finding here, where the February 12 Decision definitively establishes that the States will not get the data to which they are entitled before the date by which they are entitled to it.

b. The February 12 Decision is arbitrary and capricious or otherwise not in accordance with law. For two separate reasons, the February 12 Decision violates the APA.

First, it is contrary to law. Again, the APA requires that courts "hold unlawful and set aside [an] agency action" if the action is "arbitrary, capricious, an abuse of discretion or *otherwise not in accordance with law*." 5 U.S.C. §706(2)(A) (emphasis added). So when an agency takes an action that is "inconsistent with the statutory mandate," that action violates the APA. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1350 (6th Cir. 1994) (quotation omitted); *see also Wall v. United States EPA*, 265 F.3d 426, 435 (6th Cir. 2001). For the reasons already discussed, the February 12 Decision is contrary to law: it commits the Secretary and the Census Bureau to violating the Census Act's mandatory March 31, 2021 deadline for sharing redistricting data with the States.

Second, the February 12 Decision is arbitrary and capricious because it was made without adequate consideration of many concerns bearing on the decision whether to comply with the deadline. An agency action is arbitrary and capricious

if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agencies must, among other things, "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

The defendants failed to satisfy these requirements. First, the Bureau did not consider and rationally respond to the problems its tardiness created. *See State Farm*, 463 U.S. at 43. The agency acknowledged a very serious problem with any delay: "Some states have statutory or even state constitutional deadlines and processes that they will have to address due to this delay." Compl., Ex.1, R.1-1, PageID#19. But the agency apparently failed to consider an obvious option for avoiding, or at least mitigating, that problem: releasing data as it becomes available, giving priority to States with early and inflexible deadlines, instead of releasing all the data to every State at once. The Bureau acknowledged that it *used to* use rolling releases, when it explained that this year, "*[d]ifferent from previous censuses*, the Census Bureau will deliver the data for all states at once, instead of on a flow basis."

Compl., Ex.2, R.1-2, PageID#22 (emphasis added). Yet the Bureau gave no good reason for departing from that practice. It claimed that its "single national delivery" would ensure "that the Census Bureau can provide accurate, high quality, and fit-for-use data in the least total amount of time to all states." Compl., Ex.1, R.1-1, PageID#19. But this "least total time" metric does not in any way address the difficulty posed by different States needing data at different times. Given the Census Bureau's express acknowledgment of unique state needs, the Census Bureau should have considered prioritizing delivery to States with early and inflexible deadlines. *Cf. State Farm*, 463 U.S. at 51; *Regents*, 140 S. Ct. at 1912. There is no indication it did so.

3. If the February 12 Decision is not subject to APA review, it is nonetheless *ultra vires* and must be enjoined.

The federal courts' inherent equitable authority empowers them to enjoin *ultra vires* actions that are otherwise immune from judicial review. Thus, even if the Court concludes that the February 12 Decision is not subject to APA review—if, for example, it concludes that the Decision does not qualify as "final agency action"—Ohio is nonetheless likely to win relief from the Bureau's *ultra vires* decision to postpone until September the release of redistricting data. In other words, Ohio will likely prevail on the merits *regardless* of whether the APA applies.

The Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" state and federal officials "who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 326–27 (citing *Osborn v. Bank of United States*, 9 Wheat. 738, 838–39 (1824); *Ex parte Young*, 209 U.S. 123, 150–51 (1908); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902)). This power to enjoin unlawful "actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. While Congress may *prohibit* courts from awarding such equitable relief, *id.* at 327–28, Congress need not *confer* the power to award such relief in order for courts to exercise that power: the power is an inherent aspect of the courts' equitable authority, *see, e.g.*, *Am. School of Magnetic Healing*, 187 U.S. at 110; *see also In re Trump*, 928 F.3d 360, 373 (4th Cir. 2019); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 287 (4th Cir. 2018) (*en banc*) (Gregory, J., concurring); *CNSP, Inc. v. City of Santa Fe*, 755 F. App'x 845, 849 (10th Cir. 2019).

This longstanding tradition comports with the "basic presumption of judicial review" for those adversely affected by agency action, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), and the courts of appeals have recognized "judicial review is available when an agency acts ultra vires," *Aid Ass'n for Lutherans v. U.S. Postal*

Serv., 321 F.3d 1166, 1173, (D.C. Cir. 2003); *see also, e.g.*, *Shalom Pentecostal Church v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 168 (3rd Cir. 2015). Federal administrative agencies, as bodies of the executive branch, have only the power to act as expressly provided by Congress. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) ("[F]or an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." (quoting *New York v. FERC*, 535 U.S. 1, 18 (2002)). Actions that exceed that authority are properly enjoined.

As already explained above, the February 12 Decision violates the Census Act. It thus commits the Bureau and the Secretary to unlawfully ignoring the mandatory deadline that §141(c) imposes. Because Congress has not foreclosed the courts from awarding injunctions to ensure compliance with the Census Act, courts retain their equitable power to do so.

B. Ohio will be irreparably harmed without an injunction.

The State has also demonstrated that it will be irreparably harmed absent an injunction forbidding the Secretary from delaying the release of redistricting data until September 30, because the delay will prevent the State from carrying out the redistricting process in the constitutionally preferred manner. Again, the federal government harms the States, irreparably, when it prevents them from effectuating

state law. *See King*, 133 S. Ct. at 3. (Roberts, C.J., in chambers); *Abbott*, 138 S. Ct. at 2324; *Thompson*, 959 F.3d at 812. As already discussed above, the February 12 Decision, by delaying the release of redistricting data beyond the point at which the State might use it, causes irreparable harm. *See above* 20–22

What is more, the harm to the public's trust in the redistricting process and Ohio's informational injury, *see above* 22–24, are both irreparable too: if the information is not timely released, Ohio will have no choice but to conduct redistricting with alternative data, and there will be no mechanism for undoing whatever public-trust or informational injuries result.

C. Enjoining the February 12 Decision will not cause substantial harm to others.

An injunction here will not cause substantial harm to others. True, the defendants might have to work a harder or spend a more to meet whatever deadline is imposed. But "injuries, however substantial, in terms of money, time and energy necessarily expended in compliance with an injunction are not enough" to defeat a request for injunctive relief. *United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (quotation omitted). And any risk can be mitigated (perhaps eliminated) by tailoring an injunction to require the release of Ohio's data (not every other State's) at a time early enough for the State to use, but not so early that it disrupts the census process.

Regardless, *even if* the Secretary or someone else might sustain some legally cognizable harm from an injunction, that would mean only that this case is one "in which irreparable harm will befall one side or the other of the dispute no matter what." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (citing *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991)). In those situations, the possibility that others might be harmed by one party being made to do what the law requires of it does not militate against issuance of an injunction. *See id.*

D. Enjoining the February 12 Decision will serve the public interest.

Finally, Ohio demonstrated that the public interest favors an injunction. The "public interest lies in a correct application of the" law, and "upon the will of the people … being effected in accordance with [the] law." *Coal. to Defend Affirmative Action*, 473 F.3d at 252. Federal law requires the Secretary to timely submit population tabulations, and the will of Ohioans with regard to legislative redistricting cannot be effectuated in the primary method set out by state law unless this Court vacates the District Court's judgment.

CONCLUSION

The Court should reverse the judgment of the District Court, and remand for either an assessment of the merits or the formulation of a proper remedy for the defendants' illegal actions.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MAY DAVIS
KYSER BLAKELY
Deputy Solicitors General
BRIDGET C. COONTZ
Section Chief, Constitutional Offices
JULIE M. PFEIFFER
Assistant Section Chief, Constitutional Offices
30 East Broad Street, 17th Floor
614-466-8980
614-466-5087; fax
benjamin.flowers@ohioattorneygeneral.gov

Counsel for the State of Ohio

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 principal brief and contains 11,317 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.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, this corrected 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.

I further certify that I will serve a copy of this brief by email upon counsel for the defendants:

Stephen Ehrlich
U.S. Department of Justice
stephen.ehrlich@usdoj.gov

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

DESIGNATION OF DISTRICT COURT RECORD

Plaintiff-Appellant, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***State of Ohio v. Gina Raimondo, et al.*, 3:21-cv-64**

Date Filed	R. No.; PageID#	Document Description
2/25/2021	R.1; 1–25	Complaint
2/25/2021	R.6; 30–67	Motion for Preliminary Injunction
3/12/2021	R.11; 84–157	Response to Motion for Preliminary Injunction
3/14/2021	R.15; 250–76	Reply in Support of Motion for Preliminary Injunction
3/24/2021	R.26; 377–95	Entry and Order Denying Plaintiff's Motion for Preliminary Injunction
3/24/2021	R.27; 396	Judgement Entry
3/24/2021	R.28; 397–99	Notice of Appeal