STATE OF MICHIGAN
IN THE SUPREME COURT

In re Independent Citizens Redistricting Commission for State Legislative and Congressional District's duty to redraw districts by November 1, 2021,

Supreme Court No. _____

Expedited consideration requested under MCR 7.311(E). Relief requested as soon as is practicable but no later than August 1, 2021.

_____/

PETITIONERS MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION AND SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN SUPPORT OF PETITION FOR DIRECTORY RELIEF

EXHIBIT LIST

A. State of Ohio v Raimondo, et al
B. March 23, 2021 Resolution and Minutes
C. April 15, 2021 Resolution and Minutes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STATE OF OHIO, Plaintiff, v. GINA RAIMONDO, in her official capacity as Secretary of Commerce,* *et al.*, Defendants.	Case No. 3:21-cv-00064-TMR District Judge Thomas M. Rose

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION AND WRIT OF MANDAMUS

* Gina Raimondo was recently confirmed as the Secretary of Commerce and has been automatically substituted for Wynn Coggins, the former Acting Secretary of Commerce, under Federal Rule of Civil Procedure 25(d).

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Ohio fails to carry its burden of showing "that [it] has 'suffered an injury in fact,' the injury is 'traceable' to the defendant's action, and a favorable decision likely will redress the harm." *Turaani v. Wray*, --- F.3d. ---, 2021 WL 631473, at *1 (6th Cir. Feb. 18, 2021) (citing *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 462 (6th Cir. 2019)); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020).

A. Ohio's purported injury is not redressable because it is impossible for the Census Bureau to produce redistricting data by March 31. 13

Ohio's purported injury is not redressable by the Court because it is impossible for the Census Bureau to produce the redistricting data Ohio wants by the March 31 statutory deadline. An injury is redressable only "if a judicial decree can provide 'prospective relief' that will 'remove the harm.'" *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). "[A] court may not require an agency to render performance that is impossible." *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017). Indeed, "[i]t has long been settled that a federal court has no authority to . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). The Court cannot "order a party to jump higher, run faster, or lift more than she is physically capable." *Am. Hosp. Ass'n*, 867 F.3d at 167–68.

B. Ohio has not established injury in fact or traceability. 7

Ohio admits it does not need the Census Bureau's data to redistrict. Compl. ¶¶ 2, 31. Indeed, Ohio's constitution contemplates ways in which redistricting can be accomplished in the absence of census data. *See* Ohio Const., art. XI, §3(A); art. XIX, §2(A)(2); *see also* art. XIX, §§1(D), (E). The absence of census data thus does not impede the state from implementing its constitutional scheme or otherwise impinge on its sovereign interests in effectuating its law. Without a concrete, cognizable harm, Ohio is left claiming a purely procedural injury—*i.e.* the frustration of its expectation that the Census Bureau will follow the timelines prescribed in 13 U.S.C. § 141(c). And Courts routinely find such procedural injuries insufficient for Article III

standing. *See, e.g.*, *Huff*, 923 F.3d at 465–66; *Lyshe v. Levy*, 854 F.3d 855, 860 (6th Cir. 2017). For similar reasons, Ohio cannot establish traceability. No stricture of the federal government requires States to use decennial census data in redistricting, so long as the redistricting complies with the Constitution and the Voting Rights Act. *See Burns v. Richardson*, 384 U.S. 73, 91 (1966). So any purported redistricting harm is traceable to Ohio's independent decisions about redistricting, not "the challenged action of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

II. Ohio has not proven that it is entitled to a preliminary injunction. 15

Ohio is not entitled to the "extraordinary and drastic remedy" of a preliminary injunction, which "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019).

A. Ohio is unlikely to succeed on the merits of its claims. 15

1. Ohio's Claim Under the Court's "Inherent Equitable Authority" Is Not Likely to Succeed. 16

"[L]egal remedies to enforce federal statutes must stem from the legislatively enacted statute, not from court-created equitable enforcement actions." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Ohio's attempt to pursue a claim "in equity" fails for at least three reasons. *First*, Congress has already provided an express mechanism for plaintiffs to challenge federal agency action (and inaction) through the Administrative Procedure Act, and Ohio cannot sidestep that framework. *Second*, any equitable jurisdiction is limited to relief that "was traditionally accorded by courts of equity," *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), and does not include the relief Ohio seeks here. *Finally*, it would be inequitable to "require an agency to render performance that is impossible." *Am. Hosp. Ass'n*, 867 F.3d at 167.

2. Ohio's APA Challenge To The February 12 Press Release Is Not Likely To Succeed. 19

Ohio's APA claims focus exclusively on a February 12 Press Release and related blog post. PI Mot. at 14. But the Sixth Circuit has recognized that final agency action occurs when the Secretary reports the final redistricting numbers. *See City of Detroit v. Sec'y of Commerce*, 4 F.3d 1367, 1377 n.6 (6th Cir. 1993). So the February 12 Press Release is not final agency action reviewable under the APA. The February

12 Press Release does not constitute final agency action for three independent reasons. *First*, it does not constitute a consummation of the decisionmaking process. *Second*, it did not change any legal rights or have any legal consequence. *Finally*, Ohio's challenge fails the final-agency-action inquiry because it is a "broad programmatic attack" on the Census Bureau's operations, not a "circumscribed, discrete agency action[]." *Id.* at 61–62. In all events, even assuming that the February 12 Press Release could be considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," all the Court could do at final judgment is "set [it] aside" and "remand [it] to the agency for additional investigation." 5 U.S.C. § 706(2); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

B. Ohio will suffer no harm, much less irreparable harm. 23

Ohio cannot obtain an injunction without establishing that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[A]lthough the extent of an injury may be balanced against other factors, the existence of an irreparable injury is mandatory." *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). And because a preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies," *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007), Ohio's burden to show irreparable harm is necessarily higher than what is required to establish standing. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Yet Ohio fails this test for all the same reasons it fails to establish standing: the State cannot show that it will suffer any injury *at all*.

C. Defendants and the public would be harmed by an injunction..... 25

The harm to the government and to the public from an injunction would be great and immediate. An injunction would be largely, if not wholly, impossible to implement because the Census Bureau simply lacks the ability to produce the redistricting data on the timeline Ohio wants. An order requiring the Census Bureau to nonetheless attempt to do so would yet again disrupt census operations, reduce the time for data quality checks, and make it even more difficult for the Census Bureau to complete its work. The harm from such a disruption would reverberate to other states and the public at large. If the Census Bureau were required to prioritize Ohio's data, it may well have to delay delivery of other states' data until past September 30, 2021. Such a delay would disrupt those other States' redistricting plans—presumably leading those States to suffer the same kinds of harms Ohio alleges in this lawsuit.

III. Mandamus relief is unavailable. 27

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 491 (6th Cir. 2011) (in-ternal quotation and alteration marks omitted). And "[e]ven when the legal requirements for mandamus jurisdiction have been satisfied, however, a court may grant relief only when it finds compelling equitable grounds." *Lovitky v. Trump*, 949 F.3d 753, 759 (D.C. Cir. 2020) (internal quotation marks omitted). Ohio is not entitled to mandamus relief for two independent reasons. Initially, Ohio has not demonstrated a clear, mandatory duty that would afford it with a clear right to relief because "it is anything but clear that Congress intended the deadline[] at issue to be mandatory rather than directory." *Friends of Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297, 1300 (N.D. Fla. 2001); *see also Robertson v. Attorney General of U.S.*, 957 F. Supp. 1035, 1037 (N.D. Ill. 1997). Ohio is also not entitled to mandamus relief because, again, the relief it seeks is impossible to provide. "[T]he writ of mandamus will not issue to compel the performance of that which cannot legally be accomplished." *Am. Hosp. Ass'n*, 867 F.3d at 167. "[P]ossibility is a necessary and antecedent condition for the writ's issuance." *Id.* at 169 (collecting sources); *accord* 52 Am. Jur. 2d § 24; 55 C.J.S. Mandamus § 19.

CONCLUSION 30

INTRODUCTION

For more than a decade, the U.S. Census Bureau—working under the Secretary of Commerce—has meticulously researched, tested, and planned the most advanced decennial census in history, all with the goal of counting every resident of the United States once, only once, and in the right place. This 15.6-billion-dollar endeavor culminated in the constitutionally mandated headcount conducted last year, which will apportion Members of the House of Representatives among the States and guide billions more in federal funds for the next ten years. But the COVID-19 pandemic, hurricanes, wildfires, civil unrest, litigation, and data-processing issues that unavoidably arise when compiling statistics for approximately 330 million people have all regrettably delayed the final census results.

Ohio—like many other States—is understandably frustrated with that delay, especially because it will not receive census-based redistricting data by the statutory deadline of March 31, 2021. *See* 13 U.S.C. § 141(c). But Ohio fails to satisfy the most basic requirement for invoking this Court's powers: it does not have standing to bring this lawsuit. Most fundamentally, a favorable ruling would not meaningfully redress any harm Ohio might allege because "[p]roducing redistricting data by, or even close to, the statutory deadline of March 31, 2021 is not possible under any scenario." Whitehorne Decl. ¶ 12. Nothing Ohio could argue, and nothing the Court could order, will change that reality. Nor has Ohio carried its burden of establishing that it will suffer a concrete injury from a delay in redistricting data or that any injury is traceable to the Census Bureau's actions, as opposed to Ohio's choices about the schedule for conducting its redistricting and elections with no flexibility to adjust for a delay in issuance of the census data during the COVID-19 pandemic (as well any decision to use census data under such circumstances).

Ohio is also unlikely to succeed on the merits of its preliminary-injunction and mandamus arguments. The Court has no inherent equitable authority to conjure a novel

cause of action that was not traditionally accorded by courts of equity. And even if it did, the Court should decline to do so here because it is impossible for the Census Bureau to provide redistricting data by March 31. For similar reasons, the Court should not issue a writ of mandamus to interfere with data-processing operations that are "dependent upon technological complexities and developments that are peculiarly within" the Census Bureau's expertise and impossible to complete by the statutory deadline. *Friends of Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297, 1301 (N.D. Fla. 2001). And Ohio's Administrative Procedure Act claims fare no better. The February 12, 2021 Press Release that Ohio seeks to challenge was a purely informational snapshot of the Census Bureau's timeline for producing redistricting data; it was not a "final agency action" subject to APA review.

Finally, the Court should reject Ohio's claim that it will be irreparably harmed because its state legislators may need to legislate in accordance with the state's constitution to select another source of data for redistricting—or by public debates that such legislation may spur. Public engagement is a virtue, not a fault, of the democratic process; it cannot be said to impair any kind of state interest, much less do so irreparably. On the other hand, granting Ohio relief would gravely harm Defendants and the country. Requiring the Census Bureau to prioritize Ohio's data would not only upend the Census Bureau's carefully calibrated operations, but could well delay delivery of *other* States' data, causing further nationwide disruptions. Whitehorn Decl. ¶¶ 24–28. There is no reason for the Court to venture into that thicket. Congress may soon moot these issues by extending the current statutory deadlines. And, even if it doesn't, States like Ohio are fully capable of remedying their self-imposed redistricting constraints. Many States have already done so without rushing to court and demanding the impossible. This Court should not order the production of redistricting data that does not exist by a statutory deadline that is impossible to meet.

BACKGROUND

In order to apportion Members of the House of Representatives among the States, the Constitution requires an "actual Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." U.S. Const. art. I, § 2, cl. 3; amend. XIV § 2. But the "population count derived from the census" goes beyond apportioning representatives; it is also used "to allocate federal funds to the States and to draw electoral districts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019) (citation omitted). So it is no surprise that the decennial census is considered "one of the most critical constitutional functions our Federal Government performs." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997) ("1998 Appropriations Act"). To ensure the census's integrity, "[t]he Framers assigned the task of enumeration to the federal government to make the apportionment count as objective as possible and to avoid the possibility of corruption by state politics." *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 357 (D. Md. 2019) (citation omitted). Within the federal government, Congress has "virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (quoting U.S. Const. art. I, § 2, cl. 3). And through the Census Act, Congress has largely delegated its census authority to the Secretary of Commerce, who is assisted by the Census Bureau. *Id.*; 13 U.S.C. § 141(a); 13 U.S.C. §§ 2, 4.

As Congress has recognized, "the decennial enumeration of the population is a complex and vast undertaking." 1998 Appropriations Act, § 209(a)(8), 111 Stat. at 2481 (1997). The 2020 Census is the paragon. It was the culmination of an estimated $15.6 billion and over a decade of "planning, research, design, development, and execution" by thousands of Census Bureau employees to count approximately 330 million people across 3.8 million square miles. Thieme Decl. ¶¶ 4–5. This "massive undertaking" consisted of "35 operations using 52 separate systems" and a "master schedule, which has

over 27,000 separate lines of census activities." *Id.* ¶ 4. Even before the statutory census day of April 1, 2020, the Census Bureau used satellite imagery and in-person inspections to establish a Master Address File containing every address in the country. *Id.* ¶¶ 8–11; 13 U.S.C. § 141(a). As census day drew near, households across the nation received an invitation by mail to complete the census, accompanied by a massive 700-million-dollar campaign to encourage participation in the constitutional survey. *Id.* ¶¶ 12–18. If a household did not respond online, by phone, or by mail, the Census Bureau sent up to five additional mailings. *Id.* ¶ 16. And if a household still did not respond—as occurred for about 33% of the population—the Census Bureau attempted to enumerate them in person. *Id.* ¶¶ 18–28.

But the COVID-19 pandemic intervened. While the original plan was for the Census Bureau to begin in-person operations (called Nonresponse Followup or NRFU) in May 2020, it was forced to suspend those operations for months. *Id.* ¶ 30. By the time the Census Bureau entered the field in earnest three months later, it did so during a perfect storm of natural disasters and civil unrest. *Id.* ¶ 33. "Devastating hurricanes in the Gulf Coast area . . . limited and slowed the Census Bureau's ability to conduct NRFU operations." *Id.* In "large areas of the West Coast, field operations were hampered by conflagrations that caused health alerts due to fire and smoke." *Id.* And "in cities across the country," civil unrest made the already-difficult enumeration even harder. *Id.*

Making matters worse, the Secretary and the Census Bureau were under a statutory directive to report the census results to the President by December 31, 2020 so that he could timely submit them to Congress for reapportionment of the House. *See* 13 U.S.C. § 141(b); 2 U.S.C. § 2a. And although the Executive had asked for an extension of these statutory deadlines, Congress did not oblige. *Id.* ¶ 34. So the Census Bureau again adjusted its operations in an attempt to meet the statutory deadlines. *Id.* ¶ 35. But that adjustment led to the intervention of another Branch: the Judiciary. After a court-ordered preliminary injunction forced the Census Bureau to remain in the field, an emergency

Supreme Court ruling stayed that injunction and allowed the Census Bureau to conclude field operations in mid-October 2020, having resolved 99.9% of all housing units in the process. *See Ross v. Nat'l Urb. League*, 141 S. Ct. 18 (2020); Thieme Decl. ¶ 35.

But collecting responses through completed questionnaires and in-person field work is not the end of the story—the Census Bureau must then "summarize the individual and household data that [it] collect[ed] into usable, high-quality tabulations." Thieme Decl. ¶ 36. Although creating such tabulations may sound easy, it's not. The Census Bureau must integrate data from different enumeration methods used across the country, identify any issues or inconsistencies that arise, rectify them, and produce tabulations that will guide the country for the next ten years, all without compromising its statutory mandate to maintain the confidentiality of census responses. 13 U.S.C. § 9; Thieme Decl. ¶¶ 56-62 (describing how administrative records are incorporated and data is reconciled to produce the Census Unedited File); *id.* ¶¶ 63-67 (describing how the federally affiliated overseas population is incorporated into the data to produce apportionment numbers); *id.* ¶¶ 68-72 (describing the iterative process for compiling detailed information such as race, ethnicity, and age to produce the Census Edited File); *id.* ¶¶ 74-77 (describing the process for applying the Census Bureua's data privacy protection method); *id.* ¶¶ 78-81 (describing the process for generating usable data files).

Even using "computer processing systems" with "the latest hardware, database, and processing technology available," and working "with all possible dispatch," the Census Bureau was not able to meet its December 31, 2020 statutory deadline for reporting apportionment numbers. Thieme Decl. ¶ 37. Due to the difficulties encountered during data collection and issues that arose during the processing phase, the Census Bureau projects that it will not complete apportionment counts until April 30, 2021. *Id.* ¶ 40. Another court and other parties have even relied upon Defendants' representation that "the Census Bureau will not under any circumstances report the results of the 2020 Census . . .

before April 16, 2021." *Nat'l Urb. League v. Raimondo*, No. 20-cv-05799, ECF No. 465 & 467 (N.D. Cal. Feb. 3, 2020).

The delay in apportionment also means the Secretary and the Census Bureau will miss the statutory deadline (March 31, 2021) to submit census-based redistricting data to the States. 13 U.S.C. § 141(c); Thieme Decl. ¶¶ 40–41. This was not a secret. In a February 12, 2021 Press Release, the Census Bureau explained that "it will deliver the [ ] redistricting data to all states by Sept. 30, 2021" because "COVID-19-related delays and prioritizing the delivery of the apportionment results delayed the Census Bureau's original plan to deliver the redistricting data to the states by March 31, 2021." *Census Bureau Statement on Redistricting Data Timeline*, U.S. Census Bureau (Feb. 12, 2021), available here.

That announcement was not for the Census Bureau's benefit, but for States that use census-based redistricting data to draw their congressional or state election districts. While no federal law requires the use of census data for this purpose, the data is generally utilized as the gold standard, including by the Department of Justice, which uses such data for enforcement of the Voting Rights Act. Whitehorne Decl. ¶ 4. That's why States generally use census data for redistricting. And many of those States make up the 27 States that are bound by their own laws to redistrict in 2021. *See 2020 Census Delays and the Impact on Redistricting*, National Conference of State Legislatures (last visited March 12, 2021), available here. That has led some States under self-imposed redistricting pressure to find workable solutions. In New Jersey, for example, voters approved a constitutional amendment that allowed the State to use previous district maps until the new maps are in effect for the 2023 elections. *See* Whitehorne Decl. ¶¶ 7–8; N.J. Const. art. III, § 3, ¶ 4; *2020 Census Delays and the Impact on Redistricting*, National Conference of State Legislatures (last visited March 12, 2021), available here. And in California, the state legislature sought and obtained at least a four-month delay of the redistricting deadlines from the California Supreme Court. *Legislature of the State of Cal. v. Padilla*, 469 P.3d 405, 413 (Cal. 2020); Whitehorne Decl. ¶¶ 7–8. These States—and many others—gathered information

from the Census Bureau and found a way to remedy their own redistricting issues. Whitehorne Decl. ¶¶ 7–8.

Ohio is not one of those States. Rather than communicating with the Census Bureau or finding its own solution, the State ran to court. *See generally* Compl. ¶¶ 1–61, ECF No. 1. And through its preliminary-injunction motion, Ohio now demands redistricting data that does not exist by a statutory deadline that is impossible to meet. Whitehorne Decl. ¶¶ 12–14. Defendants oppose that motion.

ARGUMENT

I. OHIO LACKS STANDING.

This Court cannot entertain the merits of Ohio's claims until it assures itself that it has authority to do so. Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To protect the vital, but limited all the same, role of the Judiciary in our system of government, the Constitution makes standing an indispensable ingredient of a judicial dispute." *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 462 (6th Cir. 2019). To have standing, "a plaintiff must show that he has 'suffered an injury in fact,' the injury is 'traceable' to the defendant's action, and a favorable decision likely will redress the harm." *Turaani v. Wray*, --- F.3d. ---, 2021 WL 631473, at *1 (6th Cir. Feb. 18, 2021) (quoting *Spokeo*, 136 S. Ct. at 1547); *see also Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020). As the party invoking this Court's jurisdiction, Ohio bears the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. It has not.

A. Ohio's purported injury is not redressable because it is impossible for the Census Bureau to produce redistricting data by March 31.

An injury is redressable only "if a judicial decree can provide 'prospective relief' that will 'remove the harm.'" *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). But a judicial decree is only the means to an end: "At the end of the rainbow lies not a judgment, but some action (or cessation of action)

by the defendant that the judgment produces." *Id.* (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). In other words, "[r]edress is sought *through* the court, but *from* the defendant," and "[t]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Id.* (quoting *Hewitt*, 482 U.S. at 761).

Here, Ohio seeks an advisory opinion that cannot redress their claimed injury. *See Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015) (explaining that "the relief the plaintiff is seeking must provide redress for the injury"); *Brown v. Berhndt*, 12-cv-24-KGB, 2013 WL 1497784, at *5 (E.D. Ark. Apr. 10, 2013) (no standing where "injunctive relief [wa]s impossible"). That's because it is now impossible for the Census Bureau to meet the March 31 statutory deadline for providing census-based redistricting data. As the Census Bureau's long-time head of redistricting explains in his sworn declaration, "producing redistricting data by, or even close to, the statutory deadline of March 31, 2021 is not possible under any scenario, and the Census Bureau would be unable to comply with any such order from the Court." Whitehorne Decl. ¶ 12. "[T]he Census Bureau must complete a series of interim steps prior to delivering the redistricting data," and "[e]ach of these interim steps, in order, is required to move to the next." *Id.* ¶¶ 13–14. Those steps will likely not be completed until September 30, 2021. *Id.* ¶¶ 14–15.

Ohio's purported injury is doubly unredressable when it comes to redistricting for congressional (as opposed to state) elections. In order to draw congressional districts, Ohio must first know the number of Representatives it will have in Congress to know how many districts to draw. 2 U.S.C. § 2c. But the Census Bureau will not finish, and neither the Secretary nor the President will be able to report, the apportionment of Representatives until sometime after the March 31 deadline for redistricting data. *See* Thieme Decl. ¶¶ 40–41. And, at that point, apportionment will be entirely in Congress's hands to accept or reject. *See* 2 U.S.C. § 2a(b) (commanding that apportionment only occurs

"under [2 U.S.C. § 2a] or subsequent statute"). So even if the Court ordered all the relief Ohio seeks in this lawsuit—redistricting data by March 31—Ohio would be no closer to drawing congressional districts on April 1. In such circumstances, redressability (and standing) are lacking. *See Leifert v. Strach*, 404 F. Supp. 3d 973, 982 (M.D.N.C. 2019) (no redressability where "[i]t is not merely speculative, but rather impossible, for the requested relief to remedy the alleged injury"); *Vaduva v. City of Xenia*, 2018 WL 4207100, at *4 (S.D. Ohio Sept. 4, 2018) (Rose, J.) (finding a lack of redressability where plaintiff's requested relief "would be of no consequence"), *aff'd* 780 F. App'x 331 (6th Cir. 2019).

Put simply, Ohio seeks the impossible. But "a court may not require an agency to render performance that is impossible." *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017). Indeed, "[i]t has long been settled that a federal court has no authority . . . to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). The Court should therefore reject Ohio's request for an advisory opinion based on the hypothetical world in which the Census Bureau could provide census-based redistricting data by March 31. The Court cannot "order a party to jump higher, run faster, or lift more than she is physically capable." *Am. Hosp. Ass'n*, 867 F.3d at 167–68; Whithorne Decl. ¶ 12 (explaining that "it would be a physical impossibility" to provide redistricting data by March 31).

B. Ohio has not established injury in fact or traceability.

Ohio also lacks standing because it has not established injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). An injury need not be tangible to be concrete: "intangible injuries premised on statutory violations in some instances may satisfy Article III's injury-in-fact requirement." *Huff*, 923 F.3d at 464. But bare assertion of "a statutory violation in and of itself

is insufficient." *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017). A litigant is not concretely injured and "standing is not met simply because a statute creates a legal obligation" that goes unfulfilled. *Id.* at 859-60 (collecting cases). To the contrary, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S.Ct., at 1549; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing"). And that "concrete injury" must be "plausibly and clearly allege[d]." *Thole v. U.S. Bank N.A*, 140 S. Ct. 1615, 1620–21 (2020).

Here, Ohio has certainly alleged a statutory, procedural violation. The State claims that the Census Bureau's plan to deliver redistricting data by September 30, 2021 is contrary to the deadlines established in 13 U.S.C. § 141(c). Compl. ¶¶ 1-2. But what harm does Ohio suffer from the delay? By Ohio's own admission, the State does not actually *need* the Census Bureau's data to redistrict. *Id.* ¶¶ 2, 31. Ohio's constitution contemplates ways in which redistricting can be accomplished in the absence of census data. *See* Ohio Const., art. XI, §3(A); art. XIX, §2(A)(2). In particular, the relevant provisions of Ohio's constitution explicitly provide that redistricting shall be based on "the federal decennial census or, *if the federal decennial census is unavailable, another basis* as directed by the general assembly." Ohio Const., art. XIX, § 2(A)(2) (congressional redistricting) (emphasis added); art. XI, §3(A) (state redistricting provision, using similar language); *see also* art. XIX, §§1(D), (E) (providing that "congressional district plan adopted under this division shall be drawn using the federal decennial census data *or other data* on which the previous redistricting was based" (emphasis added)). Notably, none of the elaborate procedures or timelines that the Ohio constitution prescribes for redistricting are affected by the data source that is chosen. *See generally* Ohio Const., art. XIX, §§ 1-3 (congressional redistricting); art. XI, §§ 1-8 (state redistricting); *see also* Compl. ¶¶ 26–31 (describing the process). The "bipartisan, transparent redistricting process," Compl. ¶ 26, that Ohio's voters selected proceeds regardless of which data source is used.

Contrary to Ohio's contention, Compl. ¶ 37, the absence of census data thus does not impede the state from implementing its constitutional scheme or otherwise impinge on its sovereign interests in effectuating its law. *See* PI Mot. at 20-21. Unlike the cases Ohio cites, *e.g.*, *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), no law is being frustrated or rendered invalid by the delay in census data. Nor is there any imposition on Ohio's ability or power "to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). To the contrary, Ohio will be able to follow its state constitutional procedures and conduct its redistricting regardless of when the Census Bureau delivers its data because the state constitution *explicitly contemplates* that census data might be "unavailable"—and provides a mechanism for that contingency. Ohio Const., art. XIX, § 2(A)(2).

To be sure, Ohio contends that the use of census data is "preferred," and that a delay of that data will leave the state no other choice but to use "alternative data sources" that are "a second-best option." Compl. ¶¶ 2, 35. And it is indeed true that, as a general matter, the use of census data for redistricting is good policy—even if it is not explicitly required by any federal statute. The Census Bureau goes to great lengths to ensure that its data is accurate, and various entities, including the Department of Justice's Civil Rights Division, rely on census data to enforce the Voting Rights Act. Whitehorne Decl. XXX.

But Ohio has made *no* allegations along these lines. The State does not, for example, allege that census data is superior to any available alternatives; nor does it contend that the use of census data will result in better districts or enable it to better comply with federal law. *See* Compl. ¶¶ 1-2, 38; PI Mot. at 22. And that is fatal. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 312 (6th Cir. 2009) (because plaintiff "is the master of the complaint," he must "take responsibility for the allegations included in the complaint"). Alleging a preference untethered from real-world effects is insufficient. *See, e.g.*, *Lujan*, 504 U.S. at 566 ("Standing is not an ingenious academic exercise in the conceivable," but ra-

ther requires "a factual showing of perceptible harm" (internal quotes and citation omitted)). To satisfy the injury-in-fact requirement, Ohio must connect the frustration of its purported preference to some "concrete harm[.]" *Spokeo*, 136 S.Ct. at 1549.

The closest Ohio comes to alleging some basis for preferring census data is its bald assertion that the use of non-census data will precipitate "high-stakes debates regarding which data to use and . . . fan[] partisan flames when one data source is eventually chosen, no matter how precise and reliable." Compl. ¶¶ 38, 39. In its motion, Ohio builds on this theory by suggesting that "debates over which data to use are sure to sow distrust in the entire redistricting process." PI Mot. at 22. But these allegations are far afield from any concrete injury. For one thing, predicting what debates will transpire—and what those debates might sow—is an inherently speculative exercise. An alleged future injury must be "*certainly impending*" and cannot rely on a "highly attenuated chain of possibilities"; '"[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) and *Lujan*, 504 U.S. at 565 n.2) (emphasis added); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ("[I]njury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (citations omitted)).

Even more fundamentally, it is hard to see how "debates" and passions surrounding a legislative function could be a cognizable form of harm. Public engagement is a virtue—not a fault—of the democratic process, and it cannot be said to impair any kind of state interest. As the Supreme Court has observed in other contexts, "there is *no* significant state or public interest in curtailing debate and discussion [related to] a ballot measure." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299 (1981) (emphasis added); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270. (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly

sharp attacks on government and public officials."). The possibility of political debate has, to Defendants' knowledge, never been successfully used as a basis for a state to establish standing. *See, e.g.*, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (identifying state interests which can give rise to standing); *W. Va. ex rel. Morrisey v. United States Dep't of Health & Human Servs.*, 827 F.3d 81, 84 (D.C. Cir. 2016) (rejecting as cognizable "injury [that] is nothing more than the political discomfort in having the responsibility to determine whether to enforce [a legal provision] . . . and thereby annoying some [state] citizens[.]"). Indeed, "no court has ever recognized political discomfort as an injury-in-fact." *Morrisey*, 827 F.3d at 84. Strong feelings and the possibility of lawsuits are simply not Article III injuries. PI Mot. at 22; *see generally Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). To find otherwise would read concreteness out of Article III's injury-in-fact test. *See generally Huff*, 923 F.3d at 462 ("An injury in fact must be real, not abstract, actual, not theoretical, concrete, not amorphous." (citing *Spokeo*, 136 S.Ct. at 1548)).

Having failed to establish a concrete, cognizable harm, Ohio is left claiming a purely procedural injury—*i.e.* the frustration of its expectation that the Census Bureau will follow the timelines prescribed in 13 U.S.C. § 141(c). *See* Compl. ¶¶ 32, 33, 34. Courts routinely find such procedural injuries insufficient for Article III standing. *See, e.g.*, *Huff*, 923 F.3d at 465–66 (finding no standing where plaintiff could not establish negative consequence from statutory violation); *Lyshe*, 854 F.3d at 860 ("[S]tanding is not met simply because a statute creates a legal obligation and allows a private right of action for failing to fulfil this obligation."). As various Circuits have recently recognized, "an asserted informational injury that causes no adverse effects cannot satisfy Article III." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020) (citing *Frank v. Autovest, LLC*, 961 F.3d 1185, 1188-89 (D.C. Cir. 2020); *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 338 (7th Cir. 2019); *Huff*, 923 F.3d at 467; *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d

337, 346–47 (4th Cir. 2017)). That is particularly true here because the Census Act does not provide a cause of action to enforce the statutory deadline for redistricting data, *see* Argument Section II.A.1., *supra*, meaning that Ohio can't rely on a congressional definition of "injuries and . . . chains of causation" to carry part of its burden. *Spokeo*, 136 S. Ct. at 1549 (internal quotes and citation omitted); *see generally Dreher*, 856 F.3d at 346 ("[I]t would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury.").

Ohio fails to establish traceability for similar reasons. "Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "involves choices about the nature of representation with which [courts] have been shown no constitutionally founded reason to interfere," *Burns v. Richardson*, 384 U.S. 73, 92 (1966). While the use of census data is the gold standard and is certainly the general practice, no stricture of the *federal government* requires States to use decennial census data in redistricting, so long as the redistricting complies with the Constitution and the Voting Right Act. *See id.* at 91 ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."); *e.g.*, *Burns*, 384 U.S. at 92–97 (State may draw districts based on voter-registration data). So any purported injury Ohio may suffer is "fairly . . . trace[able]" to Ohio's independent decision to create a state redistricting timeline with no flexibility to accommodate the COVID-19 pandemic that has resulted in the unique challenges in completing the census this year (as well any decision to use census data under such circumstances), not "the challenged action of the defendant." *Lujan*, 504 U.S. at 560. [1]

[1] To be sure, the Supreme Court has stated that an intrastate redistricting injury was traceable to a Census Bureau decision because some States required the use of federal

In very practical terms, Ohio has not established that it cannot actually accomplish its redistricting in the time that remains between the unavoidably delayed results of the 2020 Census and its 2022 elections. The Census Bureau intends to release the decennial redistricting data for the entire country by the end of September 2021. There is every reason believe that Ohio can in fact redraw its districts by the time of its legislative and congressional primary and general elections in 2022 using census data released in September. The fact that the census data is not available to Ohio on the schedule it prefers, simply cannot harm the State if it can still redistrict by the time of its next elections. And if Ohio does not believe it can meet the schedule for redistricting using the census data once it is released, there are alternatives it can pursue until the State can enact a plan.

Because Ohio has not proven any concrete, cognizable harm that is traceable to the Census Bureau's actions, the State fails to establish that "a federal court [should have] business entertaining [its] lawsuit." *Huff*, 923 F.3d at 465.

II. OHIO HAS NOT PROVEN THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION.

Even if Ohio had standing to bring this case, it is not entitled to the "extraordinary and drastic remedy" of a preliminary injunction, which "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (internal quotation marks omitted). "Four factors determine when a court should grant a preliminary injunction: (1) whether the party moving for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest." *D.T. v. Sumner*

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decennial census population numbers for their state legislative redistricting. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332–34 (1999). But that discussion was dicta because the Court had already found Article III standing based on the expected loss of a congressional representative, which involved no independent choices of state governments. *See id.* at 331–32. And, unlike the States in *House of Representatives*, Ohio is not *required* to use decennial census data for redistricting. As discussed above, Ohio law fully contemplates using other redistricting data if census-based redistricting data is "unavailable." *See* Argument Section I.A., *supra*.

Cty. Sch., 942 F.3d 324, 326 (6th Cir. 2019). Where, as here, the government is the defendant, the last two factors merge. *See Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). And while the factors may be balanced to an extent, "the existence of an irreparable injury is mandatory" and "even the strongest showing on the other three factors cannot eliminate the irreparable harm requirement." *D.T.*, 942 F.3d at 326–27 (internal quotation marks omitted). Here, Ohio has not established any of the preliminary-injunction factors, and therefore fails to carry its "burden of proving that the circumstances clearly demand" an injunction. *Walther v. Fla. Tile, Inc.*, 3:17-cv-257, 2017 WL 5634246, at *2 (S.D. Ohio Aug. 28, 2017) (Rose, J.) (citation omitted).

A. Ohio is unlikely to succeed on the merits of its claims.

1. Ohio's Claim Under the Court's "Inherent Equitable Authority" Is Not Likely to Succeed.

While Ohio alleges that Defendants "violate[d] the Census Act," Compl. ¶ 45, the Census Act does not provide a cause of action to pursue equitable relief against the federal government. Recognizing this, Ohio asserts a cause of action under what it calls the Court's "inherent equitable authority," relying on *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015). *See* PI Mot. at 12–13. But Ohio's reliance on *Armstrong* is misplaced, and it cannot invoke a cause of action "in equity" here for several reasons.

In *Armstrong*, the Court observed in *dictum* 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. But the Court in *Armstrong* also recognized that this "judge-made remedy" is available only in "a proper case." *Armstrong*, 575 U.S. at 327. And nothing in *Armstrong* suggests that a plaintiff may simply bring a claim "in equity" whenever it lacks an express cause of action to pursue an alleged statutory violation. As the Sixth Circuit has held, "legal remedies to enforce federal statutes must stem from the legislatively enacted statute, not from court-created equitable

enforcement actions." *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 903 (6th Cir. 2014). Here, Ohio's attempt to pursue a claim "in equity" fails for at least three reasons.

First, allowing Ohio to pursue its challenge "in equity" would be inappropriate in these circumstances because Congress has already provided an express mechanism for plaintiffs to challenge federal agency action (and inaction) through the Administrative Procedure Act. "[G]iven the vast number of federal laws, government agencies, and potential legal disputes," Congress enacted the APA to "provide . . . a single uniform method for review of agency action." *Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989) (Breyer, J.). Thus, it is the APA that "sets forth the procedures by which federal agencies are accountable to the public to their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). While Ohio is not likely to succeed on its APA claim for the reasons explained below, *see* Argument Section II.A.2, *infra*, Ohio cannot avoid the APA's express requirements by recasting its claim as arising under the Court's "inherent equitable authority." *See Armstrong*, 575 U.S. at 327 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). Were it otherwise, a plaintiff seeking relief against the United States could always style a claim as one "in equity," and the APA's limitations on judicial review in such cases would be meaningless.[2]

Second, the Supreme Court has explained that a court's equitable jurisdiction is limited to relief that "was traditionally accorded by courts of equity." *Grupo Mexicano de*

[2] Two of the cases on which Ohio relies, by contrast, involved challenges to action taken by states or localities, where APA review was unavailable. *See Barry v. Lyon*, No. 13-cv-13185, 2015 WL 12838828, at *4 (E.D. Mich. June 5, 2015); *CNSP, Inc. v. City of Santa Fe*, 755 F. App'x 845, 849 (10th Cir. 2019). And while a divided panel of the Ninth Circuit recently concluded that plaintiffs had an equitable cause of action notwithstanding the availability of APA review in *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019), the Supreme Court stayed that decision because the government "ha[d] made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review" of the agency action at issue. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999). Equitable suits against the government traditionally have been recognized where a party seeks *preemptively to assert a defense* that would otherwise be available to it in an anticipated enforcement action by the government. *See, e.g.*, *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 487, 491 n.2 (2010); *Mich. Corr. Org.*, 774 F.3d at 906 (the "classical[]" type of implied equitable suit "permit[s] potential defendants in legal actions to raise in equity a defense available at law"). Here, by contrast, Ohio seeks to create an affirmative equitable cause of action even though it is not subject to or threatened with any enforcement proceeding.

Third, even if Ohio could assert a claim under the Court's "inherent equitable authority," the Court should not exercise its equitable discretion to compel the Census Bureau to produce redistricting data by March 31. As explained further below, Ohio has not demonstrated that Congress intended the March 31 deadline to be mandatory. *See* Argument Section III., *infra*. And as explained above, it is simply not possible for the Census Bureau to provide the redistricting data that Plaintiff requests by March 31, 2021, and it is well established that a court may not exercise its equitable powers to "require an agency to render performance that is impossible." *Am. Hosp. Ass'n*, 867 F.3d at 167. "*Ought* implies *can*," and thus it is elementary that "in order for law . . . to command the performance of an act, that act must be possible to perform." *Id.* at 161. In exercising its equitable authority, "a court must be mindful of the 'budgetary commitments and manpower demands that are required,' and thus avoid imposing deadlines that 'are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs.'" *Cmty. In-Power & Dev. Ass'n, Inc. v. Pruitt*, 304 F. Supp. 3d 212, 220 (D.D.C. 2018) (quoting *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974)). Here, due to a global pandemic and other extraordinary circumstances beyond its control, it is simply not possible for the Census Bureau to provide redistricting data by March 31.

Nor may Ohio avoid the APA's limitations by styling its claim as challenging "*ultra vires*" agency action. *See* PI Mot. 13. Again, Ohio's challenge does not fit within the