

**No. 21-3294**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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STATE OF OHIO,

*Plaintiff-Appellant,*

—v.—

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the  
Southern District of Ohio  
(No. 3:21-cv-00064)

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**BRIEF FOR NATIONAL REDISTRICTING FOUNDATION AS AMICUS  
CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6th Cir. R. 26.1, Amicus National Redistricting Foundation states that it has no parent corporation and does not issue stock.

*/s/ David M. Zionts*

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## **INTEREST OF AMICUS CURIAE<sup>1</sup>**

The National Redistricting Foundation (“NRF”) is a nationwide, non-profit organization founded in 2017, whose mission is to prevent and reverse invidious gerrymandering, by promoting the public’s awareness of reapportionment and redistricting processes and engaging in legal action as appropriate to ensure that states’ redistricting and electoral processes result in fair representation. NRF has supported a variety of litigation related to redistricting, election administration, and the Census, including as amicus curiae. Bringing national attention to the importance of a fair redistricting process in 2021 is central to NRF’s mission, and elevating the need for a fair and accurate Census in 2020 is a foundational piece of NRF’s work. Ensuring a deliberate, well-ordered process for the Census Bureau’s release of accurate, high-quality redistricting data is of great importance to NRF.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The 2020 Census was conducted in the midst of extraordinary disruption caused by a global pandemic. After significant delay and uncertainty, the U.S. Census Bureau has now committed to delivering redistricting data to all states by September 30, 2021. It is critical to the integrity of the redistricting process in all 50 states that this plan be accomplished without further disruption.

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<sup>1</sup> All parties have given consent to the filing of this amicus brief. This brief was not authored in whole or in part by counsel for any party to this appeal, nor was it funded by such party or any party’s counsel. No person other than the amicus curiae, its members, or its counsel contributed money intended to fund this brief.

NRF takes no position on the standing question raised in this appeal, but strongly opposes Ohio’s request that it be awarded a preliminary injunction. Ohio has not established that the injunction it requests would advance—rather than threaten—all parties’ shared goal of releasing accurate redistricting data as soon as that can be responsibly accomplished. NRF strongly supports the goal of “prevent[ing] partisan gerrymandering,” (Ohio Br. 3), and wants Ohio’s new redistricting process to succeed. But compelling the Census Bureau to rush out potentially inaccurate data is not the way to achieve fairness in redistricting. Permitting such interference would disrupt the Bureau’s operations and undermine the processes that are intended to ensure the most accurate redistricting data—not just for Ohio but for all 50 states.

The injunction that Ohio seeks should be denied. First, there appears to be nothing left to this case: all Ohio now seeks is an order requiring the Census Bureau to release data as early as practicable, but the Bureau says it is already doing exactly that, and Ohio has proffered no evidence suggesting that the Bureau could go faster. Second, an order requiring the Bureau to rush out redistricting data would be contrary to the public interest. The redistricting data that the Census Bureau releases will have critical implications over the next decade, not just for the fairness of legislative districts but also for questions of federal funding. Compromising the quality of that data by judicial imposition of an artificial timetable on the agency,

particularly at this late date in the process, would harm the very public interests that Ohio purports to be vindicating.

### **ARGUMENT**

#### **I. Ohio Fails To Justify The Extraordinary Remedy Of A Preliminary Injunction To Deliver Results “At The Earliest Practicable Date” Without A Showing That The Agency Is Not Already Working To Do So.**

Ohio does not dispute that “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). And the State appears to have withdrawn its request for an order requiring release of data by a certain date; the March 31 date that Ohio previously requested has passed, and it does not articulate a new date by which it demands release of the data. (*See* Ohio Br. 15-16). Instead, Ohio in this appeal focuses on an “alternative request for an injunction ordering the data’s release at the earliest practicable date.” (*Id.* at 16). The Census Bureau has already indicated, however, that it is proceeding to do exactly that, and in fact recently “reviewed [its] timeline to identify any opportunities to shorten the processing schedule.” Press Release, United States Census Bureau, U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File (Mar. 15, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html>.

In other words, at least at this point in the litigation, all Ohio seeks is an injunction requiring the Bureau to do what it says it is already doing. And Ohio has proffered no evidence showing that the Bureau is not in fact working to release accurate data at the earliest practicable date. Under the record and circumstances of this case, there is no apparent justification for putting the Census Bureau under judicial supervision as it works toward a common goal shared by all. And as explained further below, producing accurate redistricting data is both complex and vitally important, and an injunction regulating that process could inject further complexity and delay into an already challenging process. At a minimum, if the Court were to conclude that Ohio has standing on the basis of allegations that the Bureau could act more quickly, it should not accept Ohio's request to decide that it is entitled to a preliminary injunction rather than remand, because a court cannot grant a preliminary injunction by "accept[ing] [a party's] untested representations as true if they are disputed." *Charette v. Town of Oyster Bay*, 159 F.3d 749, 755-57 (2d Cir. 1998).

## **II. The Preliminary Injunction That Ohio Requests Would Be Contrary To The Public Interest.**

Ohio's brief focuses mostly on the statutory deadline for the release of redistricting, which all agree that—as a consequence of the need to complete the Census in the middle of a pandemic—has not been met. But "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat'l*

*Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It is “an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017). And the Court “must . . . consider the overall public interest[.]” *id.*, paying “particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (citations omitted). Ohio, however, barely discusses the impact of its requested relief on the public interest.

In a single conclusory sentence, Ohio argues that an injunction “will serve the public interest” because “[f]ederal law requires the Secretary to timely submit population tabulations, and because 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.” (Ohio Br. 50). There is certainly a public interest in compliance with law, and in some cases that interest can support a preliminary injunction. But here, where the Bureau has represented that it is *impossible* to release high-quality data any faster than it is currently doing, the public interest cannot support compelling the Bureau to rush out what would likely become an inferior product. Moreover, Ohio never addresses the impact of its requested relief on the remaining 49 states’ redistricting initiatives. In short, Ohio has failed to carry its burden to show why it is entitled to “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) (citation omitted).

**A. An order requiring the Census Bureau to deliver redistricting data more quickly would undermine the public’s interest in ensuring an equitable redistricting process.**

If the Court entered an order forcing the Census Bureau to rush out redistricting data, the public would be greatly harmed. Accurate, state-level population data, such as the data sourced from the Census Bureau, is necessary to draw state and local legislative districts that comply with the constitutional principle of “one person, one vote” and safeguard the right to equal representation. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (citation omitted); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *see Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (explaining use of census data “to achieve population equality” in drawing legislative districts). In addition, census data directly affects the ability to enforce the Voting Rights Act. *See Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574-75 (2019); (*see also* Affidavit of James Whitehorne (“Whitehorne Aff.”), R 11-2, Page ID # 148). And multiple sources of federal funding to local governments are distributed based on census data. *Dep’t of Com.*, 139 S. Ct. at 2565. Given these weighty public interests, Congress has codified the Bureau’s “duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the

apportionment.” *Id.* at 2568-69 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992)) (Stevens, J., concurring in part and concurring in judgment).

The Bureau has represented that its current schedule reflects the minimum amount of time it needs to complete processing and verifying the data to prepare it for release to the states. As explained by the Assistant Director for Decennial Census Systems and Contracts, Michael Thieme, the Bureau must complete a series of post-data collection processing and review steps prior to delivering the redistricting data. (See Affidavit of Michael Thieme (“Thieme Aff.”), R. 11-1, Page ID ## 132-143); (see also Whitehorne Aff., R. 11-2, Page ID # 151). Ohio contends it has “plausible bases” to doubt the Bureau’s declarants’ “credibility[,]” (Ohio Br. 35), but even if true, Ohio certainly has not put forward evidence *establishing* that the Bureau can in fact go faster than it is going. *Cf. Am. Hosp. Ass’n*, 867 F.3d at 181 (court cannot order agency to take action it claims is impossible without making a “finding of possibility”).

Moreover, the Bureau’s schedule does not contemplate prioritizing one state over another, and this reprioritization would cause the Bureau to recreate its entire working schedule, which is impractical at this late stage. (See Whitehorne Aff., R. 11-2, Page ID # 156). A single national release also promotes accuracy overall because any error discovered in one state during the data review phase may only become apparent when viewed in conjunction with other states. (See *id.*, Page ID

## 154-155). Specifically, such a finding may trigger additional reviews to understand whether the error is systemic and requires reprocessing of all data or whether it only affects the state in which it was found. (*See id.*). Depriving the Bureau the opportunity to ensure uniformity in the results of the data review phase would threaten the fairness of the data analysis process generally. (*See id.*).

Disrupting the Bureau's procedure for ensuring overall accuracy and reliability of the data poses serious threats to fair redistricting and our underlying system of political representation. Failure to deliver accurate, high-quality census data threatens to subject voters to unconstitutional vote dilution. *See Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 332-34 (1999) (describing how the use of inaccurate census data in intrastate redistricting causes vote dilution); *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 675-76 (S.D.N.Y. 2019) (noting that "the loss of political representation and the degradation of information" would constitute irreparable harm and that fair apportionment based on accurate census figures is in the public interest), *aff'd in part, rev'd in part, and remanded*, 139 S.Ct. 2551, 2576 (2019). It would also risk depriving localities of their fair share of federal funding. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) ("[I]t is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data"). Furthermore, because census data affects the redistricting process and resulting elections, as well as the

distribution of federal funds, for the next ten years, the harm to the public cannot be remedied until at least 2031. And the representational harms and loss of federal funding that some voters and localities may suffer over the next decade would be irreversible.

**B. Requiring the Census Bureau to prioritize Ohio’s data could cause additional nationwide delays.**

Requiring the Bureau to prioritize Ohio’s data would cause harm to others by delaying delivery of data to states throughout the nation. *See Gun Owners of Am., Inc. v. Garland*, --- F.3d ----, 2021 WL 1138111, at \*21 (6th Cir. Mar. 25, 2021) (“The final two factors—assessing the harm to others and weighing the public interest—merge when the Government is the opposing party.”) (citations omitted). The COVID-19 pandemic, natural disasters, and civil unrest forced the Bureau to extend its planned timeline for the completion of its field operations. (Thieme Aff., R. 11-1, Page ID ## 130-132). Not long after concluding field operations in October 2020, the Bureau encountered data anomalies and pledged to “thoroughly correct and address all issues and anomalies as a part of its mission to deliver accurate 2020 Census data products as close to the statutory deadline as possible.” Press Release, United States Census Bureau, Update on 2020 Census Data Processing (Dec. 2, 2020), <https://www.census.gov/newsroom/press-releases/2020/update-2020-data-processing.html>. In February 2021, the Bureau announced its final plan to deliver redistricting data to all 50 states by September 30, 2021. Press Release, United

States Census Bureau, Census Bureau Statement on Redistricting Data Timeline (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>. Despite the significant delays caused by the pandemic, the Bureau has worked “to curtail, eliminate, re-order, or run processing operations in parallel to deliver census results as early as possible.” (Thieme Aff., R 11-1, Page ID # 133).

The Bureau’s plan for delivering redistricting data has several, carefully-planned interim steps. These steps are interrelated, such that changing one would impact each subsequent step. For example, the Bureau is scheduled to complete its incorporation of the Enumeration of Transitory Locations data and any late-added addresses by April 19, 2021; this step is necessary in order to complete the Census Edited File by June 23, 2021. (*See* Whitehorne Aff., R. 11-2, Page ID # 151). Completion of the Census Edited File is, in turn, necessary to generate the Microdata Detail File, which is scheduled for completion by July 17, 2021. (*See id.*). The review procedure and subsequent production, loading, and testing of the dissemination materials cannot be accomplished before these earlier steps are completed. (*See id.*).

Ohio, in asking for “priority,” (Ohio Br. 45), wants to jump the line. Requiring the Bureau to provide Ohio with its data sooner than other states would threaten the integrity and success of the overall process and working schedule. Not

only that, but prioritizing one state over the other 49 would divert the use of resources and systems needed to ensure there are no further delays to the national release of data. Although the Bureau's current schedule builds in time to account for multiple reviews upon discovering anomalies in the data, the current schedule does not factor in the time it would take to reprioritize one state's data ahead of the other 49 states, (*see, generally*, Whitehorne Aff., R. 11-2, Page ID # 156), which may cause additional delay by as much as several weeks. (*Id.*). Indeed, Ohio effectively admits the harm that its approach would cause, asking the Court to “tailor[] an injunction” that would “require the release of Ohio's data . . . at a time early enough for the State to use, but not so early that it disrupts the census process”—without explaining to the Court how in practical terms it is supposed to strike such a delicate balance in its order. (Ohio Br. 49).

In essence, if the Bureau were forced to prioritize Ohio's data, it would have to complete each interim step for Ohio, and then repeat each step for the remaining states. As explained by the Chief of the Census Redistricting and Voting Rights Data Office at the U.S. Census Bureau, James Whitehorne, the Bureau “sought to establish an achievable schedule for redistricting data that built in sufficient time for review and revision, and produce[] redistricting data that States could use with confidence.” (Whitehorne Aff., R. 11-2, Page ID # 152). In an effort to keep the delays in delivering redistricting data as short as possible, the Bureau determined

that a single national release would enable it to compress several production and review activities as well as ensure delivery of the data with finality, which could save additional time. (*See id.*, R. 11-2, Page ID # 154).

Finally, allowing one state to jump to the front of the line would open the door to a host of litigation and a race among the remaining 49 states to seek court orders requiring the Bureau to prioritize their own state's data. (*Cf.* Ohio Br. 23). One state has already done so, *see, e.g., Alabama, et al., v. Raimondo, et al.*, Case No. 21-cv-0211, Complaint, R. 1 (M.D. Ala.), and if more courts intrude on the Bureau's process, more states will likely seek such court intervention to protect their own interests. This is hardly a recipe for ensuring that the Census Bureau finishes the vitally important work of producing accurate redistricting data as quickly and responsibly as it possibly can.

**CONCLUSION**

This Court should reject Ohio's request that it be awarded injunctive relief.

Dated: April 12, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 2,898 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word using a proportionally spaced typeface, 14-point Times New Roman.

Dated: April 12, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on April 12, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 12, 2021

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