

No. 21-3294
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

APPELLANT’S EMERGENCY MOTION TO EXPEDITE

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INTRODUCTION

The State of Ohio moves under Sixth Circuit Rule 27(f) to expedite this appeal so that it may be resolved before **April 23, 2021**. If the Court expedites this appeal, Ohio proposes the following schedule, which would allow Ohio to reap the rewards of a successful appeal while still leaving time for oral argument (if the Court wants it), decision, and further appellate review.

- Appellant's Brief: Thursday, March 25.
- Appellees' Brief: Thursday, April 8
- Reply Brief: Tuesday, April 13

BACKGROUND

Ohio filed its opening merits brief at the same time that it filed this motion to expedite. That brief lays out the relevant background, and any reader familiar with it can skip this (largely identical) summary. For the sake of completeness, however, Ohio describes the underlying facts here.

1. The Ohio Constitution creates two redistricting processes, one for drawing 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 group must adopt a map for state legislative districts 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.*, §1(C).

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 mem-

bers 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).

2. 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).

Census population data should, by statute, be available. The Census Act provides that “tabulations of population of each State ... shall ... be completed, reported, and transmitted to each respective State within one year after the decennial census date.” 13 U.S.C. §141(c). The “decennial census date” is April 1, *see* §141(a), meaning the Secretary must provide redistricting data to the States no later than March 31, 2021.

On February 12, however, the Census Bureau abandoned its plan to comply with the law. It announced that it will deliver redistricting data to all states by September 30, 2021, not by the statutory deadline. (The State refers to this decision relaying the data's release as the "February 12 Decision.") Compl., Ex. 2, R.1-2, PageID#22. As a result, Ohio's Redistricting Commission, which must finalize state legislative maps by September 1, will be unable to use census data. And the General Assembly will be unable to use that data in meeting its September 30 deadline for congressional maps.

3. 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 by failing to release the data before March 31, 2021, and that the defendants promulgated the February 12 Decision in violation of the Administrative Procedure Act. The State of Ohio asked the Court to enjoin the February 12 Decision and to require the Secretary to produce Ohio's redistricting data either: (1) by March 31; or (2) at a later time sufficiently far in advance of the September 1 deadline to permit its use by the State in meeting the September 1 and September 30 redistricting deadlines.

On March 24, the District Court declined to reach the merits of Ohio's challenge, determining that the State of Ohio lacked standing. It dismissed the case,

too. Order, R.26, PageID#394–95. Ohio filed a notice of appeal the same day, and its merits brief the day after.

ARGUMENT

As the foregoing shows, Ohio has good cause for seeking an expedited appeal. Ohio brought this suit to obtain redistricting data so that such data could be used by the Ohio Redistricting Commission and the General Assembly in drawing maps. The Ohio Redistricting Commission *must* finalize state legislative maps by September 1. And before doing so, it must share its proposed map with the public and conduct three public hearings. *See* Ohio Const. art. XI, §1(C). None of that can happen overnight. And so Ohio cannot win meaningful relief in this case unless it wins remand to the District Court in time for that court to fashion relief that would enable Ohio to obtain the redistricting data well in advance of the September 1 deadline. That is not possible on an ordinary briefing schedule. Thus, unless Ohio can obtain expedited review, it will be unable to defend its interests in this Court. This Court has previously allowed Ohio to pursue expedited appeals in cases where delay threatened to negate the benefits of a successful appeal. *See* Order, *Mays v. LaRose*, No. 19-4112, Doc. 21-1 (Dec. 11, 2019); Order, *Schmitt v. LaRose*, No. 19-3196, Doc. 23-1 (May 3, 2019). The same concerns support hearing this

case on an expedited basis. That is especially true because, as the State's merits brief shows, the State has strong arguments for reversal.

What is more, both Ohio and the federal government will want the option to seek relief at the Supreme Court should they lose in this case. The United States has already gone to the Supreme Court twice this Term to challenge census-related decisions with which it disagreed. *See Ross v. Nat'l Urban League*, 141 S. Ct. 18 (2020); *Trump v. New York*, 141 S. Ct. 530 (2020). To preserve the parties' ability to obtain Supreme Court relief, and to ensure that they can seek that relief without depriving the District Court of time to fashion relief on remand, it is vital that this Court decide Ohio's appeal on an expedited basis.

This Court has, in the past, denied motions to expedite appeals filed by parties who failed to "proceed[] expeditiously." *Nader v. Land*, 115 F. App'x 804, 805 (6th Cir. 2004). That concern does not apply here, however: Ohio filed its notice of appeal within hours of the District Court's ruling, and it filed its appeal (along with this motion) the next day.

Finally, expedited review will not prejudice the parties. "The appeal focuses" on "issues that have already been briefed below." *Autocam Corp. v. Sebelius*, No. 12-2673, 2012 U.S. App. LEXIS 26736, at *5 (6th Cir. Dec. 28, 2012). The parties will thus have little trouble converting their district-court filings to appellate

briefs. Ohio produced a merits brief in approximately twenty-four hours. The United States Department of Justice can similarly re-articulate its position if given two weeks.

CONCLUSION

The Court should grant the motion to expedite the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a motion and contains 1,400 words. Fed. R. App. P.(d)(2)(A).

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 25, 2021, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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

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/s/ Benjamin M. Flowers
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