No. 21-3294

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,

Plaintiff-Appellant,

v.

GINA RAIMONDO, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division

BRIEF FOR APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Appellant has not requested oral argument. Appellees do not independently request argument but stand ready to present oral argument if the Court believes argument would facilitate its resolution of the appeal.

INTRODUCTION

The COVID-19 pandemic has created unprecedented obstacles to the conduct of the 2020 census, including the suspension of crucial field operations for over three months. In consequence, completion of the 2020 census has extended beyond the statutory timetable for reporting to Congress and to the states. Thus, although the Census Act timetable called for the Census Bureau to provide the President with the results needed to determine congressional reapportionment by December 31, 2020, the Census Bureau now expects that it will provide this data by April 30, 2021. And while the statutory timetable calls for the Bureau to provide the states with the tabulations required for redistricting by March 31, the Bureau will be able to provide that data by September 30, although it will, of course, provide them earlier if the processing encounters fewer obstacles than expected.

The Bureau has been forced to adjust its predictive schedules repeatedly over the last year in response to conditions on the ground, the results obtained during various stages of census operations, and, in some cases, in response to judicial orders. In turn, the Bureau has repeatedly apprised the public and courts of accomplishments to date and projected timetables. The Bureau made one such statement in a February 12, 2021, press release and accompanying blog post which described the schedule for providing apportionment data to Congress and redistricting data to the states.

Shortly thereafter, Ohio filed this suit and sought what it described as a "preliminary injunction" that would require the Bureau to produce redistricting data

by March 31 or as soon thereafter as a court might deem equitable. The government opposed on several grounds, and the district court concluded that the State lacked standing because it would be impossible for the Census Bureau to create and produce the tabulations on the proposed time frame and that its asserted injury was therefore not redressable, and that Ohio's constitution does not require the use of census data.

Ohio's brief provides no basis for a contrary conclusion. The declarations of two Census Bureau officials explain in detail the steps necessary to provide the redistricting data that Ohio requests and the time required to do so. Ohio assails the declarations in general terms, but does not address their comprehensive and specific account of the work that must be completed in order to provide complete and accurate tabulations in which the states and the public can have confidence.

If the Court were to conclude otherwise, however, the State correctly notes that "the Court does not have to go any further—it can simply remand for further proceedings," Br. 37, and, as it at least implicitly recognizes, any other course would be extraordinary. The State suggests, however, that this Court might address its claims in the first instance. Were it to do so, it is clear that the relief Ohio seeks is in no sense preliminary and that it would effectively resolve the suit in the State's favor. It is also plain that the February 12 press release is not final agency action under the Administrative Procedure Act (APA) and that setting it aside would have no impact on the conduct of the census.

The Census Bureau is fully aware of the importance of providing redistricting tabulations to the states, and that 26 States in addition to Ohio have time lines for redistricting that incorporate data produced by the Bureau. The Bureau "has made every attempt to curtail, eliminate, re-order, or run processing operations in parallel to deliver census results as early as possible," Thieme Decl. ¶ 39, R.11.1 PageID# 133, and, having employed "the latest hardware, database, and processing technology available," it is "[ta]king advantage of this processing power and speed," to "work[] with all possible dispatch," *id.* ¶ 37, PageID# 133. No basis exists for concluding otherwise.

STATEMENT OF JURISDICTION

The district court correctly held Ohio had not demonstrated standing and that it therefore it lacked jurisdiction. *See infra* pp. 15-20. The district court entered final judgment on March 24, 2021. Judgment, R.27, PageID# 396. Ohio filed a timely notice of appeal. 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. Whether the district court correctly held that Ohio lacks standing to seek an injunction compelling the Secretary of Commerce to release redistricting data by a date certain, where unrefuted declarations establish that there can be no assurance that complete and accurate tabulations can be produced in advance of the current predicted date.

2. Whether, assuming that the Court were to reach the question, Ohio has demonstrated entitlement to an injunction requiring the Census Bureau to produce restricting data by a date certain.

STATEMENT OF THE CASE

A. Statutory Background

The Enumeration Clause of the Constitution requires that an "actual Enumeration shall be made" of the population every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. 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).

In the exercise of that power, Congress has set a series of interlocking deadlines for census operations. The Census Act sets "the first day of April" as "the 'decennial census date,'" 13 U.S.C. § 141(a), and prescribes that "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary [of Commerce] to the President of the United States," *i.e.*, December 31, 2020. 13 U.S.C. § 141(b). After receiving the Secretary's report, the President must calculate "the number of Representatives to which each State would be entitled" and transmit that information to Congress within one week of the first day of the next Congress's first regular session. 2 U.S.C. § 2a(a). Then "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" by March 31, 2021. 13 U.S.C. § 141(c); *see generally Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing sequence triggered by the submission of the Secretary's report).

Aside from this timetable and a few other requirements not relevant here, *e.g.*, 13 U.S.C. § 195 (prohibiting the use of statistical sampling for certain purposes), Congress has given the Secretary "broad authority" to conduct the census. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019); *see Wisconsin*, 517 U.S. at 23 (noting "the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary").

B. The 2020 Census

1. The 2020 decennial census is a multi-phase operation of extraordinary complexity. It is 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, R.11.1, PageID# 122. 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, PageID# 122. In advance of the statutory census day of April 1, 2020, the Bureau used satellite imagery and in-person inspections to establish a Master Address File containing every address in the country. *Id.* ¶¶ 8-11, PageID# 124-125; 13 U.S.C. § 141(a). Prior to

that date, the Bureau contacted households across the nation by mail explaining how to complete census forms by mail or online, and also undertook an extensive campaign to encourage return of the questionnaires. Thieme Decl. ¶¶ 12-18, R.11.1, PageID# 125-127. If a household did not respond online, by phone, or by mail, the Bureau sent up to five additional mailings. *Id.* ¶ 16, PageID# 127.

At that point, the Bureau's operations entered their final two phases: the "Non-Response Followup" and "post processing." During Non-Response Followup, census field staff, known as enumerators, attempt to contact non-responsive addresses up to six times. Thieme Decl. ¶¶ 19-21, R.11.1, PageID# 127-128. Enumerators also gather crucial geographic information that may alter the Master Address File—the Bureau's account of every household in the country—such as changes resulting from construction, demolition, or new uses. *Id.* ¶¶ 43-44, PageID# 134.

In post processing, the Bureau engages in a sequence of data-processing operations designed to create reliable and usable statistics. *See* Thieme Decl. ¶¶ 43-85, R.11.1, PageID# 134-143. As part of these operations, the Bureau must confirm or correct geographic information in the Master Address File. *See id.* ¶¶ 43-44, PageID# 134. Because this address information is central to the census, other data-processing operations cannot take place until the entire universe of addresses nationwide is determined. It is thus necessary to conclude field operations before proceeding with post-processing operations.

2. The Bureau's plan to commence the Non-Response Followup in May was derailed by the COVID-19 pandemic. And, since the onset of the pandemic, the Bureau has responded to changing and unforeseen circumstances in efforts to achieve the most accurate census practicable.

The Non-Response Followup was scheduled to begin in May 2020. To protect the health and safety of both census workers and the public, the Bureau suspended field operations, which recommenced in full only in August. Thieme Decl. ¶¶ 30-31, R.11.1, PageID# 130-131. To reflect the impact of the pandemic, the Secretary announced a new COVID Schedule in April, under which field operations would have continued until October 31, instead of July 31 as originally planned. *Id.* ¶ 34, PageID# 132. Under that schedule, the Secretary's report to the President would be delivered by April 30, 2021, rather than December 31, 2020, and redistricting data would be provided to States by July 31, 2021, rather than March 31. *Id.*

The Secretary also asked Congress to extend the statutory deadlines by 120 days to accommodate that new schedule. Thieme Decl. ¶ 34, R.11.1, PageID# 132. When it became clear that the Bureau could not rely on congressional action, the Bureau announced a new revised schedule with the goal of meeting the Census Act's statutory deadlines. *Id.* ¶ 35, PageID# 132. The District Court for the Northern District of California enjoined the revised schedule, *see National Urban League v. Ross*, 489 F. Supp. 3d 939 (N.D. Cal. 2020), and the Supreme Court stayed the injunction's requirement that field operations extend well beyond the period contemplated by the

plan. *Ross v. National Urban League*, 141 S. Ct. 18 (2020); Thieme Decl. ¶ 35, R.11.1, PageID# 132.

Upon completion of field operations, the Bureau then undertook the challenges of crucial post processing operations that would culminate first in the production of population counts necessary for apportionment and then in the far more detailed and complex tabulations necessary for redistricting. "[S]ummariz[ing] the individual and household data . . . into usable, high-quality tabulations," Thieme Decl. ¶ 36, R.11.1, PageID# 132-133, requires the Bureau to 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, R.11.1, Page ID# 136-137 (describing how administrative records are incorporated and data is reconciled to produce the Census Unedited File); *id.* ¶¶ 63-67, PageID# 137-138 (describing how the federally affiliated overseas population is incorporated into the data to produce apportionment numbers); *id.* ¶¶ 68-72, PageID# 138-139 (describing the iterative process for compiling detailed information such as race, ethnicity, and age to produce the Census Edited File); *id.* ¶¶ 74-77, PageID# 141-142 (describing the process for applying the Bureau's data privacy protection method); *id.* ¶¶ 78-81, PageID# 142 (describing the process for generating usable data files).

Recognizing the unprecedented delays resulting from the COVID-19 pandemic, the Bureau "has made every attempt to curtail, eliminate, re-order, or run processing operations in parallel in order to deliver census results as early as possible." Thieme Decl. ¶ 39, R.11.1, PageID# 133. But even with those adjustments, and even using "computer processing systems" with "the latest hardware, database, and processing technology available," and working "with all possible dispatch," the Bureau was not able to meet its December 31, 2020, statutory deadline for reporting apportionment numbers, *id.* ¶ 37, PageID# 133, and the Bureau projects that it will not complete apportionment counts before April 30, 2021, *id.* ¶ 40, PageID# 133; *see also* Joint Case Management Statement at 3, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Feb. 3, 2020), ECF No. 465 (noting that "the Census Bureau will not under any circumstances report the results of the 2020 Census . . . before April 16, 2021"); Stipulation & Order at 2, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Feb. 3, 2020), ECF No. 467 (same).

The processing steps essential to provide complete and usable redistricting tabulations are linked to the provision of the apportionment data, and it has thus been clear for some time that the Bureau would not provide redistricting data to the states by the March 31, 2021, date in the statutory timetable. 13 U.S.C. § 141(c); Thieme Decl. ¶¶ 40-41, R.11.1 PageID# 133-134.

3. The Bureau provided current information regarding the status of census operations in a February 12, 2021, press release, which explained that the Bureau "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." U.S. Census Bureau, *Census Bureau Statement on Redistricting Data Timeline* (Feb. 12, 2021), https://go.usa.gov/xHgHd. The Bureau published an accompanying blog post that explained those challenges in greater detail, acknowledging "the difficulties that this delayed delivery of the redistricting data will cause some states" but noting that the Bureau had taken steps to provide data "in the least total amount of time to all states" that "meet[s] the quality standards they expect" for the redistricting process. Compl., Exh. 1, R.1.1, PageID# 19.[1]

That announcement was designed, in part, to provide States, which use census-based redistricting data to draw their congressional or state election districts, the opportunity to plan to address the effect of those delays on their redistricting process. Twenty-seven States, including Ohio, have requirements to complete redistricting in 2021. *See* Nat'l Conference of State Legislators, *2020 Census Delays and the Impact on Redistricting* (Apr. 9, 2021), https://www.ncsl.org/research/redistricting/2020-census-

[1] The Bureau has since provided further updates regarding the status of census operations. On March 15, the Bureau announced that it would provide certain data to states by mid to late August to allow them to proceed with redistricting prior to September. U.S. Census Bureau, *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File* (Mar. 15, 2021), https://go.usa.gov/xHbYE. And on March 16, the Bureau posted additional materials on its website to further assist states that wish to receive redistricting data in August. U.S. Census Bureau, *Redistricting Data Program Management* (Mar. 16, 2021) https://go.usa.gov/xHbYH.

delays-and-the-impact-on-redistricting-637261879.aspx. 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, R.11.2, PageID# 148. 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 id.* ¶¶ 7-8, PageID# 148-149; N.J. Const. art. IV, § 3, ¶ 4. 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 v. Padilla*, 469 P.3d 405, 413 (Cal. 2020); Whitehorne Decl. ¶¶ 7-8, R.11.2, PageID# 148-149. 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, R.11.2, PageID# 148-149.

C. Prior Proceedings

On February 25, 2021, Ohio filed a motion seeking a preliminary injunction "requiring the Secretary to fulfill her statutory obligations under the Census Act." Mot. for Preliminary Injunction, R.6, PageID# 48. The Secretary opposed that motion, on several grounds. The Secretary urged, as threshold matter, that Ohio lacked standing to seek the requested injunction because, inter alia, the requested relief was impossible to provide. The Secretary submitted two declarations explaining that

the preliminary injunction Ohio requested would require the Secretary to provide redistricting data that does not exist by a deadline that is impossible to meet. *See* Whitehorne Decl. ¶¶ 12-14, R.11.2, PageID# 150-152; Thieme Decl. ¶¶ 36-40, R.11.1, PageID# 132-133.

On March 24, 2021, the district court denied Ohio's motion for a preliminary injunction and dismissed the case for lack of subject matter jurisdiction. Order, R.26, PageID# 394-395. The court explained that it could not issue an order that would redress the State's claimed injuries because the evidence before the court demonstrated that "it is now impossible for the Census Bureau to meet the March 31" deadline set out in the Census Act. *Id.*, PageID# 387. The court rejected Ohio's suggestion that the Bureau's declarations were "not credible," noting that the declarations are entitled to a presumption of regularity and that Ohio failed to allege "any facts that would overcome this presumption." *Id.*, PageID# 393-394 (quotation marks omitted). The district court alternatively held that Ohio lacks standing because it failed to establish injury-in-fact, noting that the Ohio constitution does not require the State to use Census Bureau data, but instead provides that the State can use alternative data if Census Bureau data is not available. *Id.*, PageID# 389-390.

Ohio filed a timely notice of appeal, Notice of Appeal, R.28, PageID# 397, and then moved this Court to expedite briefing in this appeal on March 25, 2021. This Court granted that motion to expedite briefing on March 26, 2021.

SUMMARY OF ARGUMENT

1. The Census Bureau recognizes the importance of providing the states with the tabulations used in redistricting and has worked—and is continuing to work—with all dispatch to provide complete, accurate, and usable data at the earliest practicable time. The declarations of two Census Bureau officials describe in detail the tasks that remain to be accomplished and the time frames for doing so. Ohio has identified no basis for questioning their highly specific explanations and provides no basis for concluding that the district court erred in holding that no court order can redress the State's asserted injuries. The court also recognized that the census data is not necessary to conduct redistricting under the Ohio constitution. And it further explained that the State's demand to obtain redistricting tabulations by March 31 or as soon as possible thereafter would not remedy any injury resulting from the relative quality of other data permitted under the Ohio constitution. Ohio seeks production not of the most accurate data possible, but instead seeks redistricting data in advance of the Bureau's timetable and without regard to the Bureau's own views of its completeness and accuracy.

2. If the Court were to conclude otherwise, however, "it can simply remand for further proceedings," as the State notes. Br. 37. The State suggests, however, that this Court might address its claim in the first instance and determine its entitlement to an injunction requiring production of redistricting data by "the earliest possible date this Court determines equitable." Br. 11. If the Court were to undertake the

extraordinary step of reviewing the merits of Ohio's claims in the first instance, it is evident that Ohio has not demonstrated an entitlement to the relief it seeks.

As an initial matter, the injunction Ohio seeks is no sense preliminary; it would effectively resolve the suit in the State's favor. To prevail it would thus be necessary to establish entitlement to a final judgment. But the State has failed to satisfy even the less stringent standard of a likelihood of success on the merits. Ohio has framed its case as a challenge to the Census Bureau's February 12 press release, but that press release in no sense constitutes final agency action. The press release was not the consummation of a decisionmaking process, but an update on the progress of census operations. By the same token, setting aside the press release would have no impact on the conduct of the census.

Although the Court has no occasion on this appeal to address the conduct of the Census, we respond briefly below to Ohio's highly generalized attack on the credibility and plausibility of the declarations of two senior Census Officials, which detail the Bureau's extraordinary efforts to address the interlocking complexities entailed in producing complete and usable redistricting data in this uniquely challenging iteration of the census. It is not clear whether the State, at this juncture, urges that a court could properly compel production of redistricting data by a date certain regardless of its quality, but in any event there is no indication in the Census Act that such an order would comport with congressional intent.

Finally, because the relief Ohio seeks is effectively final and not preliminary, it could not properly be awarded even if it had no adverse impact on the public interest and third parties. But the public interest would not be served by compelling release of data that would not merit public confidence. Ohio urges that the concerns set out in the declarations of Census Bureau officials could be resolved by producing Ohio's data in advance of production to any other State. Even apart from other difficulties doing so would create, the State identifies no basis for prioritizing its interests above those of all other states, including the other 26 with redistricting deadlines in 2021.

STANDARD OF REVIEW

This Court reviews a dismissal for lack of standing de novo and denial of a motion for a preliminary injunction for abuse of discretion. *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012).

ARGUMENT

I. The District Court Correctly Held that Ohio Lacks Standing.

Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). 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*, 988 F.3d. 313, 316 (6th Cir. 2021) (quoting *Spokeo*, 136 S. Ct. at 1547); *see also Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020).

"Because redressability is an 'irreducible' component of standing, no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797-801 (2021) (citation and quotation marks omitted) (quoting *Spokeo*, 136 S. Ct. at 1547). An injury is redressable only "if a judicial decree can provide 'prospective relief' that will 'remove the harm'" the plaintiff has identified. *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

1. Ohio asked the district court to issue an injunction requiring that the Census Bureau produce redistricting tabulations by March 31, even though the President had not yet delivered to the House of Representatives the results necessary for apportionment purposes that would determine the number of representatives to which the State is entitled. The court recognized that the relief Ohio sought was impossible.

The State now criticizes the court for not specifically addressing its alternative request that it enjoin the Bureau from "delaying the release of data beyond the earliest possible date this Court determines equitable." Br. 11 (quoting Compl., R.1, PageID# 16). That formulation fundamentally misunderstands what is at issue. The tabulations that the State seeks do not yet exist. As the declarations of two Census Bureau officials explain, and as discussed in detail below, the tabulations required for restricting are far more detailed and complex than the population count required for apportionment, and in preparing those tabulations, the Bureau will also need to take

extensive measures to implement the new, sophisticated measures needed to implement the Bureau's statutory duty to protect the confidentiality of census information.

Ohio does not address the detailed analysis of the work to be done provided by the declarations. Nor does it address the declarations' explanation that "[t]he Census Bureau is processing the data from the 2020 Census with all possible speed and care, consistent with the production of high-quality data products," that "[t]he computer processing systems at Census Headquarters were optimized in partnership with industry leaders to use the latest hardware, database, and processing technology available," and that "[t]aking advantage of this processing power and speed, [the Bureau is] working with all possible dispatch." Thieme Decl. ¶ 37, R11.1, PageID# 133.

Instead, the State mistakenly asserts that the district court could not properly consider the declarations to determine standing. *See* Br. 34. The State disregards the posture of the case. Ohio moved for a preliminary injunction, and the government filed the declarations together with its opposition, properly directing the court to the question of the State's standing to seek the requested relief. It would have been plain error for the court to refuse to consider those declarations. Even at the pleading stage, a district court has authority to consider materials outside of the complaint if the defendant raises a factual challenge to the plaintiff's standing. *See Gentek Bldg. Prods., Inc. v. Sherwin-Williams, Co.*, 491 F.3d 320, 330 (6th Cir. 2007). Where, as here,

the defendant presents evidence that challenges a factual predicate of the plaintiff's standing, "the [district] court can actually weigh evidence to confirm the existence of [that] factual predicate[] for subject-matter jurisdiction." *Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015) (quotation marks omitted). In addition, although Ohio asserts that it "adequately pleaded facts showing redressability," Br. 34, it does not indicate what those facts were and how, in any event, they contradicted the highly specific declarations.

At bottom, the State's argument reduces to the contention that the court could order the Bureau to work "harder" or spend "more." Br. 49. But it neither alleges nor points to any evidence indicating how the Bureau should (or could) be working harder or spending more. Just as a court cannot "order a party to jump higher, run faster, or lift more than she is physically capable," it "may not require an agency to render performance that is impossible." *American Hosp. Ass'n v. Price*, 867 F.3d 160, 167-68 (D.C. Cir. 2017). That is the case here.

2. The district court also recognized that the State has not established a cognizable injury-in-fact from the Census Bureau's delay in providing the data. The State asserts that it is injured because producing the data no later than September 30 will prevent it from meeting the deadlines set by its own constitution. But as the district court explained, "the State does not actually need the Census Bureau's data to redistrict." Order, R.26, PageID# 389. The court noted that "[t]he Ohio Constitution contemplates ways in which redistricting can be accomplished in the

absence of census data" and "explicitly provides 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.'" *Id.* (quoting Ohio Const. art. XIX, § 2(A)(2) (congressional redistricting)). And "[n]one of the elaborate procedures or timelines that the Ohio constitution prescribes for redistricting are affected by the data source that is chosen." *Id.*, PageID# 390. Thus, "[t]he absence of census data . . . does not stop the [S]tate from implementing its constitutional scheme or otherwise impinge on its sovereign interests in effectuating its law." *Id.*

The court also addressed Ohio's assertion that "census data is 'preferred,' and that a delay of that data will leave the [S]tate no other choice but to use 'alternative data sources' that are 'a second-best option[.]'" Order, R.26, PageID# 390 (alteration in original) (quoting Compl. ¶¶ 2, 35, R.1, PageID# 2, 10). In order "[t]o satisfy the injury-in-fact requirement," the court noted, the State must connect "the frustration of its purported preference to some 'concrete harm.'" *Id.*, PageID# 391 (quoting *Spokeo*, 136 S. Ct. at 1549). Ohio, however, has not "allege[d] 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." *Id.*, PageID# 390-391. Thus, Ohio's bare "prefer[ence]" for census data over alternative data sources, Compl. ¶ 2, R.1, PageID# 2, is insufficient to establish that Ohio will suffer a concrete harm if it is required to use those alternative sources.

Moreover, Ohio's alleged injuries are entirely at odds with its request that the court order production of redistricting data by March 31 or, if not by that date, as soon as possible thereafter. Ohio does not seek to obtain the redistricting data in which the Bureau has the greatest confidence, and it has made its demands without regard to accuracy, as epitomized by the State's insistence that, notwithstanding the update on timing provided by the February 12 press release, it should obtain redistricting tabulations by March 31, even before the apportionment figures were provided to the President.

Likewise, the district court correctly declared that "Ohio's claim that Defendant's announcement that providing accurate numbers will take more time 'will undermine the public's confidence in Ohio's redistricting process,' beggars belief." Order, R.26, PageID# 391 (citation omitted). The court emphasized that Ohio's disregard of the goal of accuracy was at odds with its asserted concern to promote public confidence, stating that "[i]t would seem that the remedy Ohio seeks is more likely to reduce public confidence." *Id.*, PageID# 391-392.

In sum, the district court correctly rejected the claim that the requested injunction is necessary to permit Ohio to conduct redistricting on the timetable set out in its constitution. And it correctly held that Ohio cannot demand production of redistricting data without regard to its accuracy and simultaneously insist that it is injured by an inability to use the finished census data in which the public rightly places its confidence.

II. Ohio Is Not Entitled to an Injunction Directing Production of Redistricting on the Basis of Unspecified Standards on an Unspecified Schedule.

As discussed, Ohio lacks standing and the court's order should accordingly be affirmed. If the Court were to conclude otherwise, however, the State correctly notes that "the Court does not have to go any further—it can simply remand for further proceedings." Br. 37.

The State also suggests, however, that this Court might instead resolve "the merits of its request for a preliminary injunction" or "at least . . . the legal question whether Ohio will likely prevail on the merits." Br. 37. The State implicitly recognizes that this would be an extraordinary course of action, but in light of its alternative request, we address its arguments on that score.

A. The State Seeks Final, Not Preliminary, Relief

Although Ohio has styled its request for relief as a motion for a preliminary injunction, the relief it seeks is in no sense preliminary and, if granted, would mark the conclusion of the litigation. "A preliminary injunction is an extraordinary remedy reserved only for cases where it is necessary to preserve the status quo until trial." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 526 (6th Cir. 2017) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)); *accord Louisiana-Pac. Corp. v. James Hardie Bldg. Prods., Inc.,* 928 F.3d 514, 517 (6th Cir. 2019) ("Courts reserve the extraordinary remedy of a preliminary injunction for those cases where it is necessary to preserve the status quo pending a final determination of the merits." (citing *Winter*

v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008))). Similarly, the APA provides that preliminary relief is appropriate only "to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Ohio does not seek relief of this kind. It asks, instead, for an order that would enjoin "the Secretary from delaying the release of the [redistricting] data beyond a date this Court deems equitable and reasonable under all the circumstances." Br. 33 (quoting Mem. in Support of Prelim. Inj., R.6, PageID# 63). Ohio does not contend that such an order would preserve the status quo in advance of a final determination of the merits of its suit, or that such an order would "prevent any violation of [its] rights before the district court enters a final judgment." *Ohio v. U.S. EPA*, 969 F.3d 306, 309 (6th Cir. 2020). Instead, such an order would effectively constitute final relief in Ohio's favor, requiring wholesale changes in the Bureau's operations to meet a target date Ohio cannot identify. *See Findlay Truck Line, Inc. v. Central States, Se. & Sw. Areas Pension Fund*, 726 F.3d 738, 746 n.4 (6th Cir. 2013) (explaining that this Court examines "the 'actual effect'" of an injunction to determine whether it is preliminary or permanent (quoting *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1395 (6th Cir. 1991))).

As discussed below, the State cannot meet even the lower burden of demonstrating a likelihood of success on the merits. But to obtain the order it seeks,

it would be necessary for Ohio to demonstrate that it is legally entitled to that relief, not merely that it might prevail at a later point.

B. The February 12 Press Release is Not Final Agency Action and Setting it Aside Would Not Affect the Conduct of the Census.

The Administrative Procedure Act provides for judicial review of final agency action. Ohio acknowledges (Br. 41) that to be final, the action must mark the "consummation of the agency's decisionmaking process" and "determine rights and obligations of a party or cause legal consequences." *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 633 (6th Cir. 2016); *accord Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted).

The February 12 press release and accompanying blog post challenged by the State satisfy no part of this prescription. The press release noted the obstacles posed by the ongoing pandemic that had already delayed the transmission of census data to the President which was to have occurred by December 31, 2020, and stated that the Bureau's immediate focus was to meet the "constitutional obligation to deliver the state population counts for apportionment" to the President and Congress, which it now expected would take place by April 30. Compl., Exh. 1, R.1.1, PageID# 19. The Bureau further explained that it would deliver the redistricting data to all states by September 30, 2021.

The press release in no way marked the "consummation of the agency's decisionmaking process," much less reflected a final decision "on the question

whether the agency will provide the States with the data" by March 31. Br. 42 (quotation marks omitted). As the preceding discussion makes clear, the Bureau has made countless adjustments in its ongoing efforts to produce the most accurate census practicable in the face of unprecedented obstacles, and the collective effect of those obstacles and corresponding adjustments led to the present timeline for expected completion. The February 12 press release was thus not a decision, but a predictive update—"a snapshot based on past and current experiences." Whitehorne Decl., R.11.2, PageID# 153.[2] The press release had no impact on the conduct of the census and had no bearing on Ohio's demand in this suit that it receive redistricting data by March 31. By the same token, an order to "set aside" the press release pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, would not have provided the State with redistricting data by that date and would, indeed, alter nothing about the post processing operations.

Indeed, the February 12 press release was no more the consummation of the decisionmaking process than the many other updates that the Bureau has provided to inform the public of the progress of its operations in light of changing on-the-ground conditions and results obtained to date. For example, the Bureau informed the public in a January 28 press release that its "current schedule points to April 30" as the date

[2] In fact, the Bureau has since issued further updates regarding the likely timeline for data production. *See* U.S. Census Bureau, *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File*, *supra* n.1.

for completion of apportionment counts.[3] And in early February, prior to the press release challenged here, the Bureau's Acting Director published a blog post explaining the delays in the schedule for apportionment data, stating that processing of the apportionment file had not yet begun and noting the downstream effects those delays would have on the production of redistricting data.[4] The February 12 press release and blog post did not "definitively establish[]" (Br. 44) a course of action any more than did such prior announcements.

The Bureau has also provided a variety of updates in the *National Urban League* litigation in the Northern District of California, and that litigation itself became a factor in the conduct of the census. The *National Urban League* district court enjoined the implementation of a plan that the Bureau hoped would permit timely delivery of apportionment counts, questioning whether the schedule would allow the Bureau to fulfill its responsibilities. The Bureau repeatedly noted that the delays caused by that litigation threatened its ability to produce results on time. *See, e.g.*, Decl. of Albert E. Fontenot, Jr. at 8, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Sept. 22, 2020), ECF No. 196-1 (explaining that an injunction that delayed post processing operations would "seriously jeopardize[]" the Bureau's "ability to meet its statutory deadlines"); Application for Stay at 9, *Ross v. National Urban League*, No. 20A62 (U.S.

[3] U.S. Census Bureau, *Census Bureau Statement on Apportionment Counts* (Jan. 28, 2021), https://go.usa.gov/xHgv9.

[4] Ron Jarmin, *2020 Census Processing Updates*, U.S. Census Bureau (Feb. 2, 2021), https://go.usa.gov/xHgvP.

Oct. 7, 2020) (stating that "every passing day exacerbates the serious risk that the district court's order to continue field operations and delay post processing will make it impossible for the Bureau to comply with the December 31 statutory reporting deadline"); Reply in Support of Application for Stay at 10, *Ross v. National Urban League*, No. 20A62 (U.S. Oct. 10, 2020) (reiterating that "[w]ith every additional passing day, meeting the December 31 deadline [for apportionment figures] becomes increasingly difficult"). By late November, the government explained to the Supreme Court that delays caused by that litigation and the process of addressing anomalies in the data meant that the Bureau was "not currently on pace" to complete apportionment by December 31, though it hoped to produce some data by mid-to-late January. Transcript of Oral Argument at 6:15-7:3, *Trump v. New York*, No. 20-366 (U.S. Nov. 30, 2020).

The California litigation continued after the Supreme Court stayed the district court's order that would have extended the field operations phase of the census by months, with plaintiffs continuing to urge that additional time is required to achieve an accurate census. In mid-January, the Bureau explained in that suit that it did not expect to be able to produce apportionment counts before March 6. *See* Transcript of Proceedings at 6:21-8:16, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Jan. 11, 2021), ECF No. 449 (counsel explaining that the Bureau's expected completion date for apportionment counts was March 6 based on data anomalies and other issues encountered to that point). And in early February, the Bureau agreed to a

stipulated order which provided that "the Census Bureau will not under any circumstances report the results of the 2020 Census to the Secretary of the Department of Commerce, the President, and Congress, before April 16, 2021." Joint Case Management Statement at 3, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Feb. 3, 2020), ECF No. 465; Stipulation & Order at 2, *National Urban League v. Raimondo*, No. 20-cv-05799 (N.D. Cal. Feb. 3, 2020), ECF No. 467. These statements, like the February 12 press release and other public statements, did not announce agency decisions: they reported on the developments of a complex and dynamic operations.

C. The State's Brief Fails to Recognize the Complexity of the Process of Providing Redistricting Data and the Bureau's Concentrated Efforts to Produce that Data at the Earliest Practicable Time

1. This appeal provides no occasion for this Court to review the Census Bureau's development of the tabulations that states use in redistricting, which are described in detail in the declarations of James Whitehorne, Chief of the Census Redistricting and Voting Rights Data Office, and Michael Thieme, Assistant Director for Decennial Census Programs, Systems, and Contracts. Nevertheless, because Ohio assails the credibility and plausibility of the declarations (albeit in highly generalized terms), Br. 34-35, and suggests that complex problems are susceptible to simple solutions, we briefly address the work to be completed.

Although Ohio describes the object of its injunction as if producing redistricting tabulations were a single, unitary, action, the steps involved in the processing to be completed, like those of the census generally, are "expressly . . . tied to one another" and altering any one of those operations "would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019).

The Thieme declaration explains, for example, the distinction between processes necessary to provide apportionment data, now anticipated to take place by April 30, and those necessary to produce redistricting data in usable form to the states. First, while the process for apportionment requires only accurate population count data, the redistricting process requires detailed information about individuals living in the households, including complex processing for necessary race and ethnicity and age information. Thieme Decl. ¶ 69, R.11.1, PageID# 138. "[T]he detailed respondent information needed for this phase can still be conflicting or contradictory and requires further processing with complex editing rules," and "missing data are accounted for using a statistical process called characteristic imputation." *Id.* ¶ 70, PageID# 139. Second, at the next step, the Bureau applies its Census Disclosure Avoidance System, which replaces traditional privacy protections that are no longer adequate in light of the vastly more sophisticated tools used by today's hackers. *Id.* ¶¶ 74-76, PageID# 141. *See* U.S. Census Bureau, *2020 Census*

Data Products: Disclosure Avoidance Modernization.[5] At the third step, the Bureau undertakes the process of transforming largely unusable data into understandable and usable data tables, a process that includes addition of new fields to facilitate filtering and organization by users, for example, adding a "voting age" field that includes records for all people age 18 or over. *Id.* ¶¶ 78-80, PageID# 142.

As the Bureau's declarations explain, whether the Bureau can provide adequate redistricting data prior to September 30 will turn on the nature and extent of the anomalies discovered in these processes and how long it takes to resolve them. To date, some steps have been completed more quickly than expected; the Bureau completed the "Census Unedited File" by March 12, well ahead of the projected date of March 26. *See* Thieme Decl. ¶¶ 56-62, R.11.1, PageID# 136-137. And, if the remaining processes incur fewer impediments than anticipated, redistricting data could be available several weeks earlier than expected. Whitehorne Decl. ¶ 15, R.11.2, PageID# 152. In light of past experience, however, it would be hazardous to offer such assurances. *Id.*

Disregarding the multifarious processes to be completed, Ohio simply suggests that the Census Bureau could overcome these difficulties and "meet whatever deadline is imposed" if it were "to work . . . harder or spend . . . more." Br. 49. General prescriptions of this kind have no application here. The Thieme declaration

[5] https://go.usa.gov/xHgfV (last visited Apr. 12, 2021).

explains that "[t]he Census Bureau is processing the data from the 2020 Census with all possible speed and care, consistent with the production of high-quality data products. The computer processing systems at Census Headquarters were optimized in partnership with industry leaders to use the latest hardware, database, and processing technology available," and "[t]aking advantage of this processing power and speed, we are working with all possible dispatch." Thieme Decl. ¶ 37, R.11.1, PageID# 133. Ohio has offered no basis whatsoever for calling into question the Census Bureau's commitment of time and resources, and it has not explained what type of additional commitment would advance the process described in the declarations.

Ohio is on no firmer ground in asserting that "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." Br. 45. This assertion is difficult to fathom. The Whitehorne declaration discusses this issue at length, noting that the Bureau had initially contemplated "a staggered delivery so that we could order states based on their redistricting deadlines," but instead had determined that "a single national delivery would provide an overall shorter timeframe than a staggered release," by enabling the Bureau to "compress several production and review activities." Whitehorne Decl. ¶ 22, R11.2, PageID# 154. The declaration also explains that findings in one state may trigger a need to reprocess data in other

states, and that a single national release "allows the Census Bureau to complete the review of all the dissemination materials prior to release, thus reducing the likelihood of finding an error after the data for one State was released that would require us to retract that data." *Id.* ¶ 23, PageID# 154. The declaration further notes that "the Census Bureau cannot produce data for any State until after the disclosure avoidance (privacy protections) have been applied, which requires processing data for all States at once." *Id.* ¶ 26, PageID# 155-156. Moreover, even apart from these considerations, the declaration also explains that at least 27 States "ha[ve] . . . constitutional and statutory requirements, some of which include public meetings, data modification, and other requirements" for redistricting in 2021, making it impossible to prioritize "in a fair, logical, and data-driven manner." *Id.* ¶ 24, PageID# 155.

2. Disregarding the Bureau's efforts and realities on the ground, the State repeatedly emphasizes that the Census Bureau has not provided apportionment and redistricting data within the statutory timetable. To the extent Ohio seeks to force the production of redistricting figures by some future date, that request is in the nature of mandamus, not a preliminary injunction. Indeed, Ohio appeared to recognize as much in district court, requesting both a preliminary injunction or, in the alternative, final relief on the merits in the form of a writ of mandamus. *See* Combined Mot. for a Prelim. Inj., Pet. for Writ of Mandamus, and Mem. in Support of the Combined Mot. and Pet., R.6, PageID# 31. The State has (properly) made no attempt in its opening

brief in this Court to demonstrate that it meets the extraordinarily high standards for that "drastic" remedy. *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 491 (6th Cir. 2011) (quotation marks omitted). Before this Court, however, Ohio errs in its apparent assumption that courts enforce timetables without regard to the impact of an injunction on an agency's ability to effectuate the overall statutory scheme and its efforts in carrying out that responsibility.

The D.C. Circuit's decision in *Western Coal Traffic League v. Surface Transportation Board,* 216 F.3d 1168 (D.C. Cir. 2000), is illustrative. In that case, although the statute established a precise timetable for acting on railroad merger applications, the Surface Transportation Board announced a moratorium for considering merger proposals to enable to it to re-evaluate the relevant standards for determining whether a merger was in the public interest. The court rejected the attempt to compel compliance with the statutory deadlines, noting the "numerous cases" rejecting efforts to compel compliance with deadlines where the agency's work was necessary to accomplish the statutory goals. *Id.* at 1172, 1173 (citing decisions). The court observed that even where an agency faces "specific timelines" or "a statutory deadline" the court considers "whether the agency has demonstrated a reasonable need for delay in light of the duties with which it has been charged." *Id.* at 1174 (citing *Telecommunications Res. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).

As noted, the Census Bureau recognizes the importance of providing the redistricting results as soon as practicable. But the statutory timetable is not the only

feature of the Census Act, and a court would be required to consider the full range of the Bureau's responsibilities and the enormity of the task before it in contemplating any request for mandamus. Although neither the Constitution nor the Census Act prescribes a specific standard of accuracy, the Bureau seeks "to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quotation omitted). The Act likewise mandates that the Bureau keep respondent data confidential, and, as detailed in the government's declarations, a meaningful portion of the remaining processing time will be devoted to implementing that statutory command. *See* Thieme Decl. ¶¶ 74-76, R.11.1, PageID# 141; 13 U.S.C. § 9; *Baldrige v. Shapiro*, 455 U.S. 345, 355 (1982) (explaining that the Bureau has "[n]o discretion" to disregard the Census Act's confidentiality requirements).

Moreover, in carrying out these statutory responsibilities, there is no question that the task before the Bureau is a considerable one. Even once the apportionment counts are released, the Bureau must then produce and review the far more detailed Census Edited File, which alone will take approximately two months. Thieme Decl. ¶ 69, R.11.1, PageID# 138. The Bureau must then apply its Disclosure Avoidance System to safeguard the confidentiality of census respondents, which takes another three weeks, *id.* ¶¶ 74-76, PageID# 141, before transforming the data into understandable and usable tables, a process that requires another month, *id.* ¶¶ 78-80, PageID# 142. Each of these steps is necessary for the Bureau to carry out its

statutory duties, and the Census Act does not suggest that a court could properly announce a schedule that would sacrifice these necessary steps. *See Western Coal Traffic League,* 216 F.3d at 1174. And historically, Congress has on several occasions retroactively extended census deadlines when the Bureau has proven unable to meet a statutory timetable. *See* An Act Granting Further Time for Making Return of the Enumeration of the Inhabitants in the District of South Carolina, 1 Stat. 226 (1791); An Act to Extend the Time for Completing the Third Census, or Enumeration of the Inhabitants of the United States, 2 Stat. 658 (1811); An Act to Amend the Act Entitled "An Act to Provide for Taking the Fourth Census, or Enumeration of the Inhabitants of the United States," 3 Stat. 643 (1821); An Act to Amend the Act for Taking the Fifth Census, 4 Stat. 439 (1831); An Act to Amend the Act Entitled "An Act to Provide for Taking the Sixth Census, or Enumeration of the Inhabitants of the United States," 5 Stat. 452 (1841); An Act Supplementary to the Act Entitled "An Act Providing for the Taking of the Seventh and Subsequent Censuses of the United States," 9 Stat. 445 (1850).

In considering whether it can properly compel agency action, a court also considers the Supreme Court's admonition that an order in the nature of a writ of mandamus can properly compel only discrete agency action rather than programmatic relief. *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 62-64 (2004). Put differently, the APA does not permit a plaintiff to attack an agency program

"consisting . . . of . . . many individual actions" simply by characterizing it as "agency action" under the APA. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891, 893 (1990).

None of these issues are before the Court on this appeal; Ohio properly does not and cannot raise them in appealing from the denial of a preliminary injunction. Ohio's invocation of mandamus in district court does, however, underscore the error of its contention that, even in the absence of final agency action, it is entitled to an injunction under the Court's "inherent equitable authority" to enjoin ultra vires action. Br. 46. That equitable power "is subject to express and implied statutory limitations," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015), and cannot be invoked "as a cause-of-action-creating sword," thereby circumventing Congress's express provision of remedies for challenges to administrative action, *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (emphasis omitted); *see Cousins v. Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989) (en banc) (Breyer, J.) (explaining that the APA exists to "provide . . . a single uniform method for review of agency action").

D. The State Mistakenly Dismisses the Adverse Impact of Its Proposed Injunction on the Public Interest and on Other States.

The State's brief treatment of the other injunction factors likewise does not advance its case. The State's discussion of the impact of an injunction on the public interest and third parties again fails to acknowledge the very real difficulties confronting the Bureau in producing accurate census data in useable form. The

Bureau recognizes the states' interest in receiving redistricting data, but Ohio does not explain how the public interest would be served by foreshortening the Bureau's work to produce less accurate, complete, or usable data at an earlier date. "[T]he State's significant interest 'in protecting public confidence in the integrity and legitimacy of representative government,'" Br. 23 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J.)), is furthered not by the use of census data as such, but by the use of census data that merits the public's confidence.

At bottom, the State's argument reduces to the contention that the Bureau should produce Ohio's redistricting data before producing the data for any other state: "[A]ny 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." Br. 49. This statement implicitly recognizes the Bureau's determination that "a single national delivery would provide an overall shorter timeframe than a staggered release," by enabling the Bureau to "compress several production and review activities," Whitehorne Decl. ¶ 22, R.11.2, PageID# 154, but suggests that carving out an exception for Ohio alone would not impede this goal. The declarations make clear, however, that any order mandating special treatment for Ohio would require "recreating the working schedule with the one prioritized State ahead of all others," with corresponding delays for the data for the other 49 States. *Id.* ¶ 28, PageID# 156. Moreover, the Bureau's privacy protection measures "must be applied to the full census data set (i.e., the entire

nation) in order to function correctly" and thus "individual states cannot be processed separately in order to finish the process earlier." Thieme Decl. ¶¶ 76-77, R.11.1, PageID# 141. The State has offered nothing to contradict the Bureau's explanations that prioritizing Ohio's data would enable it to receive redistricting figures at most a few weeks earlier, while further delaying results for other States, including the other 26 with deadlines this year. Whitehorne Decl. ¶¶ 26-28, R.11.2, PageID# 155-156; Thieme Decl. ¶¶ 82-85, R.11.1, PageID# 142-143.

Even apart from these practical problems, Ohio does not explain how a court could properly order that Ohio be accorded different treatment than the other states facing redistricting deadlines in 2021, and indeed offers no acknowledgement whatsoever of the challenges its sister States face. As the Whitehorne declaration explains, the Bureau cannot prioritize the competing needs of these States "in a fair, logical, and data-driven manner." Whitehorne Decl. ¶ 24, R.11.2, PageID# 155. And the anomalous nature of Ohio's proposal is underscored by a separate suit brought by Alabama that seeks priority treatment for its own redistricting data. *See* Compl., *Alabama v. Raimondo*, No. 21-cv-211 (M.D. Ala. Mar. 10, 2021), ECF No. 1. Moreover, whatever harm Ohio contends that it suffers from the delay in redistricting data is more than counterbalanced by the harms the State's request for relief would engender, both to Ohio and to the other 49 States, particularly given that any harm to the State is sharply reduced, if not fully eliminated, where Ohio law specifically

provides for the possibility that census data might not be available for redistricting purposes. *See* Ohio Const. art. XIX, § 2(A)(2) (congressional redistricting).

In any event, Ohio would not be entitled to the relief it seeks even if equitable factors tipped in its favor. As discussed, there is nothing preliminary about the injunction the State requests, and it has not demonstrated entitlement to an injunction requiring the Census Bureau to deliver redistricting tabulations on a court-ordered schedule.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,605 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

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

s/ Brad Hinshelwood
Brad Hinshelwood

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 1	Complaint	1-25
RE 6	Combined Motion for Preliminary Injunction, Petition for Writ of Mandamus, and Memorandum in Support of Combined Motion and Petition	30-67
RE 11.1	Declaration of Michael Thieme	120-145
RE 11.2	Declaration of James Whitehorne	146-157
RE 26	Order Denying Motion for Preliminary Injunction and Dismissing Case	377-395
RE 27	Judgment	396
RE 28	Notice of Appeal	397-399