narrow circumstances where equitable *ultra vires* review is available because Congress has afforded Ohio a separate mechanism to pursue its challenge through the APA. *See Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (rejecting *ultra vires* challenge because statute provided plaintiff "with a meaningful and adequate opportunity for judicial review" of the challenged regulation); *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (agency action is subject to *ultra vires* review only if "there is no alternative procedure for review of the statutory claim"); *Puerto Rico v. United States*, 490 F.3d 50, 59–60 (1st Cir. 2007) (holding that nonstatutory review was inappropriate where the APA provided plaintiff a cause of action).

Even if *ultra vires* review were available, courts have held that review under that doctrine "is essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nyunt v. Broad. Bd. of Govs.*, 589 F.3d 445, 449 (D.C. Cir. 2009). Among other requirements, plaintiff must show that the agency's error is "so extreme that one may view it as jurisdictional or nearly so." *Id.* (quoting *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)). Plaintiff cannot make that showing here because the Census Bureau has not willfully violated a statutory deadline, but instead recognized the practical reality that, due to extraordinary events, delivery of redistricting data by March 31 is impossible. And even if Ohio could establish *ultra vires* agency action, injunctive relief would still be inappropriate because, as noted, a court may not exercise its equitable powers to "require an agency to render performance that is impossible." *Am. Hosp. Ass'n*, 867 F.3d at 167.

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

Ohio is likewise unlikely to succeed under the APA because its claims do not challenge any final agency action. The State's APA claims focus exclusively on a February 12 Press Release and related blog post. PI Mot. at 15 (citing Compl. Exs. 1 & 2). But the Sixth Circuit has recognized that final agency action occurs when the Secretary reports the final

redistricting numbers. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1377 n.6 (6th Cir. 1993). So the Press Release is not final agency action reviewable under the APA.

a. The February 12 Press Release Was Not Final Agency Action.

For a valid claim under the APA, the agency action at issue must be *final* agency action. *See* 5 U.S.C. § 704. Final agency action "must mark the consummation of the agency's decision–making process—it must not be of a merely tentative or interlocutory nature" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *see also Berry v. Dep't of Labor*, 832 F. 3d 627, 633 (6th Cir. 2016)). A cognizable APA claim must also challenge a "circumscribed, discrete agency action[]"; it cannot advance a "broad programmatic attack" on an agency's operations. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004) ("SUWA"). 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. Nat'l Wildlife Fed'n*, 497 U.S. 871, 893 (1990). Ohio satisfies none of the requirements for final agency action.

No Consummation of the Decisionmaking Process. "The agencies' decisionmaking process consummates when they issue a final decision." *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 496 (6th Cir. 2014). "The core question is whether the agency has completed its decisionmaking process." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The APA also does not allow a party to challenge "preliminary, procedural, or intermediate agency action" until the agency completes its final agency action. *See Jama*, 760 F.3d at 497.

The Sixth Circuit, relying on reasoning from the Supreme Court, has already held that final agency action occurs when the Secretary reports the final redistricting numbers. *See Detroit*, 4 F.3d at 1377 n.6. In *Franklin*, the Supreme Court held that there was no final agency action until the President delivered the final apportionment count to Congress. 505 U.S. at 797. The interim steps taken by the Secretary of Commerce and the Bureau

prior to the delivery of the final apportionment numbers were thus tentative and not reviewable. *Id.* Although *Franklin* dealt with apportionment, the Sixth Circuit relied on its reasoning to conclude that "the Secretary's reporting of the [redistricting] counts for these purposes is a final agency action." *Detroit*, 4 F.3d at 1377 n.6. Since reporting of final redistricting data is reviewable final agency action, the tentative actions and decisions leading up to the delivery of the redistricting data are not reviewable under the APA.

Dispositive precedent aside, a Press Release explaining that the Census expects to deliver redistricting data by a certain date did not consummate anything; it simply provided a snapshot in time of the expected delivery date that had shifted over the past year due to many factors, including disruptions from COVID, wildfires, hurricanes, court orders, and issues in data processing. *See* Background, *supra*. The February 12 Press Release simply updated Census's estimated timeline, and of course, estimates can still change as data processing continues. Whitehorne Decl. ¶¶ 15. The Press Release thus does not reflect any definitive decision at all.

No Legal Consequences. The February 12 Press Release is also not final agency action because it did not change any legal rights or have any legal consequences. *See Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 638, (D.C. Cir. 2019) (no final agency action where "no direct and appreciable legal consequences" and no party "can rely on it as independently authoritative in any proceeding"). The February 12 Press Release did not change any rights or obligations: the Secretary will deliver redistricting data to the States, including Ohio, when the data becomes available. In other words, the Press Release was "purely informational"; "[c]ompelling no one to do anything," the Press Release "had no binding effect whatsoever—not on the agency and not on" the general public. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). And, as discussed above, Ohio faces no legal consequences if it does not receive redistricting data by March 31, 2021. *See* Argument Section I.A., *supra*. In fact Ohio faces no legal consequences at all,

regardless of timing, because its own law fully contemplates the use of other data if census-based redistricting data "is unavailable." PI Mot. at 5 (citing Ohio Const., art. XI, § 3(A) & art. XIX, § 2(A)(2)).

Improper Programmatic Attack. Finally, Ohio's challenge fails the final-agency-action inquiry because it is a "broad programmatic attack" on the Census Bureau's operations, not a "circumscribed, discrete agency action[]." *SUWA*, 542 U.S. at 61–62. While "[c]ourts are well-suited to reviewing specific agency decisions," they are "woefully ill-suited [ ] to adjudicate generalized grievances asking [them] to improve an agency's performance or operations." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019). But that is exactly what Ohio seeks here. Because the Census Bureau's data-processing operations are all interdependent and interrelated, *see* Thieme Decl. ¶¶ 5, 38, 41–42; Whitehorne Decl. ¶¶ 13–14, 19, producing redistricting data on a different timeline would require "a sweeping overhaul to the [processing operations], which exceeds the scope of reviewable 'agency action.'" *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 422 (D. Md. 2019), *aff'd in part, rev'd on other grounds*, 945 F.3d 183 (4th Cir. 2019). Indeed, like the Census Bureau's field operations, its data-processing operations "expressly are tied to one another," so altering any of these 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) (citing *SUWA*, 542 U.S. at 66–67); Thieme Decl. ¶¶ 38, 41–42. That is "precisely the result that the 'discreteness' requirement of the APA is designed to avoid." *Id.* (citing *SUWA*, 542 U.S. at 67).

b. The February 12 Press Release is not arbitrary or capricious.

While the Census Bureau's inability to deliver the redistricting data by March 31, 2021 is inconsistent with 13 U.S.C. § 141(c), Ohio is unlikely to prove that the Census Bureau is acting arbitrarily or capriciously in violation of the APA. Where (unlike here)

there is final agency action, "the arbitrary and capricious standard is the least demanding form of judicial review." *Wolf v. Causley Trucking, Inc.*, 719 Fed. Appx. 466, 473 (6th Cir. 2017). "So long as 'it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.'" *Id.* And "[d]eference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise." *Ranchers Cattlemen Action Legal Fund v. Dep't of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005).

Here, there is a "reasoned explanation" for the Secretary's inability to transmit redistricting data by the statutory deadline: "Producing redistricting data by, or even close to, the statutory deadline of March 31, 2021 is not possible under any scenario." Whitehorne Decl. ¶ 12; *cf.* Compl. Ex. 1. Nor can the Bureau's delivering redistricting data for all States at once be considered arbitrary or capricious: even if the Census Bureau prioritized Plaintiff's redistricting data to the detriment of the other 49 States, "it would not be able to deliver the data more than a few weeks earlier than a national release"; "[t]he resulting data may have uncaught errors or anomalies from [having] been rushed through review without the benefit of other states having also been reviewed"; and it would "delay the release of data for the other 49 states." Whitehorne Decl. ¶¶ 26–27.

Finally, even assuming that the February 12 Press Release could be considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the only remedy would be to "set [it] aside" and "remand [it] to the agency for additional investigation." 5 U.S.C. § 706(2); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Indeed, under the APA § 706(2), "it is not a court's role to direct the agency how to act. Rather, a court's role is to review the agency's decision and, if it cannot be sustained, remand to the agency." *Neto v. Thompson*, 2020 WL 7310636, at *11 (D.N.J. Dec. 10, 2020) (citing *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907–08 (2020)). And while the Census Bureau would take any such remand seriously, it would

not change the fact that "[p]roducing redistricting data by, or even close to, the statutory deadline of March 31, 2021" would be impossible. Whitehorne Decl. ¶ 12.[3]

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

Regardless of the merits of its claims, Ohio cannot obtain an injunction without establishing that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. This showing is not optional: "although the extent of an injury may be balanced against other factors, the existence of an irreparable injury is mandatory." *Sumner Cty. Sch.*, 942 F.3d at 327. And because a preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies," *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007), Ohio's burden to show irreparable harm is necessarily higher than what is required to establish standing. *See, e.g.*, *Mazurek*, 520 U.S. at 972. Yet Ohio fails this test for all the same reasons it fails to establish standing: the State fails to establish that it will suffer any injury *at all*. Ohio's claim to harm rests entirely on an assertion that it will be unable to comply with state law, but Ohio's constitution expressly contemplates the use of non-census data for redistricting when census data is "unavailable," so the absence of census data does not interfere with Ohio's constitutional scheme or its sovereign interests. *See* Argument Section I.A., *supra*.

The cases Ohio cites confirm that it does not stand to suffer any injury. *See* PI Mot. at 20-21. In each of those cases, some portion of state law was enjoined or invalidated, precluding the state from enforcing its provisions. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020). The hypothetical posed by Ohio—a court

[3] Contrary to Ohio's protestations, the Census Bureau *did* consider States' self-imposed reliance on census-based redistricting data. Mot. at 18; *see also* Mot. at 19. Indeed, Ohio acknowledges as much. *See* Mot. at 18; *see also* Compl. Ex. 2 (Census Bureau explaining that "[w]e are acutely aware of the difficulties that this delayed delivery of the redistricting data will cause some states"). And, "[w]ith the delay in the delivery of the redistricting data, there are now too many states (at least 27[]) to prioritize, in a fair, logical, and data-driven manner." Whithorne Decl. ¶ 24.

injunction preventing the use of otherwise available census data—might bear some superficial similarity to those cases, particularly *if* Ohio's constitution did not contemplate an alternative data source. Pl. Mot. at 21. But here, the census data is "unavailable," exactly as Ohio's constitution contemplates it might be. Ohio Const., art. XIX, § 2(A)(2). So the realization of a circumstance expressly accounted for in the constitutional text is not a frustration of that text or its purpose. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (courts "must presume that [the] legislature says in a statute what it means and means in a statute what is says there.").

Likewise, Ohio cannot claim irreparable injury from the mere possibility that the absence of census data will inflame passions or spur lawsuits. Pl. Mot. at 22. Neither debate nor litigation constitutes irreparable injury—to the contrary, courts have recognized that irreparable injury can come from the *frustration* of public debate. *See, e.g.*, *Ctr. for Pub. Integrity v. United States Dep't of Def.*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019). And the mere possibility of debate or lawsuits is too speculative to satisfy the demanding standards for obtaining a preliminary injunction in any event. *See Winter*, 555 U.S. at 22.

Ohio may well prefer to use census data for redistricting, but are frustration of an alleged preference, without a factual showing of likely real-world effects, is insufficient to constitute an irreparable injury. *Cf. Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007) ("Although plaintiff's desire to have its case decided in an expedited fashion is understandable, that desire, without more, is insufficient to constitute the irreparable harm[.]"). Were it otherwise, anyone that came to court with a preference for different census operations could obtain an injunction as a matter of course. That is not—and cannot be—the standard. *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 326-27 (6th Cir. 2019) ("[E]ven the strongest showing on the other three factors cannot eliminate the irreparable harm requirement." (citation and internal quotation marks omitted)).

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

On the other side of the ledger, the harm to the government and to the public from an injunction would be great and immediate. *See Nken*, 556 U.S. at 435 (harm to opposing party and the public interest "merge" when relief is sought against the government). As explained above, the injunction would be largely, if not wholly, impossible to implement because the Census Bureau lacks the ability to produce the redistricting data on the timeline Ohio wants. Whitehorne Decl. ¶¶ 12–15, 19; *see* Argument Section I.C., *supra*. The Census Bureau's current schedule reflects the minimum amount of time the Bureau has concluded it needs to complete the myriad of complex steps required to finish processing the various sources of data it received; verifying the quality of its tabulations; and preparing usable, accurate outputs that comply with statutory requirements for respondent privacy protection. Whitehorne Decl. ¶¶ 18–19, 25–28; Thieme Decl. ¶¶ 63–85 (detailing the steps that still need to be accomplished to deliver redistricting data). An order requiring the Census Bureau to nonetheless attempt to deliver data faster would yet again disrupt census operations, reduce the time for data quality checks, and make it even *more* difficult for the Census Bureau to complete its work. Whitehorne Decl. ¶¶ 26–28; Thieme Decl. ¶¶ 67, 72, 76–77, 81, 85.

The harm from such a disruption would reverberate to other states and the public at large. If the Census Bureau were required to prioritize Ohio's data, it may well have to delay delivery of other states' data until past September 30, 2021. Whitehorne Decl. ¶¶ 27, 28. Such a delay would disrupt those other States' redistricting plans—presumably leading those States to suffer the same kinds of harms Ohio alleges in this lawsuit. Already, at least one other state has brought a lawsuit like Ohio's, requesting that its data be prioritized over those of other states. *See Alabama, et al., v. Raimondo, et al.*, Case No. 21-cv-211, ECF No. 1 (M.D. Ala.). Meanwhile, plaintiffs in California continue to assert that data-processing operations should not be cut short. *See Nat'l Urb. League v. Raimondo,*

No. 20-cv-0577, ECF No. 465 & 467 (N.D. Cal. Feb. 3, 2020). The more courts intrude on census operations, the more entities will want to seek judicial intervention on their behalf.

Managing census operations through competing court orders is untenable. Census operations are interrelated. Whitehorne Decl. ¶¶ 13-14. "Setting aside one or more of these choices necessarily 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) (internal quotes and citation omitted). Court intervention in the carefully calibrated operations of the census will only upend the process.

A better course is available. For one, States have the ability to alleviate any injury they may suffer from the redistricting-data delay by working cooperatively with the Census Bureau and by taking action on the relevant state deadlines. *See* Background Section, *supra* (explaining that New Jersey and California did so). More importantly, a senator has announced that legislation providing a statutory extension is about to be introduced in Congress. *See* Office of Senator Schatz, *Schatz, Murkowski, Sullivan Set To Reintroduce Bill To Extend Key Deadlines For 2020 Census, Ensure Accurate Count* (Feb. 12, 2021), available here. The hard work of accounting for broad and competing interests related to the census can thus be taken up by the branch of government best suited to—and, indeed, constitutionally charged with—balancing those interests. That, in fact, is what has been done historically. Throughout the nation's history, census deadlines were repeatedly codified and amended when unmanageable—including in every census from 1810 to 1850. *See infra* n.4. Congress is more than capable of doing so again. The extraordinary remedy of an injunction, by contrast, would work a tremendous disservice to the Census Bureau, other states, and the public. *Romero–Barcelo*, 456 U.S., at 312, 102 S.Ct. 1798 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

III. MANDAMUS RELIEF IS UNAVAILABLE.

In three short paragraphs, Ohio argues that it is entitled to mandamus relief pursuant to the Mandamus Act, 28 U.S.C. § 1361. *See* PI Mot. at 24–25. Ohio is wrong.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 491 (6th Cir. 2011) (internal quotation and alteration marks omitted). "Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Id.* (internal quotation marks omitted). And "[e]ven when the legal requirements for mandamus jurisdiction have been satisfied, however, a court may grant relief only when it finds compelling equitable grounds." *Lovitky v. Trump*, 949 F.3d 753, 759 (D.C. Cir. 2020) (internal quotation marks omitted); PI Mot. at 25 ("The court must also assure itself 'that the writ is appropriate under the circumstances.'") (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 381 (2004)). Ohio is not entitled to mandamus relief for two independent reasons.

For starters, Ohio has not demonstrated a clear, mandatory duty that would afford it with a clear right to relief because "it is anything but clear that Congress intended the deadline[] at issue to be mandatory rather than directory." *Friends of Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297, 1300 (N.D. Fla. 2001). "[I]n order to establish either jurisdiction or entitlement to" mandamus relief, "a court must find," *inter alia*, "that a duty is owed to the plaintiff." *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987). And—crucially—"[f]or there to be a 'duty owed to the plaintiff' within the meaning of section 1361, there must be a mandatory or ministerial obligation. If the alleged duty is discretionary or directory, the duty is not 'owed.'" *Id.* (internal quotation marks omitted). To be sure, as Ohio points out, *see* Pl. Mot. at 10, "the word 'shall' *usually* connotes a requirement." *Kingdomeware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (emphasis added). But, as the Supreme Court expressly noted, that is not always the case, and it is not the case here.

The *Friends of Aquifer* case is directly on point. That case concerned the Pipeline Safety Act, which provided in part that the Secretary of Transportation "'shall prescribe standards'" relating to certain hazardous liquid pipeline facilities by various dates certain. 150 F. Supp. 2d at 1298–99 (quoting Pipeline Safety Act). The Secretary allegedly did not discharge his statutory duties in that regard, and the plaintiff sought mandamus relief. *See id.* at 1298. Citing several cases, the court explained that "in a variety of contexts, courts have concluded that Congress's use of the word 'shall' in directing the discharge of a specified duty does not require that the statute be construed as mandatory rather than directory." *Id.* at 1300. The court noted that, like § 141(c) here, the Pipeline Safety Act neither imposed any "penalty or sanction for the Secretary's failure to prescribe the requisite standards by the specified dates," nor did it include any provision affording jurisdiction to plaintiffs "to compel the Secretary to prescribe certain standards required under the Act." *Id.* at 1299–1300. Finding no "clear mandate from Congress that it intended the statutory deadlines at issue to be something other than directory, and absent a showing that Congress intended a clear right in Plaintiff to the relief sought," the court declined to "exercise its equitable powers to order the Secretary to issue standards that are dependent upon technological complexities and developments that are peculiarly within the agency's—not th[at] court's—expertise." *Id.* at 1301.

The same analysis applies here. Ohio has not demonstrated any "clear mandate from Congress," *id.*, that it intended the § 141(c) deadline to be mandatory rather than directory. To the contrary, there are no statutory consequences for missing the deadline, and historical practice supports the conclusion that census deadlines are directory in nature. And, like the *Friends of Aquifer* court, this Court should decline to "exercise its equitable powers" to order Defendants to rush the processing of the data Ohio seeks, which work is similarly "dependent upon technological complexities and developments that are peculiarly within" the Census Bureau's expertise. *See Friends of Aquifer*, 150 F. Supp. 2d at 1301; *see also, e.g.*, *Robertson v. Attorney General of U.S.*, 957 F. Supp. 1035, 1037 (N.D. Ill.

1997) (finding statutory deadline to be directory and declining to issue mandamus relief; "In order to achieve the goals of the statute, the Attorney General and INS may have to engage in lengthy investigations to determine the validity of a given marriage.").[4]

Moreover, Ohio is not entitled to mandamus relief because, as explained above, the relief it seeks is impossible to provide. "[T]he writ of mandamus will not issue to compel the performance of that which cannot legally be accomplished." *Am. Hosp. Ass'n*, 867 F.3d at 167. "[P]ossibility is a necessary and antecedent condition for the writ's issuance." *Id.* at 169 (collecting sources); *see* 52 Am. Jur. 2d § 24 ("Mandamus will not issue if the performance of the requested action is impossible"); 55 C.J.S. Mandamus § 19 ("The writ of mandamus will not lie where performance of the duty is impossible."). Simply put, this Court "may not require" the Census Bureau "to render performance that is impossible." *Am. Hosp. Ass'n*, 867 F.3d at 167. So Ohio's request must be denied.

CONCLUSION

For the reasons explained above, Ohio's motion should be denied.

[4] Historical practice demonstrates that Congress considers census deadlines as directory. From the very first census, deadlines were missed for various reasons, but Congress either retroactively revised the statute to accommodate the late submission, or simply ignored that a deadline was missed. *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). Congress likewise extended census deadlines throughout the 1800s whenever they were missed. *See* An Act to Extend the Time for Completing the Third Census, 2 Stat. 658 (1811); An Act to Amend the Act Entitled "An Act to Provide for Taking the Fourth Census," 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," 5 Stat. 452 (1841), An Act Supplementary to the Act Entitled "An Act Providing for the Taking of the Seventh and Subsequent Censuses," 9 Stat. 445 (1850).

DATED: March 12, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

BRAD P. ROSENBERG
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
ZACHARY A. AVALLONE
ELLIOTT M. DAVIS
STEPHEN EHRLICH
JOHN ROBINSON
ALEXANDER V. SVERDLOV
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L St. NW
Washington, DC 20005
Phone: (202) 305-9803
E-mail: stephen.ehrlich@usdoj.gov

Counsel for Defendants

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

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

DECLARATION OF MICHAEL THIEME

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

I, Michael Thieme, make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Assistant Director for Decennial Census Programs, Systems, and Contracts at the U.S. Census Bureau. I have occupied this position since November 2017. The 2020 Census is my third Decennial Census. For the 2010 Census, I was the Chief of the Decennial Systems and Contracts Management Office, providing the primary technology and contract management support for that census. For the 2000 Census, I was the Special Assistant to the Assistant Director for Field Operations working at the national level directing field data collection. In my current role as Assistant Director I am responsible for three Census Bureau divisions: the Decennial Information Technology Division, the Geography Division, and the Decennial Contracts Execution Office. With over 2,000 employees and contractors, these divisions provide all the information technology, geography, and contract management support for the 2020 Census. I am knowledgeable about the progress of the 2020 Census in general and the processing of census data in particular.

2. I am making this Declaration in support of Defendants' Opposition to Ohio's preliminary-injunction motion. All statements in this Declaration are based on my personal knowledge or knowledge obtained in the course of my official duties. In this declaration I:

- Provide background about the progress of the 2020 Census and delays;
- Stress the Census Bureau's commitment to producing high quality, usable, data products from the 2020 Census; and
- Provide background on how the Census Bureau processes data for the 2020 Census.

I. Background on the 2020 Census

3. The Census Bureau goes to extraordinary lengths to count everyone living in the country once, only once, and in the right place. The Census Bureau's goal in conducting the decennial census is to count everyone living in the United States, including the 50 states, the District of Columbia, and the territories of Puerto Rico, American Samoa, Commonwealth of the Northern Mariana Islands, Guam, and U.S. Virgin Islands. To that end, we expend significant funds, efforts, and resources in capturing an accurate enumeration of the population, including those who are hard to count.

4. The planning, research, design, development, and execution of a decennial census is a massive undertaking to count over 330 million people across 3.8 million square miles. The 2020 decennial census consisted of 35 operations using 52 separate systems. We monitored and managed the status and progress of the 2020 Census in large part using a master schedule, which has over 27,000 separate lines of census activities. Thousands of staff at Census Bureau headquarters and across the country supported the development and execution of the 2020 census operational design, systems, and procedures. In addition, the 2020 Census required the hiring and management of hundreds of thousands of field staff across the country to manage operations and collect data in support of the decennial census.

5. The complexity and inter-related nature of census operations is echoed in the budget for the 2020 Census. The overall budget estimate for the 2020 Census—covering fiscal years 2012 to 2023—was $15.6 billion. The Government Accountability Office (GAO) determined that, as of January 2020, this estimate substantially or fully met GAO's standards and best practices for a reliable cost estimate in terms of credibility, accuracy, completeness, and documentation quality. It is rare for civilian agencies to be so designated, and we are proud that the Census Bureau has achieved this status. As of this writing, the Census Bureau has been appropriated in aggregate just over $14.2 billion to use for the 2020 Census, covering fiscal years 2012 through 2021.

6. The operational design of the 2020 Census was subjected to repeated and rigorous testing. Given the immense effort required to conduct the census, the importance of the results, and the decade of work by thousands of people that goes into planning and conducting the decennial census, the Census Bureau expends a significant amount of effort to evaluate its planning and design to ensure that its operations will be effective in coming as close as possible to a complete count of everyone living in the United States. Design and testing of the 2020 Census was an iterative process: after each test, we revised our plans and assumptions as necessary.

7. The 2020 Census Operational Plan explains the overall operations of the 2020 Census, including the integration of numerous sub-operations. Further details on most of these sub-operations can be found on our website. A partial list of the major operations for which we have posted detailed operations plans includes:

a. Local Update of Census Addresses
b. Address Canvassing
c. Geographic Delineations
d. Field Infrastructure and Logistics
e. Forms Printing and Distribution
f. Integrated Communications Plan
g. Count Review
h. Intended Administrative Data Use
i. Internet Self-Response
j. Counting Federally Affiliated Americans Overseas
k. Non-ID Processing
l. Update Enumerate
m. Update Leave
n. Nonresponse Followup (NRFU)
o. Response Processing

p. Formal Privacy Methods

q. Redistricting Data Program

r. Post Enumeration Survey (PES)

s. Count Question Resolution

t. Data Products and Dissemination

u. Evaluations and Experiments

v. Archiving

Census Step 1: Locating Every Household in the United States

8. The first operational step in conducting the 2020 Census was to create a Master Address File (MAF) to represent the universe of addresses and locations to be counted in the 2020 Census. A national repository of geographic data—including addresses, address point locations, streets, boundaries, and imagery—is stored within the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing (MAF/TIGER) System, which provides the foundation for the Census Bureau's data collection, tabulation, and dissemination activities. It is used to generate the universe of addresses that will be included in a decennial census. Those addresses are then invited to respond, typically through an invitation in the mail. The MAF/TIGER System provides the address and geographic base used by our operational control systems to control responses as they are returned to the Census Bureau. The MAF/TIGER data are used to ensure that each person is tabulated to the correct geographic location as the final 2020 Census population and housing counts are prepared.

9. The Census Bureau continually updated this address list in preparation for the 2020 Census. For the third decade, as mandated by the Census Address List Improvement Act of 1994, the Census Bureau implemented the Local Update of Census Addresses (LUCA) Program to provide tribal, state, and local governments an opportunity to review and update the Census Bureau's address list for their respective jurisdictions. Between

September 2015 and June 2017, the Census Bureau conducted a 100 percent in-office review of every census block in the nation (11,155,486 blocks).[1] During the in-office review, clerical staff had access to satellite and aerial imagery from federal, state, and local sources, and to publicly available street-level images through Google Street View and Bing StreetSide, which provided the ability to see the fronts of structures, as if standing on the sidewalk.

10. A field operation called In-Field Address Canvassing occurred between August 2019 and October 2019 for approximately 50 million addresses that were not verified in the in-office review. Address Canvassing fieldwork validated roughly 88% of these addresses and the remainder were removed from the universe because the Address Canvassing fieldwork verified that they did not exist, were duplicates, or were non-residential addresses. Some new addresses identified during fieldwork matched addresses already in the MAF as a result of contemporaneous in-office update processes. Other new addresses were added to the MAF.

11. The Census Bureau believes that the Census Bureau's MAF/TIGER System is the most complete and accurate address listing in census history.

Census Step 2: Encouraging Self-Response Throughout the 2020 Census

12. In order to encourage everyone in the United States to self-respond, the Census Bureau designed, tested, and implemented a $700 million Integrated Communications Program. This included a massive multimedia campaign designed to engage

[1] Statistical geographies establish the geographic areas at which the Census Bureau produces statistics. Census blocks are the smallest geographic areas for which we collect and tabulate data. Census blocks are formed by streets, railroads, bodies of water, and legal boundaries (there are approximately 8 million Census Blocks). Census blocks are aggregated to form block groups, and block groups are aggregated to form census tracts. Census tracts optimally represent about 1,600 housing units and 4,000 people. These statistical geographies nest within governmental unit boundaries, such as municipalities and counties.

stakeholders and partners, and to communicate the importance of the census through paid advertising, public relations, social media content, and the new web site. This was the first census where we made a significant investment in digital advertising, targeting online sites including Facebook, Instagram, paid search engines, display ads, and programmatic advertising.

13. The Census Bureau adapted its outreach strategies in response to delayed census operations due to COVID-19, increasing advertising and outreach to specific areas of the country with lower response rates. We quickly adjusted our messaging, pivoting from our original campaign to encourage people to respond online from the safety of their own homes. The use of micro-targeting allowed the Census Bureau to tailor its messaging, including directing appropriate messages to hard-to-reach communities and those who distrust government, both of which have been traditionally undercounted.

14. The Census Bureau's communications program also relied heavily on partnerships, including with organizations in the State of Ohio. There are two prongs to the Partnership Program, the National Partnership Program that works from Census Bureau headquarters mobilizing national organizations, and the Community Partnership and Engagement Program, that works through the regions at the local level to reach organizations that directly touch their communities. Census partners include national organizations like the National Urban League (NUL), the Mexican American Legal Defense Fund (MALDEF), the National Association of Latino Elected Officials (NALEO), the National Association for the Advancement of Colored People (NAACP), and the U.S. Chambers of Commerce. Major corporations also become census partners. At the local level, partners can be churches, synagogues and mosques, legal aid clinics, grocery stores, universities, colleges, and schools.

Census Step 3: Self-Response

15. The design of the 2020 Census depended on self-response from the American public. In an effort to ensure the most efficient process to enumerate households, the

Census Bureau assigned every block in the United States to one specific type of enumeration area (TEA). The TEA reflects the methodology used to enumerate the households within the block. There were two TEAs where self-response was the primary enumeration methodology: TEA 1 (Self-Response) and TEA 6 (Update Leave). Regardless of enumeration methodology, everyone in the country was able to participate in the census online, by mail, or by phone.

16. TEA 1 used a stratified self-response contact strategy to inform and invite the public to respond to the census, and to remind nonresponding housing units to respond. In total, six mailings including the initial Invitation, reminders, and, if we did not receive a response by the third mailing, questionnaires were be delivered on a flow basis unless a household responded.

17. Update Leave (TEA 6) was conducted in areas where the majority of the housing units did not have mail delivery to the physical location of the housing unit, or the mail delivery information for the housing unit could not be verified. The purpose of Update Leave was to update the address list and feature data, and to leave a 2020 Census Internet Choice package at every housing unit. The major difference from TEA 1 is that a Census Bureau employee, rather than a postal carrier, delivers the 2020 Census invitation to respond, along with a paper questionnaire. As with other housing units, those in TEA 6 had the option to respond online, by mail, or by phone.

18. Self-response began in March 2020 and was open until October 15, 2020. We are proud to have secured a self-response rate of 67%, higher than the 2010 self-response rate of 66.5%.

Census Step 4: Nonresponse Followup (NRFU) and Quality Control

19. After giving everyone an opportunity to self-respond to the census, census field staff (known as enumerators), attempted to contact nonresponding addresses to determine whether each address was vacant, occupied, or did not exist, and when occupied, to collect census response data. Multiple contact attempts to nonresponding addresses

were done to determine the housing unit status and to collect decennial census response data. This was the Nonresponse Followup operation, or NRFU. Enumerators conducted the NRFU operation using iPhones equipped with "optimization" software that assigned cases based on the enumerator's availability and to increase efficiency of the operation.

20. In addition to the NRFU operation, the Census Bureau conducted several operations to collect information for individuals who do not live in housing units. The Group Quarters Enumeration collects response information for individuals living in group housing situations, such as college dormitories, prisons, or long term care facilities. The Enumeration at Transitory Locations (ETL) operation collects response information for individuals living at campgrounds and marinas.

21. Cases in the NRFU workload are subject to six contact attempts. The first contact attempt is primarily an in-person attempt. Each contact attempt in the 2020 Census NRFU was either a telephone or an in-person contact attempt (however the vast majority of attempts were in-person).

22. If upon the first contact attempt an enumerator determined an address was occupied and the enumerator was able to obtain a response for the housing unit, then the housing unit was counted, and no follow-up was needed.

23. If upon the first contact attempt, the enumerator was not able to obtain a response, the enumerator was trained to assess whether the location was vacant or unoccupied. Enumerators used clues such as empty buildings with no visible furnishings, or vacant lots, to identify an address as vacant or non-existent.

24. A single determination of a vacant or nonexistent status was not sufficient to remove that address from the NRFU workload; a second confirmation was required. If a knowledgeable person could confirm the enumerator's assessment, the address was considered vacant or non-existent and no additional contact attempts were needed. A knowledgeable person was someone who knew about the address as it existed on census day or about the persons living at an address on census day. A knowledgeable person

could be someone such as a neighbor, a realtor, a rental agent, or a building manager. This knowledgeable person is known as a proxy respondent.

25. If a knowledgeable person could not be found to confirm the status of vacant or non-existent, use of administrative records could provide confirmation of the enumerator's assessment. The Census Bureau did not rely on a single administrative-records source to determine an address was vacant or non-existent. Rather, multiple sources were necessary to provide the confidence and corroboration before administrative records were considered for use. When used in combination with an enumerator's assessment of vacant or non-existent, corroborated administrative records provided the second confirmation that a nonresponding address was vacant or non-existent.

26. If, upon the first in-person contact attempt, the enumerator believed the address was occupied, but no knowledgeable person was available to complete the enumeration, the Census Bureau used consistent and high-quality administrative records from trusted sources as the response for the household and no further contact was attempted. We consider administrative records to be of high quality if they are corroborated with multiple sources. Examples of high-quality administrative records include Internal Revenue Service Individual Tax Returns, Internal Revenue Service Information Returns, Center for Medicare and Medicaid Statistics Enrollment Database, Social Security Number Identification File, and 2010 Census data.

27. Regardless of whether administrative records were used as a confirmation of vacancy or non-existent status or for the purposes of enumerating an occupied housing unit, the Census Bureau sent, as a final backstop, a final mailing encouraging occupants, if any, to self-respond to the 2020 Census.

28. If a nonresponding housing unit was found to be occupied but no information was gathered on the first attempt, enumerators repeatedly returned. The vast majority of nonresponding addresses in the NRFU workload had the full battery of in-person contact attempts to determine the status of the nonresponding address (vacant,

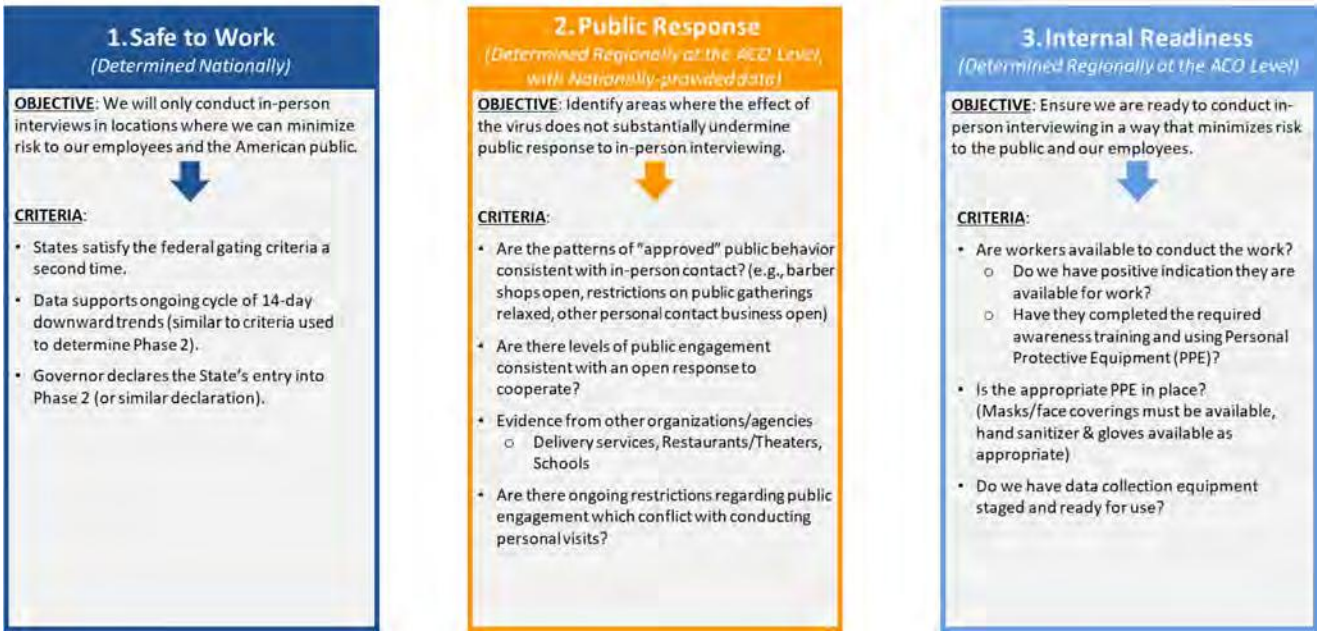
occupied, does not exist) and to collect 2020 Census response data. The full battery of in-person contact attempts also included the ability to collect information from a proxy respondent. Nonresponding units became eligible for a proxy response after three unsuccessful attempts to find residents of a nonresponding address themselves.

29. The Census Bureau arrived at the operational design for NRFU over the course of the decade. Use of administrative records, field management structures, systems, procedures, data collection tools and techniques were proven in tests occurring in 2013, 2014, 2015, 2016, and 2018.

30. While data collection began on schedule, the Census Bureau was forced on March 18, 2020 to announce a suspension of field operations because of the COVID-19 Pandemic. Our original plan was to begin the NRFU operation in most parts of the country in May. But continuing with planned field operations in the spring of 2020 was simply not an option. Many jurisdictions had issued "lockdown" orders. The nation did not know as much about the COVID-19 virus as it does now, and clear public health guidance had not yet been issued. Nor was the Census Bureau able to safely recruit, hire, and train employees for its field operations, and it did not have confidence that households would respond to individuals knocking on their doors seeking responses to the census. Protocols for mask wearing and social distancing were not yet in place and the public health impacts of conducting one of the nation's largest peacetime mobilizations were unclear.

31. The suspension of field operations and subsequent decisions to adapt field operations were driven by a need to protect the health and safety of the American public; the requirement to implement federal, state, and local regulations on COVID-19; and the desire for a complete and accurate enumeration. We began to re-start operations by resuming our Update Leave operation, resuming pre-NRFU operations in Area Census Offices (ACOs), resuming operations at our paper data capture centers, and resuming fingerprinting and staff onboarding for NRFU workers. The graphic below describes the

criteria we used in our review process for resuming operations during the COVID-19 pandemic.



32. The Census Bureau returned to field operations using a "Soft Launch" approach, meaning that instead of opening all offices at the same time, we instead opened a small number of offices in succession. We opened offices in areas that we believed could be safely started based on COVID risk profiles (developed using CDC, state, and local health guidance), availability of staff, and availability of Personal Protective Equipment (PPE). We needed to acquire PPE, implement social distancing protocols, and work with state and local officials. We opened additional offices throughout the month of July based on detailed daily review of the data about COVID, taking into account state and local stay-at-home orders. We looked for data showing a 14-day downward trend in the area of virus cases, along with sufficient workers to conduct the enumeration, and sufficient available PPE. By August 9 we had begun NRFU in all 248 ACOs. There are 8 ACOs in Ohio. The Census Bureau began NRFU in the Mansfield ACO on July 26, 2020 and commenced operations in the remaining ACOs (Akron, Cincinnati, Cleveland, Toledo, South Point, Dayton, and Columbus) on August 1, 2020.