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 13 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
 14 **SAN JOSE DIVISION**

15
 16 NATIONAL URBAN LEAGUE, *et al.*,

17 Plaintiff,

18 v.

19 WILBUR L. ROSS, JR., *et al.*,

20 Defendants.
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Case No. 5:20-cv-05799-LHK

**DEFENDANTS' BRIEF IN RESPONSE TO
 THE COURT'S SEPTEMBER 12, 2020
 ORDER, ECF No. 101**

1 Pursuant to the Court’s Order dated September 12, 2020, ECF No. 101, Defendants
2 respectfully submit this brief to address the Court’s questions concerning *in camera* review and
3 the duration of the Court’s September 5, 2020, Order.

4 **I. *In Camera* Review of Privileged Documents**

5 The Court should not engage in *in camera* review of the privileged documents. Defendants
6 have only just completed a privilege log for a set of documents; review of potentially responsive
7 documents is ongoing; and the volume of privileged documents is substantial. Review of
8 privileged documents *in camera* is the exception, not the rule, and as the Supreme Court has
9 cautioned, is not automatically available. *See, e.g., United States v. Zolin*, 491 U.S. 554, 571
10 (1989) (noting that the Court had previously “declined” “to say that the court *may automatically*
11 *require* a complete disclosure to the judge before the claim of privilege will be accepted” (internal
12 quotes and citations omitted)). Indeed, a “blanket rule allowing *in camera* review as a tool for
13 determining the” existence of a privilege would (1) “place the policy of protecting open and
14 legitimate disclosure between attorneys and clients at undue risk;” (2) raise “possible due process
15 implications;” (3) and place “burdens . . . upon the district courts, which may well be required to
16 evaluate large evidentiary records without open adversarial guidance by the parties.” *Id.* at 571
17 (internal quotes and citations omitted).

18 Based on these concerns, the Court held that, “[b]efore engaging in *in camera* review,” a
19 judge “should require a showing of a factual basis adequate to support a good faith belief by a
20 reasonable person” that an exception to a claim of privilege applies. *Id.* at 572 (internal quotes
21 and citation omitted). Only once such a showing is made should the Court proceed to determine
22 whether to undertake *in camera* review considering “among other things, the volume of materials
23 the district court has been asked to review, [and] the relative importance to the case of the alleged
24 privileged information.” *Id.*; *see generally NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214,
25 224 (1978) (“[I]n camera review ... is designed to be invoked when the issue before the District
26 Court could not be otherwise resolved.”).

27 *In camera* review thus does not flow automatically from the existence of party
28 representations regarding privilege. Rather, it requires a showing that there is, at the very least, a

1 meaningful dispute about the need for the privileged documents and the scope of the privilege,
2 grounded in specific facts. *See, e.g., Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089,
3 1093 (9th Cir. 1997) (explaining that “*in camera* review is appropriate only if ‘the preferred
4 alternative to *in camera* review—government testimony and detailed affidavits—has first failed to
5 provide a sufficient basis for a decision.” (quoting *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th
6 Cir.1983)); *Ocean Mammal Inst. v. Gates*, No. CIV.07-00254DAELEK, 2008 WL 2185180, at
7 *10 (D. Haw. May 27, 2008) (“A court need not conduct an *in camera* review of documents
8 withheld on the basis of the deliberative process privilege if the agency provides ‘reasonably
9 detailed descriptions of the documents and allege[s] facts sufficient to establish an exemption.’”
10 (quoting *Ctr. for Biological Diversity v. Norton*, 336 F.Supp.2d 1149, 1155 n. 4 (D.N.M.2004)
11 (additional citations omitted)). An actual dispute about the privilege is also necessary to inform
12 the type of review that the Court conducts. Different privileges require distinct factual showings,
13 and engender their own type of analysis.

14 Here, of course, no factual basis to question an assertion of privilege has been identified.
15 Indeed, Defendants have not even been able to complete all the necessary review of the mass of
16 documents the Court has directed them to collect, or to determine the full set of documents over
17 which they need to assert privilege. *See* DiGiacomo Decl. ¶¶ 11-13, ECF 104-1. And Plaintiffs
18 have not yet raised a single objection to the documents Defendants have thus far identified as
19 privileged. If Plaintiffs do raise such a challenge, then they would have to first contend with
20 binding law on what kinds of documents are properly covered by, for example, the deliberative
21 process privilege. *See, e.g., Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092–
22 93 (9th Cir. 1997). Further, all of that analysis would be completely beside the point, in any event,
23 because the privileged documents are entirely irrelevant to the threshold legal issues upon which
24 this case can—and should—be resolved.

25 Therefore, it would seem an inefficient use of judicial resources for the Court to undertake
26 *in camera* review at this juncture. More to the point, the Court should not delay resolution of this
27 case by undertaking *in camera* review of internal Department of Commerce documents, when the
28 basis for concluding census field operations by the end of this month rests on a requirement that

1 Plaintiffs have not, and cannot, set aside: the statutory deadline in 13 U.S.C. § 141. Privilege
2 review will not alter the deadline, nor compel Congress to change it.

3 **II. Duration of the Court’s September 5, 2020 Order**

4 The Court has separately directed Defendants to state whether they would consent to an
5 extension of the Court’s September 5, 2020, Order. ECF 84. In the interest of judicial efficiency
6 given the time constraints inherent in meeting applicable statutory deadlines and arriving at an
7 accurate census, Defendants again urge that, if the Court believes Plaintiffs are entitled to relief
8 despite the statutory deadlines, the Court “convert the [Order] to a preliminary injunction now in
9 order to afford adequate time for any appellate review.” Defs. Notice, ECF 86, at 1-2. In addition
10 to helping facilitate the ultimate resolution of this case, and permit sufficient time for any appellate
11 courts to consider the issues if any appeal is filed, such a conversion would obviate any need for
12 the Court to consider whether an extension of the September 5, 2020, Order is necessary.

13 Should the Court decline such a streamlined process, Defendants would not consent to any
14 extension of the September 5, 2020, Order. As a general matter, temporary restraining orders may
15 be extended only for “good cause.” Fed. R. Civ. P. 65(b)(2). No good cause for such an extension
16 exists here because: (i) there was no good cause to enter any injunctive relief in the first instance,
17 *see generally* ECF 74, 81; (ii) the extension of the September 5, 2020, Order would, in the absence
18 of a congressional extension of the operative December 31, 2020, deadline, only “further compress
19 the time period for the Census Bureau to process the data it collects after field operations conclude,
20 thus creating risks to the Census Bureau’s ability to conduct an accurate enumeration,” ECF 74 at
21 3; and (iii) such relief is not necessary given that the Census Bureau is well on its way to
22 completing the enumeration, *see* <https://2020census.gov/en/response-rates/nrfu.html> (last visited
23 Sept. 14, 2020) (listing completion rates by state), and any extension of the September 5, 2020,
24 Order could create confusion if parties are forced to seek expedited appellate review. *See generally*
25 Fontenot Decl. ¶¶ 100-101, ECF 81-1.

26 Further, any extension that would cause the September 5, 2020 Order to last beyond the
27 fourteen-day period permitted by Rule 65(b)(2) would convert that Order into an immediately
28 appealable preliminary injunction. “The most prevalent view is that a temporary restraining order,

1 even if issued with notice, cannot be continued beyond the periods prescribed in Fed.R.Civ.P.
2 65(b) without being treated as the equivalent of a preliminary injunction and thus subject to
3 appellate review.” *Nutrasweet Co. v. Vit-Mar Enters., Inc.*, 112 F.3d 689, 692 (3d Cir. 1997).
4 Indeed, “where the duration of the order exceeds the ordinary duration for TROs as set forth in the
5 Federal Rules of Civil Procedure, classification as a TRO is unlikely.” *Serv. Emps. Int’l Union v.*
6 *Nat’l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010).

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9 DATED: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Alexander V. Sverdlov
ALEXANDER V. SVERDLOV