

1 LATHAM & WATKINS LLP
Steven M. Bauer (Bar No. 135067)
2 steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
3 sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
4 amit.makker@lw.com
Shannon D. Lankenau (Bar No. 294263)
5 shannon.lankenau@lw.com
505 Montgomery Street, Suite 2000
6 San Francisco, CA 94111
Telephone: 415.391.0600
7 Facsimile: 415.395.8095

8 LATHAM & WATKINS LLP
Richard P. Bress (*pro hac vice*)
9 rick.bress@lw.com
Melissa Arbus Sherry (*pro hac vice*)
10 melissa.sherry@lw.com
Anne W. Robinson (*pro hac vice*)
11 anne.robinson@lw.com
Tyce R. Walters (*pro hac vice*)
12 tyce.walters@lw.com
Genevieve P. Hoffman (*pro hac vice*)
13 genevieve.hoffman@lw.com
Gemma Donofrio (*pro hac vice*)
14 gemma.donofrio@lw.com
555 Eleventh Street NW, Suite 1000
15 Washington, D.C. 20004
Telephone: 202.637.2200
16 Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Kristen Clarke (*pro hac vice* forthcoming)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming)
dspence@lawyerscommittee.org
Ajay P. Saini (admitted *pro hac vice*)
asaini@lawyerscommittee.org
Maryum Jordan (Bar No. 325447)
mjordan@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
1500 K Street NW, Suite 900
Washington, D.C. 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Additional counsel and representation
information listed in signature block*

17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

19 NATIONAL URBAN LEAGUE, et al.,

20 Plaintiffs,

21 v.

22 WILBUR L. ROSS, JR., et al.,

23 Defendants.
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25
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CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' RESPONSE TO ORDER
RE: BRIEFING AND DEADLINE FOR
PRODUCTION**

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 Plaintiffs respectfully respond to the two questions raised in the Court’s September 12,
2 2020 Order re: Briefing and Deadline for Production (ECF No. 101) (“Order”).

3 **I. THE COURT HAS DISCRETION TO REVIEW ADMINISTRATIVE RECORD**
4 **PRIVILEGE LOG DOCUMENTS *IN CAMERA* AND SHOULD EXERCISE**
5 **THAT DISCRETION HERE**

6 As a general matter, “in camera review is a highly appropriate and useful means of dealing
7 with claims of governmental privilege.” *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 405-06 (1976).
8 District courts in the Ninth Circuit regularly exercise their discretion to conduct *in camera* review
9 when assessing deliberative process privilege in an administrative record (“AR”) context. *See,*
10 *e.g., In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017) (explaining “many district courts
11 within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative
12 materials in APA cases,” and finding no clear error on mandamus review), *vacated on other*
13 *grounds by*, 138 S. Ct. 443 (2017); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*,
14 2007 WL 3049869, at *6 (N.D. Cal. Oct. 18, 2007) (conducting AR *in camera* privilege review);
15 *Trout Unlimited v. Lohn*, 2006 WL 1207901, at *5 (W.D. Wash. May 4, 2006) (same);
16 *Fisherman’s Finest, Inc. v. Gutierrez*, 2008 WL 2782909, at *5 (W.D. Wash. July 15, 2008)
(same).¹

17 The government has the burden to justify any deliberative process privilege assertions. *N.*
18 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003). To do so, the
19 government must provide: “(1) a formal claim of privilege by the head of the department
20 possessing control over the requested information, (2) an assertion of the privilege based on actual
21 personal consideration by that official, and (3) a detailed specification of the information for which
22 the privilege is claimed, along with an explanation of why it properly falls within the scope of the
23 privilege.” *Coleman v. Schwarzenegger*, 2008 WL 2237046, at *4 (E.D. Cal. May 29, 2008)
24 (citation omitted); *see City of Laguna Niguel v. FEMA*, 2009 WL 10687971, at *5 n.1 (C.D. Cal.
25 Nov. 20, 2009) (same requirements in AR context). The privilege is very narrowly construed,

26 _____
27 ¹In *United States v. Zolin*, 491 U.S. 554, 571-72 (1989), the Court considered whether *in camera*
28 review was required in the context of the crime-fraud *exception* to the attorney-client privilege.
In that distinct context, the Court held that the court must find a factual basis adequate to support
a good faith belief that the review may reveal evidence to establish the applicability of the
exception. That standard, which is itself not “stringent,” is not applicable here.

1 applicable only to particular documents that are “predecisional” and “deliberative in nature.” *FTC*
 2 *v. Warner Commc 'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *N. Pacifica*, 274 F. Supp. 2d at
 3 1122 (“[T]he [deliberative process] privilege is strictly confined within the narrowest possible
 4 limits consistent with the logic of its principles.”). The privilege does not apply to “factual
 5 material”; ultimate adoption by the agency obviates any claim of deliberative process privilege;
 6 and “[a] document that was prepared to support a decision already made is not predecisional.”²
 7 And the privilege is not absolute, meaning that even when properly invoked, it can be overcome by
 8 a sufficient showing of need outweighing any claimed harm. *Warner Commc 'n*, 742 F. 2d at 1161.

9 Defendants fail to meet their burden here—they barely even try. They have filed no
 10 declaration by the head of the relevant department, and their only declarant (the Assistant General
 11 Counsel for Employment, Litigation, and Information) does not even claim to have personally
 12 reviewed or considered the purportedly privileged documents. Nor does their privilege log (Dkt.
 13 106, Att. 2) provide a detailed specification of the information for which the privilege is claimed,
 14 along with an explanation of why it properly falls within the scope of the privilege. *See Cal. Native*
 15 *Plant Soc’y v. EPA*, 251 F.R.D. 408, 413 (N.D. Cal. 2008) (“Conclusory statements that a document
 16 is deliberative do not suffice”); *Fishermen’s Finest*, 2008 WL 2782909, at *2 (need to “identify
 17 specific decision to which the document is predecisional”).

18 A brief review of just one portion of Defendants’ log is illustrative:

19	8/3/2020 13:39	Christopher Denno	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document reflecting information provided to facilitate deliberative discussions internal briefing materials on proposed Department action/decision/policy.	Withheld in full
20	8/3/2020 13:39	Christopher Denno	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
21	8/3/2020 13:39	Christopher Denno	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
22	8/3/2020 13:39	Christopher Denno	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
23	8/3/2020 15:56	Burris, Meghan (Federal)	Draft Census Statement	Predecisional and Deliberative	Email communication reflecting information provided to facilitate deliberative discussions a draft public statement on proposed Department action/decision/policy.	Withheld in full
24	8/3/2020 15:56	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement_of.docx	Predecisional and Deliberative	Draft document reflecting information provided to facilitate deliberative discussions a draft public statement on proposed Department action/decision/policy.	Withheld in full
25	8/4/2020 0:11	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	Embargoed Till Posting- Statement from Director Dillingham on 2020 Census Updates.docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
26	8/4/2020 0:11	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	Embargoed Till Posting- Statement from Director Dillingham on 2020 Census Updates.docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
27	9/10/2020 0:17	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement (f).docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
28	9/10/2020 0:17	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement (f).docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
	9/10/2020 20:21	Christopher Denno	Operational and Processing Options to meet September 30 Final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
	9/10/2020 20:21	Christopher Denno	Operational and Processing Options to meet September 30 Final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full

² *See Dominguez v. Schwarzenegger*, 2010 WL 3341038, at *5 (N.D. Cal. Aug. 25, 2010); *Nat’l Res. Def. Council v. U.S. Dep’t of Defense*, 388 F. Supp. 2d 1086, 1098 (C.D. Cal. 2005); *Fisherman’s Finest*, 2008 WL 2782909, at *5 (W.D. Wash. July 15, 2008).

1 Dkt. 106. Here, among other things, Defendants claim “predecisional” deliberative privilege over
 2 various versions of the important August 3, 2020 “final.pdf” presentation that was first revealed by
 3 Congress and highlighted in Plaintiffs’ TRO—even though Defendants produced three other
 4 versions of that document (Dkt. 105-3 at DOC_0000870-910), even though they come after and
 5 reflect the July 29 decision to cut short census operations, and even though some versions of it
 6 (September 10, 2020) are dated long after even the August 3 press release. Plaintiffs respectfully
 7 submit that this log affirmatively shows that many of the claimed privileged documents are nothing
 8 of the sort. *In camera* review “is not a substitute for the government’s burden of proof.” *Coleman*,
 9 2008 WL 2237046, at *3. The Court should accordingly order production of the vast majority of
 10 these documents now. But at a minimum, the Court should conduct an *in camera* review.

11 **II. THE COURT MAY EXTEND THE TRO FOR A BRIEF TIME WHILE**
 12 **CONSIDERING THE MOTION FOR PRELIMINARY INJUNCTION**

13 “[T]here is no time limit or other requirements clearly set in the Federal Rules for the court
 14 to set the hearing on the motion for preliminary injunction where,” as here, “the TRO was issued
 15 *with notice.*” *Fid. Brokerage Servs. LLC v. Rocine*, 2017 WL 3917216, at *6 (N.D. Cal. Sept. 7,
 16 2017); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 n.23 (N.D. Cal. 2018).
 17 Whatever the outer limits, the Court clearly has ample discretion to follow the rules that govern *ex*
 18 *parte* motions. That is, the Court may extend “for good cause” and “for a like period” (here, up to
 19 an additional 12 days). Fed. R. Civ. P. 65(b)(2).

20 Here, the record demonstrates good cause to extend the TRO for two independent reasons.
 21 *First*, good cause exists because Defendants have not complied with the Court’s order requiring
 22 production of the AR in this case. Dkt. 96. Due to space and time constraints, Plaintiffs will
 23 highlight only a few of Defendants’ many failings in this respect:

- 24 • Defendants ignored the Court’s Order to provide the critical materials at the heart of
 this case: the “documents comprising the Replan and its various components for
 conducting the 2020 Census in a shortened time period.” Dkt. 96 at 21.
- 25 • Defendants unilaterally decided they would stop reviewing and producing AR
 materials at approximately 11:00 AM on Sunday, September 13, rather than use the
 26 full day to comply with the Order. Notice 1 (Dkt. 104).
- 27 • Defendants’ collection efforts involved only a half-hearted attempt to identify
 28 relevant documents from the Bureau Director and Deputy Director. *See* DiGiacomo

1 Decl. ¶ 5 (acknowledging that, unlike approach to the Department of Commerce, no
2 search terms were used to identify potentially responsive Bureau documents).

- 3 • Defendants failed to produce materials from their *own* recent production to the OIG
4 covering largely identical issues. On August 13, 2020, the OIG sought essentially the
5 same documents ordered by this Court, and gave Defendants **4 days** to comply. *See*
6 **Annex A**. Defendants did so, as Mr. Fontenot attests. Fontenot Decl. ¶ 103. But to
7 this Court, Defendants simply say they are still “reviewing” this already-identified set
8 of critical, responsive materials. DiGiacomo Decl. ¶ 5.b.

9 These problems are readily evidenced by Defendants’ non-production production: a total of
10 72 documents, comprised almost entirely of (1) the 2018 Operational Plan (which everyone has,
11 and covers approximately 23% of the total pages of the production); (2) a series of “Reports” on
12 census operations which begin in April 13 and end on July 27; (3) a set of emails almost entirely
13 redacted for alleged deliberate process privilege; and (4) a few versions of the August 3
14 presentation previously revealed by Congress. Defendants themselves admit their production is
15 neither complete nor compliant with this Court’s order. DiGiacomo Decl. ¶ 11.

16 *Second*, good cause exists if the Court needs “more time” to “fully . . . consider the parties’
17 arguments and motions.” *Costa v. Bazron*, 2020 WL 2410502, at *2 (D.D.C. May 11, 2020)
18 (extending TRO “because parties need time to brief, and the Court needs time to consider” PI
19 motion); *see Castellanos v. Countrywide Bank NA*, 2015 WL 914436, at *3 (N.D. Cal. Feb. 27,
20 2015); *SEC v. AriseBank*, 2018 WL 10419828, at *1 (N.D. Tex. Mar. 9, 2018). The parties have
21 submitted extensive briefing and evidentiary submissions already; additional briefs, and
22 (hopefully) a more robust AR, are still to come; and a PI hearing is currently scheduled for the day
23 the TRO is set to expire.

24 These are independently sufficient reasons to find good cause and extend the TRO.
25 Viewed together, extending the TRO for a short additional period so that Defendants can comply
26 with the Court’s order would be eminently reasonable.

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1 Dated: September 14, 2020

LATHAM & WATKINS LLP

2

By: /s/ Anne Robinson

3

Anne Robinson

4

Steven M. Bauer (Bar No. 135067)

steven.bauer@lw.com

5

Sadik Huseny (Bar No. 224659)

sadik.huseny@lw.com

6

Amit Makker (Bar No. 280747)

amit.makker@lw.com

7

Shannon D. Lankenau (Bar. No. 294263)

shannon.lankenau@lw.com

8

LATHAM & WATKINS LLP

505 Montgomery Street, Suite 2000

San Francisco, CA 94111

9

Telephone: 415.391.0600

10

Facsimile: 415.395.8095

11

Richard P. Bress (admitted *pro hac vice*)

rick.bress@lw.com

12

Melissa Arbus Sherry (admitted *pro hac vice*)

melissa.sherry@lw.com

13

Anne W. Robinson (admitted *pro hac vice*)

anne.robinson@lw.com

14

Tyce R. Walters (admitted *pro hac vice*)

tyce.walters@lw.com

15

Genevieve P. Hoffman (admitted *pro hac vice*)

genevieve.hoffman@lw.com

16

Gemma Donofrio (admitted *pro hac vice*)

gemma.donofrio@lw.com

17

LATHAM & WATKINS LLP

555 Eleventh Street NW, Suite 1000

18

Washington, D.C. 20004

Telephone: 202.637.2200

19

Facsimile: 202.637.2201

20

Attorneys for Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of San Jose, California; Rodney Ellis; Adrian Garcia; and the NAACP

21

22

23

Dated: September 14, 2020

By: /s/ Jon M. Greenbaum

24

Kristen Clarke (*pro hac vice* forthcoming)

kclarke@lawyerscommittee.org

25

Jon M. Greenbaum (Bar No. 166733)

jgreenbaum@lawyerscommittee.org

26

Ezra D. Rosenberg (admitted *pro hac vice*)

erosenberg@lawyerscommittee.org

27

Dorian L. Spence (*pro hac vice* forthcoming)

dspence@lawyerscommittee.org

28

Maryum Jordan (*pro hac vice* forthcoming)

1
2
3
4
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9
10
11
12
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14
15
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18
19
20
21
22
23
24
25
26
27
28

mjordan@lawyerscommittee.org
Ajay Saini (admitted *pro hac vice*)
asaini@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
**LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW**
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Wendy R. Weiser (admitted *pro hac vice*)
weiserw@brennan.law.nyu.edu
Thomas P. Wolf (admitted *pro hac vice*)
wolf@brennan.law.nyu.edu
Kelly M. Percival (admitted *pro hac vice*)
percivalk@brennan.law.nyu.edu
BRENNAN CENTER FOR JUSTICE
120 Broadway, Suite 1750
New York, NY 10271
Telephone: 646.292.8310
Facsimile: 212.463.7308

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Doreen McPaul, Attorney General
dmcpaul@nndoj.org
Jason Searle (*pro hac vice* forthcoming)
jasearle@nndoj.org
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
Telephone: (928) 871-6345

Attorneys for Navajo Nation

Dated: September 14, 2020

By: /s/ Danielle Goldstein
Michael N. Feuer (Bar No. 111529)
mike.feuer@lacity.org
Kathleen Kenealy (Bar No. 212289)
kathleen.kenealy@lacity.org
Danielle Goldstein (Bar No. 257486)
danielle.goldstein@lacity.org
Michael Dundas (Bar No. 226930)
mike.dundas@lacity.org
CITY ATTORNEY FOR THE CITY OF LOS ANGELES
200 N. Main Street, 8th Floor
Los Angeles, CA 90012
Telephone: 213.473.3231
Facsimile: 213.978.8312

Attorneys for Plaintiff City of Los Angeles

Dated: September 14, 2020

By: /s/ Michael Mutalipassi
Christopher A. Callihan (Bar No. 203010)
legalwebmail@ci.salinas.ca.us
Michael Mutalipassi (Bar No. 274858)
michaelmu@ci.salinas.ca.us
CITY OF SALINAS
200 Lincoln Avenue
Salinas, CA 93901
Telephone: 831.758.7256
Facsimile: 831.758.7257

Attorneys for Plaintiff City of Salinas

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 14, 2020

By: /s/ Rafey S. Balabanian
Rafey S. Balabanian (Bar No. 315962)
rbalabanian@edelson.com
Lily E. Hough (Bar No. 315277)
lthough@edelson.com
EDELSON P.C.
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415.212.9300
Facsimile: 415.373.9435

Rebecca Hirsch (*pro hac vice* forthcoming)
rebecca.hirsch2@cityofchicago.org
**CORPORATION COUNSEL FOR THE
CITY OF CHICAGO**
Mark A. Flessner
Stephen J. Kane
121 N. LaSalle Street, Room 600
Chicago, IL 60602
Telephone: (312) 744-8143
Facsimile: (312) 744-5185

Attorneys for Plaintiff City of Chicago

Dated: September 14, 2020

By: /s/ Donald R. Pongrace
Donald R. Pongrace (*pro hac vice* pending)
dpongace@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
2001 K St., N.W.
Washington, D.C. 20006
Telephone: (202) 887-4000
Facsimile: 202-887-4288

Dario J. Frommer (Bar No. 161248)
dfrommer@akingump.com
**AKIN GUMP STRAUSS HAUER & FELD
LLP**
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067-6022
Phone: 213.254.1270
Fax: 310.229.1001

*Attorneys for Plaintiff Gila River Indian
Community*

1
2
3
4
5
6
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10
11
12
13
14
15
16
17
18
19
20
21
22
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24
25
26
27
28

Dated: September 14, 2020

By: /s/ David I. Holtzman
David I. Holtzman (Bar No. 299287)
David.Holtzman@hkllaw.com
HOLLAND & KNIGHT LLP
Daniel P. Kappes
Jacqueline N. Harvey
50 California Street, 28th Floor
San Francisco, CA 94111
Telephone: (415) 743-6970
Fax: (415) 743-6910

Attorneys for Plaintiff County of Los Angeles

ATTESTATION

I, Anne Robinson, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: September 14, 2020

LATHAM & WATKINS LLP

By: /s/ Anne Robinson
Anne Robinson