

1 LATHAM & WATKINS LLP  
Sadik Huseny (Bar No. 224659)  
2 sadik.huseny@lw.com  
Steven M. Bauer (Bar No. 135067)  
3 steven.bauer@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  
Melissa Arbus Sherry (*pro hac vice*)  
9 melissa.sherry@lw.com  
Richard P. Bress (*pro hac vice*)  
10 rick.bress@lw.com  
Anne W. Robinson (*pro hac vice*)  
11 anne.robinson@lw.com  
Tyce R. Walters (*pro hac vice*)  
12 tyce.walters@lw.com  
Gemma Donofrio (*pro hac vice*)  
13 gemma.donofrio@lw.com  
Christine C. Smith (*pro hac vice*)  
14 christine.smith@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*)  
kclarke@lawyerscommittee.org  
Jon M. Greenbaum (Bar No. 166733)  
jgreenbaum@lawyerscommittee.org  
Ezra D. Rosenberg (*pro hac vice*)  
erosenberg@lawyerscommittee.org  
Ajay P. Saini (*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.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' PRIVILEGE  
OBJECTIONS TO DECEMBER 21  
LOG AND RELATED PRIVILEGE  
DISPUTES**

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

1 Pursuant to the Court’s December 15, 2020 Order on Further Procedures For In Camera  
2 Review of Documents on Privilege Logs (“Order on Privilege Procedures”) (Dkt. 383), Plaintiffs  
3 submit the following objections to Defendants’ assertions of privilege in the December 21, 2020  
4 log. As this Court instructed, Plaintiffs have streamlined their objections and identified those  
5 that are the highest priority. Plaintiffs attach as Exhibit A the December 21 privilege log, with  
6 an added column titled “Privilege Objections/Response” summarizing Plaintiffs’ objections to  
7 challenged entries. Plaintiffs have highlighted in yellow high priority objections within Exhibit  
8 A. After a meet and confer, Defendants agreed to remove 52 entries from the log. Those entries  
9 are crossed through on Exhibit A.

10 To avoid duplication, Plaintiffs incorporate their prior filings describing the scope of the  
11 deliberative process privilege, attorney-client privilege, and attorney work product protection,  
12 and identifying the categories of documents that would fall outside of those privileges. *See, e.g.*,  
13 Plaintiffs’ Memorandum Re: Privilege Disputes (Dkt. 149), Plaintiffs’ Privilege Objections (Dkt.  
14 170).

## 15 I. BACKGROUND

### 16 A. Defendants Produced A Privilege Log with Only 135 Documents and Should 17 be Ordered to Produce all Non-Logged Materials as to which They Have 18 Now Waived Privilege

19 As detailed in Plaintiffs’ Response to Court’s Ruling Ordering Defendants to Show Cause  
20 (Dkt. 400 at 1-4) (“Plaintiffs’ Response”), Defendants have resisted complying with their discovery  
21 obligations at every turn—even when specifically ordered to do so by this Court. Defendants’  
22 deficiencies and delay tactics forced Plaintiffs to file a motion to compel, which the Court granted.  
23 Dkt. 372. Defendants filed a motion for reconsideration, which was denied. Dkt. 380. Defendants  
24 then filed a motion for protective order to drastically limit the scope of the Rule 30(b)(6) deposition  
25 ordered by the Court, which was also denied. Dkt. 387.

26 As to Defendants’ obligations to log any and all documents over which Defendants assert  
27 privilege, the Court issued an Order on Privilege Procedures requiring that Defendants produce (1)  
28 a first privilege log by December 14, 2020; and (2) second privilege log by December 21, 2020 at

1 7:00 p.m. including “any additional documents that have been withheld as privileged up to the time  
2 of the final production” on December 21. Order on Privilege Procedures at 2. As the Court noted  
3 in its Order in Response to Defendants’ Failure To Comply With Court Order To Produce  
4 Privilege Log (“Show Cause Order”) (Dkt. 392), Defendants failed to produce *any* December 14  
5 privilege log, contrary to the Court’s orders and Defendants’ representations. Show Cause Order  
6 at 1. Accordingly, in Plaintiffs’ Response to Court’s Ruling Ordering Defendants To Show Cause  
7 (Dkt. 392), Plaintiffs respectfully asked the Court to find Defendants to have waived all privileges  
8 in connection with the documents responsive to Plaintiffs’ document requests corresponding to the  
9 December 14 through December 21 productions.

10 In the face of this Court’s Show Cause Order, Defendants chose to log a mere 135  
11 documents. Ex. A. Thus, for the 89,228 documents produced since December 1, 2020,  
12 Defendants logged fewer than 180 documents. This scant privilege log stands in stark contrast to  
13 Defendants’ representations to this Court regarding the volume and type of documents it would  
14 claim to be privileged in this case. On December 12, Defendants filed the Declaration of Brian  
15 DiGiacomo (“DiGiacomo Declaration”) (Dkt. 376-2), which sought to excuse Defendants’ delayed  
16 document productions by stating that of the approximately 88,765 documents ordered “to be  
17 produced to Plaintiffs by December 14, 2020,” approximately 25,512 documents “are likely to  
18 contain material protected by the attorney-client, attorney-work-product, and Executive  
19 privileges.” DiGiacomo Declaration at 1-2. Mr. DiGiacomo additionally specified that “a  
20 significant number of documents—as many as 2,944—are likely subject to Executive privilege,” as  
21 they “include communications between federal agency personnel and presidential advisers or  
22 members of their staff in the Office of the President.” *Id.* at 2.

23 Despite these express and sworn representations, Defendants produced a privilege log of  
24 135 documents. Moreover, there is not a single claim of Executive privilege on the log. (As  
25 discussed below, the White House is mentioned in two entries, but each of those asserts either the  
26 attorney-client or deliberative process privilege as the applicable privilege.)

27 Based on the parties’ meet-and-confers it appears that Defendants did not log  
28 approximately 19,000 documents to, from, or originating from a broad swath of attorneys they

1 have deemed “litigation counsel.” Despite repeated requests from Plaintiffs for over a week,  
2 Defendants have not provided even a list of the counsel whose communications they are refusing  
3 to log. However, Defendants have acknowledged that this group includes members of the  
4 Department of Commerce General Counsel’s Office—even though this same counsel may very  
5 well have participated in activities and issues underlying this case—including discussions  
6 regarding implementation of the Replan. As Plaintiffs have previously explained, only emails  
7 from Department of Justice counsel should not be logged, as only those attorneys are clearly not  
8 involved in the substantive issues involved in the litigation. Plaintiffs’ Response to Motion for  
9 Leave to File an Emergency Motion for Reconsideration or, in the Alternative, for a Protective  
10 Order (Dkt. 378) at 7.

11 In addition to not including attorney documents that do not involve Department of Justice  
12 attorneys, Defendants may well have failed to properly log additional documents that are  
13 responsive to Plaintiffs’ document requests. For example, the nearly 3,000 documents involving  
14 the White House that Defendants previewed logging under the Executive privilege are noticeably  
15 missing in their entirety from the log.

16 Plaintiffs therefore respectfully request that the Court find that Defendants have waived all  
17 privileges in connection with the subset of the 19,000 documents that do not include a Department  
18 of Justice attorney but have been withheld from production by Defendants. As described in  
19 Plaintiffs’ Response, waiver is more than appropriate in light of Defendants’ repeated conduct  
20 regarding its privilege obligations. Dkt. 400.

21 Plaintiffs further request that the Court order Defendants to immediately produce the 2,944  
22 documents described in paragraph 12 of Mr. DiGiacomo’s declaration as being reviewed for White  
23 House privilege, except for any subset of documents (which Defendants are to identify) for which  
24 privilege is being claimed on Defendants’ December 21 privilege log and which were not  
25 challenged by Plaintiffs and resolved by this Order. No documents on the December 21 log are  
26 described as being withheld on that ground, and accordingly these documents should be produced  
27 to Defendants.

28

1           **B. Defendants Did Not Provide a Declaration to Accompany Their Privilege**  
 2           **Log, as Required by Federal Law and This Court’s Orders**

3           In accordance with the Order on Privilege Procedures, Plaintiffs provided Defendants with a  
 4 list of challenged entries in Defendants’ December 21 log on December 22, 2020 prior to 3:00 p.m.  
 5 PT. *See* Exhibit A. Plaintiffs and Defendants then met and conferred shortly thereafter. Plaintiffs  
 6 discussed their objections with Defendants, stating that a large portion of the 135 entries on the  
 7 December 21 privilege log appear to be improperly withheld documents.

8           During the meet and confer, Plaintiffs noted that Defendants did not provide a declaration  
 9 to accompany their claims of deliberative process privilege in the December 21 privilege log, as  
 10 required for any assertions of deliberative process privilege. *See Padgett v. City of Monte Sereno*,  
 11 No. 04-CV-3946 JW (RS), 2006 WL 8442137, at \*4 (N.D. Cal. Feb. 24, 2006) (to assert  
 12 deliberative process privilege in the Ninth Circuit, the agency must submit a declaration from the  
 13 head of the department which has control over the relevant matter). Defendants responded that  
 14 they did not believe they were required to provide a declaration regarding claims of deliberative  
 15 process privilege in their privilege log until after Plaintiffs provided objections, and they would  
 16 provide their declaration to the Court when they file their briefing regarding privilege disputes on  
 17 December 23, 2020. However, it is well established that an “assertion” of deliberative process  
 18 privilege requires “(1) a formal claim of privilege by the head of the department having control  
 19 over the requested information; (2) assertion of the privilege based on actual personal  
 20 consideration by that official; and (3) a detailed specification of the information for which the  
 21 privilege is claimed, with an explanation why it properly falls within the scope of the privilege.”  
 22 *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (internal citations and quotations  
 23 omitted). And the Court has acknowledged the need for a declaration accompanying claims of  
 24 deliberative process privilege in several prior orders. *See* Order on Procedures For In Camera  
 25 Privilege Review By Magistrate Judge (Dkt. 163) at 2 (noting that, per the Court’s Order,  
 26 Defendants provided attorney declarations in support of their deliberative process privilege  
 27 claims); Order Re: Privilege Declaration And Documents For *In Camera* Review (Dkt. 153)  
 28 (ordering Defendants to provide a declaration in support of their privilege assertions in prior

1 privilege logs). In failing to produce a declaration along with their privilege log, to explain why  
 2 entries properly fall within deliberative process privilege, Defendants have failed to properly claim  
 3 this privilege over any of their December 21 privilege log entries.

4 **II. DEFENDANTS' ASSERTIONS OF THE DELIBERATIVE PROCESS**  
 5 **PRIVILEGE ARE OVERBROAD IN SEVERAL RESPECTS**

6 Plaintiffs challenge the documents withheld in privilege log entries 3-4, 7-9, 11-13, 17-18,  
 7 28-35, 43, 55-56, 61, 64, 66-67, 69-70, 73, 75-84, 86-88, 90-91, 93-99, 107-110, 114, 116-121,  
 8 124-131, 133, and 136. Ex. A.

9 **A. Documents Described in the Privilege Log Are Not “Predecisional”**

10 The documents described in Defendant’s privilege log are not deliberative or predecisional,  
 11 and must therefore be produced to Plaintiffs.

12 The deliberative process privilege is “strictly confined within the narrowest possible limits  
 13 consistent with the logic of its principles.” *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d  
 14 1118, 1122 (N.D. Cal. 2003) (citation omitted); *Cal. Native Plant Soc’y v. EPA*, 251 F.R.D. 408,  
 15 410 (N.D. Cal. 2008) (“[C]ourts should construe the [deliberative process] privilege narrowly and  
 16 strictly.”). It covers a limited category of documents reflecting predecisional advisory opinions,  
 17 recommendations, and deliberations within an agency. *Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th  
 18 Cir. 2019). Materials are considered “predecisional” if “prepared in order to assist an agency  
 19 decisionmaker in *arriving* at his decision,” and deliberative if they cover “opinions,  
 20 recommendations, or advice about agency policies.” *Carter v. U.S. Dept. of Commerce*, 307 F.3d  
 21 1084, 1089 (9th Cir. 2002) (emphasis added) (internal citation omitted). Additionally, “[a] document  
 22 that was prepared to support a decision already made is not predecisional.” *Fisherman’s Finest Inc.*  
 23 *v. Gutierrez*, No. C07-1574MJP, 2008 WL 2782909, at \*2 (W.D. Wash. July 15, 2008).  
 24 Accordingly, documents that “only reiterate or explain” a decision once it has been made are not  
 25 predecisional. *Id.* at \*3.

26 As a preliminary matter, the vast majority of documents listed as protected by the deliberative  
 27 process privilege in the December 21 privilege log are dated after the July 29, 2020 decision to  
 28 implement the Replan. *See* Ex. A, rows 15 through 136. As the Court held in its First Order After

1 In Camera Review As To Deliberative Process Privilege (Dkt. 179), documents dated after the  
2 Secretary of Commerce’s decision on July 29, 2020 to shorten the census timeless for data collection  
3 and data process were “mere implementation of the Secretary of Commerce’s decision,” and thus  
4 did “not fall within the deliberative process privilege.” *Id.* at 6; *see also Fisherman’s Finest Inc.*,  
5 2008 WL 2782909, at \*2.

6 Separate and apart from their timing, no one of these documents relate to a “significant  
7 policy decision.” *Dominguez v. Schwarzennger*, 2010 WL 3341038, at \*5 (N.D. Cal. Aug. 25,  
8 2010). For instance, several documents discuss email correspondence or draft documents such as  
9 “response to an NPR story” (Ex. A, row 67). Discussion of news articles is not deliberative of a  
10 “significant policy decision” of the Commerce Department or the Census Bureau, *Dominguez*,  
11 2010 WL 3341038, at \*5, and these documents cannot be withheld under deliberative process  
12 privilege.

13 Additionally, even if a document “is predecisional at the time it is prepared, it can lose that  
14 status if it is adopted, formally or informally, as the agency position on an issue or is used by the  
15 agency in its dealings with the public.” *Nat’l Res. Def. Council v. U.S. Dep’t of Def.*, 388 F. Supp.  
16 2d 1086, 1099 (C.D. Cal. 2005). In so far as information in the December 21 privilege log documents  
17 was adopted as the agency position on data processing for the 2020 census, those documents are no  
18 longer predecisional and must be disclosed to Plaintiffs.

19 **B. Documents Described in the Privilege Log Are Not “Deliberative”**

20 Moreover, several of the documents listed as privileged in Defendants’ December 21  
21 privilege log are not deliberative and instead contain factual information. Factual material that does  
22 not reveal the decision maker’s predecisional, deliberative mental processes is not protected by the  
23 deliberative process privilege and must be segregated and released. *Nat’l Res. Def. Council*, 388 F.  
24 Supp. 2d at 1106; *see also Dominguez*, 2010 WL 3341038, at \*5. Moreover, the party asserting the  
25 privilege must “‘connect the dots’ between each withheld document and a decision-making process  
26 or specific decision.” *Nat’l Res. Def. Council*, 388 F. Supp. 2d at 1106.

27 Defendants’ log entries for documents withheld under deliberative process privilege are  
28 replete with descriptions of factual information. For instance, the document in row 55 is described

1 as discussion “regarding recent articles concerning conduct of Census operations.” Ex. A, row 55.  
 2 This type of communication does not reflect any “opinions, recommendations, or advice about  
 3 agency policies,” *Carter*, 307 F.3d at 1089, and must also be provided to Plaintiffs. Additionally,  
 4 the documents described in rows 2-4, 7-9, 11-13, 17-18, 28-35, 43, 55-56, 61, 64, 66-67, 69-70, 73,  
 5 75-84, 86-88, 90-91, 93-99, 107-110, 114, 116-121, 124-131, 133, and 136 ostensibly contain factual  
 6 material that must be segregated and released and/or are not tied to any significant policy decision  
 7 by Defendants and must be produced. Ex. A; *see also Nat’l Res. Def. Council*, 388 F. Supp. 2d at  
 8 1106; *Dominguez*, 2010 WL 3341038, at \*5.

9 **C. Deliberative Process Privilege is a Qualified Privilege**

10 As Plaintiffs have noted in prior briefing, even a proper assertion of privilege can be  
 11 overcome by a sufficient showing of need outweighing the harm that might result from disclosure.  
 12 *FTC v. Warner Comm’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The Ninth Circuit has set forth  
 13 four non-exclusive factors that courts consider in balancing the competing interests: “(1) the  
 14 relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the  
 15 litigation; and (4) the extent to which disclosure would hinder frank and independent discussion  
 16 regarding contemplated policies and decisions.” *Id.* (citations omitted).

17 Plaintiffs do not have sufficient information to inform the balancing test for deliberative  
 18 process privilege, but ask the Court to conduct this balancing test if it finds that deliberative  
 19 process privilege applies to any of the challenged documents. In particular, the documents  
 20 described in rows 13, 32, 56, 63, 66, 91, 99, 128, 130, 133, and 136, appear to be key documents  
 21 related to data processing issues central to this case, some of which involve communications with  
 22 White House Counsel. Ex. A. Plaintiffs’ need for these factual documents, which are essential  
 23 for Plaintiffs’ Enumeration Clause claim, outweighs any harm to Defendants.

24 **III. DEFENDANTS’ CLAIMS OF ATTORNEY-CLIENT PRIVILEGE AND WORK**  
 25 **PRODUCT PROTECTION ARE INSUFFICIENTLY SUPPORTED**

26 Plaintiffs object to Defendants’ log entries on the basis of attorney-client privilege in  
 27 rows 15-16, 37-38, 68, 74, 85-86, 89-98, 121, 130, and 132-133. Ex. A. Plaintiffs also object to  
 28 Defendants’ claim of attorney work product in rows 86, 103, and 105. Ex. A.



1           **A. Defendants’ Failed to Identify Attorneys on Their Privilege Log**

2           The privilege log provided to Plaintiffs on December 21 failed to identify any  
3 attorneys—rendering each of Defendants’ assertions of attorney-client privilege and attorney  
4 work product protection are deficient. *See, e.g., In re Grand Jury Investigation*, 974 F.2d 1068,  
5 1071 (9th Cir. 1992) (A party claiming privilege must provide a privilege log that identifies “the  
6 attorney and client involved” in the communications). At 10:30 a.m. PT on December 23,  
7 Defendants provided a revised log which indicated the entries which involved an attorney.  
8 However, as discussed below, many entries where attorney-client privilege or attorney work  
9 product is claimed do not include any attorney.

10           **B. Defendants’ Attorney-Client Privilege Claims Are Vague and Do Not**  
11           **Describe Legal Advice**

12           Even if Defendants’ entries claiming attorney-client privilege do, in fact, involve an  
13 attorney, all of the entries to which Plaintiffs object do not sufficiently identify any legal advice  
14 being provided or sought.

15           When asserting privileges including attorney-client privilege or work product protection,  
16 the asserting party bears the burden to demonstrate the privilege applies and must “(i) expressly  
17 make the claim; and (ii) describe the nature of the documents, communications, or tangible  
18 things not produced or disclosed—and do so in a manner that, without revealing information  
19 itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P.  
20 26(b)(5)(A); *see also, e.g., Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988). The  
21 Ninth Circuit applies an eight-factor test for determining the applicability of the strictly  
22 construed attorney-client privilege: ““(1) [w]here legal advice of any kind is sought (2) from a  
23 professional legal adviser in his capacity as such, (3) the communications relating to that  
24 purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected  
25 (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.””  
26 *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (internal citation omitted). The agency  
27 asserting attorney client privilege “bears the burden of showing that the information exchanged  
28 [with its attorney] was confidential.” *Nat’l Res. Def. Council*, 388 F. Supp. 2d at 1099.

1           The attorney-client privilege or attorney work products documents listed on the  
 2 December 21 privilege log which Plaintiffs are objecting to (Ex. A, rows 37, 74, 85-86, 90-98,  
 3 121, 130, and 133) cannot be redacted or withheld under attorney-client privilege because  
 4 Defendants fail to identify the legal advice involved. Communications simply “deliberating a  
 5 draft document” (Ex. A, row 37) cannot be considered communications where “legal advice . . .  
 6 is sought.” *Ruehle*, 583 F.3d at 607. Communications or comments by an attorney who does  
 7 not even represent Defendants (Ex. A, rows 130, 133) similarly cannot be considered “legal  
 8 advice,” seeing as the attorney-client relationship that protects such communications is non-  
 9 existent. *Ruehle*, 583 F.3d at 607. Likewise, other log entries contain correspondence with  
 10 agency counsel “regarding draft MOUs related to obtaining records from other Federal agencies”  
 11 (Ex. A, rows 90-91, 93-98, 121); it is not clear how this communication relates to any legal  
 12 advice.

13           Further, additional correspondence mentions “legal strategy” (Ex. A row 68), but fails to  
 14 state that an attorney for Defendants is providing legal advice through the communication.  
 15 Granted, a few entries on the log state, in a cursory manner, that communications involved  
 16 “seeking legal advice” (Ex. A rows 74, 86, 92). Yet these log entries do not meet the agency’s  
 17 burden to show that “the information exchanged [with its attorney] was confidential,” and thus  
 18 protected from disclosure. *Nat. Res. Def. Council v. Dept. of Defense*, 388 F. Supp. 2d 1086,  
 19 1099 (C.D. Cal. 2005). Defendants have therefore failed to sustain their burden to demonstrate  
 20 they may redact or withhold these documents based on attorney-client privilege.

21           **C. Defendants’ Claim of Work Product Protection is Overly Broad**

22           The work-product doctrine is qualified and only protects “certain materials prepared by  
 23 an attorney acting for his client in anticipation of litigation.” *Hernandez v. Tanninen*, 604 F.3d  
 24 1095, 1100 (9th Cir. 2010) (quoting *United States v. Nobles*, 422 U.S. 225, 237-38 (1975)); Fed.  
 25 R. Civ. P. 26(b)(3). Where a document is not prepared exclusively for litigation, Ninth Circuit  
 26 courts apply the “because of” test, meaning whether the “document was created because of  
 27 anticipated litigation, and would not have been created in substantially similar form but for the  
 28 prospect of litigation.” *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (quoting *In re*

1 *Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004)  
 2 (“Document should be deemed prepared in anticipation of litigation ... if ... the document can be  
 3 fairly said to have been prepared or obtained because of the prospect of litigation.” (citation  
 4 omitted))).

5 Defendants invoke attorney work product regarding a communication over which they  
 6 also claim deliberative process or attorney-client privilege. Ex. A, row 86. This document is  
 7 also improperly withheld under attorney work product because Defendants have not  
 8 demonstrated that the communication at issue was prepared “*because of*” the litigation at hand.  
 9 *Rickey*, 632 F.3d at 568 (emphasis added). There is no indication that this material was  
 10 specifically created because of the litigation in this case, and as such, it cannot be redacted under  
 11 attorney work product.

12 **D. Defendants Cannot Withhold Communications with White House Counsel**  
 13 **Because White House Counsel Does Not Represent Defendants**

14 Defendants list two documents as protected by the attorney-client privilege where the  
 15 communication at issue is between the Department of Commerce or Census Bureau staff and  
 16 White House Counsel:

- 17 • **Row 130: DOC\_0179363** – “Communication from Census attorney to attorney in  
 18 White House Counsel’s Office reflecting request for and formulation of legal  
 19 advice on proposed policy/action for the President”
- 20 • **Row 133: DOC\_183475** – “Communication between attorney in White House  
 21 Counsel’s Office (Philbin) and Census attorney (Mayfield) reflecting request for  
 22 legal advice on proposed action/policy for President  
 23

24 These documents do not qualify as attorney-client privileged for the reasons discussed  
 25 above. Moreover, these documents are not privileged for the additional reason that the  
 26 Department of Commerce is not the White House Counsel’s client. The Office of the White  
 27 House Counsel “advises the President, the Executive Office of the President, and the White  
 28 House staff on legal issues,” and does not purport to be the attorneys representing the

1 Department of Commerce in this case or any other matter. *Presidential Departments*, White  
 2 House Internship Program, [https://www.whitehouse.gov/get-involved/internships/presidential-](https://www.whitehouse.gov/get-involved/internships/presidential-departments/)  
 3 [departments/](https://www.whitehouse.gov/get-involved/internships/presidential-departments/) (last accessed Dec. 23, 2020). Therefore, there is no attorney-client relationship  
 4 between White House Counsel and Defendants, and Defendants cannot withhold or redact the  
 5 above-referenced documents containing communications with White House Counsel based on  
 6 attorney-client privilege. Nor have Defendants asserted any common interest privilege as a basis  
 7 for any of their withheld documents. *See* Ex. A.<sup>1</sup>

#### 8 **IV. CONCLUSION**

9 Defendants' assertions of deliberative process privilege for entries in rows 3-4, 7-9, 11-  
 10 13, 17-18, 28-35, 43, 55-56, 61, 64, 66-67, 69-70, 73, 75-84, 86-88, 90-91, 93-99, 107-110, 114,  
 11 116-121, 124-131, 133, and 136, assertions attorney-client privilege in rows 37, 68, 86, 90-98,  
 12 121, and 130, and assertion of attorney work product in row 86 of the December 21 privilege log  
 13 are without merit. Defendants should be ordered to produce the documents corresponding to the  
 14 aforementioned entries.

15 Moreover, Plaintiffs respectfully request that the Court find that Defendants have waived  
 16 all privileges in connection with the subset of the 19,000 documents not logged that do not  
 17 include a DOJ attorney, but have been withheld from production by Defendants. Plaintiffs  
 18 further request that Defendants immediately produce the 2,944 documents described in

---

19  
 20 <sup>1</sup> Moreover, even if Defendants had properly asserted common interest privilege, the  
 21 common interest privilege applies only to communications made for the purpose of seeking legal  
 22 advice or services. *See, e.g., United States v. NGL Crude Logistics, LLC*, No. 16-CV-1038-LRR,  
 23 2018 WL 9870043, at \*2 (N.D. Iowa June 18, 2018) (“Communications between a lawyer  
 24 representing one governmental agency and an employee of another governmental agency are  
 25 privileged . . . if the lawyer represents both agencies or if the communication is pursuant to a  
 26 common-interest arrangement.” (quoting Restatement (Third) of the Law Governing Lawyers § 74  
 27 cmt. c) (emphasis added)). Communications made “for the purpose of broader policymaking” fall  
 28 beyond the scope of the privilege. *Id.* at \*3. The key question is “whether the [agency] attorneys  
 . . . were acting in their legal or policymaking capacities (*and whether the privilege log contains  
 sufficient information to determine this issue*).” *Id.* at \*3, 5 (emphasis added) (noting that “bare  
 assertions that a communication ‘provides legal advice’ are insufficient to . . . evaluate whether an  
 attorney was acting in a legal or policymaking capacity when she made the communication”). In  
 these entries, the attorneys appear to be acting in a policymaking capacity rather than a legal  
 capacity. *See, e.g.* Ex. A (Row 130) (describing communications between Census attorney and  
 White House Counsel’s Office regarding “proposed policy/action for the President”).

1 paragraph 12 of Mr. DiGiacomo’s December 12, 2020 declaration as being reviewed for  
2 Executive privilege, except for any subset of documents (which Defendants are to identify) for  
3 which privilege is being claimed on Defendants’ December 21 privilege log and which were not  
4 challenged by Plaintiffs and resolved by this Order.

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

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: December 23, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny  
Sadik Huseny

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

Melissa Arbus Sherry (*pro hac vice*)  
melissa.sherry@lw.com  
Richard P. Bress (*pro hac vice*)  
rick.bress@lw.com  
Anne W. Robinson (*pro hac vice*)  
anne.robinson@lw.com  
Tyce R. Walters (*pro hac vice*)  
tyce.walters@lw.com  
Gemma Donofrio (*pro hac vice*)  
gemma.donofrio@lw.com  
Christine C. Smith (*pro hac vice*)  
christine.smith@lw.com  
**LATHAM & WATKINS LLP**  
555 Eleventh Street NW, Suite 1000  
Washington, D.C. 20004  
Telephone: 202.637.2200  
Facsimile: 202.637.2201

*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*

Dated: December 23, 2020

By: /s/ Jon M. Greenbaum  
Kristen Clarke (*pro hac vice*)  
kclarke@lawyerscommittee.org  
Jon M. Greenbaum (Bar No. 166733)  
jgreenbaum@lawyerscommittee.org  
Ezra D. Rosenberg (*pro hac vice*)  
erosenberg@lawyerscommittee.org  
Ajay Saini (*pro hac vice*)

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

asaini@lawyerscommittee.org  
Maryum Jordan (Bar No. 325447)  
mjordan@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 (*pro hac vice*)  
weiserw@brennan.law.nyu.edu  
Thomas P. Wolf (*pro hac vice*)  
wolft@brennan.law.nyu.edu  
Kelly M. Percival (*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*)  
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: December 23, 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: December 23, 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*

Dated: December 23, 2020

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



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

Telephone: 415.212.9300  
Facsimile: 415.373.9435

Rebecca Hirsch (*pro hac vice*)  
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: December 23, 2020

By: /s/ Donald R. Pongrace  
Donald R. Pongrace (*pro hac vice*)  
dpongrace@akingump.com  
Merrill C. Godfrey (Bar No. 200437)  
mgodfrey@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

*Attorneys for Plaintiff Gila River Indian  
Community*

Dated: December 23, 2020

By: /s/ David I. Holtzman  
David I. Holtzman (Bar No. 299287)  
David.Holtzman@hklaw.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*

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

**ATTESTATION**

I, Sadik Huseny, 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: December 23, 2020

**LATHAM & WATKINS LLP**

By: /s/ Sadik Huseny  
Sadik Huseny