**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| LA UNIÓN DEL PUEBLO ENTERO, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*,<br><br>Defendants. | No. 8:19-cv-02710-GJH |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO UN-RELATE AND REASSIGN THIS CASE**

## INTRODUCTION

The issue in this motion is simple: whether a new case challenging Defendants' collection of citizenship information through administrative records is "related" to an old case challenging Defendants' decision to include a citizenship question on the 2020 Census with different legal theories, different requested relief, and an inconsequential overlap in parties. The answer is also simple: no. The applicable Local Rule says as much. In order to be considered "related," two cases must "arise from *the same or identical* transactions, happenings, or events"; involve "*identical* parties or property"; or entail a "*substantial* duplication of labor if heard by different judges." Local Civ. R. 103.1(b)(i) (emphasis added). There are no factual or legal similarities between these two cases, so there would be no duplication of labor if they were heard by different judges. Here, as in most cases, the default rule of random assignment should govern "in order to ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *Comm. on Judiciary v. McGahn*, 391 F. Supp. 3d 116, 118–19 (D.D.C. 2019) (citations omitted).

Plaintiffs attempt to obfuscate this straightforward analysis by framing their claims as broadly as possible, arguing that both cases derive from a plot that "began in at least 2017 when President Trump took office" to "intentionally discriminate against and dilute the political power of Latinos, non-U.S. citizens, and communities of color to

benefit non-Latino White, Republicans." Pls.' Opp'n at 8. Notably absent from Plaintiffs' argument, however, is any specific discussion of their own allegations or the facts needed to support them. Nowhere do Plaintiffs explain how the only two factual issues in the citizenship-question case—the reasons for the Secretary's 2018 decision to *include a citizenship question* on the 2020 Census, and whether a citizenship question would cause an inaccurate census count—have anything to do with the factual issues concerning the 2019 decision to collect citizenship information through administrative records. And nowhere do Plaintiffs explain how the legal analyses in the prior litigation—whether reinstating a citizenship question violated the Constitution, the APA, and 42 U.S.C. § 1985—have anything to do with the legality of one federal agency, the Census Bureau, collecting citizenship information from other federal agencies.

They do not because they cannot. The Court would not examine "the same or identical transactions, happenings, or events" to assess the lawfulness of *both* a citizenship question on the 2020 Census *and* the use of the administrative records to gather citizenship data. Nor could the Court award Plaintiffs' requested relief in *this* case—an injunction barring Defendants "from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population"—by scrutinizing the "transactions, happenings, or events" in the citizenship-question case. So it is logically impossible for the "transactions, happenings, [and] events" to be "the same or identical."

Plaintiffs' remaining arguments are easily rejected: they readily admit that this case and the citizenship-question case do not involve "identical parties," and they make little effort to identify a "substantial duplication of labor" beyond parroting their illogically broad arguments and citing cases that support *Defendants'* position. "The burden on the party claiming relation is heavy as random assignment of cases is essential to the public's confidence in an impartial judiciary." *McGahn*, 391 F. Supp. 3d at 119. Plaintiffs cannot meet their heavy burden.

## ARGUMENT

### I. The citizenship-question case and this case do not "arise from the same or identical transactions, happenings, or events."

As Defendants previously explained, the prior case "ar[o]se from" the Secretary's 2018 decision to include a citizenship question on the 2020 Census; this case "arise[s] from" the President's 2019 decision to gather citizenship information from administrative records. Defs.' Mem. at 10. The Court would not be examining "the same or identical transactions, happenings, or events" to assess the lawfulness of those incongruent decisions. *Id.* Plaintiffs do not dispute this legally dispositive point or, really, any of Defendants' specific arguments. Instead, they try a different tactic: framing their claims as broadly as possible, regardless of the facts needed to prove the relevant claims or any applicable legal analysis.

To begin, all factual development that occurred in the prior year-long litigation concerned two issues: (1) the process preceding, and the reasons for, the Secretary's

decision to include a citizenship question; and (2) whether a citizenship question would cause an inaccurate census count after the Census Bureau's extensive Non-response Follow-up operations and imputation. *See* Defs.' Mem. at 11–12. Neither of those inquiries are relevant here. The Secretary's reasons for including a citizenship question on the census have nothing to do with the compilation of administrative records under a presidential directive concerning a different decision, and there is no allegation that simply gathering citizenship information from other agencies would affect the census count. *Id.*

How do Plaintiffs' address this critical discrepancy? They don't. Instead, Plaintiffs hypothesize a presidential conspiracy dating back to 2017, Pls.' Opp'n at 7–9, and contend that there is a discriminatory motive behind collecting citizenship data from agencies and producing it "for use along with the P.L. 94-171 Redistricting Data File." FAC ¶¶ 96, 112, 115–16. But these (meritless) claims about the collection of administrative records are entirely distinct from the prior litigation in which the citizenship-question plaintiffs argued that "the Secretary's decision [to include a citizenship question] was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 754 (D. Md. 2019). Neither

"depressing immigrant response" nor including a citizenship question are at issue here. *See* Defs.' Mem. at 14.[1]

Plaintiffs also claim that "there are common questions of fact as to Plaintiffs' APA claims" due to "policies and procedures that govern the Census Bureau's collection of information." Pls.' Opp'n at 9. They are mistaken. Even assuming Plaintiffs' APA claims are cognizable (they are not), "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal" and "[t]he entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (alterations omitted); *Owusu-Boakye v. Barr*, 376 F. Supp. 3d 663, 667 (E.D. Va. 2019). So there cannot be "common questions of fact" on Plaintiffs' APA claims. In any event, the

[1] Plaintiffs are incorrect that "where a discriminatory purpose infected a prior policy, that discriminatory purpose can also provide evidence that a new policy is similarly motivated by discriminatory intent," Pls.' Opp'n at 9. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding a facially neutral Presidential directive despite previous versions of the same policy found by lower courts to discriminate on the basis of religion); *Karnoski v. Trump*, 926 F.3d 1180, 1199 (9th Cir. 2019) (analyzing anew a policy barring transgender persons from military service—after a previous version of the policy was enjoined—because "the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions"). But even if Plaintiffs were correct, it would make little difference to the relevant inquiry: whether both cases "arise from *the same or identical* transactions, happenings, or events." Local Civ. R. 103.1(b)(i) (emphasis added). For one, no court ever found that the Secretary was motivated by discriminatory animus in deciding to reinstate a citizenship question on the 2020 Census. *See Kravitz*, 366 F. Supp. 3d at 754; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded* 139 S. Ct. 2551 (2019); *see also Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041 (D. Md. June 24, 2019), ECF No. 175 at 8, 13 (finding a "substantial issue" in the citizenship-question context). For another, the citizenship-question plaintiffs were, unsurprisingly, focused on whether the Secretary's decision to include a citizenship question on the 2020 Census "was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *See Kravitz*, 366 F. Supp. 3d at 754. Even if Plaintiffs' current claims are cognizable, they would need to prove a discriminatory motive to collect citizenship data *from other administrative agencies* (and prove a discriminatory effect from such collection). In short, if this case progressed to the merits, the Court's inquiry would not examine "the same or identical transactions, happenings, or events" or perform the same legal analysis.

Court's APA inquiry on this procedural claim would look nothing like the analysis in the citizenship-question litigation. There, the Court examined Census Bureau procedures and found that the citizenship question was not "well tested" because "the Administrative Record show[ed] that . . . the citizenship question [did] not perform adequately on the [American Community Survey (ACS)]." *Kravitz*, 366 F. Supp. 3d at 748 (deemphasized). Here, again, there is no census question at issue nor any dispute about pretesting census questions. And perhaps unsurprisingly, Plaintiffs make no effort to defend the relatedness of their other APA claims. *See* FAC ¶¶ 88–92 (APA claim for purportedly failing to provide "any independent analysis or support to justify collecting citizenship data to produce this data for use with the population tabulations provided to states in the 2020 Census P.L. 94-171 Redistricting Data File"); *id.* ¶¶ 99–104 (APA claim for supposedly exceeding statutory authority).

It is true that "courts do not require complete factual overlap or that that there be no factual difference" between related cases. Pls.' Opp'n at 9. But this Court's Local Rules require that both cases "arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). Plaintiffs' cited cases, and many others, simply support the unremarkable proposition codified by the Local Rules: when two cases "arise from the same or identical transactions, happenings, or events," *id.*, "the strong presumption of random case assignment" may be "outweighed by the interests of judicial

efficiency" because there will be "virtually identical and highly overlapping issues of fact" that must be resolved, *McGahn*, 391 F. Supp. 3d at 121.

Yet, again, Plaintiffs nowhere explain how the only two factual issues in the citizenship-question case (the reasons for the Secretary's decision to *include a citizenship question*, and whether a citizenship question would cause an inaccurate census count) relate in any way to the collection of citizenship information through administrative records.[2] So Plaintiffs' cited authorities—finding cases related due to virtually identical alleged harms and virtually identical factual issues—are unlike this situation. *See, e.g.*, *Moore v. Rite Aid Corp.*, 2013 WL 4833854, at *3 (E.D. Pa. Sept. 11, 2013) (finding cases related because "the harm alleged to have been sustained by both putative classes stems from the same facts—the use of LexisNexis's employment adjudication services and whether such conduct violates the FCRA"); *Sellers v. Phila. Police Com'r*, 2002 WL 32348499, at *3 (E.D. Pa. Feb. 7, 2002) (noting that cases were "hardly identical" but nonetheless related because "the central events underlying the claims" all concerned "the alleged consequences of police surveillance and infiltration . . . at 4100 Haverford Avenue"); *Assiniboine & Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F. Supp.

[2] Plaintiffs also advance the non sequitur that they are "challenging action by the Secretary and not just action by the President." Pls.' Opp'n at 7. But they do not explain how this is relevant to whether the two cases "arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). If anything, Plaintiffs' statement goes to whether the cases involve "identical parties or property," *id.*, but as explained below, Plaintiffs fail that test too.

2d 157, 158–59 (D.D.C. 2002) (finding cases related because they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).[3]

Nor do Plaintiffs explain how the legal analyses in the citizenship-question litigation would remotely resemble the legal analyses in this case. Instead, they argue that "all of the claims in the current case are identical to claims that were raised in the citizenship-question case" because "[b]oth cases assert claims for violation[s] of the APA, the Fifth Amendment's equal protection guarantee, and conspiracy to violate civil rights under 42 U.S.C. § 1985(3)." Pls.' Opp'n at 10 (citations omitted).

This contention is nonsensical. For starters, alleging claims that arise under the same statutory or constitutional provisions has nothing to do with whether the two cases

[3] Plaintiffs also advance other premature arguments. For example, they allude to an "overlap in the experts and expert topics between the two cases." Pls.' Opp'n at 9. This argument is misplaced for two reasons. First, this case should be resolved on Defendants' forthcoming motion to dismiss; there is no need for discovery, let alone expert discovery. Second, Plaintiffs give no reason why similar "experts and expert topics" would be used in both cases when nearly all expert testimony in the citizenship-question litigation related to the procedures for including a citizenship question on the census and its impact on the census count, neither of which are at issue here. *See, e.g.*, *Kravitz*, 366 F. Supp. 3d at 710–11(findings of fact related to procedures for adding a question to the census); *id.* at 712–33 (findings of fact related to citizenship-question plaintiffs' standing, including whether the census count would capture individuals deterred from responding to the census because of a citizenship question); *see United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007) (explaining that Federal Rule of Evidence 702 "requires that the expert testimony must be the product of reliable principles and methods that are reliably applied *to the facts of the case*" (emphasis added)). Plaintiffs similarly claim that "several Census Bureau studies and analyses regarding the effectiveness and appropriateness for collecting citizenship data through either a survey or administrative records are relevant in both cases." Pls.' Opp'n at 9. But this is Plaintiffs' conjecture; they cannot know which "Census Bureau studies and analyses" are relevant to the compilation of citizenship records until their case survives Defendants' motion to dismiss and relevant information is produced by the agency.

"arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). For example, the Court routinely decides equal protection claims in numerous contexts, none of which "arise from the same or identical transactions, happenings, or events." *See, e.g.*, *Moore v. Bishop*, 2019 WL 1331352, at *1 (D. Md. Mar. 25, 2019) (Hazel, J.) (rejecting an equal protection claim by a prisoner suing under 42 U.S.C. § 1983); *CASA de Maryland* v. *Trump*, 355 F. Supp. 3d 307 (D. Md. 2018) (Hazel, J.) (addressing an equal protection challenge to the Secretary of Homeland Security's termination of El Salvador's Temporary Protected Status). That is why the applicable Local Rule makes no mention of common legal *claims* giving rise to "related" cases. *See* Local Civ. R. 103.1(b)(i).

Worse yet, if common statutory or constitutional claims were enough to relate cases, then this Court could be tasked with deciding every APA challenge to administrative action, every alleged violation of equal protection, and every alleged claim of a civil-rights conspiracy filed in this District. *See, e.g.*, *Casa De Maryland, Inc. v. Trump*, 2019 WL 5190689, at *1 (D. Md. Oct. 14, 2019) (alleging that the Department of Homeland Security's immigration rule regarding "public charge" determinations violates the APA and equal protection); *Stone v. Trump*, 2019 WL 3935363, at *1 (D. Md. Aug. 20, 2019) (alleging equal protection and due process "challenges to President Trump's policy regarding transgender persons' enlistment and service in the military"); *Edokobi v. Mondo Int'l, LLC*, 2019 WL 3432431, at *13 (D. Md. July 29, 2019) (alleging a civil conspiracy under 42 U.S.C. § 1985(3)); *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349 (D. Md. 2019)

(alleging violations of the APA and the Enumeration Clause based on purported deficiencies in the Census Bureau's 2020 Census procedures that would result in an inaccurate census count). Plaintiffs' theory would eviscerate Local Rule 103.1(b) and make a mockery of the related-case inquiry. There could be no inferior way to "guarantee fair and equal distribution of cases to all judges" and "avoid public perception or appearance of favoritism in assignments." *McGahn*, 391 F. Supp. 3d at 118.

The "transactions, happenings, or events" in this case and the citizenship-question case (as well as attendant legal questions) are not similar, much less "the same or identical." Defendants previously explained, and Plaintiffs do not dispute, that the Court would not examine "the same or identical transactions, happenings, or events" to assess the lawfulness of *both* a citizenship question on the 2020 Census *and* the sole use of administrative records to gather citizenship data. *See* Defs.' Mem. at 15. Put differently, Plaintiffs do not (and cannot) elucidate any way for the Court to scrutinize the "transactions, happenings, or events" in the citizenship-question case and award the relief requested in *this* lawsuit—an injunction barring Defendants "from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population." FAC at 31–32. So the "transactions, happenings, [and] events" in this case cannot possibly be "the same or identical" to the citizenship-question case. *See Singh v. McConville*, 187 F. Supp. 3d 152, 157 (D.D.C. 2016) (finding related cases where "plaintiffs in both cases . . . challenge the same Department of Defense and Army regulations governing requests for

religious accommodations on the same grounds"); *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010) (finding multiple related cases where "[e]ach case [ ] presents identical issues for resolution: whether the regulation impermissibly conflicts with the underlying statute"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where both cases sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act). Plaintiffs have therefore failed to carry their heavy burden of demonstrating that the cases are related. *McGahn*, 391 F. Supp. 3d at 119.

## II. The citizenship-question case and this case do not "involve the identical parties or property."

Plaintiffs' concede that this case and the citizenship-question case do not "involve the *identical* parties or property" as required by Local Rule 103.1(b). *See* Pls.' Opp'n at 11 (noting "overlap in the parties" and admitting that there are only [s]everal [o]f [t]he [s]ame Plaintiffs); *id.* at 12 (observing a "significant overlap between the parties"). Notwithstanding this concession, Plaintiffs attempt to rewrite the Local Rule, wishing it required only an "overlap" in parties rather than "identical parties." *Compare id.* at 11–13 *with* Local Civ. R. 103.1(b). But they cite no cases applying this atextual interpretation of the District of Maryland Local Rules, nor any court interpreting an analogous local rule in the manner they desire.

Instead, they rely on cases from the U.S. District Court for the District of Columbia, which does not relate cases based on "identical" parties. *See* D.D.C. Local Civ. R.

40.5(a)(3) ("[C]ases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent."); *see* Pls.' Opp'n at 11–12. It is no surprise, then, that Plaintiffs' cited cases never confronted the issue of "identical parties" and instead related cases on other grounds. *See Singh*, 187 F. Supp. 3d at 156 (finding related cases where "plaintiffs in both cases at issue [ ] challenge the same Department of Defense and Army regulations governing requests for religious accommodations on the same grounds"); *Autumn Journey*, 753 F. Supp. 2d at 140 (finding multiple related cases where they all "concern[ed] a hospice care provider subject to recently issued cap repayment demands calculated pursuant to the same regulation"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).

The Court should follow the Local Rules' unambiguous text and reject Plaintiffs' claim of "identical parties" when Plaintiffs themselves admit that the parties are not "identical." *See* Local Civ. R. 103.1(b).

## III. There would be no "duplication of labor," let alone a "substantial duplication of labor," if a different judge heard this case.

Defendants previously explained that this case concerns factual allegations and legal claims entirely distinct from the citizenship-question litigation, so this case would be no easier for this Court to handle based on its familiarity with the prior litigation. *See* Defs.' Mem. at 16–18; *see also* Section I., *supra*. Even the legal arguments in Defendants' forthcoming motion to dismiss will be dissimilar because they will be tailored to the unique claims in *this* litigation, which concerns the compilation of administrate records, not a census question. *Compare LUPE v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018) (finding standing at the motion-to-dismiss stage because, among other reasons, the plaintiffs plausibly plead that "the citizenship question would have a coercive effect on individuals' decisions not to respond to the Census") *with* Defs.' Mem. at 10–15 (explaining that neither a census question nor census response rates are at issue in this case).

Once again, Plaintiffs advance nothing but broad generalities in response. *See* Pls.' Opp'n at 13–14. And their cited cases actually prove *Defendants'* point: judicial economy is served by relating cases only "when virtually identical and highly overlapping issues of fact are likely to be resolved in two cases." *McGahn*, 391 F. Supp. 3d at 121; *see Singh*, 187 F. Supp. 3d at 156 (finding related cases where "plaintiffs in both cases at issue [ ] challenge the same Department of Defense and Army regulations governing requests for religious accommodations on the same grounds"); *Moore*, 2013 WL 4833854, at *3 (finding

cases related because "the harm alleged to have been sustained by both putative classes stems from the same facts—the use of LexisNexis's employment adjudication services and whether such conduct violates the FCRA"); *Autumn Journey*, 753 F. Supp. 2d at 140 (finding multiple related cases where they all "concern[ed] a hospice care provider subject to recently issued cap repayment demands calculated pursuant to the same regulation" and "[e]ach case [ ] presents identical issues for resolution: whether the regulation impermissibly conflicts with the underlying statute"); *Sellers*, 2002 WL 32348499, at *3 (E.D. Pa. Feb. 7, 2002) (noting related cases where "the central events underlying the claims" all concerned "the alleged consequences of police surveillance and infiltration . . . at 4100 Haverford Avenue"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).

As discussed above, this case and the citizenship-question case do not present the same legal issues, much less "virtually identical and highly overlapping issues of fact." *McGahn*, 391 F. Supp. 3d at 121. So there would be no "duplication of labor" if this case were heard by a different judge. *See* Local Civ. R. 103.1(b). A contrary ruling would "contravene the very purpose of random assignment, which is to 'prevent judge-shopping by any party, thereby enhancing public confidence in the assignment process.'"

*Vaqueria Tres Monjitas, Inc. v. Rivera Cubano*, 341 F. Supp. 2d 69, 72–73 (D.P.R. 2004) (quoting *United States v. Mavroules*, 798 F. Supp. 61 (D. Mass. 1992)). The Court should therefore reject Plaintiffs' designation of "related" cases and allow random assignment, which "is essential to the public's confidence in an impartial judiciary." *McGahn*, 391 F. Supp. 3d at 119.

**CONCLUSION**

For the reasons set forth above and in Defendants' prior memorandum, the Court should un-relate this case from *LUPE v. Ross*, No. 18-cv-1570 (D. Md.), so that it may be randomly assigned.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DIANE KELLEHER
Assistant Director, Federal Programs Branch

*/s/ Stephen Ehrlich*
STEPHEN EHRLICH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel.: (202) 305-9803
Email: stephen.ehrlich@usdoj.gov

*Counsel for Defendants*