IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. JAMES L. SHERLEY; DR. THERESA DEISHER; NIGHTLIGHT CHRISTIAN ADOPTIONS, individually and as next friend for PLAINTIFF EMBRYOS; SHAYNE AND TINA NELSON; WILLIAM AND PATRICIA FLYNN; CHRISTIAN MEDICAL ASSOCIATION, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES; DR. FRANCIS S. COLLINS, in his official capacity as Director of the National Institutes of Health; NATIONAL INSTITUTES OF HEALTH, Defendants.	Civil Action No. 1:09-cv-1575 RCL

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION
TO THE RELATED CASE DESIGNATION

The government objects to Plaintiffs' designation of this case as "related" to the prior action,[1] even though it involves all of the same defendants, the same subject matter, and a number of the same plaintiffs. The government does so because although this case involves the same parties as the prior action, it does not involve *all* of the same parties, and because although this case presents the same legal issues regarding the same government policy, the challenge is to a newly promulgated version of that policy. The government cites no authority for this extremely narrow

[1] The prior action was *Nightlight Christian Adoptions, et al. v. Thompson, et al*, D.D.C. No. 01-cv-00502.

interpretation of Local Rule 40.5(a)(4), and there is none. Indeed, the purpose of the Rule would be frustrated by adoption of the government's position, because litigants could evade its provisions with ease and judicial efficiency would be disserved, in that cases would qualify as related in only extremely narrow circumstances. The District Court would frequently lose the benefit of a District Judge's prior knowledge of a case in which the parties had changed only marginally and the legal issues were in all relevant respects identical.

DISCUSSION

II. The Present Case Involves The "Same Parties" As The Previous Case.

Local Rule 40.5(a) requires that, in order for a case to be designated as "related" to a previously dismissed case, it must "involv[e] the same parties." This Court has stressed that "same parties" within the Rule requires that the cases involve the same *actual* parties, and not just the same parties' *interests*. *See, e.g.*, *Judicial Watch, Inc. v. Rossotti*, 2002 WL 31100839, at *1 (D.D.C. Aug. 2, 2002); *Thomas v. Nat'l Football League Players Ass'n*, 1992 WL 43121 (D.D.C. Feb. 18, 1992) ("'[T]he same parties' means identical parties, not parties in interest."). But despite the government's claim, the Court has never held that a case must involve *each and every one* of the same parties in order to be characterized as related. Indeed, in *Collins v. Pension Ben. Guar. Corp.*, 126 F.R.D. 3 (D.D.C. 1989), the Court characterized as related (albeit under the prior version of the Rule), two cases brought as class actions. The Court did not go through the named plaintiffs and absent class members to ensure a complete overlap; rather, because the parties from the previous action were *included* in the subsequent class, the cases involved the "same parties" and were thus related. *Id.* at 7-8.

The government cites no authority for the supposed requirement that *every* party to the case must be the same in the subsequent action, and there is no reason to read the rule so as to require assignment to a new judge when the same parties file an action involving the same sub-

ject matter against the same defendants, but add new parties as plaintiffs. As the government acknowledges, two of the Plaintiffs in this case were also involved in the previous action (Nightlight Christian Adoptions and the Christian Medical Association (CMA)), and therefore are "the same parties," as the Rule requires. What the government overlooks, however, is that Dr. Sherley and Dr. Deisher, who are two of the Plaintiffs in this action, were also included in the putative class of adult stem cell researchers on whose behalf the prior action was brought. Importantly, moreover, *all* the defendants in this case are the same as the previous defendants.[2]

The "considerations of judicial economy," *Tripp v. Executive Office of President*, 196 F.R.D. 201, 202 (D.D.C. 2000), are plainly present when, as here, the same plaintiffs bring a subsequent lawsuit relating to the same subject matter against the same governmental defendants but are joined by additional plaintiffs. The government's contrary view would facilitate gamesmanship, undermine judicial efficiency, and frustrate the purposes of the Rule by preventing its application even to closely related cases asserting the same claims against the same defendants on behalf of many of the same plaintiffs. The government cites no authority and provides no justification for its assertion that the Rule requires that *all* the plaintiffs (as well as all the defendants) must be identical to those in the previous action, and this Court should reject that assertion.

II. The Present Case Involves The Same "Subject Matter" As The Previous Case.

Rule 40.5 also requires that a case "relat[e] to the same subject matter" as a previously dismissed case in order to be "related" under the Rule, but the government is wrong that this standard requires that the identical regulation be at issue. The government cannot dispute that

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[2] In both cases, the agency heads were sued in their official capacity.

this case presents the same legal issue as the previous case (whether the NIH's proposed funding of human embryonic stem cell research violates the Dickey-Wicker Amendment and the Administrative Procedure Act), and that both cases presented the question in the same agency context: a challenge to NIH's decision to fund human embryonic stem cell research. *Compare* Complaint ¶ 2 (Dkt No. 1), *Nightlight Christian Adoptions, et al. v. Thompson, et al*, No. 01-cv-00502 (D.D.C. filed Mar. 8, 2001) (alleging that the previous NIH guidelines for stem cell research violated the Dickey-Wicker Amendment because they "provide for public funding of research that requires and depends upon the destruction of living human embryos") *with* Complaint ¶ 1 (Dkt. No. 1), *Sherley, et al. v. Sebelius, et al.*, No. 1:09-cv-01575 (D.D.C. filed Aug. 19, 2009) (alleging that the new guidelines for human stem cell research violate the Dickey-Wicker Amendment because they provide for "public funding of research that depends upon, and indeed, requires the destruction of human embryos"). Rather, the government claims that because the present lawsuit challenges a more recent regulation, the "subject matter" is somehow different.

There is no support for the government's argument. The case the government cites, *Collins*, 126 F.R.D. 3, did not even address this issue, and indeed characterized the subsequent case as related. The "subject matter" of a case consists of the legal and factual issues presented, not the Federal Register citation of the particular regulation by which the government chooses to implement its challenged policy at a particular point in time. Indeed, the government's interpretation of Rule 40.5 would undermine the Rule's "considerations of judicial economy," *Tripp*, 196 F.R.D. at 202, by requiring assignment of a new judge even where, as here, the exact same issues are presented, simply because a new version of the regulation is being challenged. There is simply no support for this argument.

The government's interpretation would also frustrate the purpose of the case assignment rules. If the Court were to adopt the government's reasoning, a federal agency could engage in judge-shopping by withdrawing a challenged rule, waiting until the suit were dismissed, and then republishing the rule at a later date. Because a subsequent challenge to that rule would not involve the same regulation (*i.e.*, the same cite in the Federal Register), it would not qualify as a related case, and would be assigned to a different District Judge through the random assignment process. The Rule should instead be construed, in a common-sense fashion in keeping with its purpose, to apply to subsequent challenges to agency action that is substantially the same as that challenged in the prior suit. That standard is plainly satisfied here.

CONCLUSION

This case squarely falls within the language and purpose of the related-case rule. The Court properly designated it as such. The government's objection to the assignment of this case should therefore be rejected.

Dated: September 16, 2009

Respectfully Submitted,

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Certificate of Service

I hereby certify that on September 16, 2009, I caused a true and correct copy of the foregoing Response to be served on Defendants' counsel electronically by means of the Court's ECF system.

/s/ Bradley J. Lingo
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