IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., et al.,

Plaintiffs,

Civil Action No. 1:13-cv-00104-RBW

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants.
_____/

PLAINTIFFS' RESPONSE TO COURT ORDER AT DOCKET ENTRY 11

Pursuant to this Court's order at docket entry 11, Plaintiffs explain why the instant action is related to *Tyndale House Publishers, Inc. v. Sebelius*, 1:12-cv-01635-RBW (D.D.C.).

INTRODUCTION

"Civil . . . cases are deemed related when the earliest is still pending on the merits in the District Court and they . . . involve common issues of fact, or . . . grow out of the same event or transaction." LCvR 40.5(a)(3)(ii) & (iii).

For purposes of Rule 40.5, there is a critical difference between (1) cases in which defendants commit one act that injures multiple plaintiffs in the same way—as in the instant action, *Tyndale House*, and cases such as *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135 (D.D.C. 2010)—and (2) cases in which defendants commit a series of distinct, separate acts, each of which harms one specific plaintiff in a unique way—as in cases such as *Tripp v. Executive Office of the President*, 194 F.R.D. 340 (D.D.C. 2000), and *Dale v. Executive Office of the President*, 121 F. Supp. 2d 35 (D.D.C. 2000).

The instant action is related to *Tyndale House* for the following reasons:

I. Commonality Between the Cases

There is ample commonality between the instant action and *Tyndale House*. Both cases grow out of the same event: the enactment of the Mandate (which requires the plaintiffs to provide coverage for all FDA-approved contraceptive methods, sterilization procedures, and related education and counseling in their employee health plans). Doc. 1, Cmplt. ¶¶ 33-38; *Tyndale House* Cmplt. ¶¶ 77-86. Both cases are brought against the same six federal government defendants responsible for the promulgation, administration, and enforcement of the Mandate. Doc. 1, Cmplt. ¶¶ 1-2, 19-24; *Tyndale House* Cmplt. ¶¶ 13-18. As this Court has previously held, the promulgation and impending enforcement of a regulation against plaintiffs in separate cases may cause their cases to be related. *Autumn Journey*, 753 F. Supp. 2d at 140.

Moreover, in both the instant action and *Tyndale House*, the for-profit companies and their owners have a demonstrated commitment to act in accordance with a set of religious principles. Doc. 1, Cmplt. ¶¶ 3, 27, 28; *Tyndale House* Cmplt. ¶ 25-36, 69. In both cases, the owners of the businesses aver, based on their sincerely-held religious beliefs, that coverage of most or all forms of contraception and related education and counseling is immoral and that their faith forbids them from paying for, providing, and facilitating the use of such goods and services through their self-insured employee health plans. Doc. 1, Cmplt. ¶¶ 3, 5, 25, 26, 29, 30, 32; *Tyndale House* Cmplt. ¶¶ 3, 68, 69, 73, 75, 88, 89. Both complaints explain that, absent relief from this Court, the plaintiffs will be forced to either take action forbidden by their faith or incur substantial annual penalties for non-compliance with the Mandate. Doc. 1, Cmplt. ¶¶ 5, 6, 42, 43, 54; *Tyndale House* Cmplt. ¶¶ 8, 87, 90.[1]/

[1]/ The plaintiffs in both cases, none of which are exempt from the Mandate, share sincerely-held religious beliefs that prohibit them from complying with the Mandate. As a result, the type of businesses they are engaged in is not relevant.

Also, in both the instant action and *Tyndale House*, the employers have more than fifty full-time employees and therefore face annual penalties if they drop their employee health plans; the employers in both cases also face daily penalties if they provide employee health plans that do not comply with the Mandate. Doc. 1, Cmplt. ¶¶ 16-17, 43-47; *Tyndale House* Cmplt. ¶¶ 71, 90-98.

In addition, the four causes of action in the instant case are based on the same legal provisions as four of the *Tyndale House* causes of action and are substantially similar in nature. Doc. 1, Cmplt. Cnts. I-IV; *Tyndale House* Cmplt. Cnts. I, II, IV, VI. Both complaints also allege that the defendants lack a compelling interest in applying the Mandate to the plaintiffs and that there are less restrictive means available to further defendants' stated interests. Doc. 1, Cmplt. ¶¶ 49, 55-57; *Tyndale House* Cmplt. ¶¶ 6, 154, 155.

Further support for the conclusion that the instant action is related to *Tyndale House* is the federal government's position in two other challenges to the Mandate brought by for-profit employers. The federal government, on behalf of the same defendants who are parties to the instant action, recently asked the United States Court of Appeals for the Tenth Circuit to assign two separate challenges to the Mandate to the same oral argument panel, characterizing the appeals as "related." Ex. A at 1-4, Motion to Assign Related Appeals to the Same Panel, *Newland v. Sebelius*, No. 12-1380 & *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Jan. 7, 2013). The government noted that both cases involve for-profit companies challenging the Mandate under RFRA and the First Amendment based on the plaintiffs' religious objections. *Id.* The government also acknowledged that treating the cases as related would conserve judicial resources. *Id.* It was not relevant that the plaintiffs operated in different business fields (manufacturing in one case, the sale of craft supplies and books in the other).

II. Review of Analogous Cases

For purposes of Rule 40.5, the *Autumn Journey* case is analogous to the present matter. The plaintiff in *Autumn Journey* was a hospice care provider that received a repayment demand from the Department of Health and Human Services based upon a Department regulation that governed the calculation of a statutory cap for Medicare reimbursements. 753 F. Supp. 2d at 136-38. The provider alleged that the regulation was in conflict with the statutory provision that it was supposed to implement. *Id.* at 138. The provider filed a notice stating that the case was related to *Russell-Murray v. Sebelius*, No. 09-2033, a lawsuit brought by another provider alleging that the same regulation conflicted with the same statute. *Id.* The government objected, asserting that the two cases did not involve common issues of fact or arise out of a common event or transaction. Defendant's Objection to Plaintiff's Related Case Designation, *Autumn Journey Hospice, Inc. v. Sebelius*, 2010 U.S. Dist. Ct. Motions LEXIS 57317, at *5-7 (Mar. 15, 2010).

This Court overruled the government's objection. This Court held that *Autumn Journey* was related to *Russell-Murray* and stated:

> Since the commencement of the *Russell-Murray* case, different hospice care providers have commenced six separate actions in this district challenging cap repayment demands issued by HHS. . . . Each of these cases concerns a hospice care provider subject to recently issued cap repayment demands calculated pursuant to the same regulation, 42 C.F.R. § 418.309. In each case, the hospice care provider challenges the validity of the regulation on the grounds that it does not provide for the proportional allocation of beneficiaries across years of service, as required by 42 U.S.C. § 1395f(i)(2). Each case thus presents identical issues for resolution: whether the regulation impermissibly conflicts with the underlying statute and, if so, what relief should be afforded the plaintiff hospices. Accordingly, there is substantial overlap in both the factual underpinning and the legal matters in dispute in each of these hospice cap cases.
>
> Indeed, in litigation before another federal district court, HHS itself has stipulated to the transfer of separate hospice cap cases to a single judge, acknowledging that those separate challenges to the same hospice cap regulation "involve common questions of

> fact, arise from similar transactions and events, involve similar parties, and the same counsel." . . . These cases . . . appear to be no more related than the hospice cap cases before the undersigned judge. . . . Furthermore, the court notes that HHS has not objected to the related case designations filed in any of the other five hospice cap cases commenced after *Russell-Murray*.
>
> In light of the above, the court concludes that these hospice cap cases do indeed share common factual issues and arise out of a common event or transaction—namely, the promulgation of the hospice cap reimbursement regulation and the calculation of the plaintiff hospices' cap repayment obligations pursuant to that regulation—such that judicial economy would be served by having these matters resolved by the same judge.

Id. at 140 (citations omitted).[2]/

Similarly, *Tyndale House* and the instant action share common factual issues and arise out of a common event: the enactment of the Mandate. *See id*. As in *Autumn Journey*, "there is substantial overlap in both the factual underpinning and the legal matters in dispute in each of [the Mandate] cases." *See id.* And, as in *Autumn Journey*, the existence of widespread factual and legal commonality, coupled with the interest of judicial economy, outweighs the minimal, inconsequential differences. Furthermore, just as the *Autumn Journey* Court found it significant that the defendants had acknowledged before another federal court that challenges to the reimbursement cap were related, it is significant that Defendants have already acknowledged in the Tenth Circuit that two separate Mandate cases brought by for-profit plaintiffs are related. Ex. A at 1-4.[3]/

---

[2]/ In a related context, this Court noted that 246 lawsuits in which hospitals serving Medicare and Medicaid beneficiaries sought to reopen reimbursement notices issued to them over the course of the previous three years in light of a new agency ruling "raise[d] the same or similar legal and factual issues" and were related cases. *Baystate Health Sys. v. Thompson*, 254 F. Supp. 2d 80, 80 (D.D.C. 2003); *In re: Medicare Reimbursement Litigation*, 414 F.3d 7, 8-10 (D.C. Cir. 2005).

[3]/ There is no requirement that a case be cited in a complaint to be considered related. For example, in *Autumn Journey*, the complaint did not specifically reference the related cases that were before this Court. *See* Complaint, *Autumn Journey Hospice, Inc. v. Sebelius*, Case 1:09-cv-02403-RMU, Doc. 1 (Dec. 22, 2009); Related Case Notice, *Autumn Journey Hospice, Inc. v. Sebelius*, Case 1:09-cv-02403-RMU, Document 2-1 (Dec. 22, 2009); 753 F. Supp. 2d at 138.

Moreover, in *Medford v. District of Columbia*, 691 F. Supp. 1473 (D.D.C. 1988), this Court held that three lawsuits seeking to collect attorneys' fees and costs incurred in bringing successful administrative actions under the same federal law were related cases. *Id.* at 1474. This Court noted that the factual issues were quite similar (albeit not identical in all respects) and stated that the plaintiffs in the first case "were in essentially the same position as [the plaintiffs in the second case] find themselves now." *Id.* at 1474-75; *see also Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 160 (D.D.C. 2002) (stating that "although differences may exist between the instant matter and *Cobell*, there are clearly issues of fact that are common to both cases that are sufficient" to establish them as related cases).

Furthermore, the three cases raised an identical legal issue. This Court stated that "[i]t would make no sense to have several different district court judges review the same legal issue—particularly when the matter is now on appeal." 691 F. Supp. at 1475.[4]/ This Court also explained:

> Even though defendants correctly contend that each individual handicapped child's proceeding involves some separate "factual" issues, such variation is insufficient to undercut the efficiency rationale for finding these cases to be related. The fact that identical legal issues are involved in all three cases greatly outweighs any argument for splitting these cases up based on trivial factual variances between each handicapped child's experience with the bureaucracy. . . .
>
> [D]efendants have submitted briefs in these cases that are verbatim copies of briefs submitted in one or more of the earlier cases. . . .
>
> Because treating these cases as related achieves great economies and preserves scarce judicial resources, defendants' arguments must be rejected. The related case rule must be enforced.

[4]/ The *Tyndale House* decision concerning the plaintiffs' motion for a preliminary injunction has been appealed. *Tyndale House Publ'rs, Inc. v. Sebelius*, No. 13-5018 (D.C. Cir. Jan. 18, 2013).

Id. at 1475-76 & n.3; *see also Assiniboine*, 211 F. Supp. 2d at 157-59 (holding that lawsuits brought by Indian plaintiffs were related because, among other things, they alleged a breach of fiduciary duties that federal officials owed them, the plaintiffs shared the ultimate goal of receiving an accounting of funds held in trust by the United States, and this Court would have to determine in each case whether the government had properly managed the plaintiffs' funds).

As in *Medford*, the plaintiffs in *Tyndale House* "[are] in essentially the same position as [Plaintiffs in the instant case] find themselves now." *See* 691 F. Supp. at 1474-75. And as in *Medford*, the minimal variation between *Tyndale House* and the instant case "is insufficient to undercut the efficiency rationale for finding these cases to be related," and "[t]he fact that identical legal issues are involved in [both] cases" is highly significant. *Id.* at 1475-76. Furthermore, as in *Medford*, the government's briefs filed in various Mandate cases are substantially similar in many respects, further counseling in favor of a related case designation. *See id.* at 1475, n.3.

In addition, in *Twist v. Ashcroft*, Magistrate Judge Facciola stated, in recommending that two cases be treated as related cases, that

> there is an interest in judicial efficiency that is advanced by a judge's familiarity with certain central facts that, at least, spares another judge from having to start at ground zero. . . . Simply put, I am half way up the hill and I cannot see why another judge or magistrate judge should have to start at the bottom.

2002 U.S. Dist. LEXIS 4115, at *5-6 (D.D.C. Mar. 11, 2002) (magistrate judge's report and recommendation), *adopted by* 2002 U.S. Dist. LEXIS 27600 (Mar. 27, 2002). Similarly, in light of the extensive factual and legal overlap between *Tyndale House* and the instant action, and the minimal meaningful differences between them, judicial efficiency counsels in favor of treating them as related cases.

III. Review of Distinguishable Cases

The instant case and *Tyndale House* are more directly and substantially related to each other than the cases in which this Court concluded that the criteria of Rule 40.5 were not met. For example, in *Tripp*, the Calendar Committee of this Court concluded that the *Tripp* litigation was not related to *Alexander v. FBI*, Nos. 96-2123 & 97-1288. 196 F.R.D. at 201. The plaintiff in *Tripp* alleged that the Department of Defense had released information from her security clearance application to a magazine reporter in violation of the Privacy Act. *Id.* at 201-02. *Alexander* was "a class action alleging that the Executive Office of the President improperly obtained the confidential files of more than 700 individuals formerly employed by the White House." *Id.* at 202.

In examining the scope and purposes of Rule 40.5, this Court stated that "[t]he exception to the general rule [requiring random assignment of cases], contained in LCvR 40.5, rests primarily on considerations of judicial economy. It will often prove wasteful of time and resources for two judges to be handling cases that are so related that they involve common factual issues or grow out of the same event or transaction." *Id.* In concluding that *Tripp* and *Alexander* were not related, this Court explained:

> *Alexander* is a class action alleging a broad pattern of White House and FBI abuse of privacy rights in 1993 and 1994. *Tripp*, on the other hand, involves a single plaintiff whose primary allegation is that her privacy rights were violated by one incident involving disclosures to a reporter for the *New Yorker* in 1998. The breadth of discovery in *Alexander* or its overlap with the discovery in *Tripp* is not thought to render the cases related. While it is certainly true that there have been numerous lengthy and contentious disputes in *Alexander* which related to the scope of discovery regarding the *Tripp* disclosure and which consumed much judicial time and effort, that circumstance cannot govern applicability of the related case rule. . . .
>
> There is little doubt that the other criterion for invoking LCvR 40.5 is not satisfied, namely that the more recently filed case did not "grow out of the same event or transaction". . . .

> Finally, application of the broad reading of LCvR 40.5 requested by Plaintiff could well lead to one judge being inundated with cases which might have only a tangential discovery connection, but no direct factual nexus, to the central allegations of the primary case.

Id. at 202-03 & n.1.

Likewise, in *Dale*, this Court upheld the denial of related-case status, concluding that the criteria of Rule 40.5 had not been met. 121 F. Supp. 2d at 36. The plaintiff alleged a violation of the Privacy Act based on actions the White House took while he was employed in the White House Travel Office and asserted that his case was related to other cases pending in this Court (primarily *Alexander*). This Court relied upon a previously issued order in the case that stated:

> Plaintiff's F.B.I. file was allegedly obtained by the White House while plaintiff was employed at the White House Travel Office, so the issues presented in the *Alexander* case—involving the White House obtaining F.B.I. files of *former* political appointees or government employees under the Reagan and Bush Administrations—simply do not arise out of the same event or transaction. Any common issues of fact are minimal and completely insufficient to meet plaintiff's burden of demonstrating that these two cases are related.

Id. at 37 (citation omitted).

Unlike in *Tripp* and *Dale*, there is a substantial "direct factual nexus" between *Tyndale House* and the instant case. *See* 196 F.R.D. at 203. While *Tripp*, *Dale*, and *Alexander* involved different unlawful acts committed at different times, the Mandate harms the plaintiffs in *Tyndale House* and the Plaintiffs in the instant action in the same way. As noted previously, there is a key difference between a defendant committing a number of individual, distinct acts, each of which injures one specific plaintiff in a unique way (as in *Tripp* and *Dale*), and a defendant doing one thing that injures numerous plaintiffs in the same way (as in *Autumn Journey*, *Tyndale House*, and the instant action). Although the former situation does not typically result in cases being related, as each distinct act may raise important unique factual issues, the latter situation typically does result in cases being related, as multiple plaintiffs experience a shared injury from

"the same event or transaction" which gives rise to "common issues of fact." *See* LCvR 40.5(a)(3).

In this vein, there is far more commonality and relatedness between the instant action and *Tyndale House* than there was in those cases where this Court concluded that allegations of discrimination were not related because the alleged discriminatory acts were of a distinctly different nature, were perpetrated by different individuals or entities, etc. *See, e.g., Boyd v. Farrin*, 2012 U.S. Dist. LEXIS 174656 (Dec. 10, 2012) (class action lawsuit alleging racial discrimination in lending by the United States Department of Agriculture was not related to a breach of contract lawsuit brought by individuals seeking compensation for advocacy and lobbying work they had done in support of legislation that benefitted the class); *Stewart v. O'Neill*, 225 F. Supp. 2d 16, 20 (D.D.C. 2002) (case alleging discrimination against African-American agents by the Bureau of Alcohol, Tobacco, and Firearms was not related to case alleging discrimination against Hispanic agents by the United States Customs Service); *Keerseagle v. Glickman*, 194 F.R.D. 1, 3 (D.D.C. 2000) (case brought by Native American farmers alleging racial discrimination by county commissions in the review of their credit or benefit applications was not related to a case brought by African-American farmers alleging racial discrimination committed by county commissions in different regions of the country).[5]/

[5]/ Furthermore, *Tyndale House* is still "pending on the merits" for purposes of Rule 40.5. No final judgment has been entered in that case, which has been stayed pending the resolution of the federal government's appeal from this Court's grant of a preliminary injunction in favor of plaintiffs.

CONCLUSION

Accordingly, for the foregoing reasons, the instant action is related to *Tyndale House* under Local Civil Rule 40.5.

Respectfully submitted on this 6th day of February, 2013,

/s/ Edward L. White III
Edward L. White III (adm. phv)
American Center for Law & Justice
5068 Plymouth Road
Ann Arbor, Michigan 48105
Tel. 734-662-2984; Fax. 734-302-1758
ewhite@aclj.org

Francis J. Manion (adm. phv)
Geoffrey R. Surtees (adm. phv)
American Center for Law & Justice
6375 New Hope Road
New Hope, Kentucky 40052
Tel. 502-549-7020; Fax. 502-549-5252
fmanion@aclj.org
gsurtees@aclj.org

/s/ Colby M. May
Colby M. May
D.C. Bar No. 394340
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, D.C. 20002
Tel. 202-546-8890; Fax. 202-546-9309
cmmay@aclj-dc.org

/s/ Erik M. Zimmerman
Erik M. Zimmerman (adm. phv)
American Center for Law & Justice
1000 Regent University Drive
Tel. 757-226-2489; Fax. 757-226-2836
ezimmerman@aclj.org

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2013, I caused the foregoing and exhibit to be electronically filed with the clerk of court using the CM/ECF system, which will send notification of such filing to the counsel of record in this case who are CM/ECF participants, and I also caused to be sent by United States Mail, first-class postage prepaid, a true and correct copy of the foregoing and exhibit to each of the following non-CM/ECF participants:

U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Defendant

Kathleen Sebelius, Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Defendant

U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Defendant

Neal Wolin, Acting Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Defendant

U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Defendant

Seth D. Harris, Acting Secretary
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
Defendant

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Civil-process clerk
c/o Ronald C. Machen Jr.
U.S. Attorney, District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530

/s/ Edward L. White III
Edward L. White III (adm. phv)
American Center for Law & Justice