**THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Plaintiff,<br>v.<br><br>DONALD J. TRUMP, in his official capacity as President of the United States; ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; RENE ALEXANDER ACOSTA, in his official capacity as Secretary of Labor; and UNITED STATES DEPARTMENT OF LABOR,<br><br>Defendants. | Civil Action No. 2:17-cv-04540 (WB) |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO LIMIT EVIDENCE AT HEARING ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Defendants respectfully submit this reply to Plaintiff's opposition to Defendant's Motion *in Limine* to Limit Evidence at Hearing on Plaintiff's Motion for a Preliminary Injunction.

The fact that this is an Interim Final Rule, for which the comment period is ongoing, does not mean that this Court should develop an independent evidentiary record of materials that were not in front of the Agencies. Plaintiff further contends that Defendants' submission of the Administrative Record consists solely of "documents associated with *other* notices of rulemaking or requests for comments along with a handful of documents that are cited in the two Rules." *See* Plaintiff's Opposition to Defendants' Motion *In Limine* (Pl. Opp.), ECF. No. 50, at 1. It objects that the Administrative Record "does not include any other new materials that the

Defendants considered in drafting the Rules, other than those that are specifically referred to or relied on in them." Pl. Opp. at 1-2. This statement is mistaken, because the Administrative Record does, in fact, include materials considered by the agencies that were not cited in the Rules. But even if Plaintiff had not mischaracterized the Administrative Record, its argument is wrong. The fact that the Agencies carefully cited within the Rules themselves hundreds of documents it considered is not evidence of the Administrative Record's incompleteness, but rather of the fact that the Rule included thorough citation and explanation. For these reasons, along with those asserted in the original motion, Defendants' Motion *In Limine* should be granted.

## I. The Fact That This is an Interim Final Rule Does Not Mean this Court Should Supplement the Administrative Record with Materials not Before the Agencies.

Plaintiff argues that the fact that the agencies did not provide the public and the Commonwealth an opportunity to comment on the Rules before they were enacted means that this Court should allow them to introduce evidence that the Agencies did not consider in promulgating the IFRs. *See* Pl. Opp. at 1. This contention is mistaken. That the agency action at issue is an IFR and not a Final Rule changes nothing about the fact that this is an APA challenge. For such challenges, the court cannot create "some new record made initially in the reviewing court." *Dorley v. Cardinale*, 119 F. Supp. 3d 345, 352 (E.D. Pa. 2015) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Plaintiff has already submitted in the context of its Preliminary Injunction motion their objection to the fact that these Rules were promulgated as IFRs—nothing about that argument is relevant to the question of what materials this Court should consider. In order to determine whether the agencies acted properly, it should not muddy the evidence by including information beyond what the Agencies had in front of them when they decided to act.

## II. The Administrative Record Does, In Fact, Include Materials Not Cited in the Rules, But Even if it Did Not, the Record Need Only Include Materials the Agencies Considered, Whether Cited or Not.

Plaintiff contends that the Administrative Record is flawed because it "does not include any other new materials that the Defendants considered in drafting the Rules, other than those that are specifically referred to or relied on in them." Pl. Opp. at 1-2. This is a flatly incorrect statement. The Record does, in fact, include information that was considered by the agencies but not cited in the rule. *See* Index for Rulemaking Record for the Religious and Moral Interim Final Rules (AR Index), CD 9, 373,527–373,579. Regardless, however, it is not clear why Plaintiff believes it should matter whether the material in the record was cited in the Rules or not—the material in the Record is what the Agencies considered, no more and no less. That Plaintiff objects to what the agencies considered goes to the merits of its APA challenge, not its ability to introduce new evidence to this Court.

Although Plaintiff complains that the Administrative Record was submitted only recently, the Record is the result of weeks of concerted effort to compile and index a comprehensive record of what was considered by multiple agencies in a complex regulatory landscape. Defendants took the extra effort to file a Preliminary Partial Administrative Record in order to provide Plaintiff and this Court with as much of the material as possible while that process was ongoing. That Plaintiff would like to supplement that material with new merits evidence would only impair the efficient resolution of this dispute.

## III. Plaintiff Does not Dispute that This is an APA Challenge in its Entirety, Notwithstanding its Constitutional Claims.

Notably, Plaintiff does not dispute Defendant's characterization of its challenge as one under the APA, notwithstanding its Constitutional claims. For a challenge to administrative action under the APA, the administrative record cannot normally be supplemented." *NVE, Inc.*

*v. Dep't of Health & Human Servs*., 436 F.3d 182, 189 (3d Cir. 2006) (citing *Camp*, 411 U.S. at 142). Plaintiff has not alleged that any exception applies, that is, that 1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate," 2) that "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action," or 3) that Congress "override[s] the APA's rule that judicial review of administrative action is limited to the administrative record." *Id*. at 189–90 (citations omitted). Because none of these exceptions apply, this Court should not supplement the Record in an APA challenge.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully submit that its Motion *in Limine* to Limit Evidence at Hearing on Plaintiff's Motion for a Preliminary Injunction be granted.

Dated: December 13, 2017

Respectfully Submitted

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