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

COMMONWEALTH OF PENNSYLVANIA, **Plaintiff,** **v.** **DONALD J. TRUMP *et al.*,** **Defendants.**	**NO. 2:17-cv-04540-WB**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE*

Plaintiff Commonwealth of Pennsylvania respectfully submits this opposition to the Defendants' Motion *in Limine* to Limit Evidence at hearing on Plaintiff's Motion for a Preliminary Injunction, and states as follows:

The Commonwealth filed this action challenging two separate interim final rules issued by the Defendants ("the Rules"), which allow for broad exemptions from the Affordable Care Act's Contraceptive Care Mandate. The Defendants issued the Rules without following the procedural requirements for rulemaking set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 553. By their own admission, they did not provide the public – or the Commonwealth – with an opportunity to comment on the Rules before they were issued.

The Defendants now argue that the merits of the Commonwealth's challenge to the Rules should be evaluated solely on the basis of the administrative record they filed with this Court. But that record – which was only belatedly produced in its entirety – appears to consist solely of documents associated with *other* notices of rulemaking or requests for comments, along with the handful of documents that are cited in the two Rules. It does not include comments on the Rules themselves, because the Defendants did not permit any prior to their being issued. And 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.

Because the Defendants denied Pennsylvania and other interested parties the opportunity to comment on the Rules before they were issued, they cannot now hide behind the limited set of materials they claim constitutes the administrative record in defending against the Commonwealth's challenge to those Rules. For this reason, the Defendants' motion should be denied.

BACKGROUND

The Commonwealth filed this action on October 11, 2017, and, on November 2, 2017, filed its motion for a preliminary injunction. *See* Dkts. 1, 8. On November 21, 2017, the Defendants filed a "Preliminary Partial Administrative Record" with the Court and provided it to the Commonwealth. *See* Dkt. 18. That filing, however, did not contain any documents identified as specifically relating to the rulemaking process that the Commonwealth is challenging in this action.[1] It was not until December 11, 2017 – the same day they filed the instant motion, and three days before the scheduled hearing on the Commonwealth's motion for a preliminary injunction – that the Defendants filed the remainder of the administrative record, which contained the materials identified as relating to the Rules. *See* Dkt. 47.[2] The Commonwealth received the final portion of the administrative record yesterday by overnight mail.

In filing the administrative record, the government certified that it "includes all of the documents directly or indirectly considered" by the defendant agencies in issuing the Rules. *See* Dkt. 47. The materials produced by the Defendants and identified as relating to the 2017 Rules appear to consist entirely of: 1) notices of rulemaking and related documents published in the *Federal Register*; 2) 24 documents specifically cited or relied on in the Moral Exemption Rule; and

[1] Attached as Exhibit A is the index of the administrative record produced by the Defendants. Discs 1-8 were produced on November 21; Disc 9 was produced on December 11.
[2] The Rules themselves were issued on October 6, 2017.

3) 82 documents specifically cited or relied on in the Religious Exemption Rule. No other documents were identified in the materials produced by the Defendants that specifically related to the 2017 Rulemaking.

ARGUMENT

I. The Commonwealth's Evidence Should Be Admitted.

Evidence should only be excluded on the basis of a motion *in limine* when it "is clearly inadmissible on all potential grounds." *United States v. Tartaglione*, 228 F. Supp. 3d 402, 406 (E.D. Pa. 2017) ("The trial court should exclude evidence on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds."). The Defendants do not attempt to make this showing here. In fact, their motion argues for precluding certain testimony the Commonwealth may offer only "[i]nasmuch as this testimony goes to the merits of Plaintiff's Administrative Procedure Act ('APA') and constitutional claims." Mot. at 1-2. They do not suggest that the evidence should be excluded for other purposes, including establishing that the Rules will cause the Commonwealth irreparable injury.

In fact, the testimony the Defendants seek to exclude is directly relevant to establishing the injury that will result from the Rules. The Defendants' motion demonstrates as much. *See* Mot. at 6 (quoting statements in Commonwealth's declarations addressing irreparable harm resulting from Rules). As a result, there is no basis for excluding it prior to the hearing on the Commonwealth's motion for a preliminary injunction.

II. The Court Is Not Limited to Considering the Materials Identified by the Defendants in Evaluating the Merits of the Commonwealth's Claims

Regardless, this Court may consider evidence outside the record identified by the Defendants in addressing the merits of the Commonwealth's claims. In conducting rulemaking, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). And a court reviewing agency action "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The procedural requirements of the APA are intended to guide agencies in this process. That Act's notice and comment requirements "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013) (citations and internal quotation marks omitted). Where, as here, an agency issues regulations without following these procedures, "the regulations are not tested by public input *nor do any interested parties have an opportunity to develop a record for judicial review*." *Id.* at 518 (emphasis added).

For this reason, there is no basis for limiting this Court's review to the administrative record produced by the Defendants. Indeed, the "record" produced by the Defendants is hardly a record at all – it consists entirely of records of *earlier* rulemaking procedures (or responses to earlier requests for comments) as well as those documents that are specifically cited in the two Rules being challenged in this action. If the Defendants truly considered nothing else in issuing such sweeping rules, there can be little doubt that they acted arbitrarily and capriciously. But regardless, looking solely to the limited record produced by the Defendants would prevent this Court from assessing "whether the agency relied on factors outside those Congress intended for consideration, completely failed to consider an important aspect of the problem, or provided an explanation that is contrary to, or implausible in light of, the evidence." *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d

182, 190 (3d Cir. 2006).[3] As a result, this Court is not limited to relying solely on these materials in addressing the merits of the Commonwealth's claims.

III. There Is No Basis for Excluding Expert Testimony from the Commonwealth's Witnesses.

Finally, the Defendants ask the Court to exclude any expert testimony from the Commonwealth's witnesses. They identify no principle for treating expert testimony differently from any other evidence in reviewing agency action, and there is none. And there is similarly no basis for excluding testimony from the Commonwealth's witnesses simply because it touches on legal issues. To the contrary, the federal rules expressly provide that opinion testimony "is not objectionable just because it embraces an ultimate issue," except in certain narrow circumstances not relevant here. *See* Fed. R. Evid. 704. Here, the Commonwealth's witnesses will not offer "'purely legal conclusion[s]'" about the Rules; rather, they will testify about the very real harm that will result from them. *See* Mot. at 6 (quoting *Zickes v. Cuyahoga Cty*., 700 F. App'x 475, 477 (6th Cir. 2017). As a result, there is no basis for excluding their testimony.

[3] Even courts that have declined to consider evidence outside the agency record acknowledge that such evidence may be considered "for background information or to determine if the agency examined all relevant factors or adequately explained its decision" *Abington Mem'l Hosp. v. Heckler*, 576 F. Supp. 1081, 1087 n.4 (E.D. Pa. 1983), *aff'd*, 750 F.2d 242 (3d Cir. 1984).

CONCLUSION

For the foregoing reasons, the Defendants' Motion should be denied.

Respectfully submitted,

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

December 13, 2017

s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
MICHAEL J. FISCHER
Chief Deputy Attorney General
LAUREN E. SULCOVE
NICOLE J. BOLAND
NIKOLE N. BROCK
Deputy Attorneys General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391
jgoldman@attorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document, and any attachments thereto, to be electronically filed with the Clerk of the Court for the United States District Court for the Eastern District of Pennsylvania by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 13, 2017

/s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN