THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. 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, Defendants.	Civil Action No. 2:17-cv-04540 (WB)

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

Defendants, by and through their attorneys, hereby move *in limine* to exclude witness testimony that Plaintiff intends to call at the December 14, 2017 hearing on their Motion for Preliminary Injunction. Defendants respectfully submit that judicial review of the merits of Plaintiff's claims, including the likelihood of success of such claims, be limited to the Administrative Record, not supplemented by witness testimony that was not before the agency. The reasons for this motion are set forth in the Brief in Support of Defendants' Motion *in Limine* to Limit Evidence at Hearing on Plaintiff's Motion for a Preliminary Injunction, filed concurrently herewith.

Dated: December 11, 2017

Respectfully Submitted,

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INTRODUCTION

Defendants respectfully move this court to limit the evidence introduced at the hearing on Plaintiff's Motion for a Preliminary Injunction on December 14, 2017, so that this Court's consideration of the merits of Plaintiff's claims is limited to the materials contained in the Administrative Record. On December 1, Plaintiff informed Defendants that they intend to present the testimony of the six witnesses whose declarations were submitted with Plaintiff's Motion. *See* Plaintiff's Motion for a Preliminary Injunction, Exhibits D-L, ECF Nos. 9-5–9-13. Inasmuch as this testimony goes to the merits of Plaintiff's Administrative Procedure Act ("APA") and

constitutional claims, Defendants respectfully submit that such testimony should be excluded.[1] In addition, the declarations submitted by Carol S. Weisman, Cynthia H. Chuang, Samantha F. Butts, and Dayle Steinberg include opinion testimony that suggests that Plaintiff intends to present these witnesses as experts. Any such expert testimony should be excluded.

I. Because This Is a Case Reviewing Final Agency Action Under the APA, Review Is Limited to the Administrative Record, and Plaintiff May Not Supplement the Record Through Witness Testimony at the Preliminary Injunction Hearing.

In reviewing final agency action under the APA, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Court "applies the same standard when determining whether an agency's actions were an abuse of discretion or arbitrary and capricious," *Mirjan v. Att'y Gen.*, 494 F. App'x 248, 250 (3d Cir. 2012) (citation omitted), and "[i]n applying that standard, the focal point for judicial review should be the administrative record already in existence, not 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)).

Therefore, because this is a case reviewing final agency action under the APA, "[r]eview is limited to the administrative record that existed before the agency at the time of the decision, which must be judged solely on the grounds raised by the agency." *Embassy of Blessed Kingdom of God For All Nations Church v. Holder*, 6 F. Supp. 3d 559, 561 (E.D. Pa.), *aff'd sub nom. Embassy of the Blessed Kingdom of God for all Nations Church v. Att'y Gen.*, 591 F. App'x 161 (3d Cir. 2014) (citing *Dia v. Ashcroft*, 353 F.3d 228, 241 (3d Cir. 2003)); *accord DiDonato v. Zilmer*, 983 F. Supp. 2d 531, 533 (E.D. Pa. 2013).

[1] To the extent that Plaintiff's appended declarations also include evidence that goes to the merits of its claims, that evidence should also be excluded from consideration by this Court. *See* Plaintiff's Motion for a Preliminary Injunction, Exhibits D–L, ECF Nos. 9-5–9-13.

The Third Circuit has made clear that "[i]n 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 presented no justifications for departing from the normal course here. The Third Circuit explained that supplementation of the record may be appropriate where: (1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate," (2) "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action," or (3) 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). None of these unusual circumstances are present here. Plaintiff is "challenging rulemaking, not adjudicative actions, and the [Agencies] considered the issues raised in this suit during the administrative proceedings." *Id*. And Congress has not overridden the rule limiting review to the record. "Therefore, the scope of review standards contained in the APA would limit the District Court's review to the administrative record." *Id*. at 190.

That Plaintiff is asserting constitutional claims does not permit supplementation of the record here. *See* 5 U.S.C. § 706(2)(B) ("The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity . . . . In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."); *see also Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006) ("We review Robbins' [constitutional] due process claim against the [agency] under the framework set forth in the APA."); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1170 (D.N.M. 2015) ("The presence of a constitutional claim does not take a

court's review outside of the APA, however—§ 706(2)(B) specifically contemplates adjudication of constitutional issues—and courts must still respect agency fact-finding and the administrative record when reviewing agency action for constitutional infirmities; they just should not defer to the agency on issues of substantive [constitutional] legal interpretation."); *Inst. of Marine Mammal Studies v. Nat'l Marine Fisheries Serv.*, 23 F. Supp. 3d 705, 718 (S.D. Miss. 2014) ("Just as with the APA claims, the Court is to resolve [Plaintiff's] constitutional claim[s] by summary judgment if appropriate, based on review of the administrative record." (citation omitted)); *Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993) (addition of constitutional claims in an APA case "cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action").

Notably, the constitutional claims asserted by Plaintiff—Establishment Clause and equal protection claims—are facial rather than as-applied challenges. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (discussing distinction between facial and as-applied challenges). Moreover, Plaintiff is not the proper party to raise this facial challenge, as it lacks standing to assert its citizens' interests, as explained in Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction. *See* ECF No. 15 at 15–17. Even if Plaintiff did have standing, it would not have a cause of action to assert these constitutional claims—a State is not a "person" protected by the Due Process Clause of the Fifth Amendment, *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-34 (1966); *Pennsylvania v. Riley*, 84 F.3d 125, 130 n.2 (3d Cir. 1996), nor could it suffer "direct, personal contact" with or be "offended and intimidated by" the Rules, so as to incur any injury of its own under the Establishment Clause. *See ACLU-NJ v. Township of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001).

Thus, resolution of Plaintiff's claims does not require any evidence specific to how the Rules would be applied to Plaintiff. Instead, Plaintiff seeks to make general assertions about matters that were thoroughly addressed in the rulemaking proceeding. Consequently, the mere fact that Plaintiff asserts constitutional claims does not place this case outside the rule limiting APA review of agency action to the administrative record.

Plaintiff has identified no circumstances placing this case outside the normal rule limiting review of agency action under the APA to the administrative record. Accordingly, review is limited to the record, and Plaintiff may not supplement that record by presenting witness testimony.

II. In Any Event, the Court Should Exclude Any Purported Expert Testimony.

In cases governed by the review provisions of the APA, a court may not "substitute [its] own judgment for that of the agency by considering expert testimony that was not made a part of the administrative record." *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1190 (8th Cir. 2001); *accord Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 565 (W.D. Tex. 2011). Here, the declarations submitted by Carol S. Weisman, Cynthia H. Chuang, Samantha F. Butts, and Dayle Steinberg include opinion testimony, which strongly suggests that Plaintiff intends to present them as expert witnesses during the preliminary injunction hearing. *See* Decl. of Carol S. Weisman ¶¶ 42-55, ECF No. 9-5 (entitled "My Opinion on the 'Religious Exemption Rule' and 'Moral Exemption Rule'"); Decl. of Cynthia H. Chuang ¶ 25, ECF No. 9-6, ¶¶ 24-45 (same); Decl. of Samantha F. Butts ¶¶ 43-62, ECF No. 9-7 (same); Decl. of Dayle Steinberg ¶¶ 22–32, ECF No. 9-13 ("for all these reasons, I believe that the new exemptions to the contraceptive mandate will have a negative effect . . ."). Because Plaintiff has not shown that any expert testimony that these witnesses plan to submit was made part of the administrative record, the Court should exclude these witnesses from presenting expert testimony.

In any event, the Court should bar these witnesses from presenting legal opinions as part of their testimony. The declarations submitted by Plaintiff indicate that they plan to attempt to present legal conclusions and legal opinions as part of their testimony at the preliminary injunction hearing. *See, e.g.*, Weisman Decl. ¶ 44 (representing that "it is my professional opinion that the Rules will cause immediate and irreversible harm because they will cause women to lose preventive contraceptive care under their employer group health plans"); Chuang Decl. ¶ 25 (same); Butts ¶ 44 (same); Weisman Decl. ¶ 55 (stating that "[f]or these reasons, I believe that an injunction of the Rules is necessary to prevent immediate and irreparable harm to women in Pennsylvania and around the Country"); Chuang Decl. ¶ 45 (same); Butts Decl. ¶ 62 (same). Legal opinions and purely legal conclusions are not the proper subject of witness testimony. *See Zickes v. Cuyahoga Cty.*, 700 F. App'x 475, 577 (6th Cir. 2017) (upholding district court's exclusion of affidavits as inadmissible to the extent that they offered "purely legal conclusion[s]" on plaintiff's constitutional claim). The portions of these witnesses' testimony that consist of legal conclusions should therefore be excluded.

Dated: December 11, 2017

Respectfully Submitted,

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AND NOW, this _____ day of _____, 20__, upon consideration of Defendants' Motion *in Limine* to Limit Evidence at Hearing on Plaintiff's Motion for a Preliminary Injunction, and any responses thereunto, it is hereby **ORDERED** that the motion is **GRANTED**. Plaintiff is **PRECLUDED** from offering testimony that would go to the merits of their claims beyond evidence found in the Administrative Record.

BY THE COURT:

_____

WENDY BEETLESTONE
Judge, United States District Court