

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 *Zickel 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
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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

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0000036-0000037	Requirement for Group Health Plans and Health Insurance Issuers to Provide Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,787-88 (Dep't of the Treasury, IRS, July 19, 2010)
0000038-0000043	Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621-26 (Aug. 3, 2011)
0000044-0000045	Requirements for Group Health Plans and Health Insurance Issuers to Provide Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,677-78 (Dep't of the Treasury, IRS, Aug. 3, 2011)
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0000058-0000063	Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS), Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers (Feb. 10, 2012)
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0000097-0000101	John Bertko et al., <i>ASPE Issue Brief: The Cost of Covering Contraceptives through Health Insurance</i> (February 2012)
0000102-0000313	Gary Claxton et al., <i>Employer Health Benefits: 2010 Annual Survey</i> , 1-196 (2010)
0000314-0000563	Committee on Preventive Services for Women; Institute of Medicine, <i>Clinical Preventive Services for Women: Closing the Gaps</i> , 1-250 (2011)
0000564-0000565	Cynthia Dailard, <i>Special Analysis: The Cost of Contraceptive Insurance Coverage</i> , 6 Guttmacher Rep. Pub. Pol'y. 12-13 (March 2003)

¹ Pages 0000052-0000055 are extraneous material that was inadvertently numbered.

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0000566-0000586	Jessica D. Gipson et al., <i>The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature</i> , 39 Stud. Fam. Plan. 18-38 (2008)
0000587-0000591	Claudia Goldin & Lawrence F. Katz, <i>Career and Marriage in the Age of the Pill</i> , 90 Am. Econ. Rev. 461-65 (2000)
0000592-0000633	Claudia Goldin and Lawrence F. Katz, <i>The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions</i> , 110 J. Pol. Econ. 730-70 (2002)
0000634-0000645	Ifigenia Mavranezouli, <i>Health economics of contraception</i> , 23 Best Prac. & Res. Clinical Obstetrics and Gynaecology 187-98 (2009)
0000646-0000651	Debbie Postlethwaite et al., <i>A comparison of contraceptive procurement pre- and post-benefit change</i> , 76 Contraception 360-365 (2007)
0000652-0000656	Adam Sonfield, <i>The Case for Insurance Coverage of Contraceptive Services And Supplies Without Cost-Sharing</i> , 14 Guttmacher Pol'y. Rev. 7-10, 15 (2011)
0000657-0000664	Adam Sonfield et al., <i>U.S. Insurance Coverage of Contraceptives and the Impact Of Contraceptive Coverage Mandates, 2002</i> , 36 Persp. Sexual Reprod. Health 72-79 (2004):
0000665-0000684	Testimony of Guttmacher Inst., submitted to the Comm. on Preventative Serv. for Women, Inst.Of Med. 1-20 (January 12, 2011)
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0000706-0000733	Nicholas Alexander et al., Family Violence Prevention Fund, <i>A Guide for Policy Makers: Realizing the Promise of Home Visitation: Addressing Domestic Violence and Child Maltreatment</i> 1-28 (2010)
0000734-0000741	Am. Acad. of Family Physicians (AAFP), Order No. 1968, <i>Summary of Recommendations for Clinical Preventive Services</i> 1-16 (2009)
0000742-0000753	American Cancer Society, Atlanta, USA et al., <i>Ovarian cancer and oral contraceptives: collaborative reanalysis of data from 45 epidemiological studies including 23257 women with ovarian cancer and 87303 controls</i> , 371 The Lancet 303-14 (January 26, 2008)
0000754-0000761	The Am. Coll. of Obstetricians and Gynecologists, Comm. on Gynecologic Practice, Committee Opinion No. 483, <i>Primary and Preventive Care: Periodic Assessments</i> , 1-8 (April 2011)

² The Bertko, Claxton, and Sonfield articles (pages 0000097-0000313, 0000652-0000604) were also considered for the Regulatory Impact Analysis but are produced only once.

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0000762-0000767	Memorandum from Cathi Callahan, Actuarial Research Corp., Adding free preventive care for women: ARC estimates from July 1, 2011 1-6 (July 19, 2011)
0000768-0000790	CDC & Wash. Bus. Grp. on Health, <i>Promoting Healthy Pregnancies: Counseling and Contraception as the First Step, Report of a Consultation with Business and Health Leaders</i> 1-14 (2000)
0000791-0000842	Linda Chamberlain & Rebecca Levenson, Family Violence Prevention Fund, <i>Reproductive Health and Partner Violence Guidelines: An Integrated Response to Intimate Partner Violence and Reproductive Coercion</i> 1-48 (2010)
0000843-0000847	Kelly R. Culwell & Joe Feinglass, <i>The Association of Health Insurance With Use of Prescription Contraceptives</i> , 39 Persp. on Sexual & Reprod. Health 226-30 (2007)
0000848-0000857	Congressional Budget Office, Estimate Reflects H3162WM_RH & Rules_005, <i>Estimated Effect on Direct Spending and Revenues of H.R. 3162, the Children's Health and Medicare Protection Act</i> , for the Rules Committee 1-9 (2007)
0000858-0000868	Jacqueline E. Darroch, Guttmacher Inst., Cost to Employer Health Plans of Covering Contraceptives: Summary, Methodology and Background (1998)
0000869-0000871	Joerg Dreweke, Guttmacher Inst., 1.94 Million Unintended Pregnancies and 810,000 Abortions Are Prevented Each Year by Publicly Funded Family Planning Services (February 24, 2009)
0000872-0000955	Constance M. Horgan et al., U.S. Dep't of Health and Human Serv., DHHS Pub. No. (SMA) 03-3797, <i>Special Report: The Provision of Mental Health Services in Managed Care Organizations</i> , 1-71 (2003)
0000956-0000969	Brian W. Jack et al., <i>The clinical content of preconception care: an overview and preparation of this supplement</i> , 2008 Am. J. Obstetrics & Gynecology S266-79 (Supp. Dec. 2008)
0000970-0000975	Memorandum from Marylouise Kelley, Dir. of Admin. Of Children and Families' Family Violence Prevention Program Office to Office of the Assistant Sec'y for Planning and Evaluation and other Health and Human Serv. Agency Staff (April 11, 2011)
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0000994-0001001	Wayne Metcalf, <i>Contraceptive Coverage Report</i> 1-8 (December 2001)
0001002-0001085	William D. Mosher & Jo Jones, Division of Vital Statistics, <i>Use of Contraception in the United States: 1982-2008</i> 1-77, May 2010, Series 23, No. 29, DHHS Publication No, (PHS) 2010-1350
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0001415-0001425	Charles E. Phelps, <i>Economics of Healthcare Financing: Implications for Breastfeeding</i> , 5 <i>Breastfeeding Med.</i> 191-199 (2010)
0001426-0001457	Usha Ranji et al., <i>State Medicaid Coverage of Family Planning Services: Summary of State Survey Findings</i> , 1-29 (2009)
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0001466-0001475	James Trussell et al., <i>The Economic Value of Contraception: A Comparison of 15 Methods</i> , 85 <i>Am. J. Public Health</i> 494-503 (1995)
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³ Bates numbering restarts with Disc 4 and the 2013 rulemaking.

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000535-000543	Zhu, B., <i>Effect of Interpregnancy Interval on Birth Outcomes: Findings from Recent U.S. Studies</i> , International Journal of Gynecology & Obstetrics, 89:S25-S33 (2005)
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000552-000558	Peipert, J., et al., <i>Preventing Unintended Pregnancies by Providing No-Cost Contraception</i> , Obstetrics & Gynecology, 120(6): 1291-1297 (Dec. 2012)
000559-000573	Conde-Aguledo, A., et al., <i>Birth Spacing and Risk of Adverse Perinatal Outcomes – A Meta-Analysis</i> , Journal of the American Medical Association, 295(15): 1809-1823 (2006)
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000608-000630	Frost, J., et al., <i>Contraceptive Needs and Services, National and State Data</i> , 2008 Update, New York: Guttmacher Institute (2010)
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000634-000636	Bluhm, W., ed., Group Insurance, 5th Ed. (2007), 459-460
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001023-001026	<i>State Policies in Brief, Insurance Coverage of Contraceptives</i> , Guttmacher Institute (June 2013)
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**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

ORDER

AND NOW, this day of , 2017, upon consideration of Defendants' Motion *in Limine* to Limit Evidence at Hearing on Plaintiff's Motion for a Preliminary Injunction, Plaintiff's Response thereto, oral argument, if any, and for good cause shown, it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

WENDY BEETLESTONE, J.