IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 16-cv-2113 (JDB) Hon. John D. Bates

AARP'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(c), Plaintiff AARP, by and through undersigned counsel, respectfully moves that this Court grant summary judgment in AARP's favor. In this action, AARP challenges EEOC's actions in promulgating 29 C.F.R. §§ 1630.14(d)(3) and 1635.8(b)(2)(iii) (2016), regulations under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., (2012), and the Genetic Information Nondiscrimination Act ("GINA"), 29 U.S.C. §§ 2000ff, et seq. (2012).

As set forth in the accompanying Memorandum of Points and Authorities in Support of AARP's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss, these Rules permit employers to impose heavy financial penalties for refusing to provide protected medical and genetic information through employee wellness programs. 29 C.F.R. §§ 1630.14(d)(3) and 1635.8(b)(2)(iii) (2016). Because the Rules defy the ADA's and GINA's requirements

that collection of this information be "voluntary," 42 U.S.C. § 12112(d)(4); 29 U.S.C. § 2000ff-1(b), they are arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012). "Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius*, 684 F. Supp. 2d 42, 52 (D.D.C. 2010). Because AARP has demonstrated that the challenged Rules are unlawful under the APA, summary judgment should be granted in AARP's favor.

In addition, AARP requests oral argument on this dispositive motion, as well as AARP's Opposition to Defendant's Motion to Dismiss. Given the legal complexity of the issues at stake and the lengthy administrative record, as well as the importance of the case, AARP submits that oral argument would be useful to the Court in resolving the matter.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AARP'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Regulations

Legislative History

Other Authorities

INTRODUCTION

> Employer: "Would you like to participate in this voluntary medical examination that is unrelated to your job duties?"
> Employee: "No, thank you."
> Employer: "Okay, here's your non-participation bill. It's $1,800.00."

Comment of the American Civil Liberties Union ("ACLU"), Administrative Record ("AR") 3498.

Included in one of thousands of comments submitted opposing the EEOC's 2016 wellness rules ("Rules"), this fictional exchange illustrates the heart of the controversy in this case: the Rules permit employers to put heavy economic pressure on employees to divulge their own and their spouses' medical information, which they otherwise would choose to keep private. That is precisely the result Congress intended to prevent when it required those exams and inquiries to be "voluntary" under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). Indeed, the administrative record contains voluminous evidence of the new Rules' likely coercive impact on workers in the United States—particularly those workers Congress set out to protect in the ADA and GINA. In promulgating the 2016 Rules, the EEOC reversed its longstanding position and abdicated its responsibility to interpret the civil rights laws in a manner that accords with the purpose of the laws' express "voluntary" requirements or with the administrative record. The result is an illogical, internally inconsistent, unjustified, and unlawful regulatory scheme that cannot withstand judicial review.

FACTUAL BACKGROUND

1. Medical Examinations and Inquiries in Employee Wellness Programs Under the ADA

The ADA significantly restricts medical examinations and inquiries that employers may conduct in both the pre- and post-employment context. 42 U.S.C. § 12112(d)(1). For current employees, the ADA prohibits non-job-related medical inquiries and exams unless they are part of an employee wellness program, and participation is voluntary:

> (A) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless . . . job related or consistent with business necessity.
>
> (B) A covered entity may conduct *voluntary* medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site . . . .

Id. § 12112(d)(4)(A)-(B) (emphasis added). Congress noted the "widespread irrational prejudice" against individuals with disabilities and explained that the prohibition on inquiries and exams was intended to protect any employee who "may object merely to being identified, independent of the [employment] consequences." S. Rep. No. 101-116, at 36 (1989) ("ADA Senate Report"); H.R. Rep. No. 101-485 at 75 (1990) ("ADA House Report"). Congress also expressed concern about the use of employee medical information in wellness programs. ADA House Report at 75 (noting that employee medical information obtained through wellness programs could not be used to limit health insurance eligibility or to prevent occupational

advancement). Consequently, at all times throughout the passage of the ADA, Congress insisted that wellness programs be voluntary. *Id.*

Congress did not define "voluntary" in the ADA, but the EEOC addressed voluntariness in employee wellness programs in enforcement guidance, making clear that "[a] wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC Notice No. 915.002, Question 22 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html ("2000 ADA Guidance"). The 2000 ADA Guidance also clarifies that wellness programs that do *not* make any disability-related inquiries or require medical exams do not implicate the ADA's protections. *Id.* at n.78.

2. Collection of Genetic Information in Employee Wellness Programs Under GINA

Like the ADA, GINA generally prohibits employers from acquiring employees' genetic information. 42 U.S.C. § 2000ff-1(b)(2)(A)-(D). And, like the ADA, GINA includes a narrow exception for wellness programs, requiring that employee participation in a wellness program's genetic services be voluntary:

> It shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee except—
>
> (2) where—
>
> (A) health or genetic services are offered by the employer, including such services offered as part of a wellness program; [and]

> (B) the employee provides prior, knowing, *voluntary*, and written authorization . . .

42 U.S.C. § 2000ff-1(b)(2)(A)-(D) (emphasis added). In establishing this strict voluntariness requirement, Congress sought to "encourage[] employees to take advantage of genetic technologies and opportunities to improve human health *without fear of discrimination by their employer*." S. Rep. No. 110-48 (2007) ("GINA Senate Report") (emphasis added).

Furthermore, GINA's restrictions on the acquisition of genetic information include information about employees' family members. 42 U.S.C. § 2000ff(3). GINA defines "family members" as dependents under the Employee Retirement Income Security Act of 1974 ("ERISA"), or up to a fourth-degree relative of ERISA dependents. *Id.* ERISA permits individuals to claim dependents "through marriage, birth, or adoption or placement for adoption." 29 U.S.C. § 1181(f)(2)(A)(iii). Congress included spouses' and adopted children's medical information within GINA's protections "because of the potential discrimination an employee or [family] member could face because of an employer's or other entities' concern over potential medical or other costs and their effect on insurance rates." GINA Senate Report at 28. For this reason, Congress cast a wide net in covering protected "genetic information," including the results of genetic tests of employees and their family members, as well as "the manifestation of a disease or disorder in [the employee's] family members," 42 U.S.C. § 2000ff(4)(a) (hereinafter referred to generally as "family medical information" or "family medical data").

3. HIPAA, the ACA, and Implementing Regulations Governing Penalties in Wellness Programs

Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA") to "reduce . . . barriers to obtaining health coverage by making it easier for people who change jobs or lose their jobs to maintain adequate coverage, and by providing increased purchasing power to small businesses and individuals." HIPAA Senate Report, S. Rep. No. 104-156, at 1 (1995). HIPAA permits health insurers to use some financial penalties/incentives as part of employee wellness programs. 29 U.S.C. § 1182(b)(2)(B).

The Departments of the Treasury, Labor, and Health and Human Services ("The Departments") issued interim guidance in 1997, 62 Fed. Reg. 16,894 Apr. 8, 1997), but did not fully consider HIPAA's implications with respect to wellness programs until 2001, 2001 HIPAA Notice of Proposed Rulemaking (NPRM), 66 Fed. Reg. 1421 (Jan. 8, 2001). The Departments proposed a monetary limit on incentives and penalties to "prohibit[] discounts and surcharges so large that they could discourage enrollment [in group health plans] based on health factors." *Id.* at 1429. The Departments' final rule in 2006 provided that penalties/incentives could not exceed 20% of the full cost of an individual's health insurance premiums, including both employee and employer contributions. Dep't of the Treasury, Dep't of Labor and Dep't of Health & Human Servs., Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. 75,014, 75,036 (Dec. 13, 2006) ("2006 HIPAA Rule").

The 2006 HIPAA Rule's penalty/incentive limit applied only to programs that required satisfaction of a health status-related factor as a condition of receiving the incentive, now called "health-contingent programs." *Id.* at 75,017-18. This rule did not apply to programs now called "participatory programs," *id.*, which do not require satisfaction of a health factor standard, but typically involve health risk assessments (HRAs) and biometric testing. *See* Dep't of the Treasury, Dep't of Labor, and Dep't of Health & Human Servs., Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,158 (June 3, 2013) ("2013 HIPAA Rule"), AR 61-62. In adopting the 2006 HIPAA Rule, the Departments made clear that compliance with the provision authorizing the 20% penalty/incentive limit "is not determinative of compliance with . . . any other State or Federal law, *including the ADA*." *Id.* 63 (emphasis added).

In 2010, the Patient Protection and Affordable Care Act ("ACA") adjusted and codified portions of the 2006 HIPAA Rule. 42 U.S.C. § 300gg-4(j). The ACA's wellness program provision permits health-contingent programs to use "rewards [that] shall not exceed 30 percent of the cost of [health insurance] coverage," with an option to raise the limit to 50% at the discretion of the Departments. *Id.* § 300gg-4(j)(3)(A). The selection of a 30% limit was a legislative compromise between the initial Democratic draft, which maintained HIPAA's 20% limit, and the Republican proposal to raise the limit to 50%. S. Rep. No. 111-89, at 439-40 (2009) ("Senate ACA Report") (additional views of Sen. Rockefeller expressing concern about impact on persons with disabilities); H.R. Rep. No. 111-299, pt. 3, at 185 n.7 (2009) ("House

ACA Report") (minority views). This section did not repeal or address the ADA or GINA, nor does the legislative history reflect any discussion of voluntariness in collecting information.

In 2013, the Departments issued regulations incorporating the 30% penalty/incentive limit.[1] 2013 HIPAA Rule, AR 60-95. The 2013 HIPAA Rule made clear that there is no distinction between rewards for participation and penalties for non-participation. *Id.* Again, the Departments did not consider the potential coercive effect of penalties/incentives on employees. *Id.*; *see also* Dep't of the Treasury, Dep't of Labor, and Dep't of Health & Human Servs., Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620, 70,627-30 (Nov. 26, 2012) ("2012 HIPAA NPRM"). Indeed, the Departments expected employees' disclosure of information to remain voluntary as separately required under the civil rights laws:

> Other State and Federal laws may apply with respect to the privacy, disclosure, and confidentiality of information . . . [E]mployers subject to the Americans with Disabilities Act of 1990 (ADA) must comply with any applicable ADA requirements for disclosure and confidentiality of medical information and non-discrimination on the basis of disability.

AR 68.

4. The Post-ACA 2010 GINA Rule's No-Penalty Voluntariness Provision Regarding Collection of Genetic Information in Wellness Programs

In 2010, after the ACA's enactment, the EEOC promulgated regulations

[1] The Departments exercised their statutory discretion to raise the penalty/incentive limit to 50% for health-contingent wellness programs designed to prevent or reduce tobacco use. 2013 HIPAA Rule, 78 Fed. Reg. at 33,167.

implementing Title II of GINA. 2010 GINA Rule, 75 Fed. Reg. 68,912 (Nov. 9, 2010). To balance GINA's statutory ban on inquiring about genetic information while preserving the benefits of voluntary genetic testing, the agency determined that "covered entities may not offer an inducement for individuals to provide genetic information." *Id.* at 68,923. Employers could reward employees for completing HRAs – or penalize them for declining to complete HRAs – but only if the employer "specifically identifies [questions about genetic information] and makes clear, in language reasonably likely to be understood by those completing [the HRA], that the individual need not answer the questions that request genetic information" to receive a reward or avoid a penalty. *Id.*[2]

5. Penalties Newly Allowed Under the 2016 ADA Rule for Refusing to Undergo Medical Exams and Answer Medical Inquiries

In April 2015, for the first time, the EEOC proposed to define "voluntary" in a manner that would permit penalties/incentives.[3] EEOC, Amendments to Regulations Under the Americans With Disabilities Act, 80 Fed. Reg. 21,659, 21,664 (Apr. 20, 2015) ("2015 ADA NPRM"), AR 21-32. The proposed Rule changed its

[2] In considering voluntariness, the EEOC noted the ACA's amendments to HIPAA that would increase the 20% penalty/incentive limit to 30% beginning in 2014. 2010 GINA Rule, 75 Fed. Reg. at 68,923 n.12.

[3] In 2009, the EEOC issued a letter suggesting that it would interpret the "voluntariness" requirement of the ADA to allow employers to use penalties/ incentives corresponding to the 2006 HIPAA Rule's limits. *See* January 6, 2009 letter, "ADA: Disability Related Inquiries and Medical Exams/Mandatory Clinical Health Risk Assessment," available at http://pdfserver.amlaw.com/cc/Wellness EEOC2009.pdf. The letter emphasized that it was "an informal discussion" and not the EEOC's "official opinion." *Id.* Two months later, the EEOC rescinded the portion of the letter concerning incentives. *See* March 6, 2009 letter, "ADA: Disability Related Inquiries and Medical Examinations/Health Risk Assessment," available at http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf, at 5.

definition of "voluntary" to permit significant penalties/incentives: any penalty/ incentive that does not exceed the value of 30% of the total cost of self-only health insurance premiums. AR 29.

The EEOC received voluminous public comments on the 2015 ADA NPRM. AR 5. Numerous comments opposed the rule, (1) arguing that increasing health insurance costs significantly for individuals choosing to exercise their statutory civil right to withhold private medical information would vitiate the ADA's "voluntary" requirement and (2) documenting the discrimination that those individuals might face if pressured to divulge that information. *See*, *e.g.*, Truckers for a Cause comment, AR 2663-65 (explaining that medical information divulged through wellness programs could lead employers to discriminate against truck drivers through unnecessary fitness for duty exams based on unfounded health-related fears); Statewide Parent Advocacy Network comment, AR 2702-09 (describing coercive impact of 30% rule and stating that a penalty of this "magnitude" would "force[] individuals to turn over sensitive disability and health related information to their employers, making it harder to prevent employment discrimination against a group that already has the lowest employment rates of any group tracked by the Bureau of Labor Statistics"); Association of University Centers on Disabilities comment, AR 2962 ("This is a serious erosion of civil rights and opens the door to increased discrimination against a group of Americans who already experience bias, disproportionate rates of poverty, and extraordinarily low rates of participation in the workforce, partly due to the prejudice they experience."); American Diabetes

Association comment, AR 3037-42 ("An individual may be justifiably wary of revealing his or her diabetes to the employer, for fear of discrimination based on the condition, but may be effectively forced by a biometric screening program to reveal this information."); Bazelon Center for Mental Health Law ("Bazelon Center") comment, AR 3775-94 (explaining in detail the coercive nature of the penalties permitted by the proposed rule); Sparrow Morgan comment, AR 2812 ("Voluntary standards aren't voluntary when one has no choice in the matter, and when financial penalties are the cost of 'opting out', participation is certainly not voluntary."); Bette Elsden comment, AR 2820 ("Disabled workers already earn about half as much as workers who do not have a disability. Please do not to permit employers to subject their disabled workers to a Hobson[']s choice: Submit to the prescribed wellness activities, or pay hundreds more each year.").

Comments pointed to the serious financial impact the penalty/incentive provision of the proposed rule would have on individuals and families with average incomes. National Women's Law Center ("NWLC") comment, AR 3298-3304; Bazelon Center comment, AR 3778-79; ACLU comment, AR 3492-3504. Other comments endorsed the use of penalties/incentives, but expressed concern that the proposed rule would only create more confusion and problems for employers because of inconsistencies with HIPAA's permissible incentives. *See*, *e.g.*, Health Enhancement Research Organization comment, AR 2711-19 (including a chart detailing inconsistencies); Business Health Coalition comment, AR 2755 ("We urge the EEOC to clarify this condition while also considering incentive limits that

remain consistent with current ACA and HIPAA designations."); Business Roundtable comment, AR 2964-67.

The final 2016 ADA Rule cements the 30% incentive/penalty scheme. 29 C.F.R. § 1630.14(d)(3). The final ADA Rule acknowledges that "inducements" can be either "a reward or a penalty." 2016 ADA Rule, AR 10. The EEOC concluded that "allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of [both the ADA and HIPAA, as amended by the ACA]." AR 5. Thus, the EEOC acknowledged that its rule must avoid economic coercion to be valid. AR 9. ("To give meaning to the ADA's requirement that an employee's participation in a wellness program must be voluntary, the incentives for participation cannot be so substantial as to be coercive."). Nonetheless, the EEOC provided no reasoning as to how or why permitting employers to penalize any employee with a levy of up to 30% of the total cost of insurance premiums is categorically non-coercive.

6. Penalties Newly Allowed Under the 2016 GINA Rule for Refusing to Provide Genetic Information

In October 2015, the EEOC proposed to permit employers to request and acquire information about the manifestation of disease or disorder—i.e., medical history—in their employees' spouses, as part of employee wellness programs. EEOC, Genetic Information Nondiscrimination Act of 2008, Proposed Rule, 80 Fed. Reg. 66,853, 66,856 (Oct. 30, 2015) ("2015 GINA NPRM"), AR 33-49. The EEOC noted that such information is "genetic information protected by GINA," but posited

that "adopting a very narrow exception" strikes a balance between GINA's goal of strong nondiscrimination protections and HIPAA's goal of promoting employee participation in wellness programs. *Id.* The EEOC justified soliciting spousal medical history, but not the medical history of employees' children, by opining that there "is minimal, if any, chance of eliciting information about an employee's own genetic make-up or predisposition for disease from the information about current or past health status of the employee's spouse." *Id.* The agency did not attempt to reconcile this reasoning with Congress' decision in GINA itself not to draw a distinction between spousal medical information and other family members' statutorily defined "genetic information." 42 U.S.C. § 2000ff(3) (incorporating the ERISA definition at 29 U.S.C. § 1181(f)(2)(A)(iii)).

Like the comments on the proposed ADA Rule, the comments on the proposed GINA Rule reflected strong concerns about medical and genetic privacy, employment discrimination, and the economic pressure that the proposed penalties/incentives would impose on individuals who choose not to reveal their spouses' medical histories. NWLC comment, AR 7184-89; Center for Democracy and Technology ("CDT") comment, AR 7191-94 ("These penalties will be financially coercive, especially for workers who feel they cannot afford the penalty for refusing to participate. A recent empirical study of one large employer by the Employee Benefit Research Institute (EBRI) showed that such concerns are justified."). Other comments praised the EEOC for permitting these penalties/incentives, but reiterated concerns about inconsistency with HIPAA and limits placed on

employers' ability to "incentivize" employees to participate in wellness programs. *See, e.g.*, Society for Human Resource Management comment, AR 7196-7202; Unite Here Health comment, AR 7203-08 ("The Fund strongly urges the Commission to implement regulations that are consistent with existing wellness program rules and regulations under [HIPAA] and [the ACA]."); College and University Professional Association for Human Resources, et al., comment, AR 7210-25.

The final 2016 GINA Rule continues to define "voluntary" as meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)(B) Likewise, the 2016 GINA Rule requires that acquisition of genetic information from an employee's spouse be "voluntary." 29 C.F.R. § 1635.8(b)(2)(iii).

However, inexplicably, the final Rule maintains the NPRM's exception from the no-penalty rule for acquisition of spousal medical information. 29 C.F.R. § 1635.8(b)(2)(iii). Under that rule, employers may apply penalties/incentives *twice*— 30% of the cost of self-only coverage when employees do not provide their own medical information, and another 30% if they withhold their spouses' medical information—i.e., the penalties stack. 2016 GINA Rule, AR 44. Therefore, even though the 2016 GINA Rule relies on the 2016 ADA Rule to justify the proposition that 30% of the cost of insurance premiums is not economically coercive, the 2016 GINA Rule blesses cumulative penalties amounting to 60% of the cost of insurance premiums for both the employee and the employee's spouse. 29 C.F.R. § 1635.8(b)(2)(iii). The 2016 GINA Rule does not speak to a situation in which each

spouse's employer penalizes each spouse with this 60% penalty, which would result in a cumulative penalty for the household worth 120% of individual health insurance premiums.

ARGUMENT

I. AARP Has Standing to Challenge the 2016 Wellness Rules.

The EEOC asks the Court to reconsider its prior conclusion that AARP has met its burden to show that it has standing to challenge the Rules. Def.'s Mot. to Dismiss or, in the Alternative, for Summary Judgment [ECF No. 31] ("EEOC's Mot.") at 9-15; Order Denying Motion for Preliminary Injunction [ECF No. 27] ("PI Order") at 12-16. The government has raised no new facts or legal arguments that could plausibly alter the Court's conclusion. *Cf. New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995) (a motion to reconsider "is not simply an opportunity to reargue facts and theories upon which a court has already ruled. Such a motion must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions") (internal quotations omitted).

A. Standard of Review

At summary judgment, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,'" supporting his allegations of standing, "which . . . will be taken to be true." *Food & Water Watch, Inc.*, 79 F. Supp. 3d at 186 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). While the government suggests that AARP now has a higher burden to prove standing, EEOC's Mot. at 10, that is not the case: at the preliminary injunction stage, "the plaintiff's burden to demonstrate

standing 'will normally be no less than that required on a motion for summary judgment.'" *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 186 (D.D.C. 2015) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8 (1990)). Consequently, the Court has already properly concluded that AARP met its burden to show standing under the summary judgment standard. PI Order at 12-16.

B. AARP Has Established Associational Standing to Bring Suit on Behalf of Its Members.

To establish associational standing to bring a suit on behalf of its members, an organization "must demonstrate [1] that at least one member would have standing under Article III to sue in his or her own right, [2] that the interests it seeks to protect are germane to [the organization]'s purposes, and [3] that neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit." *Delaware Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 7 (D.C. Cir. 2015) (quoting *NRDC v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007) ((citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977))). The third factor has never been contested.[4]

The government repeats its contention that AARP is not a "membership organization." EEOC's Mot. at 10-13. First and foremost, AARP maintains that a

[4] The government previously argued that AARP did not satisfy the "germaneness" requirement, EEOC Opposition to Plaintiff's Motion for Preliminary Injunction [ECF No. 14] ("EEOC's PI Opp") at 14-5, but the Court rejected that argument, explaining that AARP had "amply demonstrated that this suit is germane to its purpose," PI Order at 16. The government's motion appears neither to concede this point nor to pursue it. EEOC's Mot. at 10, n.4. As no relevant facts or law have changed since the Court's prior decision, there is no reason for the Court to change its opinion on this factor.

searching inquiry into this issue is unnecessary because AARP is plainly a traditional membership organization empowered to stand in its members' shoes. *See AARP v. E.I. Dupont de Nemours & Co.* 677 F. Supp. 351, 354-55 (E.D. Pa. 1987) (determining without "indicia of membership" analysis that "*In representing its members*, AARP seeks to enhance the quality of life of older persons, improve employment opportunities or older workers, and eliminate age discrimination in the workforce") (emphasis added). AARP dedicates itself to "speaking on behalf of its tens of millions of members . . . in advocating for social change in our national . . . and state legislatures." *Boudreau Decl.*, [ECF No. 21-4] at 1. It is equally appropriate for AARP to speak on those members' behalf in this lawsuit. *See* PI Order at 10 ("The goal of this inquiry is to ensure that the organization claiming associational standing actually represents the individual "members" on whose behalf it purports to bring suit.").

In attacking this straightforward conclusion, the EEOC points out that AARP's bylaws state that AARP has no "members" as defined in the D.C. Code's provision defining "members" for purposes of nonprofit corporations law. EEOC's Mot. at 10 (citing *Boudreau Decl.* at 3 (citing D.C. Code § 29-401.02(24)). But, the D.C. Code's definition of a "member" in distinguishing among types of nonprofits under local law has no bearing on what qualifies as a "membership organization" that may stand in the shoes of its members for purposes of standing in a federal lawsuit—an inquiry that includes voting rights as only part of one of several indicia deemed relevant by the Supreme Court. *See Hunt*, 432 U.S. at 344-45; *Citizens Coal*

Council v. Matt Canestrale Contr., Inc., 40 F. Supp. 3d 632, 640 (W.D. Pa. 2014) ("just because the Standing Witnesses lacked voting rights when this lawsuit was commenced, that factor alone is not sufficient to defeat associational standing for Article III purposes."). State corporations law does not define which organizations may represent their members for federal associational standing purposes. *See Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 675 (E.D. La. 2010) ("Corporate formalities and formal membership structure are not constitutional requirements for associational standing.").

However, even if the Court is persuaded that AARP in some sense has "no members at all," *Hunt*, 422 U.S. at 342, that does not change the result because the "indicia of membership" analysis shows that AARP is the "functional equivalent," *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26 (D.C. Cir. 2002), of a traditional membership organization. *See Friends of the Earth v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) ("the 'indicia of membership' test is the correct one to apply to determine whether a purported corporation, despite the failure to meet state law requirements, has 'members' whose interests it can represent in federal court."). Accordingly, assuming *arguendo*, as the Court did in its prior order, that this analysis is necessary, there is no reason for the Court to change its view that "AARP satisfies the 'indicia of membership' criteria." PI Order at 12-13.

The D.C. Circuit has described a "traditional membership organization" as having "a defined mission that serves a discrete, stable membership with a definable set of common interests." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d

588, 598 (D.C. Cir. 2015). Additional indicia of membership include "whether members play a role in selecting the organization's leadership, guiding the organization's activities, and financing the organization's activities." PI Order at 10 (citing *Hunt*, 432 U.S. at 344-45).

The Court was right to conclude that AARP meets these criteria: it has a membership with defined common interests; members "play a role" in choosing AARP's leadership and guiding its activities; and, member dues account for a very significant portion of AARP's finances. PI Order at 12-13. The EEOC again contends that AARP's members are not "members" at all, likening AARP to Netflix because both entities serve populations they call "members," who have common interests.[5] EEOC's Mot. at 11. But, the EEOC's observation that serving a population with common interests *alone* is insufficient for associational standing, *id.*, is entirely beside the point. The *Hunt* indicia go beyond this initial requirement, and, as the Court concluded, AARP satisfies those indicia as well. PI Order at 12-13.

Nonetheless, the EEOC maintains that because AARP members do not directly elect AARP's Board of Directors, members do not play a sufficient role in selecting AARP's leadership or guiding its activities. EEOC's Mot. at 11-12. Yet, as the Court previously explained, there is simply no precedent requiring that members engage in direct election or have full policymaking authority; playing a role is all that is required. PI Order at 12-13; *Hunt*, 432 U.S. at 344-45; *Citizens Coal Council*, 40 F. Supp. 3d at 640. AARP has already catalogued, and the Court

[5] AARP takes no position on whether Netflix could show associational standing.

has already recognized, the numerous ways in which AARP members direct AARP's actions: members serve on the National Policy Council committees, guide the organization's advocacy through various surveys and frequent other communications and advice, and exclusively compose the Board of Directors, who choose subsequent Board members. *Boudreau Decl.* at 1-2; PI Order at 12-13. That a 38-million-member organization has a complex structure in which members choose representatives—who are also members—to make final decisions about the organization's actions is only practical. It does nothing to detract from the organization's representative nature, especially when it is clear that Board and National Policy Council members ensure that the larger body of members is consulted, and their views are considered, at every stage of policymaking. *Boudreau Decl.* at 1-2.

While the government attempts, again, to compare AARP members' role in the organization to that of a Netflix subscriber or other commercial service recipient, EEOC's Mot. at 12-13, the analogy is entirely inapposite. The cases that the EEOC invokes for this proposition—cases involving subscription services and television viewers—rejected associational standing claims because, among other reasons, the subscribers and viewers at issue played *no* role in the organization's direction or financing. *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) ("petitioners have not shown that its 'readers and subscribers' *played any role* in selecting its leadership, guiding its activities, or financing those activities") (emphasis added); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) ("it

does not appear from the record that ALF's 'supporters' *play any role* in selecting ALF's leadership, guiding ALF's activities, or financing those activities") (emphasis added).[6]

In short, the government's current arguments raise nothing that the Court has not already considered and correctly rejected in its prior decision. AARP has thoroughly demonstrated that it is a membership organization for standing purposes.

C. AARP Has Shown That at Least One Individual Member Would Have Standing to Sue in His Own Right.

The government also seeks to relitigate whether Declarant A would have Article III standing to challenge the 2016 Rules. As the Court explained, under *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009), "'when an agency adopts a rule with the purpose and substantially probable effect of economically helping regulated Party A,'—here, employers covered by the ADA—

[6] Relatedly, the government's apparent view that any declarant put forth to exemplify members' interest in the outcome of the case must, himself, make policy decisions to be considered a "member," EEOC's Mot. at 12-13, is entirely unsupported. That none of AARP's declarants are on the Board of Directors, for instance, is not a deficiency similar to cases in which an organization fails to point to *any* injured members, as the government suggests in relying on *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("Because the Chamber has not identified a single member who was or would be injured by EPA's waiver decision, it lacks standing to raise this challenge."). Likewise, while the EEOC concedes the very significant role members play in financing AARP's activities, it seeks to undercut that point by noting that Declarant A's dues are included in his spouse's dues. *Id.* at 12. The Court has already taken account of the fact that individuals' membership dues may be included with their spouses' dues, and that did not alter its conclusion that AARP members are members. PI Order at 12. The government has pointed to no case law suggesting that the dollar amount that a given declarant pays in dues is dispositive of an organization's status as a membership organization or a declarant's status as a member.

'and hindering Party B,' *i.e.*, employees who do not want to participate in wellness programs, 'Party B ordinarily will have standing to challenge the rule.'" PI Order at 14-15. The Court explained that AARP had met the *Stilwell* standard by showing that: (1) Declarant A's employer currently charged penalties for non-participation in its employee wellness program; (2) the purpose of the 2016 Rules was to permit employers to raise the amount of the penalties for non-participation in employee wellness programs and penalize employees for refusing to provide spousal information; (3) employers and industry groups stated in comments that they intended to do just that; and therefore, (4) there is a substantial likelihood that Declarant A's employer will raise its penalties for non-participation and begin to include penalties for refusing to provide spousal information. PI Order at 14.

The government's latest salvo does nothing to change this analysis. The EEOC argues that because Declarant A's employee wellness program's terms are governed by a collective bargaining agreement ("CBA"), and because the current wellness program charges "only" a one percent penalty for non-participation, it is somehow far less likely that Declarant A's employer will increase its penalties and add spousal penalties as permitted by the 2016 Rules. EEOC's Mot. at 14-15. However, the EEOC offers nothing but its own opinion to support this prediction. There is nothing about collective bargaining that inherently makes the change permitted by the 2016 Rules less likely. Indeed, a plethora of factors doubtless affect all employers' decisions about how to change their health insurance pricing; that collective bargaining may be one of them is not self-evidently significant to the

question whether Declarant A's employer will increase its penalties for non-participation in wellness programs or add penalties for refusing to disclose spousal information.

AARP has met the *Stilwell* standard for showing a likelihood that the 2016 Rules will harm him, and the EEOC cannot unilaterally raise that burden by speculating that one of many factors in Declarant A's workplace will affect his employer's decision about its wellness program. Declarant A has shown a substantial likelihood of future harm caused by the 2016 rules, and that is enough.[7]

II. Summary Judgment in AARP's Favor is Warranted Because The 2016 Wellness Rules Are Unlawful Under the APA.

A. Standard of Review

"Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius*, 684 F. Supp. 2d 42, 52 (D.D.C. 2010). Under the APA, courts must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In assessing whether the agency's action is contrary to law, the reviewing court uses the framework set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Hearth, Patio, & Barbecue Ass'n*

[7] In addition, Declarant C would have standing to challenge the ADA Rule as well. Because he participates in his employer's wellness program to avoid heavy financial penalties, he faces future harm because in the coming year, he will again submit to medical exams and inquiries that he would not volunteer to undergo in the absence of penalties. *See* Decl. C. ¶ 6 Especially given that he expects his medical condition to deteriorate over time, *id.*¶ 4, he will continue to be required to reveal additional, increasingly serious medical information to his employer to avoid penalties.

v. U.S. Dep't of Energy, 706 F.3d 499, 503 (D.C. Cir. 2013). Under this analysis, "if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent." *Id.* Next, "if Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* Step Two," in which the court defers to the agency's interpretation if it is reasonable. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). Even where the agency is acting within its regulatory authority, its regulations are not entitled to any deference when they are "clearly wrong." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004).

Furthermore, an agency action is "arbitrary and capricious" if it is not the product of "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). The agency's action fails this test when the agency has failed to consider the relevant factors or made a "clear error in judgment." *Id.* at 43. Such an error occurs when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Ass'n*, 462 U.S. at 43)).

While agencies may reverse their policies, they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) ("*Brand X*")). While the agency need not justify its

decision in more detail than it would "for a new policy created on a blank slate," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), it must, nevertheless, "display awareness that it is changing position" and "show that there are good reasons for the new policy" because the agency is inherently "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* (internal citations omitted). Accordingly, an "unexplained inconsistency" is arbitrary and capricious. *Brand X*, 545 U.S. at 218.

B. The 2016 ADA Rule's Redefinition of "Voluntary" is Arbitrary, Capricious, and Contrary to Law.

Since the ADA's inception, the EEOC has construed "voluntary" in a way that ensures genuinely free choice: "voluntary" medical examinations and inquiries were only those that could be declined without any penalty. *See* 2000 ADA Guidance, Question 22. The EEOC's about-face defining "voluntary" as permitting non-participation penalties of up to 30% of self-only health insurance premiums, 29 C.F.R. § 1630.14(d)(3), in addition to what they already contribute, is an unreasonable construction of the statutory language, and it is not the product of "reasoned decisionmaking" based on the administrative record. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52.

1. The 2016 ADA Rule is Unreasonable Because It Permits Employers to Coerce Employees to Undergo Medical Inquiries and Examinations, Which Contravenes Any Meaningful Definition of "Voluntary" Under the ADA.

While the ADA does not define "voluntary," the term's ordinary definition connotes genuine choice free from coercion. Voluntary, The American Heritage

Dictionary of the English Language, at 1929 (4th ed. 2000) (""[a]cting or done willingly and without constraint or expectation of a reward"); Voluntary, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/voluntary (last visited Oct. 19, 2016) (also defining "voluntary" as "unconstrained by interference," "acting or done of one's own free will without valuable consideration or legal obligation"). The EEOC's redefinition of this term transgresses any reasonable boundaries, defying Congress' intent to guarantee a meaningful voluntariness requirement that preserves employees' genuine choice to withhold private medical information and protect themselves from potential employment discrimination.

a. The administrative record contains compelling evidence that the newly permitted penalties unduly pressure employees to submit to medical exams and inquiries.

The administrative record contains abundant proof that the 2016 ADA Rule permits employers to rob employees of a meaningful choice about whether to divulge personal medical information to employee wellness programs. As numerous comments to the proposed rule reflect, the 2016 ADA Rule will permit employers to put intense financial pressure on many individuals who otherwise would refuse to divulge private medical information. The record reflects that an increase in health insurance premiums worth 30% of the total cost of self-only coverage would at least double the amount that the vast majority of employees pay per month. Bazelon Center comment, AR 3778-79; ACLU comment, AR 3493. That would mean, on average, a cost of approximately $1,800 per person, based on 2014 data. NWLC comment, AR 3302; Nat'l Disability Rights and Educ. Fund comment, AR 3827;

Bazelon Center comment, AR 3774; ACLU comment, AR 3491.

For an average family, that $1,800 would otherwise cover months' worth of child care or food, and nearly two months' rent. NWLC ADA comment, AR 3302. As the National Women's Law Center's ("NWLC") comment explained, "In order to place this amount in context, the average cost of food for a family of four is about $632 per month, and the median housing costs for renters in the United States in 2013 was $850 per month. A financial incentive of $1,808 would cover more than 2 months of child care costs for a 4[-]year[-]old child in 47 states." *Id.* Thousands of individual NWLC supporters also submitted comments urging the EEOC to ensure that the ADA Rule did not use these substantial penalties to coerce women to divulge pregnancy status. AR 96-2506.

Furthermore, as many comments reflect, the increased health insurance charges permitted by the 2016 ADA Rule fall more harshly on individuals with disabilities—precisely the people the ADA was enacted to protect. On average, people with disabilities have disproportionately lower incomes and higher medical costs than the general population. ACLU comment, AR 3496 ("According to the U.S. Census Bureau, median household income for people with disabilities is less than half of household income for people without disabilities ($25,974 compared to $61,103). About 31 percent of working-age Americans with disabilities participate in the workforce, compared with about 76 percent of working-age non-disabled Americans. About 29 percent of working-age Americans with disabilities live below the poverty line, compared to 12 percent of working-age non-disabled Americans.");

American Psychological Association comment, AR 3505; Epilepsy Found. comment, AR 3237. The EEOC has not pointed to any comments stating that the proposed increase would not be coercive.

Numerous individual commenters corroborated these statistics with their personal experiences. They implored the EEOC not to allow their employers to coerce them into revealing their disabilities with heavy financial penalties. *See*, *e.g.*, Matilda Sokolov comment, AR 2809; Leigh Stevens comment, AR 2811; Sparrow Morgan comment, AR 2812; Rae Bielski comment, AR 2817; Ryan Carter comment, AR 2818; Kristina Blake comment, AR 2823; Helena Ritz-Unzueta comment, AR 2837.

Accordingly, the record amply demonstrates that the 2016 ADA Rule would allow employers to present employees with a "choice" between paying punishingly high penalties and foregoing their ADA-protected right to protect themselves from employment discrimination by keeping their health information private.

b. The 2016 ADA Rule's redefinition of "voluntary" is unreasonable because it contravenes Congress's intent to give employees a meaningful choice about whether to divulge disability-related medical information in the workplace.

While, as the Court has observed, there are cases concluding that "[a] hard choice is not the same as no choice," PI Order at 24 (citing *U.S. v. Martinez-Salazar*, 528 U.S. 304, 315 (2000)), these cases did not involve laws with express "voluntary"

requirements.[8] *E.g.*, *Martinez-Salazar*, 528 U.S. at 315 (concluding that criminal defendant had not been deprived of his right to bring a peremptory challenge because he made the difficult decision not to do so). On the contrary, cases construing the term "voluntary" in comparable statutes or regulations have taken a far less permissive view of its meaning.

For instance, in cases under the Fair Labor Standards Act addressing whether employee training is "voluntary" (and, thus, not compensable), courts have endorsed a meaningful definition that takes employees' real choices into account and considers more than just whether conduct is compulsory for continued employment. These courts have explained that plaintiffs "need not show that the employer has a rule terminating those who do not attend training. Instead, training is 'required' if the employee is 'led to believe' that his or her working conditions or continuance of his or her employment *'would be adversely affected by nonattendance*.'" *Haszard v. Am Med. Response NW, Inc.*, 237 F. Supp. 2d 1151, 1153 (D. Ore. 2001) (citing 29 C.F.R. § 785.28) (emphasis added); *accord Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 919 (S.D. Tex. 2009) (holding training not voluntary under same standard where employees who did not take training were subject to discipline, but not termination). Likewise, in False Claims Act ("FCA")

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[8] The one notable exception is the recent decision in *EEOC v. Orion Indus.*, No. 14-cv-1019, 2016 U.S. Dist. LEXIS 128292, *8 (E.D. Wis. Sept. 19, 2016), which opined that all employment-based health insurance coverage was "voluntary" because it was not compulsory for continued employment. The case has since been settled, with the defendant agreeing to cease conditioning health insurance on wellness program participation. EEOC Press Release (April 5, 2017), https://www1.eeoc.gov//eeoc/newsroom/release/4-5-17a.cfm?renderforprint=1.

cases, courts have taken a strict approach to the statutory requirement that relators must "'voluntarily provide[ ]' [fraud-related] information to the Government before bringing suit." 31 U.S.C. § 3730(e)(4)(B) (2012). For example, in *United States ex rel. Barth v. Ridgedale Elec.,* 44 F.3d 699, 704 (8th Cir. 1995), the Eighth Circuit held that an individual who divulged information to a government investigator did not do so "voluntarily" within the FCA's meaning, even though he was not legally obliged to do so. The court reasoned that such a construction "ignores the clear intent of the Act[,] which is to encourage private individuals who are aware of fraud against the government to bring such information forward at the earliest possible time and to discourage persons with relevant information from remaining silent." As another court construing the same provision explained:

> [A] broader view of voluntary . . . would . . . render the word insignificant. . . . . Consider a disclosure that even the relators agree is not voluntary: information compelled by subpoena. When a witness summoned by subpoena . . . takes the stand, her testimony, even if compelled by subpoena, was the product of her free will. Thus, even compliance with a subpoena would constitute a voluntary act under a broad interpretation of "voluntarily." Indeed, it strains the imagination to conjure up disclosures to the Government that would not be voluntary under those definitions. Perhaps the only true "involuntary" disclosure would be where the relator, through some muscle twitch, hits "send" on an email to a government employee . . . or accidentally leaves a memo about his company's fraud at a coffeehouse, only for it to be later picked up by a government employee . . . Because such all-encompassing definitions would classify virtually all disclosures as voluntary, they would not limit the [relevant statutory] exception in any meaningful way. . . . .

United States ex rel. Griffith v. Conn, No. 11-157-ART, 2015 U.S. Dist. LEXIS 22668, *13-15 (E.D. Ky. Feb. 24, 2015).

Similarly, the ADA requires a meaningful construction of "voluntary." Section

12112(d)'s "voluntary" requirement is meant to allow employees to protect themselves from discrimination and stigma in the workplace that too often result from disclosure of medical information. *See*, *e.g.*, American Diabetes Association comment, AR 3041 ("The Association has the unfortunate experience of witnessing countless cases where workers with diabetes were doing fine at work, until their employer learned of their disability . . . ."); *Doe v. USPS*, 317 F.3d 339, 344 (D.C. Cir. 2003) (referring to an employee's "right to avoid being publicly identified as having a disability" under the Rehabilitation Act, the ADA's predecessor statute). In enacting this language, Congress did not intend for individuals with disabilities to face a hard choice when deciding whether to withhold their personal medical information from their employers. Rather, it sought to give those workers the opportunity to participate in employee wellness programs if they *wanted* to do so, while retaining the ability to decline freely—not at great personal cost. ADA House Report at 75 ("As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities."). Allowing employers to put pressure on employees that would significantly alter the conditions of their employment and make their "choices" far less than genuine would defy this statutory purpose.

Indeed, the EEOC has itself acknowledged that a "voluntary" choice to disclose private medical information must be a meaningful choice, not a technical

one. As the agency stated in the 2016 ADA Rule itself, "to give meaning to the ADA's requirement that an employee's participation in a wellness program must be voluntary, the incentives for participation cannot be so substantial as to be coercive." *See* 2016 ADA Rule, AR 9. Thus, the agency's apparent current position that any financial "temptation" is metaphysically indistinguishable from coercion cannot be squared with its own rulemaking. *See* EEOC's Mot. at 16 (citing case law discussing "a philosophical determinism by which choice becomes impossible."). Notwithstanding the government's position in this litigation, there can be no question that the "voluntary" language in § 12112(d) must do more than create a merely technical volitional requirement; it must guarantee a genuinely free choice. The serious financial pressure blessed by the 2016 ADA Rule defies and undermines, rather than enforcing, that guarantee. In doing so, the Rules enable an employer to make employees offers they can't refuse.

2. The EEOC Did Not Give An Adequate Justification for Redefining "Voluntary" As Permitting Employers to Impose Penalties Worth 30% of Insurance Premiums.

a. The EEOC has not justified the reversal of its longstanding no-penalty position.

The 2016 ADA Rule's new definition of "voluntary" is not the product of "reasoned decisionmaking," *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 52, because the EEOC did not provide a sufficient factual or legal justification for creating a definition based wholly on this bright-line penalty/incentive limit. First and foremost, the EEOC has not justified the abrupt shift in its longstanding—and recent—position that "voluntary" medical examinations and inquiries in wellness

programs include only those that may be declined without penalty. *See* 2000 ADA Guidance at Question 22; EEOC Brief, *EEOC v. Honeywell*, No. 14-cv-04517 (D. Minn. Oct. 27, 2014) ("EEOC Honeywell Brief") ("Honeywell is, therefore, requiring employee participation [in employee wellness programs] *or penalizing those who do not participate* in violation of the ADA.") (emphasis added). The agency has yet to give a coherent explanation for its conclusion that it now has "good reasons" to "disregard[] facts and circumstances that underlay or were engendered by" the no-penalty rule. *Fox Television Stations*, 556 U.S. at 515-16.

Indeed, it is difficult to credit the EEOC with actually concluding that circumstances necessitating a change in its construction of "voluntary" had arisen at all, when the simultaneously-finalized 2016 GINA Rule *maintains* the agency's longstanding position that a "voluntary" wellness program is one in which "the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)(B). While the EEOC continues to assert that consistency is not necessary,[9] the agency has yet to offer any explanation, much less identify any new factual or legal developments, that now require the ADA's definition of "voluntary" to change course, but not GINA's. Statutes with the same purpose and objective must be construed

[9] The EEOC quotes part of a sentence from AARP's reply brief at the PI Motion phase to suggest, incorrectly, that AARP has "conceded" that the EEOC may permissibly adopt differing definitions of "voluntary" in the two 2016 Wellness Rules. EEOC's Mot. at 24. On the contrary, immediately following the clause quoted in the government's motion, AARP continued to dispute that the agency has in any way justified these contrasting definitions or that there is such a justification. AARP's Reply to PI Opp. [ECF No. 17] at 22-23.

consistently. *See, e.g., Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) ("a legislative body generally uses a particular word with a consistent meaning in a given context . . . The rule is but a logical extension of the principle that individual sections of a single statute should be construed together"); *U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008) (referring to two statutes "obviously designed to serve the same purpose and objective").

Particularly where two sets of regulations promulgated on the same subject, finalized on the same day, construing the same word, interpreting two parallel statutes that address highly related subjects, purportedly for the purpose of creating a consistent wellness regime, define the same word in dramatically different ways, that decision surely requires at least a coherent explanation. That explanation is absent here. The EEOC offers no reason why, under GINA, "voluntary" must mean the same thing that it always has, but under the ADA, it must now mean something significantly different than the statute previously required, to the detriment of the very people it was intended to protect.

b. Purported harmony with HIPAA does not justify the new "voluntary" definition.

The EEOC's primary justification for the 30% penalty cap is, purportedly, harmony with HIPAA's wellness program penalty/incentive provisions. EEOC's Mot. at 17-18; 2016 ADA Rule, AR 5. The EEOC rightly acknowledges that there is no statutory conflict that would *require* the ADA to permit the penalties/incentives allowed by HIPAA and its implementing regulations, PI Opp. at 24-25. Nonetheless, the agency argues that it issued the 2016 ADA Rule in an effort to: (1) clear up

employers' confusion about what penalties/incentives were permissible; and (2) "effectuate the purposes of the wellness provisions of both laws." EEOC's Mot. at 18 (citing 2016 ADA Rule, AR 5). But the final rule was neither necessary nor effective in accomplishing either goal.

First, there was simply no need to "harmonize" the two sets of rules. The EEOC's no-penalty position coexisted with HIPAA's 20% penalty/incentive limit for a decade after the 2006 HIPAA Rule, with no need for reconciliation. The ACA and its implementing regulations did nothing to change the legal landscape in that arena, other than to increase the general 20% penalty/incentive limit to 30%. 42 U.S.C. § 300gg-4(j). In any event, even after the enactment of the ACA, the EEOC maintained its no-penalty approach to voluntariness in the 2010 GINA regulations. 2010 GINA Rule, 75 Fed. Reg. at 68,923.

Moreover, "harmony" is not a valid goal for the ADA and HIPAA, which apply to different entities, regulate different activities, and seek to achieve different goals. *Cf. Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009) ("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."). HIPAA regulates insurers in group health plans, *see* 2013 HIPAA Rule, AR 61-62, whereas the relevant titles of the ADA and GINA regulate employers. 29 C.F.R. §§ 1630.2(b), 1635.2(b).

Nor are the wellness programs addressed by HIPAA coextensive with the practices regulated by the ADA and GINA's nondisclosure provisions. As the EEOC

recognized in its 2000 ADA Guidance, wellness programs that do not make any disability-related inquiries or require medical exams do not implicate the ADA's protections.[10] 2000 ADA Guidance at n.78. For example, tobacco cessation programs that test for nicotine levels implicate the ADA because they include medical examinations, whereas programs that ask employees about their tobacco use do not. 2016 ADA Rule, AR 12. Moreover, HIPAA's penalty/incentive limits only apply to "health-contingent" wellness programs, which are a very small percentage of existing employee wellness programs: only 5%, in 2015. Kaiser Family Foundation, Workplace Wellness Program Characteristics and Requirements Issue Brief, May 2016, AR 7557. HIPAA's penalty/incentive limits do not apply to "participatory" programs, which typically involve HRAs and biometric testing, *id.* at 7556-57, the aspects of wellness programs most likely to implicate the ADA and GINA.

Finally, the ADA's "voluntary" requirement and HIPAA's penalty/incentive limits are meant to achieve very different goals: HIPAA seeks to preserve access to health care, while the ADA protects individuals' private health information to avoid the discrimination and stigma that so often come from disclosing that information. Thus, the 2016 ADA Rule did not "effectuate the purpose of both laws," but instead, it subordinated the ADA's mandate to HIPAA's. It was not free to do so. While creating the superficial appearance of harmony[11] might seem to be the simplest

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[10] For the same reason, wellness programs that do not request genetic information naturally do not trigger GINA's protections.

[11] Indeed, the 2016 Rules are not at all consistent with HIPAA. As discussed in the factual background above, many comments from employers, insurers, and their

solution, the EEOC did not act reasonably by pursuing that solution at the cost of diluting the effectiveness of the law that it is responsible for enforcing. The agency must interpret the ADA in a manner that independently accords with the statute's "voluntary" requirement and the ADA's core purpose, but it failed to do so.

c. Defining "voluntary" via a 30% penalty cap cannot be justified by the facts in the administrative record, and it is therefore entirely arbitrary.

Given that HIPAA does not justify the 30% penalty/incentive limit, the agency has done nothing to explain or justify its selection of its new "voluntary" definition. While the 2016 ADA Rule repeatedly states that 30% of health insurance premiums is "not involuntary" or "not coercive," AR 8-11, these conclusory statements are not enough to support the EEOC's decision to define "voluntary" via a 30% numerical limit rather than a substantively meaningful standard. This Court has rejected similar arbitrary line-drawing used as a replacement for reasoned decisionmaking. For instance, in *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012), the Court struck down a U.S. Department of Education regulation that set a standard that excluded the bottom quarter of programs from eligibility for funding for one reason: "failing fewer programs would suggest that the test was not 'meaningful' while failing more would make for too large a 'subset of programs that could potentially lose eligibility.'" *Id.* The Court reasoned, "[t]hat this explanation could be used to justify any rate at all demonstrates its arbitrariness." *Id.* Likewise, in this case, the EEOC's statement that a 30% penalty/incentive limit

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partners highlighted at length the inconsistencies between the proposed rules and HIPAA's penalty/incentive limits.

uniformly defines when penalties are "not coercive" is a conclusory phrase that could be applied to any selected number. The EEOC cannot cite to anything in the administrative record – no data, no studies, no analyses – to support any particular dollar or cost threshold as a reasonable proxy for voluntariness. In the absence of further reasoning, as in *Duncan*, the agency "has not provided a reasonable explanation of that figure," so "the court must conclude that it was chosen arbitrarily." *Id.* (citing *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1019 (D.C. Cir. 2002)).

The conclusion that the 2016 ADA Rule's penalty/incentive scheme is arbitrary is all the more appropriate because the rule gives no reasoned response to the numerous comments to the proposed rules. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (internal citations omitted) (agencies "need not address every comment, but . . . must respond in a reasoned manner to those that raise significant problems."). As discussed above, *see supra*, Part II.B.1.a., these comments pointed out that the penalty/incentive limit certainly *does* enable significant coercion, especially when an average of $1,800 per year is a significant portion of an average family's budget.

The government argues that the EEOC has fulfilled its APA-required duty by baldly asserting that a 30% penalty/incentive limit renders inquiries and exams non-coercive. EEOC's Mot. at 19. But that is not a "reasoned" response to "significant concerns" raised by many commenters. *Covad Commc'ns Co.*, 450 F.3d at 550. Likewise, the total absence of any analysis of the rule's economic impacts makes more bewildering its conclusion that its across-the-board 30% penalty/incentive limit universally fulfills the ADA's "voluntary" requirement "given current insurance rates." 2016 ADA Rule, AR 9. If it was sufficient for the EEOC to issue a summary recitation

that the agency has considered and rejected objections raised by numerous, compelling comments, the APA is nothing more than a set of boilerplate formalities to be included in final rules.

Finally, the government suggests that the lack of support for its new "voluntary" standard is somehow cured by "an independent incentive for large employers . . . to offer affordable coverage to full-time employees, including those who refuse to participate in wellness programs." EEOC's Mot. at 19. This point refers to the final ADA Rule's statement that large employers who do not offer "affordable" health insurance, based on Treasury standards, pay a tax penalty, which the agency opined would be sufficient to prevent premiums from being too high. 2016 ADA Rule, AR 8. This consolation is entirely inadequate. First, many ADA-covered employees will not enjoy any benefit of this "independent incentive" because the tax penalty only applies to employers with more than 50 employees, *id.*, whereas the ADA covers employers with 15 or more employees, 42 U.S.C. § 12111(5)(a). Moreover, in any event, tax penalties on companies that do not provide "affordable" health insurance to some low-income individuals are no comfort to employees of *average* income, whose comments the EEOC ignored, and who will have to make great sacrifices to accommodate newly-permissible penalties. *See supra,* Part II.B.1.a. Moreover, the government's argument exposes a more basic gap in its reasoning: the notion that affordability is equivalent to voluntariness. There is no reason to believe that if an employee *can* afford – in the government's judgment – significantly higher health insurance costs, that employee would pay that cost voluntarily.

Consequently, the agency's abdication of its responsibility to explain how it

determined that 30% of the total employer-employee cost health insurance premiums is an appropriate measure of voluntariness for all employees everywhere "demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984).

C. The 2016 GINA Rule's Newly Permitted Penalties for Withholding Spousal Medical Information Are Arbitrary, Capricious, and Contrary to Law.

The 2016 GINA Rule is also a reversal of the EEOC's prior position on penalties for withholding genetic information, which categorically forbid employers to penalize employees for exercising their GINA-protected rights or reward employees for sacrificing those rights. 2010 GINA Rule, 75 Fed. Reg. at 68,923 (prohibiting penalties) & 68,914-15 (explaining why spousal information was covered by this protection under the statute). Specifically, the 2016 GINA Rule maintains the agency's prior no-penalty definition of "voluntary," but permits employers to penalize employees who refuse to provide spousal medical information 29 C.F.R. § 1635.8(b)(2)(iii)) (permitting penalties for refusing to provide spousal information). This regulatory exception for spousal medical information cannot be squared either with the statute or with other portions of the 2016 GINA Rule itself, nor is it supported by the administrative record.

1. The 2016 GINA Rule impermissibly allows wellness programs to collect spousal medical information—the employee's genetic information—in a manner that the 2016 GINA Rule defines as not "voluntary."

GINA prohibits employers from acquiring "genetic information with respect to an employee or a family member of the employee" unless, among other things,

"the employee provides prior, knowing, *voluntary*, and written authorization" as part of an employee wellness program. 42 U.S.C. § 2000ff-1(b) (emphasis added). The statute defines an individual's "genetic information" as including "the manifestation of a disease or disorder in family members of such individual." *Id.* § 2000ff(4)(A). Because employees' spouses are their "family members" under the statutory definition, *id.* § 2000ff(3) (incorporating the ERISA definition at 29 U.S.C. § 1181(f)(2)(A)(iii)), the "manifestation of a disease or disorder" in an employee's spouse is both the employee's family member's genetic information and the employee's *own* genetic information. Consequently, an employer may only request an employee's spouse's information as part of a wellness program if the employee provides that information voluntarily.

The 2016 GINA Rule maintains the EEOC's longstanding definition of "voluntary" as "neither requir[ing] the individual to provide genetic information nor penaliz[ing] those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)(B). The only logical conclusion is that under this regulatory scheme, employers that penalize employees for refusing to provide spousal medical information—which is genetic information of the employee and the employee's family member (42 U.S.C. §§ 2000ff(3), 4(b), 2000ff-1(b))—are running afoul of the regulation's "voluntary" requirement. Yet, the 2016 GINA Rule provides that an employer "may offer an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment"—or, in other words, the employer *may* penalize employees who decline to provide spousal

information. 29 C.F.R. § 1635.8(b)(2)(iii).

Under the 2016 GINA Rule's own terms, this exception either: (1) allows non-voluntary collection of spousal medical information; or (2) expresses the view that, while employees are unlawfully coerced by *any* penalties imposed for withholding their own genetic tests, or their spouses' and other family members' genetic tests, or all of their other family members' medical information—nonetheless, those same employees are *not* coerced by a penalty worth up to 30% of their health insurance premiums for withholding their spouses' medical data.

Neither interpretation can stand. The statute expressly treats the "manifestation of a disease or disorder" in spouses as covered "genetic information," 42 U.S.C. §§ 2000ff(3), 4(b), so the statute's "voluntary" requirement, § 2000ff-1(b), must apply to that information. The EEOC cannot read that requirement out.

The agency's view that there "is minimal, if any, chance of eliciting information about an employee's own genetic make-up or predisposition for disease from the information about current or past health status of the employee's spouse," 2016 GINA Rule, AR 37, is irrelevant. Congress made no such distinction, and GINA's legislative history shows why. Legislators were concerned about "the potential discrimination an employee or [family] member could face because of an employer's or other entities' concern over potential medical or other costs and their effect on insurance rates." GINA Senate Report at 28. The EEOC was not free to disregard the language that Congress specifically chose to use to alleviate this explicit concern simply because the agency, without any direction from the

legislature, took on the task of "striking an appropriate balance" between GINA and HIPAA's wellness provisions. 2016 GINA Rule, AR 53; *cf. Duncan,* 870 F. Supp. 2d at 154 ("Merely . . . picking a compromise figure is not rational decisionmaking"). And, while the EEOC argues that this exception was "fully supported by the administrative record," EEOC's Mot. at 25, the agency has pointed only to its own opinion, rather than any record evidence supporting the extraordinary conclusion that employees are less likely to be coerced by penalties for withholding spousal information than by penalties for withholding any other information.

The EEOC's remaining arguments are meritless. The agency's assertion that it "was not required to interpret voluntariness by reference to incentives at all," EEOC's Mot. at 23, is perplexing, given that the agency did, in fact, adopt a definition of "voluntary" forbidding penalties/incentives conditioned on providing genetic information. 29 C.F.R. § 1635.8(b)(2)(1)(B). That the EEOC chose a no-penalty definition of "voluntary" under GINA does not excuse its decision to apply that definition in a way that is at odds with the statute's core requirements.

Equally puzzling is the agency's argument that the statute's "voluntary" disclosure requirement "does not apply to spouses of employees, who have no employment relationship with the employer." *Id.* at 23-24. The 2016 GINA Rule provides that an employer "may offer an inducement *to an employee* whose spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment." 29 C.F.R. § 1635.8(b)(2)(iii). The 2016 GINA Rule permits an employer to incentivize the *employee* for disclosing his or her spouse's

information (or penalize the employee for refusing to disclose it). Such a transaction is a request for genetic information from the employee – spousal medical history – and, therefore, under both the statute and the express terms of the rule, it must be voluntary. *Id.*; 42 U.S.C. § 2000ff-1(b)(2)(A)-(B). In any event, even if the employer were to somehow directly provide incentives to, or extract penalties from, the employee's spouse without involving the employee, the 2016 GINA Rule itself provides that to collect spousal medical history, employers must ensure that the employee's spouse "provide[s] prior, knowing, *voluntary*, and written authorization." 29 C.F.R. § 1635.8(b)(2)(iii) (emphasis added). Even by the terms of its own rule, the agency cannot escape the voluntariness requirement.

Finally, the EEOC argues that a request for an employee's spouse's "current health status" is not a request for the employee's genetic information under the statutory definition. EEOC's Mot. at 24. The agency points to no authority for this proposition, and the statute does not support it. The relevant subsection of GINA states that "[t]he term 'genetic information' shall not include information about the sex or age of any individual," but it does not exclude current health status. 42 U.S.C § 2000ff4(C). More to the point, it is intuitively clear that many current health conditions—such as, for example, cancer, Huntington's Disease, lupus, or heart disease—qualify as "the manifestation of a disease or disorder" under section 2000ff(4)(A)(iii). There is no statutory or logical basis for this argument.[12]

[12] Nor is it clear why, even if the government were somehow correct on this point, it would excuse the Rule's permission for involuntary collection of spousal medical *history*.

In sum, the agency's carve-out from its no-penalty rule for spousal medical information is unsupported by the statute, facts, or logic.

2. The EEOC did not explain its decision to allow employers to charge double the penalties permitted under the ADA.

In addition to stripping protection for spousal medical history, the 2016 GINA Rule's penalty/incentive scheme suffers from many of the same APA shortcomings as the 2016 ADA Rule: it ignores significant factual information raised in comments, fails to perform an economic analysis that would support its conclusion, and relies on no authority that would require this otherwise arbitrary conclusion. *See supra,* Part II.B.1.a. Yet, the government is not correct to contend that AARP's argument that the GINA Rule is arbitrary and capricious duplicates entirely the reasons why the 2016 ADA Rule is legally flawed. *See* EEOC's Mot. at 25. The 2016 GINA Rule is invalid for the additional reason that it doubles the penalties' coercive effect by permitting employers to penalize employees twice: once under the ADA, for withholding the employee's medical information, and once under GINA, for withholding spousal medical information. 29 C.F.R. § 1635.8(b)(2)(iii).

The agency has never even attempted to explain why any penalty exceeding 30% of insurance premiums is coercive, but if any employee is charged twice that penalty for withholding her own information and her spouse's, that is not coercion. Based on the comments discussed above, if individuals withhold both types of information: (1) their insurance premiums would, on average, triple instead of double; and (2) the average increase in premiums would be $3,600 ($1,800 x 2)

rather than $1,800. Indeed, nothing in the rule precludes the possibility that an employee and the employee's spouse, if both are employed and insured separately, could be penalized by *each* employer for twice this amount: an average total cost of an additional $7,200 per year for the household ($1,800 x 2 for each = $3,600 total, x 2 if both are penalized, for a total of $7,200). The EEOC never considered the Rule's cumulative coercive impact on an employee whose household will have to bear the weight of the penalties imposed simultaneously on that employee's spouse.

In light of the 2016 GINA Rule's silence on this possibility, the EEOC's reassurance that the penalties/incentives are not coercive simply because they are consistent with the 2016 ADA Rule's 30% maximum, 2016 GINA Rule, AR 44, is both misleading and facially implausible. Accordingly, like the other aspects of both rules, there is no indication that this component of the 2016 GINA Rule is the product of reasoned decisionmaking. *U.S. Air Tour Ass'n*, 298 F.3d at 1019.

CONCLUSION

For these reasons, the Court should deny the government's Motion to Dismiss and grant AARP's Motion for Summary Judgment.

Respectfully submitted,

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Dated: April 28, 2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 16-cv-2113 (JDB) Hon. John D. Bates

(Proposed) Order

Upon review and consideration of AARP's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss, it is HEREBY ORDERED that AARP's Cross-Motion for Summary Judgment is granted, and that Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment is denied.

Dated:_____

_____
Hon. John D. Bates
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing documents: AARP's Cross-Motion for Summary Judgment, Memorandum of Points and Authorities in Support of AARP's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, and Proposed Order with the Clerk of Court for the United States District Court for the District of Columbia and served all parties to the case via electronic mail.

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