**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFF'S REPLY IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION STAYING THE JANUARY 1, 2017 APPLICABILITY DATE FOR PARTS OF THE EEOC WELLNESS PROGRAMS RULES**

## Table of Contents

## Table of Authorities

### Cases

**Statutes, Rules and Regulations**

**Legislative History**



**Miscellaneous**

## ARGUMENT

### I. AARP Has Satisfied All Legal Requirements To Show It Has Associational Standing.

The EEOC states correctly that AARP premises this lawsuit on its associational standing and that, accordingly, AARP "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 EEOC only contests AARP's satisfaction of the first two of these requirements. *See* Opposition to Plaintiff's Motion for Preliminary Injunction ("Opp.") at 9. The evidentiary record and the declarations submitted powerfully support both AARP's associational standing and its members' individual Article III standing.

#### A. AARP Is A "Traditional Membership Organization" And Has Demonstrated That The Declarants Are Its Members.

Remarkably, as an initial matter, the EEOC disputes that AARP – widely recognized as the largest organization with a membership in the United States[1] – is a "membership organization" at all. Further, the EEOC argues that AARP's

[1] *See, e.g.*, About AARP, http://www.aarp.org/about-aarp/ (AARP has 38 million members); Non-Profit Pro (March 12, 2009), "Agent for Change to Lead Nation's Largest Membership Organization," http:/ /www.nonprofitpro.com/article/agent-social-change-lead-nations-largest-membership-organization-404365/all/.

member declarants are not "members" of AARP in any meaningful sense. This is a red herring.

Since *Hunt v. Wash. State Apple Adver. Comm'n*, the federal courts, including the D.C. Circuit, have entertained associational standing claims for both "traditional voluntary membership organization[s]" and groups that are sufficiently analogous to such organizations to warrant standing. 432 U.S. 333, 344 (1977) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (approving standing for a not-for-profit taxpayer group, a group of fair housing advocates, and a home builders' trade association)). *Hunt* extended precedent approving standing for "traditional" membership organizations to a state agency because the state agency "for all practical purposes perform[ed] the functions of a traditional trade association representing the apple industry." 432 U.S. at 344. While the Supreme Court has not articulated the precise indicia of a "traditional" membership organization, the D.C. Circuit recently suggested what those indicia might be when it concluded that an environmental group suing to limit drilling for oil off the coast of California "is a traditional membership organization with 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).

Here, the Court need not delve into this detail to conclude what is facially clear: that AARP is a "traditional membership organization" under standing law. The *Hunt* membership analysis need not be applied unless there is some reason to believe AARP has "no members at all." *Hunt*, 422 U.S. at 342. As this Court

explained in *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009), "[t]he inquiry into the 'indicia of membership' . . . is necessary only when an organization is not a 'traditional membership organization.'" This notion is not an unusual one, but a basic conclusion implicit in most of the cases on which the EEOC relies. Each of these involved an associational standing claim by a group without members – unlike AARP – attempting to prove it was "the functional equivalent of" a traditional membership organization. *See* Opp. at 10-11, (citing *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26 (D.C. Cir. 2002) (discussing non-member "groups of individual investors"); *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) ("High Times Magazine stumbles on the first step. It does not have any *members*."); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (discussing non-member "supporters"); *Health Research Group v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979) ("Mr. Nader . . . structured Public Citizen and HRG as non-membership organizations")). This case does not present the need for a "functional equivalent" analysis.

Nonetheless, AARP easily satisfies the description of a "traditional membership organization." AARP established in its comments to the EEOC, in the proceedings at issue, that it is an "organization with a defined mission that serves a discrete, stable membership with a definable set of common interests." *Jewell*, 779 F.3d at 598. Specifically, AARP serves the "discrete" population of Americans age 50 and above, including its nearly 38 million members. *See* AARP, Comment Letter on 2016 ADA Rule, at 1 (June 19, 2015), http://www.regulations.gov/#!document

Detail;D=EEOC-2015-0006-0257 ("AARP ADA Comment"); AARP, Comment Letter on 2016 GINA Rule, at 1 (Jan. 28, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0074 ("AARP GINAComment"). AARP's "mission" serves its members and articulates "a definable set of common interests." AARP ADA Comments at 1 (AARP seeks wellness programs affording "a means of promoting health and reducing health care costs" consistent with "well-established civil rights principles and statutory mandates"); *see also* About AARP, http://www.aarp.org/about-aarp/ (stating that AARP fights for "health care, employment and income security").

Likewise, AARP has established that its members are, in fact, members. Contrary to the EEOC's arguments, it is not true that in every case, "the Court looks to whether [each] individual" on behalf of whom an organization sues – and whom the organization has designated as a member with standing in their own right – "possesses the 'indicia' of membership" identified in *Hunt*. Opp. at 10 ("electing the leadership of the association, guiding the association's activities, and financing those activities"). Rather, if no facts suggest that the individuals the association represents are something other than traditional "members," this analysis is entirely unnecessary, and courts do not typically engage in it. *See Delaware Dep't of Nat. Res. and Envtl. Control,* 785 F.3d at 7 (taking members' declarations at face value in descriptions of organization and themselves as members). In an exception to this general approach, this Court's decision in *Conservative Baptist Ass'n of Am. v. Shinseki*, 42 F. Supp. 3d 125 (D.D.C. 2014),

contains a rare analysis appropriate to its unique facts, in which an association of churches sought associational standing on behalf of two individuals that unsuccessfully claimed also to be "members of CBAA," even though the association's own Constitution made clear that they were not. *Id.* at 134 & n.6. Undersigned counsel are aware of no associational standing case in this Circuit – and Defendant has cited none – applying this Court's reasoning in *CBAA* to the question whether an organization like AARP is a "membership organization" or whether its declarants are "members."

In short, the "indicia of membership" tests only apply to organizations with "no members at all." The EEOC's proposed application of these criteria to AARP and its member declarants is unprecedented and should be rejected.[2]

### B. This Case Is Highly Germane to the Associational Interests of AARP and the Needs and Concerns of AARP Members.

While the EEOC acknowledges that "the germaneness requirement" for establishing associational standing "is not rigorous," it insists nevertheless that AARP is unable to show that its "litigation goals" in this lawsuit are "pertinent to

[2] If the Court concludes that further confirmation of AARP's status as a membership organization is required, AARP is prepared to document the ways in which members contribute their time to AARP programs, their ideas and opinions to AARP policies and advocacy, and their funds to AARP resources. AARP can also supplement the member declarants' submissions to clarify the precise definition of membership in good standing of AARP. The Court "retains the discretion to seek supplemental submissions from the parties if it decides that more information is necessary to determine whether petitioners, in fact, have standing." *Public Citizen Inc. v. NHTSA*, 489 F.3d 1279, 1296 (DC. Cir. 2007); *see Jewell*, 779 F.3d at 598-99 (approving court's requesting and relying on post-argument submissions on associational standing).

its special expertise and [to] the grounds that bring its membership together." Opp. at 14 (quoting *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988); *see also Jewell*, 779 F.3d at 597 (quoting *Humane Soc'y of the U.S.*, 840 F.2d at 58) ("the germaneness requirement mandates 'pertinence between litigation subject and organizational purpose).

The EEOC's contention is easily dismissed based on the record in this case and the record of AARP's past litigation efforts. AARP's comments on the rules at issue in this case explained that AARP has "consistently and actively participated in ACA-related policy discussions and rulemaking proceedings regarding wellness programs," as well as "in policy discussions by the EEOC regarding the application of the civil rights laws to wellness programs." AARP ADA Comments at 1; AARP GINA Comments at 1. This demonstrates AARP's "special expertise" in regard to wellness programs and the application of the ADA and GINA to them. *Humane Soc'y of the U.S.*, 840 F.2d at 56.

Likewise, AARP's comments to the proposed Rules in this case articulate that "healthcare" and "employment opportunity" are among AARP's highest policy priorities, for which it "fights" on behalf of persons age 50 and above, including its members. AARP ADA Comments at 1; AARP GINA Comments at 1. And, finally, AARP's involvement in wellness policy issues is directly related to the needs and interests of its members: "older workers have a tremendous stake in avoiding discrimination on the basis of age, disability and genetic information." *Id.* Thus, this

lawsuit challenging rules that enable such discrimination is highly pertinent to AARP's "organizational purpose." *Humane Soc'y of the U.S.*, 840 F.2d at 58.

### C. At Least One of the AARP Member Declarants, and Thus AARP, Has Standing to Challenge the 2016 Rules.

The EEOC correctly acknowledges that to meet Article III standing requirements for purposes of this lawsuit, AARP need only show that "at least one" AARP member declarant has standing in his or her own right to challenge each Rule at issue. *See* Opp. at 13; *Delaware Dep't of Nat. Res. and Envtl. Control*, 785 F.3d at 7 (quoting *NRDC v. EPA*, 489 F.3d at 1370). AARP has met this standard.

Plaintiffs challenging a federal agency rule that affects them indirectly by regulating a third party may establish the elements of Article III standing by demonstrating that "the challenged government action authorize[s] conduct that would otherwise [be] illegal." *Renal Physicians Ass'n v. U.S. Dep't of H.H.S.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007). Thus, "when the challenged rule carves out an exception to otherwise outlawed behavior . . . and the plaintiff is allegedly harmed as a result," the plaintiff has shown causation and redressability. *AFGE v. Vilsack*, 118 F. Supp. 3d 292, 300-01 (D.D.C. 2015). To establish an injury-in-fact in this context, a plaintiff must "show a 'substantial probability' of injury as a result of the rule." *Stilwell v. Office of Thrift Supervision,* 569 F.3d 514, 518 (D.C. Cir. 2009).

Here, the EEOC does not contest the issues of causation and redressability, and the reason why is clear. In short, the agency acknowledges that employers have factored its 2016 Rules into their planning for 2017 in selecting and pricing their employee health insurance offerings so as to include ADA Rule and GINA Rule-

compliant programs. As a result, "an injunction [prohibiting implementation of such programs] could bring about chaos in the health insurance market, as employees are currently selecting coverage for 2017 based on rates that have been set [by employers and health insurers] to reflect the existence of [such] employee wellness programs [compliant with the EEOC's Rules]." Opp. at 3. Thus, the EEOC concedes that whatever employers have done in the past, beginning in January 2017, a very large share of employer wellness programs – enough to require considerable modifications if a preliminary injunction is ordered – will incorporate changes, including much greater financial penalties, permitted by the EEOC's new Rules. AARP alleges that the Rules are contrary to the ADA and GINA. Consequently, there does not appear to be any dispute that the necessary causal connection exists to show that "the challenged government action authorize[s] conduct that" AARP alleges "would otherwise [be] illegal." *Renal Physicians Ass'n*, 489 F.3d at 1275.

Rather, the focus of the EEOC's argument is that the declarants have not shown a sufficient threat of injury to satisfy Article III. Opp. at 13-14. On the contrary, the Declarations demonstrate a "substantial probability" that at least one of AARP's members will be harmed by the rule. *See Stilwell,* 569 F.3d at 518.

The EEOC does not dispute that "[d]eclara[nts] A and C do each allege that [he] receives employer-based health insurance, and that each employer offers a wellness program with incentives tied to participating." Opp. at 13. Nor does the agency dispute Declarant C's account that he has been forced to participate in his employer's wellness program by the potential financial loss that would result from

his refusal to participate. *Id.* Instead, the agency disputes both Declarants' claims to be threatened with future injury by either rule. *Id.* at 14 n.8. However, Declarant A recounts that he incurred significant financial penalties in 2016 as a result of his refusal to participate, that he does not plan to participate in 2017, and further, because of the ADA Rule, he is certain again to incur financial penalties due to his planned future refusal to participate.[3] Decl. A. Declarant C states that he feels compelled to participate in his employer's plan in 2017, and because of the ADA Rule (absent a preliminary injunction), he will again submit personal health data for the current year. Decl. C. Finally, the government admits that "employees are currently selecting coverage for 2017 based on rates that have been set to reflect the existence of employee wellness program," Opp. at 3. It follows that the harms feared by Declarants A and C are real and immediate. There is at least a "substantial probability," *Stilwell*, 569 F.3d at 518 – indeed, a certainty – that these individual members will suffer harm resulting from the 2016 ADA Rule.

Likewise, the Declarations establish injury-in-fact flowing from the 2016 GINA Rule's exception permitting employers to penalize employees who do not submit spousal data. This showing is clearest with respect to Declarant A, who describes the economic harm he expects to incur if his employer alters its wellness program, consistent with the new Rule, to penalize him for refusing to provide his

[3] The EEOC quibbles that Declarant A is unclear whether he participated in his employer's plan in its first year, prior to the current year and thus, already has disclosed personal health information. Opp. at 14 n.8. This is irrelevant to the issue whether he requires a preliminary injunction to prevent his suffering an "imminent" future injury that is "concrete and particularized."

spouse's medical history. Decl. A. While he has not alleged that he is certain this will occur, the facts demonstrate that it is at least a substantial probability that it will, given the record's ample documentation that incentivizing employees to provide spousal information is at the top of many groups' to-do list.

In the GINA comment process, numerous employers, employer organizations, or health care firms apparently envisioning partnering with employers to provide wellness programs urged the agency to increase or eliminate altogether the 30%-of-self-only-health-insurance-coverage limit on participation penalties/incentives ties to providing spousal medical data. *See* U.S. Chamber of Comm. Comment Letter on 2016 GINA Rule, at 7-8 (Jan. 28, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0081 (increase limits); Cigna Corp., Comment Letter on 2016 GINA Rule, at 4 (Jan. 26, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0052 (same); Bravo Wellness, Comment Letter on 2016 GINA Rule, at 2 (Jan. 25, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0044 (same); Nat'l Bus. Group on Health, Comment Letter on 2016 GINA Rule, at 3 (same), 7 (expand permissible incentives/penalties to those outside group health plan context) (Jan. 28, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0090; Unite Here Health, Comment Letter on 2016 GINA Rule, at 3 (Jan. 28, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0079 ("remove the restrictions surrounding spousal HRAs entirely"). Likewise, comments submitted in response to the proposed ADA Rule reflect these groups' eagerness to attach financial consequences for employees' refusal to provide spousal data in their

wellness programs. Cigna Corp., Comment Letter on 2016 ADA Rule, at 5 (June 19, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0184 (tying the 30 percent limit to employee-only coverage would inhibit employers from offering wellness programs to spouses and dependents); Nat'l Ass'n of Mfrs., Comment Letter on 2016 ADA Rule, at 2 (June 19, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0252 (raising concerns about inability to provide incentives for individuals and spouses); Wash. Metro Area Transit Auth., Comment Letter on 2016 ADA Rule, at 3 (June 19, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0150(same).[4] It is not surprising that employers and other entities intend to take advantage of this opportunity, which the EEOC gave to them intentionally by creating this exception.

In this respect, the instant case resembles *Stilwell*, 569 F.3d at 516-18. There, the Office of Thrift Supervision ("OTS") issued a new regulation allowing certain subsidiaries to adopt charter provisions that would "prevent activist minority investors" from, in essence, effecting takeovers. *Id.* at 516. Stilwell, the plaintiff, was just such a minority investor, who sought to invalidate the rule so he could do exactly what the new regulation empowered companies to ban. *Id.* at 517. Although the rule did not directly regulate Stilwell, the D.C. Circuit held that "[u]nder the OTS rule, it is substantially probable that . . . subsidiaries will adopt charter provisions that will cause Stilwell economic harm; he therefore has standing to challenge the rule as a violation of the APA." *Id.* at 518. In support of its

[4] These comments also make clear that employers intend to increase their penalties/incentives in general, up to the maximum amount possible.

conclusion, the court invoked comments to the proposed rule and an amicus brief describing amici's desire to use the rule to take actions that would affect Stilwell. *Id.*

Likewise, here, the EEOC adopted the 2016 Rules "for th[e] precise reason" of "help[ing] solve the perceived problem posed by" the AARP member declarants – employees reluctant to participate in wellness programs and likely to invoke the ADA and/or GINA to avoid such participation absent the penalties/incentives newly authorized by the challenged Rules. As in *Stilwell*, a profusion of comments reflect employers' and other groups' desire to do exactly what AARP alleges will harm their members: penalize them for refusing to provide their own health data and/or their spouses' data. Thus, in this litigation, as in *Stilwell*, "it is substantially probable" that employers, including those employing the AARP declarants, "will adopt" wellness programs (or modifications of current programs) tailored to the EEOC's ADA and GINA rules, thereby causing the AARP member declarants "economic [and/or other] harm."

## II. AARP Has Demonstrated That Its Affected Members Will Suffer Irreparable Harm.

AARP has stated that its members will face harm when coerced to *disclose* private medical information involuntarily through wellness programs. Pl. Mot. Mem. at 20. AARP's concern is that the information, once disclosed, can never be made private again. *Id.* The EEOC seeks to minimize this harm by arguing that certain mitigating measures safeguard employee information *after* disclosure, once

the information is already collected in the workplace. Opp. at 15. This response fails to acknowledge that disclosure itself offends the protections of the ADA and GINA.

Both statutes expressly prohibit employer inquiries into either disability-related or genetic information. *See* 42 U.S.C. § 12112(d)(4)(A) (employers "shall not make inquiries" into disability-related information); 42 U.S.C. § 2000ff-1(b) (employers shall not "request, require, or purchase genetic information"). Involuntary disclosure of this information through a wellness program violates these statutes and constitutes an act of discrimination under the ADA and an unlawful employment action under GINA; indeed, even unlawful inquiries themselves violate the statutes. 42 U.S.C. § 12112(d)(1), (d)(4)(B); 42 U.S.C. § 2000ff-1(b), (b)(2)(B). Congress acted to prevent invasive inquiries in the workplace, because "an inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability." H.R. Rep. No. 101-485, pt. 2, at 75 (1990).

Accordingly, AARP appropriately drew a comparison between its members' personal medical information and proprietary business information at risk in trade-secrets cases, because the harm is, in fact, quite similar. Pl. Mot. Mem. at 20-21. Both forms of information are protected by law. Both forms of information are closely held, deriving value simply from their confidential nature. *See Hosp. Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192, 200 (D.D.C. 2010) ("the disclosure of confidential information can constitute irreparable harm because such information, once disclosed, loses its confidential nature."). Therefore, injunctive

relief is appropriate in both contexts to maintain confidentiality of the sensitive information until the merits of a case can be resolved. *See Hosp. Staffing Sols., LLC*, 736 F. Supp. at 200 (D.D.C. 2010); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 77-78 (D.D.C. 2001).

The EEOC summarily rejects this alleged harm by assuring the Court that mitigating measures protect the further spread of medical information once it is already disclosed. Opp. at 16-17. First and foremost, this argument neglects Congress' conclusion that confidentiality protections of any kind were not sufficient to protect employees from discrimination. Congress determined that employees need not deliver private medical information in the workplace *at all* unless necessary for their jobs, permitting employees to protect themselves from *any* risk of exposure to their employers. 42 U.S.C. § 12112(d)(4)(B); H.R. Rep. No. 101-485, pt. 2, at 75 (finding collection of medical data in wellness programs acceptable "[a]s long as the programs are voluntary *and* the medical records are maintained in a confidential manner . . .") (emphasis added). Thus, the EEOC cannot successfully argue that confidentiality protections for involuntarily-disclosed medical and genetic information can somehow compensate for a lack of voluntariness.

In any event, the protections that the agency invokes as "sharply curtail[ing]" further disclosure of private information are far from comprehensive. *See* Opp. at 16. The 2016 ADA Rule leaves a significant gap by permitting employers to handle individually-identifiable health data from a wellness program when "necessary to administer the health plan." 29 C.F.R. § 1630.14(d)(4)(iii). Moreover, while the

EEOC emphasizes HIPAA's privacy protections, HIPAA does not apply to independent wellness vendors – non-insurers – operating portions of wellness programs (such as HRAs) outside group health plans. *See* 29 C.F.R. § 1630.14(d)(3)(ii)-(iv); 29 C.F.R. § 1635.8(b)(2)(iii)(B)-(D) (discussing wellness programs outside group health plans); *see also* Karen Pollitz & Matthew Rae, *Workplace Wellness Programs Characteristics and Requirements*, Kaiser Family Found. (May 19, 2016), http://kff.org/private-insurance/issue-brief/workplace-wellness-programs-characteristics-and-requirements/ ("Kaiser Summaries") (noting that over 5,600 independent vendors administer parts of wellness programs). And, even in programs where HIPAA does apply, employees are often required to waive their HIPAA privacy rights to participate in the wellness program in the first place, usually via passive consent on a website. AARP GINA Comment at 15-17 (highlighting how wellness vendors obtain *passive* consent to share information collected through HRAs with third-parties); *see also* AARP ADA Comment at 18-19 (discussing how wellness vendor Provant openly advertises that it shares employee data with third-party vendors). Accordingly, just as Congress anticipated, privacy protections for already-disclosed information are far from sufficient.

Finally, the EEOC further dismisses the harm faced by AARP's members by suggesting that delay alone may invalidate irreparable harm. Opp. at 18-19. However, none of the cases the EEOC cites for this proposition has actually found delay to be dispositive. *Fund for Animals v. Frizzell*, 530 F.2d 982, 987-88 (D.C. Cir. 1975) (noting that delay rendered the challenge moot, as birds plaintiff had sought

to protect were already harvested); *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) (noting delay but deciding on likelihood of success on the merits and public interest); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 286 (D.D.C. 2005) (finding irreparable harm despite five-month delay); *Mylan Pharm. v. Shalala*, 81 F. Supp. 2d 30, 42-44 (D.D.C. 2000) (failing to find harm because alleged harm was minimal economic damages).

Many of AARP's members will soon be compelled by heavy financial penalties to disclose their personal medical information through wellness programs, without any certainty that their information will be protected and kept confidential from their employer or other business interests. Injunctive relief is necessary to prevent this irreparable harm and maintain the confidentiality of personal medical information until the merits of this case can be decided.

## III. AARP Is Likely To Succeed On The Merits Of Both Claims.

The EEOC's merits arguments do nothing to shore up the fatal deficiencies in the provisions the agency seeks to defend. In particular, the Opposition: (1) fails to explain how the 2016 Rules' penalty/incentive schemes avoid the coercion described in the record; (2) fails to show that HIPAA justifies the Rules' penalty/incentive schemes; (3) lacks any explanation for the Rules' conflicting definitions of "voluntary;" and (4) fails to justify the 2016 GINA Rule's "narrow exception" for spousal medical history.

### A. The EEOC Fails To Meaningfully Address The Coercion That Makes The 2016 Rules' Penalty/Incentive Schemes Unlawful.

The EEOC attempts to refute AARP's arguments about the 2016 Rules' coercive effect by setting up a straw man that the agency can easily sweep aside. First, the agency characterizes AARP's position as an argument "that incentives are necessarily coercive." Opp. at 20. The agency then responds by arguing that incentives are *not* inherently coercive. *Id.* at 20-21. This argument both misunderstands AARP's position and fails to respond to it.

AARP does not contend that *any* penalties/incentives are coercive, but, rather, that the 2016 Rules' *specific* penalty/incentive caps – 30 or 60% of self-only health insurance premiums – enable significant coercion. *See* PI Mot. Mem. at 27-28, 35-36. As AARP's Memorandum of Law details at length, numerous comments submitted in response to the proposed rules document the magnitude of the impact of a 30% financial penalty on a household budget and the hardship such a penalty would cause for an average individual or family. *Id.* Neither AARP's argument nor these comments merely state that all penalties/incentives are inherently coercive. Instead, both point out the coercive impact of the 2016 Rules' penalty/incentive caps *in particular*.

The EEOC plainly agrees that at some point, financial penalties/incentives cross the line from "temptation" into economic coercion. 2016 ADA Rule, 81 Fed. Reg. 31,126, 31,133 (May 17, 2016) ("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 agency has still not explained why a 30% (or 60%) across-the-board limit categorically avoids crossing that line, in light of record evidence that it does so for many people. *See* PI Mot. Mem. at 35-36 (describing insufficiency of the agency's generic, conclusory statement that 30% penalty/incentive cap is not coercive). Likewise, the agency's argument that incentives are not synonymous with coercion, Opp. at 20-21, does nothing to explain or justify its bright-line rule in this instance. Instead, the agency relies on cases analyzing whether the EEOC is using its taxation power to compel individual action – an issue that provides no relevant basis for an analogy to coerced disclosure of sensitive personal information in the workplace under the ADA and GINA, as documented in this factual record. *Id.* (internal citations omitted). Once again, the EEOC has avoided entirely addressing the particulars of its interpretation, this time by attempting to justify the use of incentives generally – but not the ones permitted by the 2016 Rules, in particular.

In short, AARP does not dispute that the EEOC could, theoretically, change its longstanding position that medical and genetic inquiries and exams in wellness programs are only "voluntary" if they do not penalize non-participants *at all*. However, the fatal flaw in the 2016 Rules is that the EEOC's new interpretation is neither reasonable nor justified by the record or the law.

### B. HIPAA Does Not Justify The 2016 Rules' Penalty/Incentive Provisions.

The EEOC's primary justification for the 2016 Rules' 30%/60% penalty/incentive cap is that the Rules are "consistent with HIPAA's provisions promoting wellness programs." Opp. at 24-25 (citing 2016 ADA Rule, 81 Fed. Reg.

at 31,129). Suggesting that the ACA's amendments to HIPAA constitute "changed circumstances" justifying the EEOC's about-face, the agency argues that "it was entirely reasonable for the EEOC to try to avoid barring the same wellness plans that Congress had separately blessed in the ACA." Opp. at 25.

This rationale, however, does not hold water. There is simply no need for such an attempt at harmony. As explained in AARP's Memorandum of Law, the EEOC's no-penalty position coexisted with HIPAA's 20% penalty/incentive limit for a decade since the 2006 HIPAA Rule, without the need for any reconciliation. PI Mot. Mem. at 37-38. The ACA and its implementing regulations did nothing to change the legal landscape in that arena, other than to increase the 20% limit to 30% (or 50% for tobacco cessation programs). *See* PI Mot. Mem. at 11-12 (citing 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. 68,912, 68,923 (Nov. 9, 2010). There has never been any reason to harmonize the civil rights laws with HIPAA, and no change of circumstances has occurred creating a new reason to do so now.

One reason for the lack of historical friction between HIPAA and the civil rights laws is that the wellness programs addressed by HIPAA are not 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. EEOC, *Enforcement Guidance: Disability-Related Inquiries and*

*Medical Examinations of Employees Under the Americans with Disabilities Act* (ADA), EEOC Notice No. 915.002, n. 78 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.[5] Likewise, wellness programs that do not request genetic information naturally do not trigger GINA's protections. Accordingly, the subset of wellness programs that do not tread into ADA- and GINA-protected territory are not bounded by the civil rights laws' protections.

Moreover, HIPAA's wellness provisions do apply to the majority of wellness programs at issue in this case, and, thus, it is irrelevant to them. HIPAA's penalty/incentive provision only addresses "health-contingent" wellness programs, which are a very small percentage of existing employee wellness programs. Kaiser Summaries. HIPAA's penalty/incentive provision does not apply to "participatory" programs typically involve Health Risk Assessments and biometric testing – the aspects of wellness programs that most likely to implicate the ADA and GINA. *Id.*[6] Consequently, it is simply not the case that by maintaining its previous no-penalty

[5] 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, 81 Fed. Reg. at 31,136.

[6] In addition, in many instances, HIPAA and the civil rights laws do not even regulate the same entities or the same contexts: HIPAA regulates insurers in group health plans, *see* 2013 HIPAA Rule, 78 Fed. Reg. 33,158, 33,158-59 (June 3, 2013), whereas the relevant titles of the ADA and GINA regulate employers. 29 C.F.R. §§ 1630.2(b), 1635.2(b). Thus, the laws only intersect where employers are self-insured or where insurers providing an employer's group health plan – as opposed to independent wellness vendors – administer the wellness program.

rule, the EEOC would be forbidding precisely what HIPAA permits. In short, the challenged Rules are not necessary to preserve many types of wellness programs.

Additionally, for the subset of wellness program practices to which both HIPAA and the civil rights laws apply, it is neither logical nor permissible to simply apply a penalty/incentive limit borrowed from HIPAA and ignore what the ADA and GINA might separately require. The EEOC admits that there is no conflict of laws here: HIPAA does not mandate what the ADA forbids. Opp. at 24-25. As the HIPAA regulations have long recognized, the ADA and GINA may impose more restrictive requirements than HIPAA. 2006 HIPAA Rule, 71 Fed. Reg. 75,014, 75,015 (Dec. 13, 2006) (explaining that the rule "clarif[ies] the application of the HIPAA nondiscrimination rules to group health plans, which may permit certain practices that other laws prohibit."). While creating the superficial appearance of harmony[7] might seem to be the simplest solution, the EEOC did not act reasonably by pursuing that solution at the expense of the civil rights laws it is responsible for enforcing. The agency must interpret the ADA and GINA in a manner that independently accords with both laws' "voluntary" requirements and with their core purposes, and it did not do so. HIPAA does not provide a separate justification for the agency's actions.

[7] Indeed, to the extent that the agency was in search of consistency, it did not find it. Many comments from employers, insurers, and their partners highlighted at length the inconsistencies between the proposed rules and HIPAA's penalty/incentive limits. *See supra*, Part I.C.

### C. The EEOC Still Fails To Explain The Conflicting Definitions Of Voluntary Between And Within The 2016 Rules.

The EEOC argues that it was fully entitled to define "voluntary" differently under the ADA and GINA and even suggests that it can permissibly define "voluntary" differently within different portions of one rule. Opp. at 24. Indeed, that argument is the agency's only recourse, as the definition of "voluntary" in the ADA Rule permits employers to penalize employees significantly for refusing to provide private medical information, 29 C.F.R. § 1630.14(d)(3), whereas the GINA rule defines "voluntary" as allowing no penalties, 29 C.F.R. § 1635.8(b)(2)(i)(B).

While the agency is correct that terms need not always be construed in the same manner, bedrock principles of statutory interpretation require that sections of a statute generally be construed together, and that statutes with the same purpose and objective be construed 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"). Likewise, where two sets of regulations promulgated on the same subject, finalized on the same day, construing the same word, interpreting two statutes that address highly related subjects, define the same word in dramatically different ways, that decision surely requires at least a coherent explanation. An explanation is all the more

needed for differing definitions within the same regulation. *See* PI Mot. Mem. at 40-42).

However, the EEOC offered no such explanation in its rulemaking, and it offers none now, instead simply asserting that the definitions need not be consistent. This supports no conclusion other than that the agency acted arbitrarily. *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1019 (D.C. Cir. 2002) ("[I]n the absence of any reasonable justification," the court "must conclude that this aspect of the [rule] is arbitrary and capricious. . . .").

### D. The EEOC's Attempt To Rationalize The 2016 GINA Rule's Exception For Spousal Medical History Defies Its Own Regulation.

The EEOC argues that it permissibly circumvented its own no-penalty definition of "voluntary" under GINA because information need not be gathered voluntarily from spouses of employees, "who have no employment relationship with the employer." Opp. at 27. That argument fails for multiple reasons. First, 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 Rule permits an employer to incentivize the *employee* for providing his or her spouse's information (or penalize the employee for refusing to provide it). Such a transaction is a request for genetic information from the employee – spousal medical history – and, therefore, under both the statute and the Rule, it must be voluntary. *Id.*; 42 U.S.C. § 2000ff-1(b)(2)(A)-(B).

Furthermore, even if the employer were to somehow directly provide incentives to, or extract penalties from, the employee's spouse without involving the employee (an implausible scenario), the 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). Even by the terms of its own Rule, the agency cannot escape the voluntariness requirement. Consequently, the EEOC has still failed to identify any coherent legal basis for its spousal medical history carve-out.

## IV. The Balance Of Equities And The Public Interest Support Granting A Preliminary Injunction.

The EEOC's arguments regarding the final two prongs of the preliminary injunction analysis are not meritorious, primarily for the reasons discussed in Part II: the harm that will befall AARP's affected members if the Rules begin to apply on January 1, 2017. Moreover, while the EEOC downplays the importance of maintaining the status quo, that is a very significant factor in assessing a preliminary injunction. *See Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) ("The primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition—to preserve the status quo."). That is as true when plaintiffs seek to preserve the status quo as when defendants do.

Finally, the EEOC argues that "chaos" will result if the Court issues a preliminary injunction, given the status of open enrollment. Opp. at 29-30. However, enjoining the Rule at any time will inherently upset expectations, as it will change what employers may do with respect to their insurance premiums and

wellness programs. Employers may postpone medical and genetic inquiries and exams in their wellness programs without great difficulty. And, of course, they are free to request such information voluntarily – i.e., without any financial consequences for refusal, as has been the case since the ADA's enactment. Furthermore, the state of health care law in general is deeply uncertain at the moment because of anticipated legislative changes, the effects of which are wholly unknown. Employers and insurers as well as employees are likely to be closely following the shifts in the legislative and regulatory landscape. While a preliminary injunction in this case would inject some additional uncertainty about the future of wellness programs, it is not nearly as significant as the many other unknowns facing individuals, employers, and insurers at this time. Therefore, the balance of equities and the public interest both weigh in AARP's favor.

## CONCLUSION

For these reasons, AARP respectfully requests that this Court issue a preliminary injunction staying the applicability date for the relevant portions of the 2016 ADA Rule and the 2016 GINA Rule for the pendency of the litigation.

Dated: November 22, 2016

/s/ Dara S. Smith
Dara S. Smith
Daniel B. Kohrman
AARP Foundation Litigation
601 E St., NW
Washington, DC 20049
dsmith@aarp.org
202-434-6280
*Counsel for AARP*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2016, I electronically filed the foregoing document, Plaintiff's Reply in Support of Application for Preliminary Injunction Staying the January 1, 2017 Applicability Date for Parts of the EEOC Wellness Programs Rules, with the Clerk of Court for the United States District Court for the District of Columbia and served all parties to the case via the CM/ECF system.

/s/ Dara S. Smith
Dara S. Smith
Daniel B. Kohrman
AARP Foundation Litigation
601 E St., NW
Washington, DC 20049
dsmith@aarp.org
202-434-6280

*Counsel for AARP*