UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 1:16-cv-02113 (JDB) Hon. John D. Bates

DEFENDANT'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant Equal Employment Opportunity Commission, by and through undersigned counsel, respectfully moves to dismiss this case for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56. As explained in the accompanying memorandum of law, Plaintiff has failed to demonstrate that it has standing to bring this case. In the alternative, the administrative record makes clear that the challenged regulations are within the agency's legal authority and neither arbitrary nor capricious.

A proposed order is attached.

Dated: February 28, 2017

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
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INTRODUCTION

On December 29, 2016, this Court denied Plaintiff's motion for a preliminary injunction, which had sought to invalidate EEOC regulations under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") that permit the use of incentive-based employee wellness programs. *See* PI Opinion, ECF No. 27 ("PI Op."). The Court recognized that "[t]he ultimate merits question in this case is whether EEOC's regulations permitting such incentives are arbitrary and capricious . . . because [they] render the disclosure of GINA- and ADA-protected information 'involuntary' and thus permit coerced disclosure in violation of the governing statutes." *Id.* at 2. The Court held that "[n]othing in either statute . . . directly prohibits the use of incentives in connection with wellness programs" or even "speaks to the level of permissible incentives at all," *id.* at 23, and so the "determination as to what level of incentives is permissible is exactly the kind of agency determination to which the Court owes some deference," *id.* at 24. In light of the deference owed to the EEOC, the Court held that Plaintiff had failed to establish a likelihood that it would succeed on the merits. *Id.* at 22.

Defendant has now compiled the full administrative record ("A.R."), which reveals the extraordinary care with which the EEOC went about promulgating the regulations challenged in this case: nearly two years before even issuing a proposed rule, the EEOC began meeting with stakeholders and receiving public comments. After promulgating proposed rules, the EEOC received thousands of comments, considered numerous published reports and studies, and then issued final rules that, in its judgment, best served the goals of preventing discrimination and facilitating the use of wellness programs, consistent with Congress's intent. The resulting administrative record, which exceeds eight thousand pages, makes it abundantly clear that the Court's initial judgment was right: especially in light of the deference owed to the EEOC in

interpreting ambiguous statutes, the challenged regulations are well within the agency's administrative discretion.

Before reaching the merits, however, the Court must determine that Plaintiff has standing to bring this case. Defendant recognizes that, in the context of ruling on Plaintiff's motion for a preliminary injunction, the Court determined that Plaintiff has sufficiently demonstrated its standing. Defendant urges the Court to reconsider that initial decision in the context of this instant motion because Plaintiff cannot meet its burden of establishing, through the identification of specific facts, that it is a membership organization within the meaning of the associational standing case law. Indeed, its corporate structure is more similar to that of Netflix than a true membership organization. Moreover, Plaintiff has failed to show, through the identification of non-speculative specific facts, that it has a member who will be injured by the challenged rules.

For all these reasons, the Court should grant Defendant's motion and dismiss Plaintiff's complaint.

BACKGROUND

I. Employee Wellness Programs

The Court's opinion denying Plaintiff's motion for a preliminary injunction lays out the legal background that governs this case. As the Court explained, employee wellness programs "have become increasingly popular in recent years as a means of decreasing the cost of healthcare by promoting and improving overall health in the insured population." PI Op. at 2*; see also* ADA Final Rule, 81 Fed. Reg. 31,126, 31,126 (2016) (reprinted at A.R. 2) ("Many employers that sponsor group health plans also offer health promotion and disease prevention activities, known as wellness programs, to employees enrolled in a health plan.").

These programs have been widely credited with improving health outcomes and lowering the cost of health care. A 2013 RAND Corporation report concluded that "lifestyle management

interventions as part of workplace wellness programs can reduce risk factors, such as smoking, and increase healthy behaviors, such as exercise." A.R. 7835. The report concluded that "these effects are sustainable over time and clinically meaningful," *id.*, and that "workplace wellness programs can help contain the current epidemic of lifestyle-related diseases, the main driver of premature morbidity and mortality as well as health care cost in the United States." A.R. 7836. Another study has concluded that there is a "return on investment of $3.27 for medical cost savings and $2.73 for absentee reduction for every dollar spent on wellness programs." A.R. 3462.

Throughout the rulemaking process, numerous commenters told the EEOC that wellness programs work. The American Heart Association told the EEOC that it is a "strong supporter of comprehensive employee wellness programs" because they "are critical to [its] goal of improving the cardiovascular health of all Americans and reducing cardiovascular disease and stroke." A.R. 2778; *see also* A.R. 6931. An insurance organization told the EEOC that these programs "promote the health of America's workforce by identifying risk factors and promoting healthier lifestyle choices," "keep overall health care costs down," and effectively "boost[] overall compensation." A.R. 2923 (comments of Council of Insurance Agents and Brokers).[1]

Wellness programs have also been widely adopted. In 2008, a National Compensation Survey conducted by the Bureau of Labor Statistics revealed that 82 percent of full-time employees in the public and private sector had access to employer-sponsored wellness programs. A.R. 8175;

[1] Numerous other commenters were equally effusive about the benefits of these programs. *See, e.g.*, A.R. 2627 (Minnesota State Colleges and Universities) ("Wellness programs encourage the adoption of healthy lifestyles and curb health care costs, thereby saving limited taxpayer dollars . . . ."); A.R. 2630-31 (Northeast Business Group on Health); A.R. 2697-98 (Foundations Health Solutions); A.R. 2757 (Harvard Street Neighborhood Health Center), A.R. 2760 (Benz Communications); A.R. 3001 (Society of Professional Benefit Administrators); A.R. 3883 (Tyson Foods) (wellness program has been "an overwhelming success"); A.R. 3284 (National Association of Health Underwriters); A.R. 3073 (Aetna).

see also A.R. 3431 (noting that "74 percent of all firms offering health benefits provide at least one wellness program).

These programs "vary widely in specific purpose and design, but wellness programs may include, for example, programs to help employees quit smoking, weight loss programs, and preventative health screenings." PI Op. at 2. These programs "often involve collecting medical information from employees, including information about disabilities or genetic information, in order to assess health risk factors." *Id.*; *see also* ADA Final Rule, 81 Fed. Reg. at 31,126 (reprinted at A.R. 2). Whether such collection is permissible involves "the complex intersection of the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), the Health Insurance Portability and Accountability Act (HIPAA), the Affordable Care Act (ACA), and their various implementing regulations, as applied to employer-sponsored wellness programs." PI Op. at 2.

II. Statutory Background

The ADA was enacted in 1990. Title I prohibits employers from "requir[ing] a medical examination" and provides that they 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 such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The ADA separately provides, however, that a "covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program." *Id.* § 12112(d)(4)(B). As the Court has recognized, "[t]he term 'voluntary' is not defined anywhere in the statute." PI Op. at 3.

GINA was enacted in 2008. Title II provides that an employer may not "request, require, or purchase genetic information with respect to an employee or a family member of the employee," 42 U.S.C. § 2000ff-1(b), except where (among other things) "health or genetic services are offered

by the employer, including such services offered as part of a wellness program," *id.* § 2000ff-1(b)(2)(A), provided that (among other things) "the employee provides prior, knowing, voluntary, and written authorization," *id.* § 2000ff-1(b)(2)(B). The genetic information of an individual includes "such individual's genetic tests," *id.* § 2000ff(4)(A)(i), "the genetic tests of family members of such individual," *id.* § 2000ff(4)(A)(ii), and (as relevant here) "the manifestation of a disease or disorder in family members of such individual," *id.* § 2000ff(4)(A)(iii), including the spouse of such individual. Critically, the "genetic information" of an individual does not include "the manifestation of a disease or disorder" in the individual himself. Thus, for example, whether an employee is diabetic is the employee's current health status, not his genetic information; whether the employee's family member is diabetic is the employee's genetic information.

As enacted in 1996, the Health Insurance Portability and Accountability Act ("HIPAA") provided that group health plans and health insurance issuers could not discriminate on the basis of "any health status-related factor," but the statute made clear that this prohibition was not meant to preclude "premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention." 29 U.S.C. § 1182(b)(2)(B); *see also* 26 U.S.C. § 9802(b)(2)(B); 42 U.S.C. § 300gg-4(b)(2)(B). "Regulations promulgated jointly in 2006 by the Departments of Labor, Health and Human Services, and the Treasury . . . capped the size of the reward that could be offered for participation in a wellness program at 20% of the cost of employee-only coverage . . . ." PI Op. at 3-4. In 2010, the Affordable Care Act ("ACA") amended these nondiscrimination provisions by providing that health-contingent wellness programs could offer incentives of up to thirty percent of the cost of coverage in which the participant and any dependents are enrolled, in exchange for participation.

See 42 U.S.C. § 300gg-4(j)(3)(A); 29 U.S.C. § 1185d(a)(1); 26 U.S.C. § 9815(a)(1).[2] There is no limit imposed on participatory wellness programs, which do not require a participant to meet any health goals. *See* PI Op. at 4.

The ACA's provisions extending the permissibility of workplace wellness programs were "one of the few public bi-partisan provisions of the bill." A.R. 3052 (comments of Population Health Alliance); *see also* A.R. 3511 (comments of Healthcare Leadership Council) ("These provisions were endorsed on a bipartisan basis by Congress, as well as by the President and the administration, as one of the keys to addressing the chronic disease epidemic . . . ."); A.R. 3568 (comments of several Republican Senators) ("one of the few bipartisan provisions in the law").[3]

III. Administrative History

As the Court noted, the EEOC's position with respect to incentive-based wellness programs "has evolved over the last several years." PI Op. at 5. In 2000, the EEOC issued ADA Enforcement Guidance stating that a "wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." EEOC, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) ¶ 22, https://www.eeoc.gov/policy/docs/guidance-inquiries.html#10. The EEOC's 2010 GINA regulations, *see* EEOC, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010), similarly

[2] The law further provided that the Secretaries of the Treasury, Labor, and Health and Human Services could raise this limit to 50% "if the Secretaries determine that such an increase is appropriate." 42 U.S.C. § 300gg-4(j)(3)(A).

[3] Congress has also shown its support for employee wellness programs by designating the first week of April as National Workplace Wellness Week. *See* H. Con. Res. 405, 110th Cong. (noting that "comprehensive, culturally sensitive health promotion within the workplace is essential to maintain and improve United States workers' health" and that "for workplace wellness efforts to reach their full potential, CEOs of major corporations, company presidents of small enterprises, and State Governors should be encouraged to make worksite health promotion a priority"); S. Res. 673, 110th Cong. (similar).

provided that the exception for wellness programs "applies only where . . . [t]he provision of genetic information by the individual is voluntary, 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); *see also* PI Op. at 6.

The 2010 enactment of the ACA changed the landscape for employee wellness programs, reflecting a clear congressional intent to facilitate their use. *See* PI Op. at 6 ("[A]gainst the backdrop of the ACA and the 2013 HIPAA regulations increasing the cap on incentives for wellness programs, and as wellness programs became more popular, confusion ensued as to how EEOC's regulations regarding the ADA and GINA were meant to interact with changes made by the ACA regarding wellness programs."). Seeking to resolve this confusion and reflect the congressional intent to facilitate the use of employee wellness programs, the EEOC began revisiting its positions with respect to wellness program incentives.

The EEOC held a meeting on May 8, 2013, prior to which it received many comments and at which it heard testimony on the pertinent issues. *See* A.R. 8136-8432. The EEOC first issued a proposed rule under the ADA on April 20, 2015. *See* ADA Proposed Rule, 80 Fed. Reg. 21,659 (Apr. 20, 2015) (reprinted at A.R. 21). The EEOC proposed a corresponding amendment to the regulations under Title II of GINA in October 2015. *See* GINA Proposed Rule, 80 Fed. Reg. 66,853 (Oct. 30, 2015) (reprinted at A.R. 50).

The EEOC received thousands of public comments in response to the proposed rules. *See* ADA Final Rule, 81 Fed. Reg. at 31,129 (reprinted at A.R. 5) (noting that nearly 2750 comments were received concerning the ADA rule); GINA Final Rule, 81 Fed. Reg. 31,143, 31,145 (reprinted at A.R. 35) (noting that over 3000 comments were received concerning the GINA rule); *see also* A.R. 96-3959 (public comments on ADA proposed rule); A.R. 3960-7445 (public comments on

GINA proposed rule). In addition, the EEOC and its staff members consulted with members of the public, ADA Final Rule, 81 Fed Reg. at 31,129 (reprinted at A.R. 5), and those consultations are fully documented in the administrative record. *See* A.R. 7454-7550.

Both rules were finalized in May 2016. "The final ADA rule provides that the use of a penalty or reward of up to 30% of the cost of self-only coverage does not render 'involuntary' a wellness program that seeks the disclosure of ADA-protected information." PI Op. at 7 (citation omitted). The final GINA rule permits employers to offer incentives, again up to 30% of the cost of self-only coverage, to employees if their spouses disclose information about the spouse's own manifestation of disease or disorder (which constitutes genetic information of the employee under GINA) as part of a health risk assessment in connection with a wellness program. The GINA regulation continues to bar the use of inducements (1) for an employee to provide the employee's own genetic information, *see* 29 C.F.R. § 1635.8(b)(2)(i)(B), (2) for the spouse to provide the spouse's own genetic information, *id.* § 1635.8(b)(2)(iii), and (3) for the employee or the spouse to provide "information about the manifestation of disease or disorder in an employee's children or for genetic information about an employee's children, including adult children," *id.*

IV. Procedural History

Plaintiff commenced this action by filing a complaint, accompanied by a motion for a preliminary injunction, on October 24, 2016. *See* ECF Nos. 1, 2. On December 29, 2016, the Court denied Plaintiff's motion in a lengthy and considered opinion, finding that Plaintiff had not demonstrated a likelihood of success on the merits. *See generally* PI Op. Defendant filed a certified index of the administrative record on January 30, 2017. *See* ECF No. 28.

STANDARD OF REVIEW

Under Rule 12(b)(1), a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court has jurisdiction to hear his claims. *See U.S. Ecology, Inc.*

v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). As relevant here, a plaintiff's lack of constitutional standing is "a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). Because the elements necessary to establish jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof; *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Under Rule 56, "[s]ummary 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." *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008). When summary judgment is sought under the APA, "the standard set forth in Rule 56(a) does not apply because of the court's limited role in reviewing the administrative record." *Coe v. McHugh*, 968 F. Supp. 2d 237, 239 (D.D.C. 2013). Instead, the "[c]ourt considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995). "Courts must 'liberally' defer to an agency's findings and sustain the agency's interpretation of its authorizing statute so long as that interpretation is 'legally permissible,' even if the court would otherwise adopt a different interpretation." PI Op. at 22 (citation omitted).

ARGUMENT

I. Plaintiff Has Failed To Meet Its Burden Of Establishing Standing.

At the outset, Defendant respectfully asks the Court to revisit its finding, made in the context of ruling on Plaintiff's preliminary injunction motion, that Plaintiff has standing to bring this action. As the Court has noted, an organization may bring suit on behalf of its members only

when "(1) at least one of its members would have standing to sue in his or her own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of an individual member of the organization in the suit." PI Op. at 10 (citing *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977)). Defendant argued in opposition to the motion for a preliminary injunction that Plaintiff had failed to establish its standing to prosecute this action because (1) it had not demonstrated that it is a membership organization within the meaning of associational standing case law, Def's PI Opp'n, ECF No. 14, at 10-12, and (2) it had not demonstrated that any one of its members would have standing, *id.* at 13-14.[4] At this stage in the litigation, Plaintiff has failed to meet its burden to establish standing. *See Lujan*, 504 U.S. at 561 (holding that plaintiff's burden to establish standing increases at summary judgment, where it must support its allegations by setting forth specific facts).

A. Plaintiff Has Failed To Demonstrate That It Is A Traditional Membership Organization.

AARP has failed to demonstrate that it is a traditional membership organization within the meaning of associational standing case law. Indeed, AARP's own bylaws — which Plaintiff filed after Defendant filed its opposition to Plaintiff's motion for a preliminary injunction — indicate that AARP has no members within the meaning of a D.C. Code provision defining a member as a "person that has the right . . . to select or vote for the election of directors or delegates or to vote on any type of fundamental transaction." *See* ECF No. 21-4 at 3 (referencing D.C. Code. § 29-401.02(24)).

[4] Defendant further contended that Plaintiff had not demonstrated that this case is germane to its organizational purpose. *See* Def's PI Opp'n at 14-15. Defendant maintains its position that Plaintiff has failed to satisfy its burden with respect to this factor but will not present additional argument on this factor at this time.

It is true, as the Court observed, that AARP has millions of individuals whom it refers to as "members," and that it has a defined mission. *See* PI Op. at 12. As the Court also recognized, however, AARP's reference to individuals as "members" cannot itself make them members within the meaning of associational standing case law. *See* PI Op. at 11 (criticizing case holding that self-described membership organization need not satisfy indicia of membership); *see also Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 210 (D.D.C. 2007) ("no authority" for proposition that "whether the individuals view themselves as members of the organization and whether they are viewed by the organization as members" is dispositive). If simply serving individuals referred to as "members" who share a common interest were sufficient, Netflix could bring suit on behalf of its customers. *See, e.g.*, Netflix Form 10-K, Part 1, Item 1, *available at* http://files.shareholder.com/downloads/NFLX/3852732760x0xS1628280-17-496/1065280/filing.pdf ("Netflix, Inc. . . . is the world's leading internet television network with over 93 million streaming members in over 190 countries . . . .").

It is also true that, as the Court noted, *some* AARP members play a role in selecting the organization's leadership. *See* PI Op. at 12. The only members who are permitted to do so, however, are the 18 members who serve on the Board of Directors — an infinitesimally small percentage of the other 38 million "members" who are denied a role in directing the organization and choosing its leadership. *Id.* Finally, it may also be true that AARP sends "various annual opinion polls and surveys" to its "members," *see* PI Op. at 12, but again the same is true of many entities that have never been understood to be capable of invoking associational standing. *See, e.g.*, Customer Surveys from Netflix, https://help.netflix.com/en/node/48042 ("To gather your feedback or to recruit small groups of customers for our in-person or virtual research, we send surveys via email."); United Airlines, OpinionMilesClub, https:/www.opinionmilesclub.com/

en/united (opportunity to earn frequent flyer miles in exchange for answering survey questions); About Amazon Consumer Survey E-mails, https://www.amazon.com/gp/help/customer/display.html?nodeId=200896290 ("We occasionally invite our customers to participate in online surveys and provide us information on their experience with our products.").

The Court has concluded that one of the three self-identified "members" of AARP identified by Plaintiff has standing to challenge both the ADA Rule and the GINA rule. *See* PI Op. at 13-16 (concluding that Declarant A would have standing). Plaintiff has not suggested that this individual (1) serves on the Board of Directors; (2) serves on any AARP policy committee; (3) has ever completed any AARP survey; or (4) has ever paid a penny in support of AARP. Indeed, Plaintiff's supplemental standing submission states that Declarant A has a free membership because his wife is a member of AARP. *See* ECF No. 24. Because the only person whom this Court has found would have standing satisfies *none* of the indicia of membership in AARP, AARP cannot sue on his behalf. *See Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm." (internal quotation marks omitted)).

Ultimately, the doctrinal premise of associational standing is that the association brings suit on behalf of its members, which requires the members to have a say in what the organization is doing. For that reason, the membership organizations that have typically been permitted to bring suit on behalf of their members vest the ultimate power of the organization in their members — whether by letting them run the organization directly, or by letting them select those who do. *See, e.g.*, The Washington Apple Commission, http://bestapples.com/general-contact-info/about-wac/ ("The Commission has a 14-member board of directors, nine of whom are elected by the apple

growers in specified districts and four of whom are elected by the apple shippers and marketers in specified districts. One is the Director of Agriculture."); Bylaws & Standing Rules of the Sierra Club, Bylaw 5, http://www.sierraclub.org/sites/www.sierraclub.org/files/bylaws.pdf (providing for election of Board of Directors by membership).

Here, as AARP's own bylaws reflect, it is *not* run by its "members," who can neither vote to select the organization's leadership nor vote on any of its fundamental transactions. Other than the fact that AARP chooses to refer to them as "members," the individuals who subscribe to AARP's services are identically positioned to the magazine subscribers who could not create associational standing in *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002), or the viewers who could not create associational standing in *American Legal Found. v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987). Because AARP has failed to demonstrate that it is a membership organization, the Court should dismiss the case for lack of standing.

B. Plaintiff Has Failed To Identify A Member Who Has Standing To Challenge The ADA Rule And The GINA Rule.

Defendant's opposition to Plaintiff's motion for a preliminary injunction further demonstrated that none of the supposed members identified by Plaintiff would have standing to challenge the ADA rule and the GINA rule. *See* Def's PI Opp'n at 13-14. The Court recognized that AARP's "burden here is made more difficult by the fact that EEOC's regulations do not directly regulate AARP or AARP's members," PI Op. at 13, but it ultimately rejected Defendant's standing challenge, finding that Declarant A would have standing to challenge both rules.

With respect to the ADA Rule, the Court held that because Declarant A's employer has a wellness program, "[a]n increase in premiums would certainly constitute an injury," such that "[t]he question is whether this injury is sufficiently 'certain.'" PI Op. at 14. The Court recognized that "Declarant A has not alleged that his employer definitively plans to raise its wellness program

incentive to the 30% level approved by the ADA rule," but held that "there is certainly a probability that Declarant A's employer will do so" because "the ADA rule is specifically designed to allow this, and Declarant A's employer already makes use of financial penalties for non-participation in its wellness program." *Id.*

What makes this possibility significantly less certain is that Declarant A is [redacted] employed by the [redacted] Public Schools; it appears that his benefits are thus governed by the collective bargaining agreement between the [redacted] and [redacted] Public Schools. And that contract, which remains in force through the end of the 2017 school year, provides that [redacted]PS will pay an additional *one* percent of the health insurance premiums for individuals who complete an online Health Risk Assessment, as well as an additional *one* percent for individuals who participate in biometric screenings — nowhere near the full extent of the increase permitted by the challenged regulations. *See* Contract Agreement Between [redacted] and Board of Education of [redacted], art. [redacted]. It is possible, of course, that the union and the board of education might negotiate a contract permitting wellness incentives to the full extent of the ADA rule. But AARP has offered no evidence that such a result is at all likely, underscoring why Declarant A lacks standing to challenge anything beyond the minor increase that he will personally experience under the terms of the collective bargaining agreement.

With respect to the GINA rule, the Court held that neither Declarant B nor Declarant C would have standing. *See* PI Op. at 15. It held that Declarant A would, however: "Because Declarant A's employer already has a wellness program in place that uses financial incentives, it

is likely that, once permitted to do so, it will adopt incentives for the collection of spousal information as well." *Id.* at 16. As before, however, Declarant A's benefits are governed by a collective bargaining agreement between the school district and the union, the agreement does not provide for spousal incentives, and AARP has offered no evidence that the next contract is likely to include spousal incentives.

II. Plaintiff's Claims Fail On The Merits Because The Court Must "Liberally Defer" To The Agency's Reasonable Construction Of Undefined Statutory Terms.

Even if Plaintiff had standing, its claims fail on the merits. As the Court has recognized, "AARP raises two principal arguments as to both the ADA rule and the GINA rule: first, that EEOC's interpretation of the term 'voluntary' as permitting the use of this level of incentives is contrary to both statutes; and second, that EEOC did not adequately explain its reversal from its previous position that incentives were not permitted under either the ADA or GINA." PI Op. at 22. The Court found that Plaintiff had "failed to demonstrate that it is likely to succeed on the merits" at the preliminary injunction stage, *id.*, and the reasons supporting the Court's decision — now buttressed by the full administrative record — demonstrate that Plaintiff cannot succeed on the merits at all.

A. The Final ADA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

1. The ADA Does Not Bar The Use Of Inducements.

At the outset, Plaintiff has abandoned the argument that any inducements for participation in wellness programs are coercive, in violation of the ADA. *See* Pl's PI Reply (ECF No. 17) at 17 ("AARP does not contend that any penalties/incentives are coercive . . . . (emphasis omitted)); PI Op. at 24 ("AARP, moreover, does not even argue that the term 'voluntary' as used in either the ADA or GINA prohibits the use of all incentives." (emphasis omitted)). That is a wise concession. As the Court held in denying Plaintiff's motion for a preliminary injunction, the ADA does not

"offer[] a definition of the term 'voluntary,' or explain[] what it means to conduct a 'voluntary' medical examination or to voluntarily provide medical information in order to participate in a wellness program." PI Op. at 23. "Nothing in [the ADA], however, directly prohibits the use of incentives in connection with wellness programs . . . ." *Id.* Thus, the "determination as to what level of incentives is permissible is exactly the kind of agency determination to which the Court owes some deference." *Id.* at 24 (emphasis omitted). "There is nothing in either the ADA or GINA to indicate that the particular incentive level EEOC selected is not permitted by the statute." *Id.*

As the Court has recognized, "[a] hard choice is not the same as no choice." PI Op. at 24 (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000)). Similarly, as the Supreme Court has said, "every rebate . . . when conditioned upon conduct is in some measure a temptation." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589 (1937). "But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." *Id.* at 589-90.[5] Thus, while Plaintiff has pointed to various comments suggesting that some individuals are encouraged to participate in voluntary wellness programs in light of the incentives associated with doing so, that is not enough under Supreme Court precedent relying

[5] The Supreme Court has relied on this principle to hold that Congress can condition the receipt of federal funds upon a State's enacting legislation that Congress could not directly coerce it into enacting, *see S. Dakota v. Dole*, 483 U.S. 203 (1987), and that Congress can tax individuals who do not purchase health insurance even though Congress lacks the authority to coerce them to purchase health insurance in the first place, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). As the *NFIB* court noted, the challenged tax did not unlawfully coerce the purchase of health insurance even though "the payment is . . . intended to affect individual conduct." *See id.* at 2596.

upon a "robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." *Id.* at 590.

2. The EEOC Adequately Explained The Basis For Its Regulatory Action.

Unable to claim that the ADA bars the use of incentives, AARP can only allege a procedural failing: that the EEOC failed to adequately explain either why it decided to allow incentives, after previously barring their use, or why it selected the permissible incentive threshold that it did. Each of these arguments fails.

a) The EEOC Adequately Explained Why It Changed Its Position To Allow The Use Of Incentives.

The Court has recognized that "[a]gencies are permitted to change their minds . . . so long as they explain the reason for the policy change, and the agency is not subject to any more scrutiny when it does change its position than when it is regulating in the first instance." PI Op. at 25 (citing *FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515 (2009)). In denying Plaintiff's motion for a preliminary injunction, the Court concluded that "the agency has offered a seemingly reasonable explanation for its change of heart." *Id.* Specifically, "EEOC's previous interpretation of both the ADA and GINA, in prohibiting the use of incentives, narrowed the universe of permissible wellness programs employers could offer, thereby undermining provisions in HIPAA and the ACA that permitted employers to offer larger incentives in order to promote the use of wellness programs (and the reduction in healthcare costs that theoretically follows)." *Id.* "Accordingly, EEOC explained its desire to harmonize its regulations with the tri-department regulations that implement the ACA's 30% incentive cap in order to provide clarity to employers about the use of incentives." *Id.*

Indeed, numerous commenters understood (and appreciated) that the EEOC was revising its wellness rules for exactly this reason. *See, e.g.*, A.R. 2895 (National Business Coalition on

Health) ("NBCH applauds the efforts of the EEOC to reduce confusion by issuing the proposed regulations specific to worksite wellness plans. Aligning the EEOC's position on wellness programs under the ADA more with the [ACA] requirements is essential for employers to remain active in this space."); A.R. 2923 (Council of Insurance Agents and Brokers) ("Recent uncertainty regarding treatment of wellness programs under the [ACA], the ADA, and [GINA] has had a dampening effect on employer creation and expansion of wellness programs. Thus, the Council very much appreciates the EEOC's efforts to bring more clarity to this topic.").

As the EEOC explained, it "believe[s] that the final rule interprets the ADA in a manner that reflects the ADA's goal of limiting employer access to medical information and is consistent with HIPAA's provisions promoting wellness programs." ADA Final Rule, 81 Fed. Reg. at 31,129 (reprinted at A.R. 5). "Accordingly, after the consideration of all of the comments, the Commission reaffirms its conclusion 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 the wellness program provisions of both laws." *Id.* AARP may not agree with this reason, but that does not mean that the agency did not have one or that it is arbitrary and capricious.

b) The EEOC Adequately Explained Why It Selected The Level Of Permissible Incentives That It Did.

AARP also contends that the EEOC failed to adequately explain why it selected the thirty-percent threshold that it did. The Court has already explained, in the course of denying Plaintiff's motion for a preliminary injunction, why that argument fails: "[a]s EEOC explains in both rulemakings, it selected these incentive levels to harmonize its interpretation of the ADA and GINA with the changes made to HIPAA by the ACA, which caps wellness program incentives at 30%." PI Op. at 24; *accord* ADA Proposed Rule, 80 Fed. Reg. at 21,663 (reprinted at A.R. 25)

("EEOC has determined that placing limits on the rewards employers may offer for employee participation (or penalties for non-participation) where participation requires employees to answer disability-related inquiries or take medical examinations promotes the ADA's interest in ensuring that incentive limits are not so high as to make participation in the program involuntary. At the same time, these limits comport with HIPAA and the Affordable Care Act wellness provisions.").

The EEOC was squarely presented with the argument that Plaintiff presses here: *i.e.*, that the incentives permitted by the regulation are so high as to be coercive. The EEOC heard that argument, considered it, and rejected it — exercising exactly the decisional process that the APA requires. As the Court explained, "EEOC acknowledged comments expressing concern that the 30% permissible incentive level was too high and could become coercive, but determined that this incentive level, 'although substantial,' was not coercive based on current insurance rates, but that incentives in excess of 30% of the cost of self-only coverage would be coercive." PI Op. at 26 (emphasis omitted); *see also* ADA Final Rule, 81 Fed. Reg. at 31,133 (reprinted at A.R. 9) (rejecting "suggestion that merely offering employees a choice whether or not to participate renders participation voluntary . . . [but] conclud[ing] that, given current insurance rates, offering an incentive of up to 30 percent of the total cost of self-only coverage does not, without more, render a wellness program coercive").

The EEOC noted that under the ACA, there is an independent incentive for large employers (*i.e.*, those with fifty or more full-time employees) to offer affordable coverage to full-time employees, including those who refuse to participate in wellness programs. ADA Final Rule, 81 Fed. Reg. at 31,132 (reprinted at A.R. 8). Specifically, under the ACA, if an employer with fifty or more full-time employees fails to offer its full-time employees the opportunity to enroll in "affordable" coverage that provides minimum value, an excise tax may be imposed upon the

employer if at least one of its full-time employees receives the premium tax credit for coverage in the Health Insurance Marketplace.[6] Coverage is not "affordable" for this purpose if "the employee's required contribution . . . with respect to the plan exceeds 9.5% of the applicable taxpayer's household income." *See* 26 U.S.C. § 36B(c)(2)(C). And under the Treasury regulations implementing this provision, incentives available for participation in employee wellness programs are (with the exception of tobacco-related incentives) treated as not earned. *See* 26 C.F.R. § 1.36B-2(c)(3)(v)(A)(4) ("Wellness program incentives that do not relate to tobacco use or that include a component unrelated to tobacco use are treated as not earned for this purpose.").

Taken together, as the EEOC explained, the "Treasury regulations that provide that the affordability of eligible employer-sponsored coverage is determined by assuming that each employee fails to satisfy the requirements of a wellness program . . . already serve[] as a constraint on the level of incentives an employer may offer, since affordability generally is calculated based on the employee's cost of coverage relative to his or her income without considering the value of any wellness program incentive." ADA Final Rule, 81 Fed. Reg. at 31,132 (reprinted at A.R. 8); *see also* A.R. 2575 (Commonwealth of Kentucky comments) (noting that "Under the Affordable Care Act, employers with at least 50 full-time employees are subject to an excise tax if they fail to offer their employees health coverage that is affordable and provides minimum value"). Congress has already determined what level of employee contribution renders coverage "affordable," and the EEOC's regulations do not change those rules.

[6] The excise tax is imposed upon large employers that fail to offer full-time employees (and their dependents) "minimum essential coverage" or that offer minimum essential coverage that is either not affordable or does not provide minimum value, and at least one full-time employee receives the premium tax credit with respect to health coverage purchased through the Health Insurance Marketplaces. *See* 26 U.S.C. § 4980H.

The EEOC also received numerous comments agreeing that the 30% threshold was appropriate. As the American Heart Association told the EEOC, it was "supportive of making 30% of employee-only coverage the ultimate ceiling for incentive design for compliance with ADA and defining 'voluntary' when conducting disability-related inquiries and/or medical examinations with the reasonable alternative standard in place for both health contingent and participatory programs." A.R. 2780; *accord* A.R. 2677 ("I support the Commission's proposal to limit the total of all types and categories of wellness incentives to 30 percent of employee-only cost of coverage."). The agency was entitled to consider and rely upon the views of these commenters. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1125 (D.C. Cir. 1984) (noting that it is reasonable to rely on comments submitted in the course of administrative process).

The EEOC also received numerous comments confirming the importance of incentives generally in encouraging participation in wellness programs. As the Society of Professional Benefit Administrators explained, "[w]ellness programs with incentives have higher participation rates." A.R. 3000; *accord* A.R. 3053 (comments of Population Health Alliance) ("Studies indicate that financial incentives are essential to encourage behaviors such as completing a health assessment or biometric screening."); A.R. 7105 (HR Policy Association) ("The ability to fully utilize the financial incentives allowed under the ACA is vital to that engagement."). As an EEOC attorney testified before the EEOC in 2013, "[m]any employers maintain that the only way to encourage participation in wellness programs by a significant number of employees is to offer financial inducements." A.R. 8175.[7]

[7] Underscoring the moderate regulatory approach selected by the EEOC, some employer groups thought that the EEOC did not go far enough, and should have permitted the 30% incentive

Ultimately, as the Court explained in denying Plaintiff's motion for a preliminary injunction, the EEOC had good reasons for selecting the 30% threshold. Because the EEOC considered the issues and stated a reasoned basis for its decision, it did not act arbitrarily or capriciously, and Plaintiff's APA claims with respect to the ADA Rule fail.

B. The Final GINA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

Plaintiff further challenges the 2016 GINA Rule, which permits an employer to provide an employee an incentive when the employee's spouse provides the spouse's own information concerning the spouse's manifestation of disease or disorder. That claim fails for many of the same reasons as Plaintiff's ADA claims, including the substantial deference owed to an agency in construing a statutory regime that it administers.

1. The 2016 GINA Rule Is Consistent With The Text Of GINA.

Title II of GINA regulates employment discrimination on the basis of genetic information. In relevant part, it provides that 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 where (among other things) "the employee provides prior, knowing, voluntary, and written authorization" to participate in a wellness program. 42 U.S.C. § 2000ff-1(b). Congress defined the term "genetic information" to include, among other things, information about "the manifestation of a disease or disorder in family members of such individual," *id.* § 2000ff(4)(A)(iii), which the EEOC agrees includes spouses of such individuals.

The 2016 GINA Rule was intended to address the fact that offering an incentive to an employee whose spouse provides information about the spouse's own "manifestation of disease,"

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to apply to whatever tier of coverage the employee had selected, rather than just the cost of self-only coverage. *See* ADA Final Rule, 81 Fed. Reg. at 31134.

(for example, whether the spouse is diabetic), could be read to violate the prohibition in the existing 2010 GINA regulation against conditioning an incentive on the provision of the *employee*'s genetic information. *See* 2016 GINA Final Rule, 81 Fed. Reg. at 31,144 (reprinted at A.R. 34) ("Read one way, such a practice could be interpreted to violate the 29 C.F.R. § 1635.8(b)(2)(ii) prohibition on providing financial inducements in return for an employee's protected genetic information. This is because information an employer seeks from a spouse . . . about his or her manifestation of disease or disorder is treated under GINA as requesting genetic information about the employee.").

Plaintiff has contended that the exception is inconsistent with the statutory requirement that the provision of genetic information as part of a wellness program must be voluntary. The Court has appropriately rejected this argument, explaining that "[n]either the ADA nor GINA offers a definition of the term 'voluntary'" and that "[n]othing in either statute . . . directly prohibits the use of incentives in connection with wellness programs" or "speaks to the level of permissible incentives at all." PI Op. at 23.

It is true that the GINA regulation generally defines "voluntariness" to preclude the use of incentives when an employee provides his or her own genetic information, *see* 29 C.F.R. § 1635.8(b)(2)(i)(B), but the 2016 GINA Rule makes clear that this definition does not preclude an employer from offering "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." *Id.* § 1635.8(b)(2)(iii). It is the EEOC's prerogative to reasonably construe the statute as it thinks best, provided that its construction can be reconciled with the statute. And the regulation is entirely consistent with the statute, because (1) the EEOC was not required to interpret voluntariness by reference to incentives at all; (2) the requirement that the disclosure of genetic information as part of a wellness program be voluntary does not apply to spouses of employees, who have no

employment relationship with the employer; and (3) even if the requirement of voluntariness did apply to spouses, asking spouses of employees to provide their own current health status information does not constitute a request for the spouse's genetic information under the statutory definition of genetic information. Moreover, the EEOC was not required to construe the term "voluntary" identically, either across the ADA and GINA, or even within GINA. *See* Pl's PI Reply at 22 (conceding the point: "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 . . . . [T]he agency is correct that terms need not always be construed in the same manner.").

2. The EEOC Adequately Explained The Basis For Its Regulatory Action.

a) The EEOC Adequately Explained Why It Allowed The Use Of Incentives For Spousal Medical History.

Plaintiff has contended that the EEOC failed to explain why it adopted the challenged GINA regulation. That is wrong. As the Court has already explained, the "EEOC concluded that collecting information from a spouse does not pose the same risk of genetic discrimination because the spouse's medical history does not reveal anything about the genetic history of the employee, even though spousal medical history is technically defined as 'genetic information' of the employee." PI Op. at 8 n.4 (citing GINA Rule, 81 Fed. Reg. at 31,147). The EEOC explained that "adopting a very narrow exception that permits inducements only for a spouse's current or past health status strikes the appropriate balance between GINA's goal of providing strong protections against employment discrimination based on the possibility that an employee may develop a disease or disorder in the future or may face discrimination because a family member is expected to become ill in the future, and the goal of the wellness program provisions of the [ACA] of promoting participation in employer-sponsored wellness programs." 2015 GINA Proposed

Rule, 80 Fed. Reg. at 66,856 (reprinted at A.R. 53).[8] This explanation, which is fully supported by the administrative record, is neither arbitrary nor capricious.

b) The EEOC Adequately Explained Why It Selected The Level Of Permissible Incentives That It Did.

Finally, Plaintiff has contended that the EEOC failed to adequately explain why it selected the specific level of permissible incentives that it did. Plaintiff has conceded that this challenge largely duplicates the arguments that it makes with respect to the ADA Final Rule, *see* Pl's PI Mot. (ECF No. 2-1) at 42, and the response is the same: as the Court has recognized, the EEOC set the permissible incentive in light of the level deemed appropriate by Congress in the ACA.

CONCLUSION

Plaintiff cannot meet its burden, at this stage in the litigation, of establishing standing, both because it is not a traditional membership organization and because it cannot identify any individual member who can establish standing in his or her own right. Furthermore, the voluminous administrative record in this case reinforces the conclusion already reached by the Court in the context of denying Plaintiff's preliminary injunction motion; namely, that neither the ADA Rule nor the GINA Rule is arbitrary or capricious. Rather, the EEOC carefully considered, and addressed, numerous comments and data in crafting the rules at issue in this case. The fact

[8] The EEOC's regulatory action further serves to avoid a conflict between Titles I and II of GINA. Title I of GINA regulates group health plans and health insurers, and it is administered by the Departments of Health and Human Services, Labor, and the Treasury. The Title I regulation prohibits the collection of genetic information for underwriting purposes, *see* 29 C.F.R. § 2590.702-1(d)(1), 45 C.F.R. § 146.122(d)(1), and it defines "underwriting purposes" in a way that would include rewards or penalties as part of wellness programs. *See* 29 C.F.R. § 2590.702-1(a)(7), 45 C.F.R. § 146.122(a)(7). The regulation makes clear, however, that it is permissible for a health plan to give an enrollee a reward for completing a health risk assessment that does not include genetic information. *See* 29 C.F.R. § 2590.702-1(d)(3) ex. 5, 45 C.F.R. § 146.122(d)(3) ex. 5. The regulation thus makes clear that enrollees, which can include spouses, can get rewards for providing their own current health information. Plaintiff is nonetheless asking this Court to conclude that Title II of GINA prohibits this practice.

that Plaintiff may have reached a different conclusion than the agency or wished for a different outcome cannot serve as a basis for invalidating these rules. Accordingly, Defendant respectfully requests that the Court grant its motion and dismiss this case with prejudice.

Dated: February 28, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 1:16-cv-02113 (JDB) Hon. John D. Bates

[PROPOSED] ORDER

Upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, IT IS HEREBY ORDERED that the Motion is GRANTED, and this case is dismissed with prejudice.

DATED: _____

_____
HON. JOHN D. BATES