IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No.: 16-cv-2113

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

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INTRODUCTION

The EEOC's 2016 rules addressing employee wellness programs enable employers to impose heavy financial penalties – potentially doubling or even tripling individual health insurance costs – on employees who exercise their right to decline invasive employer requests for medical and genetic information. The EEOC's rules vitiate the crucial employee protections in the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), which require any response to employer inquiries that probe these deeply personal matters to be "voluntary." The rules leave vulnerable employees open to employment discrimination and workplace stigma.

Most employers offer wellness programs. These programs often involve the collection of employees' health information and family medical history through detailed questionnaires called "health risk assessments" ("HRA"s) and biometric testing. Because the ADA and GINA require that the collection of medical and genetic information through wellness programs be *voluntary,* the EEOC has consistently recognized – first under the ADA, and more recently under GINA – that wellness programs can neither require participation nor penalize non-participants.[1]

[1] As discussed throughout this Complaint, the relevant regulations variously use the terms "inducement," "incentive," "reward," and "penalty." There does not appear to be any dispute that incentives, rewards, or inducements for participating in wellness programs are indistinguishable from penalties for non-participation, as many of the regulations make clear as early as 2001. *See* Dep't of the Treasury, Dep't of Labor, & Dep't of Health & Human Servs., Notice of Proposed Rulemaking for Bona Fide Wellness Programs, 66 Fed. Reg. 1421, 1422 (Jan. 8, 2001) ("2001

But, in an unexplained reversal, the EEOC's 2016 ADA Rule permits employers to "incentivize" employees to respond to these exams and inquiries by exacting from non-participants penalties valued at as much as 30% of the total employer-employee cost of individual health insurance premiums. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016) (to be codified at 29 C.F.R. § 1630) ("2016 ADA Rule"). Further, the 2016 GINA Rule permits employers to charge a second 30% penalty where an individual refuses to provide spousal medical history, thereby blessing even more severe penalties of up to 60% of the cost of health insurance premiums. Genetic Information Nondiscrimination Act ("GINA"), Final Rule, 81 Fed. Reg. 31,143 (May 17, 2016) (to be codified at 29 C.F.R. § 1635) ("2016 GINA Rule"). Individuals must divulge what the civil rights laws protect as private, or pay the price. As one individual commented when the rule proposed, this is no real choice at all. Karen Darcy, Comment on 2016 ADA Rule (June 20, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0146 (describing the rule as creating a "Hobson's Choice.").

Accordingly, AARP moves for preliminary injunctive relief during the pendency of its challenge to the 2016 ADA Rule and the 2016 GINA Rule. Preliminary injunctive relief is necessary to avoid the irreparable harm that AARP's affected members will face when employers impose these penalties on non-

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HIPAA NPRM") ("However, in some cases, the resulting reward (or penalty) might be so large as to have the effect of denying coverage to certain individuals."). Therefore, this memorandum uses the generic phrase "penalties/incentives," but at times uses the terms interchangeably, as contextually appropriate.

participants, thereby coercing employees to divulge private medical and genetic information. This information, once disclosed, will never be confidential again. Employees' privacy cannot be restored.

In addition to irreparable injury, AARP satisfies the three other factors necessary to demonstrate that injunctive relief is necessary. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). AARP is likely to succeed on the merits because both rules are arbitrary, capricious, and contrary to the laws they purport to interpret and, thus, invalid under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2). The penalties/incentives allowed under the 2016 ADA Rule do not comport with any reasonable interpretation of the term "voluntary" or the ADA's purpose. Furthermore, the EEOC failed to justify its abrupt change in position or address significant comments on the coercive nature of these penalties/incentives. Similarly, the 2016 GINA Rule is contrary to the statute because it carves out an extra-statutory exception to the rule's protections for spousal medical information. Moreover, as with the 2016 ADA Rule, the EEOC failed to adequately explain its sudden change in position or its decision to allow employers to impose heavy penalties on employees and their spouses to pressure them into revealing private genetic information. Thus, both rules are invalid under the APA.

Finally, AARP has demonstrated that it meets the final two factors, as the balance of equities tips in AARP's favor, and a preliminary injunction would be in the public interest, in order to preserve the status quo. This benefits AARP's

members, as well as employers and the government, by clarifying the law before wellness programs in violation of the ADA and GINA are operational.

Accordingly, the Court should issue a preliminary injunction to stay the applicability date of the challenged provisions – 29 C.F.R. §§ 1630.14(d)(3) and 1635.8(b)(2)(iii) (2016) – until this litigation is resolved.

FACTUAL BACKGROUND

1. The ADA only permits non-job-related medical inquiries and exams through employee wellness programs if participation is voluntary.

Congress enacted the ADA to create a comprehensive national remedial scheme to combat widespread and systemic discrimination against individuals with disabilities, including in employment. Pub. L. No. 101-336, § 2(a)(3), 2(b), 104 Stat. 327, 328-29 (1990). Congress compiled a thorough record of witness testimony and data indicating that discrimination against individuals with disabilities was an "inexcusable barrier" to their employment opportunities. S. Rep. No. 101-116, at 7-9 (1989) ("ADA Senate Report"); H.R. Rep. No. 101-485, pt. 2, at 32-34 (1990) ("ADA House Report").

To prevent this discrimination, the ADA significantly cabins permissible medical examinations and inquiries conducted by employers in both the pre- and post-employment context. 42 U.S.C. § 12112(d)(1). For current employees, the ADA prohibits medical inquiries and exams unless they are part of an employee wellness program, and participation is voluntary:

> (A) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a

> disability or as to the nature or severity of the disability, unless . . . job related or consistent with business necessity.
>
> (B) A covered entity may conduct *voluntary* medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site. [A covered entity may also inquire as to job-related functions].

Id. § 12112(d)(4)(A)-(B) (emphasis added). In adopting this approach, Congress considered both the potential for employer discrimination and the stigma that discourages an employee with disabilities from fully integrating into the workplace. ADA Senate Report at 36 ("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."); ADA House Report at 75 ("As was made abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma."). Congress noted the "widespread irrational prejudice" against individuals with disabilities and clarified that the prohibition on inquiries and exams was intended to protect any employee who "may object merely to being identified, independent of the [employment] consequences." ADA Senate Report at 36; ADA House Report at 75.

Congress also expressed concern with the use of employee medical information in wellness programs. ADA House Report at 75 (noting that employee medical information obtained through wellness programs could not be used to limit health insurance eligibility or prevent occupational advancement). At all times

throughout the passage of the ADA, Congress insisted that wellness programs be voluntary. *Id.*

Congress did not define voluntary in the ADA. EEOC guidance issued in 1995 first expressed the agency's strict view on employer questions about disability-related information that is non-job-related when it stated that "employer[s] cannot request, persuade, coerce, or otherwise pressure the individual to get him/her to disclose medical information" in a pre-employment context. EEOC, *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, EEOC Notice No. 915.002 (Oct. 10, 1995), https://www.eeoc.gov/policy/docs/preemp.html ("1995 ADA Guidance"). The EEOC specifically addressed voluntariness in wellness programs in later guidance, making clear that "[a] wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC Notice No. 915.002, Question 22 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html ("2000 ADA Guidance"). The 2000 ADA Guidance also clarifies that wellness programs that do not make any disability-related inquiries or require medical exams do not implicate the ADA's protections. *Id.* at n.78.

2. GINA prohibits employers from collecting genetic information about employees or their family members unless employees give prior knowing, voluntary, written authorization.

In enacting GINA, Congress expressed concern about discriminatory employer practices regarding genetic testing, including tests administered without employees' consent and efforts to selectively screen for carriers of sickle cell anemia, a disease that afflicts primarily African-Americans. S. Rep. No. 110-48, at 8-9 (2007) ("GINA Senate Report"). Although Congress recognized the "enormous opportunities" that genetic testing provided in identifying and preventing disease, it diagnosed two significant problems: fear of employment discrimination and the desire to keep genetic information private. *Id.* at 6-7. To address these problems, GINA generally prohibits employers from acquiring employees' genetic information. 42 U.S.C. § 2000ff-1(b)(2)(A)-(D).

Like the ADA, GINA includes a narrow exception for wellness programs. GINA requires that employee participation in a wellness program's genetic services be voluntary:

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

Id. § 2000ff-1(b)(2)(A)-(B) (emphasis added). In establishing this strict voluntariness requirement, Congress sought to "encourage[] employees to take advantage of

genetic technologies and opportunity to improve human health *without fear of discrimination by their employer*." GINA Senate Report at 29 (emphasis added).

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

As discussed further below, the EEOC promulgated regulations in 2010 that implemented GINA. EEOC, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010) (codified in 29 C.F.R. § 1635) ("2010 GINA Rule"); *see also infra* Parts 5-6. Consistent with the 2000 ADA Guidance, the 2010 GINA Rule prohibited employers from penalizing

employees for refusing to provide genetic information as part of an employee wellness program. 75 Fed. Reg. at 68,935.

3. HIPAA addresses wellness programs but does not govern voluntariness under the ADA or GINA.

Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA") to "reduce . . . barriers to obtaining health coverage by making it easier for people who change jobs or lose their jobs to maintain adequate coverage, and by providing increased purchasing power to small businesses and individuals." HIPAA Senate Report, S. Rep. No. 104-156, at 1 (1995). As part of HIPAA's goal in regulating the health insurance market to ensure access to health coverage, the statute prohibits discrimination in health insurance on the basis of several "health status-related factors." 29 U.S.C. § 1182(a)(1). These factors include disability, genetic information, and medical history, as well as insurance-related bases such as claims experience, receipt of health care, and evidence of insurability. *Id.* Despite this prohibition, HIPAA permits some financial penalties/incentives as part of employee wellness programs, allowing health insurers to "establish[] premium discounts or rebates or modify[] otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention." *Id.* § 1182(b)(2)(B).

The Departments of the Treasury, Labor, and Health and Human Services ("The Departments") issued interim guidance in 1997, *see* 62 Fed. Reg. 16,894, but did not fully consider HIPAA's implications with respect to wellness programs until 2001. 2001 HIPAA NPRM, 66 Fed. Reg. 1421. The Departments proposed a

monetary limit on incentives and penalties to "prohibit[] discounts and surcharges so large that they could discourage enrollment [in group health plans] based on health factors." *Id.* at 1429.

The 2001 HIPAA NRPM included an extensive economic analysis that evaluated the effect of incentives and penalties on group health plans, especially those plans that already offered penalties/incentives above the proposed limit. *Id.* at 1428-31. The Departments' analysis did not evaluate whether a penalty/incentive limit was financially coercive on employees, especially non-participants.

After considering a lower penalty/incentive limit, the Departments' final rule in 2006 provided that penalties/incentives could not exceed 20% of the full cost of an individual's health insurance premiums, including both employee and employer contributions. Dep't of the Treasury, Dep't of Labor, & Dep't of Health & Human Services, Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. 75,014, 75,036 (Dec. 13, 2006) ("2006 HIPAA Rule").

The 2006 HIPAA Rule's penalty/incentive limit applied only to programs that required satisfaction of a health status-related factor as a condition of receiving the incentive, now called "health-contingent programs." *Id.* at 75,017-18. This rule did not apply to "participatory programs," which do not require satisfaction of a health factor standard, but typically involve HRAs and biometric testing. *See* Dep't of the Treasury, Dep't of Labor, & Dep't of Health & Human Servs., Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,158 (June 3, 2013) ("2013 HIPAA Rule").

In adopting the 2006 HIPAA Rule, the Departments responded to the EEOC's comments, which requested that the Departments clarify that some practices that complied with the HIPAA rule might nonetheless violate the ADA. 71 Fed. Reg. at 75,015. Accordingly, the Departments made clear that the 2006 HIPAA Rule authorizing the 20% penalty/incentive limit "is not determinative of compliance with . . . any other State or Federal law, *including the ADA*." *Id.* (emphasis added). After again indicating that the ADA and other federal civil rights laws might further regulate group health plans, the Departments emphasized that the 2006 HIPAA Rule "clarif[ies] the application of the HIPAA nondiscrimination rules to group health plans, *which may permit certain practices that other laws prohibit*." *Id.* (emphasis added). The 2006 HIPAA Rule in no way altered the EEOC's existing regulations or guidance regarding employer medical inquiries and examinations.

4. The ACA amended HIPAA without altering HIPAA's interaction with the civil rights laws.

In 2010, the Patient Protection and Affordable Care Act ("ACA") adjusted and codified portions of the 2006 HIPAA Rule. 42 U.S.C. § 300gg-4(j). The ACA's wellness program provision permits "rewards [that] shall not exceed 30 percent of the cost of [health insurance] coverage," with an option to raise the limit to 50% at the discretion of the Departments. *Id.* § 300gg-4(j)(3)(A). This section did not repeal or even address the ADA or GINA.

The selection of a 30% limit was a legislative compromise between the initial Democratic draft, which maintained HIPAA's 20% limit, and the Republican proposal to raise the limit to 50%. S. Rep. No. 111-89, at 439-40 (2009) ("ACA

Senate Report") (additional views of Sen. Rockefeller expressing concern about impact on persons with disabilities); H.R. Rep. No. 111-299, pt. 3, at 185 n.7 (2009) ("ACA House Report") (minority views). The ACA's final wellness program provision is an apparent combination of these proposals, but it is not a reflection of any analysis relevant to voluntariness under the ADA and GINA.

In 2013, the Departments issued regulations incorporating the 30% penalty/incentive limit.[2] 2013 HIPAA Rule, 78 Fed. Reg. at 33,160. The Departments made clear that the 2013 HIPAA Rule made no distinction between rewards for participation and penalties for non-participation. *Id.* Again, the Departments did not consider the potential coercive effect of penalties/incentives on employees. Dep't of the Treasury, Dep't of Labor, & Dep't of Health & Human Servs., Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620, 70,627-30 (Nov. 26, 2012) ("2012 HIPAA NPRM"). Furthermore, as in 2006, the 2013 HIPAA Rule expressly declared that:

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

78 Fed. Reg. at 33,165.

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

5. The EEOC meticulously considered voluntariness when drafting the no-penalty scheme in the 2010 GINA Rule.

In 2010, after the ACA's enactment, the EEOC promulgated regulations implementing Title II of GINA. 2010 GINA Rule, 75 Fed. Reg. 68,912.

After receiving numerous comments, the EEOC considered a variety of approaches as to whether penalties/incentives for wellness programs were voluntary. The EEOC considered proposals that permitted: (1) any penalties/incentives that complied with HIPAA;[3] (2) penalties/incentives below HIPAA's threshold, but for *either* health-contingent or participatory programs; (3) unlimited penalties/incentives (4) no penalties/incentives at all. *Id.* at 68,922-23.

The EEOC chose the no-penalty/incentive option. To balance the statutory ban on inquiring about genetic information while preserving the benefits of voluntary genetic testing, the agency determined that "covered entities may offer certain kinds of financial inducements to encourage participation in health or genetic services under certain circumstances, but *they may not offer an inducement for individuals to provide genetic information.*" *Id.* at 68,923 (emphasis added).

Therefore, employers could reward employees for completing HRAs – or penalize them for declining to complete HRAs – but only if the employer "specifically identifies [questions about genetic information] and makes clear, in language reasonably likely to be understood by those completing [the HRA], that

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

the individual need not answer the questions that request genetic information" to receive a reward or avoid a penalty. *Id.*

6. The 2010 GINA Rule protected spousal medical history from involuntary disclosure.

In another portion of the same rule, the EEOC implemented the definition of "family member" found in Title II of GINA. Drawing on ERISA's definition of dependent, 29 U.S.C. § 1181(f)(2)(A)(iii), *supra* Part 2, the EEOC stated that Title II protects "persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption." 2010 GINA Rule, 75 Fed. Reg. at 68,914-15. In reaching this conclusion, the EEOC stated:

> The Commission believes its interpretation of the term "family member," particularly the way in which GINA's reference to section 701(f)(2) of ERISA relates to that term, is *consistent with the plain language* of both section 701(f)(2) and Title II of GINA, furthers Congress's intent to prohibit genetic discrimination in the employment context, and provides covered entities with clear standards governing compliance with the law.

Id. at 68,914 n.5 (emphasis added). The EEOC clarified that even non-biological family members' information was covered, given Congressional concerns that an employer could discriminate based on potential health care costs, including by increasing health insurance rates, associated with a family member's medical or genetic condition. *Id.* at 68,915 (citing GINA Senate Report at 28) ("indicating that spouses and adopted children were included in the definition of family member for [that] exact reason").

7. In 2016, the EEOC reversed its longstanding no-penalty rule in its rulemaking on wellness programs under the ADA and GINA.

On May 17, 2016, the EEOC issued new regulations under both the ADA and GINA that, for the first time, permit penalties/incentives for employees who provide private health and genetic information. The 2016 ADA Rule redefines "voluntary," permitting penalties/incentives up to 30% of the full cost of self-only health insurance coverage. 29 C.F.R. § 1630.14(d)(3); *see* 81 Fed. Reg. at 31,134-35. The 2016 GINA Rule maintains the 2010 GINA Rule's prohibitions on penalties/incentives for genetic information, with one exception: it permits employers to penalize employees who do not provide spousal medical history. 29 C.F.R. § 1635.8(b)(2)(iii); *see* 81 Fed. Reg. at 31,152-54. The 2016 GINA Rule allows for up to 30% penalties/incentives for *both* the employee and the employee's spouse – for a cumulative penalty/incentive of 60% of premiums. 81 Fed. Reg. at 31,154. Both rules received significant comments from advocacy groups and individuals, many of which illuminated the coercive impact of the penalties/incentives permitted under these rules. *See infra* II.A.1.c. Although the rules became effective on July 18, 2016, the applicability date for the penalty/incentive schemes is January 1, 2017. 2016 ADA Rule, 81 Fed. Reg. at 31,126; 2016 GINA Rule, 81 Fed. Reg. at 31,143.

8. The 2016 ADA Rule permits employers to impose heavy penalties on employees who do not disclose their health information in wellness programs.

In April 2015, the EEOC solicited comment on whether to define "voluntary" in a manner that would permit penalties/incentives. EEOC, Amendments to Regulations Under the Americans With Disabilities Act, 80 Fed. Reg. 21,659, 21,664

(Apr. 20, 2015) ("2015 ADA NPRM"). The proposed rule included an exception to its definition of "voluntary" that permitted significant penalties/incentives: any penalty/incentive that does not exceed 30% of self-only health coverage. *Id.* at 21,668.

The final 2016 ADA Rule expressly acknowledges that "inducements" can be either "a reward or a penalty." 81 Fed. Reg. at 31,134. Additionally, the rule makes no distinction between participatory and health-contingent programs, describing its penalty/incentive provisions as applying to any "wellness program that includes disability-related inquiries and/or or medical examinations." *Id.* Under the final rule, employers may initiate penalties/incentives where an employee is not enrolled in the employer's health plans, or even where the employer offers *no* health plan whatsoever.[4]

The EEOC concluded that "allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of [both the ADA and HIPAA, as amended by the ACA]." *Id.* at 31,129. The EEOC acknowledged that its rule must avoid economic coercion. *Id.* at 31,133 ("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

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[4] Where an employer offers no health plan, the 30% calculation is tied to the second lowest cost Silver Plan available through the state or federal health care Exchange in the location that the employer identifies as its principal place of business. 29 C.F.R. § 1630.14(d)(3)(iv); 2016 ADA Rule, 81 Fed. Reg. at 31,140. For all other scenarios, the 30% calculation is tied to an employer group health plan. *Id.* at 31,135.

substantial as to be coercive."). Nonetheless, the EEOC provided no reasoning as to how or why permitting employers to penalize any employee with up to 30% of insurance premiums is categorically non-coercive, and, thus, a proper way to "effectuate the purposes" of the ADA.

9. The 2016 GINA Rule permits employers to impose heavy penalties on employees who do not disclose their spouses' information in wellness programs.

In October 2015, the EEOC solicited comment on whether to permit employers to request and acquire information about the manifestation of disease or disorder – i.e., medical history – in their employees' spouses, as part of employee wellness programs. EEOC, Genetic Information Nondiscrimination Act of 2008, Proposed Rule, 80 Fed. Reg. 66,853, 66,856 (Oct. 30, 2015) ("2015 GINA NPRM"). The EEOC noted that such information is "genetic information protected by GINA," but posited that "adopting a very narrow exception" strikes a balance between GINA's nondiscrimination protections and HIPAA's goal of promoting employee participation in wellness programs. *Id.* The EEOC justified soliciting spousal medical history, but not the medical history of employees' children, by opining that there "is minimal, if any, chance of eliciting information about an employee's own genetic make-up or predisposition for disease from the information about current or past health status of the employee's spouse." *Id.* The agency did not describe how the exception could be rooted in GINA's text.

The final 2016 GINA Rule maintains this exception. 29 C.F.R.

§ 1635.8(b)(2)(iii). Under that rule, employers may apply penalties/incentives *twice* when employees do not provide their own medical information or their spouses' family medical history – i.e., the penalties stack.[5] 2016 GINA Rule, 81 Fed. Reg. at 31,154. Therefore, even though the 2016 GINA Rule relies on the 2016 ADA Rule to justify that 30% of the cost of insurance premiums is not economically coercive, the 2016 GINA Rule blesses cumulative penalties amounting to 60% of the cost of insurance premiums for both the employee and the employee's spouse. 29 C.F.R. § 1635.8(b)(2)(iii); 81 Fed. Reg. at 31,158. In other words, for example, where the individual coverage option of a health insurance plan is $6,000, employers may charge non-participating employees $1,800 for refusing to provide their own health information and an additional $1,800 for refusing to provide their spouses' information, for a total of $3,600. *Id.*

Nonetheless, the 2016 GINA Rule does not alter the 2010 GINA Rule's voluntariness requirement: it continues to prohibit penalties/incentives contingent on providing the employee's genetic information. 29 C.F.R. § 1635.8(b)(2)(i)(B) ("the 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.*") (emphasis added). Moreover, the 2016 GINA Rule requires that acquisition of genetic information from an employee's spouse be "voluntary." 29 C.F.R. § 1635.8(b)(2)(iii). The EEOC has not explained the

[5] The 2016 GINA Rule is unclear as to whether the employer may exact this 60% penalty under GINA *alone*, or under the two Rules cumulatively, as described above. The most plausible reading is the latter, so AARP assumes that to be the rule's meaning.

contradiction between its no-penalty definition of "voluntary" and its prohibition on penalties for refusing to provide genetic information, on the one hand, and its exception for spousal medical history on the other.

ARGUMENT

While a preliminary injunction is "an extraordinary remedy," such relief is appropriate where a plaintiff establishes: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the plaintiff's favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). Parties requesting a preliminary injunction in this Circuit must make "'a clear showing that [the] four factors, taken together, warrant relief.'" *League of Women Voters of the U.S. v. Newby*, No. 16-5196, 2016 U.S. App. LEXIS 17463, at *10 (D.C. Cir. Sept. 26, 2016); *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).[6] As explained below, all four factors favor preliminary injunctive relief.

I. Many Of AARP's Members Will Face Irreparable Harm Without Injunctive Relief.

The Court should award preliminary injunctive relief to avert the irreparable harm faced by AARP members whose employers, prompted by the 2016 rules, will

[6] While the D.C. Circuit has not yet ruled on the applicability of its "sliding-scale" rule permitting "'a strong showing on one factor [to] make up for a weaker showing on another,'" *Newby*, 2016 U.S. App. LEXIS 17463, at *12 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392, 396 (D.C. Cir. 2011)), in this case, all four factors merit preliminary injunctive relief.

coerce them to divulge confidential information. This Court recognizes that irreparable harm must be "'both certain and great . . . show[ing] that the injury complained of is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 49 (D.D.C. 2011) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The harm faced by many of AARP's members, should this rule take effect, meets this standard.

The heavy penalties blessed by these rules – which amount to hundreds or thousands of dollars – will coerce many of AARP's members to surrender their private medical information. The irreversible loss of this privacy is irreparable harm.[7] *See Hosp. Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192, 200 (D.D.C. 2010) ("This Court has recognized that the disclosure of confidential information can constitute irreparable harm because such information, once disclosed, loses its confidential nature."); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 77-78 (D.D.C. 2001) (recognizing, on similar grounds, irreparable harm for alleged breaches of a non-compete clause). Federal courts have long held that individuals have an interest in keeping their own medical information private. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy

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[7] Whereas economic loss alone is insufficient to constitute an irreparable injury, this Court has held that an inability to recover money damages could lead to irreparable harm. *R.J. Reynolds*, 823 F. Supp. 2d at 50. It is not at all clear AARP's affected members, should they object to participation and pay the penalty, will be able to recover money damages if employers penalize them within the 2016 Rules' limits.

interests than that of one's health or genetic make-up."); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."). Preliminary injunctive relief is necessary to prevent the disclosure of this sensitive information until the Court can fully consider the merits of this litigation.

This disclosure is inevitable for many people, as the EEOC's 2016 rules, once applicable, will encourage employers nationwide to increase the penalties/incentives they use to pressure employees to participate in wellness programs. About 70% of employers already offer wellness programs. PriceWaterhouseCoopers, *Health and Well-being Touchstone Survey results*, at 64 (June 2015), http://www.pwc.com/us/en/hr-management/publications/assets/pwc-touchstone-survey-results-2015.pdf ("PwC Survey") (73% of employers offer a wellness program, and businesses with less than 1,000 employees have seen a 10-point rise in wellness programs since 2011); Soc'y for Human Res. Mgmt., *2015 Strategic Benefits – Wellness Initiatives* (Oct. 15, 2015), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM_Survey_Findings-Strategic-Benefits-Wellness-Initiatives.pdf ("SHRM Survey") (69% of responding organizations offered a wellness program). Though wellness programs may take many forms, employers rely heavily on biometric testing and HRAs, both of which implicate privacy concerns. PwC Survey at 70.

Most wellness programs make use of penalties/incentives, and the most widely used penalty/incentive is a change in employee health insurance premiums. PwC Survey at 66 (87% of wellness programs include penalties/incentives, with 38% offering a change in premiums); SHRM Survey at 4 (59% of wellness programs include penalties/incentives, with 45% offering a change in premiums). When premium penalties/incentives are used, they tend to be relatively large sums. *See* PwC Survey at 66 (55% of premium penalties/incentives were valued at highest-surveyed category: over $500 per year).

Many AARP members facing penalties/incentives permitted by the 2016 rules will have no real choice but to disclose their personal medical information. For instance, Declarant A describes his fear of revealing private medical information in his workplace and the economic burden of refusing to do so under his employer's current wellness program. Declaration A. His employer's wellness program involves a physical exam, blood tests, and an HRA with many detailed medical questions about employees' physical and mental health. *Id.* He fears disclosing this information about himself, and he expresses an even stronger concern about disclosing his wife's health history if his employer requests it. *Id.* In particular, he is very concerned about revealing this information to the wellness vendor because the HRA's terms state that the vendor can disclose the information to businesses that are free to "spam" him. *Id.* His choice to withhold this information is currently costing him $492.43 extra annually in health insurance premiums, and he says that

it is already difficult enough to afford this penalty, let alone an increased and/or doubled penalty.

Similarly, Declarant B, who is insured through her husband's employer, describes the importance of keeping her genetic condition private from her husband's employer and coworkers. Declaration B. She does not want others to make assumptions about her or view her differently because of her condition. *Id.* Nonetheless, she states that if her family's health insurance premiums were increased by 60% on top of the $630 monthly premium they already pay – the amount permitted by the 2016 rules – she would have no choice but to reveal the information. *Id*; *see also* Declaration C (explaining that the declarant cannot resist the employers' penalties for non-participation and must divulge his health conditions, despite his concern that his employer might use the information to discriminate against him due to his placement in a wellness "group," which may be publicly known).

This Court should stay the applicability dates for both rules to prevent AARP members like these individuals from irrevocably surrendering their confidential medical information.

II. AARP Is Likely To Succeed on the Merits.

The Court should stay the effective date of both regulations with regard to the challenged provisions because AARP is likely to succeed in demonstrating that these provisions are arbitrary, capricious, and contrary to law. *See Winter*, 129 S. Ct. at 374 (movant must show that "he is likely to succeed on the merits"); *Davis*,

571 F.3d at 1291-92 (declining to decide whether a movant must show a lower likelihood of success on the merits if there is a stronger showing on the other factors).

Under the APA, courts must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In assessing whether the agency's action is contrary to law, the reviewing court uses the framework set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Hearth, Patio, & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013). Under this analysis, "if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent." *Id.* Next, "if Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* Step Two," in which the court defers to the agency's interpretation if it is reasonable. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). Even where the agency is acting within its regulatory authority, its regulations are not entitled to any deference when they are "clearly wrong." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) (refusing to defer to EEOC regulation permitting claims of "reverse" age discrimination, where defendant favored older employees over younger ones).

Furthermore, an agency action is "arbitrary and capricious" if it is not the product of "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). The agency's action fails this test when the

agency has failed to consider the relevant factors or made a "clear error in judgment." *Id.* at 43. Such an error occurs when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007).

Here, the relevant portions of the 2016 ADA and GINA Rules cannot withstand APA review. Both rules are contrary to their organic statutes, and neither is the product of reasoned decisionmaking.

A. The 2016 ADA Rule is Arbitrary, Capricious, and Contrary to the Statute.

The 2016 ADA Rule's redefinition of "voluntary" is unlawful because it is: (1) an unreasonable construction of the statutory language under *Chevron* Step II; and (2) an unexplained departure from the EEOC's longstanding position. Therefore, the EEOC's interpretation is "clearly wrong." *Cline*, 540 U.S. at 600.

1. The 2016 ADA Rule's redefinition is not a reasonable construction of "voluntary."

a. "Voluntary" can mean either uncompensated or non-coercive.

The word "voluntary" ordinarily means "[d]one or undertaken of one's own free will," or "[a]cting or done willingly and without constraint or expectation of a reward." *Voluntary*, The American Heritage Dictionary of the English Language, at 1929 (4th ed. 2000); *Voluntary,* Merriam-Webster Dictionary, http://www.merriam-

webster.com/dictionary/voluntary (last visited Oct. 19, 2016) ("proceeding from the will or from one's own choice or consent," "unconstrained by interference," "acting or done of one's own free will without valuable consideration or legal obligation"). Accordingly, numerous cases in a variety of contexts have concluded that "voluntary" means either "uncompensated" or "non-coercive."[8] The 2016 ADA Rule is consistent with neither definition.

b. The 2016 ADA Rule's redefinition of "voluntary" does not comport with an "uncompensated" definition.

Plainly, the 2016 ADA Rule is at odds with a construction of voluntary that means "uncompensated" because it expressly permits very significant compensation for employees who provide their ADA-protected information. 29 C.F.R. § 1630.14(d)(3). A penalty/incentive of up to 30% of the total cost of insurance premiums is certainly designed to have an influence on employees that Congress

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[8] *See*, *e.g.*, *Haszard v. American Medical Response Northwest, Inc.*, 237 F. Supp. 2d 1151, 1153 (D. Or. 2001) ("A plaintiff seeking to show that he is 'required' by his employer to attend training need not show that the employer has a rule terminating those who do not attend training. Instead, training is 'required' if the employee is 'led to believe' that his or her working conditions or continuance of his or her employment 'would be adversely affected by nonattendance.'); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 744 (9th Cir. 1995) (citing and quoting definition of "voluntary" from Webster's Third: "Acting, or done, of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs."); *United States ex rel. Stone v. AmWest Sav. Ass'n*, 999 F. Supp. 852 (N.D. Tex. 1997) ("For the purposes of § 3730(e)(4)(B), 'voluntary' is interpreted as 'uncompensated' or 'unsolicited,' not as 'uncompelled.'") (citing *Fine*, 72 F.3d at 744, and *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995)); *In re Hannan Trucking, Inc.*, 17 B.R. 475, 478 (Bankr. N.D. Tex. 1981) ("Webster defines the word 'voluntary' as 'proceeding from the will or from one's own choice or consent; acting or done of one's own free will without valuable consideration or legal obligation.'").

did not anticipate or endorse in enacting the ADA. Indeed, as early as 1995, the EEOC forbade employers to even attempt to persuade employees to forfeit their medical information's confidentiality in the pre-employment context – an indication of the independent choice employees were meant to retain under the statute. 1995 ADA Guidance.

c. The 2016 ADA Rule's redefinition of "voluntary" does not comport with a "non-coercive" definition.

Just as plainly, the regulatory definition defies any reasonable understanding of "non-coercive." As numerous comments submitted during this rulemaking reflect, the 2016 ADA Rule will permit employers to pressure many individuals into divulging private medical information. AARP, Comment Letter on 2016 ADA Rule at 1 (June 19, 2015), http://www.regulations.gov/#!documentDetail;D=EEOC-2015-0006-0257 ("AARP ADA Comment"). 30% of self-only health insurance coverage is, on average, $1,800, based on 2014 data. Nat'l Women's Law Ctr., Comment Letter on 2016 ADA Rule (June 19, 2015), http://www.regulatio ns.gov/document?D=EEOC-2015-0006-0246 ("NWLC ADA Comment"); Nat'l Disability Rights and Educ. Fund, Comment Letter on 2016 ADA Rule (June 19, 2015), http://www.regulations.gov/document?D=EEOC-2015-0006-0318; Bazelon Center for Mental Health Law, Comment Letter on 2016 ADA Rule (June 19, 2015), http://www.regulations.gov/document?D=EEOC-2015-0006-0304 ("Bazelon Center ADA Comment"); American Civil Liberties Union, Comment Letter on 2016 ADA Rule at 6 (June 25, 2015) https://www.regulations.gov/document?D=EEOC-2015-0006-0274 ("ACLU ADA Comment).

The vast majority of employees – 85% – contribute 20 to 30% of the total premium for their insurance coverage, so that a 30% increase in premiums (if the penalties/incentives were, like most, in the form of a premium surcharge) would at least double most of these employees' health care costs. Bazelon Center ADA Comment; ACLU ADA Comment. Furthermore, the $1,800 average would generally cover months' worth of child care or food, and nearly two months' rent. NWLC ADA Comment.

This significantly increased cost would fall more harshly on individuals with disabilities – precisely the people the ADA is intended to protect – who, on average, have disproportionately lower incomes and higher medical costs than the general population. ACLU ADA Comment; American Psychological Association, Comment Letter on 2016 ADA Rule (June 25, 2015), http://www.regulations.gov/document?D=EEOC-2015-0006-0275; Epilepsy Found., Comment Letter on 2016 ADA Rule (June 19, 2016), http://www.regulations.gov/document?D=EEOC-2015-0006-0220. Finally, individuals with disabilities commenting on the rule related the impossible situation the rule would create for them and their families, in which they faced a false choice between paying heavy penalties and disclosing ADA-protected information, and thereby leaving themselves vulnerable to discrimination and stigma. Karen Darcy described the "Hobson's choice" the rule permitted, Karen Darcy, Comment on 2016 ADA Rule (June 20, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0146, while Elizabeth Henry put it simply: "we're damned if we do, damned if we don't," Elizabeth Henry, Comment on 2016 ADA

Rule (June 20, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0144.

When faced with either losing thousands of needed dollars or forfeiting their statutory right to maintain the ADA-protected confidentiality of their health information, these individuals will, realistically, have no "choice" at all – let alone a genuinely free choice. The 2016 ADA Rule blesses this coercion.

d. The 2016 ADA Rule's redefinition of "voluntary" is unreasonable because it seriously undermines the purpose of the ADA's nondisclosure provision.

In addition to the rule's inconsistency with any ordinary definition of "voluntary," the EEOC's 2016 redefinition of this term defies the very purpose of the provision it purports to interpret. Congress enacted 42 U.S.C. § 12112(d), the ADA provision that addresses "voluntary" medical examinations and inquiries in employee health programs, out of concern about the pervasive "blatant and subtle stigma" that persons with disabilities experienced in the workplace. ADA House Report at 75. The enactment record reflects that individuals with disabilities that were perceived as especially upsetting, contagious, or otherwise socially disparaged, such as cancer and HIV/AIDS, needed this ban most acutely. *Id.*; *see also* Chai R. Feldblum, *Medical Examinations and Inquiries Under The Americans With Disabilities Act: A View From The Inside*, 64 Temple L. Rev. 521, 536 (1991) (discussing disability rights community's concern about stigma against individuals with HIV). For these individuals, privacy was – and still is – critical.

As the EEOC's 2000 ADA Guidance explained, the risk of employment discrimination was greater for individuals with "nonvisible disabilities," including "diabetes, epilepsy, heart disease, cancer, and mental illness." 2000 ADA Guidance. The 2000 ADA Guidance related Congress' conclusion that "the only way to protect employees with nonvisible disabilities is to prohibit employers from making disability-related inquiries and requiring medical examinations that are not job-related and consistent with business necessity." *Id.*

Indeed, since the ADA's enactment, cases have repeatedly demonstrated that when employees do reveal their private medical information, employment discrimination often follows. Too frequently, when employers learn of employees' disabilities – or perceive those employees as having disabilities – those employers make unsubstantiated assumptions about the employees' abilities and safety on the job. *See*, *e.g.*, *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960 (10th Cir. 2002) (explaining that employer "misused Mr. Garrison's entrance examination results" by revoking his conditional offer based on "'possible future injuries,'" such that "the jury could have determined [the employer] withdrew the job offer because of unsubstantiated speculation about future risks from a perceived disability"); *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 479 (5th Cir. 2006) (employer improperly withdrew job offer after learning that applicant had diabetes because it believed he was not "controlling" his condition).

Furthermore, as the ADA's enactment record reflects, if employees are forced to disclose ADA-protected medical information, not only can employers use that

information to discriminate against them directly, but also, being "outed" as having a disability can be a grave harm in itself. Congress sought to avoid these harms by allowing employees to choose to keep their health information private:

> For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related. Testimony before the Committee indicated there still exists widespread irrational prejudice against persons with cancer. While the employer might argue that it does not intend to penalize the individual, the individual with cancer may object *merely to being identified*, independent of the consequences.

ADA House Report at 75 (emphasis added); *see also Doe v. USPS*, 317 F.3d 339, 344 (D.C. Cir. 2003) (referring to an employee's "right to avoid being publicly identified as having a disability" under the Rehabilitation Act, the ADA's predecessor statute).

The ADA's ban on involuntary, non-job-related exams and inquiries guards against precisely these harms. Accordingly, any construction of "voluntary" in § 12112(d)(4)(B) that permits employers to pressure employees into revealing what the general ban shields as private would exacerbate the harms that § 12112(d)(4)(A) seeks to ameliorate. Instead, "voluntary" must mean that employees may freely choose or decline to answer medical questionnaires or undergo medical exams in order to take advantage of the health benefits they hope to gain from a wellness program. ADA House Report at 75 ("As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities.").

Therefore, the 2016 ADA Rule's redefinition of "voluntary" is an unreasonable construction of the statute, and, thus, contrary to law under *Chevron* Step II. *See Abbott Labs. v. Young*, 920 F.2d 984, 988 (D.C. Cir. 1990) (rejecting an agency decision as unreasonable because it was "linguistically infeasible" to reconcile the agency's position with the statutory language).

2. The EEOC did not give a reasoned explanation for its redefinition of "voluntary."

The EEOC's longstanding definition of "voluntary" in its 2000 ADA Guidance satisfies either the "uncompensated" or "non-coercive" definition, as it forbids all penalties for employees who choose not to undergo medical exams and inquiries through employee wellness programs. Under this regime, employees that chose to divulge ADA-protected medical information in wellness programs did so without any pressure or financial penalties/incentives – they freely volunteered their information. *See* 2000 ADA Guidance, Question 22; *cf.* 1995 ADA Guidance ("employer[s] cannot request, persuade, coerce, or otherwise pressure the individual to get him/her to disclose medical information" in a pre-employment context). The 2016 ADA Rule is an about-face from this position.

While agencies may reverse their policies, they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)). While the agency need not justify its decision in more detail than it would "for a new policy created on a blank slate," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), it must, nevertheless, "display

awareness that it is changing position" and "show that there are good reasons for the new policy" because the agency is inherently "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* (internal citations omitted). Accordingly, an "unexplained inconsistency" is arbitrary and capricious. *Brand X*, 545 U.S. at 218.

The 2016 ADA Rule does not provide a reasoned explanation for its reversal of the EEOC's longstanding position, nor does it give a justification that would be sufficient were the agency regulating "on a blank slate." *Fox Television Stations,* 556 U.S. at 515. Therefore, it is invalid under the APA.

a. The 2016 ADA Rule is an unexplained and unsupported departure from the EEOC's longstanding position.

The EEOC has not explained or justified the 2016 ADA Rule's departure from the agency's previous position that "voluntary" medical examinations and inquiries in wellness programs included only those that could be declined without penalty. 2016 ADA Rule at 31,126; 2000 ADA Guidance at Question 22; EEOC Brief, *EEOC v. Honeywell*, No. 14-cv-04517 (D. Minn. Oct. 27, 2014) ("EEOC *Honeywell* Brief") ("Honeywell seeks to compel employees to have medical examinations by imposing large financial penalties . . . Honeywell is, therefore, requiring employee participation or penalizing those who do not participate *in violation of the ADA*.") (emphasis added). Certainly, the 2016 ADA Rule does not explain why the EEOC believes that the time has come to "disregard[] facts and circumstances that

underlay or were engendered by" the no-penalty rule. *Fox Television Stations,* 556 U.S. at 515-16.

Indeed, the EEOC's reversal is particularly perplexing because, while the 2016 ADA Rule redefines "voluntary" to permit penalties/incentives up to the 30% maximum, the simultaneously-finalized GINA wellness rule retains a provision defining a "voluntary" wellness program as one in which "the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)(B). Consequently, the EEOC's decision to depart so significantly from this no-penalty definition in the 2016 ADA rule appears to be entirely arbitrary, as there is no apparent reason why, under GINA, "voluntary" must mean the same thing that it always has, but under the ADA, it must now mean something significantly different than the statute previously required.

b. The 2016 ADA Rule lacks sufficient justification regardless of the agency's prior position.

Even in the absence of such a stark policy change, the 2016 ADA Rule's justification would be insufficient to support a rule "created on a blank slate." *Fox Television Stations,* 556 U.S. at 515. While the rule's preamble repeatedly states that 30% of health insurance premiums is "not involuntary" or "not coercive," 2016 ADA Rule, 81 Fed. Reg. at 31,132-35, it never explains why or how the EEOC reached this conclusion. These conclusory statements are not enough to support the EEOC's selection of a numerical limit. In this respect, the 2016 ADA Rule resembles the Department of Education's regulation struck down by this Court in *Ass'n of*

Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 154 (D.D.C. 2012). The Court rejected as insufficient the Department's reason for setting a standard that would exclude the bottom quarter of programs from eligibility for funding because the Department's only explanation for that figure was that "failing fewer programs would suggest that the test was not 'meaningful' while failing more would make for too large a 'subset of programs that could potentially lose eligibility.'" *Id.* The Court reasoned, "That this explanation could be used to justify any rate at all demonstrates its arbitrariness." *Id.* Likewise, in this case, the EEOC's statement that a 30% penalty/incentive limit is always "not coercive" is a generic, conclusory phrase that could be applied to any selected number. In the absence of further reasoning, as in *Duncan*, the agency "has not provided a reasonable explanation of that figure," so "the court must conclude that it was chosen arbitrarily." *Id.* (citing *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1019 (D.C. Cir. 2002) ("[I]n the absence of any reasonable justification," the court "must conclude that this aspect of the [rule] is arbitrary and capricious. . . .").

The conclusion that the 2016 ADA Rule's penalty/incentive scheme is arbitrary is all the more appropriate because the rule gives no reasoned response to the numerous comments to the proposed rules. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (internal citations omitted) (agencies "need not address every comment, but . . . must respond in a reasoned manner to those that raise significant problems."). As discussed above, *see supra*, Part II.A.1.c, these

comments pointed out that the penalty/incentive limit does permit significant coercion.

While the EEOC dutifully summarizes these comments in the final 2016 ADA Rule, it fails entirely to actually address them. The EEOC's bald assertion that a 30% penalty/incentive limit renders inquiries and exams non-coercive and "effectuates the purposes of" the ADA and HIPAA, 2016 ADA Rule, 81 Fed. Reg. at 31,132-35, is not a "reasoned" response to these "significant concerns," *Covad Commc'ns Co.*, 450 F.3d at 550. The agency's abdication of its responsibility to explain how it determined that 30% is an appropriate measure of voluntariness for all employees everywhere "demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Id.* (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)). Likewise, the total absence of any analysis of the rule's economic impacts suggests no reason for its conclusion that an across-the-board 30% penalty/incentive somehow equates to the ADA's "voluntary" requirement. The agency's analysis sheds no light on its assertion that a penalty averaging $1,800 per individual – which seriously impacts average Americans' household budgets – is per se non-coercive.

The only clue to the agency's reasoning is its allusion to HIPAA. 2016 ADA Rule, 81 Fed. Reg. at 31,129. Yet, both the 2013 HIPAA Rule and the 2016 ADA Rule expressly acknowledge that compliance with HIPAA is not determinative of compliance with the ADA. 45 C.F.R. § 146.121(h); 2013 HIPAA Rule, 78 Fed. Reg. at 33,165 ("Other State and Federal laws may apply with respect to the privacy,

disclosure, and confidentiality of information . . . employers subject to the [ADA] must comply with any applicable ADA requirements for disclosure and confidentiality of medical information and non-discrimination on the basis of disability."); 2016 ADA Rule, 81 Fed. Reg. at 31,129.

Powerful evidence that HIPAA did not mandate the EEOC's 30% penalty/incentive rule originates in the ACA itself, whose amendment to HIPAA refrained from repealing or superseding the ADA. 42 U.S.C. § 300gg-4(j)(3)(A) (2008). Indeed, the EEOC itself has recently asserted this position in litigation. EEOC *Honeywell* Brief at 15 n.4 ("HIPAA and the ACA do not *require* employers to impose financial penalties in connection with wellness programs, and thus could not form the basis for a conflict of laws defense under the ADA." (emphasis original)).

Moreover, it is evident that HIPAA does not require the 2016 ADA Rule's redefinition of "voluntary" because HIPAA's regulatory 20% penalty/incentive rule coexisted with the EEOC's no-penalty position for ADA "voluntariness" for many years. The 2006 HIPAA Rule contemplated and rejected the notion that the two laws ought to be coextensive, recognizing that the HIPAA penalty/incentive limit was "not determinative of compliance with . . . any other State or Federal law, including the ADA." 2006 HIPAA Rule, 71 Fed. Reg. at 75,015 (also emphasizing 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."). That is only sensible, as ADA's and HIPAA's wellness provisions have entirely different purposes: HIPAA seeks to preserve access to affordable health care, while

the ADA protects individuals' private health information to avoid the discrimination and stigma that so often come from disclosing that information.

The Departments that promulgated the HIPAA rules, both before and after the ACA, clearly contemplated that their rules did not define what was permissible in the context of ADA- and GINA-protected information-collection. As such, there was no discernible basis for the EEOC to borrow a number from a portion of HIPAA as amended by the ACA rather than fulfilling its duty to define "voluntary" in a manner that accords with the ADA's statutory purpose of protecting individuals from being forced to disclose private medical information. *Cf. Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009) ("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.").

Therefore, in the EEOC's 2016 rulemaking, the absence of any factual or legal basis for the ADA rule's redefinition of "voluntary" warrants the conclusion that the 2016 ADA Rule violates the APA.

B. The 2016 GINA Rule is Arbitrary, Capricious, and Contrary to the Statute.

The 2016 GINA Rule's penalty/incentive scheme is unlawful because: (1) its treatment of spousal medical history as different from other protected "genetic information" contradicts express statutory language; and (2) its scheme permitting employers to penalize employees who choose not to provide spousal medical history is internally contradictory and unsupported by reasoned explanation. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 52.

1. The 2016 GINA Rule's treatment of spousal medical information as less protected than other forms of "genetic information" directly contradicts GINA's plain language.

The 2016 GINA Rule impermissibly treats spousal medical history as less protected than other forms of "genetic information," which contradicts the statute's plain language. GINA's prohibition on the acquisition of genetic information protects both employees and their family members. 42 U.S.C. § 2000ff(3). GINA defines "family members" as including dependents "through marriage, birth, or adoption or placement for adoption." *Id.* (incorporating the ERISA definition at 29 U.S.C. § 1181(f)(2)(A)(iii)).

There can be no dispute that this definition covers spouses. Congress expressly included spouses and adopted children within GINA's protections "because of the potential discrimination an employee or member could face because of an employer's or other entities' concern over potential medical or other costs and their effect on insurance rates." GINA Senate Report at 28. Therefore, a spouse's medical history is protected "genetic information" of the employee under the statute's unambiguous terms. 42 U.S.C. § 2000ff(4)(a).

However, the 2016 GINA Rule does not give spousal medical history the protection it affords other "genetic information." Instead, the rule permits employers to collect spousal medical history – and only spousal medical history – using financial penalties/incentives. 29 C.F.R. § 1635.8(b)(2)(iii).

The 2016 GINA Rule maintains the EEOC's longstanding definition of "voluntary" as "neither requir[ing] the individual to provide genetic information nor

penaliz[ing] those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)(B). Accordingly, employers may not penalize employees at all for refusing to provide their genetic information, and they must give any employee who participates in a wellness program any permissible reward irrespective of whether the employee provides "family medical history or other genetic information." *Id.* § 1635.8(b)(2)(ii). In addition, the EEOC acknowledges in the 2016 GINA Rule that spouses are "family member[s]" under the statute. 81 Fed. Reg. at 31,144. Thus, the only logical conclusion is that spouses are "family members" whose medical histories are "genetic information" of the employee, which may only be collected voluntarily – i.e., without the threat of penalties – and, employers cannot condition incentives on employees' willingness to surrender their spouses' medical histories.

Nevertheless, 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). Thus, employers may *not* penalize employees for keeping private their own genetic tests and medical histories, their children's tests and medical histories, and their spouses' genetic tests – but, they *may* penalize employees for refusing to divulge their spouses' medical histories.

The rule's exception to this protection for spousal medical history has no basis in the statute. Therefore, it is contrary to law and invalid under the APA. *Hearth, Patio, & Barbecue Ass'n*, 706 F.3d at 503.

2. The EEOC did not give a reasoned explanation for its rule permitting any penalty/incentive to provide spousal medical history that does not exceed 30% of health insurance premiums.

a. The 2016 GINA Rule's carve-out for spousal medical history is unexplained and internally contradictory.

The EEOC has made very little effort to justify its differential treatment for spousal medical history. While the Notice of Proposed Rulemaking suggested that spousal medical history would not be likely to reveal true genetic information of the employee, 2015 GINA NPRM, 80 Fed. Reg. at 66,856, the final 2016 GINA Rule makes no attempt to square its carve-out with the statutory text, the legislative history, or the agency's own regulations. Indeed, the EEOC maintained this approach despite the fact that comments to the proposed rule pointed out its inherent contradictions and departure from the organic statute. *See* AARP, Comment Letter on 2016 GINA Rule (Jan. 28, 2016), https://www.regulations.gov/document?D=EEOC-2015-0009-0074.

However, the maze of contradictions does not end there. The 2016 GINA Rule further provides that to collect spousal medical history, employers must ensure that the employee's spouse "provide[s] prior, knowing, *voluntary*, and written authorization." 29 C.F.R. § 1635.8(b)(2)(iii) (emphasis added). Yet, under the rule's own terms, the disclosure is not "voluntary" if it is given under threat of penalty. *Id.* § 1635.8(b)(2)(i)(B). It is impossible to discern how an employer may financially pressure an employee's spouse to divulge his or her medical history, while simultaneously ensuring that the information collection is "voluntary." The final

2016 GINA Rule did not assist in navigating this contradiction or explaining how it even relates to the statutory language or purpose.

For these reasons, the 2010 GINA Rule gives employers directions whose source is as elusive as their meaning. The rule lacks any indicia of reasoned decisionmaking and is, therefore, invalid under the APA. *U.S. Air Tour Ass'n*, 298 F.3d at 1019 ("[I]n the absence of any reasonable justification," the court "must conclude that this aspect of the [rule] is arbitrary and capricious. . . .").

b. The EEOC did not explain its decision to allow employers to penalize employees for a cumulative total of double the penalties permitted under the ADA.

In addition to stripping protection for spousal medical history, the 2016 GINA Rule's penalty/incentive scheme suffers from many of the same APA shortcomings as the 2016 ADA Rule: it ignores significant factual information raised in comments, fails to perform an economic analysis that would support its conclusion, and relies on no authority that would require this otherwise arbitrary conclusion. *See supra,* Part II.A.2.a. As a result, even assuming *arguendo* that the 2016 GINA Rule could lawfully allow *some* financial penalties/incentives contingent on providing spousal medical information, the rule's penalty/incentive provision would still be invalid because it allows the same coercion blessed by the 2016 ADA Rule, except that it doubles the penalties' coercive effect by permitting employers to penalize employees twice: once under the ADA, for withholding the employee's medical information, and once under GINA, for withholding spousal medical history. 29 C.F.R. § 1635.8(b)(2)(iii).

The 2016 GINA Rule's numerical limit for penalties/incentives remains as arbitrary as the 2016 ADA Rule, and twice as potentially coercive. Based on the comments discussed above, that means that: (1) individuals' insurance premiums would, on average, triple instead of double; and (2) the average increase in premiums (or equivalent penalties) would be $3,600 ($1,800 x 2) rather than $1,800. Indeed, nothing in the rule precludes the possibility that an employee and the employee's spouse, if both are employed, could be penalized for twice this amount *each*, yielding a 120% increase in premiums, for a total cost of an additional $7,200 per year ($1,800 x 2 for each = $3,600 total, x 2 if both are penalized, for a total of $7,200).

In light of the rule's silence on this possibility, its reassurance that the penalties/incentives are not coercive simply because they are consistent with the 2016 ADA Rule's 30% maximum, 2016 GINA Rule, 81 Fed. Reg. at 31,154, is both misleading and facially implausible. Accordingly, like the other aspects of both rules, there is no indication that this component of the 2016 GINA Rule is the product of reasoned decisionmaking. Hence, it violates the APA. *U.S. Air Tour Ass'n*, 298 F.3d at 1019.

Because the challenged portions of both the 2016 ADA and GINA Rules are arbitrary, capricious, and contrary to law, AARP is likely to succeed on the merits.

III. The Balance of Equities Favors Injunctive Relief.

"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.'" *Aamer v.*

Obama, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (quoting *Doeskin Prods., Inc. v. United Paper Co.*, 195 F.2d 356, 358 (7th Cir. 1952)). It has been approximately eighteen months since the regulatory process began, and no harm will befall the government from a delay during the pendency of this litigation. However, great harm would befall AARP's affected members should they be driven to divulge their medical information to their employer. That irrevocable injury cannot be undone after litigation. *See supra,* Part I.A. Furthermore, all parties involved – the government, employees, and particularly employers seeking to enact lawful wellness programs – would benefit from a stay of the applicability date until the merits are resolved. For these reasons, the balance of equities heavily favors injunctive relief.

IV. An Injunction Serves The Public Interest.

Preliminary injunctive relief serves the public interest for two reasons. First, the public has a strong interest in vigorous enforcement of the antidiscrimination provisions enshrined in federal civil rights statutes, including the ADA and GINA. *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 188 (D.D.C. 2011). Second, the public is best served by the preservation of the status quo when the injury is irreparable and irrevocable. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 237 (D.D.C. 2003) ("maintenance of the *status quo* pending adjudication of their claims on the merits serves the public interests"); *see also* EEOC *Honeywell* Brief at 28-29 ("It is essential that the public be confident that the terms of the ADA cannot be flouted, and that their interests in the privacy of their medical information will be

protected."). Therefore, preliminary injunctive relief is necessary to serve the public interest.

CONCLUSION

For the reasons discussed above, 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: October 24, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I caused a true and correct copy of the Foregoing Memorandum Of Law in Support of Plaintiff's Application for Preliminary Injunction Staying the January 1, 2017 Applicability Date for Parts of The EEOC Wellness Programs Rules via hand delivery on the following parties:

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