IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AARP'S REPLY MEMORANDUM IN SUPPORT OF AARP'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Regulations and Guidance

Legislative History

INTRODUCTION

Repeatedly and with increasing emphasis, the EEOC has told this Court that its 2016 Rules' penalty/incentive schemes are entitled to deference. Deference, in the government's view, is a hair's breadth from no judicial review at all: when any amount of ambiguity appears in the statute, the agency becomes unbounded by the statute's context and purpose, untethered to facts in the record, and unencumbered by any explanatory obligation beyond its own say-so.

But, while the law affords agencies considerable capital in issuing regulations, it does not give them a blank check. The Court owes no deference to Rules that do nothing to effectuate Congress' intent to ensure genuine voluntariness in divulging private medical and genetic information, rely on an irrelevant number plucked from an entirely different statutory context, and employ contortion to fit within the statutes' text—as well as the confines of common sense and basic logical reasoning. The EEOC's Opposition fails to overcome these fatal flaws, and, thus, the Court need not defer to the agency's 2016 Rules.

ARGUMENT

I. The EEOC Has Still Failed to Show That Its 2016 Rules Reasonably Construe the Civil Rights Laws' "Voluntary" Requirements.

A. The EEOC cannot demonstrate that its redefinition of "voluntary" under the ADA gives the term a contextually plausible meaning.

First and foremost, the EEOC continues to offer no serious argument, explanation, or factual basis for its new definition of "voluntary." The agency's entire defense of its penalty scheme is nothing more than a conclusory statement

and an emphasis on *Chevron* deference. Defendant's Opposition to AARP's Cross-Motion for Summary Judgment [ECF No. 38] ("EEOC Opp. to Cross-Mot.") at 13-15. However, as the Supreme Court has explained, "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation' . . . [a]nd reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citing *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013), and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J. dissenting) ("the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct").

The EEOC has still failed to explain how the 2016 Rules' penalty scheme makes sense in the context of the civil rights laws' purposes. The agency's Opposition provides no substantive response to AARP's contention that the statutory "voluntary" requirements must be meaningful and must guarantee employees a genuine choice about whether to exercise their right to withhold private medical and genetic information. EEOC Opp. to Cross-Mot. at 14; AARP's Cross-Motion for Summary Judgment [ECF No. 35] ("AARP's Cross-Mot.") at 27-31. The EEOC dismisses courts' constructions of "voluntary" requirements in False Claims Act ("FCA") and Fair Labor Standards Act ("FLSA") cases as merely "one reasonable construction." EEOC Opp. to Cross-Mot. at 14. But this cursory response ignores entirely these cases' reasoning: that as under the ADA and GINA, where an

express "voluntary" requirement is meant to guarantee meaningful free choice rather than technical volition, "voluntary" actions are only those taken without undue pressure, not merely those that are somehow, existentially, a product of free will. *United States ex rel. Griffith v. Conn*, No. 11-157-ART, 2015 U.S. Dist. LEXIS 22668, *13-15 (E.D. Ky. Feb. 24, 2015) (FCA); *Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 919 (S.D. Tex. 2009) (FLSA). These decisions cannot be written off as applying one among many permissible interpretations because their reasoning illustrates precisely why a definition of "voluntary" that permits employers to impose heavy penalties on employees if they do not divulge private medical and genetic information cannot fit *any* contextually reasonable understanding of the statutory term.

In addition, while the EEOC once again invokes the notion referred to in this Court's previous decision that "[a] hard choice is not the same as no choice," EEOC Opp. to Cross-Mot. at 13 (citing Order Denying Motion for Preliminary Injunction [ECF No. 27] ("PI Order") at 24), it has not addressed the fact that the agency's own rulemaking reflects its judgment that some choices are *too* hard to be voluntary. *See* AARP's Cross-Mot. at 30-31 (citing 2016 ADA Rule, AR 9) ("to give meaning to the ADA's requirement that an employee's participation in a wellness program must be voluntary, the incentives for participation cannot be so substantial as to be coercive").

Nor has the agency seriously addressed the voluminous administrative record's extensive documentation of exactly how hard this choice would be for

employees who do not want to reveal their medical and genetic information in wellness programs. *See* AARP's Cross-Mot. at 9-10, 12-13, 25-27. Instead, the EEOC simply eschews the thousands of comments submitted by organizations and individuals, which explain the financial and personal cost associated with either submitting to or resisting the economic pressure permitted by the Rules. The agency downplays these submissions as merely "comments from some individuals who would rather not choose between foregoing an incentive and participating in a workplace wellness program." EEOC Opp. to Cross-Mot. at 13. Like the 2016 Rules' conclusory statement that the 30% penalty/incentive cap is "not coercive," 2016 ADA Rule, AR 8-11, this dismissive characterization does nothing whatsoever to explain how the Rules could possibly be reasonable. Rather, the agency continues to brush off these serious concerns, which were raised in extensive, fact-intensive comments, yielding an unsupported and unreasonable rule devoid of any explanation, let alone analysis, of why 30% would not be coercive. *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.")

Despite the EEOC's contrary contention, AARP's argument does not amount to merely an observation that the court might have reached a different conclusion were it "writing on a blank slate." *See* EEOC's Opp. to Cross-Mot. at 14-15. Rather, it is evident that the agency's interpretation cannot withstand even the deferential review that *Chevron* requires.

B. The inconsistency between the ADA and GINA Rules' definitions of "voluntary" remains unexplained and demonstrates that the agency's interpretation is unreasonable.

The EEOC has still given no coherent reason for the stark inconsistency between the 2016 ADA Rule's definition of "voluntary," which permits significant financial penalties for withholding disability-related information, 29 C.F.R. § 1630.14(d)(3), and the 2016 GINA Rule's definition of "voluntary," which still expressly forbids penalties for withholding genetic information, 29 C.F.R. § 1635.8(b)(2)(i)(B).[1] As in prior briefing, the EEOC makes no attempt whatsoever to explain why there are "good reasons" to "disregard[] facts and circumstances that underlay or were engendered by" the no-penalty rule under the ADA, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), but there are no such "good reasons" to do the same under GINA.

Instead of providing any factual basis or legal reasoning for the discrepancy between the two regulations, the EEOC simply asserts more forcefully than before

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[1] Of course, as discussed below, the while it is undisputed that medical information of an employee's spouse is part of the employee's genetic information, the agency has permitted employers to penalize employees whose spouses do not provide their own medical information—a provision the EEOC has described both as an exception to GINA's no-penalty definition *and* as compliant with GINA's prohibition against imposing penalties on employees who refuse to provide their genetic information. *See infra*, Part III. Nonetheless, the GINA definition of "voluntary" in 29 C.F.R. § 1635.8(b)(2)(i)(B) remains identical to the EEOC's longstanding definition: requests for confidential information are only voluntary when the employer "neither requires the individual to provide genetic information nor penalizes those who choose not to provide it." 29 C.F.R. § 1635.9(b)(2)(i)(B); 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").

that it was not obliged to reconcile the two regulations' definitions. EEOC's Opp. to Cross-Mot. at 16-17. In particular, the agency argues that canons of statutory construction have no role in a *Chevron* analysis beyond assessing whether a statute is or is not ambiguous. *Id.* Yet, the EEOC offers no support for this sweeping expansion of the *Chevron* doctrine; instead, the agency cites cases in which courts did use statutory construction tools to assess statutory ambiguity. *See id.*

Even at Step II of the *Chevron* analysis, the Court does not assess whether a regulation is reasonable in a vacuum. Rather, it inquires whether the regulation reflects a reasonable construction *of the statute it interprets*—which is plainly still an exercise in statutory construction. *See Utility Air Regulatory Group*, 134 S. Ct. at 2427 (describing the reasonableness analysis under *Chevron* as "statutory interpretation"). The government correctly asserts that the Court is not free to *solely* apply tools of statutory construction and ignore the agency's interpretation, thereby conducting a de novo review, EEOC's Opp. to Cross-Mot. at 16-17. But, the Court certainly *is* free—if not obliged—to use any tools at its disposal, including canons, to determine whether the agency's rule accords with a reasonable construction of the statute, in context, and in light of its purpose as a whole. *See Utility Air Regulatory Group*, 134 S. Ct. at 2427. Consequently, while not dispositive, the canon that like terms in statutes on the same subject generally should be construed consistently is properly within the principles the Court should consider in its analysis.

More to the point, what matters here is not the canon of construction itself, but the common sense principle that the canon embodies. It is telling that the agency still cannot articulate a single reason—factual or legal—why "voluntary" acquisition of genetic information under GINA must not involve penalties, while "voluntary" disclosure of disability-related information under the ADA can come under threat of thousands of dollars' worth of penalties. Principles of statutory interpretation are unnecessary to conclude that the agency cannot explain this inconsistency for a simple reason: it makes no sense. Accordingly, it is not entitled to deference.

II. The EEOC's Purported Explanations for its 2016 Rules Are Irrational, Inaccurate, and Insufficient.

A. The EEOC's decision to make the ADA and GINA's wellness provisions appear harmonious with HIPAA's is unjustified and ineffective.

While the agency's 2016 Rules created a critical inconsistency in the meaning of "voluntary" in parallel provisions in the civil rights laws, the EEOC simultaneously asserts a commitment to consistency between the penalty/incentive scheme limit in HIPAA and the civil rights laws, supposedly to alleviate confusion. EEOC's Opp. to Cross-Mot. at 18-20. This justification for the 2016 Rules does not hold water because, while seeking clarity may be a valid aspiration in the abstract: (1) the agency was not permitted to "clarify" the civil rights' laws voluntariness requirements by making them so permissive as to be meaningless; and (2) the 2016 Rules are not, in fact, consistent with the HIPAA scheme, and only muddy the waters further, exacerbating rather than resolving confusion.

While the EEOC appropriately acknowledges that HIPAA and the civil rights laws have different but overlapping areas of authority regarding wellness programs, the agency goes astray in arguing that where the two sets of laws overlap, the civil rights laws must yield. *Id.* at 18-19. That is not the case. Where wellness programs involve disability-related or genetic inquiries, both sets of rules apply, so employers must comply with both. *See* 2013 HIPAA Rule, AR 63 (explaining that compliance with the provision authorizing HIPAA's penalty/incentive limit "is not determinative of compliance with . . . any other State or Federal law, *including the ADA*") (emphasis added). With regard to this one element of workplace wellness programs (disclosure of disability-related and genetic information), the civil rights laws create more stringent protections for employees than HIPAA because medical and genetic inquiries and examinations involve deeply personal information that, if revealed, could result in employment discrimination. Thus, the higher standard of protection under the civil rights law sets the bar.

The EEOC has conceded, as it must, that there is no conflict of laws here: HIPAA does not *require* penalties that the civil rights laws forbid. EEOC Opp. to AARP's Motion for Preliminary Injunction ("PI Opp.") at 24-25. Nonetheless, the agency maintains that it *may* simply choose to subordinate the civil rights laws' mandates to HIPAA's by deeming any penalties permissible under HIPAA to be considered "voluntary" under the ADA. EEOC Opp. to Cross-Mot. at 18-19. It may not.

The reason for that is clear: HIPAA's 30% penalty/incentive limit for health-contingent wellness programs that are part of group health plans does not—and was never meant to—guarantee that employees' disclosure of private medical and genetic information is "voluntary." The 30% figure represents an evident political compromise between HIPAA's historical 20% limit and a legislative proposal to raise the limit to 50%, not an analysis of what penalty/incentive level would actually coerce employees to divulge personal medical information. S. Rep. No. 111-89, at 439-40 (2009) ("Senate ACA Report") (additional views of Sen. Rockefeller expressing concern about impact on persons with disabilities); H.R. Rep. No. 111-299, pt. 3, at 185 n.7 (2009) ("House ACA Report") (minority views).

Moreover, Congress set the HIPAA limit to serve an entirely unrelated purpose from the civil rights laws: preserving access to health insurance for individuals with health conditions, who may be unable to meet a wellness program goal related to a health status factor.[2] 2001 HIPAA Notice of Proposed Rulemaking

[2] That is why HIPAA does not cap penalties/incentives in purely participatory wellness programs: those programs do not risk unduly penalizing individuals with health conditions who cannot achieve particular health status factors. The EEOC's argument that this means that Congress "intended there to be less regulation of these programs—not more," EEOC's Opp. to Cross-Mot. at 19, is particularly wrongheaded. There was no reason for HIPAA to regulate penalties/incentives in participatory programs because participatory programs do not implicate the concerns that HIPAA was enacted to address: health status discrimination. In contrast, health-contingent programs frequently do implicate HIPAA concerns. Not so for the civil rights laws: the ADA and GINA are implicated predominantly by participatory programs, whose inquiries and examinations (through HRAs and biometric testing, AR 7556-57) must be voluntary. Participatory programs should not be less regulated—they are simply regulated more by the civil rights laws than by HIPAA. And it is the civil rights laws that Congress charged the EEOC with enforcing.

(NPRM), 66 Fed. Reg. 1421, 1429 (Jan. 8, 2001); 2013 HIPAA Rule, AR 61-62. Indeed, the 2013 HIPAA Rule expressly disclaimed any notion that the Rule addressed whether information-collection was voluntary when wellness programs' inquiries and exams tread onto ADA- and GINA-protected territory. 2013 HIPAA Rule, AR 68 ("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."). So, while the EEOC is correct that Congress intended the ACA's wellness program provisions "to reach *all* workplace wellness programs offered in connection with a group health plan, whether they make disability-related inquiries or not," EEOC's Opp. to Cross-Mot., both Congress and the Departments promulgating the 2013 HIPAA Rule appropriately anticipated that where wellness programs reached far enough to implicate the civil rights laws, additional restrictions would apply.

In short, preserving genuine voluntariness in wellness programs that *do* implicate the ADA and GINA would not unravel Congress's plan to permit incentives under HIPAA; many aspects of wellness programs would not trigger additional restrictions. Nevertheless, where the two sets of laws overlap, the agency charged with implementing the civil rights laws cannot simply choose to give more weight to HIPAA, as the EEOC claims it did in the 2016 Rules. EEOC's Opp. to Cross-Mot. at 17. Rather, the agency must ensure that the civil rights laws'

additional protections remain present and meaningful. It did not fulfill that duty by simply asserting that the 30% limit borrowed from HIPAA also sufficed to guarantee voluntariness.[3] This was not a lawful way to achieve clarity in the legal landscape surrounding wellness programs.

Nor was it an effective way to do so. In addition to the aforementioned inconsistency between the 2016 ADA and GINA Rules' definitions of "voluntary," the EEOC's rules are inconsistent with HIPAA's penalty/incentive limits in ways that many commenters considered extremely confusing. *See*, *e.g.*, Health Enhancement Research Organization (HERO) comment, AR 2711-19 (including a chart detailing inconsistencies); Business Health Coalition comment, AR 2755 ("We urge the EEOC to clarify this condition while also considering incentive limits that remain consistent with current ACA and HIPAA designations."); Business Roundtable comment, AR 2964-67 (detailing reasons why the organization believes that "the construct of the proposed rule is limiting and inconsistent with the Affordable Care Act"); Society for Human Resource Management comment, AR

[3] Similarly, the EEOC's renewed focus on the Treasury Department's penalty for large employers that do not provide "affordable" health insurance, EEOC's Opp. to Cross-Mot. at 21-22, does not aid its argument. In addition to the significant number of employees that this rule would not help (those who work for smaller employers, or those whose incomes are high enough that "affordable" health insurance will not be too high a percentage of their income, but who will still face serious hardship from the cost increases under wellness programs), this rule attempts to use yet another irrelevant statutory standard—affordability—as a proxy for "voluntary" disclosure under the civil rights laws. While the EEOC protests that this protection aids a significant number of employees, it does not address the fundamental problem that some promise of "affordable" health insurance for some low-income employees is no substitute for a guarantee that exams and inquiries in wellness programs are "voluntary" for all.

7196-7202 (describing at length the inconsistencies between the 2016 GINA Rule and penalties/incentives permitted under the ACA); Unite Here Health comment, AR 7203-08 ("The Fund strongly urges the Commission to implement regulations that are consistent with existing wellness program rules and regulations under [HIPAA] and [the ACA]."); College and University Professional Association for Human Resources, et al., comment, AR 7210-25 (explaining "the proposal's failure to adopt incentive limits consistent with those established under the ACA and regulations issued under [HIPAA] by the . . . tri-agency regulations"). As the HERO Comment details, among the inconsistencies between the 2016 Rules and the 2013 HIPAA Rule are: (1) the EEOC Rules cap penalties/incentives at 30% of the cost of individual health insurance premiums, while HIPAA caps penalties at 30% of the cost of premiums in the plan in which the employee is enrolled; (2) the 2013 HIPAA Rule permits penalties/incentives equal to the cost of 50% of the applicable premium in tobacco cessation programs, but the EEOC Rules do not; and (3) HIPAA allows unlimited incentives in participatory programs, while the EEOC Rules apply the 30% cap. HERO Comment, AR 2718.

The EEOC acknowledges one of these discrepancies: the difference between the 2016 Rules' and 2013 HIPAA Rule regarding how the 30% incentive level is calculated (i.e., what denominator applies). EEOC's Opp. to Cross-Mot. at 19. But, the EEOC's purported explanation for "why this choice made sense in the context of the ADA and GINA," *id.*, is merely a more detailed exposition of *how* the Rules

work, not an explanation of *why* this difference is either a sensible way to make the Rules consistent with HIPAA or a reasonable construction of the civil rights laws.

Thus, the EEOC's explanation for its 30% limit fails on both fronts: it neither effectuates the civil rights statutes' "voluntary" requirement nor creates the harmony with HIPAA that the agency purportedly set out to achieve. It is, therefore, wholly arbitrary.

B. The EEOC's policy considerations are not permitted by the statutes that the agency is charged with interpreting and enforcing.

The EEOC argues in multiple contexts that the 2016 Rules were driven by appropriate policy considerations. EEOC's Opp. to Cross-Mot. at 16 n.11, 17, 24. Contrary to the EEOC's suggestion, AARP does not argue that the agency could not consider policy outcomes. *Id.* at 24. Rather, under the APA, the EEOC may not to elevate its preferred policy outcomes over its duty to faithfully interpret the ADA and GINA. Specifically, the EEOC was not entitled to decide that spousal medical history deserved less protection than other types of information Congress defined as "genetic information" because spousal medical history is not likely to reveal the information the agency considered genuinely, and not merely technically, genetic. 2016 GINA Rule, AR 37 ("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."). Congress' policy decision—that spousal information must be covered "genetic information" because "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," S. Rep. No. 110-48 (2007) ("GINA Senate Report") at 28—must take precedence over the EEOC's.

Nor are the 2016 Rules justified by the EEOC's supposed need to "balance two legislative policies in tension," as the agency contends. EEOC's Opp. to Cross-Mot. at 17. That two different sets of laws regulate the employment context is not "tension"—it is entirely ordinary. For instance, employers must regularly ensure that their employment practices conform to both federal and state civil rights laws, even where one may be more restrictive than the other. Employers also must be sure that their working environments conform to both the ADA and Occupational Health and Safety Act ("OSHA") standards, even where one statute has more stringent requirements about physical space and conditions. Overlapping rules are a staple of American law that many entities, including employers, must deal with on a regular basis—they are not a "tension" that must be resolved.

More fundamentally, however, it was not the EEOC's duty to "balance" HIPAA and the civil rights laws. Even the case law on which the agency relies for this proposition is inapposite, because it applies to "conflicting *policies that were committed to the agency's care by the statute*." *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989) (emphasis added). The ADA and GINA were "committed to the agency's care." *Id.* HIPAA was not. The EEOC chose to "balance" the two of its own accord, and in doing so, it made a policy choice

that was outside its purview. That sort of policy decision cannot help a regulation withstand APA review.

III. The EEOC's Semantic Arguments Ignore Common Sense and the Administrative Record.

A. The EEOC's justifications for the 2016 GINA Rule's spousal information carve-out are nonsensical and insufficient.

The agency employs particularly tortured logic in pursuit of a justification for the GINA Rule's spousal information carve-out. In addition to the conceptual flaw discussed above—that the EEOC has purported to create an "exception" based on the agency's decision to value its own policy considerations above Congress's judgment, *see supra,* Part II.B—the government also attempts to show, in effect, that the "exception" is not an exception at all, but an instance when GINA's protections do not apply. *See* EEOC's Opp. to Cross-Mot. at 25-26.

In its latest iteration, the agency's position is now clear: the Rule, the EEOC contends, does not violate GINA because the Rule does not permit employers to incentivize employees or their spouses to provide *their own* genetic information (a practice forbidden by the statute and other portions of the Rules themselves). *Id.* The agency correctly notes that under the statute, the health data of an employee's spouse is not the spouse's genetic information, but is considered the *employee's* genetic information. *Id*; *see also* 42 U.S.C. § 2000ff-4(a). However, the EEOC goes on to argue that the Rule is permissible under GINA and its other regulatory strictures because the Rule only permits employers to incentivize the *employee* if the employee's *spouse* provides the *employee's* information. EEOC's Opp. to Cross-Mot.

at 25-26 & n.26. Consequently, the agency suggests, the scheme technically complies with GINA because the employer may not incentivize the employee for providing the employee's own genetic information, and it may not incentivize the spouse to provide the spouse's genetic information—but it may incentivize the *employee* if the employee's *spouse* divulges the *employee*'s genetic information. *Id.* This argument is nothing more than a linguistic device for circumventing the statute's protections. Such a construction permits employers to simply specify that the employee—the individual who has a relationship with the employer—must delegate the task of divulging his or her genetic information to his or her spouse to avoid facing a penalty. That is not an interpretation of GINA; it is an evasion of GINA.

Indeed, it is plain that the agency does not even believe that its Rule is realistic because it contemplates providing "incentives" to an employee based on the actions of an employee's spouse. *See id.* at 26. The EEOC must recognize that the employee's and spouse's actions are not independent, unrelated decisions, such that neither will feel pressure to ensure that the employer receives the spouse's medical data. That is only logical, as spouses are not strangers whose decisions about health insurance are unrelated, but part of a family unit whose decisions about medical coverage and expenses are inherently intertwined. Thus, the agency's argument here defies not only common sense but also, the underlying premise of the Rule itself, which recognizes this connection.

Similarly, the EEOC's justification for the cumulative effect of the two Rules' permissible 30% penalties for withholding private information ignores basic common sense and contradicts the agency's own reasoning. Despite the Rules' own conclusion that any penalty exceeding 30% of self-only coverage is coercive, the EEOC argues that it may permit a 60% total penalty for employees who refuse to divulge both their own health information and their spouse's information because the agency "selected a per-transaction approach" (or sometimes a "per-individual approach") rather than HIPAA's "per-household approach." *Id.* at 27. Once again, that is a description of the agency's actions, but it is not a justification.

Moreover, to the extent that the EEOC suggests that it has explained itself because its Rule imposes a penalty worth 30% of self-only coverage on each individual "irrespective of choices made by his or her spouse," that is both an inaccurate description of the Rule and factually implausible. The Rule permits an employer to "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, an employer may impose a 30% penalty not separately on each spouse, but on the employee—twice.

In addition, the agency's argument rests on the same unrealistic assumption contained in its argument to evade GINA: that spouses' finances and decisions about submitting sensitive medical and genetic information to an employer are unrelated. Indeed, this assumption is particularly inappropriate in light of Congress's decision to categorize spousal medical information as the employee's

genetic information because it is likely to be used to discriminate against the employee. GINA Senate Report at 28. Congress concluded that these two categories of data are not separable. The EEOC cannot avoid the logical conclusion that a 60% cumulative penalty imposed for an employee's refusal to give his or her employer access to his or her medical and genetic information permits employers to charge employees twice the amount that the agency determined to be the upper limit of "voluntariness."

In addition, the EEOC's argument that an employer could never extract a penalty worth 120% of insurance coverage because Title I of GINA independently forbids employers from requesting genetic information of spouses who are not beneficiaries of the employee's insurance, EEOC's Opp. to Cross-Mot. at 27 & n.17, ignores many likely factual scenarios. First, this argument assumes that both spouses could not be beneficiaries of each other's plans as secondary coverage—a possibility that virtually every medical intake form contemplates—in which case, each spouse's insurer could permissibly make requests of both spouses. Moreover, the agency's argument once again conflates rules applying to group health plans with rules covering employers' wellness programs. As the EEOC acknowledged in its rulemaking, employee wellness programs are not always administered by a group health plan; some are administered by independent wellness vendors. *See* 2016 ADA Rule, AR 8 (discussing EEOC's conclusion that it was necessary to limit incentives in wellness programs that are not part of an employer-sponsored group health plan). These vendors are not regulated by HIPAA or Title I of GINA, so there

is no legal barrier, as the agency contends, to prevent them from imposing a 60% penalty on an employee whose spouse is also paying a 60% penalty when both refuse to divulge private medical and genetic information to their employers through wellness programs. Indeed, given that the 2016 Rules permit penalties/incentives irrespective of whether the employer even *has* a group health plan, AR 2, there is no reason whatsoever to assume that limits on group health plans rule out the Rules' damaging potential. The agency's only real response to this scenario is to deny the possibility that it could occur—another instance of the EEOC's refusal to confront the consequences permitted by its 2016 Rules.[4]

B. The EEOC's conclusory explanation for its bright-line 30% Rule is not grounded in the administrative record.

For much the same reason that the 2016 Rules' penalty/incentive schemes are not reasonable constructions of the civil rights statutes' "voluntary" requirements, the agency's decision to define "voluntary" using an across-the-board 30% limit is irrational: it is not in any way justified by the administrative record. The agency's *ipse dixit* that penalties/incentives worth 30% of self-only health insurance premiums are categorically "not coercive," 2016 ADA Rule, AR 8-11, does not respond to comments in the record, nor does it take into account the facts set forth in those comments.

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[4] The EEOC's argument that AARP does not have standing to point out that the 2016 Rules permit this 120% scenario is meritless. *See* EEOC's Opp. to Cross-Mot. at 17. The 2016 Rules' implicit permission for wellness vendors to cause this result need not be exemplified in this lawsuit to be discussed here. A declarant need not show that he will likely be harmed in every possible way permitted by the Rules for AARP to invoke those possibilities to demonstrate the agency's irrationality.

In addition to the thousands of individual comments that the EEOC dismisses as personal preferences, EEOC's Opp. to Cross-Mot. at 13, the record contains empirical data showing the extent of the financial hardship that the Rule would impose on average-income households, as well as evidence that persons with disabilities—who need the civil rights laws' protection the most—tend to have lower incomes, higher medical costs, and a greater risk of experiencing employment discrimination. *See* AARP's Cross-Mot. at 9-11.

The agency has never explained how it took these record facts—not merely individuals' opinions—into account when it declared that 30% of self-only health insurance premiums was an appropriate across-the-board benchmark for voluntariness. The EEOC seeks to distinguish *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012), by arguing simply that the 30% figure was effectively pegged to the HIPAA standard, EEOC Opp. to Cross-Mot. at 20, but as explained above, that is neither accurate nor sufficient, *see supra* Part II.B-C. Because HIPAA's standard is not a valid excuse for using some version of a 30% limit, the agency "has not provided a reasonable explanation of that figure," so "the court must conclude that it was chosen arbitrarily." *Duncan*, 870 F. Supp. 2d at 154.

To avoid this conclusion, the EEOC relies on the principle that courts generally defer to agencies' expertise in line-drawing decisions when agencies "must select some, necessarily somewhat arbitrary figure." EEOC's Opp. to Cross-Mot. at 20 (citing *United Dist. Cos. v. FERC*, 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996)). But

that principle does not give agencies unbounded authority, and it does not apply here, for two primary reasons. First, the figure chosen must still be supported by *some* record evidence, and must "respond[] to substantial criticisms of that figure," *United Dist. Cos.*, 88 F.3d at 1141 n.45, and be "reasonably explained," *Emily's List v. FEC*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009). As AARP has discussed at length, the EEOC's number does not fit that bill because other than its inapposite reference to HIPAA, its conclusory explanation "could be used to justify any [number] at all." *Duncan*, 870 F. Supp. 2d at 154. The Court need not defer to the EEOC's expertise as a civil rights enforcement agency when it chose not to apply that expertise, and instead selected a number born from raw political compromise concerning access to health care.

Second, and perhaps more fundamentally, the agency's argument presupposes that a bright-line rule is the only appropriate definition of "voluntary." But, unlike the campaign contribution limits at issue in *Emily's List*, 581 F.3d at 22 n.20, or the length of contract terms at issue in *United Distribution Cos.*, 88 F.3d at 1141, voluntariness is not necessarily susceptible to a purely quantitative interpretation. As cases interpreting the term "voluntary" in other contexts—including the employment context—reflect, the question of when individuals are unduly pressured to act is often a nuanced one that involves qualitative aspects of the pressure's effects on the individual. *See Haszard v. Am Med. Response NW, Inc.*, 237 F. Supp. 2d 1151, 1153 (D. Ore. 2001) (training not "voluntary" under Fair

Labor Standards Act where working conditions or continuance of employment "would be adversely affected by nonattendance").

This is not a novel concept for employers or the EEOC, both of which face fact-based, situational standards—even for the meaning of "voluntary"—rather than numerical ones to separate unlawful actions from lawful ones in many contexts. *See*, *e.g.*, *EEOC Compliance Manual*, *Early Retirement Incentives, Voluntariness*, https://www.eeoc.gov/policy/docs/benefits.html#B ("The determination of whether an [early retirement incentive] is voluntary will be based upon the facts and circumstances of a particular case. The test is whether, under those circumstances, a reasonable person would have concluded that there was no choice but to accept the offer."); *cf. Burlington N. & Santa Fe Ry. Co.*, *v. White*, 548 U.S. 53, 67 (2006) (holding that a materially adverse action for purposes of a retaliation claim is one that would deter a reasonable employee under the circumstances from engaging in protected activity). A penalty/incentive's quantity may well be all that matters when considering affordability and cost-prohibitive rates of health insurance under HIPAA. However, it is not readily apparent how a number encompasses the more circumstance-specific aspects of voluntariness in the workplace, where the type of incentive, the context in which it is applied, the impact on employees—financial and otherwise—and many other considerations may come into play. Consequently, the EEOC was certainly not obliged to draw a bright line to interpret "voluntary" under the civil rights laws. And, if the agency chooses to adopt such a bright line, it must do *something* to explain why that figure is a reasonable

and appropriate one to measure voluntariness under the civil rights laws. Because the EEOC did not, the Court should not defer to the line that it arbitrarily chose.

CONCLUSION

For the foregoing reasons, the Court should grant AARP's Cross-Motion for Summary Judgment.

Respectfully submitted,

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

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Counsel for AARP

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2017, I electronically filed the foregoing AARP's Reply Memorandum In Support of AARP's Cross-Motion for Summary Judgment with the Clerk of Court for the United States District Court for the District of Columbia and served all parties to the case via electronic mail.

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

Counsel for AARP