UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LISA KWESELL; CHRISTINE TURECEK; AND JASON SCHWARTZ, individually and on behalf all others similarly situated,	:	**CIVIL ACTION NO.: 3:19-cv-1098 (KAD)**
	:	**CLASS ACTION**
Plaintiffs,	:	
v.	:	
YALE UNIVERSITY,	:	
Defendant.	:	**March 2, 2020**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

"**You have required health actions that are now past due.** A $25 weekly opt out fee will be deducted from your pay. Act now to stop the weekly $25 fee from being deducted from your paycheck[.]" *See* Past Due Notice HEP Health Action, attached hereto as **Exhibit A** (emphasis in original).

Defendant Yale University ("Yale") recently sent Lisa Kwesell, a named plaintiff in this case, this notice in the mail. The "required health action[]" was a colorectal screening, a procedure required under Yale's Health Expectation Program ("HEP" or the "Program"). When Lisa received the notice, she had already undertaken an at-home colorectal test, the one recommended by her doctor, but the Program required her to take a different exam, so Yale was not satisfied. Because Lisa refused to undergo unnecessary testing, Yale has begun deducting the $25 "opt-out fee" from her paycheck — a fee that will add up to $1,300 over the course of the year.

Lisa's experience with the Program is not unique, but an endemic feature of the HEP as a whole. The Program requires certain union employees and their covered spouses to adhere to a strict schedule of medical examinations. Further, to administer the Program, health insurance claims data, which reflects personal medical and genetic information, is regularly transferred without employees' consent to one of Yale's wellness vendors — accurately named HealthMine. HealthMine analyzes the data to identify union employees who have a condition that requires them to engage in "health coaching." Those identified for health coaching must complete three hours of conversations with a "coach" who dives into their medical conditions, prescription use, and more. Anyone who does not comply with the HEP, or whose spouse does not comply, must

pay the price and forfeit up to $1,300 annually from their pay. This regime is not what any ordinary person would call "voluntary."

Thus, the Program violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(d), and the Genetic Information Nondiscrimination Act ("GINA"), 42 U.S.C. § 2000ff-1(b). These two civil rights statutes seek to protect employees from discrimination by prohibiting employers from requiring them to undertake non-job-related medical examinations, making non-job-related medical inquiries, or acquiring genetic information from any employee. 42 U.S.C. § 12112(d); 42 U.S.C. § 2000ff-1(b). These statutory prohibitions have narrow exceptions for employee wellness programs, as long as participation in those programs is "voluntary." *Id.*

Here, "voluntary" must be defined in a meaningful manner to give life to the statutes' general prohibitions on workplace medical testing and inquiries and the collection of genetic information. Dictionaries in use at the time of the ADA's enactment, similar "voluntary" provisions in other statutes such as the False Claims Act ("FCA") and Fair Labor Standards Act ("FLSA"), the ADA's and GINA's clear purpose, and the ordinary, plain meaning any individual would give to the word "voluntary" in this context all inexorably establish that "voluntary" must mean more than a technical "choice" or "not accidental" action. It must mean a decision made without financial consideration or coercion, and as a matter of genuinely *free* choice. That definition simply cannot be squared with a program like the HEP, which imposes financial penalties for failure to submit to medical examinations, inquiries, and requests for genetic information. The ADA's and GINA's plain language demands that employees be able to freely choose, on their own terms, when to disclose private medical and genetic information as part of their jobs.

Even if the Court concludes that the statutes contain some ambiguity as to the term voluntary, the no-penalty definition of "voluntary" endorsed by the Equal Employment Opportunity Commission ("EEOC"") is entitled to deference, and the HEP is unlawful. For 25 years, the EEOC has banned all penalties associated with medical inquiries and examinations and failed to explain rationally how it could do otherwise in its one regulatory attempt to depart from that position in 2016. Because the aberrant 2016 regulations were vacated and rescinded, the longstanding ban on penalties remains the agency rule in effect today.

In short, the civil rights laws' "voluntary" exception to the general prohibition on employers' medical intrusions into employees' lives does not permit financial penalties for non-compliance with a wellness program. Thus, summary judgment is warranted on the vast majority of liability issues in this case.[1]

FACTUAL AND LEGAL BACKGROUND

I. FACTUAL BACKGROUND

Plaintiffs Lisa Kwesell, Christine Turecek, and Jason Schwartz bring this action on behalf of themselves and all other current and former employees of Yale who are or were required to participate in the HEP or pay a $25 weekly fine between January 1, 2017 and the present.

Yale is a private academic institution located in New Haven, Connecticut, that employs over 4,700 faculty and thousands of staff. *See* Defendant's Answer to the First Amended Complaint at ¶ 15, attached hereto as **Exhibit B**. In or around January 2017, Yale entered into new collective bargaining agreements ("CBAs") with two Yale unions, Local 34 and Local 35. Exhibit B at ¶ 38. The CBAs provided for the implementation of a new employee wellness

[1] Plaintiffs are moving for summary judgment on Count I in its entirety, Count II except as to the class allegations incorporated by reference, Count III except as to Paragraphs 119-120, and Count IV except as to the class allegations incorporated by reference and Paragraphs 126-127.

program, the HEP, purportedly designed to "improve the health of Staff Members and spouses covered by the University's health plans." Exhibit B at ¶ 39. The HEP applies to all Local 34 and 35 members as well as their covered spouses. *See* Deposition of Hugh K. Penney at 44:3-17, excerpts of which are attached hereto as **Exhibit C**. While participation in the HEP is nominally "optional," Yale levies a $25 weekly opt-out penalty on non-participants and those who are not in compliance with the Program. *See, e.g.*, 2017 Agreement on Health Benefits Program for Active Employees between Yale University and UNITE HERE Local 34 and Local 35 at YU-00000108, attached hereto as **Exhibit D** ("Members may pay a fee to opt-out $25/week when the program goes live, with increases in subsequent years."); *see* also Form 26(f) Report of Parties' Planning Meeting at 4, attached hereto as **Exhibit E** (stipulating that Local 34 and Local 35 members who are not participating in the HEP are subject to the weekly $25 opt-out fee.). Yale deducts this $25 weekly fee directly from non-participating and non-compliant employees' paychecks. *See* HEP FAQs at 2, attached hereto as **Exhibit F** ("The opt-out fee will be payroll deducted on a weekly basis.")

To avoid the penalty, Yale requires that employees and covered spouses complete a battery of "health actions," such as colonoscopies, PAP smears, and blood testing at Yale's direction and on Yale's timeline. *See* Exhibit D at YU-00000109 (listing the required Health Actions). The full list of medical procedures required by the HEP are reflected in the below chart:

The opt-out fee will not apply to bargaining unit employees who have retired prior to January 21,2017, or their covered spouses. These employees and their spouses will, however, be eligible and encouraged to participate in the Program.

Health Care Requirements

Healthcare Services	Age 21 – 29	30 – 39	40 – 49	50 – 64	65+
Primary Care Visit with PCP	WITHIN ONE YEAR OF ENROLLMENT (after 1/1/2017) AND WITHIN PAST 3 YEARS		WITHIN ONE YEAR OF ENROLLMENT (after 1/1/2017) AND WITHIN PAST 2 YEARS		
Cholesterol Screening (Lipid)			LIPID PANEL WITHIN PAST 5 YEARS		
Diabetes Screening (Glucose)			FASTING BLOOD GLUCOSE OR HEMOGLOBIN A1C OR GLUCOSE TOLERANCE TEST WITHIN PAST 5 YEARS		
Breast Cancer Screening (Mammogram)				WITHIN PAST 2 YEARS	
Cervical Cancer Screening (PAP Smear)	WITHIN PAST 3 YEARS	• WITHIN PAST 3 YEARS WITHOUT DOCUMENTED HPV NEGATIVE STATUS • WITHIN PAST 5 YEARS WITH DOCUMENTED HPV NEGATIVE STATUS			
Colorectal Cancer Screening				COLONOSCOPY WITHIN PAST 10 YEARS OR FIT/FOBT WITHIN PAST 1 YEAR	
Pneumococcal Vaccine					AT LEAST ONCE AFTER AGE 65

Note: A clinician may recommend additional screening tests and medical interventions to a patient, not subject to the opt-out fee.

See Exhibit B at ¶ 41 (admitting the above table is an "accurate description of the Program's requirements"). Union members and covered spouses who do not complete the prescribed health actions in the allotted time are assessed the $25 weekly fee until they opt back into the Program, which they can only do on a quarterly basis. Exhibit C at 63:12-15,

Yale also mandates "health coaching" for certain employees and spouses. Individuals must participate in health coaching if they have (1) a diagnosis of diabetes, heart disease, hyperlipidemia, COPD, heart failure, or hypertension and (2) certain risk variables including gaps in care, multiple chronic conditions, lack of evidenced-based screenings, lab values out of range, or other evidence. Exhibit D at YU-00000108. Those selected for health coaching must complete three hours of coaching to avoid paying the $25 weekly penalty, Exhibit B at 73:9-24, although individuals can "continue [additional health coaching] on a voluntary basis," *id*. at 73:21-24. During health coaching, individuals must engage in "guided conversations" led by the health coaches that are designed to elicit information about the participant's "basic sort of health problems and challenges." *Id*. at 75:12-16. While TrestleTree, one of the vendors that assists

Yale in administering the HEP, employs the health coaches, Yale is integrally involved in the hiring of health coaches and can "veto" any proposed health coach. *Id*. at 69:6-21.

Critical to administering the HEP is the regular transfer of union members' and covered spouses' insurance claims and claims-equivalent data[2] from insurers to HealthMine,[3] the second of Yale's vendors administering the Program. *See id*. at 35:6-37:3 (explaining the insurance claims and claims-equivalent transfer process). The claims and claims-equivalent data reflects individuals' medical information, such as procedure codes and pharmacy claims, including current prescriptions and the quantity and the strength of the medication. *Id*. at 37:4-39:4 (explaining what is included in insurance claims data and claims equivalent data). Despite the sensitive nature of the claims data, Yale never discloses this routine transfer to union employees and covered spouses, does not seek their consent for the transfer, and continues the transfer even if the individual opts out of the Program. *Id*. at 43:18-44:2 (Q: "Is it disclosed to participants in the HEP that their insurance claims data is transferred from their insurer to HealthMine as part of the administration of the HEP? A: I am not familiar with an actual disclosure. . . . So I am not aware of it being disclosed, no."); *id*. at 43:15-17 (Q: "If you affirmatively opt out, would your claims information still be transferred?" A: "Yes, it would, as allowed under HIPAA."); *id*. at 41:8-9 ("So opting out of the HEP program would not change the transfer of files.")

Once the claims and claims-equivalent data is transferred to HealthMine, HealthMine reviews it to identify whether an individual is in compliance with the Program (i.e., whether a health action is due or becoming due) and to identify individuals for health coaching. *Id*. at

[2] For union employees and covered spouses on Yale Health's insurance plan, "claims equivalent" data is transferred because Yale Health is a staff model HMO for which individuals do not pay for services, therefore no "claim" is generated. *Id.* at 40:3-19.
[3] HealthMine is a subcontractor of TrestleTree. *Id*. at 16:23-24.

71:15-72:9; *id*. at 37:8-38:2 (noting that HealthMine reviews claims and claims-equivalent data to "identify the challenges of high risk patients, those that are dealing with multiple chronic conditions or acute conditions that would put them into a higher risk."). If HealthMine identifies an individual for health coaching, it notifies TrestleTree and provides TrestleTree with medical information concerning the "condition [the individual] is dealing with." *Id*. at 48:7-49:10. TrestleTree then contacts the individual to begin scheduling health coaching sessions. *Id*. at 72:11-15.

Plaintiffs Lisa Kwesell, Christine Turecek, and Jason Schwartz are all subject to the HEP. Lisa is a member of Local 34, and Christine and Jason are both members of Local 35. While Lisa had previously adhered to the HEP's demands to avoid paying the fee, she recently fell out of compliance with the Program while awaiting resolution of an exception request for a colorectal screening. Declaration of Lisa Kwesell at ¶ 6, attached hereto as **Exhibit G**. In consultation with her doctor, Lisa opted to do an at home colorectal cancer screening on July 19, 2018. *Id.* at ¶ 5. When Yale informed her that another colorectal screening was required just one year later, she requested an exception because it ran counter to her doctor's advice and because her insurance would not cover the cost of the test for another three years. *Id*. Although Lisa's exception request remains outstanding, Yale has begun levying the $25 weekly fee against her. *Id.* at ¶ 8.

Christine Turecek, on the other hand, is currently in compliance with the Program to avoid paying the $25 weekly fine. Christine has financial obligations that make paying the fine infeasible. Declaration of Christine Turecek at ¶ 4, attached hereto as **Exhibit H**. Christine is a single mother who is paying for her child's college expenses and the $25 weekly fine is the cost of books for an entire semester. *Id.* Compliance, however, has also come with a price for Christine. Having previously undergone a double mastectomy when battling (and prevailing

over) breast cancer she could not comply with the HEP's requirement that women over 50 undergo a mammogram every two years. *Id*. at ¶ 5. As a result, she was contacted several times, asked about her mammogram results, and told she would be held in non-compliance and charged the $25 weekly fee if she did not provide documentation of a mammogram. *Id*. While Christine was finally released from the mammogram requirement after several conversations, she found the entire process invasive and emotionally draining. *Id*.

Jason Schwartz, meanwhile, has paid the $25 weekly fee since approximately February 2019. Declaration of Jason Schwartz at ¶ 5, attached hereto as **Exhibit I**. Although the weekly fee cuts into Jason's finances, he is ultimately paying the price for refusing to participate in the HEP due to privacy concerns and because he does not want to be forced to go to the doctor under threat of financial penalty. *Id*. at ¶¶ 4, 5.

Lisa, Christine, and Jason represent just a small subset of thousands of Yale employees forced to either endure non-job-related medical exams and inquiries and the acquisition of their genetic information or pay $25 per week to protect their rights under the ADA and GINA. This case seeks to grant them the freedom to make their own medical choices and to reveal their medical and genetic information to their employer on their own terms—just as the ADA and GINA envisioned.

II. LEGAL BACKGROUND

A. The ADA and GINA Prohibit Employers from Requiring Any Non-Job Related Medical Exams or Medical Inquiries or Acquiring Employees' Genetic Information, with a Narrow Exception for "Voluntary" Employee Wellness Programs.

Enacted in 1990, the ADA protects employees from disability discrimination in the workplace. Under the ADA, an employer commits a prohibited act of discrimination if it "require[s] a medical examination" or "make[s] inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The ADA permits only a narrow exception to this general prohibition against non-job-related medical examinations and inquiries. Specifically, employers may make medical inquiries and conduct medical examinations as part of an employee wellness program, but only if those inquiries and examinations are "voluntary." *Id.* § 12112(d)(4)(B) (emphasis added).

In 2008, Congress enacted GINA to combat workplace discrimination based on an employee's genetic information. *See* S. Rep. No. 110-48, at 8-9 (2007). Under GINA, "genetic information" includes both information about an employee's genetic tests and those of an employee's "family members" and information about "the manifestation of a disease or disorder in family members," also known as family medical history. 42 U.S.C. § 2000ff(4).

To protect employees from discrimination, GINA forbids employers from "acquisition of" employees' genetic information—i.e, they may not "request, require, or purchase genetic information with respect to" an employee or his or her family members. *Id.* § 2000ff–1(b). GINA defines "family members" as dependents under the Employee Retirement Income Security Act of 1974 ("ERISA"), or those related (up to four degrees) to the employee or dependent. 42 U.S.C. §

2000ff(d) (citing § 1181(f)(2)); 29 U.S.C. § 1191b(d)(5). This includes those related through "marriage, birth, or adoption or placement for adoption." *Id.* (incorporating 29 U.S.C. § 1181(f)(2)(A)(iii)); 29 C.F.R. § 1635.3(a). Thus, GINA prevents employers from acquiring (requesting, requiring, or purchasing) the medical histories of employees' family members, regardless of whether those family members are blood relatives. The EEOC's definition of "requesting" genetic information is likewise broad and includes more than a direct request from the individual, such as conducting internet searches likely to reveal genetic information or actively listening to third-party conversations that disclose genetic information. *See* 29 C.F.R. § 1635.8(a).

Like the ADA, GINA has a narrow carve-out for the collection of genetic information through an employee wellness program. Under GINA, an employer can acquire genetic information about an employee or his or her family members when "health or genetic services are offered by the employer, including such services offered as part of a wellness program," but only if "the employee provides prior, knowing, voluntary and written authorization." 29 U.S.C. § 2000ff–1(b)(2).

B. The Current Regulatory Landscape Governing Voluntariness in Employee Wellness Programs Forbids Financial Penalties for Non-Compliance.

In 2000, the EEOC issued guidance on voluntariness in the context of the ADA and wellness programs, 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),* Question 22 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html ("2000 ADA Guidance"). In 2010, the EEOC promulgated regulations implementing GINA (the "2010 GINA Rule"). The 2010

GINA Rule forbade employers from exacting any penalties—or applying any incentives—that are conditioned on providing genetic information. 75 Fed. Reg. 68,912 (Nov. 9, 2010); 29 C.F.R. § 1635.8(b)(2)(i)(B) (2010) ("The provision of genetic information [must be] voluntary, meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it."); *id.* at § 1635.8(b)(2)(ii) ("Consistent with, and in addition to, the requirements of paragraph (b)(2)(i) of this section, a covered entity may not offer an inducement (financial or in-kind) . . . for individuals to provide genetic information."). Thus, the 2010 GINA Rule expressly forbade any penalties or incentives attached to collecting any statutorily protected genetic information (including spousal medical history) through an employee wellness program. *Id.*

In 2016, the EEOC promulgated new regulations governing employee wellness programs' compliance with the ADA and GINA (the "2016 Rules"). EEOC, Amendments to Regulations Under the Americans With Disabilities Act, Proposed Rule, 80 Fed. Reg. 21,659 (Apr. 20, 2015); EEOC, Genetic Information Nondiscrimination Act of 2008, Proposed Rule, 80 Fed. Reg. 66,853 (Oct. 30, 2015). One of the most significant features of the 2016 Rules was the redefining of "voluntary" participation in an employee wellness program. The EEOC abandoned its longstanding position that no penalties were permitted and expressly allowed employers to impose financial penalties for non-participation in a wellness program without rendering the wellness program involuntary. 29 C.F.R. § 1630.14(d)(3) (2016).

Specifically, the 2016 ADA Rule established that examinations and inquiries in wellness programs were "voluntary" only if the "incentive available under the program . . . [did] not exceed . . . thirty percent of the total cost of [individual] coverage." *Id.* Under the 2016 GINA Rule, employers could penalize employees for refusing to provide spousal medical histories

through Health Risk Assessments in employee wellness programs without rendering the wellness program involuntary only if the penalty did not exceed 30% of the total cost of individual health coverage. 29 C.F.R. § 1635.8(b)(2)(iii) (2016) (providing 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").

In 2017, the U.S. District Court for the District of Columbia vacated the penalty and incentive provisions of the 2016 Rules as "arbitrary and capricious." *AARP v. EEOC*, 292 F. Supp. 3d 238, 241-42 (D.D.C. 2017), *amending judgment in opinion at* 267 F. Supp. 3d 14 (D.D.C. 2017). The court held that the EEOC had not "considered any factors relevant to the financial and economic impact the rule is likely to have on individuals who will be affected by the rule." 267 F. Supp. 3d at 32 (emphasis in original).

On December 20, 2018, consistent with the court's order, the EEOC withdrew the "incentive" portions of the 2016 Rules. The "voluntary" provisions in the ADA and GINA and the agency's 2000 ADA Guidance and the 2010 GINA Rule stating that wellness programs can impose neither penalties nor even incentives, respectively, remain in place.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). The Court views the facts in the light most favorable to the non-moving party and then decides if those facts would be enough—if eventually proved at trial—to allow a reasonable jury to decide the case in that party's favor. If not, the movant is entitled to summary judgment. *See generally Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); *Pollard v. N.Y. Methodist Hosp.*, 861 F.3d 374, 378 (2d Cir. 2017).

ARGUMENT

I. The HEP Implicates the ADA's and GINA's Prohibitions Because Yale Requires Medical Examinations, Makes Medical Inquiries, and Acquires Genetic Information as Part of the Program.

The HEP includes medical examinations, medical inquiries, and the acquisition of genetic information that implicates the ADA's and GINA's prohibitions on forced examinations and collection of medical and genetic information in the workplace. *See* 42 U.S.C. § 12112(d)(4)(A) (ADA); 42 U.S.C. § 2000ff-1(b) (GINA). Yale requires Local 34 and Local 35 members and their covered spouses to complete a list of prescribed procedures, and those selected for health coaching are required to respond to medical inquiries. Yale also acquires the genetic information of union members whose spouses are participating in the HEP through the automatic transfer of insurances claims data and claims-equivalent information—a transfer that occurs even if the union member "opts out" of the Program.

A. Yale Requires Medical Examinations as Part of the HEP.

Yale requires medical examinations as part of the HEP. The ADA does not expressly define "medical examinations," but according to EEOC enforcement guidance, "a 'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairments or health." 2000 ADA Guidance, Question 2. The EEOC considers the following factors as relevant to whether a procedure is a "medical examination":

> (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test is normally given in a medical setting; and (7) whether medical equipment is used.

Id. Medical examinations include, but are not limited to, the following: "blood, urine, saliva, and hair analyses to detect disease or genetic markers . . . blood pressure screen and cholesterol screening . . .and diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI)." *Id*. Here, Yale requires an array of health actions, including colonoscopies, blood testing, mammograms, and PAP smears. *See* Factual Background *supra* at 5.

Applying the EEOC guidance here confirms that Yale requires "medical examinations" within the meaning of the ADA. First, most procedures are administered and interpreted by health care professionals.[4] Second, some of the required procedures are invasive, including colonoscopies, PAP smears, and blood draws for cholesterol screenings. Third, the tests are administered in a medical setting, and medical equipment, such as x-rays for mammograms, is used. Finally, the EEOC guidance *per se* classifies cholesterol screening, which is a requirement for HEP participants over 40, as a medical exam. Accordingly, Yale requires medical examinations as part of the HEP, thus implicating the ADA's prohibition.

B. Yale Makes Medical Inquiries of Participants Selected for Health Coaching.

The HEP includes mandatory disability-related inquiries. Like medical examinations, "inquiries" are not expressly defined in the ADA, but EEOC enforcement guidance defines a disability related inquiry as "a question (or series of questions) that is likely to elicit information about a disability." 2000 ADA Guidance, Question 1. Disability-related inquiries may include: "asking an employee whether s/he currently is taking any prescription drugs or medications,

[4] An exception is for individuals choosing the FIT/FOBT colorectal screening option, which can be performed at home rather than by a medical professional. *See* Dep. Ex. 7/Above Table (permitting individuals to satisfy the colorectal screening requirement with an annual FIT/FOBT test).

whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and asking an employee a broad question about his/her impairments that is likely to elicit information about a disability." *Id.*

Here, the HEP includes inquiries under the ADA through its health coaching program. During health coaching sessions, coaches lead a "guided conversation" during which they elicit "information about [the participant's] basic sort of habits and health problems and challenges." Exhibit C at 75:12-16; *see also id*. at 77:22-78:15 (explaining that, for example, a health coach may discover through conversations that high blood pressure is attributable to pregnancy complications rather than a chronic condition). While coaches do not ask a specific set of questions, they "have specific information they are looking for that would be similar to a health assessment." *Id.* at 75:18-20. Prescription use and pharmacy compliance is a "likely . . . topic of conversation" for those individuals dealing with chronic disease and taking medication, *id*. at 76:5-14, and "pharmacy compliance" is one of the "most important habits" health coaches seek to establish, *id*. at 76: 12-13. These "guided conversations" are designed to elicit information from individuals regarding their prescription use and include "broad" questions designed to elicit information about a disability. Accordingly, Yale conducts inquiries as part of the HEP program.

C. Yale Acquires Genetic Information in Administering the HEP.

Yale also acquires genetic information when administrating the HEP, thereby implicating GINA's bar on the acquisition of genetic information in the workplace.[5] As discussed above in the Legal Background Section, GINA prohibits the acquisition of genetic information from

[5] Plaintiffs contend that Yale acquires employee genetic information under GINA because the University both "requests" the information, as described in this Section, and "requires" the information to be provided because, as discussed throughout this Memorandum, providing spousal medical history is not "voluntary." *See, e.g.*, Exhibit A (referring to a "required" health action).

employees and their "family member[s]," 42 U.S.C. § 2000ff-1(b), and "family member[s]" includes spouses, *id.* § 2000ff (3). Genetic information includes information about a "manifestation of a disease or disorder in family members." *Id.* at § 2000ff (4). Here, Yale acquires employees' genetic information in the form of spousal medical history that includes information about a "manifestation of a disease or disorder in family members" in two ways: through spousal health coaching and through the transfer of spousal claims and claims-equivalent data.

To be compliant with the HEP, it is not enough for the employee alone to participate. If the employee's spouse is also insured through Yale, he or she must likewise participate in the Program. *See, e.g.*, Exhibit C at 44:3-17. Spouses selected for health coaching must answer the same questions and have the same discussions with health coaches as those previously described, *see supra* at 15. As articulated above, the "guided conversations" with health coaches are designed to elicit "information about [the participant's] basic sort of habits and health problems and challenges." Exhibit C at 75:12-16. Such "conversations" therefore necessarily include discussions about "manifestation of a disease or disorder" in the "family member" of a covered employee and thus violates GINA's bar on the acquisition of genetic information in the workplace, unless such acquisition is voluntary (which, as discussed below, it is not).

Additionally, Yale "request[s] [and] require[es]. . . genetic information with respect to . . . a family member of [an] employee" in connection with the transfer of spousal claims data and claims-equivalent data from the insurance companies to HealthMine. *See id*. at 35:2-37:3 (explaining the insurance claims transfer process); *see also id*. at 44:18-20 (confirming that spousal claims data is transferred as part of the HEP). The information contained in the claims data and claims-equivalent data is genetic information because it includes information about a

"manifestation or a disease or disorder in family member." As Yale's corporate representative explained, the insurers, as part of the claims data transfer, are "transmitting health risks in general, so . . . all of the claims information is transmitted so that they can identify the challenges of high risk patients, those that are dealing with multiple chronic conditions that would put them into a higher risk." *Id*. at 37:20-38:2. The claims and claims-equivalent information also reveal the procedures for which an individual has visited the doctor, as well as pharmacy claims, which includes the prescription, the quantity, and the strength. *Id*. at 38:3-39:4. Accordingly, when HealthMine, on behalf of Yale, receives the transfer of insurances claims data in order to administer the HEP, Yale is acquiring employees' genetic information. As discussed below, because this acquisition is not voluntary, it violates GINA.

II. The HEP's Medical Examinations and Inquiries and the Acquisition of Genetic Information are Unlawful Because They are Not Voluntary.

Because the HEP includes non-job-related medical examinations, disability-related inquiries, and acquisition of genetic information, the Program violates the ADA and GINA unless the employees' participation is "voluntary."[6] Thus, the issue at the heart of this motion — and of this case in its entirety — is the meaning of "voluntary" under the ADA and GINA — specifically, whether the HEP's $25 weekly pay deduction for "opting out" or failing to comply with the Program renders the Program non-voluntary. The statutes' plain language, the dictionaries in use at the time of the ADA's enactment, similar "voluntary" provisions in other statutes, and the purposes of the statutes' general prohibitions on medical and genetic intrusions into employees' lives, yield only one conclusion: "voluntary" must mean a decision made without financial consideration or coercion, as a matter of free choice. That definition is

[6] The Parties have stipulated that the HEP is an "employee health program" under the ADA and an "employee wellness program" under GINA. *See* Exhibit E at 4.

fundamentally incompatible with a program like the HEP, which imposes financial penalties for failure to submit to examinations, inquiries, and requests for genetic information. Thus, the Court should grant summary judgment for Plaintiffs on the issue of voluntariness.

A. The Plain Meaning of "Voluntary" Under the ADA and GINA Must be Defined as More Than a Technical Choice; It Must Mean a Genuinely Free Choice.

I. Dictionaries from the time of the ADA's enactment confirm that "voluntary" means a genuinely free choice.

In all cases involving statutory construction, "[the] starting point must be the language employed by Congress . . . and [the Court] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotations, citations omitted); *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S 101, 109 n.5 (2002) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (citing *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)); *Old Colony R. Co. v. Comm. of Internal Revenue*, 284 U.S. 552, 560 (1932). "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *U.S. v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotations, citations omitted).

"Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, frequently derived from the dictionary." Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service (2014) at 8 *available at* https://fas.org/sgp/crs/misc/97-589.pdf; *see, e.g., Wisconsin Central Ltd. v. U.S.*, 138 S. Ct. 2067, 2070-71 (2018) (relying on Webster's New International Dictionary, Oxford English Dictionary, and Black's Law Dictionary for meaning of the term "money

remuneration."). Neither the ADA nor GINA expressly defines the term "voluntary," so the ordinary sense of the term applies: it means free choice.

"Dictionaries are hardly necessary to confirm the point, but they do." *Intel Corp Investment Pol'y Comm. v. Sulyma*, 589 U.S. ____ (2020). According to dictionaries published at the time the ADA was enacted in 1990, "voluntary" means "acting of oneself: not constrained, impelled, or influenced by another" or "acting or done of one's own free will without valuable consideration" or "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."[7] Webster's Third New International Dictionary, 2564 (1986) (hereinafter "Webster's"). Similarly, the 1990 Edition of Black's Law Dictionary defines "voluntary" as "unconstrained by interference; unimpelled by another's influence"; "[p]roduced in or by an act of choice. Resulting from free choice, without compulsion or solicitation[,]" and "[w]ithout valuable consideration." Black's Law Dictionary, 1575 (1990) (hereinafter "Black's"). In short, an act is only truly "voluntary" when it is free from coercion, divorced from financial considerations, and characterized by true freedom of choice.

2. In the context of the ADA and GINA a hyper-technical definition of voluntary that merely means "intentional" yields an absurd result.

Dictionaries do contain another more technical definition of "voluntary": "done by design or intention" Webster's at 2564; Black's at 1575; or "not accidental," Webster's at 2564,

[7] Under the canon of *in pari materia*, similar statutes, such as the ADA and GINA, should be interpreted similarly unless legislative history or purpose suggests material differences. Here, the ADA and GINA are similar statutes: both govern the collection of medical information in the workplace and contain voluntary exceptions to the general prohibition on medical exams, inquiries, and the collection of genetic information in the context of employment. Accordingly, the voluntariness exception should be interpreted the same for both statutes. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 260 (2005) (O'Connor, J., concurring) ("To be sure, where two statutes use similar language we generally take this as 'a strong indication that [they] should be interpreted *pari passu*.") (quoting *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973)).

meaning that an action is "voluntary" if it is simply done with volition rather than inadvertently. That definition plainly does not apply here. In the context of the ADA and GINA, applying a definition that renders the outcome of any choice, no matter how forced, to be voluntary as long as the individual makes a decision consciously, defies common sense. It would be absurd to interpret the ADA to permit "[intentional] medical examinations, including [intentional] medical histories, which are part of an employee health program," *see* 42 U.S.C. § 12112(d)(4), or to interpret GINA as prohibiting acquisition of employee genetic information unless the employee gives prior, knowing, written, "not accidental" authorization, *see* 29 U.S.C. § 2000ff-1(b)(2)(B). *Cf. Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.").

EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 1001 (E.D. Wisc. 2016), provides an example of how this absurdity would play out under a technical definition of "voluntary" in the context of the ADA and GINA. In that case, the court employed a hyper-literal definition of voluntary and concluded that the mere presence of a technical choice to participate in a wellness program rendered the program voluntary, even though non-participants had to pay 100% of their monthly health-insurance premiums. *Id.* at 1001. The entirety of the court's explanation was that a "hard choice is not the same as no choice"—a conclusion that it could only have reached using a hyper-technical definition of "voluntary." But, under a definition that actually makes sense in the context of the civil rights statutes, a "hard choice" between Scylla on the one hand and Charybdis on the other is not "voluntary" simply because it is a volitional act. Instead it is a coerced decision, tied strongly to financial consideration and devoid of free choice. Accordingly, this Court should reject *Orion* because its view of voluntariness would make virtually all

examinations and inquiries voluntary, so long as the employer simply presented employees with a choice, no matter how coercive.

3. Defining "voluntary" meaningfully, rather than technically, properly avoids swallowing the ADA and GINA's general rule against employer intrusions into employees' private health information.

A technical definition of "voluntary" would not merely yield harsh results; it would cause the "voluntary" wellness program exception to swallow the general prohibition on the collection of medical and genetic information in the workplace. *Maracich v. Spears*, 570 U.S. 48, 60 (2013) ("An exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision.") (internal quotations omitted).

Indeed, cases interpreting the term "voluntarily" in the context of the FCA scrupulously apply this principle by adopting a meaningful, rather than technical, definition. As in the ADA and GINA, the term "voluntarily" appears in a statutory exception to a blanket FCA prohibition. In general, individuals cannot maintain FCA claims for publicly disclosed information. 37 U.S.C § 3730(e)(4)(A). The only exception to this "public-disclosure bar" is if an individual has direct and independent knowledge of the information and *voluntarily provides* that information to the government. *Id.* § 3730(e)(4)(B).

In this context, courts have repeatedly defined "voluntarily" in a manner that denotes genuinely free choice, not merely technical volition. They have insisted on a definition of voluntary that imposes "some meaningful limit[]" on the exception to the public-disclosure bar. *U.S. ex rel. Griffith v. Conn*, No 11-157-ART, 2015 WL 779047, *4 (E.D. Ky. Feb. 24, 2015); *see also U.S. v. Sorgnard*, 396 F.3d 326, 338-42 (3d Cir. 2005) (collecting cases interpreting the term voluntarily under the FCA). For instance, in *Griffith*, the court, relying on Webster's Third New International Dictionary and Black's Law Dictionary, defined "voluntary" as "acting or

done without any present legal obligation or without valuable consideration." *Griffith*, 2015 WL 779047 at *4-5. The court found that this definition would preserve the purpose of the public-disclosure bar and any "broader view of voluntary—such as acts 'done by design or intention' and 'not accidental,' or as the product of one's free will—would impose no limitations on relators and would render the word insignificant." *Id*. at *5. The court explained that such a limitless definition of voluntary would lead to absurd results in the context of the statute:

> [I]t strains the imagination to conjure up disclosures to the Government that would not be voluntary under those definitions. Perhaps the only true "involuntary" disclosure would be where the relator, through some muscle twitch, hits "send" on an email to a government employee. Or perhaps it is where the relator accidentally leaves a memo about his company's fraud at a coffeehouse, only for it to be later picked up by a government employee. . . . Because such all-encompassing definitions would classify virtually all disclosures as voluntary, they would not limit the original-source exception in any meaningful way.

Id.

Similarly, here, voluntariness must be construed in a meaningful way that preserves the "voluntary" exception to the general bar against the collection of medical information and genetic information in the workplace. Doing so requires rejecting a definition of voluntary that is equated with mere volition, and instead adopting a definition that recognizes true voluntary decision-making is free from coercion, divorced from financial consideration, and characterized by true freedom of choice.

B. The Ordinary Meaning of "Voluntary" Prohibits Employers from Levying Penalties for Non-Participation in an Employee Wellness Program.

In the context of the ADA and GINA, the proper definition of "voluntary" as uncoerced, divorced from financial consideration, and borne of genuinely free choice cannot be squared with a wellness program that penalizes employees financially for non-participation. An employee forced to decide between submitting to medical exams and inquiries and the transfer of genetic

information on the one hand or paying financial penalties for refusing to do so on the other, does not face a genuinely voluntary choice, but a merely technical one: either forfeit private and sensitive personal medical information or pay to protect their civil rights. The outcome of such constrained decision-making, which is self-evidently influenced by financial consideration, is not "voluntary."

1. Yale's itself equates "voluntary" with the absence of penalties for noncompliance.

One of the clearest indicators that the ordinary understanding of "voluntary" means "no penalties" is Yale's own use of the term in the context of the HEP. Yale describes "voluntary" participation in the Program as the opposite of participation under threat of financial penalties. For instance, in online materials describing the HEP for the Yale Police Benevolent Association ("YPBA"), Yale describes the program as "voluntary" precisely because no financial penalty is levied against YPBA members who do not participate. Yale explains: "The HEP Program is *voluntary* for YPBA staff and their covered spouses – no opt out fees will apply for non-participation or non-compliance." It's Your Yale Health Expectations Program at 5, attached hereto as **Exhibit J** (emphasis added). The materials go on to explain, "YPBA members and their spouses may participate in the HEP program screening requirements and coaching on a *voluntary* basis." *Id.* at 1 (emphasis added). Thus, unlike members of Local 34 and 35, YPBA members face more than a mere technical choice to participate in the HEP—they are presented with a truly voluntary choice because failure to participate in the HEP does not result in any adverse action (here, a $25 per week reduction in pay), so their decision-making regarding the program is not colored by coercion or financial consideration.

Yale's corporate representative also used "voluntary" to describe health actions that, for Local 34 and 35 members, are not "required" to avoid a penalty. In describing the HEP's health

coaching requirement, Yale's representative explained that once an individual completes the three hours of coaching required by the program, "they can continue on *a voluntary* basis with whatever they want to do with this coach afterwards beyond the requirements of the Program." Exhibit C at 73:9-24; *see also* Exhibit D at YU-00000108 (contrasting "additional voluntary programs" with programs required under the HEP).

2. Analogous precedent supports the conclusion that an action is not voluntary when it is tied to financial consideration or coerced by an adverse employment action, such as a reduction in pay.

Yale's repeated usage of "voluntary" as the opposite of "required" or "under threat of penalty" is consistent with cases construing the term "voluntary" in another employment statute: the FLSA. Those cases likewise endorse a definition of voluntary that means free from coercion, detached from financial consideration, and characterized by freedom of choice. Under the FLSA, an employer does not have to compensate an employee for "voluntary trainings." *See, e.g.*, *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106, 112 (2d Cir. 2013) ("Time spent at training is not compensable . . . if attendance is voluntary . . . ."). This rule makes sense in the context of employment, where a "voluntary" activity is one severed from financial consideration.[8] Further, regulations issued by the Department of Labor ("DOL") that interpret

[8] Cases interpreting the term "voluntarily" under the FCA are also informative here because they recognize that an individual is not "voluntarily" providing information if he or she receives financial consideration in exchange for that information. In each of the following cases, courts found that because the individual was receiving his or her normal salary at the time they provided the information, they were not acting "voluntarily": *U.S. ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 744 (9th Cir. 1995) (finding relator did not act voluntarily because he "acted in exchange for valuable consideration—his salary"); *U.S. ex rel. Foust v. Group Hospitalization and Medical Services, Inc.*, 26 F. Supp. 2d 60, 73 (D.D.C. 1998) ("In return for their reports of fraud to the government, relators received valuable consideration—i.e., their salaries—and therefore their reports are not voluntary."); *U.S. ex rel. Varnado v. CACI International Inc., et al.*, No. 96 CIV 7827(RWS), 1997 WL 473549, at *8 (S.D.N.Y. Aug. 18, 1997) ("In return for these reports, Varnado obtained valuable consideration, i.e., his salary, and therefore his reports . . . cannot be called voluntary.").

the term "voluntary" for purposes of trainings under the FLSA confirm that employees must be given at least one option that does not result in an adverse employment action for a choice to be truly voluntary. *See* 29 CFR § 785.28 (When an employee is "given to understand or led to believe that his present working conditions or the continuance of his employment would be *adversely affected* by nonattendance . . . attendance is not voluntary.") (emphasis added). And, cases repeatedly find that a reduction in pay (like Yale's $25 weekly pay deduction) constitutes an adverse employment action. *See, e.g.*, *Montero v. City of Yonkers*, 890 F.3d 386, 401 (2d Cir. 2018) ("An adverse employment action may include . . . reducing the pay" of the employee.); *see also Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 72 (2d Cir. 2019) (characterizing a "pay cut" as a "tell-tale sign[] of [a] material adverse employment action[].")

This concept of voluntariness is borne out in the FLSA case law interpreting the DOL regulations, too. In *DeBraska v. City of Milwaukee*, 189 F.3d 650 (7th Cir. 1999), for example, the Seventh Circuit held that attendance at a police preliminary discipline hearing was voluntary because police who failed to appear did "not forfeit anything" and because the outcome of the hearing did not adversely affect working conditions or continuation of employment. *Id*. at 652-653. Likewise, the court in *Dade County, Florida v. Alvarez*, 124 F.3d 1380 (11th Cir. 1997), applied a definition of "voluntary" that means a genuinely free choice not constrained by employer pressure. In that case, the Eleventh Circuit held that off-duty physical training completed by police officers to maintain the physical fitness standards mandated by their employer was voluntary. *Id.* Critical to the court's holding was that the employer did not require any specific training. *Id*. at 1383. Thus, "*given the freedom the officers enjoyed in selecting their off-duty activities* . . . the actual off-duty physical training performed . . . was voluntary." *Id.* at

1385 (emphasis added). These cases demonstrate that in the employment context an act is only voluntary if it is without risk of penalty and accompanied by true freedom of choice.

Here, employees like Plaintiffs and putative class members are stripped of true freedom of choice and forced to decide between either participating in a wellness program or being penalized by a $25 weekly reduction in pay. Such forced decision-making, made under threat of an adverse employment action, runs afoul of analogous case law and the only contextually reasonable definition of "voluntary."

C. Only a Definition of "Voluntary" that Preserves Employees' Genuine Free Choice Fulfills the Purpose of the ADA and GINA's Protective Provisions.

It is axiomatic that the court looks to "history [and] purpose" to divine the meaning of language. *Gundy v. U.S.*, 139 S.Ct. 2116, 2126 (2019) (citing *Maracich*, 570 U.S. at 76, (2013) (looking to "text, structure, history, and purpose" of statute)). Here, the purpose of the ADA's and GINA's bans on medical examinations, inquiries, and acquisition of genetic information necessitates a meaningful interpretation of "voluntary" that guarantees a free choice, severed from financial considerations and pressure.

The ADA's legislative history reflects that Congress enacted § 12112(d)'s protections out of concern about the pervasive "blatant and subtle stigma" affecting persons with disabilities in their workplaces. H.R. Rep. No. 101-485, pt. 2 at 75 (1990). 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. *See* H.R. Rep. No. 101-485 (1990); *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) ("hereinafter *A View From The Inside*") (discussing disability rights community's concern about stigma against individuals with HIV). Similarly, as EEOC Guidance explained, the social cost of

being identified as disabled was greater for individuals with "nonvisible disabilities," including cancer, diabetes, heart disease and mental illness. 2000 ADA Guidance, General Principles.

For these individuals, privacy was critical. If employees were forced to disclose confidential medical information, not only could employers use that information to discriminate against them directly, but being outed as having a disability could be a grave harm in itself. Congress sought to avoid these harms by allowing employees to choose to keep their health information private. H.R. Rep. 101-485, Pt. 2, at 75 (1990) (discussing stigma of being identified as a person with a disability); *A View From The Inside* at 536 ("the actual motivation for this provision on the part of the disability community had been to prohibit employers from inquiring into particular disabilities, such as HIV infection, which pose a social stigma simply by identification").

Since the ADA's enactment, cases have repeatedly demonstrated that when employees do reveal their confidential 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 Products Co.*, 436 F.3d 468, 479 (5th Cir. 2006) (employer withdrew job offer after learning that applicant had diabetes because it believed he was not "controlling" his

condition). Consequently, under the ADA, Congress gave employees a self-help mechanism, so that they might freely choose not to expose them to an increased risk of this discrimination.

GINA built on the ADA's legacy to prohibit employer acquisition of genetic information for the same reason: to guard against discrimination. 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. 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." *Id* at 29. And, 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." *Id* at 28.

Accordingly, any construction of "voluntary" in the ADA or GINA that permits employers to pressure employees into revealing what the general ban shields as private would force employees to expose themselves to greater risk of the harms that the civil rights statutes seek to ameliorate. That would thwart the general ban's purpose. *Cf. AARP*, 267 F. Supp. 3d 14, 33 (holding that a fatal flaw in the 2016 ADA Rule was that the permitted penalties were "likely to be far more coercive for employees with lower incomes, and was likely to disproportionately affect people with disabilities specifically, who on average have lower incomes than those

without disabilities," and therefore "could disproportionately harm the group the ADA is designed to protect."). Instead, voluntariness requires that employees may freely choose or decline to participate in a wellness program without any fear for their jobs, benefits or pay. Yale's HEP cannot pass muster under this standard.

D. The EEOC's Longstanding Interpretation of "Voluntary" and the Current Regulatory Landscape Also Confirms that No Penalties Are Permitted.

Because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because the meaning of "voluntary" is plain here, the Court need not address the issue of agency deference. The only real significance of the EEOC's construction of the civil rights statutes is that for twenty-five years after the ADA's inception and through GINA's enactment, the EEOC recognized that financial penalties are incompatible with voluntariness and, thus, interpreted the civil rights laws to forbid employers to put any financial pressure on employees to submit to medical examinations or reveal personal health information. *See supra*, pp. 10-12.

If, however, the Court concludes that the statutes are ambiguous, the result is the same under the prevailing regulatory landscape: the HEP is unlawful because employers may not penalize their employees for non-participation when medical examinations and inquiries and acquisition of genetic information is part of the program. While the 2016 regulations reversed course on this position, the vacatur and subsequent rescission of the relevant portions of those regulations does not, as Yale has argued, leave a regulatory gap. Instead, it leaves the state of the agency's interpretation in exactly the state it was in *before* the 2016 regulations: the 2000 ADA Guidance (which remains in force) and the 2010 GINA regulations (the relevant amendments to which have now been vacated) categorically forbid penalties. 81 Fed. Reg. 31,126, 31,127 n.10.;

31,132 n.23 (May 17, 2016) (positively citing to ADA Guidance on exams and inquiries); 29 C.F.R. § 1635.8(b)(2)(i)(B) (defining "voluntary" under GINA as forbidding penalties for non-participation). Consequently, even if the Court concludes that there is some ambiguity, the EEOC's longstanding and current position applies, and the HEP is unlawful.

III. Yale's Acquisition of Genetic Information Violates GINA Under Any Construction of Voluntariness Because It Occurs Without Employees' Knowledge or Consent, and Even if the Employee "Opts Out" of the Program or Pays the Non-Compliance Penalty.

GINA prohibits employer acquisition of genetic information except when, among other things, the employee provides "prior, knowing, voluntary, and written authorization." 42 U.S.C. §2000ff-1(b)(2)(B). Here, even assuming *arguendo* that the Court adopts a technical definition of "voluntary" that merely requires "intent" or "lack of accident," the HEP nonetheless includes involuntary acquisition of genetic information through the claims data-transfer process, which occurs without employees' knowledge or consent. Yale has admitted that its vendor, HealthMine, collects *all union members'* insurance claims data and claims-equivalent data periodically. Penney Deposition at 35:2-37:3 (explaining the claims data transfer process and frequency). This includes claims data and claims-equivalent data for covered spouses—that is, spouses' medical history, which is genetic information under GINA. 42 U.S.C. § 2000ff (4)(A)(iii). Yet, neither Yale nor its vendors even disclose this data collection to employees, let alone seek their permission, written or otherwise. *See* Penney Dep. at 43:18-2. Furthermore, the collection occurs regardless of whether the employee has opted out of the program and is paying the weekly penalty. Penney Dep. at 43:15-17 ("Q: If you affirmatively opt out, would your claims information still be transferred? A: Yes, it would, as allowed under HIPPA."). Thus, even if the Court concludes that employees "voluntarily" divulge information even when they do so under threat of a pay cut, they do not voluntarily divulge information that is transferred without

their knowledge or consent, irrespective of their express wish to "opt out" of the Program and payment of the penalty. *See* 42 U.S.C. § 2000ff-1(b)(2). And since the employees do not even know about the transfer, they cannot possibly give "prior knowing, voluntary, written authorization" for their employer to collect their genetic information. *Id.* Consequently, regardless of the Court's conclusion on any other issue, the HEP's automatic claims data transfer process violates GINA's prohibition on acquisition of employee genetic information.

CONCLUSION

For these reasons, the Court should grant summary judgment for Plaintiffs on Count I in its entirety, Count II except as to the class allegations incorporated by reference, Count III except as to Paragraphs 119-120, and Count IV except as to the class allegations incorporated by reference and Paragraphs 126-127.

Respectfully submitted,

/s/*Dara S. Smith*

Dara S. Smith (*pro hac vice)*
Elizabeth Aniskevich (*pro hac vice)*
Daniel B. Kohrman (*pro hac vice)*
AARP FOUNDATION
601 E Street, NW Washington,
DC 20049 Tel: (202) 434-6280
Fax: (202) 434-6424
dsmith@aarp.org
eaniskevich@aarp.org
dkohrman@aarp.org

GARRISON, LEVIN-EPSTEIN,
FITZGERALD & PIRROTTI, P.C.
Joshua R. Goodbaum (ct28834)
Joseph D. Garrison (ct04132)
Elisabeth J. Lee (ct30652)
405 Orange Street
New Haven, Connecticut, 06511
Tel.: (203) 777-4425
Fax: (203) 776-3965
jgoodbaum@garrisonlaw.com
jgarrison@garrisonlaw.com
elee@garrisonlaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 2, 2020, a copy of the foregoing Plaintiffs' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Dara S. Smith*
Dara S. Smith