



The Supreme Court 2019:

What's at Stake for Older Adults in America
A Preview of the 2019 Term

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Introduction

True to the apocryphal expression, we live in interesting times, and October 2019 promises to usher in an interesting Supreme Court term. Perhaps fittingly, the end of the term will segue into the Democratic and Republican National Conventions, where the parties' platforms may well reflect strong opinions of—and prescriptions for—the federal judiciary, especially the Supreme Court. For politicians and pundits on either side of the aisle, Alexander Hamilton's "least dangerous branch" will be the subject of many a "hot take."

In this tense electoral environment, Chief Justice John Roberts will again be called upon to play the role of chief conciliator, the umpire not only calling balls and strikes, but also calling them for both sides. Given the Chief Justice's concern for the Supreme Court's integrity, he may find himself hard-pressed to leave the public with a lasting impression that the Court bases its opinions on the law, not on politics or ideology—a difficult task in these often cynical and hyper-politicized times.

As of August 2019, the Court has accepted approximately 50 cases for the term. In this Preview, we explore several cases that we expect to have a significant or an acute impact on those who are age 50 or older. They include civil rights, health care, employee benefits, and access to courts—matters central to AARP Foundation's goals of building economic opportunity and social connectedness for vulnerable older adults.

More grants of certiorari are still to come, and we hope that one of our age discrimination in employment cases, *Kleber v. CareFusion*, will be one of them. We discuss *Kleber* in this Preview, as we don our best fortuneteller costumes and gaze into a crystal ball to explore cases with certiorari petitions pending, as well as other percolating cases that may come to the Supreme Court in the near future.

As the number of adults over 50 increases, the impact of Supreme Court and other federal cases on their lives likewise will increase. Vigorous legal advocacy is central to AARP Foundation's mission. We look forward to continuing to champion the rights and interests of older adults in courts throughout the United States, including the Supreme Court. Especially in these interesting times.

The attorneys of AARP Foundation would like to thank the legal fellows and interns who contributed to the 2019 Preview: Holly Ceasar, Suzanne Davies, Caitlin Kidd, Thomas Moore, Sara Planthaber, and Sean Rowland.

CASES — 2018 TERM

On the Basis of Sex: Safeguarding Discrimination Protections for LGBT+ Workers

Altitude Express, Inc. v. Zarda,
No. 17-1623,
[883 F.3d 100 \(2d Cir. 2018\)](#),
cert. granted, 139 S. Ct. 1599 (Apr. 22, 2019).

Bostock v. Clayton County, Georgia,
No. 17-1618,
[723 Fed. Appx. 964 \(11th Cir. 2018\)](#),
cert. granted, 139 S. Ct. 1599 (Apr. 22, 2019).

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC,
No. 18-107,
[884 F.3d 560 \(6th Cir. 2018\)](#),
cert. granted, 139 S. Ct. 1599 (Apr. 22, 2019).

Oral argument scheduled for Oct. 8, 2019.

Issue: (1) *Whether Title VII prohibits discrimination against transgender people based on (a) their status as transgender or (b) sex stereotyping under [Price Waterhouse v. Hopkins](#), 490 U. S. 228 (1989)?*

(2) *Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of . . . sex” within the meaning of [Title VII of the Civil Rights Act of 1964](#), 42 U.S.C. § 2000e-2?*

Aimee Stephens, a funeral home director, was fired after she came out as a transgender woman and told her boss she planned to begin wearing traditionally feminine clothing at work. Donald Zarda was fired from his job as a skydiving instructor after he told a customer he was gay. Gerald Lynn Bostock, a county social worker, lost his job after county officials learned he had joined a gay recreational softball league. Stephens, Zarda, and Bostock each brought cases under Title VII of the Civil Rights Act of 1964, which forbids employers to discriminate “because of . . . sex.” [42 U.S.C. § 2000e-2](#).

Stephens makes two related claims under Title VII. First, Stephens argues that when Harris Funeral Homes fired her for being transgender, it violated the plain meaning of Title VII, because she would not have been fired “but for” her gender. Second, Stephens argues she was fired because of her failure to conform to gender stereotypes—a form of bias long recognized as an impermissible form of sex discrimination under Title VII. See [EEOC v. R.G.](#), [884 F.3d 560, 566-67 \(6th Cir. 2018\)](#). Stephens lost in federal district court, but won in the Sixth Circuit. According to the Sixth Circuit,

“[d]iscrimination on the basis of transgender and transitioning status” violates Title VII because it is “necessarily discrimination on the basis of sex,” and because it is discrimination based on sex stereotyping. [Id. at 571](#).

Zarda and Bostock’s Title VII sexual orientation claims differ somewhat from Stephens’ transgender identity claim. They argue that every time an employer discriminates on the basis of sexual orientation, gender is the “but-for” cause, because an employer who fires a man for dating another man would presumably *not* have fired a woman who dated men. In other words, the employer would not fire a gay man “but for” his gender. [Zarda v. Altitude Express](#), 883 F.3d 100, 116 (2d Cir. 2018); [Brief for Petitioner at 10, Bostock v. Clayton Cty.](#), 139 S. Ct. 1599 (2019) (No. 17-1618).

The Second Circuit, sitting *en banc* to rehear Zarda’s case, found that sexual orientation discrimination is a form of sex discrimination under Title VII—overruling longstanding circuit precedent. [Zarda](#), 883 F.3d at 108. In Bostock’s case, however, a three-judge panel of the Eleventh Circuit affirmed the district court’s ruling that sexual orientation discrimination was *not* sex discrimination under Title VII. [Bostock v. Clayton Cty. Bd. of Comm’rs](#), 723 Fed. Appx. 964, 964 (11th Cir. 2018) (rehearing *en banc* denied, 894 F.3d 1335, 1335 (11th Cir. 2018)).

Until very recently, circuit courts largely agreed that Title VII’s prohibition on sex discrimination did not include sexual orientation discrimination. [Compare Evans v. Ga. Reg’l Hosp.](#), 850 F.3d 1248, 1256 (11th Cir. 2017) (rejecting plaintiff’s sexual orientation discrimination claim under Title VII and collecting similar cases from other circuits), [with Hively v. Ivy Tech Cmty. College](#), 853 F.3d 339, 343 (7th Cir. 2017) (finding that “actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex” under Title VII).

Several circuits have recognized that discrimination based on transgender status is discrimination based on sex. *See, e.g.*, [Smith v. City of Salem](#), 378 F.3d 566, 575 (6th Cir. 2004) (firing a transgender firefighter for failure to adhere to gender stereotypes is sex stereotyping under Title VII); [Rosa v. Park West Bank & Trust Co.](#), 214 F.3d 213, 214-16 (1st Cir. 2000) (refusal to serve a bank customer who presented male identification documents because the customer wore “traditionally feminine attire” could be evidence of unlawful sex discrimination under the Equal Credit Opportunity Act); [Schwenk v. Hartford](#), 204 F.3d 1187, 1205 (9th Cir. 2000) (violence motivated by a person’s transgender status is violence motivated by gender under the Gender Motivated Violence Act).

Those who oppose reading gender identity and sexual orientation protections into Title VII rely on the legislative history of Title VII, arguing that when the Civil Rights Act was enacted in 1964, Congress was not contemplating the application of the “because of . . . sex” phrase to protect members of the LGBT+ community from discrimination. *See Bostock v. Clayton Cty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *7 (Nov. 3, 2016). Although various amendments have been proposed over the years that would have added explicit protections for

sexual orientation and gender identity to the Civil Rights Act, none have successfully made it through Congress. *Id.* at *10.

Proponents of reading Title VII to include protections for LGBT+ employees point to key language in two Supreme Court cases. In *Price Waterhouse*, the Court recognized that Title VII forbids even subtle discrimination, like sex stereotyping, observing that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” 490 U.S. at 250. And in [Oncale v. Sundowner Offshore Services](#), the Court explained that same-sex harassment claims are covered under Title VII because the language of the statute “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” 523 U.S. 75, 78-79 (1998) (Scalia, J.). The Court went on to explain that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *Id.* According to Stephens, Bostock, and Zarda, sexual orientation discrimination and gender identity discrimination are covered under Title VII because they are “reasonably comparable” to the “principal evil” targeted by Title VII’s prohibition on sex discrimination.

WHAT’S AT STAKE

AARP and AARP Foundation joined several civil rights organizations to file an [amicus brief](#) supporting Stephens, Zarda, and Bostock. More than [2.7 million adults](#) in the United States age 50 and over identify as LGBT. And LGBT+ individuals are disproportionately affected by workplace discrimination compared to their straight and cisgender peers. In 2015, one study found that 41% of transgender respondents who had been employed within the past year reported being fired, denied a promotion, or otherwise mistreated in the workplace based on their gender identity or expression. [Brief for Impact Fund et al. as Amici Curiae Supporting Petitioner at 8, Bostock v. Clayton Cty., 139 S. Ct. 1599 \(2019\) \(No. 17-1618\)](#). Due to [widespread discrimination](#) over the course of their lifetimes, many LGBT older adults face limited job opportunities, lower incomes, and fewer opportunities to build savings and plan for retirement. LGBT adults age 45 and over who responded to a 2018 [AARP Survey](#) expressed high levels of concern about challenges as they age, including access to quality health care, long-term care, housing, and other social supports. Yet, despite clear evidence that the LGBT+ community is vulnerable to discrimination, employees in twenty-six states lack protections against discrimination based on sexual orientation or gender identity.

If the Supreme Court finds that Title VII’s prohibition on sex discrimination also protects against sexual orientation discrimination and gender identity discrimination, it would expand employment opportunities and economic security for LGBT+ individuals across the country. And it would provide greater security for LGBT+ employees who may face additional forms of discrimination as they age. In contrast, if the Supreme Court finds that Title VII’s prohibition on workplace sex discrimination does not extend to sexual orientation or gender identity, it could open the door to widespread

discrimination against LGBT+ employees whose state laws do not explicitly protect their rights. Finally, if the Supreme Court finds that discrimination on the basis of a person's transgender status is *not* sex stereotyping, it could undermine *Price Waterhouse's* protections against gender stereotyping in the workplace for everyone by encouraging arbitrary line drawing by lower courts.

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Free From Any Discrimination Based on Age: Giving Effect to Broad Protections for Federal Workers

Babb v. Wilkie,
No. 18-882,
[822 F.3d 1179 \(11th Cir. 2016\)](#),
cert. granted, 2019 U.S. LEXIS 4444 (U.S. June 28, 2019).

Oral Argument not yet scheduled.

Issue: *Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any “discrimination based on age,” 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.*

Petitioner Noris Babb joined the Bay Pines Veterans Administration (VA) Medical Center as a clinical pharmacist in 2004. In 2010, the VA created Patient Aligned Care Teams (PACT), which Babb applied to join. If Babb had been permitted to join a PACT, it would have meant a promotion and raise for her. Despite accolades from doctors who worked with her and the VA’s HR department, the VA denied Babb and several other women over 40 the promotion in favor of younger workers.

Babb sued the VA, alleging that the VA discriminated against her based on her age in violation of the federal sector provision of the ADEA. The VA Secretary argued that the younger applicants had job-related experience that Babb did not. The district court granted the VA Secretary’s motion for summary judgment, and the Eleventh Circuit affirmed. The Eleventh Circuit held that an elevated “but-for” causation standard applied to Babb’s case, rather than the more lenient “motivating factor” standard that Babb argued should apply. Under the “but-for” standard, plaintiffs must show that had they been younger, their employers would have treated them more favorably. Under the “motivating factor” standard, an employer can be liable if an employment decision is “infected in some way by age discrimination, even if it may not be the determinative factor.” [Ford v. Mabus, 629 F.3d 198, 204 \(D.C. Cir. 2010\)](#) (citation omitted). The Supreme Court granted Babb’s petition for certiorari, limiting review to the causation standard applicable to the ADEA’s federal sector provision.

The relevant portion of the ADEA relating to federal employees states, “[a]ll personnel actions . . . shall be made free from any discrimination based on age.” 29 U.S.C. § 633a(a). Federal courts and agencies have interpreted this language differently. The D.C. Circuit has held that the “motivating factor” standard applies, based in part on Congress’s clear intention to provide separate, stronger protection to federal workers by making the language in Section 633a(a) broader than the analogous private sector provision, [Section 623\(a\)](#). *Id.* at 206. The Equal Employment Opportunity Commission and Merit Systems Protections Board have adopted the D.C. Circuit’s approach.

See, e.g., [Savage v. Dep't of Army](#), 122 M.S.P.R. 612, 634 (Sept. 3, 2015); [Complainant v. Dep't of Homeland Sec.](#), EEOC Doc. 0720140014, 2015 WL 5042782, at *5-6 (Aug. 19, 2015) (retaliation under Title VII or ADEA). In contrast, the Ninth Circuit found no distinction between the private and federal employee sections of the ADEA, and therefore held that the “but-for” standard, requiring a showing that age played a role in employment decision at issue and had a determinative influence on the outcome, is appropriate in federal sector ADEA cases. [Shelley v. Geren](#), 666 F.3d 599, 615-22 (9th Cir. 2012).

Babb contends that because Congress specifically enacted a separate provision protecting federal workers, Section 633a(a) cannot be interpreted simply by applying rulings construing the ADEA’s provisions relevant to private sector employers. The VA argues that Congress amended Title VII, expressly codifying the “motivating factor” standard, and if Congress wanted that standard to apply to Section 633a(a), it would have revised the ADEA’s federal sector provision accordingly. The government also relies on [University of Texas Southwestern Medical Center v. Nassar](#), 570 U.S. 338 (2013), in which the Supreme Court applied a “but-for” standard to Title VII retaliation claims against private sector employers, which Petitioner notes should not control in this case.

This is one of two cases focusing on causation this term. [Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media](#), 204 L. Ed. 2d 1089 (2019), concerns the applicable standard for claims of racial discrimination under [42 U.S.C. § 1981](#).

WHAT’S AT STAKE

It is essential that federal workers retain robust protection against age discrimination. The Court’s choice of a controlling causation standard for federal sector ADEA claims will make it either easier or harder for federal employees to prove age discrimination, at least in cases where causation is at issue. If the Supreme Court affirms the Eleventh Circuit’s “but-for” standard, federal workers will face the same causation standard as private sector workers, potentially hindering their ability to bring successful ADEA claims. A holding supporting the “motivating factor” standard will ensure that ADEA claims continue to be accessible to federal employees.

The Court’s decision is also likely to affect ADEA and Title VII enforcement for federal workers more broadly. First, the Court is likely to articulate reasons why Section 633a(a)’s directive to make federal service “free from any discrimination based on age” should be read to either make the ADEA’s prohibitions stronger for federal workers or simply comparable to those for private employees. Ultimately, the Court’s interpretation of such language under Section 633a(a), broad or narrow, may inform how lower federal courts—and the Supreme Court itself—also interpret the same “free from any discrimination” language that appears in the federal sector provision of

[Title VII, 42 U.S.C. § 2000e-16\(a\)](#), in regard to bias in federal agencies based on “race, color, religion, sex, or national origin.”

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The Patent Office's Express Lane: Protecting Prescription Drug Affordability

Thryv, Inc., fka, Dex Media, Inc. v. Click-to-Call Techs., LP,
No. 18-916,

[No. IPR2013-00312, 2014 Pat. App. LEXIS 8333](#)
[\(P.T.A.B. Oct. 28, 2014\),](#)

[vacated, 899 F.3d 1321 \(Fed. Cir. 2018\),](#)

[cert. granted, 2019 U.S. LEXIS 4270 \(U.S. June 24, 2019\).](#)

Oral argument scheduled for Dec. 9, 2019.

Issue: *Whether [35 U.S.C. § 314\(d\)](#) permits appeal of the Patent Trial and Appeal Board's decision to institute an inter partes review upon finding that [35 U.S.C. § 315\(b\)](#)'s time bar did not apply.*

In 2011, Congress enacted the Leahy-Smith America Invents Act, which established a patent agency procedure called “inter partes review” (IPR). IPR allows third parties to challenge patents that they believe should not have been granted in the first place. The purpose of IPR is to improve the patent system by creating a faster, less expensive alternative to litigation. The Patent Office's decision to institute IPR is “final and nonappealable,” which speeds up the process and makes disputes less expensive for both sides. 35 U.S.C. § 314(d). Under 35 U.S.C. § 315(b), a petition requesting IPR will be dismissed if filed more than one year after “the petitioner, real party in interest, or privy of the petitioner” was served with a complaint alleging patent infringement.

This case returns to the Supreme Court after a tortured litigation history spanning nearly two decades. The case began in 2001, when Inforocket.com, Inc. (Inforocket) sued Keen, Inc. (Keen) for patent infringement based on its patent for an anonymous telephone communication system, U.S. Patent No. 5,818,836 (836 patent). In 2003, while the case was still pending, Inforocket and Keen settled their differences by merging, and the case was voluntarily dismissed without prejudice. [Click-To-Call Techs., LP v. Ingenio, Inc., 899 F.3d 1321, 1325 \(Fed. Cir. 2018\)](#). The 836 patent has since changed hands and proceeded through not only company mergers, but also several rounds of appellate litigation, including one prior remand from the Supreme Court. Keen, after a few more mergers and name changes, ultimately became petitioner Thryv, Inc.; in 2012, Click-to-Call Technologies (CTC) acquired the 836 patent. *Id.* at 1326.

CTC initiated the latest appeal in November 2014, after a final written decision of the Patent Trial and Appeals Board (Board) cancelled thirteen claims of the 836 patent in an IPR proceeding. *Id.* at 1328. CTC, not wanting its patent claims cancelled, argued that the entire proceeding should have been time barred because of the prior patent litigation between Keen and Inforocket back in 2003. *Id.* But the Board held that the time bar did not apply because of binding Federal Circuit case law that held that the effect of

dismissals without prejudice was to leave the parties as though the complaint had never been filed. *Id.* at 1326-27.

In 2018, the Federal Circuit, sitting *en banc* for a different case, overruled this precedent and held that a decision by the Board about whether Section 315's time bar applied *could* be appealed. [Wi-Fi One, LLC v. Broadcom Corp., 878 F.3d 1364, 1367 \(Fed. Cir. 2018\)](#). In light of that opinion, the Federal Circuit, *en banc*, reheard CTC's case on the merits. *Click-to-Call*, 899 F.3d at 1328. A divided Federal Circuit vacated the Board's 2014 decision, finding that Section 315(b)'s time bar applies even when the parties voluntarily dismiss a claim. *Id.* The Supreme Court will now decide the procedural question of whether the Board's decision to institute an inter partes review after a voluntary dismissal is time-barred.

Thryv, Inc. argues that the Supreme Court should reverse the Federal Circuit's holding not just in *Click-to-Call*, but also in *Wi-Fi One*. Petition for Writ of Certiorari at 28, *Thryv, Inc., fka, Dex Media, Inc. v. Click-to-Call Techs., LP*, 2019 U.S. LEXIS 4270 (No. 18-916) (filed Jan. 11, 2019). The Supreme Court has already recognized that weakening Section 314(d)—which provides that the Board's decision to initiate IPR—would undermine the purpose of the statute. “We doubt that Congress would have granted the Patent Office this authority . . . if it had thought that the agency's final decision could be unwound after some minor statutory technicality related to its preliminary decision to institute inter partes review.” [Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2140 \(2016\)](#). Thryv, Inc. argues that if the Court affirms *Wi-Fi One*, it will “open a Pandora's box of appellate litigation” over issues that had previously been left to the Board to decide, undermining the purpose of IPR to provide a “quick and cost effective alternative to litigation.” Pet. at 16.

In response, CTC argues that the text of Section 314(d) does not apply to time-bar determinations, and that Section 315(b) sets a “statutory limit” on the Board. [Brief for Respondent](#) at 4, *Thryv, Inc. fka, Dex Media, Inc. v. Click-to-Call Techs., LP*, 2019 U.S. LEXIS 4270 (2019) (No. 18-916). CTC points to language in *Cuozzo* recognizing a “strong presumption favoring judicial review,” and argues that the statute does not contain enough “clear and convincing terms” about how Sections 314(d) and 315(b) are supposed to interact to overcome that presumption. *Id.* (quoting *Cuozzo*, 136 S. Ct. at 2140).

This same issue is pending in two additional cases before the Supreme Court: [Superior Comm., Inc. v. Volstar Tech. Inc., No. 18-1027](#), and [Atlanta Gas Light Co. v. Gennett Regulator Guards, No. 18-999](#).

WHAT'S AT STAKE

CTC and Thryv, Inc.'s disagreement is about a communications technology patent. But a decision making it more difficult to institute timely IPR proceeds will also have adverse effects in another line of commerce of extreme interest to older Americans—prescription drugs. Many drug companies build a “patent thicket” around their brand-name or biologic drugs, patenting every

aspect of the drug, including the compound, formulations, dosage forms and strengths, uses, delivery devices, and extensions, including combination products with the same active ingredient. Lengthy pharmaceutical patent litigation drives up drug prices and prevents generic brands from entering the market.

Higher drug prices disproportionately impact older adults. A recent AARP [study](#) found that, on average, older Americans take 4.5 prescription drugs every month. And in 2017, the average cost of brand-name prescription drugs was \$6,798—more than 18 times the average cost of generic prescription drugs. Specialty prescription drugs for conditions such as cancer, rheumatoid arthritis, and multiple sclerosis—that disproportionately affect older populations—[cost even more](#). In 2017, the average cost of prescription drug therapy for a single specialty drug was \$78,781. If the Court further narrows Section 314(d) and rules that the Patent Office's decision to institute IPR is appealable, it would undermine the efficiency of the IPR process and the ensuing litigation will delay patient access to generic drugs and increase the price of the drugs to older Americans.

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Timing Is Everything: Maintaining Access to Courts in Employee Benefits Cases

Intel Corp. Investment Policy Committee v. Sulyma,
No. 18-1116,
[909 F.3d 1069 \(9th Cir. 2019\)](#),
cert. granted, 204 L. Ed. 2d 1089 (June 10, 2019).

Oral argument scheduled for Dec. 10, 2019.

Issue: *Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, which runs from “the earliest date on which the plaintiff had actual knowledge of the breach or violation,” bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.*

Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) to provide protections for individuals in employer-based retirement and health insurance plans. ERISA includes standards of conduct for fiduciaries, those who manage an employee benefit plan and its assets. Fiduciaries who violate these standards, including the duties to act loyally and prudently, are liable under the Act.

ERISA Section 413 sets out a distinct limitations period for such fiduciary breach claims, requiring a plaintiff to sue the earlier of six years from the date of the alleged breach or three years from “the earliest date that the plaintiff had actual knowledge” of the breach. [29 U.S.C. § 1113\(2\)](#). However, the term “actual knowledge” is not defined under ERISA, so courts have been left to figure out on their own when plaintiffs meet this threshold. In this case, the Court will decide whether receiving plan information is enough to trigger the three-year limit, or if an employee actually has to read it.

In October 2015, Christopher Sulyma, a former Intel employee and participant in two Intel-sponsored retirement plans, sued several plan fiduciaries for ERISA violations, including breach of fiduciary duties. Intel moved to dismiss the suit as time-barred. While Sulyma sued within six years of the alleged breach, Intel pointed to quarterly statements and disclosures sent to him that, Intel argued, provided actual knowledge of the plans’ investments. Sulyma argued that these alleged disclosures were insufficient to trigger actual knowledge, because the statements provided little detail about the investments. He also argued that merely receiving an email or being linked to a website does not equate to understanding them. Ultimately, the district court converted the motion to dismiss into one for summary judgment and granted it in favor of Intel.

The Ninth Circuit reversed, holding that Intel had not established that Sulyma had actual knowledge. 909 F.3d 1069, 1077-78 (9th Cir. 2019). The court found the record unclear on whether respondent had ever looked at the

materials allegedly detailing his investments. *Id.* The court reasoned that while Intel might have shown enough to satisfy a constructive knowledge standard, that is, one where knowledge is imputed to a plaintiff from available information, “actual knowledge” must mean something more. *Id.* at 1075.

Intel sought certiorari, arguing the Ninth Circuit misapplied Section 413. [Petition for Writ of Certiorari at 2, *Intel Corp. Investment Policy Comm. v. Sulyma*, 204 L. Ed. 2d 1089 \(No. 18-1116\) \(filed Feb. 26, 2019\)](#). Intel also argues in its petition that the Ninth Circuit’s decision gives plaintiffs a “roadmap” to avoid the shorter, three-year period by simply asserting that they did not read the relevant plan documents. *Id.* at 23. In response, Sulyma argues Intel’s roadmap argument is absurd because “[n]o rational person will refus[e] to read plan documents about their retirement investments solely in the hopes that, three to six years later, they can try to figure out whether the investments were imprudent and sue if so.” [Brief for Respondent at 14-15, *Intel Corp. Investment Policy Comm. v. Sulyma*, 204 L. Ed. 2d 1089 \(2019\) \(No. 18-1116\)](#).

WHAT’S AT STAKE

As with other ERISA cases before the Court this term, *Sulyma* is important for older Americans’ economic security. One of AARP’s main objectives is to increase the availability, security, equity, and adequacy of public and private employee benefits. Plan participants and beneficiaries must have the ability to enforce their rights and obtain redress for violations of those rights. A ruling in Intel’s favor could broaden the definition of “actual knowledge” under ERISA, limiting individuals’ ability to pursue such claims later on.

In addition, lurking in the case is the question of whether disclosure by reference to a website or email is sufficient. Participants do not always read their plan statements in detail and are less likely to read lengthy disclosures stored online. Utilization of this method of disclosure also assumes that participants have the means and ability to access such information. Depending on how the Court resolves the case, plan administrators could see an incentive to provide participants with increased electronic information without adequate safeguards to ensure that beneficiaries know what is being disclosed.

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Show Them The Money: Ensuring Access to Affordable Health Care

Moda Health Plan Inc. v. United States,
No. 18-1028,

[892 F.3d 1311 \(Fed. Cir. 2018\)](#),

cert. granted, 2019 U.S. LEXIS 4338 (U.S. June 24, 2019)

Maine Community Health Options v. United States,
No. 18-1023,

[729 F. App'x 939 \(Fed. Cir. 2018\)](#),

cert. granted, 2019 U.S. LEXIS 4207 (U.S. June 24, 2019)

Land of Lincoln Mutual Health Insurance Co. v. United States,
No. 18-1038,

[892 F.3d 1184 \(Fed. Cir. 2018\)](#),

cert. granted, 2019 U.S. LEXIS 4281 (U.S. June 24, 2019)

Oral argument not yet scheduled.

Issue: (1) *Whether—given the “cardinal rule” disfavoring implied repeals, which applies with “especial force” to appropriations acts and requires that repeal not to be found unless the later enactment is “irreconcilable” with the former—an appropriations rider whose text bars the agency’s use of certain funds to pay a statutory obligation, but does not repeal or amend the statutory obligation, and is thus not inconsistent with it, can nonetheless be held to impliedly repeal the obligation by elevating the perceived “intent” of the rider (drawn from unilluminating legislative history) above its text, and the text of the underlying statute; and (2) whether—when the federal government has an unambiguous statutory payment obligation, under a program involving reciprocal commitments by the government and a private company participating in the program—the presumption against retroactivity applies to the interpretation of an appropriations rider that is claimed to have impliedly repealed the government’s obligation.*

These consolidated cases involve “risk corridor” payments under the Affordable Care Act (ACA). The payments were established under the ACA ([42 U.S.C. § 18062](#)) to mitigate some of the risk associated with insurance companies’ participation in the exchanges established by the law. The risk corridor provision said that, for three years, if the costs incurred from participation exceeded the amount collected in premiums, then the federal government would reimburse insurance companies a portion of the difference. Conversely, if an insurer experienced savings from lower than expected costs, then the insurer would pay the government a portion of that savings. Petitioners, insurance companies that offered plans through the exchanges, argue that they relied on the risk corridor provision when they decided to participate.

In 2013, the U.S. Department of Health and Human Services (HHS) issued a regulatory notice that said risk corridor payments would be made regardless

of whether the program was budget neutral. HHS Notice of Benefit and Payment Parameters for 2014, [78 Fed. Reg. 15,410, 15,473 \(Mar. 11, 2013\)](#). A year later, HHS reversed course, indicating that risk corridor payments would only be made if they were budget-neutral, meaning that HHS would only pay insurers using amounts it collected in risk corridor savings. Later in 2014, Congress included a rider to the annual appropriations law that similarly limited HHS's ability to make risk corridor payments unless they were budget-neutral and forbade HHS from using any allocated funds for FY 2015 to pay those obligations.

Risk corridor payments and collections did not begin until 2015. After calculating 2014 expenses, HHS pro-rated its payments to insurers because the revenue collected fell short of the agency's obligations. Insurers were paid about 12.6% of what the companies claim they were owed for that year, and HHS paid out nothing under the program for 2015 and 2016. Petition for Writ of Certiorari at 11, *Land of Lincoln Mutual Health Ins. Co. v. U.S.*, 2019 U.S. LEXIS 4207 (No. 18-1038) (filed Feb. 4, 2019). By HHS's own calculation, insurance companies are due more than \$12 billion for the three-year duration of the program. *Id.* at 22a (citing CMS, Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year (Nov. 2017)).

The insurance companies filed suit in the Court of Federal Claims, each alleging they were owed money under the risk corridor program. The Court of Federal Claims reached conflicting outcomes. In *Moda*, the court held that, by enacting ambiguous riders to repudiate an unambiguous statute, the government violated both statutory and contractual obligations. *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 462 (Fed. Cl. 2017). In [Maine Community Health Options](#) and [Land of Lincoln](#), the court held that any existing obligation under [Section 1342](#) negated the congressional riders. *Me. Cmty. Health Options*, 133 Fed. Cl. 1, 12-13 (Fed. Cl. 2017); *Land of Lincoln Mut. Health Inc. Co.*, 129 Fed. Cl. 81, 107 (Fed. Cl. 2016).

All three cases were appealed to the Federal Circuit and were decided together to resolve the inconsistencies. The Federal Circuit held that, while the statutory language of the ACA created an obligation that the government make risk corridor payments, the appropriations bills passed in 2015 and 2016 repealed or suspended any obligation that the government pay out more than it took in. [Moda Health Plan, Inc. v. United States](#), 892 F.3d 1311, 1322 (Fed. Cir. 2018). The majority wrote that Congress's intent in enacting the appropriations riders to limit sources of funding for the risk corridor program was clear. *Id.* at 1328.

Writing in dissent, Judge Newman argued that the appropriations riders cannot cancel the government's obligation to make risk corridor payments, and that a statute cannot be modified or repealed without express language so stating. *Id.* at 1332-34 (Newman, J., dissenting). The Federal Circuit denied a rehearing en banc. [Moda Health Plan, Inc. v. United States](#), 908 F.3d 738, 740 (Fed. Cir. 2018). In their petitions for certiorari, the insurance companies echo the dissent, while the government advocates for affirmance of the majority opinion.

WHAT'S AT STAKE

Because the risk corridor payment was a limited three-year program, the impact of non-payment has already been realized by the exchanges, and it is unlikely any further destabilization of the exchanges will result. That said, a ruling in favor of the government may undermine the government's reputation as a fair and reliable partner. Ultimately, the Court's ruling in this case will determine the extent to which Congress controls the purse strings when it comes to government programs that rely on the participation of private entities.

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Inside Information: Preserving Employees' Right to Bring Employer Stock Suits

Retirement Plans Committee of IBM v. Jander,
No. 18-1165,
[910 F.3d 620 \(2d Cir. 2018\)](#),
cert. granted, 2019 U.S. LEXIS 3791 (U.S. June 3, 2019).

Oral argument scheduled for Nov. 6, 2019.

Issue: Whether [Fifth Third Bancorp v. Dudenhoefter](#)'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

The Employee Retirement Income Security Act (ERISA) requires fiduciaries, the individuals charged with administering employee benefit plans, to act prudently. In recent years, employees have argued that fiduciaries have breached this duty when investing plan assets in employer securities. Often in these cases, the fiduciaries are also company insiders who knew information that could impair investment value, but failed to act in a way that would protect beneficiaries.

The Supreme Court has articulated a pleading standard for these "inside information" cases. [Fifth Third Bancorp v. Dudenhoefter](#), 573 U.S. 409 (2014). Plaintiffs must allege that a prudent fiduciary "could not have concluded" that an alternative action (such as disclosing the information or removing the investment option from the plan) "would do more harm than good to the fund." *Id.* at 428. The Second Circuit was the first appellate court to find a complaint sufficient under the *Dudenhoefter* standard. *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620, 631 (2d Cir. 2018). In reviewing *Jander*, the Supreme Court will consider whether courts applying *Dudenhoefter* must apply a heightened pleading standard, or if general allegations that early disclosure is typically beneficial are enough.

Beginning in 1983, IBM made retirement plans available to employees, including an Employee Stock Option Plan (ESOP) that was invested primarily in IBM's stock. Employees who participated in the plan, led by Jander, sued, alleging that IBM's stock price was artificially inflated. They argued that plan fiduciaries breached their duty of prudence by continuing to allow investment in company stock, despite knowing that the stock was artificially inflated. The district court twice held that Jander failed to meet *Dudenhoefter*'s pleading standard and ultimately dismissed the case. The court held that a prudent fiduciary could have foreseen that a disclosure could have done more harm than good (for example, by leading to a run on the stock). [Jander v. Retirement Plans Committee of IBM](#), 272 F. Supp. 3d 444, 449-54 (S.D.N.Y. 2017).

The Second Circuit reversed, finding that Jander met the pleading standard articulated in *Dudenhoefter* for an ERISA violation. The Second Circuit

grappled with the exact standard set by *Dudenhoeffer*, but ultimately concluded that Plaintiffs had pled enough to survive a motion to dismiss. The court emphasized that “non-disclosure of IBM’s troubles was no longer a realistic option, and a stock-drop following early disclosure would be no more harmful than the inevitable stock drop that would occur following a later disclosure.” *Jander*, 910 F.3d at 631. In other words, if IBM disclosed the harm to beneficiaries earlier, it would not have caused more harm than IBM continuing to sit on the information.

In its [petition for certiorari](#), IBM argues that the relaxed pleading standard allowed by the Second Circuit would not result in “separating the plausible sheep from the meritless goats.” Petition for Writ of Certiorari at 2, *Retirement Plans Committee of IBM v. Jander*, 2019 U.S. LEXIS 3791 (No. 18-1165) (citing *Dudenhoeffer*, 573 U.S. at 425)). IBM expresses concern that a lenient standard will disincentivize employers from making ESOP plans available because it will expose them to more liability. Additionally, IBM urges a resolution to the circuit split to “restore the ability of the *Fifth Third* pleading standard to separate cases involving actual imprudence from reflexive, lawyer-driven suits that could follow every stock drop.” *Id.* at 11. In response, *Jander* maintains that the Second Circuit correctly applied the *Dudenhoeffer* standard: through the lens of “careful, context-sensitive scrutiny.” *Id.* at 21. *Jander* also argues that there should not be a higher bar for ESOP fiduciaries than for a typical ERISA duty-of-prudence claim. *Id.* at 23.

In *Dudenhoeffer* itself, AARP and AARP Foundation, as amici, urged the Court not to adopt an overly strict pleading standard. AARP’s brief argued “[t]he Court should not place the retirement of millions of private employees at risk by insulating fiduciaries’ investment decisions from meaningful judicial review.” [Brief for AARP and AARP Foundation as Amicus Curiae Supporting Respondents](#) at 27, *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). The same concern is at issue in *Jander*, signaling that the Supreme Court is prepared to resolve the standard.

WHAT’S AT STAKE

Millions of older Americans plan to fund their retirement years through investments in ERISA plans, which often include ESOPs or employer stock as an option. There are various ways that employers, whether intentionally or unintentionally, encourage employees to purchase company stock. But, employees typically underestimate the risks attendant to concentrating their investments in employer securities and overvalue the significance of past stock performance. In addition, stock portfolios concentrated in employer securities can pose a significant threat to retirement security because such portfolios essentially require a participant to place all their eggs in one basket, displacing investments in diversified equity funds and other balanced funds. *Dudenhoeffer* established a protective standard to guard against these pitfalls. Should the Supreme Court impose an overly stringent pleading standard on ESOP breach-of-prudence claims, it could erode that protection.

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Unknown Unknowns: Protecting Consumers From Unfair Debt Collection Practices in “Discovery Rule” Cases

Rotkiske v. Klemm,
No. 18-328,
[890 F.3d 422 \(3d Cir. 2018\)](#),
cert. granted, 139 S. Ct. 1259 (Feb. 25, 2019).

Oral argument scheduled for Oct. 16, 2019.

Issue: *Whether the “discovery rule” applies to toll the one-year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq., as the U.S. Courts of Appeals for the 4th and 9th Circuits have held but the U.S. Court of Appeals for the 3rd Circuit (sua sponte en banc) has held contrarily.*

The stated purpose of the Fair Debt Collection Practices Act (FDCPA) is “to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.” [15 U.S.C. § 1692\(e\)](#). Enacted in 1977, the FDCPA is a longstanding safeguard for consumers against improper debt collection practices.

Between 2003 and 2005, Kevin Rotkiske accumulated credit card debt, which his bank referred to Klemm & Associates for collection. In March of 2008, Klemm sued Rotkiske for payment and attempted service at an address where Rotkiske no longer lived. Unable to locate Rotkiske, Klemm withdrew its lawsuit. In January of 2009, Klemm tried again to sue for payment and attempted service at the same address as before. Unknown to Rotkiske, someone at that address accepted service on his behalf, and ultimately Klemm obtained a default judgment against Rotkiske for around \$1,500. Rotkiske did not discover this judgment until he applied for a mortgage in September of 2014 and was rejected because of it. In June of 2015, Rotkiske sued Klemm, alleging that Klemm “violated the FDCPA by fraudulently obtaining the default judgment through their efforts to make sure that Rotkiske would not be properly served.” [Rotkiske v. Klemm, No. 15-3638 2016 U.S. Dist. LEXIS 32908, at *7 \(E.D. Pa., Mar. 14, 2016\)](#). Rotkiske’s claim was dismissed because he filed outside of the FDCPA’s one-year statute of limitations on enforcement actions. The District Court concluded that the statute of limitations started to run when the violation occurred, back in 2009, and not when Rotkiske first discovered the violation, in 2014.

The Third Circuit relied on the language of the FDCPA to affirm the district court’s holding, saying “[a]n action to enforce any liability created by this subchapter may be brought in any appropriate United States district court . . . within one year from the date on which the violation occurs.” [Rotkiske v. Klemm, 890 F.3d 422, 425 \(3rd Cir. 2018\)](#) (citing [15 U.S.C. § 1692k\(d\)](#)). The Third Circuit interpreted the FDCPA’s statute of limitations as starting to run

when a debt collector violates the statute, not when the injured party discovers the violation. The issue before the Supreme Court is whether the Third Circuit is correct, or, instead, the Fourth and Ninth Circuits, which have held that the FDCPA's statute of limitations begins to run when the violation is *discovered*. See [Lembach v. Bierman, 528 Fed. Appx. 297, 302 \(4th Cir. 2013\)](#) (finding that there is a general federal rule that “a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action”); [Mangum v. Action Collection Serv., Inc., 575 F.3d 935 \(9th Cir. 2009\)](#) (same). Rotkiske argued that the Third Circuit should follow *Lembach* and *Mangum*, but the Third Circuit declined, noting that “neither opinion analyzed the ‘violation occurs’ language of the FDCPA.” 890 F.3d at 427.

The Supreme Court will determine whether the discovery rule applies to the FDCPA. Historically, the discovery rule doctrine originated in cases of fraud, where the victim did not realize that he had been injured until well after the fraud occurred. Without the discovery rule, fraudsters could manipulate statutes of limitations to avoid prosecution, leaving consumers with no legal recourse. The discovery rule has been expressly added to some statutes, but this is usually done when the injury the statute protects against is not already based in fraud—for example, when developments in modern medicine allowed latent injuries to be traced back to events that occurred years prior. When it comes to cases of fraud, however, the discovery rule has been read into every federal statute of limitations. See, e.g., [U.S. v. Kubrick, 444 U.S. 111 \(1979\)](#) (holding discovery rule applies to the Federal Tort Claims Act). This case asks whether the discovery rule is a rule of broad implicit application that should be read into the FDCPA.

WHAT'S AT STAKE

The Fair Debt Collection Practices Act, designed to protect consumers from unfair or abusive third-party debt collection practices that continue to plague the industry, has become increasingly important to older people in the past decades. Older borrowers have always been highly susceptible to harassing phone calls, threats, and demands for payment on accounts already paid or inaccurately calculated. Stagnant wages, increasing health care and other costs of living, and dramatic shifts in the consumer lending industry have significantly increased the percentage of older people who still owe debt entering their retirement years. Moreover, the level of debt carried by older borrowers is increasingly unaffordable to the many older Americans barely making enough to meet expenses. Important income sources, such as Social Security and pensions, are exempt from attachment by debt collectors, but often are placed at risk by unfair and abusive debt collection practices, threatening the financial security of older adults. Meaningful redress requires providing consumers with a reasonable opportunity to know about the violation before their right to sue expires.

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The Ends Don't Justify the Means: Protecting Pension Plans From Mismanagement and Abuse

Thole v. U.S. Bank, N.A.,
No. 17-1712,
[873 F.3d 617 \(8th Cir. 2017\)](#),
cert. granted, 2019 U.S. LEXIS 4411 (U.S. June 28, 2019).

Oral argument not yet scheduled.

Issue: (1) *Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under [29 U.S.C. § 1132\(a\)\(3\)](#) without demonstrating individual financial loss or the imminent risk thereof;* (2) *whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under [29 U.S.C. § 1132\(a\)\(2\)](#) without demonstrating individual financial loss or the imminent risk thereof;* and (3) *whether petitioners have demonstrated Article III standing.*

The Employee Retirement Income Security Act of 1974 (ERISA) safeguards the interests of employee benefit plan participants by ensuring that plan funds are protected and that participants receive their benefits. One way the law achieves this is through enforcement provisions, which provide a range of mechanisms for plan participants to access the federal courts by suing under Section 502, 29 U.S.C. § 1132. Section 502(a)(2) allows a plan participant to sue for “appropriate relief” under ERISA Section 409, which makes plan fiduciaries liable for losses resulting from fiduciary breaches and subjects fiduciaries to removal. Section 502(a)(3) allows plan participants to sue to enjoin any violation of ERISA and to obtain other “appropriate equitable relief.”

James Thole and Sherry Smith, participants in U.S. Bank’s Benefit Pension Plan, sued U.S. Bancorp, the Plan’s sponsor, under Section 502. They alleged that the sponsor breached ERISA’s fiduciary duties of prudence and loyalty by investing all of the Plan’s assets in high-risk equities. The plan lost approximately \$750 million in 2008 and became underfunded, meaning the present value of future liabilities exceeded the value of plan assets. But during the litigation, the sponsor made additional contributions, and the Plan became overfunded.

The district court held that the plaintiffs had standing under Article III of the Constitution at the outset of the case because their injury—the greater risk that the plan would default and they would not receive future benefits—was sufficiently concrete and particularized. [Adedipe v. U.S. Bank, N.A. \(Adedipe I\)](#), 62 F. Supp. 3d 879, 890-95 (D. Minn. Nov. 21, 2014). The court dismissed the entire case as moot, however, following the change in the Plan’s funding. [Adedipe v. U.S. Bank \(Adedipe II\)](#), No. 13-2687, 2015 U.S. Dist. LEXIS 178380, at *26-27 (D. Minn. Dec. 29, 2015). The court held that the plaintiffs

no longer had a concrete interest in any monetary relief that it might award. *Id.* at 15.

Plaintiffs appealed to the Eighth Circuit. AARP and AARP Foundation, as amici, argued against any rule that unnecessarily limits participants' ability to sue fiduciaries that breached their duties, regardless of the plan's funding status at any given moment in the litigation. [Brief for AARP and AARP Foundation](#) as Amicus Curiae Supporting Appellants at 3, *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2015).

The Eighth Circuit affirmed the district court's ruling, but based its holding on statutory, rather than constitutional grounds. *Thole v. U.S. Bank, N.A.*, 873 F.3d 617, 622 (8th Cir. 2017). The court cited earlier decisions, including [Harley v. Minn. Mining & Mfg. Co.](#), 284 F.3d 901 (8th Cir. 2002), which held that participants in an overfunded plan lack standing to bring a fiduciary duty claim because such participants will still receive their promised benefits and, thus, have suffered no injury. *Id.* at 627-28. The Eighth Circuit explained that this analysis applied equally to the question of whether plaintiffs can state a claim under Sections 502(a)(2) and 502(a)(3). *Id.* at 630. The court reasoned that plaintiffs who see no diminution in their pensions or a greater risk thereof do not fall within the class of plaintiffs authorized to bring suit. *Id.*

Thole and Smith petitioned for certiorari. The Solicitor General submitted a brief at the request of the Court, recommending that the Court grant the petition. [Brief for United States](#) at 1, *Thole v. U.S. Bank, N.A.*, (2019) (No. 17-1712). The Court will resolve the question of what relief is available to plan beneficiaries who have not suffered an individual financial loss and are not in imminent risk of such a loss.

WHAT'S AT STAKE

The outcome of this case will have a significant impact on older Americans' ability to protect their pension plans from mismanagement and to obtain appropriate relief. As AARP and the AARP Foundation stressed in the [Eighth Circuit](#), "[w]hether the plan is overfunded or underfunded is irrelevant as to whether the plan fiduciary has breached her duties of loyalty, prudence, and diversification by placing all of the plan assets in proprietary equity funds." [Brief for AARP and AARP Foundation as Amicus Curiae Supporting Appellants](#) at 3, *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2015). To deny plaintiffs a remedy based on a snapshot of a pension's funding at a given moment also ignores the wild fluctuations in funding that can occur in risky pensions with long lives. "If employees cannot police their pension plans by suing the plan fiduciaries, it will be impossible for them to ensure proper and prudent plan administration and management of plan assets." *Id.* at 2.

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Looking Forward: Gazing Into the Crystal Ball

This section discusses not only pending petitions for certiorari that AARP and AARP Foundation are following, but also significant cases in the lower courts and issues on which the Supreme Court may grant certiorari within the next few years. These cases and issues are important to people over the age of 50 and, if the Court eventually grants a petition, may have a significant impact on their lives. We note that several important decisions from past Supreme Court terms have left unresolved legal issues of critical importance to older people. Of course, as lower courts issue decisions and legislatures enact laws, new issues inevitably arise.

Employment Discrimination

Age Discrimination

As of the issuance of this Preview, a [petition for certiorari](#) filed by AARP Foundation is pending and scheduled for action in the first conference of the 2019 term in *Kleber v. CareFusion Corp.*, No. 18-1346 (U.S. filed Apr. 23, 2019). *Kleber* poses an important question regarding the scope of the disparate impact theory of liability under the Age Discrimination in Employment Act of 1967 (ADEA)—a theory the Court recognized as valid in [Smith v. City of Jackson](#), 544 U.S. 228 (2005), and further defined in [Meacham v. Knolls Atomic Power Laboratory](#), 554 U.S. 84 (2008).

Attorney Dale Kleber, 58, sued in the U.S. District Court for the Northern District of Illinois challenging CareFusion’s imposition of a rigid maximum-years-of-experience criterion (“no more than seven”) for a seemingly complex position, involving considerable responsibility, in its General Counsel’s office. He alleged that the seven-year ceiling had an adverse disparate impact on his chances of securing the job based upon his age, in that virtually all potential candidates over the age of 40—the minimum age for an ADEA discrimination claimant, would likely exceed the experience cap. The full Seventh Circuit affirmed the district court’s dismissal of Kleber’s disparate impact claim, ruling that [Section 4\(a\)\(2\)](#) of the ADEA—the provision of the Act the Supreme Court identified as the locus of such a claim in *Smith*—does not extend to outside job “applicants.” See *Kleber v. CareFusion Corp.*, 914 F.3d 480, 481 (7th Cir. 2019) (en banc).

Whether there is a disparate impact hiring claim under the ADEA has been a highly contentious question. Thus far, two en banc U.S. Courts of Appeals have vacated panel decisions recognizing such a claim. See [Kleber v. CareFusion Corp.](#), 888 F.3d 868 (7th Cir. 2018), *vacated and contrary result entered on reh’g en banc*, 914 F.3d 480 (7th Cir. 2019), and [Villarreal v. R.J. Reynolds Tobacco Co.](#), 806 F.3d 1288 (11th Cir. 2015), *vacated and contrary result entered on reh’g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (June 26, 2017). Significantly, the *Villarreal* decision produced no fewer than four distinct opinions as to the “unambiguous” meaning of Section 4(a)(2). And a trial court in the Ninth Circuit has

approved such a cause of action. See [*Rabin v. PricewaterhouseCoopers, LLP*, 236 F. Supp. 3d 1126 \(N.D. Ca. 2017\)](#) (recognizing disparate impact hiring claim under Section 4(a)(2) of the ADEA). The rulings in *Kleber* and *Villarreal* diverge dramatically from the Supreme Court’s interpretation of identical statutory text in Title VII in [*Griggs v. Duke Power Corp.*, 401 U.S. 424 \(1971\)](#) (recognizing disparate impact claim in job application context). But, Congress amended that text in 1972 after *Griggs* (and after enactment of the ADEA) to include a reference to “applicants,” consistent with the Court’s inclusion of job applicants in its holding. Vehement debates in the various opinions in *Villarreal* and *Kleber* are not likely to be resolved until the Supreme Court takes up the question whether Section 4(a)(2) covers cases of age bias in hiring. For instance, what is the scope of the *Griggs* decision: did it cover only internal applicants for promotion or all applicants, including those from outside a firm? And what is the meaning of Congress’s 1972 amendment of Title VII’s disparate impact language: did it finally cover all applicants—external as well as internal—or simply codify the ruling in *Griggs* in doing so?

Another emerging issue involving disparate impact claims in the age discrimination arena is whether sub-groups of individuals over age 40 (such as those age 50 and over) may bring disparate impact claims under the ADEA. The Seventh Circuit recently concluded that such an approach is allowed in a case, [*O’Brien v. Caterpillar, Inc.*, 900 F.3d 923, 930 \(7th Cir. 2018\)](#), involving older workers eligible to retire who were laid off in a reduction-in-force and were denied unemployment benefits unless they agreed to retire. The company also paid such benefits to retirement-ineligible employees as part of an agreement with machinist and aerospace worker unions in return for the union’s agreement to eliminate a formal unemployment benefits plan. The plaintiffs—retirement-eligible workers who were laid-off but who declined to retire and, thus, did not receive unemployment benefits—alleged that denying them such benefits had a disparate impact on older laid-off workers. The parties disagreed on how to measure the impact: Caterpillar urged the Court to compare the impact on workers age 40 and over with that on workers under age 40, while Plaintiffs argued that the proper comparison was between retirement-eligible and retirement-ineligible workers. Retirement-eligible workers were significantly older, and yet, only they had to take an additional step—retiring—to receive unemployment benefits.

The Court agreed with the plaintiffs that the ADEA does not require a rigid under- and over-age-40 analysis. Yet, it affirmed dismissal of the plaintiffs’ claims, finding that the payout formula was founded on “reasonable factors other than age,” such as the company’s desire to encourage the retirement of retirement-eligible employees. *Id.* at 933. The Third Circuit also has approved ADEA “sub-group” claims, see [*Karlo v. Pittsburgh Glassworks LLC*, 849 F.3d 61, 66 \(3d Cir. 2017\)](#), while the Eighth Circuit two decades ago held otherwise, in [*EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 \(8th Cir. 1999\)](#).

Disability Discrimination

A number of disability employment discrimination issues have emerged in the past year as matters ready for resolution by the Court, while others present stark conflicts in decisional law that are still percolating in the circuits.

One issue that is ripe for review now is leave as a form of reasonable accommodation. To a significant degree, lower federal courts have been consistent in recent years in upholding this possibility as one contemplated by the express terms of the Americans with Disabilities Act (ADA). See, e.g., [Cehrs v. Northeast Ohio Alzheimer's Research Ctr.](#), 155 F.3d 775 (6th Cir. 1998); [Criado v. IBM Corp.](#), 145 F.3d 437 (1st Cir. 1998). However, other recent decisions—in particular, one by then-appellate judge, now-Justice Neil Gorsuch, [Hwang v. Kan. State Univ.](#), 753 F.3d 1159 (10th Cir. 2014)—have signaled to counsel for employers that the Supreme Court may be much less favorably inclined. Yet, the Court in 2018 declined to review the issue. A losing ADA claimant and leave applicant in the Seventh Circuit petitioned for certiorari after two lower courts upheld his employer's decision to refuse his request for unpaid leave, beyond the twelve weeks guaranteed by the Family and Medical Leave Act of 1993, based on what the plaintiff claimed to be a “maximum leave” policy. [Severson v. Heartland Woodcraft, Inc.](#), 872 F.3d 476 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (Apr. 2, 2018). In his petition, Severson asserted that not only the First and Sixth Circuits, but also the Ninth and Tenth, have determined, consistent with the EEOC's position, that “maximum leave” policies clash with the ADA's requirement that employers consider accommodation requests on a case-by-case basis. While the Supreme Court did not grant this petition, it is likely that it will address the issue soon.

Still percolating in the circuits are a number of challenges to employer policies that exclude applicants based upon what plaintiffs and many employers characterize as obesity, and what some employers prefer to describe as the mere physical characteristic of weight. Prior to the ADA Amendments Act of 2008 (ADAAA), obesity rarely formed the basis for an ADA employment discrimination claim, because EEOC policy stated that it rarely was a covered disability. The ADAAA, however, greatly expanded ADA coverage by revising the definition of “disability,” including the scope of conditions qualifying an individual as being “regarded as having [a covered] impairment.” [42 U.S.C. § 12102\(1\)\(C\)](#). To be a covered disability under the ADAAA, a “regarded as” condition need only be an “impairment”—a “disorder or condition . . . affecting one or more body systems.” Obesity significantly affects many of these systems, such as the musculoskeletal, cardiovascular, digestive, and circulatory systems. [29 C.F.R. § 1630.2\(h\)\(1\)](#). Moreover, a majority of the medical community, including the American Medical Association, has declared obesity to be a serious chronic disorder amounting to a disease. In short, there is a widespread consensus that obesity meets all the statutory criteria of an ADA disability, at least under the “regarded as” prong of the definition.

Yet, the federal courts continue to adhere to outdated scientific and legal reasoning that obesity only qualifies as a “regarded as” disability if it is

caused by a separate underlying condition amounting to a disability. See [*Richardson v. Chicago Transit Authority*, 926 F.3d 881 \(7th Cir. 2019\)](#); [*Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 \(8th Cir.\), cert. denied, 137 S. Ct. 256 \(2016\)](#). A notable exception is a recent state court decision that recognized obesity as a basis for a valid disability discrimination in employment claim under a state law similar to, but providing somewhat stronger protections than, the ADA. [*Taylor v. Burlington N. R.R. Holdings, Inc.*, 2019 Wash. LEXIS 456 \(Wash. Jul. 11, 2019\)](#) (Obesity is always an impairment under the Washington Law Against Discrimination as it is a “physiological disorder” and a “condition” that affects multiple body systems); see also [*Shell v. Burlington Northern Santa Fe Ry.*, 2018 U.S. Dist. LEXIS 197474 \(N.D. Ill. Nov. 20, 2018\)](#) (upholding ADA employment discrimination claim based on employer perception that obesity is likely, at any time, to produce one or more separate underlying disabilities).

Whether obesity may be, on its own, a covered disability under the ADA is likely to remain highly contentious and may require resolution by the Supreme Court. Increasingly, people at work or seeking work can show that they have obesity; estimates of the overall adult U.S. population with obesity are in the range of one-third to 40%. In the minds of various advocates, this cuts both ways: opponents of considering obesity a disability warn of an increase in potential ADA liability. Proponents respond that, in passing the ADAAA, Congress intended to define disability broadly and to shift the focus of ADA litigation to whether employers had engaged in unequal treatment on the basis of impairment-related factors.

ERISA and Employee Benefits

The Supreme Court is once again considering which party bears the burden of proving that a defendant’s breach of ERISA’s fiduciary duties caused the plaintiff’s harm. While the issue appears narrow and technical, the answer can make an outcome-determinative difference in the case. If a plaintiff proves that the defendant chose an imprudent investment, must the plaintiff also show that the investment caused a loss, or can she win if the defendant cannot show the loss would have happened anyway? The Court has considered addressing this question several times in the past few years. In 2015 and 2018, it called for the Solicitor General’s views on petitions raising the issue. The Court denied certiorari in 2015 after the Solicitor General recommended letting more circuit courts weigh in. [*Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 \(4th Cir. 2014\)](#), cert. denied, 135 S. Ct. 2887 (2015). In 2018, the parties settled the case before the Court took any action. [*Pioneer Centres Holding Co. ESOP & Trust v. Alerus Fin., N.A.*, 858 F.3d 1324 \(10th Cir. 2017\)](#), cert. dismissed, 139 S. Ct. 50 (Sept. 20, 2018). In [*Putnam Investments, LLC v. Brotherston, No. 18-926*](#), the Court has again called for the Solicitor General’s views, and it may grant certiorari in light of the added developments on this issue. The First Circuit held that while the default federal rule places the burden on the plaintiff to prove all elements of a case, ERISA’s incorporation of trust law provides an exception, shifting the burden to defendant. This deepens a circuit split. The First Circuit joined three other circuits (the Fourth, Fifth, and Eighth), while six others (the Second, Sixth, Seventh, Ninth, Tenth, and Eleventh) have reached the opposite conclusion.

In addition, courts continue to wrestle with the issue of when ERISA preempts state and local regulation. ERISA has a broad preemption clause, reaching “any and all State laws insofar as they may now or hereafter relate to any employee benefit plans.” [ERISA § 514\(a\), 29 U.S.C. § 1144\(a\)](#). In [Rutledge v. Pharm. Care Ass’n](#), the Eighth Circuit held that ERISA preempted an Arkansas state law regulating pharmacy benefits managers (PBMs), entities that administer prescription benefits for health plans and handle transactions with pharmacies. 891 F.3d 1109 (8th Cir. 2019). The court reasoned that because PBMs administer benefits for “health benefit plans and employers, labor unions, or other groups ‘that provide health coverage,’” a statute regulating them necessarily “relates to” employee benefit plans. *Id.* at 1112. Petitioner and its amici say that between 36 and 38 states have passed laws regulating PBMs and that the decision renders many of them subject to challenge. The Court has sought the Solicitor General’s views on this issue. If the Court grants certiorari, a ruling could have an impact on a range of state PBM laws and could affect a broader range of laws attempting to regulate aspects of the pharmaceutical market.

The wave of lawsuits against 403(b) Plans—a type of retirement plan, named after a section of the Internal Revenue Code commonly used in the higher education and medical fields—continues to generate rulings on ERISA issues, some of which may eventually make it to the Supreme Court. In [Sweda v. University of Pennsylvania](#), the Third Circuit issued the first appellate decision in one such case, and it was a noteworthy one. 923 F.3d 320 (3d Cir. 2019). The court affirmed the dismissal of certain claims, but reversed on the core fiduciary breach claims. Plaintiffs claimed that Defendants offered plan participants improper investment options over reasonable alternative investments and overpaid for services provided to the plan. The court held that the Federal Rules of Civil Procedure and Supreme Court precedent governing pleading standards apply with “contextual specificity.” Viewing the complaint’s allegations in light of ERISA’s protective function, Plaintiffs alleged sufficient facts to support these claims. The Court denied Defendants’ petition for rehearing. AARP and AARP Foundation, along with the Pension Rights Center, filed an [amicus brief](#) in support of the plaintiffs in a Seventh Circuit case raising a similar issue. Brief for AARP and AARP Foundation as Amici Curiae Supporting Plaintiffs, [Divane v. Northwestern Univ.](#) (2019) (No. 18-2569). The brief explained that plaintiffs should not have to allege facts too specific for them to know at the pleading stage and that offering participants multiple investment options does not relieve fiduciaries of their duties of prudence and monitoring.

Finally, the Supreme Court may consider whether ERISA plans can require plaintiffs to file suit in a specific court. In [Robertson v. U.S. Dist. Court for the Eastern District of Pennsylvania, No. 18-1341](#), a retiree sued his plan’s administrator and its agent in the Eastern District of Pennsylvania, where he lived, but the district court granted a motion to transfer the case to the Southern District of New York based on a forum selection clause in the plan. ERISA provides participants and beneficiaries with a choice of venues in which to sue. They can proceed “where the plan is administered, where the breach took place, or where a defendant resides or may be found.” 29 U.S.C. § 1132(e)(2). *Robertson* raises the issue of whether a plan provision

that requires a plaintiff to sue in only one of those venues conflicts with public policy. Following the district court's transfer order, Plaintiff petitioned for mandamus in the Third Circuit, which denied his petition without an opinion. That court is the fourth appellate court to rule on the question, apparently agreeing with the others that such a clause is permissible. In [Smith v. AEGON Cos. Pension Plan](#), the Court called for the views of the Solicitor General, who took the position that such forum selection clauses are invalid but recommended the Court deny certiorari until there was further percolation in the circuit and district courts. 769 F.3d 922 (6th Cir. 2014) *cert. denied* 136 S. Ct. 791 (2016). Since then, the Eighth, Seventh, and now the Third Circuits ruled in accord with the Sixth Circuit. The Court denied certiorari in all three previous cases, though only the Sixth and Seventh circuits have issued opinions addressing the issues.

Americans with Disabilities Act

AARP Foundation attorneys have been involved in many cases enforcing the Americans with Disabilities Act (ADA), particularly for people in long-term care settings. *Brown v. D.C.* is a case brought by AARP Foundation and co-counsel in 2010 on behalf of a class of District of Columbia nursing facility residents who want to return to live in the community. The lawsuit exposed the city's failure to provide transition services to nursing facility residents that would allow them to do so. These residents have lived in the facilities for a long time and need the city's help to transition out of the facility. For example, they need help applying for services, identifying available housing options, and selecting the right Medicaid-funded home care aides.

After trial, the district court found for the city. However, the U.S. Court of Appeals for the District of Columbia Circuit provided a [major victory](#) to AARP Foundation's clients when it reversed and remanded the district court's decision, restoring the civil rights of thousands of Washington, D.C., nursing facility residents who want to transition from nursing facilities back to their own homes. *Brown v. D.C.*, No. 17-7152, 2019 U.S. App. LEXIS 20058 (D.C. Cir. July 5, 2019). At the time of publication, the District of Columbia had not sought certiorari of the appellate court's decision.

This victory is especially significant because this year marks the 20th Anniversary of the Supreme Court's landmark [Olmstead v. L.C.](#) decision, holding that unjustified segregation of people with disabilities in institutions is unlawful discrimination under the [Americans with Disabilities Act](#) (ADA). 527 U.S. 581, 600 (1999). Thus, the ADA requires state and local governments to provide services to people in the most integrated setting appropriate to their needs, including long-term care services. *See id.* at 592. It also requires them to reform policies and practices that unnecessarily segregate or isolate people in nursing facilities and other institutions. *Id.*

Olmstead affirmed the civil rights of people with disabilities to live in the community, if able, and avoid unnecessary placement in institutional settings, such as nursing facilities. This decision is critical to older adults because they have a [higher incidence](#) of disabilities. They are also the [largest population](#) in nursing facilities. Moreover, [the overwhelming majority](#) of people age 65 and older would prefer to receive care in their homes rather

than in an institution. AARP Foundation has filed many [lawsuits](#) on behalf of older adults to ensure that states and local governments provide them meaningful access to home- and community-based long-term care alternatives to nursing facilities.

Affordable Care Act Challenges

Nine years after the enactment of the Patient Protection and Affordable Care Act (ACA), legal challenges continue. The most recent and expansive challenge stems from the Supreme Court's *NFIB v. Sebelius* [decision](#), which held that the ACA's individual mandate was constitutional as a valid exercise of Congress's Taxing Power. *NFIB v. Sebelius*, 567 U.S. 519, 569-70 (2012). The individual mandate was an ACA provision that required most Americans to have a basic level of health insurance coverage or pay a tax penalty.

In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). Among other things, [the Act](#) amended the tax code by reducing the tax penalty for failing to comply with the individual mandate to zero. Two months later, a group of states led by Texas and two individuals filed a lawsuit asking a Texas federal district court to declare the ACA unconstitutional. *Tex. v. U.S.*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). They argued that when Congress eliminated the tax penalty, the ACA's individual mandate was unconstitutional because it was no longer enforceable as a tax. They also argued that if the mandate were unconstitutional, then the rest of the ACA would be invalid because the remaining provisions relied on the mandate.

The Department of Justice (DOJ) did not fully defend the law in responding to the lawsuit. Instead, it agreed with the plaintiffs that the individual mandate is unconstitutional and specific consumer protection provisions, like protections for people with pre-existing conditions and limits on age rating, could not remain without the mandate. DOJ stopped short of asking the court to strike the entire law.

As the executive branch did not defend the entire ACA, several states intervened to defend it. Recognizing the importance of this case, more than 30 organizations and individuals also filed amicus briefs supporting the law, including [AARP and AARP Foundation](#). Brief for AARP and AARP Foundation In Opposition To Plaintiffs' Application For A Preliminary Injunction, *Tex. v. U.S.*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167-O).

In December 2018, the federal district court for the Northern District of Texas [declared](#) that the entire ACA is invalid. *Tex.*, 340 F. Supp. 3d at 613-14. It reasoned that the elimination of the tax penalty renders the individual mandate provision unconstitutional. *Id.* at 596. It also found that the rest of the ACA could not be severed from the individual mandate. *Id.* at 615. The district court's ruling invalidating the ACA was put on hold pending appeal. *Tex. v. U.S.*, No. 4:18-cv-00167-O, 2018 U.S. Dist. LEXIS 222345 (N.D. Tex., Dec. 30, 2018).

The case is now on appeal before the U.S. Court of Appeals for the Fifth Circuit. The U.S. House of Representatives intervened to join the states defending the law. The DOJ changed its prior position and is now calling for the court to strike the entire ACA. AARP, AARP Foundation, and their partners filed a [brief](#) explaining how older adults will be harmed if the Court rules that the ACA is invalid. Brief for AARP and AARP Foundation as Amici Curiae Supporting Intervenor Defendants-Appellants Urging Reversal, *Texas v. U.S.* (5th Cir. 2019) (No. 19-10011).

The importance of this case to older adults cannot be [overstated](#). The ACA is a lifeline for millions of Americans, including older adults who rely on it for their health and financial stability. Since its enactment, the ACA has become an integral part of the nation's health care system. Among other things, it expands access to quality affordable care, guarantees coverage for people with preexisting conditions, and limits how much insurers can charge older adults. It strengthens the financial viability of Medicare, lowers Medicare prescription drug costs, and expands Medicaid eligibility. It also helps protect nursing facility residents from fraud and abuse and the ability of older adults to live independently. Regardless of how the Fifth Circuit rules, the losing side will appeal the case to the Supreme Court. We can expect the Supreme Court to decide the constitutionality of the ACA once again at the beginning of next year.

There are also two cases challenging rules issued by the administration designed to expand the availability of short-term, limited-duration insurance (STLDI) and association health plans (AHPs). *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury*, No. 18-2133 (RJL) (D.D.C.); *State of N.Y. v. U.S. Dep't of Labor*, No. 18-1747 (JDB) (D.D.C.). STLDI and AHPs are two types of health insurance not subject to the requirements of the ACA. The challengers argue that the agencies that issued these rules exceeded their authority and that the rules are in conflict with the ACA.

AARP and AARP Foundation [filed a brief](#) in support of the challengers in the suit concerning STLDI, highlighting how older adults may be harmed by the proliferation of these plans. Insurers who offer these plans can deny coverage because of preexisting conditions, charge exorbitant rates based on age alone, and need not provide the minimum essential benefits ACA compliant plans must offer.

In March of this year, the district court [invalidated](#) the rule on association health plans, describing the rule as "designed to end run the requirements of the ACA[.]" *N.Y. v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 141 (D.D.C. March 28, 2019). In July, the district court [upheld](#) the STLDI rule. 2019 U.S. Dist. LEXIS 120834 (D.D.C. July 19, 2019). Both decisions have been appealed to the D.C. Circuit, and will likely be argued this fall.

Medicaid Work Requirements and Other Medicaid Proposals

Within the next year, the Supreme Court is likely to consider legal challenges to changes to state Medicaid policies, including the addition of work requirements. These proposed changes could fundamentally change the

Medicaid program. They also would place adults age 50 to 64 at risk of losing access to health care services.

These cases stem from [a January 2018 State Medicaid Director letter](#) in which the Centers for Medicare and Medicaid Services (CMS) announced a new policy that, for the first time, allows states to condition Medicaid eligibility on participation in a work or “community engagement” program under the waiver provision of Section 1115 of the Social Security Act. That section grants the Secretary of the U.S. Department of Health and Human Services (HHS) the authority to waive a state’s compliance with certain requirements of the Medicaid Act only for an “experimental, pilot, or demonstration project” likely to help promote the objectives of the Medicaid Act. The Secretary of HHS has delegated that authority to CMS.

One day after announcing this new policy, CMS approved Kentucky’s waiver application. The Kentucky waiver conditions Medicaid participation on satisfying work or community engagement requirements and new premium payments. It also imposes coverage lockouts if a beneficiary fails to satisfy the new requirements. Since then, CMS has approved additional state waivers that include work or community engagement requirements, coverage lockout periods, and higher premiums. It also approved waivers that eliminate retroactive coverage.

Beneficiaries in three states (Kentucky, Arkansas, and New Hampshire) challenged the Secretary’s approval of the waivers in federal district court. The beneficiaries claimed that the Secretary exceeded his authority in approving these waivers. They also claimed that the waivers placed them in danger of losing Medicaid, and, thus, access to needed healthcare.

In March 2019, a District of Columbia federal district court [vacated](#) HHS’s approval of the Kentucky and Arkansas waivers in two separate cases, [Gresham v. Azar](#), 363 F. Supp. 3d 165 (D.D.C. 2019) and [Stewart v. Azar](#), 366 F. Supp. 3d 125 (D.D.C. 2019). The district court held that the federal government cannot approve changes to state Medicaid programs that are inconsistent with the central objective of the Medicaid program to furnish medical assistance to low-income people and people with disabilities. The court found that the states’ waivers are not likely to promote this objective, thus, the Secretary exceeded his authority in approving them. In July 2019, the same court vacated HHS’s approval of the New Hampshire waiver for similar reasons in a third case, [Philbrick v. Azar](#), No. 19-773 (JEB), 2019 U.S. Dist. LEXIS 125675 (D.D.C. July 29, 2019).

The Department of Justice appealed the district court’s decisions concerning the Kentucky and Arkansas waivers to the U.S. Court of Appeals for the District of Columbia Circuit. The parties have briefed the cases. AARP, AARP Foundation, and their partners also filed an [amicus brief](#) in the *Stewart v. Azar* appeal. Brief for AARP and AARP Foundation as Amici Curiae Supporting Plaintiffs-Appellees Urging Affirmance, *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (No. 1:18-cv-152). The brief addresses inconsistencies between the Kentucky waiver and Medicaid’s objectives. It also discusses how the waiver could harm older adults and people with

disabilities or chronic conditions. The circuit court has not yet decided the case.

The losing party will likely seek certiorari from the Supreme Court when the D.C. Circuit issues its decision. While the waivers are [specific to each state](#), the decision here will have nationwide impact. At least fifteen other states have requested waivers involving work or “community engagement” requirements, and at least seven other states have requested waivers authorizing eligibility “lock-outs” for noncompliance. The court’s ruling will guide the extent to which low-income adults have access to health care and the types of restrictions their state Medicaid program can impose. Thus, the Supreme Court is likely to take up these cases.

Consumer

Constitutionality of the Consumer Financial Protection Bureau

Whether the single-director, removal-for-cause structure of the Consumer Financial Protection Bureau (CFPB) is constitutional may finally wind its way up to the United States Supreme Court next term. In June 2019, Selia Law, a California based law firm that was previously served with a civil investigative demand from the CFPB, filed a petition for a writ of certiorari, seeking review of the Ninth Circuit’s decision holding that the CFPB was constitutionally structured. See [Consumer Fin. Protec. Bureau v. Selia Law, LLC, 923 F.3d 680 \(9th Cir. 2019\)](#). Although there is currently no circuit split on the issue, with the Ninth Circuit and an en banc D.C. Circuit both finding that the CFPB’s structure is constitutional, [PHH Corp. v. Consumer Fin. Protec. Bureau, 881 F.3d 75 \(D.C. Cir. 2018\)](#), one may be percolating. On March 12, 2019, the Fifth Circuit heard [oral argument](#) in *Consumer Fin. Protec. Bureau v. All Am. Check Cashing Inc.*, on an interlocutory appeal from a district court’s ruling upholding the CFPB’s constitutionality. No. 18-60302 (5th Cir. 2018). Meanwhile, briefing is ongoing in the Second Circuit in *Consumer Fin. Protec. Bureau v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir. 2018), which is on appeal following a decision from the U.S. District Court for the Southern District of New York holding that the structure of the CFPB was unconstitutional and striking down Title X of Dodd-Frank in its entirety. [2018 U.S. Dist. LEXIS 104132 \(S.D.N.Y. June 21, 2018\)](#). Rulings from either the Second or the Fifth Circuit could result in a split in authority, enticing the Supreme Court to grant certiorari on the issue next term.

Data Breaches

Another issue ripe for Supreme Court review is whether individuals whose personal information is held in a database that is breached have Article III standing based on risk of future harm or whether such individuals must have already suffered harm to demonstrate a concrete injury. Many federal circuit courts have struggled to craft an answer to this question following the Supreme Court’s decision in [Spokeo, Inc. v. Robbins](#), which left open the issue of when the risk of harm can satisfy Article III’s “concreteness” requirement for an injury-in-fact. 136 S. Ct. 1540 (2016). The Third, Sixth, Seventh, Ninth and D.C. Circuits have found that plaintiffs in data breach cases have standing when they articulate a risk of future harm, whereas the

First, Second, Fourth, and Eighth Circuits have found no standing when the alleged injury is a heightened risk of future harm. Last term, the Court denied a [petition for certiorari](#) in *Zappos.com, Inc. v. Stevens* that could have resolved the circuit split. Next term, the Court may reverse course and take up the issue, as the split between circuits deepens and data breaches become an ever-increasing mainstay of today's society.

Utilities

During the past 10 years, state investigators have found several utility companies to be responsible for an increasing number of wildfires. In California, state investigators have found that poorly maintained power lines sparked multiple fires that have caused hundreds of millions of dollars in damage to homes and businesses. The California Public Utilities Commission has prohibited utility companies from transferring these costs to consumers in the form of higher monthly utility bills when a utility company is found to be responsible for the fires. The utility companies maintain that it is unconstitutional to prohibit them from increasing consumer utility bills to pay for the damage even when they are found to be responsible for the fire. The San Diego Gas and Electric Company has petitioned for review of a number of California court decisions precluding them from transferring over \$300 million in liability costs to consumers, and several other utility companies have filed amicus briefs urging the Court to take the case. If the Supreme Court grants certiorari in [San Diego Gas & Electric Company v. Cal. Pub. Utilities Comm'n, No. 18-1368](#) the decision may determine whether low-income and elderly consumers, as well as other ratepayers, will have to pay for wildfire or other damage caused by a utility company in the form of increased utility bills.

ABOUT AARP FOUNDATION

AARP Foundation works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. As AARP's charitable affiliate, we serve AARP members and nonmembers alike. Bolstered by vigorous legal advocacy, we spark bold, innovative solutions that foster resilience, strengthen communities and restore hope.

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