What’s at Stake for Older Adults in America

A Preview of the 2020 Term
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In Memoriam: 
Justice Ruth Bader Ginsburg 
(1933-2020)

We publish this year’s Supreme Court Preview with heavy hearts, as it comes on the heels of Justice Ruth Bader Ginsburg. A trailblazing and tireless advocate for equality, Justice Ginsburg shaped our world in ways unimaginable when she graduated first in her law school class in 1959—just one year after AARP’s founding. Among Justice Ginsburg’s contributions to civil rights, she authored the majority opinion in *Olmstead v. L.C.*, a seminal Americans with Disabilities Act case, which held that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead* has been central to much of our advocacy over the last two decades and continues to fuel our work on behalf of vulnerable older adults. It is a case that advances AARP Founder Ethel Percy Andrus’s commitment to empower older Americans to live with independence, dignity, and purpose, a commitment for all Americans reflected throughout Justice Ginsburg’s career.
Introduction

This year, the coronavirus has dramatically changed how we live our daily lives. The Supreme Court is no exception. The Court adapted to our new reality by holding the first telephonic arguments in Supreme Court history. And, although the Court made some scheduling changes along the way (and endured one infamous “flush”), it managed to carry on its vital work as final arbiter of the law.

In fact, the Court worked overtime, issuing decisions in July for the first time since 1996. But, as the saying goes, there is no rest for the weary. During the break between terms, the Court received numerous requests for emergency review of cases that raise important questions about how our democracy will continue to adapt to a historic pandemic, including when it comes to voting rights and state actions to stop the proliferation of the virus. Undoubtedly, this will continue when the Court resumes its regular work.

At the time of this preview’s publication, the Court has granted certiorari in about half as many cases as last year. AARP Foundation attorneys believe that several of them may directly or indirectly affect people age 50 and older. Several pending petitions will also have a significant impact if granted. Gazing Into the Crystal Ball discusses these pending petitions and predicts which legal issues affecting the lives of older adults may soon come before the Court.

Given the ever-increasing number of adults over the age of 50, impending Supreme Court decisions are likely to affect a growing percentage of the U.S. population. Participation in these cases is an integral part of AARP Foundation’s advocacy, particularly in a time when older adults with lower incomes are more vulnerable than ever. AARP Foundation will continue to fiercely defend older adults — not only in the Supreme Court, but also in courts across the country.

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CASES — 2020 TERM

Money Back Not Guaranteed: Consumer Redress and the Federal Trade Commission

AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n,
No. 19-508,
910 F.3d 417 (9th Cir. 2018),

Fed. Trade Comm’n v. Credit Bureau Ctr., LLC,
No. 19-825,
937 F.3d 764 (7th Cir. 2019),

Oral Argument not yet scheduled.

Issue: Whether Section 13(b) of the Federal Trade Commission Act authorizes the Federal Trade Commission to seek an injunction that includes the defendant returning all unlawfully obtained money.

The Supreme Court has agreed to hear two consumer protection cases about the remedies available to the Federal Trade Commission (FTC) under the Federal Trade Commission Act (FTC Act). The FTC’s mission is to protect consumers by preventing unfair or deceptive business practices as well as unfair methods of competition. Section 13(b) of the FTC Act gives the agency the authority to seek a permanent injunction to stop these practices. 15 U.S.C. § 53(b). For more than 30 years, the FTC has argued, and federal courts have agreed, that an injunction under Section 13(b) can include restitution and other forms of monetary relief. See, e.g., Fed. Trade Comm’n v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991). Indeed, disgorging ill-gotten gains from companies that violate the FTC Act is one of the FTC’s primary remedies. Thus, the Supreme Court’s decision will have profound implications for both the agency and consumers.

The first case, AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n, involves one of the largest payday lenders in the United States. In 2012, the FTC sued AMG Services, Inc. (AMG) under Section 13(b) for falsely claiming they would charge borrowers a loan amount plus a one-time finance fee. Fed. Trade Comm’n v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 421 (9th Cir. 2018). Instead, AMG piled undisclosed fees onto their loan and then illegally collected on loans by threatening borrowers with arrest and lawsuits. A Nevada district court granted summary judgment to the FTC, enjoined AMG from engaging in similar conduct in the future, and ordered AMG to pay $1.3 billion in equitable monetary relief. 910 F.3d at 422. On appeal, AMG argued that Section 13(b) did not permit an award of equitable monetary relief. Id. at 426. The Ninth Circuit disagreed with AMG, holding that Section 13(b) carries with it the right to grant “ancillary” relief, including restitution and other equitable monetary relief. Id. AMG appealed that decision to the Supreme Court.
The companion case, *Fed. Trade Comm'n v. Credit Bureau Ctr.*, came to the Supreme Court through a contrasting Seventh Circuit decision. In 2017, the FTC sued Credit Bureau Center, LLC, and others for luring people to its website with bogus Craigslist rental ads. 325 F. Supp. 3d 852, 856 (N.D. Ill. 2018). When consumers responded to the ads, the defendants impersonated property owners, offering property tours to consumers if they first obtained free credit reports and scores from the defendants’ websites. Id. at 857. Instead of providing tours, the defendants signed consumers up for a credit-monitoring service with continuing $30 monthly charges. Id. An Illinois district court awarded the agency $5.2 million in restitution. Id. at 869-70. The Seventh Circuit reversed that decision, holding the FTC Act does not expressly allow the FTC to seek restitution. 937 F.3d 764, 775, 786 (7th Cir. 2019). The FTC appealed that decision to the Supreme Court.

Although the FTC normally depends on the U.S. Solicitor General to represent it at the Supreme Court, the Solicitor General decided not to represent the FTC in its petition. This signals that the Administration is at odds with the FTC.

### WHAT’S AT STAKE

The Supreme Court’s decision in these cases will have a significant impact on the FTC’s continued ability to seek monetary relief to return money to consumers when they are victims of unfair, deceptive or anticompetitive practices. The FTC’s restitution authority under Section 13(b) is arguably the agency’s most potent weapon in two battles of great concern to older adults—the fight against consumer fraud and the fight against rising prescription drug prices. As detailed in the FTC’s 2018 *Protecting Older Consumers Report to Congress*, the FTC has filed many Section 13(b) redress actions protecting older adults. For over three decades, the FTC has exercised its Section 13(b) authority to return millions of dollars to older adults. Id.

Older adults suffer disproportionately from fraud and deception. Applied Res. & Consulting LLC, *Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey 11* (Sept. 2013). Each day, older adults confront countless advertising pitches falsely claiming that products and services can reverse aging, prevent age-related diseases, and provide retirement security. AARP and AARP Foundation have worked tirelessly to protect consumers from fraud through education, AARP’s national Fraud Watch Network Helpline, and other efforts. Still, vigorous law enforcement is crucial in this fight.

Likewise, older adults—especially those on low or moderate fixed incomes—experience difficulty paying for prescription drugs at a time when prices are rising at two or three times the rate of inflation. The high price of drugs forces many older adults to sacrifice their health and welfare by not filling their prescriptions, skipping doses, or cutting pills in half. Ashley Kirzinger et al., *Data Note: Prescription Drugs and Older Adults*, Kaiser Family Found. (Aug. 9, 2019). The FTC also uses its Section 13(b) authority to seek restitution from drug companies that violate the FTC Act.
Older adults simply cannot afford to have companies who break the law keep hundreds of millions of dollars in ill-gotten gains. The Supreme Court will decide if the FTC can continue to use its enforcement power to return money to older consumers harmed by fraud and unfair practices. Loss of this historically effective remedy will limit the FTC’s ability to remedy harm to older consumers.

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Third Time’s the Charm? Protecting the Affordable Care Act

*California v. Texas,*
No. 19-840,
945 F.3d 355 (5th Cir. 2019),
cert. granted, 140 S. Ct. 1262 (2020).

*Texas v. California,*
No. 19-1019,
945 F.3d 355 (5th Cir. 2019),
cert. granted, 140 S. Ct. 1262 (2020).

Oral argument scheduled for November 10.

**Issues:** (1) Whether the Affordable Care Act’s minimum coverage provision is unconstitutional now that Congress dropped the penalty for not securing ACA-compliant coverage to zero; and (2) if that provision is unconstitutional, whether that provision is severable from the rest of the ACA or renders the entire ACA invalid.

Ten years after the enactment of the Patient Protection and Affordable Care Act (ACA), the Supreme Court will consider the most expansive legal challenge to the law so far. The consolidated case 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. See *NFIB v. Sebelius*, 567 U.S. 519, 569-70 (2012). The individual mandate 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 of 2017* (TCJA). Among other things, the TCJA 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. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). They argued that when Congress zeroed out the tax penalty, it made the ACA’s individual mandate provision unconstitutional because it was no longer enforceable as a tax. Id. at 596. They also argued that if the provision were unconstitutional, then the rest of the ACA would be invalid because the remaining provisions relied on the mandate. Id. at 605.

The Department of Justice (DOJ) did not fully defend the law, prompting several states, led by California, to intervene and 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. See *Brief for AARP and AARP Foundation In Opposition To Plaintiffs’ Application For A Preliminary Injunction*, *Texas 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 held that the entire ACA is invalid. See *Texas*, 340 F. Supp. 3d at 613-14. The Court
reasoned that the zeroing-out of the tax penalty renders the individual mandate unconstitutional and that the rest of the ACA is not severable from that provision. *Id.* at 596, 615. The district court's ruling was put on hold pending appeal. *Texas v. United States*, 352 F. Supp. 3d 665 (N.D. Tex. 2018).

In a 2-1 decision, the U.S. Court of Appeals for the Fifth Circuit held that the individual mandate is unconstitutional. See *Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019). However, instead of determining what this meant for the rest of the law, the court sent the case back to the district court for additional analysis on which provisions could remain without the mandate. *Id.* Recognizing that the analysis could take years, several states, led by California, sought Supreme Court review. AARP and AARP Foundation again filed an amicus brief explaining that invalidating the law would harm all Americans, including older adults.

**WHAT’S AT STAKE**

The importance of this case cannot be overstated. With its broad reach, 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 protects the ability of older adults to live independently.

Moreover, the ACA has withstood the test of time and continues to operate as Congress intended, even with the zeroed-out penalty. It has been a crucial source of stability during the COVID-19 pandemic. Because of the ACA, 20 million more people had health insurance when the pandemic hit. In addition, millions of people who lost their jobs and employer-based health insurance became eligible to obtain insurance on the ACA marketplaces.

If the Supreme Court finds that the ACA is invalid, millions of older adults will lose life-saving health care coverage and consumer protections they have relied on for years. It will also throw the Medicare and Medicaid programs into fiscal and administrative chaos, disrupting the nation’s health care system and economy. Finally, it will destroy hard-fought gains, such as meaningful choice for older adults to age in place and protections for nursing facility residents and the lowest-income seniors who rely on Medicaid.

This would be a disaster at any time, but even worse now in the midst of a pandemic. The Supreme Court will have the final word on the ACA’s survival in the upcoming term.

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On Shaky Foundation: Constitutionality of FHFA’s Structure

*Collins v. Mnuchin,*
No. 19-422,
938 F. 3d 553 (5th Cir. 2019) (en banc),

*Mnuchin v. Collins,*
No. 19-563,
938 F. 3d 553 (5th Cir. 2019) (en banc),

Oral argument scheduled for December 9.

**Issues:** (1) Whether the Federal Housing Finance Agency’s (FHFA) structure violates the separation of powers; and (2) whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent.

During the Great Recession, Congress passed the [Housing and Economic Recovery Act of 2008 (Recovery Act)](https://en.wikipedia.org/wiki/Recovery_Act) to prevent catastrophic effects on the national housing market and the economy. The Recovery Act created the Federal Housing Finance Agency (FHFA). [12 U.S.C. § 4511](https://www.gpo.gov/fdsys/search/index.html?cid=fdsysds-6095176). Congress made the FHFA an independent agency led by a director, appointed by the President subject to Senate confirmation, who could be removed only for cause. [12 U.S.C. § 4512(a) and (b)(1)](https://www.gpo.gov/fdsys/search/index.html?cid=fdsysds-6095176). The Recovery Act gave the FHFA broad powers to regulate [Fannie Mae and Freddie Mac](https://en.wikipedia.org/wiki/Fannie_Mae_and_Freddie_Mac), the publicly traded, government-sponsored enterprises (together, the Enterprises) that were established to ensure a reliable and affordable supply of mortgage funds throughout the United States. The Enterprises operate in the secondary mortgage market, primarily buying home loans from private lenders, bundling them into mortgage-backed securities, and selling them to private investors.

In 2008, the Enterprises suffered overwhelming losses because of the decline in home prices and an increase in defaults on home loans. To prevent their collapse, FHFA appointed itself as conservator of the Enterprises under authority granted by the Recovery Act. [12 U.S.C. § 4617(a)](https://www.gpo.gov/fdsys/search/index.html?cid=fdsysds-6095176). Shortly afterward, using its power as conservator, the FHFA executed a funding agreement with the Treasury Department to keep the Enterprises afloat. This agreement was amended twice in attempts to assist the Enterprises, which continued to face repeated losses and liquidity problems.

Shareholders in Fannie and Freddie sued FHFA and Treasury under the [Administrative Procedure Act (APA)](https://en.wikipedia.org/wiki/Administrative_Procedure_Act) to set aside the agreement on two grounds. First, they argued that the FHFA and Treasury had exceeded their powers under the Recovery Act by agreeing to the third and final amendment. Second, they claimed the FHFA’s structure is unconstitutional and the agency’s decisions are, accordingly, invalid. [Collins v. Fed. Hous. Fin. Agency, 254 F. Supp. 3d 841, 848](https://www.gpo.gov/fdsys/search/index.html?cid=fdsysds-6095176)
The district court rejected both of these arguments and held that the Recovery Act barred the shareholders' APA claims and that the structure of the FHFA is constitutional. See id.

The shareholders appealed to a panel of the Fifth Circuit, which affirmed the dismissal of the APA claims, but held that the FHFA is unconstitutionally structured because it is insulated from presidential oversight. Collins v. Mnuchin, 896 F.3d 640, 676 (5th Cir. 2018). All parties sought rehearing en banc, and a majority of the Fifth Circuit affirmed the holding that the FHFA's structure is unconstitutional. See Collins v. Mnuchin, 938 F.3d 553, 563 (5th Cir. 2019).

While the parties' cross-petitions for certiorari were pending, the Supreme Court held that the structure of the Consumer Financial Protection Bureau (CFPB) is unconstitutional and severed the "for cause" provision. See Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197, 2209 (June 29, 2020). The CFPB and the FHFA have similar structures, making it likely that the Court will also hold that the FHFA's structure is unconstitutional.

The parties will likely devote significant briefing to the additional questions the Court will consider: severability and whether the agreement between the FHFA and Treasury should be set aside. The shareholders contend that the provision of the agreement at issue deprives them of all of their economic rights and that the Fifth Circuit, having concluded the agency is unconstitutionally structured, should have set aside that portion of the amendment. The government, on the other hand, argues that the structure of the FHFA did not prejudice shareholders because the Treasury secretary, who is removable at will, also approved and signed the amendment. See Petition for Writ of Certiorari at 12-13, Mnuchin v. Collins, No. 19-563 (Oct. 25, 2019). The government also points out that the shareholders seek to invalidate the portion of the agreement that they dislike, while preserving the portions relating to the capital contributions that helped keep the Enterprises solvent. Id.

WHAT'S AT STAKE

A decision adverse to FHFA is unlikely to have a big impact on the housing market right away, as the Court will probably remand the case to the lower courts to determine any remedy. An eventual remedy that requires the government to compensate the shareholders, however, may affect the government's ability and willingness to act as backstop for the Enterprises in another recession. Given the Enterprises' indispensable role in the housing finance system and the secondary mortgage market, any perceived weakness in their stability would likely restrict mortgage lending and put affordable homeownership out of reach for aspiring homeowners across the country.

An AARP study found that millions of older Americans carry mortgage debt. See Lori A. Trawinski, Nightmare on Main Street: Older Americans and the Mortgage Market Crisis, AARP Public Policy Institute (July 2016). From 2007 to 2011, the foreclosure rate for the 50+ population increased nearly sixfold. Id. at 3. The foreclosure rate is disproportionately high for Black and Hispanic borrowers age 50+. Id. at 12. Older Americans once used home equity to finance health care, home maintenance and other large expenses that arise during retirement,
options that the housing market collapse has taken off the table for many. *Id.* at 3. Stable, affordable homeownership is a cornerstone of financial stability and well-being that should be open to all Americans, and the Supreme Court's decision may have a substantial impact on that.

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Don’t Call Me, Maybe: Defining Auto Dialer Under the TCPA


Oral argument scheduled for December 8.

Issue: Whether the definition of an “automatic telephone dialing system” in the Telephone and Consumer Protection Act of 1991 encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not “use[a] random or sequential number generator.”

Noah Duguid does not use Facebook and never gave the company his cell phone number. Nevertheless, he received multiple text messages from Facebook informing him that an unknown device had accessed his account. After several unsuccessful attempts to stop these texts, Duguid filed a class-action lawsuit against Facebook for violating the Telephone Consumer Protection Act (TCPA).

Enacted in 1991 to protect privacy and prevent harassment, the TCPA bans unsolicited calls made using an automatic telephone dialing system (ATDS, or auto dialer). The statute defines an auto dialer as “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.” 47 U.S.C. § 227(a)(1).

The TCPA’s ban on robocalls also applies to text messages, and Duguid alleged that Facebook sent the text messages he received using an auto dialer. In urging dismissal, Facebook argued that the equipment Duguid described in his complaint was not an auto dialer under the TCPA. The district court adopted this argument and dismissed Duguid’s case. Duguid v. Facebook, Inc., No. 15-CV-00985-JST, 2017 WL 635117, at *5 (N.D. Cal. Feb. 16, 2017), rev’d and remanded, 926 F.3d 1146 (9th Cir. 2019).

On appeal, the primary statutory question concerned the TCPA’s definition of “auto dialer.” Under the interpretation Facebook advanced, a device would be an auto dialer only if it has the ability to call numbers using a “random or sequential number generator.” The Ninth Circuit, however, read the statute to include any device “with the capacity to dial stored numbers automatically,” whether or not the device could also call numbers using a random or sequential number generator. Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019). Applying this definition, the court held that Duguid had adequately pled a TCPA violation. Id. Facebook sought certiorari.

In its petition, Facebook contends that the Ninth Circuit’s interpretation of the TCPA incorrectly “decoup[es] the statutory requirement that an ATDS must use ‘a random or sequential number generator’ from the requirement that the device
be able to store numbers and dial them[.]” Suppl. Br. for Pet’r 5. The result, per Facebook, is that commonplace devices like smartphones are inappropriately brought under the sweep of the TCPA. Given the TCPA’s statutory damages of $500 per violation, this expansion of what counts as an auto dialer will result in substantially increased liability.

Duguid contends that Facebook advances an excessively narrow definition of “auto dialer,” one that conflicts with the Supreme Court’s recognition of the TCPA’s importance. In Barr v. Am. Ass’n of Pol. Consultants Inc., 140 S. Ct. 2335 (2020), the Court noted that the TCPA represents Congress’s attempt to stop unwanted robocalls and explained the statute’s importance in realizing that goal. Barr, 140 S. Ct. at 2343. Duguid argues that adopting Facebook’s preferred definition would restrict the statute to “a small universe of rapidly obsolescing robocalling machines,” Suppl. Br. for Resp’t 4, and kneecap the statute, contrary to Congress’s aim.

The Supreme Court will not be making its decision in a vacuum. The Second Circuit has followed the Ninth Circuit’s interpretation of auto dialer. Duran v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020); see also Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018). The Third, Seventh, Eleventh and D.C. Circuits have taken the opposite track. See Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020); Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020); ACA Int’l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).


What’s at Stake


Americans have benefited from great technological advances since Congress enacted the TCPA. The definition of “automatic telephone dialing system” affects...
the scope of the TCPA to protect against unwanted robocalls that use newer technology. If the Supreme Court affirms the Ninth Circuit’s definition of ATDS it will broaden the definition of illegal phone spam to include dialing from a pre-existing customer list. This would protect consumers from unwanted calls and messages. If the Supreme Court instead adopts a narrower definition of ATDS, it could lead to more unwanted calls, more harassment, and greater challenges for consumers to determine which calls are legitimate and which are not.

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Who Decides Who Decides? The Impact of Arbitration Carve-Outs on Delegation Clauses

Henry Schein, Inc. v. Archer and White Sales, Inc.,
No. 19-963,
935 F.3d 274 (5th Cir. 2019),

Oral argument scheduled for December 8.

Issue: Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

Returning to the Supreme Court for a second time, Henry Schein v. Archer and White Sales will resolve whether a federal judge or an arbitrator decides threshold questions of arbitrability under certain circumstances. In 2012, Archer and White, a dental equipment distribution and sales company, sued competitor Henry Schein for antitrust violations, seeking millions of dollars in damages and injunctive relief. Upon suit, Henry Schein moved to compel arbitration of Archer and White’s claims. See Brief for Respondent at 4-5, Henry Schein, Inc. v. Archer and White Sales, Inc., 2020 WL 1373161 (U.S. Mar. 2, 2020) [No. 19-963]. In opposition, Archer and White pointed to an exception in the language of the arbitration clause for injunctive relief claims. Id. At issue is whether this exception, or carve out, for injunctive relief claims allows a federal court to determine the threshold issue of arbitrability (i.e., whether the excepted claim is arbitrable) even though there is an otherwise clear and unmistakable delegation of that issue to the arbitrator.

There is a presumption that courts determine gateway issues of arbitrability, but the Supreme Court has held that an arbitrator can decide those issues if the parties clearly and unmistakably delegate the question of arbitrability to an arbitrator, in accordance with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (2018). Henry Schein v. Archer and White Sales, Inc, 139 S. Ct. 524, 530 (2019). Here, Henry Schein asserts that an arbitrator should decide whether Archer and White’s claims are arbitrable, despite the injunctive relief carve-out, because holding otherwise would allow parties to unravel a clear delegation clause by simply requesting injunctive relief. See Petition for Writ of Certiorari at 13(a), Henry Schein, Inc. v. Archer and White Sales, Inc., 2020 WL 529195 (U.S. Jan. 31, 2020) [No. 19-963]. Archer and White ask the Court to hold that questions of arbitrability only be delegated to an arbitrator when there is clear and unmistakable evidence that the parties intended to do so. Here, because the arbitration agreement contains exceptions to arbitration, Archer and White claims there is no clear delegation of authority to the arbitrator. The Supreme Court must now determine whether the injunctive relief exception negates the delegation clause.
WHAT'S AT STAKE

Mandatory binding arbitration clauses are increasingly common, especially in long-term care settings. These clauses are problematic because they limit access to courts and often include oppressive terms for consumers. Consumers who are forced to arbitrate their claims must often do so with limited discovery and can rarely, if ever, seek systemic or class-wide relief. Arbitrations are confidential, and arbitrators are not required to issue written opinions, limiting transparency. Arbitrators are free to veer from established law and rules of evidence in rendering a decision.

Because arbitration clauses disadvantage consumers, it is important that they only be enforced when there is a clear intent to arbitrate. Federal courts are the most appropriate forum to determine arbitrability, absent a clear and unmistakable delegation of that issue to an arbitrator. Here, if the Court determines that an arbitrator can decide the gateway issue of arbitrability, it will expand the power of arbitrators, who ultimately benefit from decisions that favor arbitration. Given the potential disadvantages of arbitration for consumers, it is important that the power to decide gateway issues remain with federal courts absent a clear and unmistakable intent to do so.

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Stuck in the Middle: Whether ERISA Preempts Regulation of PBMs

Rutledge v. Pharmaceutical Care Mgmt. Ass’n, No. 18-540, 891 F.3d 1109 (8th Cir. 2018), cert. granted, 140 S. Ct. 812 (2020).

Oral argument scheduled for October 6.

**Issue:** Whether the U.S. Court of Appeals for the 8th Circuit erred in holding that Arkansas’s statute regulating pharmacy benefit managers’ drug-reimbursement rates, which is similar to laws enacted by a substantial majority of states, is preempted by the Employee Retirement Income Security Act of 1974, in contravention of the Supreme Court’s precedent that ERISA does not preempt rate regulation.

The State of Arkansas, like most states, enacted a law attempting to regulate the conduct of pharmacy benefit managers (PBMs) and lower drug prices. See Ark. Code § 17-92-507 (2019). PBMs are intermediaries between health plans and pharmacies that set reimbursement rates for prescription drugs distributed by pharmacies. Pharm. Care Mgmt. Ass’n v. Rutledge, 891 F.3d 1109, 1111 (8th Cir. 2018). The Arkansas legislature argues that PBMs were reimbursing pharmacies at a lower rate than what the pharmacies paid for prescription drugs, resulting in a spate of rural pharmacy closures and increased costs for consumers. Petition for a Writ of Certiorari at 2-3, Rutledge v. Pharm. Care Mgmt. Ass’n, 140 S. Ct. 812 (2020) (No. 18-540). The Arkansas statute narrowed the gap between wholesale drug prices and PBM reimbursement rates. 891 F.3d at 1111.

The Pharmaceutical Care Management Association challenged the law, arguing that it is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Pharm. Care Mgmt. Ass’n v. Rutledge, 240 F. Supp. 3d 951, 957 (E.D. Ark. 2017). Congress enacted ERISA to protect the well-being and security of employees by providing standards to govern the management of employee benefit and health plans. 29 U.S.C. § 1001. ERISA has a broad preemption clause, which provides that, “the provisions . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.” Id. § 1144(a). The Supreme Court has expanded this provision, holding that a state law relates to an employment benefit plan even if there is just a “connection with or reference to such a plan.” Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).

The district court held that ERISA preempted Arkansas’s law, and the Eighth Circuit affirmed. Rutledge, 891 F.3d at 1111. The Eighth Circuit joins the D.C. Circuit with this ruling. See Pharm. Care Mgmt. Ass’n v. District of Columbia, 613 F.3d 179 (D.C. Cir. 2010). The First Circuit, on the other hand, has held that ERISA does not preempt regulation of PBMs, citing their position outside the web of principal players in the scenarios contemplated by ERISA. Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 305 (1st Cir. 2005). The Supreme Court originally set
oral argument in this case for April 27, 2020, but rescheduled it due to the coronavirus.

The State of Arkansas argues that the Eighth Circuit's decision conflicts with the Supreme Court's earlier precedent regarding preemption. Petition for a Writ of Certiorari at 15, Rutledge, 140 S. Ct. 812 (No. 18-540). Arkansas further argues there is no preemption under the Supreme Court’s standards for ERISA preemption, which requires a "connection with" or "reference to" ERISA plans. Brief for the Petitioner at 18-19, Rutledge v. Pharm. Care Mgmt. Ass’n, No. 18-540 (filed Feb. 24, 2020). The Pharmaceutical Care Management Association argues that the Arkansas law regulates benefits on behalf of plans and has an “impermissible connection” with ERISA plans because it can affect the benefits plans offered by affecting drug prices. Brief for Respondent at 22, Rutledge, No. 18-540 (filed March 25, 2020).

AARP and AARP Foundation filed a brief with the Supreme Court, urging the Court to hold that ERISA does not preempt state regulation in this area, specifically citing states' authority to regulate the health, safety and welfare of its citizens. Brief of AARP and AARP Foundation as Amici Curiae Supporting Neither Party at 4, Rutledge, No. 18-540 (Mar. 2, 2020). Further, AARP emphasized that the preemption standard put forth by the Court of Appeals reaches too far and would encompass laws that have a completely different purpose and effect than ERISA. Id. at 9-11.

WHAT'S AT STAKE

The outcome of this case could have a significant effect on the approach states take to regulate the exorbitant costs of prescription drugs. In their Supreme Court brief, AARP and AARP Foundation noted that prescription drugs are the single largest health care expense for consumers with private commercial insurance. Id. at 12. Additionally, drug prices are vastly exceeding the growth of incomes of older adults. Id.

AARP continues to champion making prescription drugs more easily attainable for every American through its Stop Rx Greed campaign, which aims to promote transparency and affordability. If the Supreme Court holds that ERISA preempts state action in this sector, states would find it increasingly difficult to take action to assist persons that depend on prescription medications.

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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 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.

COVID-19 and the 2020 Election

This year’s presidential election will take place under unprecedented conditions, as the entire country will vote during a public health crisis. The primaries provided a preview of the potential successes and chaos that may be associated with various approaches to voting. In some states, like Iowa, voters who had concerns about contacting the virus by voting in person could vote by absentee ballot. In other states, like Texas and Wisconsin, there was litigation that had mixed results, with some residents permitted to vote by mail and others required to choose between exercising their right to vote and risking exposure to the coronavirus. In the Wisconsin case, the Court declined to extend the deadline for absentee voting, noting that the “wisdom of that decision is not the question before the Court.” Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1206 (2020). In a dissent joined by Justices Breyer, Sotomayor, and Kagen, Justice Ginsburg expressed fear that the Court’s order, “will result in massive disenfranchisement.” Id. at 1211.

States like Kentucky closed many voting locations, leading to very long voting lines for many people who chose to vote in person. Some states that used mail-in ballots or a combination of in-person and mail-in ballots did not have the election results until several days later. As voters tried to navigate the election rules, one message was clear: voters want to vote safely, and they want their vote to count.

The Supreme Court has already weighed in on several emergency voting challenges during the primaries. In April, as described above, the Supreme Court granted a request by the Republican National Committee and the Republican Party of Wisconsin to block a lower-court order that had extended the deadline to submit absentee ballots. See Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205 (2020). In June, the Court turned down a request by the Texas Democratic Party and four individuals to reinstate a district court’s injunction that would have permitted all eligible voters in Texas to vote by mail for the 2020 general election. Texas Democratic Party v. Abbott, 140 S. Ct. 2015 (2020). Six days later, in another 5-4 ruling, the Court stayed a district court’s preliminary injunction that would have made it easier for people in three Alabama counties to vote by absentee ballot. Merrill v. People First of Ala., No. 19A1063, 2020 WL 3604049 (U.S. July 20, 2020). Because they were each heard on an emergency basis, the Court did not hear oral argument in any of these cases and provided little to no reasoning in the opinions.
The Supreme Court is likely to decide several cases under emergency review on voting rights issues before the election. Many of these cases are already pending in courts across the country. For example, *NAACP Minnesota-Dakotas Area State Conference v. Simon*, No. 62-cv-20-3625 (Minn. Dist. Ct., Ramsey Cty.), is one of three challenges to Minnesota’s absentee voting laws. In that case, AARP and AARP Foundation filed an amicus brief supporting the plaintiffs, who include two older voters (ages 77 and 87, respectively) seeking non-enforcement of a state requirement that absentee ballots be witnessed by a registered voter or notary public (Witness Requirement). They also sought an order directing the secretary of state to send an absentee ballot to all registered voters statewide because of the dangers posed to voters by the COVID-19 crisis. In this case, the parties agreed to a consent decree whereby the secretary of state agreed not to enforce the Witness Requirement for the August state primary and to allow absentee ballots to be postmarked by Election Day and to be received within two days of in-person voting. The parties then reached another agreement related to the general election providing for non-enforcement of the Witness Requirement and counting of absentee ballots postmarked by Election Day and received within seven days thereafter. The state Republican Party and the Trump campaign intervened in the two related cases to appeal the district court’s approval of the consent decree for the general election, but then later withdrew that appeal. As a result, the consent decree became final and the Witness Requirement will not be enforced in November.

Minnesota is one of 12 states whose election laws impose a Witness Requirement for casting an absentee ballot. For state primary elections, such laws have been set aside, due to COVID-19, in Virginia and Rhode Island by consent decrees agreed to by state officials and by court order in South Carolina. The Court declined a request by the Republican National Committee to overturn the district court’s approval of the consent decree suspending the Witness Requirement in Rhode Island.

As the coronavirus continues to create challenges to gathering in public settings, more states will have to decide how to ensure that their pandemic election rules do not disenfranchise voters. Any legal challenges will quickly make their way to the Supreme Court.
Employment Discrimination

Age Discrimination

Last term, for the second time, the Supreme Court denied certiorari on the question of whether outside job applicants can use the disparate impact theory to challenge age discrimination under section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a)(2) (2016). See Kleber v. CareFusion Corp., 140 S. Ct. 306 (2019). In cases raising this issue, 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) (AARP Foundation attorneys represented Mr. Kleber), 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 (2017). In light of the divergent opinions on this issue, we are likely one circuit court opinion away from the Court having to decide this incredibly important issue for older workers.

Another emerging issue involving disparate impact claims in the age discrimination arena—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 Lab., Inc., 554 U.S. 84 (2008)—is whether sub-groups of individuals over age 40 (such as those 50 and over) may bring disparate impact claims under the ADEA. The Seventh Circuit recently concluded that such an approach is allowed in O’Brien v. Caterpillar, Inc., 900 F.3d 923, 930 (7th Cir. 2018), a case 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. Id. at 925. 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. Id. at 927. 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. Id. at 929.

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 has also 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, EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950-951 (8th Cir. 1999).
Disability Discrimination

The Court denied certiorari in two cases concerning the standard of proof of causation required under the Americans with Disabilities Act of 1990 (ADA), *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2020), cert. denied, No. 19-995, 2020 WL 1978957 (U.S. Apr. 27, 2020) and *Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019), cert. denied, No. 19-732, 2020 WL 1906572 (U.S. Apr. 20, 2020). In declining to hear these cases during the 2020 term, the Court may have simply postponed a reckoning. Federal appeals courts are in profound disagreement regarding the proper standard of causation in ADA litigation. As plaintiff Michael Murray claimed in his petition, the Fifth and Eighth Circuits apply a “motivating factor” test, as in race and sex and other employment discrimination cases under Title VII of the Civil Rights Act of 1964, while the Second, Fourth and Ninth Circuits have embraced “but-for” causation. *Petition for a Writ of Certiorari at 12-17, Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2020). The First, Sixth and Seventh Circuits have not yet settled on a standard for these claims. *Id.* at 17-24. These denials are in contrast with last year, when the Court decided two cases concerning causation in federal civil rights laws. *See Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (holding 8-1, in an opinion penned by Justice Alito, that plaintiffs need only prove age was “a factor” in an employer's conduct, rather than that it was a “but-for cause” thereof, in order to establish liability under the federal sector provision of the ADEA, 29 U.S.C. § 633(a); AARP and AARP Foundation filed an amicus brief supporting the employee); *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009 (2020) (declaring, in a unanimous decision authored by Justice Gorsuch, that the “but-for cause” standard must be satisfied in order to prove a violation of 42 U.S.C. § 1981 (1977), which guarantees “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”).

The Court’s highly consequential employment discrimination decision this term in *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (holding 6-3, in an opinion by Justice Gorsuch, that the term discrimination “because of . . . sex” in Title VII encompasses bias based on sex stereotypes and gender identity) is likely to have significant ripple effects. As a result, it may give rise to follow-on cases before the Court, albeit under other federal civil rights laws governing conduct beyond the realm of employment. For instance, *Bostock* is likely to be the basis for litigation challenging discrimination based on sex stereotypes and/or gender identity in colleges and universities and K-12 public schools under Title IX of the Higher Education Amendments of 1972, which prohibits discrimination because of “sex” in educational institutions receiving federal financial assistance. This covers virtually all higher education institutions, based on their students’ receipt of federal student financial aid, and all public schools. The core text of Title IX is not identical to that of Title VII, but it is very close.

satisfying the ADEA’s requirement of timely exhaustion of administrative remedies (i.e., time limits—usually 300 days—for filing a charge following an act of discrimination). 552 U.S. at 405; see also 29 U.S.C. § 626(d). In Edelman, the Court accepted an unverified charge as sufficient to satisfy Title VII’s analogous exhaustion deadline, even though the complainant failed to verify the charge until after expiration of the 300-day period. 535 U.S. at 109, 116-17. These decisions recognize that lay people, not lawyers, usually file EEOC charges. In Vantage, the petitioner-employer complains that the EEOC permitted its former employee to satisfy the ADA’s analogous exhaustion requirement based on his completing an unverified Intake Questionnaire shortly after his termination—upon returning from leave after a heart attack—and his filing a verified charge with EEOC eight months later. Petition for a Writ of Certiorari, Vantage, at 3-4, No. 19-1476. Vantage argues that allowing such filings to suffice undermines the goal of assuring timely notice to employers of their charge of discrimination and discourages complainants from promptly clarifying their intention to proceed before the EEOC. Id.
ERISA and Employee Benefits

The Court considered a trio of ERISA cases last term that resolved some longstanding questions while raising a host of new ones. In *Thole v. USA Bank, N.A.*, 140 S. Ct. 1615 (2020), the Court held that individuals do not have standing to sue for pension plan mismanagement unless they can show that the mismanagement will imminently affect their own benefits. For participants in defined benefit plans, this decision forbids litigants from pursuing a remedy for breaches unless they threaten the integrity of the entire plan—and even then, the Court suggested, their anticipated loss may need to exceed the amount guaranteed by the Pension Benefit Guaranty Corporation (PBGC) to be actionable. *Id.* at 1622 & n.2. *Thole* forecloses many lawsuits but opens up new channels of litigation surrounding whether plaintiffs have adequately shown that a breach threatens a plan's stability and risks termination; whether a PBGC guaranty defeats standing even in the case where the breach threatens the plan's integrity; and whether defined contribution plans—i.e., 401(k) and 403(b) plans—should be treated the same way as traditional pension plans, when gains and losses to plan assets may directly affect their benefit amounts, even when the plan itself is not in jeopardy.

On the other hand, *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020), opened the door to more claims by holding that to meet the “actual knowledge” requirement that triggers ERISA’s shortened three-year limitations period (as opposed to the usual six-year period), a plaintiff must have become aware of the information. *Id.* at 776-77. The decision makes clear that a plaintiff does not necessarily have “actual knowledge” of information contained in disclosures that he receives but does not read or cannot recall reading. However, it leaves open crucial questions about when defendants have met their burden to show actual knowledge, what facts the plaintiff must know to have knowledge “of the breach,” and how the decision will affect class actions. Particularly in light of the Department of Labor’s new electronic disclosure rules, which make it easier for plans to disseminate information over email, questions of whether and to what extent plaintiffs have read or understood these disclosures are likely to arise in the near future. See Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31884 (May 27, 2020) (to be codified at 29 C.F.R. pts. 2520, 2560). AARP and AARP Foundation filed amicus briefs supporting plan participants in *Thole* and *Sulyma*.

Finally, the Court denied as improvidently granted the petition in *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020), leaving open the question of the pleading standard in “insider information” employer stock cases. The Supreme Court articulated a pleading standard for these cases in *Fifth Third Bancorp v. Dudenhoeffer*, 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 430. The Court granted cert in *Jander* to consider whether courts applying *Dudenhoeffer* must apply a heightened pleading standard, or if general allegations that early disclosure is typically beneficial are enough. *Jander*, 140 S. Ct. at 594. After *Jander*’s denial, that question once again awaits a vehicle for a decision.
Looking ahead to this term and beyond, the Court will continue to confront 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, Pub. L. No. 93-406, § 514(a), 88 Stat. 829, 897 (1974) (codified as 29 U.S.C. § 1144(a)). In addition to deciding the extent to which ERISA preempts state laws regulating pharmacy benefit managers in Rutledge v. Pharm. Care Mgmt. Ass’n, 891 F.3d 1109 (8th Cir. 2018), cert. granted, 140 S. Ct. 812 (Jan. 10, 2020) (No. 18-540), the Court will likely confront other cases concerning states’ attempts to address their citizens’ high health care costs and lack of retirement savings. For instance, Seattle’s ordinance requiring hotels that have no employee health plan to pay their employees’ health care costs directly recently survived a preemption challenge in ERISA Indus. Comm. v. City of Seattle, No. C18-1188 TSZ, 2020 WL 2307481 (W.D. Wash. May 8, 2020). Because the ordinance did not require creation of an employee health plan or affect existing health plans in any way, the court held that ERISA did not preempt it. Id. at *6-7. The case is now pending before the Ninth Circuit. Notice of Appeal, ERISA Indus. Comm. v. City of Seattle, No. 20-35472 (9th Cir. May 29, 2020). Similarly, in Howard Jarvis Taxpayers Ass’n v. Cal. Secure Choice Ret. Sav. Program, No. 2:18-cv-01584-MCE-KJN, 2020 WL 1157924 (E.D. Cal. Mar. 10, 2020), appeal docketed, No. 20-15591 (9th Cir. Apr. 3, 2020), California’s statute creating tax-deferred retirement savings accounts for workers whose employers do not have ERISA-covered retirement plans also withstood an ERISA preemption challenge—twice in the same district court—before an appeal to the Ninth Circuit. Oregon and Illinois have similar programs that will likely encounter preemption challenges, making this particular type of statute a likely candidate for eventual Supreme Court review. See OregonSaves, H.B. 2960, 78th Leg. Assemb., Reg. Sess. (Or. 2015) (codified as Or. Rev. Stat. §§ 178.200-178.245 (2015)); Illinois Secure Choice Savings Program Act, S.B. 2758, 98th Gen. Assemb. (Ill. 2015).

States are also attempting to fill the gap left behind by the Fifth Circuit’s invalidation of the Department of Labor’s (DOL’s) Fiduciary Rule in 2018 in U.S. Chamber of Commerce v. U.S. Dep’t of Labor, 885 F.3d 360 (5th Cir. 2018). With the DOL’s recent promulgation of a new regulation reinstating the limited fiduciary obligations of the longstanding 1975 rule, and the SEC’s promulgation of a confusing, toothless standard for investment brokers and advisors, state regulation of financial services professionals is the most viable option for ensuring that investment advice is in consumers’ best interest and not an avenue for self-dealing. See, e.g., News Release, U.S. Department of Labor Proposes to Improve Investment Advice and Enhance Financial Choices For Workers And Retirees (June 29, 2020); Kenneth Terrell, New SEC Rule Could Hurt Retirement Investors, AARP Says, AARP (June 5, 2019). New York, for instance, has issued a regulation requiring any insurance broker, issuer, or salesperson to act solely in their clients’ best interests. In re Indep. Ins. Agents & Brokers’ Ass’n of N.Y. v. N.Y. State Dep’t of Fin. Servs., 65 Misc. 3d 562 (N.Y. Sup. Ct. 2020). This regulation has survived a challenge based on preemption as well as other state statutory bases, but this litigation is only now heating up. Within a short time, the Supreme Court will likely be considering states’ ability to pick up the Department of Labor’s slack.
Finally, 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. Univ. of Pa., the Third Circuit issued the first appellate decision in one such case, and it is a noteworthy one. 923 F.3d 320 (3d Cir. 2019). Plaintiffs claimed that Defendants offered plan participants improper investment options over reasonable alternative investments and overpaid for services provided to the plan. Id. at 324. The court held that the Federal Rules of Civil Procedure and Supreme Court precedent governing pleading standards apply with “contextual specificity.” Id. at 326. Viewing the complainants’ allegations in light of ERISA’s protective function, Plaintiffs alleged sufficient facts to support their claims of breach of fiduciary duty. The Supreme Court denied Defendants’ petition for certiorari. Univ. of Pa. v. Sweda, 140 S. Ct. 2565 (2020).

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 et al. as Amici Curiae Supporting Plaintiffs, Divane v. Northwestern Univ., 953 F.3d 980 (7th Cir. 2020). The plaintiffs’ petition for certiorari in that case is now pending before the Supreme Court. Petition for Writ of Certiorari, Divane, No. 19-1401 (U.S. June 19, 2020). Whether in this case or in another, the Court will likely address this issue soon.
Americans with Disabilities Act

This year marked the 30th anniversary of the passage of the Americans with Disabilities Act (ADA). AARP Foundation attorneys have been involved in many cases enforcing the ADA in areas of employment, housing, transportation, public accommodations and access to government services.

One issue that may reach the Court is whether the United States Department of Justice (DOJ) has standing to enforce Title II of the ADA. The Eleventh Circuit recently ruled that Title II’s enforcement section refers to related statutes that grant the Attorney General standing to file suit to enforce the ADA’s provisions against states. United States v. Florida, 938 F.3d 1221, 1250 (11th Cir. 2019). The DOJ opposes Florida’s petition seeking rehearing en banc in United States v. Florida. No. 17-13595 (Oct. 29, 2019). DOJ has been effective in bringing lawsuits to enforce the rights of people with disabilities, particularly following the United States Supreme Court’s decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), which was a landmark decision construing the ADA’s integration mandate. DOI’s Olmstead litigation and resulting settlements have produced meaningful change for people with disabilities across the United States. If the Eleventh Circuit affirms its ruling on DOI’s standing, Florida might seek resolution of the matter at the Supreme Court in the coming year.

Whether ADA claims against long-term care providers, particularly assisted living facilities, are subject to arbitration is another issue being litigated in the federal appellate courts. See Stiner v. Brookdale Senior Living, Inc., 810 Fed. Appx. 531 (9th Cir. 2020). In Stiner, California residents of Brookdale-operated assisted living facilities litigated a putative class action alleging that Brookdale’s facilities are inaccessible and that its policies discriminated against people with disabilities. Id. at 533. Brookdale sought to compel arbitration of two of the eight named plaintiffs’ claims. Id. The Ninth Circuit held that the plaintiffs’ claims under the ADA “do not rest upon the residency agreement” and, therefore, the plaintiffs could not be compelled to arbitrate these claims under principles of equitable estoppel. Id. at 535. If Brookdale seeks review of this decision and the Court agrees to take the case, there could be broad implications for disability-based challenges to the operation of assisted living facilities throughout the country.

Accessible and available transportation is a vital issue for the 600,000 older adults who stop driving annually; this issue has been the subject of appellate litigation over the past year and may ripen for Supreme Court review in the near future. Whether ridesharing companies such as Uber and Lyft constitute public accommodations subject to Title III of the ADA is a significant issue. Title III of the ADA prohibits private entities that operate businesses open to the public from discriminating against members of the public based on disability. 42 U.S.C. § 12182. It is not clear, however, whether Title III applies to operators of app-based businesses without physical locations. See, e.g., O’Hanlon v. Uber Techs., Inc., No. 2:19-cv-00675, 2019 WL 5895425, at *6 (W.D.Pa. Nov. 12, 2019); Access Living of Metro. Chicago v. Uber Techs., Inc., 958 F.3d 604, 607 (7th Cir. 2020). A related issue is whether older adults who use ridesharing services but have not downloaded the app are bound by an arbitration agreement that would preclude...
litigation of ADA claims against rideshare operators. This issue is currently pending before the Third Circuit. *O’Hanlon v. Uber Techs., Inc.*, No. 19-3891 (3d Cir. argued July 2, 2020). Also significant is the Ninth Circuit’s recent decision that a public community college’s termination of its on-campus shuttle service restricted students’ access to the college’s programs and, as such, violated Title II of the ADA. See *Guerra v. West Los Angeles Coll.*, 812 Fed. Appx. 612, 615 (9th Cir. 2020). The Ninth Circuit held that Title II mandates that a public entity provide individuals with disabilities “meaningful access” to its programs and services, viewed in their entirety. *Id.* at 613-14. As these cases and others make their way through the courts, they will have a significant impact on older adults with mobility issues.

The ability of older adults who use wheelchairs to challenge barriers to accessing public accommodations may also come before the Supreme Court soon. The Sixth Circuit recently ruled that an Arizona resident traveling to Michigan, who alleged that two Michigan Kohl’s stores were inaccessible to wheelchair users, has standing to pursue injunctive relief under Title III of the ADA. See *Mosley v. Kohl’s Dept. Stores, Inc.*, 942 F.3d 752 (6th Cir. 2019). Any Supreme Court ruling clarifying the standard for a prospective injury requisite to standing would influence older adults’ ability to challenge barriers to their full engagement with their communities and their ability to travel freely.
Health Care

During the 2020 term, many long-term legal health care challenges will finally make their way to the Supreme Court.

Medicaid Work Requirements

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.

The Supreme Court is currently considering whether to grant certiorari in the Gresham v. Azar Medicaid work requirements case. 950 F.3d 93 (D.C. Cir. 2020). This case stems 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 work or a “community engagement” program under the waiver provision of Section 1115 of the Social Security Act. Letter from Brian Neale, Dir., Ctr. For Medicaid & CHIP, Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dirs. (Jan. 11, 2018). 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.

Arkansas was the first state to implement work requirements for people who received health coverage under Medicaid expansion. The Arkansas demonstration waiver program, known as Arkansas Works, conditioned Medicaid eligibility for people between the ages 19 and 49 on proving they have worked or volunteered for 80 hours per month. Those who fail to provide documentation for three months in a calendar year lose coverage for the rest of the calendar year. It exempted the medically frail and disabled, pregnant women, and people in substance abuse treatment, people caring for a sick person or minor child, and those persons exempt from work requirements for the Supplemental Nutrition Assistance Program.

When Arkansas implemented its waiver, more than 18,000 beneficiaries lost coverage. See Benjamin Hardy, Over 18,000 Lost Coverage in 2018 Due to Medicaid Work Rule, But Only Fraction Have Reapplied, Ark. Times (Jan. 16, 2019 at 2:11 AM). A review of the program found that over 95 percent of people who lost coverage were either working or qualified for an exemption. See Benjamin D. Sommers et al., Arkansas’s Medicaid Work Requirements Contributed to Higher Uninsured Rate and No Change in Employment, Commonwealth Fund (June 19, 2019).

Medicaid beneficiaries in Arkansas, Kentucky and two other states challenged the secretary’s approval of their state waivers in separate cases 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. AARP and the Foundation filed amicus briefs in the Kentucky case. *Brief for AARP et al. as Amici Curiae Supporting Plaintiffs-Appellees Urging Affirmance, Stewart v. Azar, Nos. 19-5095 & 19-5097 (D.C. Cir. Aug. 1, 2019).*

In March 2019, the District Court for the District of Columbia vacated HHS's approval of the Kentucky and Arkansas waivers in *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 could not 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 federal and state defendants appealed that decision to the D.C. Circuit, though Kentucky withdrew its appeal when the newly elected governor terminated Kentucky’s program. The D.C. Circuit unanimously affirmed the lower court’s decision, holding that the approval of Arkansas Works violated the Administrative Procedure Act and was contrary to the objectives of the Medicaid Act. *Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020).*

Arkansas and the United States now seek Supreme Court review of the D.C. Circuit’s decision. If the Supreme Court accepts this case, it will determine whether Medicaid programs can condition eligibility on work requirements. This will be a difficult obstacle for many to overcome, as the country is dealing with dual economic and public health crises.

*Anti-Discrimination Provisions of the Affordable Care Act (Section 1557)*

Another set of cases likely to reach the Court concern Section 1557 of the ACA. Section 1557 prohibits discrimination in health care for protected classes. *42 U.S.C. § 18116.* In drafting the law, Congress recognized the need to ensure all individuals have access to health services and insurance, regardless of their race, color, national origin, sex, age, or disability. To meet this goal, the law prohibits discrimination by applying existing civil rights laws to the health care context.

The law applies to every health program or activity that receives Department of Health and Human Services (HHS) funding, including to most hospitals, skilled nursing facilities, pharmacies, clinics, health insurance market places, and any other program that HHS administers. It went into effect in 2010. Since that time, the law has been a powerful tool for combatting discrimination in health care.

The prior regulations interpreting Section 1557 made clear that sex discrimination prohibited by the law includes discrimination based on sexual orientation and gender identity. *81 Fed. Reg. 31,376 (May 18, 2016)* (codified at *45 C.F.R. pt. 92*). However, HHS recently finalized a rule that would strip these protections out of the regulations, and potentially eviscerate them entirely. The rule also eliminates key language access provisions that enable Americans with limited English proficiency to obtain health care.
Five lawsuits have been filed, each arguing that the rule violates the Administrative Procedure Act. The lawsuits are not identical, but each alleges that the new rule is not in accordance with the ACA and that its adoption was arbitrary and capricious. See *Whitman Walker Clinic, Inc. v. U.S. Dep’t of Health and Human Servs.*, No. 1:20-cv-01630 (D.D.C); *Asapansa-Johnson Walker v. Azar*, No. 1:20-cv-2834 (E.D.N.Y); *Bagly v. HHS*, No. 1:20-cv-11297 (D. Mass.); *State of Washington v. HHS*, No. 2:20-cv-1105 (W.D. Wash.); *State of New York v. HHS*, No. 1:20-cv-5583 (S.D. N.Y).

AARP and AARP Foundation filed an amicus brief in the *Whitman Walker Clinic* case, in support of Plaintiffs’ effort to stop implementation of the rule. The brief argues that allowing the rule to take effect would harm older adults, including members of the LGBTQ community and those with limited English proficiency. The brief also argues that implementing the rule now, during a public health crisis when access to care is critical, would have devastating consequences.

On August 17, the District Court for the Eastern District of New York issued a preliminary injunction in the *Asapansa-Johnson Walker* case, blocking implementation of the portions of the rule that rolled back anti-discrimination protections for LGBTQ people. On September 2, the District Court for the District of Columbia also issued a preliminary injunction in the *Whitman Walker* case, similarly stopping implementation of the portions of the rule rolling back anti-discrimination protections for LGBTQ people. The injunction also blocks a provision that would have extended Title IX’s religious exemption to Section 1557. The injunction applies nationwide, and will remain in effect while the case proceeds.

*Insurance-Related Cases (STLDI & AHPs)*

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) continue to work their way through the courts. *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.

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). The government appealed, and the D.C. Circuit held oral argument in November 2019.

In contrast, the district court upheld the STLDI rule. *2019 U.S. Dist. LEXIS 120834 (D.D.C. July 19, 2019)*. Plaintiffs appealed to the D.C. Circuit. AARP and AARP Foundation filed a brief in support of the plaintiffs-appellants, highlighting how the proliferation of these plans will harm older adults. Insurers who offer these plans can deny coverage because of preexisting conditions and charge exorbitant rates based on age alone, and they need not provide the minimum essential benefits that ACA-compliant plans must offer. The D.C. Circuit affirmed the lower court’s decision, holding that the rule does not violate the Administrative
Resident Rights under the Federal Nursing Home Reform Act

The Federal Nursing Home Reform Act (NHRA) defines and guarantees the legal rights of nursing facility residents, such as the right to be free of chemical restraints. The purpose of the NHRA is to ensure that nursing facility residents receive high-quality care and are protected from physical, emotional, and social abuse and neglect. Nursing facilities must provide for residents “in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.” Pub. L. No. 100-203, § 4211(b)(1)(A), 101 Stat. 1330, 1330-183 (1987).

There is still an open question about whether nursing facility residents can sue under Section 1983 of the Civil Rights Act to enforce their NHRA rights. The Third and Ninth Circuits have held they can. Grammer v. John J. Kane Reg'l Ctrs., 570 F.3d 520 (3d Cir. 2009); Anderson v. Ghaly, 930 F.3d 1066 (9th Cir. 2019). Section 1983 provides a private right of action against state actors who have violated rights guaranteed by a federal statute. 42 U.S.C. § 1983. Without Section 1983, residents cannot enforce their rights under the NHRA and hold facilities accountable for harm.

The Seventh Circuit is considering this issue for the first time in Talevski v. Health & Hosp. Corp. of Marion Cty. Notice of Appeal, No. 20-1664 (7th Cir. Apr. 22, 2020). In that case, a nursing facility resident is suing a government-owned facility and others under the NHRA after they allegedly chemically restrained and illegally discharged him. The district court dismissed the case, holding that a resident cannot use Section 1983 to challenge a violation of the NHRA. Talevski v. Health & Hosp. Corp. of Marion Cty., No. 2:19 CV 13, 2020 WL 1472132 (N.D. Ind. Mar. 26, 2020). The resident appealed that decision to the Seventh Circuit. AARP and AARP Foundation filed an amicus brief in support of the resident.

This case is important to nursing facility residents because it will explore whether residents can require states and state entities to enforce the rights guaranteed to them by the NHRA. Holding nursing facilities accountable allows residents to obtain redress for injuries and deters future misconduct. No matter the outcome, this case is likely to be appealed to the Supreme Court.

Prescription Drugs

Prescription drug prices continue to skyrocket each year, with the prices of brand name drugs increasing at an exorbitant rate. An AARP study found that in 2018, retail prices for 267 widely used brand name prescription drugs increased by 5.8 percent, more than twice the rate of inflation. See Stephen W. Schondelmeyer & Leigh Purvis, AARP Pub. Policy Inst., Brand Name Drug Prices Increase More than Twice as Fast as Inflation in 2018 (2019).

These escalating drug prices disproportionately hurt older adults. Many older adults, who average 4.5 brand name prescription medications each month,
cannot afford them. Id. As a result, many risk their health by not filling their prescriptions or by taking less than the prescribed dose. See Ashley Kirzinger, Data Note: Prescription Drugs and Older Adults, Kaiser Fam. Found. (Aug. 9, 2019).

States and other stakeholders are taking various actions to lower the price of drugs for consumers. The State of California enacted Assembly Bill 824, also known as the California Pay-For-Delay Bill, to combat the effect that anticompetitive prescription drug agreements have on consumers. A.B. 824, Reg. Sess. (Cal. 2019). The law is the first of its kind. Its specific targets are pay-for-delay agreements. These are settlements where a brand name drug manufacturer agrees to settle a patent lawsuit by paying a generic drug company to delay entering the market. During the delay, the branded manufacturer has a monopoly on the market and can charge consumers higher prices for the drug. As a result, consumers pay millions more for the brand name drug because they cannot access a lower-cost generic.

The California law creates a presumption that any transfer of value from a brand name drug manufacturer to a generic drug company settling patent infringement litigation, combined with a delay of the generic drug’s entry into the market, has an anticompetitive effect. Shortly after its passage, generic drug lobbying group Association for Accessible Medicines sued in federal district court to invalidate the California law and preliminarily enjoin its implementation and enforcement. In Ass’n for Accessible Meds. v. Becerra, No. 2:19-cv-02281-TLN-DB, 2019 WL 7370421 (E.D. Cal. Dec. 31, 2019), it alleged that, among other things, the law violates the dormant Commerce Clause of the U.S. Constitution by directly regulating out-of-state conduct. A district court denied the injunction, and AAM appealed to the Ninth Circuit. Notice of Appeal, Ass’n for Accessible Meds. v. Becerra, No. 20-15014 (9th Cir. Jan. 2, 2020). AARP and AARP Foundation submitted a brief explaining that the law is in the public interest because it ensures that consumers can access lower-cost generic drugs. Brief for AARP & AARP Foundation, as Amici Curiae Supporting Defendant-Appellee, Ass’n for Accessible Meds. v. Becerra, No. 20-15014 (9th Cir. Mar. 5, 2020). The Ninth Circuit should issue its decision before the end of 2020.

In addition, continued litigation attacks are filed against the Patent Trial and Appeal Board (PTAB), which may affect drug pricing. The latest petition in the Supreme Court claims that PTAB judges were unconstitutionally appointed. Petition for Writ of Certiorari, Arthrex, Inc. v. Smith & Nephew, Inc., 2020 WL 3805820 (U.S. June 30, 2020) (No. 19-1458). Congress created the PTAB to overturn improperly granted patents expeditiously. Limits on the Board’s authority can delay the invalidation of dubious patents, including drug patents, which could ultimately increase consumer costs.

As research for a coronavirus vaccine focuses on antibody research, pharmaceutical giants Amgen and Sanofi continue to litigate about how narrowly patents involving antibodies must be claimed. Amgen, Inc. v. Sanofi, 872 F.3d 1367 (Fed. Cir. 2017), cert. denied, 139 S. Ct. 787, 202 L. Ed. 2d 568 (2019). While the patents at issue in the dispute involve cholesterol-lowering antibodies, many of the new drugs for cancer therapy and other immune-related diseases are antibody drugs. Amgen argues that an entire genus of antibodies can be
patented, whereas Sanofi maintains that inventors must narrow their patents to the specific antibodies that will be used in a drug, since a genus can include millions of antibodies. *Id.* at 1377-1378. If drug companies are allowed to patent an entire genus of antibodies, drug costs may increase.

**ABOUT AARP FOUNDATION**

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