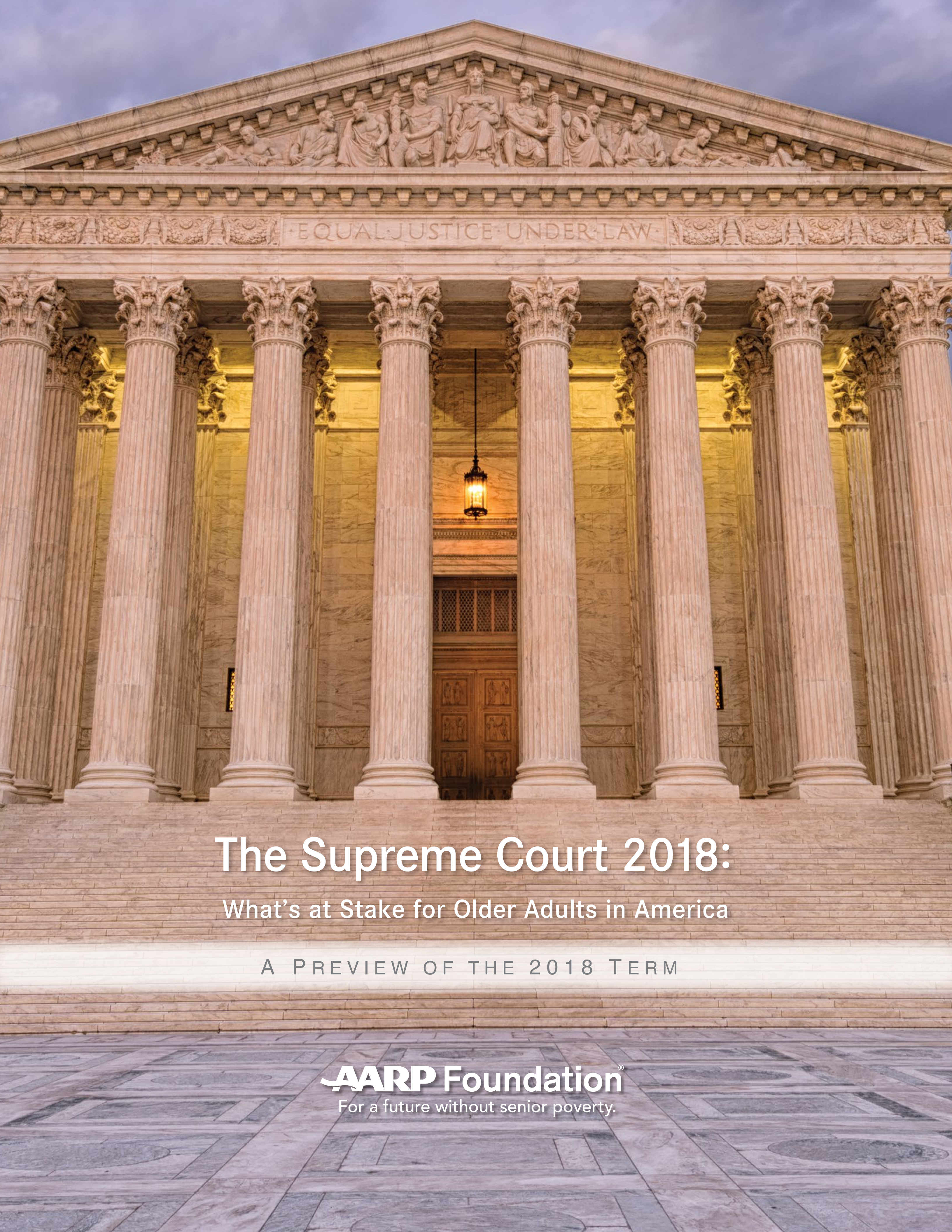

The Supreme Court 2018:

What's at Stake for Older Adults in America

A PREVIEW OF THE 2018 TERM

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AARP FOUNDATION

Lisa Marsh Ryerson
President

William Alvarado Rivera
Senior Vice President

Kelly Bagby
Vice President

Dean Graybill
Vice President

Attorneys

Iris Gonzalez

Meryl Grenadier

Maame Gyamfi

Barbara Jones

Daniel Kohrman

Laurie McCann

Julie Nepveu

Mary Ellen Signorille

Susan Silverstein

Dara Smith

THE SUPREME COURT 2018:

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TABLE OF CONTENTS

Introduction

With the retirement of Justice Kennedy and nomination of his potential successor, Judge Brett Kavanaugh, all eyes will be on Chief Justice Roberts. The Chief Justice will be in the middle of the Court, literally and figuratively, giving him the ability to truly turn the court into his own.

Chief Justice Roberts is known for his concern for the Supreme Court's integrity and its perception as a non-political institution. Although the Court's composition frequently reflects the nation's political trends, Chief Justice Roberts will be concerned that significant votes along party lines could make the Court look as polarized as the body politic. Thus, many commentators expect that any changes to legal precedent will be incremental.

The pace of grants for this coming term is about the same as last year's — meaning the Court will probably hear and decide between 70 and 80 cases. At the time of this Preview's publication, the Court has granted certiorari on a number of cases that AARP Foundation attorneys believe may, directly or indirectly, affect people age 50 and older. There are also several pending petitions that will have a significant impact if granted. *Gazing Into the Crystal Ball* discusses these pending petitions and attempts to predict 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 American population. Participation in these cases is an integral part of AARP Foundation's advocacy. AARP Foundation will continue to advocate on behalf of older adults — not only in the Supreme Court, but in courts across the country.

Guaranteeing Public Sector Workers Can Sue Under Federal Age Law

Mount Lemmon Fire District v. Guido,
No. 17-587
859 F.3d 1168 (9th Cir. 2017),
cert. granted, 2018 U.S. LEXIS 1479 (U.S. Feb. 26, 2018).
Oral argument scheduled for Oct. 1, 2018.

Issue: *Under the Age Discrimination in Employment Act (ADEA), does the same 20-employee minimum that applies to private employers also apply to political subdivisions of a State, as the Sixth, Seventh, Eighth, and Tenth Circuits have held, or does the ADEA apply instead to all State political subdivisions of any size, as the Ninth Circuit held in this case?*

The Mount Lemmon Fire District, a political subdivision of the State of Arizona, fired full-time firefighter captains John Guido and Dennis Rankin in 2009. They were the two oldest full-time employees at the Fire District — Guido at 46 years of age and Rankin at 54. Guido and Rankin filed age discrimination claims, pointing to their replacement by significantly younger persons and the allegedly pretextual grounds cited by the Fire District for their dismissal. The district court granted summary judgment in favor of the Fire District, concluding that it was not an "employer" within the meaning of the ADEA because it had fewer than 20 employees. However, the Ninth Circuit reversed, holding that the exemption for employers with fewer than 20 employees only applied to private entities, not political subdivisions of a state. The Supreme Court granted certiorari to resolve the conflicting interpretations of the ADEA, as amended in 1974 to cover federal, state, and local governmental employers.

ADEA section 11(b), 29 U.S.C. § 630(b), defines the term "employer" as:

> a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Section 630(a) defines the term "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons."

The Ninth Circuit found that the 20-employee minimum in the first sentence of Section 630(b) does not apply to political subdivisions under the ADEA. In particular, the court compared the ADEA's language with corresponding definitions in Title VII, 42 U.S.C. § 2000e(a) and (b), which define "person" as including governmental agencies and political subdivisions, and "employer" as limited to any "person" with a minimum number of at least 15 employees. The Ninth Circuit concluded that a textual interpretation of the ADEA, especially when its text is compared to Title VII, makes clear that Congress acted intentionally and did not want to exempt political subdivisions with fewer than 20 employees from ADEA enforcement. The court also concluded that the history of the ADEA's amendment in 1974 contains no clear evidence to the contrary.

The Fire District now argues that the Ninth Circuit is incorrect. It contends that the Sixth, Seventh, Eighth, and Tenth Circuits are correct in their conclusion that Section 630(b) is ambiguous and, thus, the Supreme Court should interpret Section 630(b) in a manner consistent with Title VII, as the Court previously has declared that Title VII is a "sister statute" to the ADEA. The Fire District also asserts that the ADEA's definition of "person" has always included state and local governments as "organized groups of persons." Hence, the Fire District reasons that the minimum employee limit has always applied, even though until 1974, the ADEA's definition of "employer" did not include state and local government employers of any size.

Guido and Rankin, along with AARP and AARP Foundation (joined by the National Employment Lawyers Association) as amici, dispute the Fire District's efforts to distract the Supreme Court from interpreting Section 630(b) according to its terms. Amici submit that the ADEA's most logical statutory parallel is the Fair Labor Standards Act (FLSA), not Title VII. The Supreme Court has repeatedly recognized that the ADEA is a "hybrid" of the FLSA and Title VII. Moreover, the 1974 law amending the ADEA to include government employers likewise amended the FLSA, which has never limited covered employers, public or private, by size. As amici's brief notes in some detail, the Supreme Court has consistently applied a nuanced approach to interpreting corresponding provisions of the ADEA and Title VII, sometimes the same, sometimes differently, depending on the specific context. Finally, amici dispute as exaggerated the Fire District's claim that ADEA liability for small public entities will be onerous, given the fact that they are already subject to other federal civil rights laws and state age discrimination laws with more robust remedies than are available under the ADEA.

WHAT'S AT STAKE

The outcome of this case will have a significant impact on private and government ADEA enforcement efforts in regard to age discrimination in the public sector. The Supreme Court's ruling will affect all older workers in smaller state subdivisions and agencies. Without the protection of the ADEA, government workers employed by such entities will only be able to seek state-law remedies for age discrimination, to the extent such remedies are even available. In addition, if the Court decides to read the ADEA restrictively in order to maintain an artificial parallelism with Title VII, it will ignore Congress's efforts to amend the FLSA and the ADEA in a similar, more robust fashion.

Dan Kohrman
dkohrman@aarp.org

Laurie McCann
lmccann@aarp.org

Dara Smith
dsmith@aarp.org

Safeguarding Older Self-Employed Workers' Right of Access to Court

New Prime, Inc. v. Oliveira,
No. 17-340
857 F.3d 7 (1st Cir. 2017),
cert. granted, 138 S. Ct. 1164 (Feb. 26, 2018).
Oral argument scheduled for Oct. 3, 2018.

Issue: *(1) Whether a dispute over applicability of the Federal Arbitration Act's (FAA) Section 1 exemption (the "contracts of employment" exemption) is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause?*
(2) Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements?

Section 1 of the Federal Arbitration Act exempts contracts of employment with "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has interpreted this definition to exempt "contracts of employment of transportation workers." *Oliveira v. New Prime, Inc*., 857 F.3d 7, 9 (1st Cir. 2017).

New Prime, Inc. (Prime) operates an interstate trucking company and provides a driver apprenticeship program. Drivers have a choice to become either independent contractors or Prime employees after they complete their apprenticeship. Oliveira completed the program and opted to become an independent contractor. *Id*. at 10. Thereafter, Prime assisted Oliveira in creating his own limited liability company, and he then signed an independent contractor agreement contract between his company and Prime. *Id*. This contract contained an arbitration clause whereby the parties agreed to "arbitrate 'any disputes arising under, arising out of or relating to [the contract], . . . including the arbitrability of disputes between the parties.'" *Id*.

Oliveira alleged that during his time as an independent contractor, Prime exercised significant control over his operations through mandated training and shipments. Oliveira also asserted that Prime significantly underpaid him for his services as a contractor and, further, as an employee, when he later changed status. *Id*. at 11. In 2015, Oliveira filed a group action against Prime, alleging violations of the Fair Labor Standards Act (FLSA) and a state minimum wage statute. Prime moved to compel arbitration. In response, Oliveira argued that the motion to compel should be denied for two reasons. First, this type of contract is exempt under Section 1 of the FAA, and, second, the question of whether the parties' agreement was exempt from Section 1 of the FAA was a determination for the court, not an arbitrator. *Id*.

The district court agreed with Oliveira, concluding that the question of applicability of the FAA's Section 1 exemption was a determination for the court. Moreover, it permitted the parties to conduct discovery to determine Oliveira's status as an independent contractor. *Id*. Prime appealed to the First Circuit. Before the parties had commenced discovery, the First Circuit affirmed the lower court's ruling. *Id*. at 9.

Prime's certiorari petition argued that the First Circuit incorrectly expanded the meaning of "contracts of employment" for transportation workers under the Section 1 exemption to include agreements that establish independent contractor relationships and that this definition conflicts with the FAA as well as rulings by the Eighth and Ninth Circuits. Further, Prime argues — along with the American Trucking Association and the U.S. Chamber of Commerce, as amici supporting Prime — that the First Circuit's decision would render all contracts with transportation workers unarbitrable.

WHAT'S AT STAKE

If the Supreme Court overrules the First Circuit, it would significantly limit the FAA's definition of transportation workers by excluding those who perform the same work as transportation employees, but who do so as independent contractors. In contrast, affirmance would recognize a broader scope of the FAA's "contracts of employment" exemption to allow independent contractors to avoid non-consensual arbitration. Thus, the outcome of this case could potentially affect many older workers in independent contractor positions, including those working in the sharing economy for companies such as Uber or Lyft, or as independent taxi or moving company drivers. If the Supreme Court rules against Oliveira, independent contractors performing transportation work could be required to arbitrate claims they may have against the companies with whom they are contracting to perform those services.

Daniel B. Kohrman
dkohrman@aarp.org

Laurie McCann
lmccann@aarp.org

Dara Smith
dsmith@aarp.org

Championing Older Workers' Ability to Challenge Unlawful Employer Practices

Lamps Plus, Inc. v. Varela,
No. 17-988
[701 Fed. Appx. 670 (9th Cir. 2017)](),
cert. granted, 2018 U.S. LEXIS 2729 (U.S. April 30, 2018).
Oral argument not yet scheduled.

Issue: *Whether the Federal Arbitration Act (FAA) forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based on general language commonly used in arbitration agreements?*

Under the FAA, arbitration agreements generally are valid and enforceable on the same terms as other contracts. It falls to the courts to determine whether a valid arbitration agreement exists and, if so, whether it governs the issue at hand.

In 2016, Lamps Plus, Inc. (Lamps) incurred a company-wide data breach exposing the personal information of current and former employees to a third party. Varela, a Lamps employee, filed a class-action suit in federal district court against his employer, asserting statutory and common law claims related to the data breach. In response, Lamps filed a motion to compel arbitration pursuant to its employment contract with Varela. Lamps argued that arbitration "should be compelled on an individual basis" because there was no contractual basis for permitting parties to file on a "class-wide basis." *Varela*, 2016 U.S. Dist. LEXIS 189521, *17 (C.D. Cal. July 7, 2016). In response, Varela argued that the agreement, by its terms, did not waive class-wide claims and, alternatively, even if it was deemed to be ambiguous, it should be construed against the drafter. *Id*. at 17-18. Agreeing with Varela, in part, the district court granted the motion to compel arbitration, but declined to limit arbitration to his individual claims, thereby authorizing the arbitrator to consider the class-action claim. *Id*. at 19. Lamps appealed to the Ninth Circuit, which affirmed the district court in a 2-1 decision.

This case raises the issue left open in [*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)](), where the court held that a party cannot be required to submit to class arbitration unless the agreement reflects both parties' consent to arbitrate such claim. *Varela*, 701 Fed. Appx. 670, 672 (9th Cir. 2017). Lamps cited *Stolt-Nielsen* for the proposition that an arbitration agreement whose language does not explicitly resolve the issue of the availability of class-action claims in arbitration precludes consideration of such claim. The Ninth Circuit reasoned, however, that *Stolt-Nielsen*'s discussion of the parties' "silence" in their arbitration agreement as to the propriety of class claims referred to the absence of an agreement altogether on this issue. *Id*. Indeed, in *Stolt-Nielsen*, the parties stipulated that they had reached no agreement as to the availability of class-wide arbitration. *Id.* The Supreme Court stated that it "had no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 687 n.10. As a clear lack of agreement was not at issue, the Ninth Circuit applied state law contract principles in interpreting the absence of an explicit prohibition of class arbitration in the Lamps agreement. The court stated that "[a] reasonable — and perhaps *the most reasonable* — interpretation of th[e agreement's] expansive language [regarding claims appropriate for arbitration] is that it authorizes class arbitration." 701 Fed. Appx at 672. The dissenting judge condemned what he said was a "palpable evasion of *Stolt-Nielsen*." *Id.* at 673.

Lamps' petition to the Supreme Court argued that the Ninth Circuit's interpretation of *Stolt-Nielsen* is incorrect and that the FAA prohibits a court's application of state law to preclude giving effect to the FAA. In response, Varela contends that the Ninth Circuit faithfully applied *Stolt-Nielsen* and the FAA. In particular, Varela argued that *Stolt-Nielsen* did not foreclose the Court of Appeals' approach — applying state law contract principles to determine the meaning of the arbitration agreement at issue.

WHAT'S AT STAKE

Many consumer and employment contracts include arbitration provisions, with language similar to what is now before the Supreme Court. If the Court affirms, its ruling may result in class-wide arbitration in cases involving similarly ambiguous arbitration agreements. If, however, the Court overturns the Ninth Circuit's decision, employers will be more likely to rely on textual "silence" as precluding arbitration on anything other than an individual basis. This would further dampen class-wide adjudication of consumer, employment and other disputes, and prevent many individuals, including older workers and consumers, from having any realistic opportunity to assert their rights in arbitration. As the district court explained, the requirement to sign contracts with arbitration clauses usually leaves the signing party no room to negotiate, as consenting to these agreements is a required condition for securing or maintaining employment and purchasing innumerable consumer products.

Daniel B. Kohrman
dkohrman@aarp.org

Laurie McCann
lmccann@aarp.org

Dara Smith
dsmith@aarp.org

Protecting Social Security Disability Benefits

Biestek v. Berryhill,
No. 17-1184
880 F.3d 778 (6th Cir. 2017),
cert. granted, 2018 U.S. LEXIS 3860 (U.S. June 25, 2018).
Oral argument not yet scheduled.

Issue: *Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for Social Security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised?*

The Social Security Act (Act) provides for the payment of supplemental security income (SSI) benefits to certain workers that have a medically determinable *severe* impairment (a disability) and financial need. The Act defines *disability* as the inability to engage in substantial gainful activity for at least 12 continuous months. 42 U.S.C. § 423(d)(1)(A). The applicant for benefits must be unable to work, not only in his or her past job, but also in any other work the applicant could do, taking into consideration the person's age, education, and work experience. 42 U.S.C. § 423(d)(2)(A).

Petitioner Michael Biestek, a carpenter and laborer, applied for Social Security disability benefits because he was unable to work due to a severe back impairment related to degenerative disc disease. Biestek also suffered from depression and Hepatitis C. Biestek appealed the denial of Social Security benefits in an administrative hearing before an Administrative Law Judge ("ALJ"). In that hearing, a vocational expert testified that various sedentary jobs were available to Biestek, notwithstanding his medical problem. Biestek challenged the accuracy of the expert's opinion that other jobs were available to him and requested that the expert provide the relied-on data. The ALJ refused to require the expert to produce the data. Based on the expert's testimony, the ALJ denied Biestek disability benefits. Biestek appealed to the federal district court and then the Sixth Circuit. Both courts upheld the ALJ's determination.

Under federal law, the ALJ must make factual findings regarding an applicant's eligibility for Social Security benefits pursuant to a five-step process laid out in 20 C.F.R § 404.1520(a)(4). Each of these findings must be supported by factual evidence. *See* 42 U.S.C. § 405(g). Under the fifth step, the ALJ must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). To make this finding, ALJs often rely on vocational experts who testify about jobs that would be available to an applicant.

In this case, the Sixth Circuit joined the Second and Ninth Circuits in holding that vocational experts' recognized expertise provides all the necessary foundation for their testimony to be credible. *See* *Brault v. Soc. Sec. Admin.,* *Comm'r*, 683 F.3d 443, 450-51 (2d Cir. 2012); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005). The holding is in direct conflict with a pair of Seventh Circuit decisions requiring vocational experts to produce, on demand, any data underlying their conclusions. *See* *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004); *Donahue v. Barnhart*, 279 F.3d 441, 446-47 (7th Cir. 2002). The Supreme Court agreed to hear the case to resolve the circuit split.

WHAT'S AT STAKE

Each year, more than 2 million individuals apply for Social Security benefits on the basis of disability. These benefits are frequently denied based on a vocational expert's testimony that other jobs are available to the applicant. Yet, in at least three circuits, these experts are not required to produce any evidence of the availability of other jobs. This rule allowing the denial of benefits based on undisclosed data can result in the denial of vitally needed benefits based on completely inaccurate information.

Barbara Jones
bjones@aarp.org

Promoting Prescription Drug Safety

Merck Sharp & Dohme Corp. v. Albrecht,
No. 17-290
852 F.3d 268 (3d Cir. 2017),
cert. granted, 2018 U.S. LEXIS 4047 (U.S. June 28, 2018).
Oral argument not yet scheduled.

Issue: *Whether a state law failure-to-warn claim is pre-empted when the Food and Drug Administration rejects the drug manufacturer's proposal to warn about the risk after being provided with the relevant scientific data, or whether such a case must go to a jury for conjecture as to why the FDA rejected the proposed warning?*

Under the Food and Drug Administration's (FDA) regulatory scheme, the drug manufacturer is responsible for the content of its label at all times. The manufacturer must provide a label that adequately warns the public about health risks associated with its drug and must maintain the adequacy of the warnings as long as the drug is on the market. FDA regulations place an affirmative duty on the manufacturer to continually scrutinize the drug after it goes on the market and revise its label as soon as there is reasonable evidence of a serious hazard associated with a drug. *See* 21 C.F.R. §§ 314.80(b), 201.80(e); 73 Fed. Reg. 49605 (Aug. 22, 2008).

People who believed that FDA-approved drugs caused their injuries have sued manufacturers under state tort laws for failure to provide adequate warnings. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court rejected one of the drug manufacturers' main arguments, holding that FDA approval of a drug's label does not always immunize the manufacturer from state tort liability for failure to warn of known risks associated with the drug. Instead, FDA regulations may preclude state failure-to-warn liability only in situations in which a manufacturer shows that it cannot comply with both the federal and state law adequate-warning requirements. *Id*. at 571-74. Specifically, a manufacturer could prevail on this impossibility preemption defense only in cases where it could show that the FDA would have prohibited the change that the state law required. *Id*. at 573.

In *Merck Sharp & Dohme Corp. v. Albrecht*, the Supreme Court will once again consider the application of the *Wyeth* impossibility preemption defense. *Merck* concerns the adequacy of the warnings on the label of Merck's osteoporosis drug, Fosamax, and whether Merck met its burden of proving that, as matter of law, federal labeling requirements preempted state law failure-to-warn claims.

Beginning in 2010, hundreds of individuals who used Fosamax sued Merck, alleging that Merck knew of the increased risks of atypical femoral (thigh bone) fractures associated with the drug, but failed to provide adequate warnings. *In re Fosamax Alendronate Sodium Prods. Lab. Litig*., 852 F.3d 268, 272 (3d Cir. 2017). Merck obtained FDA approval for Fosamax in 1992. *Id*. at 275. Subsequently, many studies showed that long-term use of

Fosamax was associated with an increased risk of bone fractures, in particular atypical femoral fractures. *Id*. In 2008, Merck submitted a revised label to the FDA, proposing that it add a warning about stress fractures, but not atypical femoral fractures. *See id*. at 276. In 2009, the FDA did not accept Merck's proposed label change because it considered Merck's "justification for the proposed . . . . language [to be] inadequate." *Id.* at 277. The FDA explained that "[i]dentification of 'stress fractures' may not be clearly related to the atypical [femoral] fractures that have been reported in the literature. Discussion of the risk factors for stress fractures is not warranted and is not adequately supported by the available literature and post-marketing adverse event reporting." *Id*. However, in 2010, the FDA required Merck (and manufacturers of the same types of drugs) to include a warning that long-term use of the drug was associated with atypical femoral fractures. *Id*. at 278.

The district court found in Merck's favor, holding that because the FDA rejected Merck's proposed warning, it was impossible for the manufacturer to comply with both the federal and state warning requirements. *In re Fosamax*, 2014 U.S. Dist. LEXIS 42253, *58 (D.N.J. Mar. 26, 2014). The Third Circuit vacated the decision, ruling that it was up to a jury, not the district court, to decide if Merck had presented clear evidence that the FDA would not have approved a properly worded warning about the risk of atypical femoral fractures that eliminated references to stress fractures and thus meet its burden for the preemption defense. 852 F.3d at 271, 283-94. Because the central question was whether Merck met the evidentiary burden of proof, "[a] state-law failure-to-warn claim will only be preempted if a jury concludes it is highly probable that the FDA would not have approved a label change." *Id*. at 293.

In its petition for certiorari, Merck contends that the FDA knew of the possible link between the increased risks of bone fracture and Fosamax, Merck submitted a proposed warning about the risks, and the FDA rejected the warning. Brief for Petitioner, at 1. Further, Merck argues that requiring that it prove an impossibility preemption defense by clear evidence to a jury only invites speculation from the jury. *Id*. at 2. In contrast, Respondents argue that because Merck presented a warning about stress fractures, not atypical femoral fractures, the FDA never considered the proper warning nor rejected it. Brief for Respondent, at 1-2. Respondents also contend that the question of whether the FDA first rejected the warning that it later required Merck to give is a question of fact properly put before a jury. *Id*. at 17. The Supreme Court agreed with the Solicitor General's recommendation and granted the petition for review.

WHAT'S AT STAKE

Prescription drug use has increased, especially for older adults. According to the Centers for Disease Control, "[i]n 2013–2014, 36.5% of adults aged 18–44, 69.6% of adults aged 45–64, and 90.8% of those age 65 and over took a prescription drug in the past month." National Center for Health Statistics, Health, United States, 2016: With Chartbook on Long-term Trends in Health, at 25 (2017). This represents an increase from 1988 to 2014 of 5.2 percent for adults age 18–44, 14.8 percent for adults age 45–64, and 17.2 percent for adults age 65 and over. *Id*. Increased prescription drug use among those over the age of 45 is most closely related to longer life spans and the fact that “a greater fraction of older Americans are living with several chronic conditions that may require multiple medications.” *Id*. *Merck v. Albrecht* highlights the particular risk of unsafe drugs to older adults, as it relates to a drug approved to treat a condition that mostly affects older adults (especially older women). Drug manufacturers must provide accurate, adequate, and timely warnings of significant safety risks associated with their drugs; otherwise, millions of lives could be endangered.

Iris Gonzalez
igonzalez@aarp.org

Securing Older Individuals' Homes

Knick v. Township of Scott, Pennsylvania,
No. 17-647
862 F.3d 310 (3d Cir. 2017),
cert. granted in part by 2018 U.S. LEXIS 1541 (U.S. Mar. 5, 2018).
Oral argument scheduled Oct. 3, 2018.

Issue: *Whether the Supreme Court should reconsider the portion of Williamson County Regional Planning Commission v. Hamilton Bank that requires property owners to exhaust state court remedies to ripen federal takings claims?*

In *Knick v. Township of Scott, Pennsylvania*, the plaintiff brought suit in federal district court alleging that an ordinance granting public access to a cemetery on her land constituted a taking of her property without just compensation in violation of the Fifth Amendment. The district court dismissed her claim and the Third Circuit affirmed, ruling the plaintiff had failed to exhaust state remedies as required by *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Supreme Court accepted certiorari to re-examine this state exhaustion prong of *Williamson County*.

AARP and AARP Foundation, as amici, urged that *Williamson County* be overturned, citing by way of illustration the courts' extreme application of the doctrine in the realm of property tax foreclosure sales, a matter of tremendous importance to older homeowners. The Court in *Williamson County* had ruled that the existence and extent of the plaintiff's "taking" in that zoning dispute was unknowable until state administrative processes designed to measure adverse impacts had run their course. In contrast, the property tax foreclosure cases exhibit no such ripeness concerns. In *Wayside Church v. Van Buren Cty*., 847 F.3d 812 (6th Cir. 2017), a Michigan county foreclosed on a church owing $16,500 in property taxes, selling the property at foreclosure for $206,000 and — as mandated by law — retaining the over $189,000 surplus for its tax coffers. The Sixth Circuit ruled that the plaintiff's claim must be dismissed for failure to exhaust state remedies, despite the fact that the underlying issues in *Williamson County* are not present in property tax foreclosure cases. First, the exact quantity of the harm was known and the state's decision final. Moreover, it was highly uncertain whether the state "inverse condemnation" (that is, proceedings where the government takes private property and fails to pay compensation required by the Fifth Amendment to the Constitution, thus forcing the owner to sue to obtain just compensation) or other state avenues of relief even applied to this type of claim. The answer to this question might not be known to plaintiffs until after years of litigation. As dissenting Judge Kethledge observed: "At this point one senses we have lost our constitutional bearings ... Congress has granted us jurisdiction over that claim. We have a strict duty to exercise that jurisdiction." 847 F.3d at 824-25.

Another illustration, as amici noted, is *Rafaeli, LLC v. Wayne Cty*., No. 14-13958, 2015 WL 3522546, at *2 (E.D. Mich. June 4, 2015). In *Rafaeli*, the county — to collect $8.41 in unpaid taxes — foreclosed on a property and sold it for $24,500, confiscating the surplus proceeds. The trial court dismissed the plaintiff's lawsuit for return of the surplus, holding that it lacked subject-matter jurisdiction because of *Williamson County*. The *Rafaeli* case, in Michigan state court since 2015, is continuing its journey through the court system. *See*, *e.g.*, *Rafaeli LLC v. Oakland Cty*., No. 330696, 2017 Mich. App. LEXIS 1704 (Mich. Ct. App. Oct. 24, 2017) (per curiam); *Rafaeli LLC v. Oakland Cty.*, No. 156849 (Mich. request for leave to appeal filed Dec. 4, 2017). The consequence of applying *Williamson County* to state tax foreclosures is that a plaintiff will have to exhaust his state court remedies before returning to federal court, wasting years and expending considerable money.

As amici stressed, application of the *Williamson County* state litigation requirement in the realm of property tax foreclosures is almost certain to act as a total bar to federal court review in many cases, rather than ripening such claim. Many such plaintiffs, unable to afford their property taxes, also will not be able to afford often-needless litigation in state court as the price of admission to federal court.

WHAT'S AT STAKE

Many older Americans rely heavily on securities investments in 401(k)s, employer-sponsored pension plans, and personal holdings to help fund their retirement years. The majority's holding is a sensible one that ascribes liability to persons who knowingly play important functional roles in securities fraud schemes. If the Supreme Court adopts Judge Kavanaugh's dissent, such additional actors may be absolved of liability, reducing the deterrent effects of the securities laws.

For many older Americans, the most important asset in retirement is the equity in their home. The application of the *Williamson County* state exhaustion requirement, especially in tax foreclosure cases, can place that asset at significant risk. This is a danger to older Americans of modest means, given their higher vulnerability to property tax foreclosure and lack of resources to fund needless state litigation to "ripen" their claim.

Julie Nepveu
jnepveu@aarp.org

Protecting Older Investors From Fraud

Lorenzo v. Securities and Exchange Commission,
No. 17-1077
872 F.3d 578 (D.C. Cir. 2017),
cert. granted, 2018 U.S. LEXIS 3813 (U.S. June 18, 2018).
Oral argument not yet scheduled.

Issue: *Whether a misstatement claim that does not meet the elements set forth in Janus Capital Group, Inc. v. First Derivative Traders can be repackaged and pursued as a fraudulent-scheme claim?*

In this case, the Securities and Exchange Commission (SEC) brought an administrative complaint alleging that members of Charles Vista, LLC, misled investors regarding the value of debentures in the startup company Waste2Energy Holding. Francis Lorenzo, Vista's director of investment banking, sent investors an email under his letterhead containing specific misstatements regarding the resources and prospects of the company. Although Vista's owner had authored the misstatements included in the email, and directed Lorenzo to send it, the SEC held that Lorenzo had willfully participated, knowing the statements were false and implicitly vouching for them in his official capacity. The SEC ruled that Lorenzo had violated (i) Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1); (ii) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; and (iii) Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. After trial, the SEC ordered Lorenzo to cease and desist all activities connected with the allegations and pay a fine of $15,000. It also barred Lorenzo from participating in the securities industry.

In a divided 2-1 decision (J. Kavanaugh dissenting), the D.C. Circuit upheld the SEC's findings of all the foregoing violations except for those on Rule 10b-5(b). The D.C. Circuit ruled that Lorenzo was not the "maker" of the statement as defined in *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), that is, he did not have "ultimate authority" to send the message and, therefore, was not liable under that section. The D.C. Circuit nevertheless upheld Lorenzo's liability under the "fraudulent scheme" sections of 10b-5(a) and (c) and 17(a)(1), opining that persons not "making" misstatements can still be held liable under those provisions. The court remanded the case to the SEC to reassess appropriate sanctions.

Judge Kavanaugh disagreed with both the SEC and the majority's finding of Lorenzo's scienter, emphasizing the ALJ's finding that Lorenzo merely "copied and pasted" the misstatement, without reading the contents of the email. More important, Judge Kavanaugh noted other circuit opinions holding that fraudulent scheme liability — conduct prohibited by Rules 10b-5(a) and (c) and 17(a) of the securities laws — requires something more than false or misleading statements and, therefore, deemed Lorenzo's actions insufficient. One concern cited by Judge Kavanaugh was that the majority's holding would effectively remove any distinction between primary and secondary liability in private securities lawsuits, undermining Supreme Court precedent. The majority countered that Lorenzo's willful actions in this case were clearly integral to the scheme and that holding him liable did not risk broadening concepts of secondary liability already accepted by the courts.

WHAT'S AT STAKE

Many older Americans rely heavily on securities investments in 401(k)s, employer-sponsored pension plans, and personal holdings to help fund their retirement years. The majority's holding is a sensible one that ascribes liability to persons who knowingly play important functional roles in securities fraud schemes. If the Supreme Court adopts Judge Kavanaugh's dissent, such additional actors may be absolved of liability, reducing the deterrent effects of the securities laws.

Dean Graybill
dgraybill@aarp.org

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 Based on Age

Last year, the Age Discrimination in Employment Act (ADEA) celebrated its 50th anniversary. Yet, a surprising number of statutory interpretation issues are still before the Courts of Appeals and are making their way to the Supreme Court.

The most prominent statutory interpretation battle concerns whether or not ADEA Section 4(a)(2), 29 U.S.C. § 623(a)(2), protects prospective employees — and not just current employees — from employer policies or practices that have a discriminatory impact on older workers. The full Eleventh Circuit recently ruled that Section 4(a)(2) does not protect job applicants. *Villarreal v. R. J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015). The Supreme Court denied certiorari in *Villarreal*, but it is likely that the Court will address the issue soon, depending on its resolution in other circuits.

A circuit split on this issue emerged briefly when a panel of the Seventh Circuit, in a case in which AARP Foundation attorneys are co-counsel, ruled that "the better reading of the [ADEA's] text" was that the statute protected both outside job applicants and current employees. The panel believed that holding was more consistent with the ADEA's purpose and nearly 50 years of precedent. However, the Seventh Circuit granted the employer's petition for rehearing en banc, *Kleber v. CareFusion, Inc*., No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. June 22, 2018), and so time will tell if the split re-emerges. In *Kleber*, the plaintiff, an attorney, is challenging a maximum-years-of-experience hiring criterion. He alleges that the "no more than seven years of experience" requirement disproportionately screens out older applicants.

A second AARP Foundation case, *Rabin v. PriceWaterhouseCoopers, LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017), challenges the defendant accounting firm's practices of recruiting exclusively on college campuses and requiring applicants to be affiliated with a university for certain classes of jobs under the disparate impact theory. The defendant challenged the scope of Section 4(a)(2) in a motion to dismiss; the district court denied the motion, concluding that the statutory text, legislative history, Supreme Court precedent, and longstanding, consistent EEOC interpretation favored including applicants in the provision's scope. *Rabin*, 236 F. Supp. 3d 1126. A district court in Texas also rejected the *Villarreal* decision's reasoning and declined to dismiss a job applicant's disparate impact ADEA claim in [*Champlin v. Manpower, Inc.*, Nos. 4:16-cv-02987, 4:16-cv-00421, 2018 U.S. Dist. LEXIS 13450 (S.D. Tex. Jan. 24, 2018)].

Another issue concerning ADEA disparate impact claims is whether plaintiffs can prove that an employer's policy or practice has an adverse disparate impact on a subgroup of workers over the age of 40, or whether plaintiffs may only compare the impact on workers over age 40 with the impact on workers under age 40 as a whole. This "subgroup" question arose in [*Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017)], where the plaintiffs alleged that a layoff had a disproportionate impact on workers over age 50. Breaking with three other circuits, *Karlo* held that plaintiffs may bring a "subgroup" claim. Relying on [*O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996)], the court held that age discrimination plaintiffs may show that they were treated unfavorably compared to individuals who are "significantly younger" than they are, regardless of whether the comparator is over or under age 40. Under *O'Connor*, the Third Circuit concluded, there is no logical reason to require plaintiffs to make a strict over-/under-40 comparison in a disparate impact case. The court pointed out that "[m]andating a forty-and-older comparison group would allow an employer to adopt facially neutral policies which had a profoundly disparate impact on individuals over age 50 or 55, so long as younger individuals within the protected class received sufficiently favorable treatment." *Karlo*, 849 F.3d at 74. While no petition for certiorari was filed in this case, the clear circuit split will likely make its way to the Supreme Court in the near future.

Finally, the Supreme Court may be called upon to resolve emerging issues surrounding waivers of rights and claims under the ADEA, including the contours of the Older Workers Benefit Protection Act's (OWBPA) otherwise clear statutory requirements that defendants must strictly satisfy to enforce such waivers. One such issue is whether or not employers can require employees to bring challenges to the validity of waivers in arbitration as opposed to in court. This issue arose in [*McLeod v. Gen. Mills, Inc.*, 140 F. Supp. 3d 843 (D. Minn. 2015)], where workers terminated in a reduction in force challenged their terminations in a "collective action" under the ADEA. They also challenged the severance agreements that they signed, alleging that the agreements violated the OWBPA. McLeod and the other plaintiffs claimed that the agreements are confusing and otherwise noncompliant with the OWBPA and, thus, void. The class asked the district court to decide their OWBPA claims and, if they succeeded in voiding the severance agreement, to proceed to consider the ADEA claims — on behalf of themselves and all others "similarly situated." General Mills argued that a unilateral mandatory arbitration clause in the workers' severance agreement required that the case be dismissed and asked the district court to enter an order compelling the plaintiffs to resolve the validity of the waiver in arbitration. The district court declined to compel arbitration based on the OWBPA's express congressional command that employers "shall" bear the burden of proving the validity of a waiver of "any" claims or rights "in a court of competent jurisdiction." 29 U.S.C. § 623(f)(3). General Mills filed an interlocutory appeal, and the Eighth Circuit affirmed the district court's decision to uphold the arbitration clause, but declined to decide whether the waiver of the underlying ADEA claims must be proved in court. *McLeod v. Gen. Mills, Inc.*, 856 F.3d 1160 (8th Cir. 2017). The *McLeod* holding was applied by a federal district court to dismiss similar claims in *Shields v. Gen. Mills, Inc*., No. 16-cv-954, 2018 U.S. Dist. LEXIS 88 (D. Minn. Jan. 2, 2018). *See also* *Horowitz v. AT&T, Inc*., 2018 U.S. Dist. LEXIS 69191 (D.N.J. Apr. 25, 2018).

ERISA and Employee Benefits

Although few ERISA breach-of-fiduciary-duty cases reach trial, for those that do, the question of which party must prove loss causation can make the difference between winning and losing. In *Pioneer Centres Holding Co. ESOP & Trust v. Alerus Fin., N.A*., 858 F.3d 1324 (10th Cir. 2017), *pet. for cert. filed*, No. 17-667 (Nov. 2, 2017), that issue is again presented to the Supreme Court, after it denied certiorari three years ago in *Tatum v. RJR Pension Inv. Comm*., 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015). There is seemingly a split in the circuits over the question of whether, once a plaintiff establishes a breach of duty to prudently investigate an investment decision and a related loss to the plan, the burden shifts to the defendant to show its breach was harmless — that is, that the loss would have occurred regardless of the fiduciary breach. The circuits split on whether to rely on trust law principles, which provide for this burden-shifting, or to interpret ERISA to require that plaintiffs must prove all elements of their claim. The Solicitor General has been asked to provide his views on whether to grant certiorari in *Pioneer Centres*. The Court followed the Solicitor's advice to deny the petition for *RJR Pension Inv. Comm. v. Tatum* and leave standing the Fourth Circuit's judgment that placed the burden on the fiduciaries to prove their conduct did not hurt the plan. The Solicitor General said in that case that the high court should not intervene because there was not a clear division among the circuits.

Many employers require current or potential employees to sign an arbitration agreement to keep or obtain their jobs. These arbitration agreements may apply to all workplace disputes. However, the issue of whether an arbitration agreement signed only by the employer and the employee, but not the benefit plan, can force retirement plan participants to arbitrate, rather than litigate in court, their claims of fiduciary breach against the plan is currently in the courts. In *Munro v. Univ. of S. Cal*., No. 17-55550, 2018 U.S. App. LEXIS 20522 (9th Cir. July 24, 2018), the Ninth Circuit refused to compel arbitration because fiduciary breach claims are, by their nature, plan claims and the plan did not consent to arbitrate. We expect the defendant to file a petition for certiorari.

The scope of appropriate equitable relief in employee benefits cases is still a contentiously litigated question. *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), explicitly approved the concept that equitable relief authorized under ERISA refers to categories of relief that were "typically available" in equity courts before the merger of law and equity. In that vein, the court stated that a district court had the authority to grant traditional equitable remedies, such as reformation, estoppel, and surcharge. *Id*. at 440-42. The boundaries of equitable relief will continue to be litigated. We expect these issues to come before the Supreme Court again.

Affordable Care Act Challenges

Although the Supreme Court has upheld challenged portions of the Affordable Care Act (ACA) in two high-profile cases, *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 563-64 (2012) (finding the individual mandate constitutional), and *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (holding that the law allowed for tax credits to individuals in states operating under federal health exchanges), legal challenges to the ACA continue. The most recent and expansive challenge to the ACA stems from the Supreme Court's decision in *NFIB v. Sebelius*, in which the Court upheld the ACA's individual mandate as a valid exercise of its power to levy taxes. The Court explained that the provision "may reasonably be characterized as a tax" because, among other things, it "produces at least some revenue for the Government." 567 U.S. at 564, 574.

In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), which, among other things, amended the tax code by reducing to zero the tax penalty imposed for failure to maintain minimum essential coverage for tax-years 2019 and beyond. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. After enactment of the TCJA, 20 Republican-led states, with Texas taking the lead, filed suit in the U.S. District Court for the Northern District of Texas, seeking a declaration that the TCJA's reduction of the tax penalty for failure to comply with the individual mandate to zero effectively removes the basis for the constitutionality of the individual mandate under the Court's *NFIB* decision. *Texas v. United States and California*, No. 4:18-cv-00167 (N.D. Tex. filed Feb. 26, 2018). Citing to the Supreme Court's reasoning in *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) that "the guaranteed issue and community rating requirements would not work without the [individual mandate]," the plaintiffs argue that, accordingly, an unconstitutional individual mandate renders the rest of the ACA unconstitutional.

Fearing the executive branch would not defend the ACA — a law that President Trump promised during his presidential campaign to repeal and replace— 17 Democratic-led states moved to intervene to defend the law. The district court granted the motion to intervene on May 16. On June 7, the government filed a response to the plaintiffs' motion for a preliminary injunction in which it conceded that the plaintiffs would likely win on the merits and argued that the court should treat the motion as one for summary judgment and grant judgment to the plaintiffs. However, the government disagreed with the plaintiffs' argument that the entire ACA must fall; instead, it took the position that the guaranteed issue provisions and community rating provisions could not be severed from the individual mandate and should, therefore, be invalidated. All of the other provisions of the ACA, the government argued, could stand independently from the individual mandate.

Recognizing the importance of this case, 34 organizations and individuals filed friend-of-the-court briefs, including AARP and AARP Foundation. In our brief, we argued that the court should not invalidate any portion of the ACA because the TCJA did not repeal the individual mandate and, even if it impliedly repealed it, all of the remaining provisions of the ACA can stand. Our brief highlighted the importance of the ACA for adults between ages 50 and 64, who do not qualify for Medicare. Consistent with its primary purpose, the ACA has improved the lives of older adults by making health insurance, and thus health care, more accessible and affordable. Millions of Americans have gained health insurance since 2010, including adults age 50 to 64.

The importance of this case to older adults cannot be overstated. The ACA has become a lifeline for pre-Medicare adults, helping them obtain much needed health care services while avoiding financial ruin. The ACA does this through several provisions, but particularly through the guaranteed issue provision, which prohibits insurers from denying coverage based on a pre-existing condition, and the community rating provisions, which prohibit bans against covering people with preexisting health conditions and establishing limits on age rating. The result is that millions of newly insured older adults have access to health care. Because this case calls for application of the Supreme Court's *NFIB* ruling, and due to the importance and national scope of the issues, it is likely that the Court will have the opportunity to rule on the constitutionality of the ACA once again.

Medicare and Medicaid

The Supreme Court's next term may include several cases that impact Medicare and Medicaid, including two cases that examine the boundaries of the False Claims Act's (FCA) implied certification theory. These cases are important to older adults because the FCA plays a vital role in ensuring the financial integrity of Medicare and Medicaid, and in protecting beneficiaries from substandard care in long-term care settings. It imposes liability on any person or entity that knowingly submits, or cause to be submitted, false or fraudulent claims for payment to Medicare, Medicaid, and all federally funded programs.

The Supreme Court first upheld the FCA's implied certification theory in *Universal Health Servs. v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016). Under that theory, when a health care provider submits a claim, it impliedly certifies compliance with all underlying statutory, regulatory, or contractual requirements. If the provider submitting the claims knows that the services provided do not meet a requirement, those claims are false and fraudulent if the misrepresentation would be material to the government's decision to pay the claim. The Court left application of the materiality standard to the lower courts, but noted that some factors to consider include whether the government paid a claim despite its actual knowledge of noncompliance with certain requirements.

Since that time, various courts have considered whether the government's payment of claims defeats the materiality standard. In *United States ex rel. Campie v. Gilead Sci., Inc.*, 862 F.3d 890 (9th Cir. 2017), *pet. for cert. filed*, 138 S. Ct. 1585 (Dec. 26, 2017), Gilead Sciences petitioned the Supreme Court to reverse a Ninth Circuit ruling that the plaintiffs had adequately alleged an FCA violation. The plaintiffs allege that the company violated the FCA in its sale of its HIV drugs to the government by making false statements about its compliance with Food and Drug Administration (FDA) regulations. The company asserts that the plaintiffs failed to meet *Escobar*'s materiality requirement because the government continued to pay for the products even after it allegedly knew about the noncompliance with FDA regulations. The Supreme Court has asked the Solicitor General for his position.

In *United States ex rel. Ruckh v. Salus Rehab., LLC,* No. 8:11-cv-1303-T-23TBM 2018 U.S. Dist. LEXIS 5148 (M.D. Fla. Jan. 11, 2018), *appeal docketed*, No. 18-10500 (11th Cir. Feb. 8, 2018), the Eleventh Circuit will consider an appeal of a district court decision reversing a $350 million jury verdict. The plaintiff alleged that the nursing-facility defendants violated the FCA by failing to complete comprehensive care plans and billing for more therapy minutes and nursing care than they actually provided. Although the jury agreed with the plaintiff, the court rejected the jury verdict because it found, among other reasons, that these misrepresentations were not material because the government paid for the claims. The Eleventh Circuit is considering the plaintiff's appeal. We expect a petition for certiorari will be filed, whatever the decision.

The Supreme Court may also hear challenges to changes to state Medicaid policies, including the addition of work requirements. On January 11, 2018, the Centers for Medicare and Medicaid Services (CMS) issued a State Medicaid Director letter announcing 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 demonstration 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 in the case of an "experimental, pilot, or demonstration project" that is likely to assist in promoting the objectives of the Medicaid Act. CMS's new policy goes against decades of agency guidance.

One day after announcing this new policy, HHS approved Kentucky's waiver application, which sought to alter Medicaid by, among other things: (1) conditioning Medicaid receipt on engaging in 80 hours per month of specified employment or community engagement activities; (2) imposing coverage lockouts for failure to pay monthly premiums, renew eligibility on time, or timely report a change in circumstances; and (3) denying retroactive eligibility. With some exceptions, these requirements applied to enrolled adults ages 19 through 64.

In *Stewart v. Azar*, No. 18-152 (JEB), 2018 U.S. Dist. LEXIS 60477 (D.D.C. Apr. 10, 2018), 16 Kentucky Medicaid enrollees filed a lawsuit against HHS and other agencies challenging the Secretary's authority to approve Kentucky's waiver. The enrollees alleged that these requirements — along with other provisions of Kentucky's 1115 waiver — placed them in danger of losing Medicaid and, thus, access to needed health care.

On June 29, 2018, the federal district court ruled in favor of the enrollees. 2018 U.S. Dist. LEXIS 108862 (D.D.C. June 29, 2018). The Court found that HHS's decision to approve the Kentucky waiver was invalid because the Secretary failed to consider the effect of the demonstration project on the

State's ability to help provide medical coverage. While the case has not yet been appealed, other states have also sought similar waivers that may be challenged in court. The potential challenges will address work requirements, coverage lockout periods, lifetime limits, termination of benefits, ending retroactive eligibility, and increased premiums and copayments. We expect that one of these cases will reach the Court for review.

The Supreme Court may once again address Medicaid expansion, this time considering cases in which state governors refuse to expand Medicaid eligibility for lower-income adults despite residents voting for the expansion through public referenda. Currently, 34 states and the District of Columbia have chosen to expand Medicaid, resulting in more than 15 million Americans gaining Medicaid coverage.[1] In November 2017, Maine residents voted decisively to expand access to Medicaid under the Affordable Care Act. Residents who are newly eligible for Medicaid as a result of the ballot measure were supposed to get coverage starting in July. Governor Paul LePage has refused to submit a state plan, so Medicaid expansion advocates sued his administration. The case is currently before the Maine Supreme Court and will be ripe for U.S. Supreme Court review after the Maine court's decision. Medicaid expansion advocates are considering ballot measures in at least two other states — Nebraska and Idaho — which may also lead to court challenges that the Supreme Court will hear.

Consumer

During the Obama administration, the consumer protection cases most likely to wind their way through the courts were industry challenges to rulemaking and enforcement actions by the Consumer Financial Protection Bureau (CFPB) and other agencies with consumer protection authority. Now, with CFPB and some other agencies reversing course in some areas of regulation or bringing fewer lawsuits, the Supreme Court may see cases where plaintiffs are challenging those agencies' efforts to weaken existing regulations or abandon case enforcement efforts. For example, in *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, No. 1:18-cv-00295 (W.D. Tex. June 12, 2018), consumer groups filed an amicus brief opposing CFPB's and the defendants' request for a stay of litigation so that CFPB could reconsider payday loan rules that the agency had finalized following a five-year rulemaking process. *See* https://bit.ly/2xkKEed. The consumer groups argued that, if the CFPB wants to delay the compliance date of its own regulation, it must follow the statutory procedures for agency rulemaking in the Administrative Procedure Act, 5 U.S.C. § 705. The court denied the stay.

Another issue that may come before the Supreme Court is the constitutionality of the structure of certain independent federal agencies. For example, a split of authority in the appellate courts may develop regarding the constitutionality of CFPB's single-director structure. That structure was found constitutional in January 2018 by the U.S. Court of Appeals for the

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[1] Kaiser Family Found., *Status of State Action on the Medicaid Expansion Decision* (June 7, 2018), https://kaiserf.am/2A35CVG.

District of Columbia Circuit in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 78 (D.C. Cir. 2018). However, a district court in the Second Circuit already has ruled to the contrary. *See* *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-cv-890 (LAP), 2018 U.S. Dist. LEXIS 104132 (S.D.N.Y. June 21, 2018). In addition, the Fifth Circuit in April 2018 granted an interlocutory appeal to consider the issue in *Consumer Fin. Prot. Bureau v. All Am. Check Cashing*, No. 18-90015 (5th Cir. Apr. 24, 2018). Recently, a panel of the Fifth Circuit also held unconstitutional the structure of another single-director agency, the Federal Housing Finance Agency. *See* *Collins v. Mnuchin*, No. 17-20364, 2018 U.S. App. LEXIS 19510 (5th Cir. July 16, 2018) (distinguishing the D.C. Circuit's opinion in *PHH*).

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.

AARP Foundation
601 E Street, NW
Washington, D.C. 20049
aarpfoundation.org

@AARPFoundation
facebook.com/AARPFoundation

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