Nos. 18-35892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs/Appellants,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants/Appellees.

On Appeal from the United States District Court
for the Western District of Washington
The Honorable Richard A. Jones, U.S. District Judge
(Seattle, No. 2:17-cv-1609 -RAJ)

REPLY BRIEF OF APPELLANTS E.S. AND JODI STERNOFF

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I. INTRODUCTION

In *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1115-1117 (9th Cir. 2000), this Court held that the Americans with Disabilities Act ("ADA") does not prohibit benefit design discrimination by a long-term disability insurer or an employer. The Court's decision to exempt benefit design discrimination in that context was based on the lack of clarity from Congress: "[H]ad Congress intended to control which coverages had to be offered by employers [and insurers] it would have spoken more plainly because of the well-established marketing process to the contrary." *Id.* at 1116.

Congress has now spoken more plainly. In Section 1557 of the Affordable Care Act ("ACA") Congress explicitly prohibited discrimination in "contracts of insurance" issued by health insurers that receive Federal financial assistance:

> [A]n individual shall not, ***on the ground prohibited under*** … ***section 504*** of the Rehabilitation Act of 1973 (29 U.S.C. §794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, ***including credits, subsidies, or contracts of insurance***…. The enforcement mechanisms provided for and available under … section 504 … shall apply for purposes of violations of this subsection.

42 U.S.C. §18116(a) (emphasis added). As the Department of Health and Human Services ("DHHS") explained, Congress meant what it said: "A covered entity ***shall not***, ***in providing or administering*** health-related insurance or other health related

coverage … ***have benefit designs that discriminate*** on the basis of … disability." 45 C.F.R. §92.207(b)(2) (emphasis added).

Appellants, E.S. and Jodi Sternoff, have been denied medically necessary outpatient office visits and durable medical equipment based solely upon their disability and the benefit design of their health policies. Their health insurance through Regence BlueShield covers outpatient office visits and durable medical equipment when medically necessary. ER 116-118. These services would be covered, but for the design of Regence's health plan, specifically application of Regence's Hearing Loss Exclusion. ER 136. Appellants do not receive the full coverage of outpatient office visits and medical equipment that other insureds receive. This disability-based exclusion is illegal under the ACA's Section 1557. *Cf., Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683, 103 S. Ct. 2622 (1983) (pregnancy exclusion in a health plan violated Title VII of the Civil Rights Act).

Regence argues that the Hearing Loss Exclusion is not discriminatory because a health insurer merely needs to include the same disability-based exclusion in health plans offered to all. Regence Opp. p. 2 ("[T]he hearing benefit exclusion at issue applies to all insureds on the same basis, disabled or non-disabled alike"). Regence asserts that this conclusion is driven by Section 1557's incorporation of all of Section 504 of the Rehabilitation Act ("Section 504") and the ADA, as well as the pre-ACA

cases interpreting these two Acts. *Id.,* p. 2. Any other interpretation, Regence explains, would require health insurers to provide coverage for disabling conditions on the same terms and conditions as other medical conditions. *Id.,* p. 1. ***That is exactly what Section 1557 requires***.

Regence is wrong about its "incorporation theory." ***First,*** Congress did not incorporate all of Section 504 and the ADA into Section 1557. The plain language of Section 1557 shows that only the "ground" of and "enforcement mechanisms" from Section 504 of the Rehabilitation Act are incorporated. *See* 42 U.S.C. §18116(a). The ADA is not referenced at all. *See id.* Congress knew how to refer to the rest of Section 504 and did so in the following subsection. *See* 42 U.S.C. §18116(b) (preserving Section 504's "rights, remedies, procedures, or legal standards" despite the expansion of Section 1557). Its choice of words is presumed to be deliberate. *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). Congress did not incorporate all of Section 504 into Section 1557.

Second, the limited incorporation of Section 504 into Section 1557 is consistent with the legislative purpose of the ACA and the administrative interpretation by the Department of Health and Human Services ("DHHS"). One of the main goals of the ACA was to ensure that all Americans, even those with disabilities and pre-existing conditions, have access to comprehensive coverage to meet their health care needs. That goal would be undermined if Section 1557 is

interpreted to allow health insurers to arbitrarily exclude all medically necessary coverage for hearing loss, or other disabling conditions like AIDS, autism, and cancer.

Third, under traditional anti-discrimination principles, the Hearing Loss Exclusion is either facial or disparate impact discrimination. Regence argues that since some people with hearing loss are not disabled, the Hearing Loss Exclusion cannot be facial discrimination. But the cases Regence relies upon are outdated. In 2008, the Section 504 definition of "disability" was amended so that it must be broadly construed in favor of coverage under the Act. *See* 29 U.S.C. §705(9), *incorporating* 42 U.S.C. §12102(4)(A); 29 C.F.R. §1630.2(1)(i). All insureds who are prescribed medically necessary treatment for hearing loss likely meet the definition of "disability." Even if the Hearing Loss Exclusion captures some non-disabled insureds in its net, it is still a form of either facial/proxy or disparate impact discrimination. *See Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach* ("*Pacific Shores*"), 730 F.3d 1142, 1160, n.23 (9th Cir. 2013).

Congress intended that people with disabilities have access to comprehensive, non-discriminatory health benefits when it enacted the ACA. Arbitrary, disability-

based exclusions in ACA-regulated health plans are no longer permissible.[1] Appellants adequately alleged a plausible claim of disability discrimination under Section 1557. The trial court's decision should be reversed, and this case remanded.

II. ARGUMENT

A. Section 1557 Prohibits Disability Discrimination in ACA-Regulated Health Insurance Benefit Design.

Regence argues that Congress intended Section 1557 to be interpreted identically to Section 504 and the ADA, such that disability-based exclusions, like the Hearing Loss Exclusion, are permissible. *See* Regence Opp. pp. 1-2. This Court should reject Regence's argument. Congress intended the ACA to end insurance industry practices that exclude people with disabilities from meaningful access to the health coverage they need. The plain language of Section 1557, the legislative history and purpose of the ACA, including Section 1557, and the administrative interpretation of the statute by DHHS reveal that only limited portions of Section 504 and none of the ADA are incorporated into Section 1557.

[1] Covering treatment for hearing loss under the same terms as that of other health conditions does not mean that all treatment is automatically covered; claims must be reviewed for medical necessity and other coverage requirements. *See Flack v. Wis. Dep't of Health Servs.,* 2019 U.S. Dist. LEXIS 68824, at *34 (W.D. Wis. Apr. 23, 2019); ***Addendum J***.

1. Section 1557 Only Incorporates the "Ground" and "Enforcement Mechanisms" of Section 504.

When Congress enacted Section 1557, it included insurance contracts within the definition of "federal financial assistance." *See* 42 U.S.C. §18116(a) ("[A]n individual shall not, on the ground prohibited under … section 504 … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, ***including* … *contracts of insurance***") (emphasis added); 45 C.F.R. §92.4; 81 Fed. Reg. 31383. For the first time, ACA-regulated health insurers were subject to federal anti-discrimination law.

In contrast, the Section 504 definition of "federal financial assistance" ***excludes*** contracts of insurance.[2] *See* 45 C.F.R. §84.3(h) ("Federal financial assistance means any grant, loan, contract (***other than*** … ***a contract of insurance***") (emphasis added). Nor are "contracts of insurance" generally subject to the ADA. *See* 42 U.S.C. §12111(2). And, in most circuits, private insurance contracts are not "places of public accommodation" under the ADA's Title III. *See, e.g., Weyer,* 198

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[2] Section 504 does not apply to insurance contracts (excluding Medicaid and Medicare programs). *See Jacobson v. Delta Airlines,* 742 F.2d 1202, 1210 (9th Cir. 1984); *United States v. Baylor Univ. Med. Ctr.,* 736 F.2d 1039 (5th Cir. 1984). *Compare* Regence Opp. p. 8.

F.3d at 1113, 1115. Congress's expansion of anti-discrimination law to health insurance contracts was deliberate and groundbreaking.

Congress chose not to amend either Section 504 or the ADA to include ACA-regulated health insurers.[3] Congress could have, but did not, amend the Section 504 definition of "federal financial assistance" to include health insurance contracts. *See* Regence Opp. p. 11. Nor did Congress adopt ***all*** of Section 504 when drafting the relevant section of Section 1557. Congress only referenced the "ground" and "enforcement mechanisms" of Section 504 in 42 U.S.C. §18116(a). Tellingly, in the next section, Congress referred to the remaining Section 504 "rights, remedies, procedures, or legal standards" to ensure that existing Section 504 law would be unaffected by any changes resulting from subsection (a). 42 U.S.C. §18116(b). This Court must presume that Congress intended the different words in subsections (a) and (b) to mean different things. *Motamedi*, 767 F.2d at 1406. Congress intended that the rights, remedies, protections and legal standards in Section 504 would be unaffected, even while Section 1557 expanded and applied anti-discrimination law in a new context.[4] *Accord, Huffman v. Univ. Med. Ctr. Mgmt. Corp.,* 2017 U.S.

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[3] Regence concedes that Congress's decision ***not*** to incorporate the ADA into Section 1557 "made sense" since it is "different with respect to whom it applies." Regence Opp. p. 26.

[4] The plain language of subsection (b) does not support Regence's argument that the "legal standards" of Section 504 are incorporated in Section 1557. *Compare* Regence Opp. p. 12 *with* 42 U.S.C. §18116(b).

Dist. LEXIS 180999, at *5-*6 (E.D. La. Oct. 31, 2017); *York v. Wellmark, Inc.*, 2017 U.S. Dist. LEXIS 199888, at *52 (S.D. Iowa Sep. 6, 2017) ("The plain meaning of these two sentences combined is clear and unambiguous – claims for discrimination are available on the grounds prohibited in the four listed federal civil rights statutes, and are to be addressed under the … corresponding enforcement mechanisms").[5] All of Section 504 is ***not*** incorporated.

Regence argues that 42 U.S.C. §18116(b) shows that Congress meant to "preserve" Section 504's legal standards ***as applied to Section 1557***. *See* Regence Opp. p. 12. Regence ignores that when Congress acts to extend anti-discrimination law, it typically does so because existing law inadequately addresses a type of discrimination. *Cf., Newport News*, 462 U.S. at 676, 685. The history behind *Newport News* is instructive here. In an earlier case, *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976), the Supreme Court found that an employer's plan did not discriminate on the basis of gender when it offered the same disability policy to both male and female employees, ***even though the policy excluded all coverage due to pregnancy***. Congress then passed legislation that expanded anti-discrimination principles based upon gender to address discrimination "on the basis of pregnancy,

[5] While Section 504 and ADA caselaw can be helpful when interpreting Section 1557, such caselaw may not undo Congress's deliberate expansion of anti-discrimination law to reach the benefit design of ACA-regulated health plans. *See* Regence Opp. p. 27.

childbirth or related medical conditions" in the "receipt of benefits." *See* 42 U.S.C. §2000e(k).

After the amendment, in *Newport News,* the Supreme Court reversed *Gilbert* and held that an employer discriminates when it offers disparate coverage of health services by gender:

> [I]f a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII…. ***The same result would be reached even if the magnitude of the discrimination were smaller***. For example, a plan that provided complete hospitalization coverage for the spouses of female employees but did not cover spouses of male employees when they had broken bones would violate Title VII by discriminating against male employees.
>
> Petitioner's practice is just as unlawful. ***Its plan provides limited pregnancy-related benefits for employees' wives, and affords more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization.***

Id., 462 U.S. at 683 (emphasis added). Thus, an employer health plan facially discriminates when it offers a package of benefits that excludes of coverage for pregnancy-related treatment, an exclusion that impacts only women. *Id.* at 685. With the ACA, Congress similarly expanded anti-discrimination principles into a new area, ACA-regulated health insurance. This expansion was designed to address the failure of existing anti-discrimination law to protect people with disabilities and others from discriminatory benefit design. Congress anticipated changes to existing anti-discrimination law in this narrow new context.

2. Section 1557 Must Be Interpreted In Light of the ACA's Purpose and Context.

This Court must consider the ACA as a whole when interpreting Section 1557. "A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell,* __ U.S. __, 135 S. Ct. 2480, 2496 (2015); *see also id.,* at 2493 ("We cannot interpret federal statutes to negate their own stated purposes"). Congressional intent must be determined in light of the remedial nature of the ACA. Comprehensive remedial statutes like the ACA are generally accorded "a sweep as broad as their language." *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S. Ct. 1790 (1971).

"In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of pre-existing conditions or other health issues." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547, 132 S. Ct. 2566 (2012). Members of Congress intended the legislation ended unfair discrimination on the basis of disability and other serious health conditions. *See* Appellants' Opening Brief pp. 14-15, *citing* ***Addenda C-E***; 81 Fed. Reg. 31379.[6]

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[6] Regence misleadingly asserts that Congress was silent about Section 1557, ignoring the Congressional record on the ACA's overall anti-discrimination purpose. *See* Regence Opp. pp. 17-18. While Regence declares that such legislative history and purpose should be accorded "little weight," the Supreme Court has concluded otherwise. *Compare id.,* p. 24, with *King,* 135 S. Ct. at 2492.

The ACA is one of the most significant disability anti-discrimination laws passed by Congress. *See* Blake, Valarie K., *An Opening for Civil Rights in Health Insurance After the Affordable Care Act,* 36 B.C. J.L. & SOC. JUST. 235, 237 (June 2016) (hereinafter, "Blake"). In addition to Section 1557, the ACA prohibits insurers from discrimination based upon health conditions in enrollment and re-enrollment. *See* 42 U.S.C. §§300gg-1; §300gg-2; §300gg-4. It ends the use of discriminatory pre-existing condition limitations in ACA-regulated health insurance. 42 U.S.C. §300gg-3. It prohibits insurers from using disability, health status and medical conditions as a basis of denying eligibility for coverage. 42 U.S.C. §300gg-4(a). It restricts insurers from discriminating against people with health conditions when it comes to paying for premiums. *See* 42 U.S.C. §300gg.

Congress not only intended to make it easier for people with disabilities and health conditions to purchase health coverage, it also intended to end disability discrimination in the type of benefits offered. Without this protection, insurers could simply re-write illegal pre-existing condition limitations as benefit exclusions. *See* Blake, p. 257. ACA-regulated health plans must offer comprehensive health benefits in ten broad categories of coverage, known as Essential Health Benefits, or EHBs. 42 U.S.C. §18022(b)(1). The ten categories of EHB includes durable medical devices, hospitalization and outpatient office visits. *See* 42 U.S.C. §18022(b)(1)(A), (C), (G). Coverage of "habilitative services and devices" must include "services and

devices that help a person keep, learn, or improve skills and functioning for daily living … including … ***for people with disabilities***." 45 C.F.R. §156.115(a)(5).

Offering some coverage within the ten categories of benefits, standing alone, is not enough to comply with the ACA. *See* Regence Opp. pp. 14-15. ***Insurers must ensure that the benefits are designed in a non-discriminatory manner***. *See* 42 U.S.C. §§300gg-6; 18022(b)(4)(B); 18116(a); 45 C.F.R. §§156.110(d); 156.125(a) (Insurers do "not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on … present or predicted disability"); 92.207(2).[7] The ACA specifically targeted a few of the most pernicious forms of benefit design discrimination including lifetime and annual dollar caps on benefits and exclusions of mental health and substance use treatment. *See, e.g.,* 42 U.S.C. §§300gg-11; 18022(b)(1)(E); 45 C.F.R. §156.115(a)(3). With Section 1557, Congress included, for the first time, a general prohibition of other forms of disability discrimination that occur in the design of health insurance benefits. *See* 42 U.S.C. §18116(a).

Regence argues that when passing Section 1557 Congress did not repudiate the "longstanding view" of discrimination under the ADA. *See* Regence Opp. p. 16-

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[7] Appellants' Regence plan is ***not*** "in full compliance" with the ACA's EHB requirements precisely because it includes the discriminatory Hearing Loss Exclusion. *See* Regence Opp. p. 24.

17. Congress didn't need to distinguish the ADA: (1) Section 1557 addresses an entirely different area of the law, applying anti-discrimination principles to ACA-regulated health insurance, not employment or places of public accommodation; and (2) Congress did not incorporate the ADA into Section 1557.

Regence further claims that while Congress "may have wanted to expand access to health care and ensure fair treatment for those with severe health conditions (including pre-existing or disabling conditions)," it failed to expressly do so. Regence Opp. p. 25. Regence ignores the express language of Section 1557, which refers to only Section 504's "ground" and "enforcement mechanisms." *See* 42 U.S.C. §18116(a). Even if Section 1557 was "inartfully drafted," it must be interpreted in light of the ACA's general anti-discrimination purpose. *See King,* 135 S. Ct. at 2492.

3. Federal Regulators Confirmed that Section 1557 Prohibits Disability Discrimination Based on Benefit Design.

The Court should also consider DHHS' administrative interpretation. On this point, both parties agree. *See* Regence Opp. pp. 19-22. The Section 1557 rules generally prohibit disability discrimination by covered entities, and specifically prohibit the "benefit designs that discriminate on the basis of … disability in a health-related insurance plan or policy." 45 C.F.R. §92.207(a), (b)(2).

DHHS concluded that "categorical exclusions of all coverage related to certain conditions could raise significant compliance concerns under Section

1557."[8] 81 Fed. Reg. 31433. Arbitrary exclusions based upon protected traits, including disabilities, are prohibited. 81 Fed. Reg. 31408; 31434. While DHHS did not specify that any particular service must be covered to avoid discrimination, it concluded that ACA-regulated health plans could not ***arbitrarily*** exclude treatment for a particular condition:

> [I]f a plan limits or denies coverage for certain services or treatment for a specific condition, [DHHS] ***will evaluate whether coverage for the same or a similar service or treatment is available to individuals outside of that protected class or those with different health conditions*** ***and*** ***will evaluate the reasons for any differences in coverage***. Covered entities will be expected to provide a ***neutral nondiscriminatory reason*** for the denial or limitation that is not a pretext for discrimination.

81 Fed. Reg. 31433 (emphasis added).

Ignoring this commentary, Regence claims that it is not required to design its benefits in a non-discriminatory manner; instead, Regence argues, once it establishes the benefits in an insurance plan, Section 1557 requires only that the benefits be ***administered*** without discrimination. Regence Opp. p. 21 ("[H]ealth insurance plans are not required to cover any particular benefit or service…. Rather once

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[8] Regence incorrectly asserts that Appellants "rely exclusively" on cases involving transgender health coverage for the proposition that "categorical exclusions for a particular condition may be discriminatory." *See* Regence Opp. p. 36. DHHS concluded that categorical exclusions of treatment for a specific condition may violate Section 1557. *See* 81 Fed. Reg. 31433; s*ee also Newport News,* 462 U.S. at 683-85.

insurers do choose to offer a benefit, they must do so on a non-discriminatory basis"). Regence is wrong – under the ACA, insurers must do both: "The rule prohibits a covered entity from employing benefit design ***or*** program administration practices that operate in a discriminatory manner." 81 Fed. Reg. 31434, referring to 45 C.F.R. §92.207(a) and (b). DHHS anticipated that Section 1557 would require changes to health plans' benefit limitations and exclusions and gave insurers time to do so. *See* 81 Fed. Reg. 31430. ***Nothing*** in the DHHS rules or commentary authorize ACA-regulated health plans to continue to apply arbitrary, disability-based exclusions.

Regence points to a single comment from DHHS regarding the potential costs of compliance with the final regulations, as the source of its claim that Section 1557 did not reach arbitrary disability-based exclusions. *See* Regence Opp. p. 22, *citing* 81 Fed. Reg. 31446 ("Because Section 1557 restates existing requirements, we do not anticipate that covered entities will undertake new actions or bear any additional costs in response to the issuance of the regulation with respect to the prohibition of race, color, national origin, age or disability discrimination"). This DHHS comment is simply incorrect. As explained above, health insurers were ***never*** subject to disability discrimination requirements under Section 504. Section 1557 is a new requirement imposed on certain private health plans, reaching discriminatory benefit design.

B. Appellants' Adequately Pled A Prima Facie Claim of Disability Discrimination.

Regence argues that Appellants failed to adequately plead a claim of facial or disparate impact discrimination. *See* Regence Opp. pp. 31, 35. This Court has held that the distinction between "facial" and "disparate impact" discrimination is not useful when addressing disability discrimination. *Crowder v. Kitigawa,* 81 F.3d 1480, 1484 (9th Cir. 1996). "[I]t is more useful to assess whether disabled persons were denied 'meaningful access' to state-provided services." *Id. See also Mark H. v. Lemahieu,* 513 F.3d 922, 937 (9th Cir. 2008); *McGary v. City of Portland*, 386 F.3d 1259, 1266-67 (9th Cir. 2004). Appellants' Complaint adequately alleges disability discrimination, whether in the form of facial or disparate impact discrimination. *See* ER 312-318, ¶¶9-13, 27-31, 37-39.

1. The Hearing Loss Exclusion is facially discriminatory.

Regence argues that the Hearing Loss Exclusion is not facial discrimination because not all hearing loss is disabling under Section 504. *See* Regence Opp. pp. 29-30. Regence is wrong for at least three reasons: ***First,*** Regence's claim that hearing loss does not always constitute a disability is based on cases that refer to the former Section 504 definition of "disability." Regence Opp. p. 29 *citing to Santiago Clemente v. Exec. Airlines, Inc.,* 213 F.3d 25, 30 (1st Cir. 2000); *Ayotte v. McPeek*, 2011 U.S. Dist. LEXIS 67913, at *8, *19 (D. Colo. June 24, 2011). Congress

expanded the definition as of January 1, 2009.[9] *See* 29 U.S.C. §705(9), *incorporating* 42 U.S.C. §12102. Section 504 "disability" must now be "construed in favor of broad coverage." 42 U.S.C. §12102(4)(A); 29 C.F.R. §1630.2(1)(i). Under the current definition, all insureds who are prescribed medically necessary treatment for hearing loss are likely "disabled."

Second, Regence incorrectly claims that "[i]n order to conclude that the Hearing Loss Exclusion is a disability-based exclusion, the Court would have to find that every person who ***seeks*** hearing treatment … is disabled." Regence Opp. p. 29 (emphasis added). To the contrary, only insureds who have a medical need for treatment for hearing loss are denied coverage ***solely*** due to their disability. Insureds who seek such treatment without having a genuine medical need for it, are also subject to Regence's standard exclusions of "not medically necessary" or "experimental/investigational." *See* ER 115, 175. Those insureds are not denied coverage "solely" due to a disability.

Third, even if this Court were to accept Regence's premise that its Hearing Loss Exclusion is applied to some non-disabled insureds with hearing loss,

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[9] Although the decision in *Ayotte* was issued in 2011, the case was filed in November 19, 2008, ***before*** the effective date of the ADAAA definition. *Ayotte*, 2011 U.S. Dist. LEXIS 67913, at *9. The trial court found, *ipsi dixit,* that the plaintiff's hearing impairment did not constitute a "disability," providing no analysis of the term under either the former or current definition of disability. *Id.* at *19.

Regence's proxy discrimination or "over-discrimination" does not excuse its practice. This is the "grotesque scenario" for covert disability discrimination that this Court warned against in *Pacific Shores,* 730 F.3d at 1159. It is irrelevant whether the "Hearing Loss Exclusion" applies solely to disabled insureds or captures some non-disabled insureds in its net. The Exclusion is a form of actual or "constructive" facial discrimination. *See McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).[10]

Regence argues that hearing loss is not an "almost exclusive" indicator of disabling hearing loss so as to be a proxy for it, without explanation. Regence Opp. pp. 31-32, *citing Pacific Shores*. Regence ignores *McWright,* cited approvingly in the same case. *See Pacific Shores,* 730 F.3d at 1160, n. 23. In *McWright,* the Seventh Circuit concluded that "gray hair" was a close enough fit to "old age" such that an allegation that an employer rejected all applicants with gray hair was sufficient for a claim of age discrimination, even though there are young people with gray hair. *McWright,* 982 F.2d at 228. Here, an exclusion of all treatment for

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[10] Proxy discrimination is not a new legal theory asserted for the first time on appeal. *See* Regence Opp. p. 31. Both facial and disparate impact discrimination were briefed below. ER 55-66. Proxy discrimination is a form of disability discrimination, whether it is characterized as facial or disparate impact discrimination. *Compare* Regence Opp. p. 31 *with McWright,* 982 F.3d at 228. It is not a new theory, but if it were, the Court should still consider it. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

"hearing loss" is a plausible proxy for disabling hearing loss, even if a few non-disabled insureds with hearing loss are impacted. Alternatively, the Exclusion may be a form of disparate over-discrimination, since the distinction between the two concepts is "merely one of degree." *Pacific Shores*, 730 F.3d at 1160, n.23.

Fourth, Regence argues that "classification by a medical condition shared by the disabled and non-disabled" is ***always*** neutral, even when the condition can be disabling. *See* Regence Opp. p. 30. In anti-discrimination law, classification matters. Even seemingly neutral classifications can result in discrimination if they are arbitrary, result from unconscious prejudice or motivated by animus. *See Crowder,* 81 F.3d at 1484. A bus company cannot classify the seating in a bus based upon race in order to declare that it still offers the same bus service to white and black riders, while excluding black riders from the better seats. *See, e.g., Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956). A college cannot classify hockey teams as men's and women's teams, so that it can claim that allows all to play in a neutral fashion, while giving the best equipment, funding and practice times to men's team. *See, e.g., Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992) *vacated as moot*, 992 F.2d 17 (2d Cir. 1993). A health insurer cannot classify otherwise covered speech, occupational and physical therapies as "neurodevelopmental therapies" ***only*** when those services are used to treat insureds diagnosed with developmental conditions, just so that the services can be excluded from coverage.

See, e.g., Z.D. v. Grp. Health Coop., 2012 U.S. Dist. LEXIS 76503, at *33 (W.D. Wash. June 1, 2012).[11] Similarly, here, Regence cannot classify otherwise covered services (inpatient treatment, outpatient office visits, durable medical equipment) as a special "Hearing Loss Treatment" in order to exclude it from coverage.

a. Facial Discrimination is Properly Alleged When an ACA-Regulated Health Insurer Arbitrarily Excludes Treatment for a Disability.

Regence argues that there is no authority for Appellant's position that "blanket exclusions in ACA-regulated plans must be based upon medical and scientific evidence." Regence Opp. p. 32. This standard is derived from: (1) DHHS commentary; (2) Section 504/ADA caselaw and (3) Regence's contract of insurance with Appellants.

First, DHHS applies this standard to exclusions of particular health conditions, recognizing that disability discrimination occurs when a health condition is used as a proxy for disability. *See* Regence Opp. p. 33. "[A]rbitrary age, visit, or coverage limitations could constitute discrimination." 81 Fed. Reg. 31408. "[I]f a plan limits or denies coverage for certain services or treatment for a specific condition, [DHHS] will evaluate … the reasons for any differences in coverage." 81 Fed. Reg. 31433. "[C]overed entities must use neutral, nondiscriminatory criteria in

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[11] *Z.D.* was based on the Washington Mental Health Parity Act, not the ADA, so it was not constrained by *Weyer*. *See Z.D.,* 2012 U.S. Dist. LEXIS 76503, at *33.

making decisions as to which benefits and services to cover." ***Addendum F,*** FAQ No. 45. "Issuers are expected to impose limitations and exclusions, if any, based on clinical guidelines and medical evidence, and are expected to use reasonable medical judgment." ***Addendum G,*** p. G-7. "Issuers may be asked to provide clinical evidence to support plan designs which have less generous benefits for subsets of individuals." *Id. See also,* ***Addendum H*** ("[T]he Department will consider an exclusion of treatments for autism spectrum disorder as discriminatory and prohibited"); ***Addendum K*** ("Potentially Discriminatory Benefit Design Example: Bone marrow transplants are excluded from transplant coverage regardless of medical necessity").[12]

Second, the DHHS test is consistent with Section 504 caselaw relating to disabled patient exclusions from medical treatment. Under Section 504, "disability alone is not a permissible ground for withholding medical benefits." *Woolfolk v. Duncan*, 872 F. Supp. 1381, 1389 (E.D. Pa. 1995). Treatment may only be withheld based upon a "bona fide medical reason." *Id.* at 1390; *see Glanz v. Vernick*, 750 F. Supp. 39, 46 (D. Mass. 1990). Courts must ensure that the proffered reasons are not "pretextual … to cover up discriminatory decisions." *Sumes v. Andres,* 938 F. Supp. 9, 12 (D.D.C. 1996); *see also Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S. Ct. 2196

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[12] Multiple examples of discriminatory benefit exclusions do not relate to gender dysphoria. *Compare* Regence Opp. p. 33 with ***Addenda F, G, H, and K.***

(1998) (Under the ADA, disabled patients may only be excluded from treatment based upon "objective, scientific information," "available medical evidence," or "other credible scientific basis").

Third, this test is consistent with the terms of Regence's health plan. Regence covers only medical services that are "medically necessary." *See* ER 115. "Medically necessary" services are defined as treatment that is clinically appropriate, effective, consistent with generally accepted medical standards and based upon credible scientific evidence. *See* ER 177-78.

2. Alternatively, the Hearing Loss Exclusion is a form of Disparate Impact Discrimination.

Alternatively, the Hearing Loss Exclusion results in disparate impact discrimination by denying "meaningful access" to otherwise covered, medically necessary benefits as well as the legally mandated external review. *See Crowder,* 81 F.3d at 1484. Regence skips over *Crowder,* reaching back to *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712 (1985), and irrelevant ADA cases, to argue that, even after the ACA and under a disparate impact analysis, its Hearing Loss Exclusion is permitted. Regence Opp. pp. 36-44. Regence is wrong on every point, as explained below.

a. Alexander v. Choate Supports A Finding that Regence's Hearing Loss Exclusion is Discrimination.

Regence claims that this Court's disparate impact analysis should begin with *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712 (1985). *See* Regence Opp. p. 37. *Choate's* key principles, however, support Appellants. ***First,*** *Choate* held that a Medicaid benefit exclusion based upon a protected trait could "effectively den[y] otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* at 301. ***Second,*** the Supreme Court confirmed that an exclusion that applied only to disabling conditions or that prevented disabled individuals from receiving needed, covered treatment could violate Section 504 by denying "meaningful access" to Medicaid benefits. *Id.* at 302. ***Third,*** *Choate* made clear that "meaningful access" must be defined in relation to the purpose of the statute at issue. *Id.* at 303. *Choate* involved the Medicaid Act, the purposes of which did not include providing "adequate health care." *Id.* Here, the ACA was enacted with an express anti-discrimination purpose: to ensure that all Americans, including people with disabilities and pre-existing conditions, have meaningful access to coverage for the health care they need. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 547, 596.

Under the principles in *Choate,* Appellants have alleged a *prima facie* case of disability discrimination. Regence's exclusion is based upon a disabling trait. Appellants have alleged that Regence denies coverage of hospitalization, outpatient office visits and durable medical equipment when those benefits are needed to treat

their disability of hearing loss, denying them meaningful access to otherwise covered benefits and meaningful internal and external review of those denials. And, unlike the Medicaid Act, the ACA requires regulated health insurers to offer an appropriate, comprehensive range of benefits without discrimination based upon disability or pre-existing health condition. 42 U.S.C. §18022(b)(4)(B), (D); 45 C.F.R. §156.125(a); 78 Fed. Reg. 12842 (a plan must offer EHBs ***and*** meet non-discrimination requirements).

Over time, *Choate* has been misinterpreted to limit the anti-discrimination concept of "equal opportunity" to merely offering the same employment-based coverage to all, disabled and non-disabled, ***even when the coverage plan contains disability-based exclusions***. *See* Regence Opp. p. 38 (Regence claims *Choate* only requires an "equal opportunity" for ***participation,*** not for coverage). Regence misconstrues *Choate,* which held that an exclusion of Medicaid benefits based upon a protected trait, like hearing loss, could be discrimination. *Id.,* 469 U.S. at 301. Excluding medically necessary treatment for a disabling condition, while covering

the same type of treatment for others, does not offer an "equal opportunity" to disabled insureds.[13]

Regence relies on select ADA and Section 504 caselaw that followed *Choate*. *See* Regence Opp. pp. 40-44, *citing Weyer* among other cases. Regence's preferred cases do not represent an unanimous line of judicial decisions. A minority of courts have held that the ADA may prohibit employers from offering benefits that discriminate on the basis of disability. *See, e.g., Tompkins v. United Health Care of New England*, 203 F.3d 90, 95 n.4 (1st Cir. 2000) (recognizing that health insurers are subject to Title III of the ADA); *Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n,* 37 F.3d 12, 19 (1st Cir. 1994) (same).

The ADA cases relied upon by Regence suffer from significant weaknesses. *See Sirva Relocation, LLC v. Richie,* 794 F.3d 185, 199 (1st Cir. 2015). ***First,*** "[t]he Supreme Court has never considered whether the ADA forbids [a Title I or Title III entity] from offering disparate benefits to different classes of the disabled." *Id.* ***Second,*** some of Regence's cases "were made over strong dissents." *Id.* ***Third,*** many of the cases were decided before *Olmstead v. L.C.,* 527 U.S. 581, 119 S. Ct.

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[13] Regence argues that eliminating arbitrary disability-based exclusions is akin to guaranteeing "equal results." Regence Opp. p. 39. Nothing under Section 1557 or the ACA guarantees health ***outcomes***. Rather, Section 1557 ensures that disabled insureds receive an "equal opportunity" to receive full coverage without arbitrary, disability-based exclusions and limitations.

2176 (1999), which broadened the concept of disability discrimination. *See id.* The First Circuit concluded:

> Given this littered legal landscape, it cannot be said that there is no room for principled disagreement about the viability of differential-benefits claims under the ADA.

Id., at 200. Into this "littered landscape," Congress expanded anti-discrimination law to require ACA-regulated health insurers to end arbitrary disparate benefits based upon disabling conditions.[14]

b. Olmstead v. L.C. Also Supports Appellants' Claims.

Regence distinguishes *Olmstead v. L.C.,* 527 U.S. 581, 119 S. Ct. 2176 (1999), as solely about "unjustified institutionalization." *See* Regence Opp. p. 39, n.8. The holding in *Olmstead* is far broader. In *Olmstead,* the Supreme Court rejected the concept that disability discrimination can only be found where there is a "comparison class" of non-disabled persons that received preferential treatment. *Id.,* 527 U.S. at 598. "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* After *Olmstead,* the "comparative approach" to disability discrimination under Regence's earlier ADA cases is no longer required. *McGary*, 386 F.3d at 1266. As described in both *Choate* and

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[14] Regence argues that Congress failed to "speak more plainly" to outlaw health insurer discrimination in benefit design when enacting the ACA. *See* Regence Opp. p. 43. Congress's intent is "plain" based upon the unambiguous language of Section 1557, Congressional history and purpose, and DHHS rulemaking and commentary. *See also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 547.

Olmstead, disability discrimination occurs when meaningful access to services and benefits is not provided. *See id.,* at 1266-67, *citing Crowder,* 81 F.3d at 1484, and *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733-35 (9th Cir. 1999). This broader approach "guard[s] against the façade of equal treatment" when more is needed to actually redress discriminatory wrongs. *McGary,* 386 F.3d at 1267. It targets both intentional discrimination and exclusion from benefits resulting from inaction, thoughtlessness, or other indifference.

Attempting to distinguish *Crowder,* Regence argues that visually impaired travelers were singled out to be denied meaningful access to benefits (state services, programs and activities) due to quarantine of their guide dogs, while the Hearing Loss Exclusion applies to all insureds, whether disabled or not. Regence Opp. p. 43. The test under *Crowder,* however, is whether the disputed facially neutral exclusionary policy (there, the state's quarantine policy, here the Exclusion) ***disproportionately burdens*** people with disabilities when they seek meaningful access to benefits. *Crowder,* 81 F.3d at 1484. Here, the Hearing Loss Exclusion solely or predominantly burdens insureds with disabling hearing loss, denying them

full access to otherwise covered benefits like hospitalization, outpatient medical visits and durable medical equipment enjoyed by others.[15]

C. Regence's "Fundamental Alternation" Argument is Improper on a Motion to Dismiss.

Regence claims that eliminating its Hearing Loss Exclusion would be a "fundamental alteration" such that the trial court's Rule 12(b)(6) dismissal should be upheld. Regence Opp. p. 44-46.

First, Regence's "fundamental alternation" defense is a fact-intensive defense that cannot be addressed in a Motion for Rule 12(b)(6) dismissal. *See Cal. Council of the Blind v. Cty. of Alameda,* 985 F. Supp. 2d 1229, 1240 (N.D. Cal. 2013).

Second, any negative financial impact imposed on insurers by the ACA, including Section 1557, was mitigated by significant financial subsidies and an expansion of the ACA-regulated insurance market. *See Molina Healthcare of Cal., Inc. v. United States*, 133 Fed. Cl. 14, 19 (August 4, 2017); 42 U.S.C. §§18061-18063.

Third, the cost of removing the Exclusion is likely relatively small, given that Regence already covers the most expensive form of hearing treatment - cochlear

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[15] Regence claims that *Choate* and *Weyer* are more "analogous" to this case than *Crowder*. Regence Opp. p. 44. ***None*** of these cases are truly "analogous," since none involved health plans issued post-ACA. As explained above, the most analogous case is *Newport News*. *See* §II.A.1.

implants. ER 136. For example, in 2018, Washington's Medicaid program added coverage of hearing aids for adults.[16] The total projected annual cost of adding that benefit for nearly 1 million Medicaid recipients was approximately $4 million, or $0.33 per person per month.

Fourth, after passage of the ACA in 2010, Regence could have eliminated the few disability-based exclusions in its plan, but it chose not to. Nearly a decade later, it cannot complain that full compliance with Section 1557 would be a "fundamental alteration." *See EEOC v. Puget Sound Log Scaling & Grading Bureau,* 752 F.2d 1389, 1394 (9th Cir. 1985).

Fifth, Regence's unsubstantiated claim that, should this case be successful, it could "destabilize the insurance industry" evokes the historic stigma that kept people with disabilities locked out of health coverage before the ACA. When such claims are offered without evidence, they may "perpetuate[ ] unwarranted assumptions" that disabled people are "incapable or unworthy" of the treatment sought. *Cf. Olmstead,* 527 U.S. at 600. Anti-discrimination laws are meant to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned

[16] *See* Washington state Health Care Authority Fiscal Note for House Bill No. 1264 (2018), located at https://fortress.wa.gov/FNSPublicSearch/GetPDF?packageID=47296 (last visited May 6, 2019).

and medically sound judgments." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284-85, 107 S. Ct. 1123 (1987).

III. CONCLUSION

Appellants pled a plausible claim of disability discrimination under Section 1557 alleging that Kaiser's Hearing Loss Exclusion discriminates on the basis of disability. The trial court's decision should be reversed, and this case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify on May 15, 2019, I electronically filed this REPLY BRIEF OF APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: May 15, 2019, at Seattle, Washington.

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