THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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,

v.

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

Defendants.

No. 2:17-cv-01609-RAJ

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

I. INTRODUCTION

In their Opposition to Defendants' Second Motion to Dismiss ("Opposition"), Plaintiffs fundamentally misconstrue the analysis in Defendants' Motion to Dismiss Amended Complaint (the "Motion") in light of the Ninth Circuit's decision in *Schmitt v. Kaiser Foundation Health Plan of Washington*, 965 F.3d 945 (2020) and the discrimination theory advanced in Plaintiffs' Amended Complaint. Plaintiffs alternately argue that Defendants' exclusion of treatment for hearing loss other than cochlear implants (the "Exclusion") violates Section 1557 of the Affordable Care Act because it disparately impacts the hearing disabled and denies them meaningful access to the treatment they need. Neither of those unpleaded assertions, however,

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address the "crucial question" identified in *Schmitt* upon which the Ninth Circuit granted Plaintiffs leave to replead and which Plaintiffs attempt to advance in their Amended Complaint: whether the neutral criteria of the Exclusion are a sufficiently close "fit" with the hearing disabled such that the Court can infer, without more, a discriminatory intent by Defendants.

Based on Plaintiffs' own allegations, the Exclusion is both (1) significantly overinclusive by denying coverage for ***all*** hearing-related treatment to insureds with non-disabling hearing loss, and (2) underinclusive by allowing coverage for the significant portion of insureds who have severe or profound hearing loss. As a result, the Exclusion's overlap with disabled insureds is limited—far less than the "virtually identical" fit required to state a claim for facial proxy discrimination, the theory that Plaintiffs advance in their Amended Complaint.

Plaintiffs also fail to state a claim under RCW 48.43.0128 because that claim is simply an attempt to use a breach of contract claim to enforce a statute that does not provide a private right of action. Even if Plaintiffs could assert the claim under a contract theory, agencies' interpretations of statutes they administer are entitled to deference, and the Exclusion is entirely consistent with OIC's EHB-benchmark plan. Defendants respectfully request that Plaintiffs' Amended Complaint be dismissed with prejudice.

II. ARGUMENT

A. Plaintiffs' Description of the Ninth Circuit's Opinion Is Incomplete.

Plaintiffs' Opposition focuses on aspects of *Schmitt* that are not in dispute and misdescribes the key part of the Court's analysis. In *Schmitt*, the Court did not take issue with this Court's analysis of meaningful access under *Choate* but instead addressed Plaintiffs' new proxy discrimination theory. The Court stated that "the crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." *Schmitt*, 965 F.3d at 959 (citing *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019)).

Contrary to Plaintiffs' assertions (see Dkt. 38 at 3), in identifying the deficiencies with Plaintiffs' complaint, the Court did not focus on the intentional aspect of benefit designs, nor did

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the Court cite only the potentially underinclusive aspect of the Exclusion—the coverage for cochlear implants. *Schmitt*, 965 F.3d at 959. Rather, the Court explained that the Exclusion is both overinclusive and underinclusive, respectively, in that it denies coverage to non-disabled insureds and provides coverage for cochlear implants to those with the most severe disabilities. *Id.* As a result, the Court required much more at the pleading stage in order to support a plausible inference of intentional discrimination based on the theory that hearing loss—of all kinds, degree, and severity—acts as a proxy for hearing disability. The Court ultimately held that, "[b]ecause [Plaintiffs'] allegations fail to show the fit of their alleged proxy, they do not state a claim for disability discrimination under section 1557." *Id.* at 960.

B. Proxy Discrimination Analyzes the Facial Application of the Exclusion, Not Its Impact on Claimants.

In their first claim for relief, Plaintiffs allege that the "Exclusion treats 'hearing loss' as a proxy for disabling hearing, since nearly all treatment sought by hearing-disabled enrollees is excluded and few, if any, non-disabled Regence enrollees are subject to the . . . Exclusion." (Dkt. 32 ¶ 118.) Addressing the "crucial question" identified in *Schmitt*, the Amended Complaint alleges that the "Exclusion is a form of proxy discrimination since the 'fit' between the . . . Exclusion and disabling hearing loss is 'sufficiently close' to make a discriminatory inference plausible." (*Id.* ¶ 120 (citing *Schmitt*, 965 F.3d at 958-99).) The Amended Complaint's apparent theory is that the category of all people who experience or will experience any type of hearing loss serves as a proxy for people who suffer from disabling hearing loss.

Despite pleading a proxy discrimination claim, Plaintiffs repeatedly argue unrelated issues of disparate impact and "meaningful access" in their Opposition. They wrongly contend that the issue for the Court here is "whether Plaintiffs have plausibly alleged sufficient discriminatory *impact* to create an inference of discriminatory intent." (Dkt. 38 at 14 (emphasis added).) As a result, they argue that the Exclusion's "fit" with disability must be determined by analyzing its relative effect on disabled and non-disabled insureds who actually seek treatment.

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(*See* Dkt. 38 at 15 ("Non-disabled hearing impaired insureds who do not seek treatment are wholly *unaffected* by [the] Exclusion . . . .") (emphasis added); *see also id.* at 16 ("[W]hether the . . . Exclusion primarily *impacts* insureds who are 'disabled' requires a factual determination by the Court.") (emphasis added).)

Plaintiffs' repeated references to a disparate impact claim (and related standards) are misplaced. As the Ninth Circuit indicated, the Amended Complaint relies on a proxy discrimination theory, which is a type of facial discrimination. *Schmitt*, 965 F.3d at 958 (quoting *Davis*, 932 F.3d at 837 ("[Proxy discrimination] arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group."). Under a proxy discrimination theory, a facially-neutral category is so closely aligned with a protected class—for example, the technically neutral category of Medicare-eligibility is closely aligned with age—that a court can infer discriminatory intent from the categorization. *See Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir. 2000). As such, the proxy's fit must be determined based on the scope of its applicability, not the impact it has on the disabled.[1]

None of the proxy discrimination cases cited by the parties or the Ninth Circuit in *Schmitt* involves an analysis of whether a neutral classification disproportionately burdened a protected class. In *Davis*, the Ninth Circuit addressed whether Guam's law restricting voting to "native inhabitants" was a discriminatory racial classification. 932 F.3d at 824. The Court did not

[1] Plaintiffs' cite *Committee Concerning Community Improvement v. City of Modesto* for the proposition that a showing of disparate impact on the disabled is sufficient to establish discriminatory intent. (Dkt. 38 at 14 (citing 583 F.3d 690, 705 (9th Cir. 2009). But *Modesto* does not address disability discrimination or proxy discrimination. It involves claims brought under 42 U.S.C. § 1983, which are subject to different standards. *See Modesto*, 583 F.3d at 705 (citing *Lee v. City of Los Angeles,* 250 F.3d 668, 686–87 (9th Cir. 2001)). Even in § 1983 cases, "it is the rare case where impact alone will be sufficient." *Id.* (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

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determine the "fit" by evaluating the racial makeup of the inhabitants who actually sought to vote in the referendum; it instead analyzed the fit between ancestry and race based on the text of the classification and its preceding laws. *Id.* at 832-41. Similarly, in *Children's Alliance v. City of Bellevue*, this Court evaluated whether an ordinance restricting the placement of group homes discriminated based on handicap and familial status in violation of the Fair Housing Act. 950 F. Supp. 1491, 1496 (W.D. Wash. 1997). In determining whether the ordinance was a proxy for the protected classes, the Court did not analyze the proportion of affected group homes that actually contained members of those classes; it instead stated that "[a]nalyzing the language of [the ordinance] demonstrates its facial invalidity." *Id.*

As in those cases, the relevant inquiry here is not the actual impact of the Exclusion—*i.e.*, what proportion of denied claims are from disabled insureds—but whether the language of the Exclusion, on its face, allows an inference of discriminatory intent regardless of its impact. *See Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160, n. 23 (9th Cir. 2013) ("Proxy discrimination is a form of facial discrimination."); *Children's Alliance*, 950 F. Supp. at 1496 (citing *McWright v. Alexander,* 982 F.2d 222 (7th Cir. 1992)) ("[L]anguage appearing neutral at first blush can nonetheless reflect discriminatory intent."). The Court should therefore evaluate the fit of the Exclusion according to its terms rather than any effect it may have on the allowance or denial of claims.

C. Plaintiffs Have Not Alleged a Sufficient Fit Between the Exclusion and Disability Such That the Court Can Infer Discriminatory Intent.

In attempting to allege a proxy discrimination claim, Plaintiffs' path to plausibility is narrow. As the Ninth Circuit noted in *Schmitt*, the Exclusion is both overinclusive and underinclusive, and the relevant question is to what degree. 965 F.3d at 959-60. Both factors must be considered together to evaluate the overall "fit" of the alleged proxy with the protected class. When Plaintiffs' Amended Complaint is viewed through the proper lens—by evaluating whether the pleaded facts support a proxy discrimination claim—it is clear that the fit between

the Exclusion's application and the hearing disabled is not close enough to infer discriminatory intent.

1. The Exclusion Applies to Twice as Many Non-Disabled Insureds.

In *Schmitt*, the Court noted that the Complaint did not "not make clear to what extent the proxy is overinclusive." *Id.* at 959. The Amended Complaint addresses this deficiency, but the allegations show that the Exclusion is overinclusive by a factor of two-to-one. This fact alone renders the Exclusion an insufficient proxy for disability.

Plaintiffs correctly note, as did the Ninth Circuit, that overdiscrimination (or an overinclusive proxy) "does not doom [Plaintiffs'] claim per se." *Id.* at 958. However, as discussed in Defendants' Motion, the neutral criteria must be "*almost exclusively* indicators of membership in the disfavored group." *Pac. Shores Props.*, 730 F.3d at 1160, n. 23 (emphasis added); *see also Davis*, 932 F.3d at 838 ("Although proxy discrimination does not involve express racial classifications, the fit between the classification at issue and the racial group it covers is so close that a classification on the basis of race can be inferred without more."); *Erie Cty. Retirees Ass'n*, 220 F.3d at 211 ("Medicare eligibility does not merely 'correlate[ ] with age,' . . . Rather, as the district court here pointed out, Medicare eligibility 'follow[s] ineluctably upon attaining age 65.' Thus, Medicare status is a direct proxy for age.") (internal citations omitted). Plaintiffs rely solely on the contention that the relevant proxy is the group of insureds who have sought treatment for hearing loss. (Dkt. 38 at 14-16.) But as discussed above, the proxy must be judged by the facial scope of its applicability—not the relative impact it has on disabled and non-disabled insureds.

The plain terms of the Exclusion show that it applies to all insureds by denying coverage for all hearing-loss-related treatment and programs, including routine hearing examinations. (Dkt. 32-1 at 50-52.) But even if the inquiry is limited to insureds with hearing loss, the Amended Complaint alleges facts showing that the Exclusion applies overwhelmingly to insureds with mild, non-disabling conditions. (Dkt. 32-2 at 2 ("Appendix B") (Adele M. Goman,

Ph.D. & Frank R. Lin, M.D., Ph.D., "Prevalence of Hearing Loss by Severity in the United States," Am. J. Pub. Health, October 2016, at 1820).) Plaintiffs' own statistics show that, of the 38.17 million people with some degree of hearing loss, 25.4 million—more than 66%—have mild cases. (*Id.*) Excluding persons 65 and over, as Plaintiffs do in their Amended Complaint, lowers the total number of persons with hearing loss to 14.02 million, of whom 11.11 million—**more than 79%**—have mild hearing loss. (*Id.*) With non-disabling conditions making up such a disproportionate percentage of total cases of hearing loss, the Exclusion's denial of coverage for all persons with hearing loss cannot be a proxy for disability.

Plaintiffs' proposed class definition underscores this problem. The proposed class is broader than insureds who have actually sought treatment—the criteria that Plaintiffs now attempt to use to narrow the group affected by the Exclusion. Instead, the putative class includes all insureds who "require" or "will require" treatment, presumably including many, if not all insureds with non-disabling hearing loss whether or not they actually seek treatment. (Dkt. 32 ¶ 22.) Thus, the lack of "fit" is two-fold—the fit between hearing loss and hearing disability, and the fit between the alleged affected group and the class that Plaintiffs define.

2. The Exclusion Allows Coverage of Cochlear Implants for a Significant Percentage of Disabled Insureds.

The Ninth Circuit noted that the Exclusion is not only overinclusive, it is also underinclusive because it does provide coverage for cochlear implants, which are needed by those with the most severe forms of hearing loss. *Schmitt*, 965 F.3d at 959. As discussed in Defendants' Motion, the Amended Complaint alleges that 18% of people with disabling forms of hearing loss have severe or profound conditions that would qualify for cochlear implants despite the Exclusion. (Dkt. 37 at 17.)

Plaintiffs dispute this assertion, arguing that the number is actually 5.6%. (Dkt. 38 at 18-19.) But Plaintiffs arrive at this number by cherry-picking statistics from different sources. They assert that there are "roughly 520,000 people under 65 [who] would be potentially eligible

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for a [cochlear implant]" based on the statistics in the Goman and Lin article in Appendix B. (Dkt. 32 ¶ 69.) But they compare that number with the 9.2 million people alleged to have self-reported hearing loss according to the U.S. Census report linked in paragraph 47. For an accurate comparison, both numbers should be obtained from the same source: the Goman and Lin article in Appendix B. Using those numbers, there are 2.91 million people between 12 and 65 who have moderate to profound hearing loss, and 520,000 (18%) of them would be eligible for a cochlear implant. (Dkt. 32-2 at 3.)

Plaintiffs contend that, because cochlear implants are not available to "most" disabled insureds, coverage for the devices cannot support Defendants' argument. But because the relevant analysis is the overall "fit" between the proxy and the disabled as a class, the degree to which the proxy is overinclusive and underinclusive must both be considered together. The allegations of the Amended Complaint show that 79% of people under 65 who have hearing loss are not disabled, and of the remaining 21% who are disabled, almost 1 in 5 are eligible for cochlear implants. This is without including the insureds with little or no hearing loss who are denied routine examinations. These facts come nowhere near the level of "fit" that courts have previously found sufficient to allow an inference of discriminatory intent.

D. *Doe v. CVS Pharmacy* Does Not Support Plaintiffs' Argument.

Plaintiffs rely heavily on the Ninth Circuit's recent decision in *Doe v. CVS Pharmacy*, in which the Court held that the plaintiffs, who were living with HIV/AIDS, had stated a disability discrimination claim under Section 1557 by alleging that specialty pharmacy requirements denied them meaningful access to their pharmaceutical benefit because it forced them to forego necessary counseling from pharmacists. 982 F.3d 1204, 1207-12 (9th Cir. 2020). Relying on the framework detailed in *Choate*, the Ninth Circuit first analyzed "the nature of the benefit Does were allegedly denied," which it characterized as the plaintiffs' "prescription drug benefit as a whole"—an essential health benefit under the ACA. *Id.* at 1210. The Court then analyzed "whether the plan provided meaningful access to the benefit," holding that it did not because

HIV/AIDS patients were prevented from obtaining the same level of care as non-disabled patients in filling prescriptions. *Id.* at 1211. In reaching this conclusion, the Court noted that "[t]he fact that the benefit is facially neutral does not dispose of a disparate impact claim based on lack of meaningful access . . . where state 'services, programs, and activities remain open and easily accessible to others.'" *Id.* (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).

Here, Plaintiffs argue that *Doe* supports their claim because they contend that when they were denied coverage based on the Exclusion, Defendants "denied them 'meaningful access' to benefits." (Dkt. 38 at 11.) They argue that, under *Doe*, "a claim for Section 1557 disability discrimination is adequately pled" whenever plaintiffs allege that "they cannot receive effective treatment under the Program because of their disability." (Dkt. 38 at 19 (quoting *Doe*, 982 F.3d at 1211). *Doe* does not aid Plaintiffs' argument here because it addresses a different legal theory and involves a benefit mandated by the ACA.

First, *Doe* is a not a proxy discrimination case, and it did not eliminate all distinctions between disparate treatment and disparate impact claims, as Plaintiffs suggest. (*Id.*) Instead, the claim in *Doe* was brought under a disparate impact theory, which, under *Choate*, must establish that the plaintiff was denied meaningful access to the benefit being offered. *Doe*, 982 F.3d at 1210 (under *Choate*, "not all disparate-impact showings qualify as prima-facie cases under Section 504"). By contrast, proxy discrimination is a facial discrimination theory that requires a classification so close to a protected class that the court can infer discriminatory intent from the classification alone. Plaintiffs have not pled a disparate impact/meaningful access theory, and *Doe* is irrelevant to this Court's analysis of Plaintiffs' proxy claim.

Second, even if Plaintiffs had pled a meaningful access theory, *Doe* still would not support their claim because the holding in that case was dependent on the nature of the benefit at issue. In *Choate*, the Supreme Court made clear that Section 504 only requires meaningful access to the benefit being offered; it does not mandate additional benefits:

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> "Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, i.e., those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Nothing in the legislative history of the Act supports such a conclusion."

Choate, 469 U.S. at 303–04.

In determining the benefit provided in *Doe*, the Ninth Circuit relied on the fact that pharmaceutical coverage is an essential health benefit mandated by the ACA: "[L]ooking to the benefit's statutory source, as the Supreme Court did in *Choate*, the ACA requires that health plans cover prescription drugs as an 'essential health benefit.'" *Doe*, 982 F.3d at 1210 (citation omitted). Treatment for hearing loss is not an essential health benefit under the ACA, and *Doe* is therefore inapposite.

This Court dismissed the initial Complaint because, under *Choate*, Plaintiffs were not denied meaningful access to the benefit offered, which was equally available to the disabled and non-disabled. (Dkt. 22 at 5.) In affirming the dismissal of the Complaint, the Ninth Circuit did not disagree with the Court's reasoning but instead granted leave to replead under a different theory—proxy discrimination. Nothing in *Doe* changes the analysis in *Choate*, which this Court has already found to require dismissal, and the Court should decline Plaintiffs' invitation to relitigate that issue here.

E. Plaintiffs Fail to State a Claim Under RCW 48.43.0128.

The Amended Complaint adds a new breach of contract claim based on RCW 48.43.0128, which prohibits benefit design that "discriminate[s] against individuals because of their age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions." Defendants moved to dismiss this claim because (1) it fails for the same reasons as the ACA claim, (2) the Exclusion is consistent with state regulations that are entitled to deference, and (3) the statute provides no private right of action. (Dkt. 37 at

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18-21.) Plaintiffs raise numerous arguments in response, but none of them support a right to enforce the insurance code through a breach of contract claim, nor do they explain how an insurance policy that is entirely consistent with OIC regulatory guidance could violate state law.

As an initial matter, Plaintiffs have not cited a single case in any jurisdiction in which a court upheld the enforcement of a provision of the Insurance Code through a breach of contract claim. The case they cite for this proposition, *O.S.T. v. Regence BlueShield*, does not support their argument. 181 Wash. 2d 691, 707, 335 P.3d 416 (2014). In that case, the plaintiffs pleaded a breach of contract claim based on an alleged violation of RCW 48.44.341, but that claim was never adjudicated. The trial court granted partial summary judgment on the plaintiffs' declaratory judgment claim, and the Washington Supreme Court affirmed. *See id.*; *O.S.T. v. Regence BlueShield*, No. 112341879, 2012 WL 12137687, at *1 (Wash. Super. Dec. 13, 2012).

To the contrary, in *Astra USA, Inc. v. Santa Clara County*, the U.S. Supreme Court held that the incorporation of a statute into a contract does not overcome the absence of a private right of action, "no matter the clothing in which [plaintiffs] dress their claims." 563 U.S. 110, 114, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011). Plaintiffs attempt to distinguish *Astra USA* by arguing that, under Washington law, "insurance contracts automatically incorporate the relevant provisions of the Insurance Code." (Dkt. 38 at 21.) But none of the authority Plaintiffs' cite stand for this proposition. RCW 48.18.200(2) renders certain noncomplying insurance provisions void, and RCW 48.18.510 states that noncomplying forms are to be construed as if they comply with state law. Similarly, *Brown v. Snohomish County Physicians Corp.*, 120 Wash. 2d 747, 753, 845 P.2d 334, 337 (1993) and *UNUM Life Insurance Co. of America v. Ward*, 526 U.S. 358, 376, 119 S. Ct. 1380, 1390, 143 L. Ed. 2d 462 (1999) simply state that provisions of insurance contracts that do not comply with state law will not be enforced.

Even if Plaintiffs could seek to enforce RCW 48.43.0128 through a contract action (and they cannot), they would still fail to state a claim because the Exclusion is consistent with OIC regulatory guidance that is entitled to deference by this Court. Plaintiffs suggest that

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Defendants' Motion cites "the wrong rule" by relying on WAC 284-43-5622 because WAC 284-43-5940 implements RCW 48.43.0128. (Dkt. 38 at 22.) To the contrary, both rules expressly reference RCW 48.43.0128 and cite it as statutory authority. These rules prohibit discrimination in benefit design and mandate coverage "substantially equal to the EHB-benchmark plan." Read together, they constitute a determination by OIC that the EHB-benchmark plan does not discriminate based on state law, and it is undisputed here that the Exclusion is consistent with the Washington benchmark plan. Contrary to Plaintiffs' assertion, the use of permissive language in the enforcement provision of WAC 284-43-5940(5) does nothing to undermine the deference that courts must show to agency interpretations of the statutes they administer. *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wash. App. 513, 523, 119 P.3d 896, 902 (2005).

III. CONCLUSION

For the reasons above, Defendants respectfully request that this Court grant its Motion to Dismiss Amended Complaint and dismiss Plaintiffs' claims with prejudice.

DATED: January 29, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021 I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of such filing to the following counsel of record:

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