

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-1609-RAJ

THIRD AMENDED COMPLAINT
(CLASS ACTION)

I. INTRODUCTION

1. Prescription hearing aids are the essential piece of durable medical equipment that ensures that hearing disabled individuals are not isolated and segregated from the mainstream of American society.¹ Hearing aids can profoundly

¹ In this Complaint, the terms "prescription" and "prescribe" are used to refer to prescriptions and/or recommendations from licensed providers and hearing care professionals necessary to obtain a non-over-the-counter hearing aid and related treatment. See 21 C.F.R. § 800.30(b) (defining a "prescription hearing aid" as a hearing aid that is not an over-the-counter hearing aid).

1 improve the life, health and social engagement of hearing disabled insureds, particularly
 2 for children like Plaintiff E.S. In this sense, hearing aids are like wheelchairs for mobility
 3 disabled persons or insulin and supplies for diabetic individuals – they are the medical
 4 devices that offer Plaintiffs and the vast majority of hearing disabled insureds access to
 5 the world at large – including education, work, activities, and other public and private
 6 benefits and services. For Plaintiffs and the proposed class, prescription hearing aids are
 7 the key to equal treatment and meaningful access to society.

8 2. Defendants Regence BlueShield and Cambia Health Solutions (“Regence”) have
 9 have historically excluded all coverage for treatment related to hearing loss
 10 (“Exclusion”). The Exclusion has been in place for decades and likely since Regence was
 11 founded. Plaintiffs have no access to Regence’s internal records regarding the original
 12 basis for the Exclusion, if any are still in existence, which may reveal the specific basis
 13 for Regence’s historic Exclusion of all hearing treatment. A brief review of the history of
 14 insurance coverage in the United States and discovery in the sister case, *Schmitt v. Kaiser*
 15 *Foundation Health Plan of Washington, et al.*, No. 2:17-cv-01611 (W.D. Wash., J. Lasnik)
 16 however, indicates that the Exclusion has always been a feature of Washington health
 17 insurance plans.

18 3. Categorical exclusions of all treatment related to hearing loss are grounded
 19 in the historic isolation and segregation of people with disabilities from the mainstream
 20 of American society. See 42 U.S.C. § 12101(a)(2)–(3). The Exclusion at issue here is one of
 21 many historical yet ongoing discriminatory barriers that individuals with disabilities
 22 continually encounter and that anti-discrimination law was designed to combat. See 42
 23 U.S.C. § 12101(a)(5). Categorical exclusions of a particular device or treatment were
 24 routinely applied when the device or treatment at issue was overwhelmingly required
 25 by disabled individuals and not the general population. See Blake, Valarie, *Restoring*
 26 *Civil Rights to the Disabled in Health Insurance*, 95 Neb. L. Rev. 1071, 1086 (2017)

1 (hereinafter “Blake”). Indeed, before the Affordable Care Act, health insurance
2 purposefully and legally eliminated coverage of such devices in order to avoid covering
3 people with disabilities. *Id.* That is the case with hearing aids. At issue in this case is
4 whether, after the ACA, such exclusions, based on disability discrimination rather than
5 medical or scientific reasons, may continue to be applied.

6 4. Regence BlueShield is the successor to the first “Blue Shield” company in
7 the United States, which was formed in 1917 by Pierce County physicians. The original
8 purpose of Blue Shield plans like Regence was to provide medical care for certain
9 populations of workers. At that time, coverage was focused on benefitting employers
10 by providing coverage for health services to temporarily ill or injured workers so that
11 they could continue to perform on the job. Accordingly, coverage for disabilities was
12 excluded.

13 5. Such historic exclusionary practices against disabled individuals,
14 grounded in the misperception that they cannot participate in work, benefit from
15 medical treatment or fully engage in other aspects of society, is a form of discriminatory
16 prejudice. *See Olmstead v. L. C. by Zimring*, 527 U.S. 581, 611 (1999) (Justice Kennedy
17 concurring) (“Underlying much discrimination law is the notion that animus can lead to
18 false and unjustified stereotypes.”); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287
19 (1987) (Section 504 is designed to protect disabled individuals from “deprivations based
20 on prejudice, stereotypes or unfounded fear”).

21 6. Regence BlueShield and other Washington insurance companies
22 historically excluded the treatment of various disabilities including developmental
23 disabilities, psychiatric disabilities, obesity, intellectual disabilities and hearing loss from
24 coverage. They also excluded the treatment specific to those conditions, such as mental
25 health treatment, neurodevelopmental therapies, and, at issue here, treatment for
26

1 hearing loss. In brief, the Exclusion of all coverage for hearing loss is a remnant of the
2 historic exclusionary treatment of people with disabilities by Regence.

3 7. Over time, Regence's categorical Hearing Loss Exclusion has been
4 modified, but a significant vestige of the original discriminatory Exclusion remains in
5 place today, without any medical or scientific justification.

6 8. **First**, Regence narrowed the exclusion after Medicare adopted a coverage
7 policy for cochlear implants ("CIs"). Regence then adopted a similar policy allowing for
8 coverage of CIs, and the tests and other treatment related to such coverage. Regence,
9 however, continued to exclude all other treatment for hearing loss, without regard to
10 medical efficacy.

11 9. **Second**, when Regence added coverage for CIs, Regence had to cover the
12 diagnostic hearing examinations required to determine whether the patient was
13 diagnosed with hearing loss that could be treated by CIs. Thus, in practice, Regence
14 covers all diagnostic examinations related to hearing loss, despite its representations in
15 its policies that purport to exclude all other forms of hearing examinations, except for
16 CIs.

17 10. For example, Plaintiff E.S. had a hearing examination covered by Regence
18 in 2020, even though she was not seeking treatment with CIs and her Regence plan
19 contained the Exclusion. *See Exh. A*. This is consistent with the discovery obtained in
20 the sister case to this, *Schmitt supra*, Dkt. No. 90, pp. 5-6; Dkt. No. 91, *Exh. B*, pp. 62-70.
21 It is also consistent with the anticipated expert testimony in this matter.

22 11. **Third**, in 2020, Regence modified its Exclusion again to specifically
23 eliminate coverage of hearing aids and related treatment, dropping the explicit language
24 in its policies that the exclusion was based on a diagnosis with hearing loss. Nonetheless,
25 all claims submitted to Regence for durable medical equipment with a diagnosis of
26 hearing loss that are not for CIs are excluded, as are other treatment related to the

1 provision of hearing aids. The trigger for the application of the Exclusion has always
2 been and remains a diagnosis of hearing loss that requires treatment with a hearing aid.

3 12. *Fourth*, the federal government recently acted to make access to hearing
4 aids more accessible and affordable and, in the process, changed the effect of the
5 Exclusion. Starting in October 2022, adults may purchase over-the counter (“OTC”)
6 hearing aids without a prescription or recommendation from a licensed provider. The
7 OTC hearing aids are expected to meet many of the needs of individuals with mild to
8 moderate hearing loss. After October 2022, only hearing disabled children and those
9 adults who still need prescription hearing aids and cannot be treated with CIs remain
10 subject to Regence’s Exclusion.

11 13. *Fifth*, Regence recently added hearing aid benefits to some, but not all, of
12 its Washington insured plans. Starting in January 2023, Plaintiffs’ Regence plan removed
13 the Exclusion and added a benefit for coverage of hearing aids and related examinations,
14 but with a benefit limit of \$1000 per year. At the same time, there is no cap on coverage
15 in the Durable Medical Equipment or Outpatient Medical benefits of the plan. Regence
16 continues to impose the Exclusion in its individual market plans. It is not known
17 whether Regence continues to impose the Exclusion in other group insured plans.

18 14. Even though the effect of the Exclusion has been narrowed over time, it
19 still impacts only or nearly only hearing disabled insureds. It remains the result of
20 historic and ongoing disability discrimination. Regence’s failure to review the Exclusion
21 and determine whether it is justified based upon the same medical and scientific criteria
22 that Regence applies to other coverage exclusions, is disability discrimination. *See* 87
23 Fed. Reg. 47873–74. Regence’s thoughtless indifference to the needs of hearing disabled
24 insureds is the source of this discrimination.

25 15. Plaintiffs brought this case in 2016, alleging that Regence’s Hearing Loss
26 Exclusion violates Section 1557 of the Affordable Care Act, which bars health insurers

1 from discriminating based on disability. After this Court granted defendants' motion to
 2 dismiss, the Ninth Circuit reversed and remanded the case. According to the Ninth
 3 Circuit, the plaintiffs could state a case under Section 1557 by showing "that the
 4 exclusion is likely to predominately affect disabled persons," *Schmitt v. Kaiser*, 965 F.3d
 5 945, 959, n. 8 (9th Cir. 2020), and that coverage for CIs fails to meet the needs of most
 6 people with disabling hearing loss. *Id.* at 959. The Ninth Circuit also recognized, in the
 7 alternative, that proxy discrimination exists where "the needs of hearing disabled
 8 persons differ from the needs of persons whose hearing is merely impaired such that the
 9 exclusion is likely to predominately affect disabled persons." *Schmitt*, 965 F.3d at 959,
 10 n. 8.

11 16. The Ninth Circuit has also concluded that disability discrimination can be
 12 pled through allegations showing a disparate impact on disabled insureds. *See Doe v.*
 13 *CVS Pharm., Inc.*, 982 F.3d 1204, 1211-12 (9th Cir. 2020). Specifically, discrimination exists
 14 if the Exclusion burdens hearing disabled insureds differently from non-disabled
 15 insured by denying them meaningful access to the otherwise covered benefits they
 16 require.

17 17. Finally, discrimination under Section 1557 exists where discriminatory
 18 action is undertaken with thoughtless indifference of the consequences of the action on
 19 the disabled. Regence's decision to draft and enforce policy terms that exclude hearing
 20 aids for its hearing disabled insureds is an inherently intentional act. *Schmitt*, 965 F.3d
 21 at 954. At minimum, the exclusion of hearing aids – a proven medical intervention to
 22 treat the hearing disabled – was established and remains in place as a result of
 23 thoughtless indifference to the medical needs of this insured population.

24 18. Since this case was originally filed, the Washington Legislature has passed
 25 its own broad anti-discrimination statute that applies to health insurance plan design,
 26 RCW 48.43.0128, which is incorporated into the Washington Law Against

1 Discrimination (“WLAD”). This statute prohibits all non-grandfathered health plans
 2 from discriminating on the basis of “present or predicted disability,” or “health
 3 condition,” in the design of benefits. *Id.* In 2020, the provision was expanded from
 4 individual and small group plans to all “non-grandfathered” health plans, with an
 5 effective date of June 11, 2020. *Id.*

6 19. Under Washington law, an insured with any loss of hearing is disabled.
 7 RCW 49.60.040(7)(a)–(c). As a result, under Washington law, Regence’s exclusion of
 8 hearing aids, imposed without any medical or scientific justification, discriminates
 9 against those disabled insureds.

10 20. Plaintiffs also bring claims under the WLAD and the Washington
 11 Consumer Protection Act to address Regence’s discrimination under state law.

12 II. PARTIES

13 21. *E.S.* Plaintiff E.S. is the now twelve-year-old daughter and dependent of
 14 R.S. and J.S. and resides in King County, Washington. E.S. is insured under a Regence
 15 BlueShield insured health plan. E.S. is diagnosed with disabling hearing loss and
 16 requires prescription hearing aids.

17 22. *Jodi Sternoff.* Plaintiff Sternoff is an adult diagnosed with disabling
 18 hearing loss who resides in King County, Washington. Sternoff is insured under a
 19 Regence BlueShield insured health plan. She requires prescription hearing aids.

20 23. *Regence BlueShield.* Regence BlueShield is an authorized health carrier
 21 based in King County and is engaged in the business of insurance in the State of
 22 Washington, including King County. Regence BlueShield is a Washington corporation
 23 that does business in the State of Washington, including King County. Regence
 24 BlueShield is a “health program or activity” that receives federal financial assistance that
 25 must comply with the Affordable Care Act, Section 1557.
 26

24. *Cambia Health Solutions, Inc., f/k/a The Regence Group.* Cambia Health Solutions, Inc., f/k/a The Regence Group (“Cambia”) is the nonprofit sole member and corporate owner of Regence BlueShield. Cambia is also the sole member and owner of other authorized health carriers engaged in the business of insurance in the State of Washington, including Regence BlueCross BlueShield of Oregon and BridgeSpan Health. Based upon information and belief, Cambia is a “health program or activity” that receives federal financial assistance that must comply with the Affordable Care Act, Section 1557.

25. *Relationship between Regence BlueShield and Cambia.* Regence BlueShield and Cambia are “alter egos.” See *McKinnon v. Blue Cross-Blue Shield of Alabama*, 691 F. Supp. 1314, 1319 (1988), *aff’d*, 874 F.2d 820 (1989). Regence BlueShield and the other authorized health carriers doing business in Washington that are wholly owned and/or managed by Cambia use the same or similar standard contracts for insured policies, and specifically, use the same or similar standard exclusions of coverage for hearing examinations, programs or treatment for hearing loss, the same standard definition of “medical necessity” and the same internal policies and procedures for determining when treatment for hearing loss is excluded. For the purpose of this Complaint, both Regence BlueShield and Cambia are referred to as a single defendant, “Regence.”

III. JURISDICTION AND VENUE

26. This action arises in part under the Patient Protection and Affordable Care Act (“Affordable Care Act” or “ACA”) § 1557, 42 U.S.C. § 18116.

27. Jurisdiction of this Court also arises pursuant to 28 U.S.C. §§ 1331, 1343. Jurisdiction for Plaintiffs’ declaratory judgment, injunction, Consumer Protection Act and Washington Law Against Discrimination claims arises under 28 U.S.C. § 1367.

28. Venue is proper under 28 U.S.C. § 1391(b)(1) and (2), because, *inter alia*, a defendant resides or may be found in this district and a substantial part of the events giving rise to the claims occurred in King County, Washington.

IV. CLASS ALLEGATIONS

29. *Definition of Class.* The class consists of all individuals who:

- (1) have been insured under a Washington health insurance plan that purports to exclude hearing aids and related services that has been delivered, issued for delivery, or renewed by (a) Regence; (b) any affiliate of Regence; (c) predecessors or successors in interest of any of the foregoing; and (d) all subsidiaries or parent entities of any of the foregoing, at any time on or after October 30, 2014 through December 31, 2022; and
- (2) have required prescription hearing aids and associated care, other than cochlear implants, for disabling hearing loss.

30. *Size of Class.* The class of Regence Washington insureds who have required prescription hearing aids for disabling hearing loss, excluding cochlear implants, is so numerous that joinder of all members is impracticable.

31. *Class Representatives E.S. and Sternoff.* Named plaintiffs E.S. and Sternoff have been, and are presently, enrollees in a non-grandfathered Regence insured health plan in the State of Washington. Both have disabling hearing loss that requires prescription hearing aids other than CIs. Both are “qualified individuals with a disability” under the Affordable Care Act and Section 504 of the Rehabilitation Act. Both are also “disabled” under Washington law. Both have required prescription hearing aids to treat their hearing loss. Regence denied both named Plaintiffs’ requests for coverage of their hearing aids, requiring them to pay out-of-pocket. Plaintiffs’ claims are typical of the claims of the other members of the class. Plaintiff E.S., by and through her parents,

1 and Plaintiff Sternoff, directly, will fairly and adequately represent the interests of the
2 class.

3 32. *Common Questions of Law and Fact.* This action requires a determination
4 of whether Regence's Exclusion of prescription hearing aids violated the requirements
5 of the Affordable Care Act's § 1557 and discriminated against Plaintiffs on the basis of
6 their disability. Adjudication of this issue will in turn determine whether Regence is
7 liable under the Affordable Care Act for retrospective injunctive relief, including
8 reprocessing claims, class wide damages and other relief. This action further requires a
9 determination of whether Regence's Exclusion of prescription hearing aids violates the
10 requirement of RCW 48.43.0128 and discriminates against Plaintiffs on the basis of their
11 disability. Finally, this action requires a determination of whether Regence violated
12 Washington's Consumer Protection Act and Law Against Discrimination by designing
13 and applying a written exclusion in violation of RCW 48.18.200(2), RCW 48.43.0128, and
14 other Washington law. This action further requires a uniform declaration of whether
15 Regence's conduct was illegal, and whether Regence compelled by retroactive injunction
16 to reprocess and pay claims that it denied in violation of law.

17 33. *Regence Has Acted on Grounds Generally Applicable to the Class.*
18 Regence, by imposing a uniform exclusion on all coverage for prescription hearing aids
19 and related treatment except for cochlear implants, acted on grounds generally
20 applicable to the class, rendering declaratory relief appropriate respecting the whole
21 class. Certification is therefore proper under FRCP 23(b)(2).

22 34. *Questions of Law and Fact Common to the Class Predominate Over*
23 *Individual Issues.* The claims of the individual class members are more efficiently
24 adjudicated on a classwide basis. Any interest that individual members of the class may
25 have in individually controlling the prosecution of separate actions is outweighed by the
26 efficiency of the class action mechanism. Upon information and belief, there has been

no class action suit filed against these defendants for the relief requested in this action. This action can be most efficiently prosecuted as a class action in the Western District of Washington, where Regence BlueShield has its principal place of business, does business, and where E.S. and Sternoff reside. Issues as to Regence's conduct in applying standard policies and practices towards all members of the class predominate over questions, if any, unique to members of the class. Certification is therefore additionally proper under FRCP 23(b)(3).

35. *Class Counsel.* Plaintiffs have retained experienced and competent class counsel.

V. FACTUAL BACKGROUND

A. History of Disability-Based Exclusions in Health Insurance.

36. "The Blue Shield concept grew out of the lumber and mining camps of the Pacific Northwest at the turn of the century. Employers who wanted to provide medical care for their workers made arrangement with physicians who were paid a monthly fee for their services. These contracts led to the creation of 'medical service bureaus' composed of groups of physicians. The first was organized in Tacoma, Washington by Pierce County physicians in 1917. Some bureaus, including the Pierce County bureau, still operate today as Blue Shield Plans." *BCBSA History Fact Sheet*, found at https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=3089&context=flablue_t_ext (last visited 03/30/23). Regence BlueShield is the successor organization to that original Blue Shield plan.

37. Blue Shield plans initially offered coverage only to employer-based groups. See *Blue Cross and Blue Shield: A Historical Compilation*, Consumer Reports, found at: https://advocacy.consumerreports.org/wp-content/uploads/2013/03/yourhealthdollar.org_blue-cross-history-compilation.pdf, pp. 7-8 (last visited 03/30/23). During the 1940s, these plans began to offer direct enrollment to individuals

1 as well as employer-based groups. *Id.* at 9. These plans could freely avoid providing
2 coverage to any groups that were viewed as undesirable risks, including disabled
3 individuals. *See* Blake, p. 1085. Based upon information and belief, Regence's benefit
4 design during this period did not provide coverage for disability-related conditions,
5 including hearing loss.

6 38. In 1965, the Medicare and Medicaid Act was signed into law. These two
7 programs were intended to meet the needs of the elderly and disabled, two populations
8 that were generally excluded from coverage by private insurance. Medicare coverage
9 was modeled on the private coverage offered by Blue Cross and Blue Shield plans at the
10 time. *See* Lew, Nancy, *Medicare 35 Years of Service*, Health Care Finance Rev. 2000 Fall:
11 22(1): 75-103 (hereinafter "Lew").

12 39. Thus, the exclusions imposed in the typical Blue Cross and Blue Shield
13 plans were imported into Medicare. This caused significant problems since Medicare's
14 benefit package with its attendant exclusions was not designed to meet the needs of those
15 who are elderly or disabled. *Id.* As a result, the discrimination that occurred in private
16 coverage was imported into Medicare. *Id.*

17 40. Until the Affordable Care Act was passed, health insurers continued to be
18 free to discriminate in the design of their benefits. *Schmitt*, 965 F.3d at 948. The ACA,
19 however, required insurers to ensure that their benefit design did not result in disability
20 discrimination. Accordingly, upon implementation of the ACA, health insurers should
21 have reviewed and reconsidered whether such historic exclusions were the result of
22 discrimination or were justified using the same medical and scientific standards applied
23 to all other covered services.

24 41. Based upon information and belief, Regence did not undertake such an
25 analysis when the ACA was first implemented.
26

B. Regence's Exclusion.

42. When this lawsuit was originally filed, Regence's insured health plans in Washington contained the following benefit exclusion:

We do not cover routine hearing examinations, programs or treatment for hearing loss, including but not limited to non-cochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them.

Dkt. No. 12-1, p. 65 of 110. This exclusion, or one functionally identical, had been in place since at least October 30, 2014. In Regence's 2020 health plan issued to the named plaintiffs and members of the class, the exclusion is worded differently but has the same effect because "programs or treatment for hearing loss" are, in practical effect, coverage for "hearing aids":

SPECIFIC EXCLUSIONS

...

Hearing Aids and Other Hearing Devices

Hearing aids (externally worn or surgically implanted) and other hearing devices are excluded. This exclusion does not apply to cochlear implants.

...

Routine Hearing Examination

See Dkt. No. 32-1, pp. 31-33 (hereinafter "Exclusion"). This exclusion remained in effect in Plaintiffs' plans through December 31, 2022.

43. Despite Regence's stated exclusion of "routine hearing examinations," Regence *covered* all medically necessary diagnostic hearing examinations, even when they were not provided for the purpose of receiving CIs.

44. For example, Plaintiff E.S. had a diagnostic hearing examination in 2020 that was covered by Regence. *Exh. A.*

45. This is consistent with the practices of other Washington health insurers.

1 46. Since October 2022, certain adult Regence insureds with mild to moderate
2 hearing loss whose needs can be met with OTC hearing aids no longer require
3 prescription hearing aids. They can purchase their hearing aids without any
4 involvement from a licensed provider. It is anticipated that the cost of OTC hearing aids
5 is or will be significantly lower than prescription hearing aids.

6 47. Under the terms of the Regence policy, OTC hearing aids are not “durable
7 medical equipment” and would not be covered if the Hearing Aid Exclusion were
8 removed. *See* Dkt. No. 32-1, p. 29 (“Durable Medical Equipment must be provided by a
9 Provider practicing within the scope of his or her license and must be Medically
10 Necessary for the treatment of an Illness or Injury”). This litigation does not seek
11 coverage of OTC hearing aids under the Regence Washington insured plans, nor
12 challenge Regence’s determination to exclude OTC hearing aids from its definition of
13 durable medical equipment.

14 48. Since January 1, 2023, Plaintiffs’ Regence plan has covered hearing aids and
15 related hearing treatment but with a special benefit cap of \$1000 per year. Presently, this
16 amount would only cover a small fraction of the cost of Plaintiffs’ hearing aids and
17 related examinations.

18 49. Regence publicly supports expanding coverage for hearing aids for its
19 enrollees. *See* [https://news.regence.com/blog/expanding-access-to-hearing-aids-](https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-overcome-much-more-than-hearing-disability)
20 [helps-people-overcome-much-more-than-hearing-disability](https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-overcome-much-more-than-hearing-disability) (last visited 04/03/23). In
21 an article dated September 15, 2020, Regence asserted it was adding such coverage for
22 all enrollees. *Id.* To date, however, no coverage was added to Regence’s insured plans
23 in the individual and family market, and the coverage was only added to Plaintiffs’
24 Regence plan starting in January 2023.

C. Hearing Loss, Hearing Aids and Cochlear Implants Defined.

1. Hearing Loss.

50. Hearing involves a complex process by which sound waves are converted to vibrations that are transmitted through the eardrum to the middle-ear bones, then to the fluid-filled cochlea in the inner ear. The cochlea contains tiny hair cells that respond to specific frequencies and emit microscopic electrical impulses to the auditory nerve, from which the brain decodes the sound. Hearing loss is the result of damage to one or more of those components.

51. A common preliminary screening for hearing loss is a pure-tone test, in which subjects are presented with tones at different frequencies (pitches), measured in Hertz (Hz), at increasing volume, measured in decibels (dB). The subjects are asked to indicate when they hear those tones. The threshold loudness at which a tone becomes audible is recorded on an audiogram.

52. The critical metric from an audiogram is the average decibel threshold in the frequencies involving speech, which are the frequencies of 500, 1,000, 2,000 and 4,000 cycles per second, measured in Hertz (Hz).

53. The generally accepted standard for normal hearing is a threshold of 25 dB. If the tones must be louder than 25 dB to be audible, the subject has worse-than-normal hearing. An average decibel threshold greater than 25 dB in the speech frequencies is generally considered the point at which “hearing loss begins to impair communication in daily life.” Lin, *et al.*, *Hearing Loss Prevalence in the United States*, Archives of Internal Medicine Vol. 14, No. 20 at pp. 1831–32, Nov. 14 (2011).

54. The most common form of hearing loss is sensorineural hearing loss, in which the inner-ear and/or the nerves that carry sound information from the inner ear to the brain are damaged. That damage is generally not correctible through surgery or

1 medication, and can be mitigated only through hearing aids or, in extreme cases,
2 cochlear implants. Plaintiff Sternoff is diagnosed with sensorineural hearing loss.

3 55. Conductive hearing loss occurs when damage to the outer or middle ear
4 prevents sound from reaching the inner ear. Conductive hearing loss can be addressed
5 with a bone-anchored hearing aid, which bypasses the damaged middle-ear structures
6 and transmits sound directly to the cochlea and the hair cells. A bone-anchored hearing
7 aid is a different device than a “cochlear implant” and, as the name makes clear, is
8 considered to be a type of hearing aid. Plaintiff E.S. is diagnosed with conductive
9 hearing loss.

10 **2. *Hearing Aids.***

11 56. Washington state law defines “hearing instrument,” as “any wearable
12 prosthetic instrument or device designed for or represented as aiding, improving,
13 compensating for, or correcting defective human hearing and any parts, attachments, or
14 accessories of such an instrument or device,” RCW 18.35.010(12). Hearing aids are
15 “hearing instruments” within the meaning of Washington law.

16 57. Until October 2022, the fitting and dispensing of hearing instruments were
17 limited by law to licensed audiologists and licensed hearing-aid specialists.
18 RCW 18.35.020. Audiologists must have doctoral-level education and experience.
19 Hearing-aid specialists must have two years of college-level education plus supervised
20 experience, RCW 18.35.040, and pass a state-mandated examination, RCW 18.35.070.
21 Both licensed audiologists and hearing-aid specialists are defined as “hearing health care
22 professionals.” RCW 18.35.010(11). For purposes of this Third Amended Complaint,
23 “prescription hearing aid” is used to mean devices prescribed by these hearing health-
24 care medical professionals in addition to the associated care in fitting, evaluating, and
25 servicing.

1 58. Hearing aids are generally prescribed when a patient's hearing loss is
2 confirmed by objective studies showing hearing loss together with subjective reports to
3 a medical provider of a significant impact from the hearing loss on their daily
4 functioning. Licensed providers did not typically prescribe hearing aids when these two
5 requirements were unmet.

6 59. Since October 2022, patients may obtain OTC hearing aids without meeting
7 these two requirements. In addition, some patients whose needs could only be met by
8 using prescription hearing aids, may now obtain OTC hearing aids to meet their needs.

9 60. Plaintiffs' expert witness(es) will testify that all or very nearly all
10 individuals who obtain prescription hearing aids are "disabled" under federal law, since
11 they have an objectively diagnosed hearing loss that causes a substantial impact on their
12 daily functioning leading to the prescription and use of a hearing aid. That is the case
13 with both Plaintiffs E.S. and Sternoff.

14 61. Accordingly, all or nearly all individuals who use prescribed hearing aids
15 (and are therefore affected by the Exclusion) are "disabled."

16 62. Since October 2022, adults may purchase OTC hearing aids without a
17 prescription or recommendation from a licensed hearing health care professional. As a
18 result, a significant number of adults diagnosed with hearing loss may have their needs
19 met with OTC hearing aids. Since OTC hearing aids are purchased without a
20 prescription, the OTC products are not eligible for health insurance coverage, even if the
21 Hearing Loss Exclusion were removed.

22 63. After October 2022, only hearing disabled children who use hearing aids
23 and the portion of hearing disabled adults who use hearing aids and cannot be treated
24 with OTC hearing aids or CIs, are affected by and injured as a result of the Regence
25 Exclusion.
26

64. Plaintiffs E.S. and Sternoff are unable to purchase the hearing aids they need over-the-counter. They both require and use prescription hearing aids.

3. *Cochlear Implants.*

65. A cochlear implant is a medical intervention and device for a limited class of people with severe to profound sensorineural hearing loss. A cochlear implant bypasses the damaged hair cells in the inner ear. It consists of an external microphone and processor that send electronic signals to an array of electrodes embedded in a filament that is threaded into the cochlea. Those electrodes substitute for the damaged hair cells by sending electronic impulses directly to the auditory nerve, creating a sensation of sound.

66. A cochlear implant is only available to people with severe to profound hearing loss who cannot be adequately treated with hearing aids.

67. CIs are implanted through a surgical procedure. Once they are implanted, the insured cannot go back to using hearing aids. The devices do not restore hearing, and once implanted, the insured may need three to six months to adapt to hearing through the implant.

68. Cochlear implants only meet the needs of approximately 5% of persons with moderate to severe hearing loss.

69. Until the mid-1990s, Regence excluded all coverage for CIs, just as it did all other hearing treatment. At that time, Medicare added coverage for CIs. When Medicare added coverage for CIs, based upon information and belief, so did Regence. That is what plaintiffs learned in discovery in the *Schmitt* case.

70. Although Regence may have undertaken a medical necessity review of CIs, based upon information and belief, it undertook no similar medical necessity review of hearing aids when the ACA was implemented, or indeed, until very recently.

71. Today, Regence confirms that hearing aids are medically necessary, effective and essential to overcome hearing disability. See <https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-overcome-much-more-than-hearing-disability> (last visited 03/30/23). Consistent with that finding, Regence represents that it has started covering hearing aids and related treatment in some, but not all, of its insured plans.

72. In Regence's individual market plans, it continues to exclude all coverage related to hearing aids, even as it concedes that this treatment is necessary and effective for treating hearing disabilities.

D. Regence's Exclusion Affects Only or Overwhelmingly Hearing Disabled Insureds.

73. The Exclusion does not affect people who do not seek the hearing devices related to hearing loss. In other words, those individuals who do not use hearing evaluations or devices for hearing loss (i.e., audiology examinations, hearing aids, CIs, etc.) are not affected by the Exclusions. *Schmitt*, 965 F.3d at 959, n. 8.

74. All or nearly all of the individuals who seek hearing aids and/or related treatment for hearing impairment are disabled under both the state and federal standards for disability.

75. All or nearly all people who seek hearing aids for hearing loss experience a substantial impact of their hearing loss in their daily lives. It is this experience of substantial impact that generally drives people to seek treatment including a diagnostic evaluation as to whether and the extent to which they have a hearing loss.

76. The first step in obtaining treatment for hearing loss is a diagnostic evaluation. The diagnostic evaluation of hearing loss is covered under the Regence plan for all insureds whether they are disabled or not.

1 77. In general, if the hearing examination reveals a permanent hearing loss that
2 is moderate to severe, a licensed provider will typically recommend treatment with a
3 hearing aid or other medical device or treatment (such as a bone-anchored hearing aid
4 or CI), based upon (1) the objective findings of an audiometric study and possibly other
5 tests and (2) subjective reports by the insured of substantial impairment in their daily
6 lives.

7 78. While some people with mild hearing loss are recommended hearing aids,
8 the number of individuals with mild hearing loss who actually use hearing aids is
9 exceedingly small, approximately under 6%.

10 79. The overwhelming majority of people who use hearing aids have a hearing
11 loss of greater than 35 dB, which is considered “moderate” hearing loss. This is consistent
12 with the Court’s preliminary conclusion that individuals with moderate to severe
13 hearing loss are disabled under federal law. Dkt. No. 41 at 14–15.

14 80. Hearing aids are not prescribed for any other condition other than forms
15 of hearing loss or impairment.

16 81. As a result, Regence’s Exclusion of all coverage for hearing aids impacts
17 only or nearly entirely people with disabling hearing loss.

18 82. The “fit” between the Exclusion and the unmet health needs of hearing
19 disabled insureds grew even closer after October 2022.

20 83. Since October 2022, individuals with mild, non-disabling hearing loss have
21 access to OTC hearing aids and no longer need prescription hearing aids. Additionally,
22 some hearing disabled insureds may also use OTC hearing aids to meet their needs.
23 Thus, after October 2022, the pool of insureds affected by Regence’s Exclusion is
24 overwhelmingly if not entirely hearing disabled.

E. Regence's Coverage of CIs Does Not Provide Meaningful Access to Treatment for Hearing Loss.

84. Only about 5% of people who are disabled due to hearing loss may be treated with CIs.

85. Since only a small proportion of individuals with hearing disabilities who seek medical treatment can have their needs met with CIs, Regence's coverage of CIs does not provide meaningful access to benefits to hearing disabled insureds.

86. The Court previously concluded that Regence's coverage of CIs supports a claim of proxy discrimination. Dkt. No. 41 at 16.

F. Regence's Exclusion Does Not Affect Insureds Who Do Not Seek Medical Treatment for Hearing Loss.

87. To determine proxy discrimination, those insureds with hearing loss who do not seek medical treatment are not considered.

88. The fact that some people with hearing loss do not seek medical treatment does not undercut Plaintiffs' discrimination claims. *See Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019) (all members of a protected classification need not be included in the proposed class). The Exclusion does not affect people who do not seek the medical treatment related to hearing loss. In other words, those individuals who do not seek medical evaluations, devices or treatment for hearing loss (i.e., audiology examinations, hearing aids, CIs, etc.) are not affected by the Exclusions. *Id.* They are not part of the required "proxy" analysis.

89. What matters for proxy discrimination is whether there is a close "fit" between the insurer's application of the Exclusion and the coverage needs of those that are hearing disabled. *Schmitt*, 965 F.3d at 959, n. 8 (identifying that the "fit" for proxy discrimination should focus on the claims actually denied by the insurer under the hearing loss exclusion).

G. The Needs of Insureds With Hearing Disabilities Are Significantly Different From the Needs of Those without Disabling Hearing Loss.

90. The needs of people who are hearing impaired but not disabled are significantly different from those who are disabled. *Id.*

91. The medical needs of vast majority of people without a hearing disability (whether they have no hearing loss or mild hearing loss) may be met through Regence's covered diagnostic evaluation and, after October 2022, with OTC hearing aids.

92. That is because, overwhelmingly, only people with moderate to severe hearing loss use prescription hearing aids. Only these individuals are "disabled" by their hearing loss.

93. At the same time, the unmet medical needs of the vast majority of hearing disabled insureds is for prescription hearing aids and related treatment. These needs remain unmet by Regence's coverage. In sum, the vast majority of Regence insureds with disabling hearing loss who seek medical treatment need prescription hearing aids have no coverage for those needs. They do not receive effective coverage for their disability.

H. Hearings Aids Are So Associated With Hearing Loss As to Be Proxy For Hearing Disability.

94. Hearing aids are so intertwined with hearing disability that the Exclusion of hearing aids is a proxy for excluding hearing disability.

95. Hearing aids are only used to treat forms of hearing loss and impairment. No other condition relies on hearing aids for medical treatment.

96. Hearing aids are deeply associated with disabling hearing loss. For example, the international accessibility symbols for hearing loss reflects the use of hearing aids. See <https://www.healthyhearing.com/report/52264-Universal-signs-for-hearing-loss> (last visited 03/28/23).

1 97. Studies show that individuals avoid the use of hearing aids to avoid the
 2 stigma associated with disability. Wallhagen, Margaret, “The Stigma of Hearing Loss,”
 3 Gerontologist, 2010 Feb; 50(1): 66-75, pp. 68-70, found at
 4 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904535/> (last visited 03/30/23).

5 98. The association of hearing aids with hearing disabilities is similar to that
 6 of wheelchairs to people with mobility disabilities. Although many people who are non-
 7 disabled or only temporarily disabled use wheelchairs, wheelchairs are easily
 8 understood as a “proxy” for mobility disability. That is why the international symbol for
 9 mobility disability access is a wheelchair. See e.g.,
 10 [https://www.cbsnews.com/news/handicapped-symbol-getting-a-makeover/](https://www.cbsnews.com/news/handicapped-symbol-getting-a-makeover/#:~:text=Danish%20graphic%20artist%20Susanne%20Koefoed,the%20United%20Nations%20in%201974)
 11 [#:~:text=Danish%20graphic%20artist%20Susanne%20Koefoed,the%20United%20Nations%20in%201974](https://www.cbsnews.com/news/handicapped-symbol-getting-a-makeover/#:~:text=Danish%20graphic%20artist%20Susanne%20Koefoed,the%20United%20Nations%20in%201974) (last visited 03/28/23). The “fit” between an exclusion of all coverage
 12 for wheelchairs and those who are mobility disabled is intuitively close, without reliance
 13 on statistics. See *Fuog v. CVS Pharmacy, Inc.*, No. 20-337 WES, 2022 U.S. Dist. LEXIS 84045,
 14 at *14 (D.R.I. May 10, 2022) (identifying wheelchairs and seeing eye dogs as proxies for
 15 mobility and visual disabilities).
 16

17 99. Just like gray hair is highly associated with old age (*McWright v. Alexander*,
 18 982 F.2d 222, 228 (7th Cir. 1992), wheelchairs with mobility disability (*Fuog, supra*),
 19 hearing aids are so closely associated with hearing disabilities as to be a proxy for them.

20 100. Proxy discrimination does not require an exact match between the proxy
 21 category and the protected classification. See *Davis*, 932 F.3d at 838. Rather, if the proxy
 22 is so intertwined with the classification, particularly when combined with historical
 23 facts, the association alone may be sufficient to demonstrate proxy discrimination. *Id.*

24 101. Plaintiffs are not required to allege deliberate discrimination or intentional
 25 animus in this case seeking prospective and retrospective injunctive relief. *Cf. Jones v.*
 26

1 AMTRAK, 2018 U.S. Dist. LEXIS 118378, at *10 (N.D. Cal. July 16, 2018) (no showing of
2 intent is necessary to object injunctive relief under the ADA).

3 102. As the Ninth Circuit noted in *Schmitt*, allegations that the insurer designed
4 the benefits in a discriminatory way “inherently involves intentional conduct.” *Id.*, 965
5 F.3d at 954. Where, as here, the Exclusion is the result of “thoughtless indifference” to
6 the needs of hearing disabled insureds, no further allegations of animus or deliberate
7 discrimination are required. *See Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 736–37 (9th
8 Cir. 2021).

9 **I. E.S.’s Need for Hearing Aids.**

10 103. E.S. was born with a right unilateral grade 3 microtia with aural atresia. In
11 other words, she was born without an outer ear or a properly formed middle ear on her
12 right side. Her cochlea and her auditory nerve function, but she was born without an
13 ear canal on her right side to allow sound to travel to her inner ear. She is disabled due
14 to her hearing impairment under federal and state law.

15 104. As a result of this congenital birth defect, E.S. had maximum conductive
16 hearing loss in her right ear and was incapable of receiving any benefit from a cochlear
17 implant.

18 105. In 2016, while covered under a Regence policy, E.S. required a bone-
19 anchored hearing aid device to be implanted. The hearing aid was medically necessary
20 and clinically appropriate for E.S.’s condition.

21 106. Regence denied coverage for the bone-anchored hearing aid device sought
22 in 2016. It did so under the exclusion for hearing aids.

23 107. E.S.’s parents appealed the Regence denial of coverage for the bone-
24 anchored hearing aid device and exhausted their administrative appeals in their attempt
25 to obtain coverage. A reviewer concluded that the bone-anchored hearing aid system
26

1 E.S. required was a bone conduction hearing aid and not a cochlear implant or prosthetic.

2 E.S.'s parents were required to pay for the bone-anchored hearing aid out-of-pocket.

3 108. Nonetheless, Regence has covered one or more of E.S.'s diagnostic hearing
4 examinations. *See e.g., Exh. A.*

5 109. E.S. cannot purchase her hearing aids over-the-counter because she is a
6 child. Additionally, her particular type of hearing loss cannot be treated with OTC
7 hearing aids.

8 110. E.S.'s hearing aids cost significantly more than \$1000. The current Regence
9 benefit is wholly inadequate to meet E.S.'s need for coverage for hearing aids and related
10 treatment.

11 **J. Sternoff's Need for Hearing Aids.**

12 111. Sternoff has moderate to severe hearing loss in her left ear and wears a
13 "cross hearing aid" that transmits sound from her left side to her hearing right ear.
14 Without the hearing aid, she is disabled under federal and state law respectively because
15 her hearing loss substantially limits her ability to work, communicate, socialize and
16 engage in other major life activities.

17 112. In 2016, Sternoff's request for coverage of her cross-hearing aid totaling
18 \$4,100.00 was denied by Regence. The Sternoffs were required to pay for the hearing aid
19 out-of-pocket.

20 113. Even after October 2022, Sternoff's hearing loss cannot be treated with an
21 OTC hearing aid.

22 114. Sternoff's hearing aid costs significantly more than \$1000. The 2023
23 Regence hearing aid benefit of \$1000 is wholly inadequate to meet her need for hearing
24 aids and related treatment.

K. Classwide Allegations.

115. During the relevant time periods, E.S., Sternoff and members of the class have been insured in one or more Regence insured plans.

116. Plaintiffs E.S., Sternoff and other members of the class have been diagnosed with hearing loss, a physical impairment that limits a major life activity so substantially as to require medical treatment. As a result, E.S., Sternoff and other members of the class are “qualified individuals with a disability.” *See* 28 C.F.R. § 39.103.

117. Plaintiffs E.S., Sternoff and other members of the class have required prescription hearing aids for their hearing loss, excluding treatment with cochlear implants.

118. Based on information and belief, the proposed class includes few if any individuals over the age of 65, since most, if not all, of Washington insured Regence enrollees lose their Regence coverage when they become eligible for Medicare.

119. The Regence health plans in which Plaintiffs are enrolled are “non-grandfathered health plans” as described in the Washington Insurance Code.

120. Regence’s non-grandfathered insured health plans must comply with the requirements of RCW 48.43.0128.

121. The application of Regence’s exclusion denies individuals with disabling hearing loss the benefits and health coverage available to other insureds, based on their disability.

122. As the Court previously concluded, insureds with moderate to severe hearing loss who need prescription hearing aids can be assumed to be disabled under federal law.

123. Insureds with mild hearing loss who are prescribed hearing aids by a licensed medical provider are also disabled under federal law. These individuals have been evaluated by a medical provider to require a hearing aid in order to engage in daily

activities. Their licensed medical provider has conducted objective medical tests and based upon those objective tests and the insured's subjective reports, concluded that they require hearing aids.

124. Thus all or very nearly all hearing disabled Regence insureds who require prescription hearing aids are "disabled" under federal law.

125. At the same time, insureds with non-disabling hearing loss are not prescribed hearing aids.

126. As a direct result, Plaintiffs E.S., Sternoff and members of the class have paid out-of-pocket for medically necessary hearing aids and associated care for their hearing loss. Other class members have been forced to forgo needed hearing aids and associated treatment due to Regence's conduct. Plaintiff E.S. has pursued her administrative appeal rights under her Regence health plan, to no avail. While any further administrative appeal would be futile, no such appeal is required before the claims alleged herein, including a § 1557 claim, may be brought. *See former* 45 C.F.R. § 92.301(a); 81 Fed. Reg. 31441.

VI. CLAIMS FOR RELIEF²

COUNT I – VIOLATION OF AFFORDABLE CARE ACT § 1557, 42 U.S.C. § 18116

A. Regence Is Required to Comply with § 1557, and Plaintiffs and the Class Are Protected Under § 1557.

127. Regence is a "health program or activity" part of which receives federal financial assistance. 42 U.S.C. § 18116; 45 C.F.R. § 92.4. Regence is a "covered entity" under the Affordable Care Act, § 1557.

128. Regence provided assurances to the U.S. Department of Health and Human Services that it complies with the requirements of § 1557. *See* 45 C.F.R. § 92.5.

² Each claim for relief set forth below incorporates by reference all the allegations set forth in this Third Amended Complaint.

1 129. It also provided similar statements to its Washington insured enrollees,
2 confirming that it complies with the requirements of § 1557.

3 130. Section 1557, 42 U.S.C. § 18116 provides that “an individual shall not, on
4 the ground prohibited under ... section 504 of the Rehabilitation Act of 1973 ... be
5 excluded from participation in, denied the benefits of, or be subjected to discrimination
6 under, any health program or activity, any part of which is receiving Federal financial
7 assistance....”

8 131. For purposes of § 1557, “disability” is defined and construed according to
9 Section 504 of the Rehabilitation Act, which, in turn “incorporates the definition of
10 disability in the Americans with Disabilities Act (ADA), as amended.” 45 C.F.R.
11 § 92.102(c).

12 132. The ADA, 42 U.S.C. § 12101 *et seq.*, as amended in 2008, defines “disability”
13 as “a physical or mental impairment that substantially limits one or more major life
14 activities of such individual,” 42 U.S.C. § 12102(1)(A) (emphasis added).

15 133. The applicable regulations state that the term “substantially limits” is to be
16 construed “broadly,” is not meant to be a “demanding standard,” 29 C.F.R.
17 § 1630.2(j)(1)(i).

18 134. “Major life activities” include, among other things, “hearing,
19 communicating and working.” 42 U.S.C. § 12102(2)(A).

20 135. The presence of a disability is to be assessed “without regard to the
21 ameliorative effects of mitigating measures such as ... hearing aids or cochlear
22 implants.” 42 U.S.C. § 12102(4)(E)(i)(I).

23 136. Plaintiffs and the class, as defined, are “qualified persons with a disability”
24 under both Section 504 and Section 1557 and are protected from discrimination under
25 these provisions.
26

B. The Hearing Aid Exclusion Is a Proxy for Discrimination Against Insureds with Disabilities.

1. *The Hearing Aid Exclusion is a Proxy for Disability Discrimination Because Needs of the Disabled Are Not Met While the Needs of the Abled Are Met Under the Policy.*

137. Discrimination against people who require hearing aids is a proxy for discrimination against people who have disabling hearing loss. Proxy discrimination exists where “the needs of hearing disabled persons differ from the needs of persons whose hearing is merely impaired such that the exclusion is likely to predominately affect disabled persons.” *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 959, n. 8 (9th Cir. 2020).

138. The needs of hearing disabled persons differ significantly from the needs of persons whose hearing is merely impaired, but not disabling. Through October 2022, the vast majority of Regence’s insureds who use prescription hearing aids are “disabled” under federal and state law. Yet, for those insureds the essential medical device to treat their disability was, and, in some plans, remains explicitly excluded by Regence. In contrast, Regence’s insureds who do not use hearing aids, overwhelmingly those with no hearing loss or non-disabling hearing loss, are still able to perform, without any substantial limitations, all major life activities without need for a prescription hearing aid. They are not affected by the Exclusion, as they have access to all the benefits they need. As a result, Regence’s Exclusion has no, or little, effect on its non-disabled insureds, whether they have a hearing impairment or not.

139. Specifically, insureds with no hearing loss only require hearing screenings or, at most, a diagnostic evaluation to determine if hearing loss exists. These services are covered by Regence for all enrollees. Hearing screening are covered as part of a physical examination, and hearing evaluations are covered as diagnostic examinations.

1 140. Insureds with hearing loss that does not substantially limit a major life
2 activity also receive covered screenings and diagnostic testing under Regence's policies.
3 Regence's exclusion of hearing aids has only a minimal impact on these non-disabled
4 insureds. Without a hearing aid, these insureds are not substantially limited in any
5 major life activity.

6 141. In contrast, the needs of Regence's hearing disabled insureds are materially
7 different, and profoundly impacted by Regence's Exclusion. Specifically, all or nearly
8 all of insureds who require hearing aids, need them in order to engage in major life
9 activities, *e.g.*, working, going to school, socializing, or communicating, such that they
10 are disabled. The wholesale exclusion of hearing aids by Regence profoundly effects the
11 lives of these hearing disabled insureds.

12 142. As more specifically alleged below, (1) the needs of the non-disabled are
13 met under the Regence's policy because hearing screenings and diagnostic hearing
14 testing, the only services required by the non-hearing disabled, are covered by Regence,
15 while (2) hearing aids and related services, a benefit required hearing impaired insureds
16 who are all (or nearly all) disabled, are excluded. The needs of hearing disabled persons
17 therefore differ significantly from the needs of persons whose hearing is merely
18 impaired, but not disabling, and Regence discriminates against its insureds who are
19 hearing disabled.

20 143. The availability of OTC hearing aids narrows the class after October 2022,
21 as some adults with disabling hearing loss will be able to purchase hearing aids to meet
22 their needs that do not require a prescription by a licensed provider. All children, and
23 some adults continue to require prescription hearing aids to treat their hearing
24 disabilities. These individuals continue to be harmed by Regence's Exclusion.

1 a. *Regence Covers the Hearing Needs of Non-Disabled*
 Insureds.

2 144. Hearing screenings and diagnostic examinations are designed to
 3 determine whether a loss of hearing has occurred. Screening and routine hearing
 4 examinations are “pass/fail” tests – either the test identifies a potential problem with an
 5 individual’s ability to hear, or it does not. If the screening or examination identifies a
 6 potential problem, then the individual is referred to a provider for a diagnostic hearing
 7 evaluation. A diagnostic hearing evaluation is then administered to further understand
 8 the nature, extent, and source of the deficit.

9 145. If a hearing screening or diagnostic examination determines that there is
 10 no hearing loss, then there is no indicated medical treatment necessary beyond the
 11 screening or examination itself. For insureds with hearing loss that does not limit life
 12 activities, hearing aids are not medically indicated, and are not prescribed by medical
 13 providers. In addition to not being prescribed by a provider, these individuals do not
 14 use hearing aids, either because they do not believe they need them, or due to the stigma,
 15 aesthetics, discomfort, inconvenience and expense of such devices. See
 16 [www.merckmanuals.com/home/ear,-nose,-and-throat-disorders/hearing-loss-and-](http://www.merckmanuals.com/home/ear,-nose,-and-throat-disorders/hearing-loss-and-deafness/management-of-hearing-loss)
 17 [deafness/management-of-hearing-loss](http://www.merckmanuals.com/home/ear,-nose,-and-throat-disorders/hearing-loss-and-deafness/management-of-hearing-loss) (“Many people are reluctant to wear hearing aids
 18 because of cost, comfort issues, and for some, social stigma.”).

19 146. Notwithstanding Regence’s purported exclusion of “routine hearing
 20 examinations,” Regence, in fact, pays for screening and diagnostic examinations
 21 designed to determine whether an insured’s hearing is functioning properly. It has paid
 22 for these hearing screening services from at least October 30, 2014, to the present.
 23 Payment for hearing screening and examinations is paid for by Regence under the
 24 benefit for a physical examination, as follows:

25 (a) Regence provides full coverage for physical examinations. Dkt.
 26 No. 32-1, p. 26 of 91. These physical examinations include, as part of a bundle of covered

1 services, an evaluation of the physical structures of the ear and screening to determine
 2 whether there is potential hearing loss. Regence makes no effort to exclude these services
 3 and, in fact, pays for these services as part of a covered physical examination.

4 (b) In a routine physical, the examination of the ear involves the
 5 physician examining both ears using an otoscopic exam to determine and evaluate
 6 potential hearing loss. The physical exam may also include at least one of a number of
 7 evaluative hearing tests, including the tuning fork test, scratch test, whispered voice test,
 8 and/or use of a handheld audiometric device. All of these are common hearing tests.

9 (c) An evaluation of the ability of a patient to hear is, in fact, one of the
 10 required elements of a physical examination. CMS's 1997 "Content and Documentation
 11 Requirements" for physicians conducting a "general multi-system examination" - a
 12 physical - requires an "otoscopic exam of external auditory canals and tympanic
 13 membranes including pneumo-otoscopy with notation of mobility of membranes" and
 14 "[a]ssessment of hearing with tuning forks and clinical speech reception thresholds (e.g.,
 15 whispered voice, finger rub)." See www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNEdWebGuide/Downloads/97Docguidelines.pdf. See
 16 also, Clinical Methods, 3rd Edition, Table 4.3 (1990) available from the National Institutes
 17 of Health at www.ncbi.nlm.nih.gov/books/NBK361/table/A253/?report=objectonly
 18 (steps of physical exam include "examin[ing] the pinnae and periauricular tissues, Test
 19 auditory acuity, perform Weber and Rinne maneuvers ... observe the auditory canals
 20 and tympani.").

21 (d) As a result, insureds with no hearing loss, or hearing loss that is not
 22 disabling, are provided with covered hearing screening services to evaluate hearing loss
 23 as part of a physical, which is covered at 100% by Regence.
 24

25 147. Not only do Regence's insureds with no hearing loss, or non-disabling
 26 hearing loss, have access to screening examinations, they also have access to coverage

1 for diagnostic examinations. A diagnostic hearing examination occurs if an individual
2 “fails” a screening examination.

3 148. Regence covers diagnostic hearing examinations and does not consider
4 them to be excluded “routine hearing examinations.”

5 149. Specifically, Regence has covered diagnostic hearing examinations for
6 Plaintiff E.S. *See Exh. A*. And such diagnostic evaluation is necessary, for example, to
7 determine if the insured is a candidate for a cochlear implant, a covered service.

8 150. “Diagnostic Procedures” have, at all relevant times, been covered services
9 under Regence’s policies. *See e.g.*, Dkt. 32-1, p. 27 of 91. Regence, since at least
10 October 30, 2014, has paid for services received by its insureds for diagnostic hearing
11 examinations notwithstanding its exclusions for “routine hearing examinations” and
12 “programs or treatment for hearing loss.”

13 151. As indicated above, Regence has paid for diagnostic hearing examinations
14 for Plaintiff E.S. This is also consistent with the discovery in the sister case, *Schmitt, supra*,
15 and the likely discovery to be obtained in this matter. It is also consistent with the
16 anticipated Plaintiffs’ expert testimony.

17 152. As a result, insureds with no hearing loss or non-disabling hearing loss
18 have insurance coverage from Regence for all the services that they may need: hearing
19 screening, examinations and diagnostic testing. Regence’s exclusions have no effect on
20 these insureds.

21 ***b. The Hearing Disabled Insureds Are Targeted by the Exclusion.***

22 153. In contrast, insureds with disabling hearing loss who require medical
23 services after diagnosis are profoundly affected by Regence’s exclusion of hearing aids.
24 With the singular exception of cochlear implants, the medical services that are designed
25 to treat their disabling hearing loss are excluded.
26

1 154. Insureds with hearing loss that substantially limits a major life activity
 2 require medical interventions beyond screening or diagnosis. Specifically, these
 3 insureds require hearing aids (either amplification or bone-anchored) or, for a small
 4 minority, cochlear implants. See [www.merckmanuals.com/home/ear,-nose,-and-](http://www.merckmanuals.com/home/ear,-nose,-and-throat-disorders/hearing-loss-and-deafness/management-of-hearing-loss)
 5 [throat-disorders/hearing-loss-and-deafness/management-of-hearing-loss](http://www.merckmanuals.com/home/ear,-nose,-and-throat-disorders/hearing-loss-and-deafness/management-of-hearing-loss) (last visited
 6 2/15/22). These disabled insureds also require follow-up care such as initial and
 7 periodic physical and electronic fittings and adjustments to hearing aids and associated
 8 care which are also excluded by Regence under its hearing aid exclusion.

9 155. Insureds with hearing loss that does not substantially affect a major life
 10 activity are only minimally impacted by Regence's exclusion of hearing aids. Even
 11 without access to hearing aids, these insureds are still able to work, socialize,
 12 communicate, go to school, and otherwise interact with others. In contrast, insureds with
 13 hearing loss that substantially impacts a major life activity have no covered access to the
 14 health care that they require to work, socialize, go to school, or otherwise interact with
 15 others. As a result, Regence's exclusion predominately and profoundly effects those with
 16 disabling hearing loss and has no or a minimal impact on insureds with no or
 17 nondisabling hearing loss.

18 156. The inclusion of coverage for cochlear implants does not change this result.
 19 Cochlear implants are only appropriate for individuals with profound or severe hearing
 20 loss, which is only about 5.5% of the total population of individuals with bilateral
 21 hearing loss, and less than 20% of the total subpopulation of individuals with bilateral
 22 moderate, severe, and profound hearing loss. Dkt. No. 32-2 at 2; Dkt. No. 41 at 16.
 23 Regence's coverage for cochlear implants meets the needs of only a small minority of
 24 insureds.

25 157. For more than 80% of the hearing disabled, the appropriate treatment for
 26 their hearing loss is not a cochlear implant but a hearing aid. Hearing aids and associated

1 services are wholly excluded under Regence's health plans from 2020 and earlier. Even
 2 today, Regence continues to design and market health plans with the same or similar
 3 exclusion.

4 **2. The Hearing Loss Exclusion Is a Proxy for Disability**
 5 **Discrimination Because It Predominately Affects Hearing**
 6 **Disabled Insureds.**

7 158. Regence's Hearing Loss Exclusion is also a proxy for discrimination
 8 against its hearing disabled insureds because it affects those insureds to a far greater
 9 degree than non-disabled insureds.

10 159. The total population of Regence's insureds can be categorized into five
 11 groups based on the relative ability to hear: (1) those with no hearing loss, (2) those with
 12 mild hearing loss that does not render them disabled, (3) those with mild hearing loss
 13 that substantially interferes with a major life activity, (4) those with moderate hearing
 14 loss, (5) those with severe hearing loss, and (5) those with profound hearing loss. Those
 15 with moderate, severe, and profound hearing loss all experience an inability to hear a
 16 person across a quiet room and/or hear in a normal conversation.
 17 See also, [www.cdc.gov/ncbddd/hearingloss/parentsguide/understanding/](http://www.cdc.gov/ncbddd/hearingloss/parentsguide/understanding/understandinghearingloss.html)
 18 [understandinghearingloss.html](http://www.cdc.gov/ncbddd/hearingloss/parentsguide/understanding/understandinghearingloss.html) (CDC's definition of moderate hearing loss: "a person
 19 with moderate hearing loss may hear almost no speech when another person is talking
 20 at a normal level.") (last visited 2/18/22). The inability to hear a person across a quiet
 21 room or hear in normal conversation substantially limits an individual's ability to work,
 22 go to school, socialize or otherwise engage in major life activities. Those individuals are
 23 "disabled" under federal law. Those with mild hearing loss are also disabled if the defect
 24 is significant enough to substantially impair a major life activity.

25 160. Regence's non-disabled insureds are not impacted at all by the exclusion
 26 of hearing aids. These insureds have access to hearing screenings and diagnostic hearing

1 examinations under Regence's policies. Hearing screenings are paid for by Regence
2 under the benefit for physical examinations, and diagnostic hearing tests are specifically
3 covered as diagnostic procedures. Likewise, Regence's insureds with non-disabling
4 hearing loss have access to these same services.

5 161. On the other end of the spectrum, certain of Regence's insureds with severe
6 or profound hearing loss have access to cochlear implants. However, the number of
7 these individuals is small: 5.5% of the total population with hearing loss, and less than
8 20% of the population with moderate or greater hearing loss. Dkt. No. 32-2 at 2; Dkt.
9 No. 41 at 16. Cochlear implants do not "serve the needs of most individuals with hearing
10 disability." *Schmitt*, 965 F.3d at 959.

11 162. The impact of Regence's Exclusion is, therefore, on those insureds who use
12 hearing aids. All or nearly all of these individuals are disabled.

13 163. The Center for Disease Control and Prevention conducts a National Health
14 and Nutrition Examination Survey ("NHANES"). [www.cdc.gov/nchs/nhanes/](http://www.cdc.gov/nchs/nhanes/index.htm)
15 [index.htm](http://www.cdc.gov/nchs/nhanes/index.htm) (last visited 2/18/22). This survey is the gold standard for determining the
16 prevalence of multiple conditions in the United States, including hearing loss and use of
17 hearing aids. The data collected by the CDC is used by academics and researchers in the
18 field. *See e.g.*, Dkt. No. 32-2 ("Prevalence of Hearing Loss by Severity in the United
19 States" is based on NHANES data).

20 164. Data from the demographics and audiometry questionnaire of NHANES
21 were analyzed by Frank R. Lin, M.D., PhD, from the Department of Otolaryngology and
22 Neck Surgery at Johns Hopkins University School of Medicine. Dr. Lin is the co-author
23 of "Prevalence of Hearing Loss by Severity in the United States" at Dkt. No. 32-2.

24 165. Dr. Lin used data from the demographics and audiometry questionnaire
25 of NHANES for the 2001-12 and 2015-18 cycles. The data is collected in such a way that
26

1 it can be determined how many people with hearing aids between the ages of 18 and 64
2 are disabled, as follows:

3 (a) In NHANES, “disabling hearing” is defined in two ways:
4 (1) Participants self-report of having moderate loss or more without a hearing aid (*i.e.*,
5 moderate hearing trouble, a lot of trouble, or deaf). For data from 2001-2004, “moderate
6 hearing trouble” was a not a response option so disabling hearing loss was defined as a
7 “lot of trouble” or “deaf.” (2) Participants reported not being able to hear and understand
8 a person speaking in a normal voice across a quiet room without a hearing aid. This
9 definition closely tracks the ADA definition of disability.

10 (b) In NHANES 2001-12, a hearing aid user was defined as having
11 worn a hearing aid in the past 12 months (2001-04), having worn a hearing aid at least 5
12 hours a week (2005-10), or having worn a hearing aid in the past 12 months (2011-12).
13 In NHANES 2015-18, a hearing aid user was defined as having worn a hearing aid in
14 the past 12 months (2015-16) or having worn a hearing aid in the past 2 weeks (2017-18).

15 (c) The data indicates that, of the people who use a hearing aid, 75%
16 had disabling hearing loss without the assistance of the aid during the 2001-2012
17 NHANES survey cycle. For the 2015-2018 NHANES survey cycle, 72% of the
18 individuals had disabling hearing loss without the assistance of the aid. This data was
19 screened to exclude individuals over the age of 64, as those individuals would be covered
20 by Medicare rather than under a Regence policy. (If this data was included, the numbers
21 would have been higher given that hearing worsens with age.)

22 166. As a result, from a purely statistical standpoint, the exclusion of hearing
23 aids is a form of proxy discrimination since the “fit” between the exclusion and disabling
24 hearing loss is “sufficiently close” to make a discriminatory inference plausible given
25 that the exclusion of hearing aids “primarily affects disabled persons.” *See Schmitt*, 965
26 F.3d at 958-959.

167. Apart from these statistics, virtually all individuals who are prescribed hearing aids are “disabled” under the federal and state definitions of disability. An exclusion of all coverage for hearing aids directly targets hearing disabled insureds.

168. Finally, hearing aids are so closely associated with disability that, given the historical context of the Exclusion, hearing aids are a proxy for disability, apart from any statistical proof.

C. The Hearing Loss Exclusion Has a Disparate Impact Against Disabled Insureds.

169. Separate from a proxy analysis, an insurer may also discriminate through exclusions that have a disparate impact against those with a disability. *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020). *See also, Payan v. L.A. Cmty. College Dist.*, 11 F.4th 729 (9th Cir. 2021).

170. The nature of the benefit at issue in this case is access to medical treatment necessary to address the needs of Regence’s insureds who are hearing disabled. For the vast majority of these disabled insureds, a hearing aid and associated care is the critical benefit they require to ameliorate their medical condition. It is also the benefit excluded by Regence in its design of benefits. Put simply, Regence discriminates against them by eliminating coverage of the hearing care that is critical to their health.

171. Based on information and belief, Regence’s Exclusion remained in its health plans until after this litigation was filed, simply because it had always been there. Regence did not conduct a medical necessity analysis to determine whether there is a medical or scientific basis for the Exclusion before this litigation. Rather, the Exclusion was the product of long-standing, unexamined disability-based prejudice that had been in place since Regence began offering coverage. Regence failed to reexamine the Exclusion to determine if there was any non-discriminatory basis for it, when the Affordable Care Act was enacted, and through the filing of this litigation. It remains in place in some of Regence’s health plans today without any clinical justification.

172. Regence's disabled insureds were denied meaningful access to the coverage that they require to treat their disability – hearing aids – under Regence's discriminatory design of its health benefits policy. At all relevant times, Regence's policies excluded coverage for hearing aids and associated care. Regence, however, explicitly provided coverage for all other forms of medically necessary prosthetics. Dkt. No. 32-1, p. 13 of 91; p. 45 of 91. Under Washington law, a hearing aid is a prosthetic device. RCW 18.35.010(12). Yet, it was excluded by Regence in its policies, impacting its hearing disabled insureds in a targeted and unique way. The hearing aid exclusion does not uniformly affect all Regence's insureds; rather, it only affects those hearing disabled insureds who need hearing aids, a prosthetic that would be covered on equal footing with most other prosthetics and durable medical equipment “but for” Regence's benefit design that excludes them.

173. Regence's decision to draft and enforce policy terms that exclude hearing aids for its hearing disabled insureds was an inherently intentional act. At minimum, the exclusion of hearing aids and related treatment – a proven medical intervention to treat the hearing disabled – was undertaken with deliberate indifference to the needs of this population.

174. Regence's exclusion of hearing aids disproportionately affects people with hearing disabilities who required, in order to overcome limitations to substantial life activities, access to hearing aids. The exclusion had the effect of systematically excluding people with disabling hearing loss from obtaining the health insurance benefits that they require and to which they are entitled.

D. Regence Intentionally Discriminated Against Disabled Insureds.

175. Regence utilizes an internal process to evaluate whether a medical service should be covered or excluded. The review, termed a “technology assessment process,” examines five elements: (1) the technology must have final approval from the

1 appropriate government regulatory bodies; (2) the scientific evidence must permit
2 conclusions concerning the effect of the technology on health outcomes; (3) the
3 technology must improve the net health outcomes; (4) the technology must be as
4 beneficial as any established alternatives; and (5) the improvement must be attainable
5 outside of the investigational settings. See [https://blue.regence.com](https://blue.regence.com/trgmedpol/intro/index.html)
6 [/trgmedpol/intro/index.html](https://blue.regence.com/trgmedpol/intro/index.html) (last visited 2/17/22). If a service or supply meets these
7 requirements, then it is eligible for coverage unless the policy specifically provides
8 otherwise. *Id.*

9 176. Hearing aids for the hearing disabled meet all five requirements of
10 Regence's technology assessment process. Hearing aids to treat the hearing disabled
11 have final approval from the government, the scientific evidence uniformly and
12 unequivocally supports their use to ameliorate hearing loss, they improve net health
13 outcomes, they are the most beneficial intervention for the vast majority of the hearing
14 disabled and the benefit is not limited to investigational settings. This is likely why
15 Regence announced it would cover hearing aids and related treatment in some (but not
16 all) of its health plans.

17 177. Despite the fact that hearing aids would be eligible for coverage under
18 Regence's own technology review process, Regence continues to enforce the Exclusion
19 which overrides its process for determining medically appropriate health care. The
20 enforcement of the Exclusion led Regence to deny coverage for a service or supply that
21 would otherwise be covered as medically appropriate under its own review process. See
22 <https://blue.regence.com/trgmedpol/intro/index.html> ("To the extend there are any
23 conflicts between medical policy guidelines and applicable contract language, the
24 contract language takes precedence.") (last visited 2/17/22).

178. Regence's decision to exclude hearing aids was not based upon a medical or scientific analysis of the effectiveness of the intervention. Regence never concluded that hearing aids were not clinically effective or not medically necessary.

179. Exclusions related to conditions protected by the anti-discrimination protections of the law are only proper if "[s]cientific or medical reasons can justify distinctions based on the grounds enumerated in Section 1557." *See* 81 Fed. Reg. 31405; 87 Fed. Reg. 47873-74. Regence had no scientific or medical reason to deny coverage of hearing aids to the hearing disabled. No medical review concluded that hearing aids were not effective, warranted and necessary for its hearing disabled insureds.

180. This discriminatory decision directly resulted in Regence retaining money that it otherwise would have been required to pay to cover medically necessary and appropriate medical services and equipment for disabled insureds. Regence made this calculus as part of its underwriting process and decided that its desire to retain money outweighed the medical needs of its insureds with disabling hearing loss.

181. As a result, the design and administration of the exclusion on hearing aids was an intentional choice or, at the very least, the result of deliberate indifference to the effect it would have on its insureds with disabling hearing loss.

COUNT II – VIOLATIONS OF WASHINGTON LAW AGAINST DISCRIMINATION

182. RCW 48.43.0128 provides that a health carrier such as Regence is prohibited from "[i]n its benefit design or implementation of its benefit design, discriminat[ing] against individuals because of ... present or predicted disability. ..." A violation of RCW 48.43.0128 is directly subject to Washington's Law Against Discrimination.

183. The Washington Law Against Discrimination explicitly recognizes that "[t]he right to be free from discrimination because of ...the presence of any sensory ... disability...is recognized as and declared a civil right. This right shall include, but not be

1 limited to ...[t]he right to engage in insurance transactions...without discrimination.”
 2 RCW 49.69.030 Accordingly, a health insurer that applies a benefit design that
 3 discriminates on the basis of a disability directly violates the Washington Law Against
 4 Discrimination.

5 184. The definition of “disability” under Washington law is far broader than the
 6 ADA definition. *See* RCW 49.60.040(7)(a) (“Disability means the presence of a sensory,
 7 mental or physical impairment that: (i) [i]s medically cognizable or diagnosable; or
 8 (ii) [e]xists as a record or history; or (iii) [i]s perceived to exist whether or not it exists in
 9 fact.”). Under Washington law, a diagnosis of hearing loss is always a “disability”
 10 because it is a physiological disorder or condition that affects the body systems listed in
 11 RCW 49.60.040(7)(c)(i). *See Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 617,
 12 444 P.3d 606 (2019).

13 185. The WLAD must be liberally construed to advance its purpose of
 14 “eradicate[ing] discrimination.” *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 852, 434
 15 P.3d 39, 41 (2019). “Denial or deprivation of services on the basis of one’s protected class
 16 is an affront to personal dignity.” *Id.* at 855.

17 186. Moreover, Washington courts recognize the “inherent difficulty a plaintiff
 18 faces in making out a claim of perceived disability discrimination” at the pleading stage.
 19 *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 794, 358 P.3d 464, 473 (2015).

20 187. Here, the trigger for the application of the Exclusion is exclusively the
 21 submission of a claim with a diagnostic code for hearing loss, together with service or
 22 device codes associated with hearing aids. In other words, the Exclusion is based on the
 23 presence of a diagnosis with hearing loss that requires treatment with a hearing aid. As
 24 described above, the Exclusion affects only or nearly only insureds with hearing
 25 disabilities. In sum, the Exclusion turns exclusively on the presence of a hearing
 26 disability.

1 188. The WLAD establishes causes of action for both disparate treatment and
2 disparate impact in employment. *See e.g., Taylor v. Burlington N. R.R. Holdings, Inc.*, 193
3 Wn.2d 611, 615, 444 P.3d 606, 608 (2019); *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 500,
4 325 P.3d 193, 202 (2014).

5 189. Disparate treatment disability discrimination in employment is established
6 if an employer refuses to hire someone due to an actual or perceived disability, and the
7 applicant is able to perform the job. *Taylor*, 193 Wn.2d at 615.

8 190. Disparate impact disability discrimination in employment is demonstrated
9 when a facially neutral employment practice that falls more harshly on a protected class.
10 *Kumar*, 180 Wn.2d at 500.

11 191. Similarly, to establish a *prima facie* claim of discrimination in a place of
12 public accommodation, a plaintiff must show that disabled persons are not provided
13 services comparable to those provided to non-disabled persons and that
14 the disability was a substantial factor causing the discrimination. *See Fell v. Spokane*
15 *Transit Auth.*, 128 Wn. 2d 618, 637, 911 P.2d 1319 (Wash. 1996).

16 192. No Washington case establishes the legal standard for review of allegations
17 of disability discrimination in the design and administration of health insurance,
18 pursuant to the WLAD, RCW 48.30.300 and RCW 48.43.0128.

19 193. Nonetheless, under both the disability discrimination standard for
20 employment or public accommodation, Regence has discriminated against Plaintiffs and
21 the proposed class.

22 194. Specifically, the Exclusion eliminates the medically effective durable
23 medical equipment and related outpatient medical services needed to treat the vast
24 majority of hearing disabilities. Thus, hearing disabled insureds do not have benefits
25 comparable to those provided to non-disabled persons since the Exclusions eliminate all
26 coverage of a medically necessary treatment that is needed uniquely by hearing disabled

persons. Moreover, Regence undertook no evaluation of the service and its medical efficacy before administering the Exclusion. Its decision to continue to administer the historic exclusion is not based upon a neutral non-discriminatory reason.

195. Regence designed a benefit plan that provides coverage for the hearing-related needs of insureds with no hearing loss (*i.e.*, screenings and diagnostic exams), but excludes coverage of the medically necessary care for the vast majority of its insureds with disabling hearing loss. For insureds with hearing loss, the only coverage available to treat their medical condition is a cochlear implant. This coverage would only provide benefits to about 5.5% of the total population of individuals with bilateral hearing loss. Dkt. No. 32-2, p. 2. The exclusion of hearing aids is a benefit design that uniquely targets and discriminates against those with hearing loss.

196. Plaintiffs and the class are entitled to remedies under the Washington Law Against Discrimination, including injunctive relief requiring reprocessing of claims, actual damages, attorney fees, and all other appropriate remedies permitted under RCW 49.60.030(2).

COUNT III – CONSUMER PROTECTION ACT VIOLATIONS

197. Regence’s exclusion of hearing aids in its benefit design constitutes a violation of Washington’s Consumer Protection Act, RCW 19.86, *et seq.* All of the elements of a CPA claim are present here: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) that affects the public interest, (4) injury to property, and (5) causation.

198. Regence’s exclusion of hearing aids is an unfair or deceptive act or practice because it unlawfully discriminates against its insureds with hearing loss, a disability under Washington law. Specifically, Regence violated RCW 48.43.0128 because it drafted and implemented a benefit design that “discriminates against individuals because of their ... present or predicted disability ... or other health conditions.” The

1 exclusion of hearing aids only affects those with hearing loss, which is a disability under
 2 RCW 49.60.040(7)(a). This conduct is defined as “unfair discrimination” under
 3 RCW 48.30.300. It is therefore a *per se* violation of the CPA. Regence’s exclusion of
 4 hearing aids also constitutes an unfair or deceptive act or practice because discrimination
 5 against the disabled, including discrimination in the design of health benefits, is in
 6 violation of the public interest.

7 199. Regence is engaged in the business of insurance, which is involved in trade
 8 and commerce that affects the public interest. RCW 48.01.030.

9 200. Plaintiffs and the class have sustained injuries to their property that were
 10 caused by Regence’s exclusion, including having to pay for hearing aids out of pocket
 11 when insurance coverage should have been provided.

12 201. Plaintiffs and the class are entitled to damages, treble damages and
 13 attorney's fees and costs because of Regence’s violations of the CPA.

14 **COUNT IV – DECLARATORY RELIEF**

15 202. RCW 48.43.0128 renders Regence’s exclusion of hearing aids null and void,
 16 since it is a form of benefit design discrimination targeted at disabled individuals with
 17 hearing loss. Specifically, since the Plaintiffs are disabled under Washington law, and
 18 Regence’s health plans are subject to RCW 48.43.0128, the exclusion discriminates
 19 against Plaintiffs since Plaintiffs’ disability is a “substantial factor” in causing the
 20 exclusion of coverage. *See Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319
 21 (1996).

22 203. Plaintiffs and the class are entitled to declaratory relief as to the meaning
 23 and effect of RCW48.43.0128 and Washington law on their Regence health care coverage.

24 **COUNT V – INJUNCTIVE RELIEF**

25 204. Regence’s failure to comply with the law also justifies entry of an
 26 injunction prohibiting Regence from further violations of the law and requiring Regence

1 to solicit and process claims for hearing aids that were not submitted for payment due
2 to its policy, and reprocess and pay claims that were wrongfully denied under its
3 policies.

4 **VII. DEMAND FOR RELIEF**

5 WHEREFORE, Plaintiffs request that this Court:

6 1. Certify this case as a class action; designate the named Plaintiffs as class
7 representatives; and designate SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC, Eleanor
8 Hamburger, Richard E. Spoonemore, and John Waldo (of counsel) as class counsel;

9 2. Enter judgment on behalf of the Plaintiffs and the class due to Regence's
10 discrimination on the basis of disability under both Section 1557 and RCW 48.43.0128;

11 3. Declare that Regence may not apply the hearing aid exclusion, and that its
12 past exclusions of hearing aids was unlawful discrimination;

13 4. Enjoin Regence from applying the same or similar hearing aid exclusions
14 now and in the future;

15 5. Equitably toll the deadlines in the Regence plans since October 2014 related
16 to claims for hearing aids and related treatment;

17 6. Order retrospective injunctive relief requiring Regence to reprocess past
18 claims for hearing aids and related treatment without application of the exclusion;

19 7. Enter judgment in favor of Plaintiffs and the class for damages in an
20 amount to be proven at trial due to Regence's violation of Section 1557 of the Affordable
21 Care Act and RCW 48.43.0128 of the Washington Insurance Code, and violations of the
22 WLAD and CPA, including actual damages, treble damages, costs and attorney's fees;
23 and

24 8. Award such other relief as is just and proper.
25
26

1 DATED: April 6, 2023.

2 SIRIANNI YOUTZ
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16 *Attorneys for Plaintiffs*

Exhibit A



✔ "Financial totals" includes final claim amounts only. (It does not include original adjusted claim amounts.)

Financial totals (1 claim)	
Amount billed	\$412.00
Your discounted rate	\$412.00
Amount we paid	\$329.60
Amount you may owe	\$82.40
Applies to my deductible	\$0.00
Applies to out-of-pocket max	\$82.40

Claim (1 of 1)

Provider	
Provider name	Virginia Mason Medical Center
Member	
Member name	E S
Birthdate	2011
Member ID	5907
Group number	10018298
Group name	
Account with provider	37004792A1-1
Claim	
Claim number	E52043691900
Date of service	10/29/2020
Date received	11/03/2020
Date processed	11/06/2020
Status	Completed
Summary	
Amount billed	\$412.00
Your discounted rate	\$412.00
Amount we paid	\$329.60
Amount you may owe	\$82.40
What this means for my plan	
Applies to my deductible	\$0.00
Copay	\$0.00
Coinsurance	\$82.40
Applies to out-of-pocket max	\$82.40
Other insurance	\$0.00
Your provider submitted (Line 1 of 2)	
Date of service	10/29/2020

Type of service	Medical
Diagnosis code	H9011
Diagnosis description	Conductive hearing loss, unilateral, right ear, with unre- stricted hearing on the contralateral side
Procedure code	92557
Charge by provider	\$299.00
Not covered	\$0.00
Insurance allowed	\$412.00
Insurance paid	\$329.60
Deductible	\$0.00
Copay	\$0.00
Coinsurance	\$82.40
Other insurance	\$0.00
Amount you may owe	\$82.40
Your provider submitted (Line 2 of 2)	
Date of service	10/29/2020
Type of service	Medical
Diagnosis code	H9011
Diagnosis description	Conductive hearing loss, unilateral, right ear, with unre- stricted hearing on the contralateral side
Procedure code	9256752
Charge by provider	\$113.00
Not covered	\$0.00
Insurance allowed	\$0.00
Insurance paid	\$0.00
Deductible	\$0.00
Copay	\$0.00
Coinsurance	\$0.00
Other insurance	\$0.00
Amount you may owe	\$0.00