

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:20-cv-00740
JUDGE CHAMBERS

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTH PLAN OF WEST VIRGINIA, INC.,

Defendants.

**MOTION TO CERTIFY APPEAL OF THE COURT'S JUNE 28, 2021
MEMORANDUM OPINION AND ORDER**

The Health Plan of West Virginia, Inc. ("THP"), by counsel, moves the Court to certify its June 28, 2021 Memorandum Opinion and Order (ECF No. 63) for immediate appeal pursuant to 28 U.S.C. § 1292(b). As set forth in more detail in the accompanying *Memorandum of Law in Support of Motion to Certify Appeal of the Court's June 28, 2021 Memorandum Opinion and Order*, certification is appropriate because:

1. the only claim against THP in this case arises under federal law for alleged discrimination in violation of Section 1557 of the Patient Protection and Affordable Care Act (the “ACA”), 42 U.S.C. § 18116 (Count Two);

2. whether the Plaintiffs have stated a valid claim against THP turns on the meaning of the phrase “health program or activity” as used in Section 1557 of the ACA, which is a controlling question of law as to the Plaintiffs’ sole claim against THP;

3. as the Court acknowledged in its June 28, 2021 Memorandum Opinion and Order, the meaning of this phrase “has a sharply disputed administrative history.” The current implementing regulations for Section 1557 adopt an interpretation of this phrase that would bar the Plaintiffs’ sole claim against THP. The Court declined to defer to the agency’s interpretation, finding Section 1557 unambiguous; however, the Court acknowledged in its opinion that at least one other district court in this circuit has reached the opposite conclusion, *see Callum v. CVS Health Corp.*, 137 F.Supp.3d 817 (D.S.C. 2015). Accordingly, THP believes there is substantial ground for difference of opinion as to the meaning and scope of Section 1557, and thus whether the Court should have granted THP’s motion to dismiss; and

4. permitting THP to immediately appeal the Court’s decision on this issue will materially advance the ultimate termination of this litigation by allowing for early resolution of the Plaintiffs’ claims against THP.

For the reasons set forth above and in more detail in its accompanying memorandum of law, THP respectfully requests that the Court grant this motion and certify its June 28, 2021 Memorandum Opinion and Order (ECF No. 63) for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Dated: September 1, 2021.

/s/ Aaron C. Boone

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2021, I electronically filed the foregoing
document with the Clerk of the Court using the CM/ECF system, which will send notification of
such filing to the following CM/ECF participants:

Walt Auvil, Esquire
Anna P. Prakash, Esquire
Nicole J. Schladt, Esquire
Sasha Buchert, Esquire
Avatara Smith-Carrington, Esquire
Tara L. Borelli, Esquire
Carl S. Charles, Esquire
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Perry W. Oxley, Esquire
David E. Rich, Esquire
Eric D. Salyers, Esquire
Christopher K. Weed, Esquire

/s/ Aaron C. Boone _____
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Aaron C. Boone