

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia
Pritchard and Nolle Pritchard on his own behalf
and on behalf of similarly situated others; and
PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR CROSS-MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO STRIKE

**Reply Due, Per Dkt. No. 90:
November 21, 2022**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION

1
2 “[A]ny health program or activity, *any part of which* is receiving federal financial
3 assistance” may not discriminate in any part of their operations. *See* 42 U.S.C. §18116(a)
4 (emphasis added). Every court to consider this issue has confirmed that once Section 1557
5 applies, it applies to all of the covered entity’s operations. *See T.S. v. Heart of Cardon, LLC*, 43
6 F.4th 737, 743 (7th Cir. 2022); *Doe v. CVS Pharm., Inc.*, 2022 U.S. Dist. LEXIS 139684, at *27
7 (N.D. Cal. Aug. 5, 2022); *Fain v. Crouch*, 545 F.Supp.3d 338, 343 (S.D.W. Va. 2021).

8 Nonetheless, Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) asserts that in its
9 operations where it is a third-party administrator (“TPA”), it should be permitted to administer
10 discriminatory exclusions of gender-affirming care (the “Exclusions”). It raises four defenses:
11 **First**, BCBSIL argues that its administration of the Exclusions is not discrimination because
12 (a) the 2020 Rules “allow transgender exclusions for any reason” (Dkt. 118 at 7), and (b) there
13 is “controversy” related to gender-affirming care (*id.* at 19–21). **Second**, BCBSIL claims that it
14 is not liable for any discrimination because the ultimate responsibility for the Exclusions rests
15 with the contracting employer (*id.* at 4–7). **Third**, BCBSIL also asserts it is not a “health program
16 or activity” subject in all activities to Section 1557 because it is a health insurer (*id.* at 17–19).
17 And **fourth**, BCBSIL argues that since Plaintiff Pritchard’s employer, Catholic Health Initiatives
18 (“CHI”), may have a “sincerely-held religious belief” opposing gender-affirming care, its
19 administration of the Exclusions must be permitted pursuant to the Religious Freedom and
20 Restoration Act (“RFRA”) (*id.* at 9–17). None of these defenses have merit.

21 This case poses a simple question: Is BCBSIL liable for discrimination based on sex
22 when it **administers** Exclusions of gender-affirming care in ERISA self-funded plans? The
23 answer is an unqualified **yes**. Because BCBSIL receives federal financial assistance—a fact that
24 is undisputed—BCBSIL cannot discriminate based on sex in any part of its operations, including
25 in its administration of health plans as a TPA.

II. UNDISPUTED FACTS

1 BCBSIL does not dispute and therefore concedes that:

2 (1) C.P. received treatment for gender dysphoria that would have been covered as
3 medically necessary under the relevant BCBSIL medical policy *but for* its administration of the
4 Exclusions. *See* Dkt. 84-1 at 52:19–53:9, 60:5–62:3.

5 (2) BCBSIL is a health entity that receives federal financial assistance that subjects at
6 least some of its operations to Section 1557, 42 U.S.C. §18116(a). *Id.* at 11:5–9; Dkt. 84-2 at
7 9:2–12; 16:20–18:9; 18:16–21:8.

8 (3) BCBSIL will administer the Exclusions upon the request of employers, without any
9 proffered legal, religious, or other justification. BCBSIL will administer the Exclusion even if an
10 employer states that it wants the Exclusion for overtly discriminatory reasons. Dkt. 84-2 at
11 28:19–29:17; Dkt. 84-6 at 72:21–73:7, 165:8–12; Dkt. 84-9 at 28:14–17.

12 (4) BCBSIL administers the Exclusions in the same standard manner, regardless of
13 differences in the specific plan language. BCBSIL identifies claims submitted with a diagnostic
14 code for “gender dysphoria” and excludes the identified services (whether in full or only “related”
15 to surgery), when those same services would be covered when medically necessary for cisgender
16 people. Dkt. 84-6 at 69:8–71:4; *see, e.g.*, Dkt. 84-9 at 22:2–24:11.

17 (5) BCBSIL is a secular entity and is not the agent of CHI or any other employer-client.
18 Dkt. 41, ¶14; Dkt. 84-15, §14.1; Dkt. 97-1 at 38:4–21.

19 (6) BCBSIL does not dispute that C.P. and his parents incurred \$12,122.50 in uncovered
20 medical expenses for gender-affirming care that would have been covered but for the
21 administration of the Exclusions. Dkt. 97-19 at 11.

III. ARGUMENT

A. The Exclusions Discriminate Based on Sex and Transgender Status.

24 Categorical exclusions of gender-affirming care discriminate on the basis of sex and
25 violate Section 1557. *See, e.g., Kadel v. Folwell*, 2022 U.S. Dist. LEXIS 103780, at *64
26

1 (M.D.N.C. June 10, 2022) (as corrected Aug. 10, 2022); *Fain v. Crouch*, 2022 U.S. Dist. LEXIS
 2 137084, at *37 (S.D. W. Va. Aug. 2, 2022); *Fletcher v. Alaska*, 443 F. Supp.3d 1024, 1027, 1030
 3 (D. Alaska 2020); *Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp.3d 1001, 1019–22
 4 (W.D. Wis. 2019); *Boyden v. Conlin*, 341 F. Supp.3d 979, 1002–03 (W.D. Wis. 2018). *Cf. Brandt*
 5 *v. Rutledge*, 47 F.4th 661, *13–18 (8th Cir. 2022) (finding a state law banning gender-affirming
 6 care for minors discriminates based on sex). And the Ninth Circuit has already held that the
 7 Supreme Court's interpretation of what sex discrimination encompasses, as articulated in *Bostock*
 8 *v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020), applies in the context of gender-
 9 affirming care exclusions and Section 1557. *See Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022)
 10 (holding *Bostock's* reasoning applies to Section 1557 claims related to gender-affirming care).

11 **1. The 2020 Rule does not authorize categorical exclusions.¹**

12 Ignoring Supreme Court and Ninth Circuit precedent, BCBSIL argues that an unidentified
 13 “2020 Rule allows categorical exclusions of transgender related services for any reason.”
 14 Dkt. 118 at 7. BCBSIL has yet to reveal the specific regulation upon which it relies upon for this
 15 proposition because *it does not exist*. As argued previously (Dkt. 20 at 17), the most that anybody
 16 can glean from the operative text is that the 2020 HHS rules are *silent* on the legality of
 17 categorical exclusions related to gender dysphoria. *See* 81 Fed. Reg. 37,244 (referencing the 2020
 18 version of 45 C.F.R. §92.2).

19 Because Section 1557's statutory text is clear and there is no operative regulatory
 20 language in the 2020 Rule on this issue, the Court should reject BCBSIL's attempt to
 21 operationalize preamble language that BCBSIL misconstrues. “[T]he preamble ... itself lacks the
 22 force and effect of law.” *Saint Francis Med. Ctr. v. Azar*, 894 F.3d 290, 297 (D.C. Cir. 2018).
 23 Moreover, the 2020 Rule did not authorize categorical exclusions. HHS stated in the preamble
 24

25 ¹ BCBSIL re-runs this failed argument. *See* Dkt. 17 at 8–11. The Court handily dispensed with it in the Order
 26 denying BCBSIL's Motion to Dismiss. Dkt. 23 at 8:12–20.

1 that “[w]ith respect to coverage for gender transition services, the Department notes that this final
2 rule makes no changes to what has been the status quo,” 85 Fed. Reg. 37,199, which includes
3 courts holding gender-affirming care categorical exclusions to violate Section 1557—before,
4 during, and after the 2020 Rule. *See, e.g., Fain*, 2022 U.S. Dist. LEXIS 137084, at *37; *Boyden*
5 *v. Conlin*, 341 F. Supp.3d 979 (W.D. Wis. 2018); *Cruz v. Zucker*, 116 F. Supp.3d 334, 348
6 (S.D.N.Y. 2015). As HHS acknowledged, the 2020 Rule’s elimination of a regulatory provision
7 “would not preclude application of [a court’s] construction.” 85 Fed. Reg. 37,168.

8 **2. No *Chevron* deference is required since Section 1557’s text is clear.**

9 This Court got it right when concluding that the plain language of Section 1557 governs
10 this dispute without resort to HHS rules. Dkt. 23 at 8 (“A claim of discrimination in violation of
11 Section 1557 does not depend on an HHS rule.”). *T.S.*, 43 F.4th at 743. This is consistent with
12 *Chevron*, which requires a court to consider the “plain meaning” of a statute as its first step. *King*
13 *v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014) (quoting *Chevron*, 467 U.S. at 842–43), *aff’d*, 576
14 U.S. 473. To discern the plain meaning, courts consider “the plain language and context of the
15 most relevant statutory sections, the context and structure of related provisions, and the
16 legislative history of the Act.” *Id.* at 372. Each of these three factors points to the conclusion that
17 categorical exclusions of gender-affirming care violate Section 1557. *See, e.g.,* Dkt. 20 at 11–17;
18 Dkt. 96 at 17–21.

19 **3. The Parties agree gender-affirming care can be medically necessary.**

20 BCBSIL claims the efficacy of gender-affirming care is in “dispute” and that there is no
21 medical consensus regarding such care. Dkt. 118 at 19. This “dispute” is neither genuine or
22 material.

23 *First*, BCBSIL and Plaintiffs both agree that gender-affirming care can be medically
24 necessary and effective, as reflected in BCBSIL’s Medical Policy. *See* Dkt. 84-4; Dkt. 84-1 at
25
26

1 52:6–13; Dkt. 84-5 at 5; Dkt. 84-7 at 5. BCBSIL cannot ignore the undisputed the evidence from
2 its own Rule 30(b)(6) witness, medical directors, and medical policy.

3 **Second**, Plaintiffs need not separately establish whether gender-affirming care can be
4 medically necessary, since BCBSIL’s own Medical Policy has already done so. *See* Dkt. 118 at
5 19–21. If an injunction is entered prohibiting the administration of the Exclusions, BCBSIL must
6 evaluate the medical necessity of claims for gender-affirming care under its *existing* policy.
7 Enjoining the administration of the categorical Exclusions “opens the door” to a genuine medical
8 necessity determination by BCBSIL according to its already established standards.

9 **Third**, and most importantly, BCBSIL cannot use its hired gun expert to fabricate a
10 dispute about the medical consensus where there is none. As BCBSIL’s Dr. Reed testified, “the
11 clinical evidence is what it is.” Dkt. 84-1 at 39:15–19. Every major medical association
12 (including the American Academy of Pediatrics, American Medical Association, American
13 Psychiatric Association, American Psychological Association, and Endocrine Society) agrees
14 that gender-affirming care can be medically necessary and effective. *See* Ettner ¶¶30, 34, 43;
15 Karasic ¶43; Schechter ¶27; Dkts. 97-6, 97-7, 97-8. So have many courts, including the Ninth
16 Circuit. *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019).

17 That BCBSIL proffered a single “expert” who holds contrary and aberrant views does not
18 negate the well-established medical consensus regarding gender-affirming care that even
19 BCBSIL accepts (outside of this litigation). *See* Dkt. 84-4. Importantly, neither BCBSIL nor its
20 “expert” offer any “competing evidence-based standards that are accepted by any nationally or
21 internationally recognized medical professional groups.” *Edmo*, 935 F.3d at 769. The subjective
22 opinion of BCBSIL’s expert cannot create a genuine dispute of material fact by disagreeing with
23 (a) BCBSIL’s own Medical Policy, Rule 30(b)(6) witness, and medical directors; (b) the Ninth
24 Circuit and numerous other courts; and (c) the overwhelming consensus among all major medical
25 organizations.

1 **Fourth**, BCBSIL continues to argue there was something deficient in the gender-
 2 affirming care that C.P. received. *See* Dkt. 118 at 20–21. ***This is demonstrably false.*** *See* Dkt. 96
 3 at 24–25; Dkt. 114 at 13–15. ***It is also irrelevant.*** As confirmed by BCBSIL’s Rule 30(b)(6)
 4 witness, Dr. Reed, C.P.’s treatment met the medical necessity standards for coverage under
 5 BCBSIL’s medical policy. Dkt. 84-1 at 52:19–53:9, 60:5–62:3. But for BCBSIL’s administration
 6 of the Exclusion, C.P.’s gender-affirming care would have been covered. Indeed, BCBSIL
 7 covered C.P.’s first Vantas Implant as medically necessary.

8 Extensive evidence from C.P.’s treating medical providers demonstrates the medical
 9 necessity of C.P.’s gender-affirming care. *See* Dkt. 97-3; Dkt. 97-4; Dkt. 97-5. Additionally, two
 10 experts further reviewed C.P.’s records and evaluated him to confirm that the treatment was
 11 medically necessary and appropriate. Dkt. 97-6, ¶¶81–83; Dkt. 97-7, ¶¶76–77. And, while there
 12 is no meaningful dispute that C.P.’s parents and C.P. provided informed consent and assent for
 13 his care (Dkt. 118 at 21),² issues of “informed consent” are irrelevant here. This case is not about
 14 whether C.P. should have received the gender-affirming care. Rather it is about whether BCBSIL,
 15 as an entity subject to Section 1557, may administer a categorical exclusion of such care.

16 **B. BCBSIL is Liable for Sex Discrimination When Acting as a TPA.**

17 BCBSIL argues that since it was not the “source” of the benefit design for the Exclusion
 18 in C.P.’s plan, it is not liable for its discriminatory ***administration*** of the Exclusions.³ Dkt. 118
 19 at 4; Dkt. 114 at 14. The sole basis for BCBSIL’s argument is the discussion of the role of TPAs
 20
 21

22
 23 ² None of BCBSIL Medical Policy, the Endocrine Society Guidelines or the WPATH standards of care require
 24 an evaluation by a psychiatrist before proceeding with gender-affirming care. *See* Dkt. 84-4; *see e.g.*, Dkt. 97-9, p.
 25 37 of 261, Statement 5.1.c. BCBSIL cites to no authority or peer-reviewed literature for the claim that gender
 26 dysphoria diagnosis can only be made by a psychiatrist because there is none. *See* Dkt. 114 at 14–15.

³ Whether the Exclusion was authored solely by CHI or it is simply a “one-off” from BCBSIL’s standard
 Exclusion is disputed, but ultimately, immaterial for summary judgment. Dkt. 86-17, Addendum A at 13; Dkt. 84-6
 at 32:5–15; 34:16–22, 41:12–24; 44:18–45:24; Dkt. 84-9 at 25:4–27:15.

1 in the preamble to HHS rulemaking on Section 1557. *See* Dkt. 118 at 4, *citing to* 81 Fed. Reg.
2 31,432. BCBSIL’s argument fails for at least the following six reasons:

3 **First**, there is no “TPA” exception to Section 1557. By its plain terms, a covered entity
4 cannot discriminate in any of its operations—even when acting as a TPA. *See* 42 U.S.C.
5 §18116(a); *T.S.*, 43 F.4th at 743 (a covered entity cannot discriminate in any of its operations).

6 **Second**, not only is preamble language generally unenforceable (*see St. Francis Med.*
7 *Ctr.*, 894 F.3d at 297; *Wildearth Guardians v. Provencio*, 923 F.3d 655, 667 (9th Cir. 2019);
8 *Walker v. Azar*, 480 F.Supp.3d 417, 429 (E.D.N.Y. 2020)), but **the preamble supports Plaintiffs’**
9 **argument**. It states that, “[w]here the alleged discrimination relates to the administration of the
10 plan by a covered third party administrator, OCR will process the complaint against the third
11 party administrator because it is the entity responsible for the decision or other action being
12 challenged in the complaint.” 87 Fed. Reg. 47,877.

13 **Third**, BCBSIL’s contention that it is not responsible for the **administration** of the
14 Exclusion in the CHI plan is indisputably false. As this Court already found, “Blue Cross’s Fed.
15 R. Civ. P. 30(b)(6) witness testified that it administers exclusions consistently. It reviews claims
16 to determine if the ‘diagnosis code’ is for ‘gender dysphoria’ or ‘gender reassignment’ and
17 examines the ‘procedural code’ to see if the claim is for gender reassignment treatment.” Dkt. 113
18 at 9. BCBSIL’s standard administration red-flags gender-affirming care for denial based on the
19 diagnostic and procedural code. Moreover, while CHI asked to review the BCBSIL denied claims
20 related to gender-affirming surgery (likely so it could prepare for any resulting employee
21 complaints), CHI never changed the denials of the claims that occurred due to BCBSIL’s
22 standard administration. Dkt. 100-4 at 74:17–75:5. And, if CHI reversed any of BCBSIL’s
23 determinations, it would jeopardize CHI’s claim to have “delegated discretionary authority” to
24 BCBSIL in the plan. *See Jebian v. Hewlett-Packard Co. Empl. Benefits Org. Income Prot. Plan*,
25 349 F.3d 1098, 1105 (9th Cir. 2003); *see also* Dkt. 84-13 at 117. BCBSIL does not dispute it.
26

1 **Fourth**, BCBSIL’s contention is nonsensical. BCBSIL cannot be absolved of statutory
 2 liability imposed by Congress through a **preamble in a proposed rule**. See *Louisiana Pub. Serv.*
 3 *Comm’n v. FCC*, 476 U.S. 355, 376 (1986) (“[O]nly Congress can rewrite [a] statute”).

4 **Fifth**, a TPA must always obey federal law, even if doing so conflicts with an ERISA
 5 plan’s terms. See 29 U.S.C. §1144(d); *Doe v. United Behavioral Health*, 523 F.Supp.3d 1119,
 6 1127 (N.D. Cal. 2021) (TPA “cannot hide behind the plan terms” when federal law imposes
 7 “specific and independent duties” on the TPA). BCBSIL has no response to this argument and
 8 ignores *Doe* entirely. BCBSIL’s failure to respond to Plaintiffs’ argument amounts to “an
 9 admission that [Plaintiffs’] argument has merit.” *Lexington Ins. Co. v. Swanson*, 2007 U.S. Dist.
 10 LEXIS 37620, n.9 (W.D. Wash. May 23, 2007).

11 **Sixth**, courts have uniformly concluded that health entities that are subject to
 12 Section 1557 may be liable for discriminatory administration of benefits when acting as TPAs.
 13 “Nothing in Section 1557, explicitly or implicitly, suggests that TPAs are exempt from the
 14 statute’s nondiscrimination requirements.” *Tovar v. Essentia Health*, 342 F.Supp.3d 947, 956 (D.
 15 Minn. 2018); see also *Boyden*, 341 F.Supp.3d at 997.⁴

16 **C. BCBSIL is a “Covered Entity” Even in its TPA Activities.**

17 BCBSIL argues its TPA activities are not subject to Section 1557 because the 2020 Rule
 18 (1) excludes health insurance from the term “health program or activity” and (2) limits Section
 19 1557’s application to only the lines of business that receive federal financial assistance. Dkt. 118
 20 at 17–18. This argument was fully addressed in Plaintiffs’ Cross-Motion. See Dkt. 96 at 27–32.

21 BCBSIL argues the Court should adhere to 45 C.F.R. §92.3(b) (2020) because it was
 22 purportedly relied upon in *Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113, 1122 (D.N.D.

23
 24
 25 ⁴ BCBSIL misrepresents the Eighth Circuit decision affirming *Tovar*. See Dkt. 118 at 5–6 (citing *Tovar v.*
 26 *Essentia Health*, 857 F.3d 771, 780 (8th Cir. 2017)). The cited discussion occurs in Judge Benton’s **partial dissent**
 from the majority’s decision to hold the TPA liable for discriminatory administration. See *Tovar*, 857 F.3d at 780
 (Benton, J., concurring in part and dissenting in part).

1 2021), and is presently effective. *See* Dkt. 118 at 18, n.6. Not true. In *Religious Sisters*, the court
 2 did not adjudicate nor apply 45 C.F.R. §92.3; it simply found that under the regulation, the
 3 plaintiffs did not have standing. *See Religious Sisters*, 513 F.Supp.3d at 1136–37.⁵

4 While BCBSIL does not make a direct appeal to *Chevron* deference regarding this
 5 argument, no deference is due. *See* Dkt. 118 at 17–19. For one, the 2020 Rule cannot override
 6 the plain language and Congressional intent that Section 1557 apply to health insurers. *See*
 7 Dkt. 96 at 30 (*citing to Chevron*, 467 U.S. at 843, n.9). BCBSIL has no response to Plaintiffs’
 8 arguments regarding the plain language, Congressional intent, and statutory construction of the
 9 ACA. *See id.* at 27–32. “Given this context, ... ‘health program or activity’ under Section 1557
 10 necessarily includes health insurance issuers.” *Fain*, 545 F.Supp.3d at 342; *Schmitt*, 965 F.3d at
 11 948; *see, e.g., Briscoe v. Health Care Serv. Corp.*, 281 F.Supp.3d 725, 729–30 (N.D. Ill. 2017)
 12 (BCBSIL and other HCSC divisions are “within the ACA’s purview”). For another, the 2020
 13 Rule is arbitrary and capricious. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011). BCBSIL
 14 overlooks that the 2020 Rule’s interpretation would lead to arbitrary and absurd results. Based
 15 on BCBSIL’s argument for deference to the 2020 Rule, BCBSIL was liable for its sex
 16 discrimination under Section 1557 between 2016 and 2020 (when this case was filed and the
 17 2016 Rule was in effect), was not liable under Section 1557 between 2020 and now (during some
 18 of the pendency of this case), and will be liable once again when the 2022 Proposed Rule is
 19 finalized. Of course, that is not and cannot be the case. *See Encino Motorcars, LLC v. Navarro*,
 20 579 U.S. 211, 222 (2016) (An “unexplained inconsistency in agency policy is a reason for holding
 21 an interpretation to be an arbitrary and capricious change from agency practice”) (internal
 22 citations omitted). Indeed, existing litigation continues to challenge the 2020 Rule, including 45

23
 24
 25
 26 ⁵ The court in *Religious Sisters* concluded that the plaintiffs had standing based upon other aspects of the 2020
 rulemaking. *Id.*, 513 F.Supp.3d at 1140–41.

1 C.F.R. §92.3(b) (2020), as arbitrary and capricious, and inconsistent with the plain language of
 2 the ACA. *See Kadel*, 2022 U.S. Dist. LEXIS 103780, at *95 (citing cases).

3 **D. BCBSIL is Not Protected by the Religious Freedom and Restoration Act.**

4 **1. No governmental party is present.**

5 As this Court concluded, “RFRA provides relief against the government, but the
 6 government is not a party to this action.” Dkt. 23 at 9. On summary judgment, BCBSIL offers
 7 no evidence that any party is a governmental entity. This dooms BCBSIL’s RFRA defense. *See*
 8 *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 (9th Cir. 1999).

9 BCBSIL argues “that courts must read RFRA and Section 1557 in conjunction,” citing to
 10 *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383
 11 (2020). BCBSIL misconstrues *Little Sisters*. That case was a direct challenge to HHS rulemaking
 12 by a religious organization. *Id.* at 2370. It did not involve a dispute between two wholly private
 13 entities. *See id.* And *Little Sisters* was solely focused on the authority of an agency to issue
 14 rulemaking, not whether the activities of private entities constitute discrimination. The specific
 15 directive from the Supreme Court was for *HHS* to consider RFRA when interpreting
 16 Section 1557 for rulemaking purposes. *See id.* at 2383 (“our decisions all but instructed *the*
 17 *Departments* to consider RFRA going forward”) (emphasis added). It did not hold that RFRA
 18 applied to all disputes over Section 1557—even ones without any governmental party. The
 19 Supreme Court did not (and could not) unilaterally expand the scope of RFRA to apply to
 20 disputes solely between private entities.

21 BCBSIL’s hyperbolic claim that to limit RFRA to only litigation involving governmental
 22 parties would “eviscerate Congress’ intent” is plainly false. *See* Dkt. 118 at 11. *First*, the plain
 23 language of RFRA limits its applicability to only against the federal government. *See* 42 U.S.C.
 24 §2000bb-1(c). *Second*, case law around the country has limited RFRA disputes in a similar
 25 manner. *See, e.g., Listecky v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir.
 26

1 2015); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411–12 (6th Cir.
 2 2010).⁶ And *third*, BCBSIL identifies no evidence of any “Congressional intent” to apply RFRA
 3 more broadly. As the RFRA legislative history recounted in *Little Sisters* shows, Congress was
 4 focused on limiting **government activity**, not disputes between private parties. *See Little Sisters*,
 5 140 S. Ct. at 2383.

6 **2. BCBSIL cannot raise an employer’s religious claim.**

7 BCBSIL does not dispute that it is neither an entity with a “sincerely-held religious belief”
 8 nor an agent for such a religious entity. *See generally* Dkt. 118; Dkt. 41, ¶14; Dkt. 84-15, §14.1.
 9 As a result, there is no party in this litigation that has a religious belief that is subject to RFRA.
 10 *See* 42 U.S.C. §2000bb-1(c).

11 Nonetheless, BCBSIL argues that it can avoid liability for Section 1557 simply because
 12 one or more of its employers could find providing coverage for gender-affirming care “immoral,”
 13 citing to the Supreme Court’s decision in *Little Sisters*.⁷ Dkt. 118 at 14. BCBSIL is wrong again.
 14 That case addressed **HHS rulemaking**, not private discriminatory activity by TPAs. Covered
 15 entities that are subject to Section 1557 have an independent statutory duty to comply with anti-
 16 discrimination requirements in all of their activities—including when acting as a TPA. 42 U.S.C.
 17 §18116(a); *T.S. v. Heart of CarDon*, 2021 U.S. Dist. LEXIS 49119, at *27 (S.D. Ind. Mar. 16,
 18 2021) (“‘All operations’ means ‘all operations,’ after all”).

21 ⁶ BCBSIL attempts to distinguish these Court of Appeals decisions on the grounds that “none ... involves a
 22 statute that the courts and regulators have explicitly held must be read in conjunction with RFRA.” Dkt. 118 at 12.
 23 But RFRA applies to **all** federal laws unless Congress explicitly excludes the law from RFRA’s reach. 42 U.S.C.
 §2000bb-3(a), (b). The scope of RFRA is tempered by its application to only two types of parties: governmental
 entities and entities with sincerely held religious beliefs. 42 U.S.C. §2000bb-1(c). Neither are present here.

24 ⁷ The only source for the “sincerely held religious belief” of any employer served by BCBSIL is a **hearsay**
 25 statement in a letter from CHI’s counsel to Plaintiffs’ counsel. BCBSIL seeks to rely on the truth of what it asserts,
 26 which is classic hearsay. *See* Dkt. 118 at 16; Dkt. 87 at 8, *citing to* Dkt. 38-8; FRE 802. Even after Plaintiffs raised
 this issue (Dkt. 96 at 6, n.6), BCBSIL did not obtain a declaration from CHI or any other employer professing a
 “sincerely-held religious belief.” BCBSIL’s failure to do so is an indication that Ms. Pritchard’s workplace is likely
 part of the “for-profit” arm of CHI that is not eligible for a religious exemption. *See id.*

1 DATED: November 21, 2022.

2 SIRIANNI YOUTZ
3 SPOONEMORE HAMBURGER PLLC

4 /s/ Eleanor Hamburger

5 Eleanor Hamburger (WSBA #26478)
6 Daniel S. Gross (WSBA #23992)
7 3101 Western Avenue, Suite 350
8 Seattle, WA 98121
9 Tel. (206) 223-0303; Fax (206) 223-0246
10 Email: ehamburger@sylaw.com
11 dgross@sylaw.com

12 LAMBDA LEGAL DEFENSE AND
13 EDUCATION FUND, INC.

14 /s/ Omar Gonzalez-Pagan

15 Omar Gonzalez-Pagan, *pro hac vice*
16 120 Wall Street, 19th Floor
17 New York, NY 10005
18 Tel. (212) 809-8585; Fax (212) 809-0055
19 Email: ogonzalez-pagan@lambdalegal.org

20 Jennifer C. Pizer, *pro hac vice*
21 4221 Wilshire Boulevard, Suite 280
22 Los Angeles, CA 90010
23 Tel. (213) 382-7600; Fax (213) 351-6050
24 Email: jpizer@lambdalegal.org

25 *Attorneys for Plaintiffs*