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; and PATRICIA PRITCHARD, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, Defendant.	NO. 3:20-cv-06145-RJB PLAINTIFF C.P.'S MOTION FOR CLASS CERTIFICATION **Note on Motion Calendar: September 16, 2022**

CONFIDENTIAL – Filed Under Seal Pursuant to Protective Order (Dkt. No. 25)

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Table of Contents

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Table of Authorities

CASES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

STATUTES

RULES

TREATISES

OTHER AUTHORITIES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

I. INTRODUCTION

Plaintiff C.P., a transgender young man enrolled in a self-funded ERISA plan administered by Defendant Blue Cross Blue Shield of Illinois ("BCBSIL"), challenges BCBSIL's standard practice of administering categorical exclusions of gender-affirming care ("Exclusions") in the self-funded ERISA group health plans that it administers. BCBSIL, a "covered entity" under the Affordable Care Act's ("ACA") non-discrimination law (also known as "Section 1557"), asserts that it may administer such Exclusions at the request of its employer-customers, even though it is illegal for BCBSIL to do so in its own insured health plans. In essence, BCBSIL claims that it may engage in discrimination on behalf of someone else, even though BCBSIL is prohibited from doing so in its own programs. That is not what the ACA's non-discrimination law permits.

Courts across the country have concluded that categorical Exclusions of gender-affirming care are discriminatory—on their face—when a covered entity administers the Exclusions for its own enrollees. *See Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731 (M.D.N.C. Aug. 10, 2022); *Fain v. Crouch*, No. 3:20-0740, 2022 U.S. Dist. LEXIS 137084, at *27 (S.D. W. Va. Aug. 2, 2022); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018). The key issue here is whether a covered entity may administer facially discriminatory Exclusions at the request of its customers who may or may not be subject to the ACA themselves? As Plaintiffs will demonstrate on summary judgment, the answer is a resounding "No."

BCBSIL, which serves as a third-party administrator ("TPA") in some of its business, is subject to Section 1557 and may not discriminate in ***any*** of its health activities, including when asked to do so as a TPA. *See* 42 U.S.C. § 18116(a) (an individual may not be subjected to discrimination "under, any health program or activity, any part of which is receiving Federal financial assistance"). An ERISA plan administrator cannot "just

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

follow orders" to administer an illegal exclusion. BCBSIL has an independent statutory, regulatory and fiduciary duty to follow the ACA's non-discrimination requirements when administering benefits. *See N.Y. State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d 125, 132 (2d Cir. 2015) (ERISA claims administrators have a fiduciary duty to comply with federal law while administering claims); *see e.g.*, Hamburger Decl., *Exh. F*, pp. 35:1-12; *Exh. O,* p. 10, § 4.2 ("Claims Administrator shall have the responsibility for and bear the cost of compliance with any federal, state or local laws as may apply to the Claim Administrator in connection with the performance of its obligations under this Agreement"); p. 17, § 19 (the agreement between BCBSIL and its employer-customer is "governed by and shall be construed in accordance with … any applicable federal law").

As a "covered entity" under Section 1557, BCBSIL cannot administer a blanket exclusion of gender-affirming care. Yet, while it has eliminated such discrimination in its fully insured plans, BCBSIL actively engages in the same discrimination at the direction of certain employer customers. When BCBSIL enforced the Exclusion and denied C.P.'s claims for coverage, it violated its obligation to conduct ***all*** of its activities, including the administration of self-funded health benefits, without illegal discrimination. 42 U.S.C. § 18116(a); *see also T.S. v. Heart of CarDon,* 2021 U.S. Dist. LEXIS 49119, at *27 (S.D. Ind. Mar. 16, 2021) (Under Section 1557, the term "all operations" includes all of an entity's activities, including those related to the administration of a client's self-funded group health plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 956 (D. Minn. 2018) ("Nothing in Section 1557, explicitly or implicitly, suggests that TPAs are exempt from the statute's nondiscrimination requirements"); *Boyden*, 341 F. Supp. 3d at 997 (TPA that administers a discriminatory exclusion may be liable for its actions).

Class certification in this case is proper. The resolution of this key legal question—whether the ACA bars covered health entities from administering blanket exclusions of gender-affirming care in self-funded plans—will determine the rights of all

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

enrollees in ERISA self-funded plans administered by BCBSIL who seek treatment for gender dysphoria that is excluded by the plans. Class actions are specifically designed to address, in one proceeding, this type of systematic violation of the law. Here, BCBSIL administers categorical Exclusions that affect hundreds of similarly situated enrollees with gender dysphoria who seek treatment for that condition. Those harmed are entitled to seek remedies under Section 1557 including injunctive, declaratory, and other equitable relief. A class action offers the most efficient process to resolve the case.

Specifically, the Court should certify a class of past, current, and future participants and beneficiaries in ERISA group health plans in which BCBSIL administered or administers a categorical exclusion of coverage for gender-affirming care. Once certified, the class can obtain class-wide declaratory relief that the administration of the Exclusions by BCBSIL violates the ACA, and an injunction prohibiting BCBSIL from doing so in the future. Plaintiffs will also seek processing by BCBSIL of past claims for gender-affirming care that were administered in a discriminatory manner, or that would have been had the claims been submitted. This presents the "ideal case" for certification of a class involving ERISA plans:

> [W]ere [a] Court to find that the Plan requires Defendants to act in a certain fashion, ERISA would require [the Defendants] to act in a similar fashion toward all beneficiaries—the quintessential (b)(1)(B) scenario. If another court were to interpret the Plan differently, it would trap Defendants in the inescapable legal quagmire of not being able to comply with one such judgment without violating the terms of another, which is what (b)(1)(A) was enacted to remedy.

K.M. v. Regence Blueshield, 2014 U.S. Dist. LEXIS 9156, at *45-46 (W.D. Wash., Jan. 24, 2014) (internal citations and quotations omitted). It also presents the "ideal case" for certification of a class to address systemic civil rights violations, as "broad class-wide injunctive relief is necessary to redress group-wide injury." *Williams v. Boeing Co.*, 225 F.R.D. 626, 631 (W.D. Wash. 2005); *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("the

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions").

II. PROPOSED CLASS DEFINITIONS

Plaintiff C.P. moves for the certification of the following class:

All individuals who:

(1) have been, are, or will be participants or beneficiaries in an ERISA self-funded "group health plan" (as defined in 29 U.S.C. § 1167(1)) administered by Blue Cross Blue Shield of Illinois ("BCBSIL") during the Class Period and that contains a categorical exclusion of some or all Gender-Affirming Health Care services; and

(2) have required, require, or will require treatment with excluded Gender-Affirming Health Care services

DEFINITIONS:

"Class Period" means November 23, 2016 through the termination of the litigation.

"Gender-Affirming Health Care" means any health care service—physical, mental, or otherwise—administered or prescribed for the treatment of gender dysphoria; related diagnoses such as gender identity disorder, gender incongruence, or transsexualism; or gender transition. This includes but is not limited to the administration of puberty delaying medication (such as gonadotropin-releasing hormone (GnRH) analogues); exogenous endocrine agents to induce feminizing or masculinizing changes ("hormone replacement therapy"); gender-affirming or "sex-reassignment" surgery or procedures; and other medical services or preventative medical care provided to treat gender dysphoria and/or related diagnoses, as outlined in World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version (2012).

This definition is narrowed from the definition in Plaintiffs' Amended Complaint based upon the evidence obtained in discovery. *See* Dkt. No. 38, ¶16; Dkt. No. 26-1, ¶91 (proposed class definition is narrowed both in scope and duration). Since the effect of Plaintiffs' amended class definition is to narrow the proposed class, the Court may

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

consider the proposal without requiring amendment of Plaintiffs' complaint. *Sandoval v. Cty. of Sonoma*, 2015 U.S. Dist. LEXIS 55571, at *4 (N.D. Cal. Apr. 27, 2015). Should the Court conclude amendment is required, Plaintiffs are prepared to move to Amend. *See* Hamburger Decl., *Exh. P* (redline of proposed Second Amended Complaint).

III. FACTS

A. Blue Cross Blue Shield of Illinois is a Division of Health Care Services Corporation which Receives Federal Financial Assistance.

BCBSIL is a division of Health Care Services Corporation ("HCSC"). Hamburger Decl., *Exh. A*, p. 11:5-9. As described by BCBSIL's Rule 30(b)(6) witness, HCSC "do[es] business as Blue Cross Blue Shield of Illinois." *Id., Exh. B*, p. 9:2-5. All of BCBSIL's activities are part of HCSC. *Id.,* p. 9:6-12. All of HCSC's activities are health related. *See id.,* pp. 16:20-17:10.

HCSC, and its division, BCBSIL, receive federal financial assistance that pays, at least in part, for certain beneficiaries' enrollment in its health coverage products, including its Medicare, Medicaid, and ACA products. *Id.,* pp. 17:14-18:9; 18:16-21:8 (describing the types of federal financial assistance received). It has received these payments since before 2016, when the proposed class period begins. *Id.*, p. 23:8-13.

Consistent with its receipt of federal financial assistance, HCSC provided an Assurance of Compliance to the federal government. *See id., Exh. C*; 45 C.F.R. § 92.4. As BCBSIL's Rule 30(b)(6) witness Mark Larson testified, the Assurance was signed by a representative of HCSC as a condition of participating in ACA programs for individual and small business health exchanges and bound both HCSC and BCBSIL to comply with the Assurance. *Id., Exh. B,* pp. 24:24-25:11. HCSC strives to comply with the promises reflected in the compliance document. *Id.,* p. 26:5-9.

BCBSIL concedes that the receipt of federal financial assistance requires it to comply with the ACA's non-discrimination law. As Mr. Larson testified, "we are

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

participating, certainly, in the ACA individual and small group that is under Section 1557 of the Affordable Care Act." *Id.,* pp. 27:24-28:11. BCBSIL, however, takes the position that it is only required to follow Section 1557 in those particular lines of business. *Id.,* pp. 28:19-29:17; Dkt. No. 41, ¶51. BCBSIL claims that, although its other lines of business, such as its work as a TPA, are part of HCSC and BCBSIL, it need not comply with Section 1557 in those activities. *Id., Exh. B,* pp. 15:22-16:3; 28:19-29:17.

B. After the ACA Became Effective, BCBSIL Removed All Exclusions of Gender-Affirming Health Care in its Insured Plans.

BCBSIL has a medical policy governing coverage of gender-affirming care. Hamburger Decl., *Exh. A,* p. 27:15-22. Before November 6, 2015, that policy imposed a blanket exclusion of gender-affirming care in all of its health plans, regardless of whether the plan was insured or self-funded. *Id.,* pp. 30:15-31:1; *See Exh. D*, p. 20.

After the ACA became effective in 2010, BCBSIL created a Section 1557 workgroup. "[T]he charge of the workgroup was to make sure that HCSC was in compliance with any regulatory requirements under 1557." *Id., Exh. A,* p. 50:5-20. The Section 1557 workgroup reviews relevant medical policies to ensure compliance with Section 1557. *See e.g., id., Exh. E,* p. 11 (changes to the gender reassignment surgery medical policy "would need to be taken back to the 1557 workgroup for re-discussion").

At the same time, BCBSIL's Medical Policy Committee continued to monitor the latest medical developments in gender-affirming care. *See id.* As BCBSIL's Rule 30(b)(6) witness, Dr. Kim Reed, testified, "the foundation for our medical policies is based on the evidence-based clinical literature that's out in the scientific community." *Id., Exh. A,* p. 12:17-23. The purpose of a medical policy is to "give a statement about what our coverage position would be for a certain service, or procedure or device or pharmaceutical." *Id.,* pp. 13:24-14:2; 22:6-12; *Exh. F,* p. 30:14-25.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Around 2015, BCBSIL re-examined its general exclusion of gender-affirming care.[1] *See id., Exh. A,* p. 33:7-18. BCBSIL then put in place a medical policy concluding that gender-affirming care can be medically necessary and required such coverage when it was. *See id., Exh. D,* p. 20 (As of November 6, 2015, "[m]ultiple coverage changes from experimental, investigational and/or unproven to medically necessary for primary and secondary gender reassignment surgeries and related services."). The effect of this medical policy change was to eliminate the Exclusions in all of BCBSIL's insured plans, as well as in its self-funded employer plans that did not explicitly exclude gender-affirming care. *Id., Exh. A,* pp. 35:15-36:8.

BCBSIL's decision to cover gender-affirming care was based upon scientific evidence and a review of the medical literature. *Id.,* pp. 37:24-38:9. The review was based in part on consideration of the *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* by the World Professional Association of Transgender Health ("WPATH"), the seventh version of which was published in 2012. *Id.,* pp. 38:10-39:8. Finally, the review also considered the requirements of the ACA. *Id.,* p. 46:11-21. Based on the scientific and medical evidence and the requirements of the ACA, BCBSIL removed all gender-affirming care exclusions from its insured health plans, as well as from self-funded plans for which the employer had not requested an express exclusion. *Id.,* p. 46:3-21; *Exh. E*; *Exh. F*, pp. 163:15-164:11. Thus, since 2015, BCBSIL has covered medically necessary gender-affirming care in its insured plans and in its self-funded plans without an express Exclusion. *Id., Exh. F,* p. 27:4-15. BCBSIL's medical policy requiring coverage of medically necessary gender-affirming care is consistent with the current WPATH requirements. *Id., Exh. A,* p. 52:6-13; *Exh. E,* p. 5 (BCBSIL determined

[1] Before 2015, BCBSIL permitted certain employers that wished to cover gender-affirming care to override BCBSIL's exclusion. Hamburger Decl., *Exh. A,* p. 34:7-24.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

that it should "strictly follow" the WPATH Standards of Care); *Exh. G,* p. 5 ("We have decided as a company to follow WPATH").

C. BCBSIL Had a Standard Practice of Administering Gender-Affirming Care Exclusions for Contracting Employer-Sponsored Plans.

Despite BCBSIL's determination that it needed to remove the Exclusions from its insured plans and its standard self-funded plans, BCBSIL still agreed to administer Exclusions when requested by employers. BCBSIL does so because it maintains that its TPA business is ***not*** subject to the ACA's non-discrimination law. *See Exh. B*, pp. 28:19-29:17. Since BCBSIL asserts that it is not required to comply with non-discrimination law when it acts as a TPA, BCBSIL permits its self-funded plans the "choice of covering or excluding gender affirming care." *See* Hamburger Decl., *Exh. F,* p. 165:8-12.

BCBSIL has an "off-the-shelf" Benefit Booklet that it uses to start the process when drafting Summary Plan Descriptions (SPDs) for its clients' self-funded plans, which they subsequently customize based on each plan's individual requests. *Id.,* p. 41:12-24. BCBSIL produced an example of the "off-the-shelf" self-funded plan document in discovery. *See* Hamburger Decl., *Exh. H; Exh. F,* pp. 44:18-45:24. The standard "off-the-shelf" plan does not contain a gendering care exclusion. *See id*. Currently, employers must affirmatively request that BCBSIL administer the Exclusions. *Id., Exh. F,* p. 32:5-7 (Employers "can add or remove any benefits that they wish"); p. 34:16-22 (Employers can use BCBSIL's standard language or they can customize it).

Overwhelmingly, employers who want BCBSIL to administer a gender-affirming care exclusion use the standard language for the Exclusions provided by BCBSIL. *Id., Exh. F,* p. 34:16-22; *Exh. I,* pp. 25:4-27:15 (378 plans use the BCBSIL standard language for the Exclusion, all the other variations in Addendum A are "represented uniquely in one plan" each); *Exh. Q,* Addendum A, p. 13.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

BCBSIL does not require employers to present a genuine medical, scientific, or legal justification in order for BCBSIL to administer a gender-affirming care exclusion. *Id., Exh. I,* pp. 28:3-29:25. Rather, as several BCBSIL's Rule 30(b)(6) witnesses testified, BCBSIL will administer such Exclusions based upon nothing more than the "personal preference of that particular client." *Id., Exh. F,* pp. 72:21-73:7; *Exh. I,* p. 28:14-17. BCBSIL never investigates an employer-customer's reason for an Exclusion. *Id., Exh. I,* pp. 28:20-23, 29:17-25. Indeed, BCBSIL would administer the Exclusion even if the employer expressed overtly discriminatory reasons for it. *Id.,* p. 29:4-16.

This stands in sharp contrast with BCBSIL's professed reliance on objective scientific and medical evidence to guide its coverage policies. Hamburger Decl., *Exh. A,* pp. 12:20-23. "All of our [medical] policies, whether it's this policy or any other medical policy, are based on a review of the scientific literature." *Id.,* p. 38:3-5. *See also, id.,* p. 39:15-19 ("[W]e don't have different medical policies [for different states] … because the clinical evidence is what it is."). In sum, BCBSIL will administer the Exclusions without any medical, scientific, or legal justification, based solely on the "individual preference" of the customer—even if that preference is for illegal discrimination. This is the exact kind of arbitrary and prejudicial actions that Section 1557 was designed to end.

D. BCBSIL Administers the Exclusions in a Standard Manner.

When administering the Exclusions in ERISA self-funded plans, BCBSIL performs its review in a standard manner. It reviews claims to determine if the service is related to "gender dysphoria" based on the diagnostic and procedural codes used; if so, the claim is denied under the Exclusions. *Id., Exh. F,* pp. 69:8-71:4. *See e.g., Exh. I,* pp. 22:2-24:11 (when BCBSIL's legal team identified plans that contained the Exclusions, it looked for denials of claims that included a gender dysphoria diagnosis); 40:17-22 (gender dysphoria is the condition that triggers the application of the Exclusions). This is BCBSIL's standard practice for administering all gender-affirming care exclusions.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Exh. F, pp. 70:4-71:4. Although there are a few deviations from the standard Exclusion that BCBSIL administers, all use the diagnosis of "gender dysphoria" as the basis for determining whether the services are excluded. *Exh. I,* pp. 40:17-22.

Importantly, most, if not all, services for gender-affirming care are covered when provided for other conditions. For example, mastectomies and Vantas implants[2] are generally covered when provided for conditions other than gender dysphoria. *See Exh. F,* pp. 124:10-125:14; 127:5-22; *Exh. N, Exh. A,* pp. 64:17-65:1. So too are other procedures for which coverage is denied when provided to treat gender dysphoria. *See Exh. I,* pp. 33:16-35:19.

BCBSIL's standard practice is to consider whether the service is used to treat gender dysphoria. If it is, and the service is one identified by the employer to exclude, then consistent with the Exclusion, the service is denied. *See Exh. F,* pp. 76:10-78:5. It is this standard action—the administration of a categorical exclusion of gender-affirming care—that all class members are subject to and that Plaintiffs challenge.

E. BCBSIL's Denial of C.P.'s Claims for the Second Vantas Implant and Chest Reconstruction Surgery is Typical of BCBSIL's Standard Practice.

When C.P. sought coverage for his first Vantas Implant in 2016, BCBSIL approved and paid for the service, because C.P.'s treatment met BCBSIL's medical policy for coverage. Hamburger Decl., *Exh. A,* pp. 52:19-53:9; *Exh. J,* pp. 2-3 of 3. BCBSIL later stated that the coverage had been approved in error, but not because the treatment was not medically necessary. Rather, BCBSIL stated that coverage for "transgender services" was not permitted under the plan in which C.P. was enrolled. *Id., Exh. K.* BCBSIL's Rule

[2] A "Vantas Implant" is a drug that is subcutaneously implanted and can be used as a puberty blocker. *See* Hamburger Decl., *Exh. A,* pp. 41:21-42:2.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

30(b)(6) witness, Dr. Kim Reed, conceded that, under the BCBSIL medical policy, C.P.'s Vantas Implant treatment was medically necessary. *Id., Exh. A,* pp. 59:20-60:18, *Exh. L.*[3]

After C.P. obtained authorization and payment for his first Vantas Implant, Ms. Pritchard's employer decided to add to their group health plan an explicit categorical exclusion of coverage for transgender health services, and BCBSIL agreed to administer it. The Exclusion first appeared in the CHI plan in 2018. *See e.g., id., Exh. M,* p. 67 of 142; *Exh. F,* pp. 79:17-80:12. The new Exclusion purported to exclude all coverage of treatment for gender dysphoria if it was considered to be "related" to gender reassignment surgery:

> **The Details – What's Covered and Not Covered**:
>
> …***Transgender Reassignment Surgery***
>
> Not Covered:
>
> Benefits shall not be provided for gender reassignment surgery including, but not limited to, ***any treatments, drugs, medicines, therapy, counseling services or supplies related to such surgeries.***

See id., Exh. M, pp. 37, 67 of 142 (emphasis and underlining in original). Although the 2018 plan indicated that only services "related" to "gender reassignment surgery" (an undefined term in the plan) were not covered, BCBSIL informed C.P. and his parents that ***all coverage*** for "transgender services" would be denied. *See Exh. K,* pp. 2-3.

In 2019, after C.P. received testosterone treatment for more than a year, Plaintiffs sought pre-authorization for a second Vantas Implant and chest surgery for C.P. as medically necessary treatment for C.P.'s gender dysphoria, which BCBSIL denied.

[3] In its Motion to Dismiss, BCBSIL misrepresented BCBSIL's medical policy as prohibiting treatment with puberty blockers and chest surgery until the age 18. *See* Dkt. No. 17, pp. 2:8-15, 4:14-24, 7:2-5. Discovery revealed that these services are covered under BCBSIL's medical policy, even for minors, and that C.P.'s services, in particular, met the BCBSIL coverage standard. *Exh. A*, pp. 59:20-60:18.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Exh. N. BCBSIL stated that both procedures were "not covered" due to the Exclusion. *Id.*

The denial was not based on any objective medical or scientific evidence concerning the safety or efficacy of the treatment. Both treatments were medically necessary under BCBSIL medical policy. *Id., Exh. A,* pp. 60:19-62:3 ("Based on the records that I reviewed and the medical policy, yes, I believe it [C.P.'s mastectomy] would have been covered"). Rather, the denial was based solely on BCBSIL's facilitation of the "individual preference" of Ms. Pritchard's employer to exclude all coverage for surgical treatment for gender dysphoria starting in 2018. Even today, BCBSIL continues to administer the Exclusion and has no plans to stop. *Exh. F,* p. 165:13-18.

IV. LAW AND ARGUMENT

A. General Class Action Requirements.

"A party seeking class certification must affirmatively demonstrate his compliance with [Fed. R. Civ. P. 23]." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011). Fed. R. Civ. P. 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Id*. In addition to these elements, a plaintiff must also establish that one or more of the requirements of Fed. R. Civ. P. 23(b) are met. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1324–25 (W.D. Wash. 2015). In conducting this analysis, the Court may look beyond the pleadings "before coming to rest on the certification question." *Wal-Mart Stores, Inc.*, 564 U.S. at 350).

Plaintiff C.P. seeks certification of a proposed class under Rules 23(b)(1)(B) and/or (b)(2). Certification is appropriate under Rule 23(b)(1)(B) where "prosecuting separate actions by … separate class members would create a risk of … adjudications with respect to individual class members that, as a practical matter, would be dispositive

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). If successful, this action would result in a court finding that BCBSIL's administration of the Exclusions constitutes unlawful discrimination under Section 1557. This determination would be broadly applicable to the coverage of hundreds of absent class members who require medically necessary gender-affirming care but who were, are, or would otherwise be denied coverage through BCBSIL's administration of the same or similar discriminatory exclusions. Moreover, as an ERISA fiduciary, BCBSIL would be required to change its practices when administering class members' claims for medically necessary gender-affirming care to conform with this finding, consistent with its fiduciary duties. As such, the Court's adjudication of the central claim in this matter "would be dispositive of the interests of the other members not parties to the individual adjudications." Fed. R. Civ. P. 23(b)(1)(B). *See* § IV(C) *infra*.

Certification under Rule 23(b)(2) is also proper here since injunctive and declaratory relief is sought. As the Ninth Circuit has explained, "the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions." *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). When "the relief sought is systemic, rather than individual, classwide injunctive or declaratory relief may be appropriate" under Rule 23(b)(2). *Wilbur v. City of Mount Vernon*, 298 F.R.D. 665, 669 (W.D. Wash. 2012). Here, Plaintiff C.P. and the putative class seek a declaration that BCBSIL violated their rights under the ACA's non-discrimination law when it administered and enforced the Plan's Exclusion and similar exclusions of gender-affirming healthcare. Dkt. No. 38, ¶¶91-92. Plaintiff on behalf of himself and similarly situated individuals seeks injunctive relief to stop BCBSIL from administering or enforcing this categorical exclusion and other similar exclusions in plans administered by BCBSIL. *Id.*, pp. 21:22–22:2. Certification under Rule 23(b)(2) "fits this bill to a 'T'." *Z.D. v. Group Health Cooperative*, 2012 U.S. Dist. LEXIS

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

76498, *19 (W.D. Wash. 2012); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("It is sufficient [for (b)(2) certification] if class members complain of a pattern or practice that is generally applicable to the class as a whole"). Similar classes were certified under Rule 23(b)(2) in *Fain v. Crouch*, No. 3:20-0740, 2022 U.S. Dist. LEXIS 137083, at *15 (S.D. W. Va. Aug. 2, 2022), and *Flack v. Wis. Dep't of Health Servs.*, 331 F.R.D. 361, 375 (W.D. Wis. 2019). *See also Davis v. Lab'y Corp. of Am. Holdings*, No. CV 20-0893 FMO (KSx), 2022 U.S. Dist. LEXIS 96130, at *21 (C.D. Cal. May 23, 2022) (nationwide class action certified under Rule 23(b)(2) for claims that included alleged violations of Section 1557).

B. Fed. R. Civ. P. 23(a)'s Requirements for Class Certification Are Met.

1. Numerosity.

"In reality … Rule 23(a)(1) is an impracticability of joinder requirement." H. Newberg and A. Conte, 1 NEWBERG ON CLASS ACTIONS, § 3:3 (4th ed.). *See also Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998) (joinder does not need to be impossible, but simply impracticable depending on the facts and circumstances of the case). "[I]mpractical does not mean impossible rather, impracticability means only the difficulty or inconvenience of joining all members of the class." *McCluskey v. Trustees of Red Dot Corp.*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (internal quotations omitted). Classes in excess of 40 members are generally so numerous as to render joinder impracticable. *Id.* at 673-74.

BCBSIL concedes that the proposed class is comprised of at least 40 individuals. *See* Dkt. No. 56, p. 8:17-22; Dkt. No. 57-1, p. 4:13-14. Indeed, BCBSIL identified hundreds of likely class members. *See id., Exh. Q,* p. 7, Answer to Interrogatory No. 8 (at least 505 individuals had claims denied under gender-affirming care exclusions during the class period); Fox Decl., ¶3 (estimating that, on average, per year there are 1,740 transgender and gender diverse individuals enrolled in the affected BCBSIL plans of whom, about 300 are likely to seek care in a given year), *id.*, ¶¶9-11; *Exh. B*, p. 2, ¶3. Numerosity is met.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Joinder is impracticable for other reasons as well. The putative class members are geographically dispersed across the country. Hamburger Decl., *Exh. I,* pp. 24:7-25:3. "[F]actors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining" whether joinder is practicable. *Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982), *citing* 1 H. Newberg, Class Actions § 1105 (1977). *See also McCluskey*, 268 F.R.D. at 675. And, given the high cost of representation, few people can bring their own litigation. Plaintiffs' counsel are not aware of any other case that has been brought against the BCBSIL challenging its application of the Exclusion. Hamburger Decl., ¶11. *McCluskey,* 268 F.R.D. at 675-76 (fact that no other suit has been filed weighs in favor of the impracticality of joinder). Joinder is also impracticable since the class includes future members impacted by the Exclusions. "The joinder of unknown individuals is inherently impracticable." *Jordan,* 669 F.2d 1311 at 1320.

2. Commonality Is Met Where, As Here, the Litigation Will Be Driven by Common Answers to Class-Wide Questions.

Fed. R. Civ. P. 23(a)(2) requires a plaintiff to show that a question of law or fact is common to each member of the proposed class. Shared legal issues establish commonality:

> Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality only imposes a "limited burden" upon the plaintiff given that it "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

> The Supreme Court has recently emphasized that commonality requires that the class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." The plaintiff must demonstrate "the capacity of class wide proceedings to generate common answers" to common questions of law or fact that are "apt to drive the resolution of the litigation."

Id. at 588-89 (*quoting Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551). In a civil rights suit, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). Plaintiff and the proposed class members seek a determination of a single core legal question: Does BCBSIL's administration of categorical Exclusions of gender-affirming care violate the ACA's non-discrimination requirements?

In addition to this overriding common question, the following common legal questions will need to be addressed for all class members in this litigation: (1) whether BCBSIL is a "covered entity" under Section 1557 for all of its lines of business even though it receives federal financial assistance in only certain lines of business; (2) whether BCBSIL is prohibited from administering discriminatory Exclusions for employer-sponsored plans, even if the employers are not themselves subject to the ACA's non-discrimination provisions; and (3) whether BCBSIL's contractual indemnification provisions purporting to protect it from liability resulting from its administration of the Exclusions, is invalid as a matter of federal public policy. *See e.g., Stamford Bd. of Educ. v. Stamford Educ. Asso.*, 697 F.2d 70, 74 (2d Cir. 1982) ("[A] party may not indemnify himself against his own willful, reckless or criminal misconduct").

Those questions will "generate common answers apt to drive the resolution of the litigation," and the injunctive and declaratory relief sought in this action will resolve the class claims "in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Indeed, the answer to these common questions will determine whether declaratory, injunctive, and other

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

equitable relief is merited and the appropriate scope of such relief. *See K.M. v. Regence Blueshield,* 2014 U.S. Dist. LEXIS 9156, at *39-40 (W.D. Wash. Jan. 24, 2014); *Z.D.*, 2012 U.S. Dist. LEXIS 76498, at *8. Commonality is easily met here.

3. Plaintiff CP.'s Claims Are Typical of the Claims of the Members of the Proposed Class.

The test of typicality is whether (1) other members of the class have the same or similar injury, (2) the action is based on conduct that is not unique to the named plaintiff, and (3) other class members have been injured by the same course of conduct. *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003) (*citing Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). All that is required is that class members have injuries similar to the representative and that those injuries result from the same course of conduct:

> When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims.

Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 648 (W.D. Wash. 2007) (*quoting Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998)).

Under the Rule's permissive standards, representative claims are "typical" if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Typicality concerns "the nature of the claim or defense of the class representative, and not … the specific facts from which it arose or the relief sought." *Hanon,* 976 F.2d at 508 (quotation omitted). "Indeed, even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). As a result, "[w]here an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

suffering other injuries, so long as all the injuries are shown to result from the practice." *Id.* at 57-58.

Plaintiff C.P.'s claims are co-extensive with those of the proposed class. Like all class members, C.P. was, is, or will be a participant or beneficiary in an ERISA self-funded group health plan administered by BCBSIL. Dkt. No. 38, ¶91. C.P. and all proposed class members seek to enforce BCBSIL's compliance with Section 1557 including their right to coverage of medically necessary gender-affirming care without the administration of discriminatory categorical Exclusions. *Id.*, ¶¶99-113. *See, e.g., Tech. Access Found. Health Benefit Plan v. Grp. Health Coop. (In re Z.D.)*, 2012 U.S. Dist. LEXIS 149610, at *12 (W.D. Wash. Oct. 17, 2012) (where plaintiffs and the proposed class members have the same or similar injury, denial under the same challenged exclusion, typicality is met). C.P., by and through his parents, is well-situated to seek the relief sought by the proposed class.

As defined, the class also satisfies the *Hansen* factors to establish typicality. *Hansen*, 213 F.R.D. at 415. Members of the class all suffer the same type of injury, in that all have been or will, in the absence of court action, be denied access to coverage for needed gender-affirming care by BCBSIL. *Id.* Class members' injuries and BCBSIL's causative action all stem from BCBSIL's administration of the discriminatory categorical exclusion. They are common to all class members and not idiosyncratic to the named Plaintiff. *Id.* Lastly, all class members, including C.P., are defined to have been injured by the same course of conduct—BCBSIL's administration of a categorical exclusion of coverage of gender-affirming care. *Id.* As described by the Court in *Fain:*

> The exclusion invidiously discriminates against Plaintiffs as much as it would other members of the class …. The relief sought is identical to other class members—the declaration of the exclusion's unlawfulness and an injunction precluding the enforcement of it.

Id., 2022 U.S. Dist. LEXIS 137083, at *10-11. Typicality is established.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

4. Representation Is Adequate.

Rule 23(a)'s final requirement is that the representative plaintiff must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). "Adequate representation depends on the qualification of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (internal quotation marks and citations omitted). Stated differently, the Court must examine: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Plaintiff C.P. will fairly and adequately represent the class. C.P., by and through his parents, is committed to the vigorous prosecution of this suit and views his interests as coextensive with the Class members, both known and unknown. His claims and interests do not conflict with any interests of the proposed class. *See generally,* Patricia Pritchard. Decl., ¶¶2-3; Nolle Pritchard. Decl., ¶¶2-3. C.P. and proposed class members all have a common interest in seeing the ACA's non-discrimination requirements enforced and securing nondiscriminatory health coverage.

The second factor—competency of counsel—has now been subsumed under Fed. R. Civ. P. 23(g), the requirement that the Court appoint adequate class counsel. The declarations of counsel who represent the plaintiffs establish that they (1) have done extensive work in identifying the claims in this action, (2) have far-reaching experience in transgender rights, health care discrimination, and class litigation, including ERISA class actions, (3) are well versed in this area of the law, and (4) are willing to commit the resources necessary to vigorously prosecute this litigation. Fed. R. Civ. P. 23(g)(1)(A) (i)-(iv). *See* Hamburger Decl., ¶¶2-10; Gross Decl.¶¶2-11; Gonzalez-Pagan Decl. ¶¶2-27.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

See also Dunakin, 99 F. Supp. 3d at 1332 (noting Ms. Hamburger's prior experience in health-related class action litigation); *Unthaksinkum v. Porter,* 2011 U.S. Dist. LEXIS 111099, *45 (W.D. Wash. Sept. 28, 2011) (stating of Mr. Gross among other proposed class counsel, "[he] is a highly qualified attorney who has class action experience [and] is prepared to represent Class Representatives and class members.…"); *Fain*, 2022 U.S. Dist. LEXIS 137083, at *13 (Lambda Legal "has extensive experience with civil right[s] and class action litigation, specifically with LGBT issues."); *Thornton v. Comm'r of Soc. Sec.*, 570 F. Supp. 3d 1010, 1048 (W.D. Wash. 2020) (noting that counsel, including Lambda Legal, "is competent and experienced in relevant constitutional litigation and class actions and has presented sufficient information to the court to satisfy this requirement"). The requirements of Fed. R. Civ. P. 23(a)(4) and 23(g) are met.

C. Certification of The Proposed Classes Is Proper under Fed. R. Civ. P. 23(b)(1) and/or (b)(2).

1. The Claims in This Case Are Appropriate for Certification Under Fed. R. Civ. P. 23(b)(1).

Fed. R. Civ. P. 23(b)(1) authorizes class actions where section (a) conditions are met, and:

> (1) prosecuting separate actions by or against individual members of the class would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Subsection (A) of Fed. R. Civ. P. 23(b)(1) considers possible prejudice to the defendants. Class certification under Rule 23(b)(1)(A) "takes in cases where the party is

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

obliged by law to treat the members of the class alike." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231 (1997). Subsection (B) looks to possible prejudice to putative class members. *In re Ikon Office Sols., Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). Here, inconsistent or varying adjudications with respect to individual class members would establish incompatible standards of conduct for BCBSIL when it comes BCBSIL's duty not to discriminate on the basis of sex when administering the Exclusions.

What is more, "[c]ertifications under either subsection are common in [ERISA benefits] cases such as this one because of the defendants' 'unitary treatment' of putative class members." *Id.* While this is a discrimination case in which no ERISA claims are brought, it nonetheless involves a defendant, BCBSIL, which is an ERISA fiduciary, and a proposed class comprised of ERISA enrollees. Accordingly, as the Advisory Committee to Rule 23 concluded, certification under 23(b)(1) is appropriate in cases alleging that a claims administrator to a large class of ERISA enrollees has uniformly and improperly administered the benefits for which it served as a fiduciary. *See Z.D.*, 2012 U.S. Dist. LEXIS 76498, at *16, *citing to* Rules Advisory Committee Notes to 1966 Amendments to Fed. R. Civ. P. 23. That is the precise situation here.

Litigation seeking equitable remedies against ERISA TPAs like BCBSIL fits squarely in Rule 23(b)(1). "Certification under Rule 23(b)(1) is particularly appropriate in cases involving ERISA fiduciaries who must apply uniform standards to a large number of beneficiaries." *Wit v. United Behavioral Health*, 317 F.R.D. 106, 132-33 (N.D. Cal. 2016); *see also Meidl v. Aetna, Inc.*, 2017 U.S. Dist. LEXIS 70223, at *56 (D. Conn. May 4, 2017) (certifying a class challenging the actions of an ERISA plan administrator that categorically excluded coverage of a particular treatment in the various health plans it administered); *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 506 (N.D. Cal. 2017) (same); *Escalante v. Cal. Physicians' Serv.*, 309 F.R.D. 612, 620 (C.D. Cal. 2015) (same). It is particularly appropriate here, where the obligation that BCBSIL owes the class "about

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

which courts could disagree and require incompatible standards of conduct—comes not from plan terms but from the statute and regulations." *Med. Soc'y of N.Y. v. UnitedHealth Grp. Inc.*, 332 F.R.D. 138, 153 (S.D.N.Y. 2019) (certifying a class across various ERISA plans administered by the same TPA); *see also McCluskey*, 268 F.R.D. at 677; *D.T. v. NECA/IBEW Family Medical Care Plan*, 2019 U.S. Dist. LEXIS 50683, *22-24 (W.D. Wash. March 26, 2019) (certifying a class under Rule 23 (b)(1) because "[t]he issues confronting every proposed class member is whether Defendants may deny coverage" based on a categorical exclusion). Since BCBSIL is required to consistently administer the Exclusions with respect to similarly situated ERISA enrollees, BCBSIL must act in a similar fashion towards all class members. *See Wit*, 317 F.R.D. at 132-33. Accordingly, the resolution of C.P.'s claim is dispositive of other similarly situated class members' claims—"the quintessential (b)(1)(B) scenario." *Z.D. v. Grp. Health Coop.*, 2012 U.S. Dist. LEXIS 76498, at *18. The Court should certify this class under Rule 23(b)(1).

2. Certification Is Also Proper Under Fed. R. Civ. P. 23(b)(2).

Certification is appropriate under Fed. R. Civ. P. 23(b)(2) where the defendant has "acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Stated differently, certification is appropriate where injunctive or declaratory relief can be provided to all class members without engaging in a case-by-case analysis of each one's individual circumstances. *Wal-Mart Stores, Inc.*, 564 U.S. at 360 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted … that the conduct … can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"). *See also Wit*, 317 F.R.D. at 136 (class certification under Rule 23(b)(2) is appropriate where all class members have been subjected to the same or similar challenged "Guideline."). "Civil rights cases against parties charged with

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

unlawful, class-based discrimination are prime examples" of class actions under Rule 23(b)(2). *Amchem*, 521 U.S. at 614.

Under these principles, "certification here is warranted, as the exclusion affects all proposed class members, and the declaratory and injunctive relief sought would benefit all class members." *Fain*, 2022 U.S. Dist. LEXIS 137083, at *14. Plaintiff C.P. seeks, *inter alia*, injunctive and declaratory relief to require BCBSIL to process claims without the discriminatory categorical exclusion prohibited by the ACA's non-discrimination requirements. A class seeking this form of relief fits perfectly under Rule 23(b)(2). *Z.D.*, 2012 U.S. Dist. LEXIS 76498, *19-20. Certification of the proposed class would fulfill the purpose underlying Rule 23(b)(2)—to "foster institutional reform by facilitating suits that challenge widespread rights violations." *Parsons*, 754 F.3d at 686 (quotation omitted). Here, "[a] declaratory judgment finding that the exclusion is unlawful and an injunction enjoining Defendants from enforcing the exclusion would be appropriate to the class as a whole." *Fain*, 2022 U.S. Dist. LEXIS 137083, at *14-15.

Furthermore, Rule 23(b)(2) supports the relief C.P. seeks in requiring BCBSIL to re-process past claims for gender-affirming care that were administered in a discriminatory manner, or would have been, had the claims been submitted. After certifying a class, the court in *Z.D.* entered a comparable injunction requiring the defendant to process and re-process claims without administering exclusions that violated state law. *Tech. Access Found. Health Benefit Plan*, 2012 U.S. Dist. LEXIS 149610, at *29-30; *Thornton*, 570 F. Supp. 3d at 1050 (requiring reprocessing of benefits without the unconstitutional requirement). Plaintiff C.P. seeks to follow a similar path here, and Rule 23(b)(2) provides the process to seek this relief.

D. The Class Period Is Properly Defined.

The proposed class period extends back four years from the filing of the original complaint because the statute of limitations for a Section 1557 claim is four years. With

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

the ACA, Congress did not establish a specific statute of limitations. Accordingly, the default federal statute of limitations of four years is proper. *See* 28 U.S.C. § 1658. *Tomei v. Parkwest Med. Ctr.*, 24 F.4th 508, 515 (6th Cir. 2022); *Vega-Ruiz v. Northwell Health*, No. 20-315, 992 F.3d 61, 66 (2d Cir. 2021); *Doe v. Pennsylvania*, No. 1:19-CV-2193, 2021 U.S. Dist. LEXIS 61637, at *14 (M.D. Pa. Mar. 31, 2021); *Palacios v. MedStar Health, Inc.*, 298 F. Supp. 3d 87, 91 (D.D.C. 2018).

V. CONCLUSION

Class actions are uniquely suited to enforcing civil rights claims, such as those brought by C.P. on behalf of himself and similarly situated others against by BCBSIL for unlawful discrimination resulting from its administration of categorical exclusions of gender-affirming care. The Court should certify the proposed class, as defined in Section II, *above*. Plaintiff C.P., by and through his parents, should be appointed as the class representative, and Ms. Hamburger and Mr. Gross of Sirianni Youtz Spoonemore Hamburger, as well as Mr. Gonzalez-Pagan and Ms. Pizer of the Lambda Legal Defense and Education Fund, Inc. should be appointed as class counsel.

DATED: August 25, 2022.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

/s/ Eleanor Hamburger
Eleanor Hamburger(WSBA #23992)
Daniel S. Gross (WSBA #23992)
3101 Western Avenue, Suite 350
Seattle, WA 98121
Tel. (206) 223-0303; Fax (206) 223-0246
Email: ehamburger@sylaw.com
dgross@sylaw.com

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan, *pro hac vice*
120 Wall Street, 19th Floor
New York, NY 10005
Tel. (212) 809-8585; Fax (212) 658-9721
Email: ogonzalez-pagan@lambdalegal.org

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

Attorneys for Plaintiffs

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; and PATRICIA PRITCHARD, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, Defendant.	NO. 3:20-cv-06145-RJB [PROPOSED] ORDER CERTIFYING CLASS, AND APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL

This matter came before the Court on Plaintiff C.P.'s Motion for Class Certification. Plaintiff C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard, were represented by Eleanor Hamburger and Daniel S. Gross of Sirianni Youtz Spoonemore Hamburger PLLC, and Omar Gonzalez-Pagan and Jennifer C. Pizer of Lambda Legal Defense and Education Fund, Inc. Defendant Blue Cross Blue Shield of Illinois was represented by its counsel, Gwendolyn C. Payton, John R. Neeleman and Stephanie N. Bedard of Kilpatrick Townsend & Stockton LLP.

The Court reviewed and considered the pleadings and record herein, including:

- Plaintiff C.P.'s Motion for Class Certification;
- Declaration of Noelle Pritchard in Support of Motion;

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

- Declaration of Patricia Pritchard in Support of Motion;
- Declaration of Frank G. Fox and all exhibits in Support of Motion;
- Declaration of Eleanor Hamburger and all exhibits in Support of Motion;
- Declaration of Daniel Gross in Support of Motion;
- Declaration of Omar Gonzalez-Pagan and all exhibits in Support of Motion;
- BCBSIL's Opposition to Plaintiff C.P.'s Motion for Class Certification and all declarations and exhibits in opposition to Motion;
- Plaintiff C.P.'s reply brief and all declarations and exhibits in support of Plaintiff's reply brief, if any; and
- _____
- _____.

Based upon the foregoing, and for good cause shown, the Court hereby finds that all of the requirements of FRCP 23 are met and GRANTS in full Plaintiff C.P.'s Motion for Class Certification. The Court further appoints class counsel and a class representative as set forth below:

A. The Proposed Class Meet the Requirements of FRCP 23(a).

With respect to FRCP 23(a)(1), the Court finds that the proposed class can reasonably be expected to be so numerous that joinder is impracticable. In addition, the class definitions include individuals who in the future may become insured by defendants. This also renders joinder impracticable.

The commonality requirement under FRCP 23(a)(2) is also met, as there are common questions of law and fact that affect all members of the class. The overarching common question relevant to the class is: Does Defendants' administration of a categorical exclusion of gender-affirming care violate ACA's non-discrimination statute?

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

The answer to this common question will necessarily result in a class-wide adjudication of the claims in this action.

The claims of the plaintiff are typical to those of the Class as required by FRCP 23(a)(3). In pursuing his claims, C.P. will necessarily advance the interests of the Class.

The Court also finds that the named plaintiff C.P. (by and through his parents, Patricia Pritchard and Nolle Pritchard) is an adequate class representative who has chosen counsel experienced in class actions of this nature. There are no conflicts between the named plaintiff and the Class members. The named plaintiff and his counsel meet the requirement of adequate representation under FRCP 23(a)(4).

B. Certification of the Class Under FRCP 23(b)(1) and (2).

The Court finds that the Class also meets the requirements of FRCP 23(b)(1) and (b)(2).

Rule 23(b)(1) allows a plaintiff to pursue a class action if Rule 23(a) is satisfied and if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Subsection (A) of Rule 23(b)(1) considers possible prejudice to the defendants, while subsection (B) looks to possible prejudice to the putative class members. *In re Ikon*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). "[A] court may certify a class under (b)(1)(A) if the court

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

finds that separate lawsuits could create inconsistent results that would establish incompatible standards of conduct for the party opposing the class." *Casa Orlando Apartments, Ltd. v. Fannie Mae*, 624 F.3d 185, 197 (5th Cir. 2010). "Certifications under either subsection are common in [ERISA] cases such as this one because of the defendants' 'unitary treatment' of putative class members." *Ikon,* 191 F.R.D. at 466; *see Wit v. United Behavioral Health*, 317 F.R.D. 106, 132 (N.D. Cal. 2016) ("[M]ost ERISA class action cases are certified under Rule 23(b)(1)"). If another court were to adjudicate this issue differently, it would impose on Defendants an "inescapable legal quagmire of not being able to comply with one such judgment without violating the terms of another." *Z.D. v. Group Health Cooperative,* 2012 U.S. Dist. LEXIS 76498, *17-18 (W.D. Wash., June 1, 2012). This is the scenario that (b)(1)(A) remedies. *Id.* Accordingly, the Court finds that the proposed class is certified under Rule 23(b)(1).

Certification is also appropriate under FRCP 23(b)(2) because BCBSIL has "acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FRCP 23(b)(2). Plaintiff seeks injunctive and declaratory relief to prevent BCBSIL from administering categorical exclusions of gender affirming care in the ERISA self-funded plans that it administers. Certification under FRCP 23(b)(2) is appropriate because this type of relief can be provided to all members of the Class without engaging in a detailed case-by-case analysis of the individual circumstances of each Class member. Accordingly, certification under FRCP 23(b)(2) is appropriate in this case.

C. Class Definition.

NOW, THEREFORE, IT IS HEREBY ORDERED that the following Class is certified:

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

All individuals who:

(1) have been, are, or will be participants or beneficiaries in an ERISA self-funded "group health plan" (as defined in 29 U.S.C. § 1167(1)) administered by Blue Cross Blue Shield of Illinois ("BCBSIL") during the Class Period and that contains a categorical exclusion of some or all Gender Affirming Health Care services; and

(2) have required, require or will require treatment with excluded Gender Affirming Health Care services

DEFINITIONS:

"Class Period" means November 23, 2016 through the termination of the litigation.

"Gender Affirming Health Care" means any health care service—physical, mental, or otherwise—administered or prescribed for the treatment of gender dysphoria; related diagnoses such as gender identity disorder, gender incongruence, or transsexualism; or gender transition. This includes but is not limited to the administration of exogenous endocrine agents to induce feminizing or masculinizing changes ("hormone replacement therapy"); gender-affirming or "sex-reassignment" surgery or procedures; and other medical services or preventative medical care provided to treat gender dysphoria and/or related diagnoses, as outlined in World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version (2011).

D. Appointment of Class Representative and Class Counsel.

The Court APPOINTS Plaintiff C.P., through his parents, as the class representative, and Ms. Hamburger and Mr. Gross of Sirianni Youtz Spoonemore Hamburger, as well as Ms. Pizer and Mr. Gonzalez-Pagan of the Lambda Legal Defense and Education Fund are appointed as class counsel.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

DATED this _____ day of _____, 2022.

ROBERT J. BRYAN
United States District Judge

Presented by:

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA # 26478)
Daniel S. Gross (WSBA #23992)

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan, *pro hac vice*
Jennifer C. Pizer, *pro hac vice*

Attorneys for Plaintiffs

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246