

APPEAL,LC-C

United States District Court
Southern District of West Virginia (Huntington)
CIVIL DOCKET FOR CASE #: 3:20-cv-00740
Internal Use Only



Fain et al v. Crouch et al
Assigned to: Judge Robert C. Chambers
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 11/12/2020
Date Terminated: 08/17/2022
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Christopher Fain
and

represented by **Anna P. Prakash**
NICHOLS KASTER
4700 IDS Center
80 South 8th Street
Minneapolis, MN 55402
612-256-3291
Fax: 612-338-4878
Email: aprakash@nka.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND
8th Floor
1776 K. Street, NW
Washington, DC 20006-2304
202-804-6245
Fax: 202-478-0210
Email: asmithcarrington@lambdalegal.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Carl S. Charles
Suite 105
1 West Court Square
Decatur, GA 30030
404-897-1800
Fax: 404-506-9320
Email: ccharles@lambdalegal.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nicole Jean Schladt
NICHOLS KASTER
4700 IDS Center
80 South Eighth St.

Minneapolis, MN 55402
612-256-3256
Email: nschladt@nka.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nora Huppert
Suite 2000
65 East Wacker Place
Chicago, IL 60601
312-663-4413
Fax: 312-663-4307
Email: nhuppert@lambdalegal.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sasha J. Buchert
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND
8th Floor
1176 K Street, NW
Washington, DC 20006
202-999-8083
Email: sbuchert@lambdalegal.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND
Suite 105
1 West Court Square
Decatur, GA 30030
470-225-5341
Fax: 404-506-9320
Email: tborelli@lambdalegal.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walt Auvil
THE EMPLOYMENT LAW CENTER
1208 Market Street
Parkersburg, WV 26101
304-485-3058
Fax: 304-485-6344
Email: auvil@theemploymentlawcenter.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Zachary Martell
TERMINATED: 01/05/2022

represented by **Anna P. Prakash**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Carl S. Charles

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Nicole Jean Schladt

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Nora Huppert

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Sasha J. Buchert

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Tara L. Borelli

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Walt Auvil

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Plaintiff

Brian McNemar

TERMINATED: 01/05/2022

represented by **Anna P. Prakash**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Carl S. Charles

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Nicole Jean Schladt

(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nora Huppert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sasha J. Buchert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Tara L. Borelli
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walt Auvil
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Shawn Anderson
TERMINATED: 05/09/2022
also known as
Shauntae Anderson, and
TERMINATED: 05/09/2022

represented by **Anna P. Prakash**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Carl S. Charles
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nicole Jean Schladt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nora Huppert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sasha J. Buchert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Tara L. Borelli
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walt Auvil
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Leann James
individually and on behalf of all others
similarly situated
TERMINATED: 03/25/2022

represented by **Anna P. Prakash**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Carl S. Charles
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nicole Jean Schladt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nora Huppert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sasha J. Buchert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Tara L. Borelli
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walt Auvil
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Shauntae Anderson
individually and on behalf of all others

represented by **Anna P. Prakash**
(See above for address)

similarly situated

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Avatara Antoinette Smith-Carrington
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Carl S. Charles
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nicole Jean Schladt
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nora Huppert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sasha J. Buchert
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Tara L. Borelli
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walt Auvil
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

William Crouch
in his official capacity as Cabinet Secretary
of the West Virginia Department of Health
and Human Resources

represented by **Caleb B. David**
SHUMAN MCCUSKEY & SLICER
P. O. Box 3953
Charleston, WV 25339
304/345-1400
Fax: 304/343-1826
Email: cdavid@shumanlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kimberly M. Bandy
SHUMAN MCCUSKEY & SLICER

P. O. Box 3953
Charleston, WV 25339
304/345-1400
Fax: 304/343-1826
Email: kbandy@shumanlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lou Ann S. Cyrus
SHUMAN MCCUSKEY & SLICER
P. O. Box 3953
Charleston, WV 25339
304/345-1400
Fax: 304/343-1826
Email: lcyrus@shumanlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Roberta F. Green
SHUMAN MCCUSKEY & SLICER
P. O. Box 3953
Charleston, WV 25339
304/345-1400
Fax: 304/343-1826
Email: rgreen@shumanlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Cynthia Beane

*in her official capacity as Commissioner for
the West Virginia Bureau for Medical
Services*

represented by **Caleb B. David**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kimberly M. Bandy
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lou Ann S. Cyrus
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Roberta F. Green
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**West Virginia Department of Health and
Human Resources, Bureau for Medical
Services**

represented by **Caleb B. David**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kimberly M. Bandy
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lou Ann S. Cyrus
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Roberta F. Green
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Ted Cheatham

*in his official capacity as Director of the
West Virginia Public Employees Insurance
Agency; and
TERMINATED: 11/15/2021*

represented by **Christopher K. Weed**
OXLEY RICH SAMMONS
Suite 1000
517 9th Street
Huntington, WV 25701
304-634-9614
Email: cweed@oxleylawwv.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David E. Rich
OXLEY RICH SAMMONS
Suite 1000
517 9th Street
Huntington, WV 25701
304-522-1138
Fax: 304-522-9528
Email: drich@oxleylawwv.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Eric Salyers
OXLEY RICH SAMMONS
P. O. Box 1704
Huntington, WV 25718
304/522-1138
Fax: 304/522-9528
Email: esalyers@oxleylawwv.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Perry W. Oxley
OXLEY RICH SAMMONS
P. O. Box 1704
Huntington, WV 25718-1704
304/522-1138
Fax: 304/522-9528

Email: poxley@oxleylawww.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

The Health Plan of West Virginia, Inc.
TERMINATED: 01/05/2022

represented by **Aaron C. Boone**
BOWLES RICE
P. O. Box 49
Parkersburg, WV 26102-0049
304/485-8500
Fax: 304/420-5587
Email: aboone@bowlesrice.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stuart A. McMillan
BOWLES RICE
P. O. Box 1386
Charleston, WV 25325-1386
304-347-1110
Fax: 304-347-1746
Email: smcmillan@bowlesrice.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Jason Haught
Interim Director of the West Virginia Public
Employees Insurance Agency
TERMINATED: 03/25/2022

represented by **Christopher K. Weed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David E. Rich
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Eric Salyers
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Perry W. Oxley
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Mediator

Donald B. O'Dell

represented by **Donald B. O'Dell**
O'DELL LAW / MEDIATION
P. O. Box 320
Huntington, WV 25708
304/525-5700
Fax: 304/525-5701

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
11/12/2020	<u>1</u>	COMPLAINT. Filing Fee \$400.00. Receipt # AWVSDC-7798809. (Attachments: # <u>1</u> Proposed Summons, # <u>2</u> Proposed Summons, # <u>3</u> Proposed Summons, # <u>4</u> Proposed Summons, # <u>5</u> Proposed Summons, # <u>6</u> Civil Cover Sheet) (hkl)
11/12/2020	<u>2</u>	STANDING ORDER IN RE: ASSIGNMENT AND REFERRAL OF CIVIL ACTIONS AND MATTERS TO MAGISTRATE JUDGES ENTERED JANUARY 4, 2016. Discovery referred to Magistrate Judge Eifert. (cc: attys; any unrepresented party) (hkl)
11/12/2020	<u>3</u>	ELECTRONIC SUMMONS ISSUED as to William Crouch, Cynthia Beane, West Virginia Department of Health and Humane Resources, Bureau for Medical Services, Ted Cheatham, The Health Plan of West Virginia, Inc., re: <u>1</u> Complaint. Summons returnable 21 days. Instructions to Counsel: This is your electronic summons. Please print as many copies of the Summons and Complaint as are necessary to effectuate service under Fed. R. Civ. P. 4. See Proof of Service page of this Summons form for filing a return of service if required by Fed. R. Civ. P. 4(l). (Attachments: # <u>1</u> Summons for Cynthia Beane, # <u>2</u> Summons for DHHR, Bureau for Medical Services, # <u>3</u> Summons for Ted Cheatham, # <u>4</u> Summons for The Health Plan of West Virginia, Inc.) (hkl)
11/12/2020		CASE assigned to Judge Robert C. Chambers. (klc) (Entered: 11/13/2020)
11/16/2020	<u>4</u>	STATEMENT OF VISITING ATTORNEY from Nora Huppert on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802438. (Auvil, Walt)
11/16/2020	<u>5</u>	STATEMENT OF VISITING ATTORNEY from Avatara Smith-Carrington on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802483. (Auvil, Walt)
11/16/2020	<u>6</u>	STATEMENT OF VISITING ATTORNEY from Nicole J. Schladt on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802487. (Auvil, Walt)
11/16/2020	<u>7</u>	STATEMENT OF VISITING ATTORNEY from Anna P. Prakash on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802496. (Auvil, Walt)
11/16/2020	<u>8</u>	STATEMENT OF VISITING ATTORNEY from Tara L. Borelli on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802498. (Auvil, Walt)
11/16/2020	<u>9</u>	STATEMENT OF VISITING ATTORNEY from Sasha J. Buchert on behalf of Zachary Martell, Christopher Fain, Brian McNemar. Local counsel: Walt Auvil. Fee \$50.00. Receipt # AWVSDC-7802501. (Auvil, Walt)
11/24/2020	<u>10</u>	SUMMONS RETURNED EXECUTED for William Crouch, William Crouch served on 11/18/2020, answer due 12/9/2020. Summons served on April Robertson.(Auvil, Walt) (Modified on 11/24/2020 to add the name of the person served and the summons as an attachment) (mkw). (Additional attachment added on 11/24/2020: # <u>1</u> Summons) (mkw).
11/24/2020	<u>11</u>	SUMMONS RETURNED EXECUTED for Cynthia Beane, Cynthia Beane served on 11/18/2020, answer due 12/9/2020. Summons served on April Robertson. (Auvil, Walt) (Modified on 11/24/2020 to add the name of the person served and to add a copy of the

		summons as an attachment) (mkw). (Additional attachment) added on 11/24/2020: # <u>1</u> Summons) (mkw).
11/24/2020	<u>12</u>	SUMMONS RETURNED EXECUTED for Ted Cheatham, Ted Cheatham served on 11/18/2020, answer due 12/9/2020. Summons served on Thomas Miller. (Auvil, Walt) (Modified on 11/24/2020 to add the name of the person served and a copy of the summons as an attachment) (mkw). (Additional attachment added on 11/24/2020: # <u>1</u> Summons) (mkw).
11/24/2020	<u>13</u>	SUMMONS RETURNED EXECUTED for West Virginia Department of Health and Human Resources, Bureau for Medical Services, West Virginia Department of Health and Humane Resources, Bureau for Medical Services served on 11/18/2020, answer due 12/9/2020. Summons served on April Robertson.(Auvil, Walt) Modified on 11/24/2020 to add the name of the person served and a copy of the summons as an attachment) (mkw). (Additional attachment added on 11/24/2020: # <u>1</u> Summons) (mkw).
11/30/2020	<u>14</u>	SUMMONS ACCEPTED FOR SERVICE BY SECRETARY OF STATE on 11/20/2020 as to The Health Plan of West Virginia, Inc.. Certified Mail Number: 92148901125134100002961036. (jsa)
12/01/2020	<u>15</u>	NOTICE OF ATTORNEY APPEARANCE by Eric Salyers on behalf of Ted Cheatham. (Salyers, Eric)
12/02/2020	<u>16</u>	STIPULATION REGARDING ANSWER DEADLINE by Ted Cheatham, Christopher Fain, Zachary Martell, Brian McNemar, re: <u>1</u> Complaint; the parties stipulate and agree that the Answer or response to the Complaint has been extended to January 11, 2021 to Respond to Complaint. (Salyers, Eric) (Modified on 12/3/2020 to add party filers and to add link to #1 complaint) (mkw).
12/07/2020	<u>17</u>	NOTICE OF APPEARANCE by Stuart A. McMillan and Aaron C. Boone on behalf of The Health Plan of West Virginia, Inc. and STIPULATION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' COMPLAINT by The Health Plan of West Virginia, Inc., Christopher Fain, Zachary Martell, Brian McNemar; the parties stipulate and agree that Defendant The Health Plan of West Virginia, Inc. may respond to Plaintiffs' <u>1</u> Complaint by 1/11/2021. (McMillan, Stuart) (Modified on 12/7/2020 to add party filers and to add link to #1 complaint) (mkw).
12/07/2020	18	ENTRY REMOVED; DUPLICATE ENTRY. (McMillan, Stuart) (Modified on 12/7/2020 to remove duplicate entry). (mkw).
12/07/2020		NOTICE OF DOCKET CORRECTION re: 18 NOTICE OF APPEARANCE AND STIPULATION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' COMPLAINT. Error: Entry is a duplicate entry of docket entry #17; Correction: Removed duplicate entry. (mkw)
12/07/2020		RESET DEADLINE: The Health Plan of West Virginia, Inc. answer due 1/11/2021. (mkw)
12/09/2020	<u>19</u>	STIPULATION EXTENDING TIME FOR DHHR DEFENDANTS TO ANSWER THE COMPLAINT by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services; re: <u>1</u> Complaint; by agreement, the responsive pleading will be due on 1/11/2021. (Cyrus, Lou) (Modified on 12/9/2020 to add party filers and add link to #1 complaint) (mkw).
12/09/2020		RESET DEADLINE: Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services answers due 1/11/2021. (mkw)

01/11/2021	<u>20</u>	MOTION by The Health Plan of West Virginia, Inc. to Dismiss With Prejudice, re: <u>1</u> Complaint. (McMillan, Stuart) (Modified on 1/11/2021 to add link to #1 complaint) (mkw).
01/11/2021	<u>21</u>	MEMORANDUM by The Health Plan of West Virginia, Inc. in support of <u>20</u> MOTION by The Health Plan of West Virginia, Inc. to Dismiss With Prejudice, re: <u>1</u> Complaint. (McMillan, Stuart) (Modified on 1/11/2021 to add link to #1 complaint) (mkw).
01/11/2021	<u>22</u>	MOTION by Ted Cheatham to Dismiss With Prejudice, re: <u>1</u> Complaint. (Attachment: # <u>1</u> Exhibit A)(Oxley, Perry)
01/11/2021	<u>23</u>	MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Partial Dismissal, re: <u>1</u> Class Action Complaint. (Cyrus, Lou) (Modified on 1/11/2021 to add link to #1 complaint) (mkw).
01/11/2021	<u>24</u>	MEMORANDUM OF LAW by Ted Cheatham in support of <u>22</u> MOTION by Ted Cheatham to Dismiss With Prejudice re: <u>1</u> Complaint. (Oxley, Perry)
01/11/2021	<u>25</u>	MEMORANDUM OF LAW by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of <u>23</u> MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Partial Dismissal, re: <u>1</u> Class Action Complaint. (Cyrus, Lou) (Modified on 1/11/2021 to add link to #1 complaint) (mkw).
01/11/2021	<u>26</u>	ANSWER TO <u>1</u> Complaint by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services; Jury demand. (Cyrus, Lou)
01/13/2021	<u>27</u>	ORDER AND NOTICE: Rule 12(b) Motions 2/2/2021. Rule 26(f) Meeting 2/16/2021. Last day to file report of Rule 26(f) Meeting 2/22/2021. Scheduling/status Conference at 11:30 AM on 3/8/2021 in Huntington. Entry of Scheduling Order 3/15/2021. Last Day to make Rule 26(a)(1) disclosures 3/22/2021. Signed by Judge Robert C. Chambers on 1/13/2021. (cc: counsel of record; any unrepresented parties) (hkl)
01/20/2021	<u>28</u>	STATEMENT OF VISITING ATTORNEY from Carl S. Charles on behalf of Christopher Fain.. Fee \$50.00. Receipt # AWVSDC-7857503. (Auvil, Walt)
01/20/2021	<u>29</u>	CONSENT MOTION by Christopher Fain, Zachary Martell, Brian McNemar to Extend Time for Response to Defendants' <u>20</u> , <u>22</u> , and <u>23</u> Motions to Dismiss to 02/15/2021. (Auvil, Walt) (Modified on 1/20/2021 to add party filers and to add link to #20, #22 and #23 motions) (mkw).
01/22/2021	<u>30</u>	ORDER granting Plaintiffs' <u>29</u> CONSENT MOTION to Extend Time for Response to Defendants' <u>20</u> , <u>22</u> , <u>23</u> Motions to Dismiss; extending Plaintiffs' time to respond by an additional 21 days. Signed by Judge Robert C. Chambers on 1/22/2021. (cc: counsel of record; any unrepresented parties) (hkl)
02/02/2021	<u>31</u>	DISCLOSURE STATEMENT PURSUANT TO RULE 7.1, Federal Rules of Civil Procedure, by Defendant The Health Plan of West Virginia, Inc. (McMillan, Stuart)
02/02/2021	<u>32</u>	MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Dismiss With Prejudice, re: <u>1</u> Complaint. (Attachments: # <u>1</u> Exhibit A, Affidavit of Angela Wowczuk with Fax Redacted, # <u>2</u> Exhibit B, Affidavit of Brian Thompson, # <u>3</u> Exhibit C, Affidavit of Unicare)(Cyrus, Lou) (Modified on 2/2/2021 to add link to #1 complaint) (mkw).
02/02/2021	<u>33</u>	MEMORANDUM OF LAW by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of

		32 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Dismiss With Prejudice. (Cyrus, Lou)
02/10/2021	34	CONSENT MOTION by Christopher Fain, Zachary Martell, Brian McNemar to Extend Time and File Combined Brief for Response to 32 Motion to Dismiss Filed by Defendants Crouch, Beane, and West Virginia Department of Health and Human Resources to 03/02/21. (Auvil, Walt) (Modified on 2/10/2021 to add link to #32 motion) (mkw).
02/11/2021	35	ORDER granting Plaintiffs' 34 CONSENT MOTION to Extend Time and File Combined Brief for Response to Motions to Dismiss Filed by Defendants Crouch, Beane, and West Virginia Department of Health and Human Resources; Plaintiffs' collective response in opposition to the 23 and 32 MOTIONS is due on 3/2/2021, and shall total not more than 40 pages in length. Signed by Judge Robert C. Chambers on 2/11/2021. (cc: counsel of record; any unrepresented parties) (jsa)
02/15/2021	36	JOINT MOTION by Brian McNemar, Zachary Martell, Ted Cheatham, to Dismiss Without Prejudice Affordable Care Act Claim against Defendant Ted Cheatham, re: 1 Complaint. (Auvil, Walt) (Modified on 2/15/2021 to remove party filer and add correct party filers and to add link to #1 complaint)) (mkw).
02/15/2021	37	PROPOSED ORDER ORDER DISMISSING AFFORDABLE CARE ACT CLAIM AGAINST DEFENDANT TED CHEATHAM by Brian McNemar, Zachary Martell, Ted Cheatham (Auvil, Walt) (Modified on 2/15/2021 to remove party filer and to add correct party filers) (mkw).
02/15/2021	38	AMENDED MOTION by Brian McNemar, Zachary Martell, Ted Cheatham to Amend 36 JOINT MOTION by Brian McNemar, Zachary Martell, Ted Cheatham, to Dismiss Without Prejudice Affordable Care Act Claim against Defendant Ted Cheatham, re: 1 Complaint and 37 Proposed Order Dismissing Affordable Care Act Claim Against Defendant Ted Cheatham. (Attachments: # 1 Proposed Order Amended Proposed Order Dismissing Affordable Care Act Claim Against Ted Cheatham with Prejudice)(Auvil, Walt) (Modified on 2/15/2021 to remove party filer and add correct party filers) (mkw).
02/16/2021	39	RESPONSE by Christopher Fain, Zachary Martell, Brian McNemar in opposition to 20 MOTION by The Health Plan of West Virginia, Inc. to Dismiss With Prejudice, re: 1 Complaint. (Auvil, Walt) (Modified on 2/16/2021 to remove link to #21 memorandum) (mkw).
02/16/2021	40	OPPOSITION by Christopher Fain, Zachary Martell, Brian McNemar to 22 MOTION by Ted Cheatham to Dismiss With Prejudice, re: 1 Complaint. (Auvil, Walt) (Modified on 2/16/2021 to remove link to #24 memorandum) (mkw).
02/17/2021	41	ORDER granting the parties' 38 AMENDED JOINT MOTION to Dismiss Plaintiffs' Affordable Health Care Act Claim against Ted Cheatham; denying as moot the parties' original 36 JOINT MOTION to Dismiss; the claim by Plaintiffs Brian McNemar and Zachary Martell against Defendant Ted Cheatham in Count II of the Complaint is DISMISSED WITH PREJUDICE. Signed by Judge Robert C. Chambers on 2/17/2021. (cc: counsel of record; any unrepresented parties) (jsa)
02/18/2021	42	JOINT MOTION by Christopher Fain, Brian McNemar, Zachary Martell, The Health Plan of West Virginia, Inc., Ted Cheatham, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Deadlines to Conduct Rule 26(F) Meeting and File Rule 26(F) Report. (Auvil, Walt) (Modified on 2/18/2021 to add party filers) (mkw).
02/18/2021	43	ORDER granting the parties' 42 JOINT MOTION for Extension of Deadlines to Conduct

		Rule 26(f) Meeting and File Rule 26(f) Report; directing that the Rule 26(f) meeting be completed within 14 days of the resolution of the pending motions to dismiss and that the Rule 26(f) report be filed within 30 days of the resolution of the pending motions to dismiss. Signed by Judge Robert C. Chambers on 2/18/2021. (cc: counsel of record; any unrepresented parties) (hkl)
02/23/2021	44	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Rule 26(a)(1) Initial Disclosures. (Auvil, Walt) (Modified on 2/23/2021 to add party filers) (mkw).
02/23/2021	45	REPLY by The Health Plan of West Virginia, Inc. to 39 Response In Opposition. (McMillan, Stuart)
02/23/2021	46	CERTIFICATE OF SERVICE by The Health Plan of West Virginia, Inc. for Rule 26(a)(1) Initial Disclosures. (McMillan, Stuart)
02/23/2021	47	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Rule 26(a)(1) Initial Disclosures. (Bandy, Kimberly)
02/23/2021	48	REPLY by Ted Cheatham to Plaintiffs' 40 Opposition. (Oxley, Perry)
02/23/2021	49	CERTIFICATE OF SERVICE by Ted Cheatham for Rule 26(a)(1) Initial Disclosures. (Oxley, Perry)
03/02/2021	50	COMBINED OPPOSITION by Christopher Fain to 23 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Partial Dismissal, re: 1 Class Action Complaint and 32 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Dismiss With Prejudice, re: 1 Complaint. (Auvil, Walt)
03/05/2021	51	CONSENT MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Time to File Reply to Plaintiffs' 50 Combined Opposition to March 19, 2021. (Bandy, Kimberly)
03/08/2021	52	ORDER granting Defendants' 51 CONSENT MOTION to Extend Time to File Reply in Support of Motions Dismiss; extending the reply memorandum due date to 3/19/2021. Signed by Judge Robert C. Chambers on 3/8/2021. (cc: counsel of record; any unrepresented parties) (hkl)
03/19/2021	53	JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Deadline to File a Reply Brief as to 50 Combined Opposition by Christopher Fain to March 26, 2021. (Bandy, Kimberly) (Modified on 3/19/2021 to add party filers) (mkw).
03/19/2021	54	ORDER granting Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services' 53 JOINT MOTION to Extend Time to File Reply in Support of 23 and 32 MOTIONS to Dismiss; extending the reply memorandum due date to 3/26/2021. Signed by Judge Robert C. Chambers on 3/19/2021. (cc: counsel of record; any unrepresented parties) (jsa)
03/26/2021	55	REPLY by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Christopher Fain's 50 Combined Opposition. (Bandy, Kimberly)
04/05/2021	56	UNOPPOSED MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File Sur-Reply in Opposition to Defendants' 32 Motion to Dismiss.

		(Attachments: # <u>1</u> Exhibit A to Motion to File Sur-Reply in Opposition to Defendant's Motion to Dismiss)(Auvil, Walt) (Modified on 4/5/2021 to add party filers) (mkw). (Modified on 4/5/2021 to add link to #32 motion) (mkw).
05/19/2021	<u>57</u>	MEMORANDUM OPINION AND ORDER denying <u>22</u> MOTION by Ted Cheatham to Dismiss With Prejudice, re: <u>1</u> Complaint; denying <u>23</u> MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Partial Dismissal, re: <u>1</u> Class Action Complaint; denying <u>32</u> MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Dismiss With Prejudice, re: 1 Complaint; granting <u>56</u> UNOPPOSED MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File Sur-Reply in Opposition to Defendants' <u>32</u> Motion to Dismiss. Signed by Judge Robert C. Chambers on 5/19/2021. (cc: attys; any unrepresented party) (mkw)
05/19/2021	<u>58</u>	UNOPPOSED MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File Sur-Reply in Opposition to Defendants' <u>32</u> Motion to Dismiss and Exhibit A attached. (Auvil, Walt) (Modified on 5/19/2021 to add party filers) (mkw).
05/20/2021	<u>59</u>	ORDER denying as moot the second <u>58</u> UNOPPOSED MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File Sur-Reply; directing Plaintiffs to file the signed Sur-Reply. Signed by Judge Robert C. Chambers on 5/20/2021. (cc: attys; any unrepresented parties) (mkw)
05/25/2021	<u>60</u>	SUR-REPLY by Christopher Fain, Zachary Martell, Brian McNemar in opposition to Defendants' <u>32</u> Motion to Dismiss. (Auvil, Walt) (Modified on 5/25/2021 to remove link to #56 motion and to add party filers) (mkw).
06/02/2021	<u>61</u>	STIPULATION REGARDING ANSWER DEADLINE by Ted Cheatham, Christopher Fain, Zachary Martell, Brian McNemar; the parties stipulate and agree the new deadline to Answer the <u>1</u> Complaint for Defendant Ted Cheatham, in his official capacity as Director of the West Virginia Public Employees Insurance Agency is now 6/16/2021. (Salyers, Eric) (Modified on 6/2/2021 to add party filers and to add link to #1 complaint) (mkw).
06/02/2021		RESET DEADLINE: Ted Cheatham answer due 6/16/2021 pursuant to the <u>61</u> Stipulation. (mkw)
06/17/2021	<u>62</u>	ANSWER to <u>1</u> Complaint by Ted Cheatham; Jury demand. (Oxley, Perry)
06/28/2021	<u>63</u>	MEMORANDUM OPINION AND ORDER denying Defendant The Health Plan of West Virginia's <u>20</u> MOTION to Dismiss. Signed by Judge Robert C. Chambers on 6/28/2021. (cc: counsel of record; any unrepresented parties) (jsa)
07/02/2021	<u>64</u>	NOTICE OF CHANGE OF ATTORNEY INFORMATION by Tara L. Borelli (Borelli, Tara). (Modified on 7/2/2021 to convert event to Notice of Change of Attorney Information) (mk).
07/09/2021	<u>65</u>	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' First Set of Interrogatories, Request for Admissions, Request for Production of Documents and Things to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Auvil, Walt)
07/09/2021	<u>66</u>	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' First Set of Interrogatories, Request for Admissions, Request for Production of Documents and Things to Defendant The Health Plan of West Virginia. (Auvil, Walt)
07/09/2021	<u>67</u>	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' First Set of Interrogatories, Request for Admissions, Request for Production of

		Documents and Things to Defendant Ted Cheatham. (Auvil, Walt)
07/12/2021	<u>68</u>	STIPULATION REGARDING ANSWER DATE FOR DEFENDANT THE HEALTH PLAN OF WEST VIRGINIA, INC. by Christopher Fain, Zachary Martell, Brian McNemar, The Health Plan of West Virginia, Inc.; said parties stipulate that the date by which said Defendant must answer the <u>1</u> Complaint is hereby extended to, and including, 7/23/2021. (Boone, Aaron) (Modified on 7/12/2021 to add party filers) (mkw).
07/12/2021		RESET DEADLINE: The Health Plan of West Virginia, Inc. answer due 7/23/2021. (mkw)
07/21/2021	<u>69</u>	AMENDED CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiff's First Set of Request for Admissions, Requests for Production of Documents and Things, and Interrogatories to Defendant Ted Cheatham. (Auvil, Walt)
07/21/2021	<u>70</u>	AMENDED CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiff's First Set of Request for Admissions, Requests for Production of Documents and Things, and Interrogatories to Defendant The Health Plan of WV. (Auvil, Walt)
07/21/2021	<u>71</u>	AMENDED CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiff's First Set of Requests for Admissions, Requests for Production of Documents and Things, and Interrogatories to Defendant W. Crouch, C. Beane and WVDHH - WV Medicaid. (Auvil, Walt)
07/23/2021	<u>72</u>	STIPULATION REGARDING ANSWER DATE FOR DEFENDANT THE HEALTH PLAN OF WEST VIRGINIA, INC. re: <u>1</u> Complaint to 7/30/2021 by The Health Plan of West Virginia, Inc., Christopher Fain, Zachary Martell, Brian McNemar. (Boone, Aaron) (Modified on 7/23/2021 to add party filers) (kew).
07/28/2021	<u>73</u>	RULE 26(f) REPORT OF PLANNING MEETING by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, Ted Cheatham, William Crouch, The Health Plan of West Virginia, Inc., West Virginia Department of health and Human Resources, Bureau for Medical Services. (Auvil, Walt) (Modified on 7/28/2021 to add party filers) (mkw).
07/30/2021	<u>74</u>	ANSWER to <u>1</u> Complaint by The Health Plan of West Virginia, Inc.; Jury demand. (Boone, Aaron)
08/06/2021	<u>75</u>	SCHEDULING ORDER: Joinder of Parties, amended pleadings due by 10/8/2021. Discovery requests to be completed by 10/18/2021. Fact discovery shall be completed by 12/1/2021. The expert discovery deadline is 4/29/2022. The last date on which to take a discovery deposition is 45 days after the last date to serve discovery requests. Expert Witness List by parties bearing the burden of proof due by 1/14/2022, by party not bearing burden of proof due by 2/15/2022, and to solely contradict or rebut evidence due by 3/15/2022. Settlement Meeting by 12/15/2021; scheduling a conference for 5/16/2022 at 11:00 a.m. in Huntington to determine the need for Fed. R. Civ. P. 26(a)(3) disclosures and the balance of the schedule. Signed by Judge Robert C. Chambers on 8/6/2021. (cc: counsel of record; any unrepresented parties) (jsa)
08/13/2021	<u>76</u>	STIPULATION FOR EXTENSION OF CASE DEADLINES by Christopher Fain, Zachary Martell, Brian McNemar, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services, Ted Cheatham, The Health Plan of West Virginia, Inc.; the parties stipulate that the deadline to file: 1. An agreed upon ESI Protocol; 2. An agreed upon format for production; 3. An agreed upon Protective Order; 4. An Order Governing the Inadvertent Disclosure of Documents or Other Material; and 5. An Order Setting Deposition Protocol is extended to, and including, 8/20/2021. (Auvil, Walt) (Modified on 8/13/2021 to add party filers) (mkw).

08/20/2021	<u>77</u>	MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions. (Attachments: # <u>1</u> Declaration, # <u>2</u> Proposed Order, # <u>3</u> Exhibit 1, # <u>4</u> Exhibit 2-Proposed Protective Order, # <u>5</u> Exhibit 3-Proposed Order Setting Deposition Protocol, # <u>6</u> Exhibit 4-Proposed Agreed Order Governing the Inadvertent Disclosure of Documents, # <u>7</u> Exhibit 5-Stipulation for Virtual Depositions) (Auvil, Walt)
08/20/2021	<u>78</u>	RESPONSE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in opposition to <u>77</u> MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions (Bandy, Kimberly)
08/20/2021		MOTION REFERRED to Magistrate Judge Cheryl A. Eifert: <u>77</u> MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions. (mk) (Entered: 08/22/2021)
08/23/2021	<u>79</u>	CERTIFICATE OF SERVICE by Ted Cheatham for Defendant Ted Cheatham's Responses to Plaintiff's First Set of Interrogatories. (Oxley, Perry)
08/23/2021	<u>80</u>	CERTIFICATE OF SERVICE by Ted Cheatham for Defendant Ted Cheatham's Responses to Plaintiff's First Set of Requests for Admissions. (Oxley, Perry)
08/23/2021	<u>81</u>	CERTIFICATE OF SERVICE by Ted Cheatham for Defendant Ted Cheatham's Responses to Plaintiff's First Set of Requests for Production of Documents. (Oxley, Perry)
08/24/2021	<u>82</u>	CERTIFICATE OF SERVICE by The Health Plan of West Virginia, Inc. for Answers to Plaintiffs' First Set of Interrogatories. (Boone, Aaron)
08/24/2021	<u>83</u>	CERTIFICATE OF SERVICE by The Health Plan of West Virginia, Inc. for Responses to Plaintiffs' First Set of Requests for Production. (Boone, Aaron)
08/24/2021	<u>84</u>	CERTIFICATE OF SERVICE by The Health Plan of West Virginia, Inc. for Answers to Plaintiffs' First Set of Requests for Admissions. (Boone, Aaron)
08/26/2021	<u>85</u>	REPLY by Christopher Fain, Zachary Martell, Brian McNemar to <u>78</u> Response In Opposition. (Auvil, Walt)
08/27/2021	<u>86</u>	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Responses to Plaintiff's First Set of Interrogatories. (Cyrus, Lou)
08/27/2021	<u>87</u>	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Responses to Plaintiff's First Requests for Production. (Cyrus, Lou)
08/27/2021	<u>88</u>	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Responses to Plaintiff's First Set of Requests for Admission. (Bandy, Kimberly)
08/30/2021	<u>89</u>	STIPULATION FOR VIRTUAL DEPOSITIONS by Christopher Fain, Zachary Martell, Brian McNemar, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services, Ted Cheatham, and The Health Plan of West Virginia, Inc.; the parties stipulate and agree to the following parameters to govern all virtual depositions, as more fully set forth herein. (hkl) (Modified on 8/30/2021 to add party filers) (mkw).

08/30/2021	90	PROTECTIVE ORDER setting forth the terms for the handling of confidential documents. Signed by Magistrate Judge Cheryl A. Eifert on 8/30/2021. (cc: counsel of record; any unrepresented party) (hkl)
08/30/2021	91	AGREED ORDER GOVERNING THE INADVERTENT DISCLOSURE OF DOCUMENTS OR OTHER MATERIAL UNDER RULE 502(d) directing that these procedures shall govern the inadvertent production of privileged or confidential documents. Signed by Magistrate Judge Cheryl A. Eifert on 8/30/2021. (cc: counsel of record; any unrepresented party) (hkl)
09/01/2021	92	MOTION by The Health Plan of West Virginia, Inc. to Certify Appeal of the Court's June 28, 2021 63 Memorandum Opinion and Order. (Boone, Aaron) (Modified on 9/1/2021 to add link to #63 memorandum opinion and order) (mkw).
09/01/2021	93	MEMORANDUM OF LAW by The Health Plan of West Virginia, Inc. in support of 92 MOTION by The Health Plan of West Virginia, Inc. to Certify Appeal of the Court's June 28, 2021 63 Memorandum Opinion and Order. (Boone, Aaron) (Modified on 9/1/2021 to add link to #63 memorandum opinion and order) (mkw).
09/01/2021	94	ORDER directing that a Telephonic Motion Hearing shall take place on 9/13/2021 at 2:30 PM before Magistrate Judge Cheryl A. Eifert, re: Plaintiffs' 77 MOTION for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions. Signed by Magistrate Judge Cheryl A. Eifert on 9/1/2021. (cc: counsel of record; any unrepresented parties) (hkl)
09/03/2021	95	RESPONSE by Ted Cheatham in opposition to 77 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions. (Oxley, Perry)
09/03/2021	96	RESPONSE by The Health Plan of West Virginia, Inc. in opposition to 77 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions. (Boone, Aaron)
09/09/2021	97	REPLY by Christopher Fain, Zachary Martell, Brian McNemar to 95 Response In Opposition, 96 Response In Opposition. (Auvil, Walt)
09/13/2021	98	TELEPHONIC MOTION HEARING held by Magistrate Judge Cheryl A. Eifert on 9/13/2021 re: Plaintiffs' 77 MOTION for Entry of a Partial ESI Protocol and Deposition Protocol Order; Court Reporter: CourtSmart. (hkl)
09/14/2021	99	ORDER granting in part and denying in part Plaintiffs' 77 MOTION For Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(d) Clawback Order, and Order Regarding Virtual Depositions, as more fully set forth herein; directing the parties to promptly submit an agreed, revised Deposition Protocol that allows each party to take up to 10 depositions; directing the parties to meet and confer, and to report to the undersigned, regarding ESI protocols no later than 9/30/2021; the parties shall also attempt to reach an agreement on more complex issues related to the production of ESI, and if they cannot agree, shall notify the undersigned's chambers on or before 9/30/2021 of any outstanding issues and whether the parties require a telephonic discovery conference. Signed by Magistrate Judge Cheryl A. Eifert on 9/14/2021. (cc: counsel of record) (hkl) (Modified on 9/14/2021 to replace image) (mkw).
09/14/2021		NOTICE OF DOCKET CORRECTION re: 99 ORDER. Error: The judge's signature was not flattened. Correction: Replaced incorrect image with correct image. (mkw)
09/14/2021	100	ORDER SETTING DEPOSITION PROTOCOL directing that the following protocol

		shall be followed with all depositions conducted herein, as more fully set forth herein. Signed by Magistrate Judge Cheryl A. Eifert on 9/14/2021. (cc: counsel of record) (hkl)
09/15/2021	101	OPPOSITION by Christopher Fain, Zachary Martell, Brian McNemar in opposition to 92 MOTION by The Health Plan of West Virginia, Inc. to Certify Appeal of the Court's June 28, 2021 63 Memorandum Opinion and Order. (Auvil, Walt) (Modified on 9/15/2021 to remove link to #93 memorandum and add link to #92 motion) (mkw).
09/17/2021	102	JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, Ted Chetham, William Crouch, The Health Plan of West Virginia, Inc., West Virginia Department of Health and Human Resources, Bureau for Medical Services to Conduct Mediation Over Videoconference. (Auvil, Walt) (Modified on 9/20/2021 to convert event to a motion and to add party filers) (mkw).
09/17/2021	103	JOINT PROPOSED ORDER Joint Proposed Order Granting Joint Motion to Conduct Mediation Over Videoconference by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, Ted Chetham, William Crouch, The Health Plan of West Virginia, Inc., West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Auvil, Walt) (Modified on 9/20/2021 to add party filers) (mkw).
09/20/2021	104	ORDER GRANTING JOINT MOTION TO CONDUCT MEDIATION OVER VIDEOCONFERENCE granting the parties' 102 JOINT MOTION to Conduct Mediation Over Videoconference; directing that the parties are permitted to conduct mediation over videoconference instead of attending in-person. Signed by Judge Robert C. Chambers on 9/20/2021. (cc: counsel of record; any unrepresented parties) (hkl)
09/20/2021	105	REPLY by The Health Plan of West Virginia, Inc. to 101 Opposition. (Boone, Aaron)
09/23/2021	106	MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File First Amended Complaint. (Auvil, Walt)
09/23/2021	107	PROPOSED ORDER Order Granting Plaintiffs' Motion for Leave to File First Amended Complaint by Christopher Fain, Zachary Martell, Brian McNemar. (Auvil, Walt)
09/23/2021	108	MEMORANDUM by Christopher Fain, Zachary Martell, Brian McNemar in support of 106 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File First Amended Complaint. (Auvil, Walt)
09/23/2021	109	AMENDED MOTION by Christopher Fain, Zachary Martell, Brian McNemar to Amend 106 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File First Amended Complaint. (Attachment: # 1 First Amended Complaint)(Auvil, Walt)
09/24/2021	110	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' Second Set of Requests for Admission to Defendant Ted Cheatham and Plaintiffs' Second Set of Interrogatories to Defendant Ted Cheatham. (Auvil, Walt)
09/24/2021	111	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiff's Second Set of Interrogatories to Defendants Crouch, Beane, and WVDHHR. (Auvil, Walt)
09/24/2021	112	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' Second Set of Interrogatories to Defendant the Health Plan of West Virginia. (Auvil, Walt)
10/07/2021	113	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' First Amended Rule 26(a)(1) Initial Disclosures. (Auvil, Walt)
10/08/2021	114	RESPONSE by Ted Cheatham in opposition to 106 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File First Amended Complaint and 109

		AMENDED MOTION by Christopher Fain, Zachary Martell, Brian McNemar to Amend 106 MOTION by Christopher Fain, Zachary Martell, Brian McNemar for Leave to File First Amended Complaint. (Oxley, Perry) (Modified on 10/11/2021 to remove link to #107 proposed order and #108 memorandum) (mkw).
10/12/2021	115	REPLY by Christopher Fain, Zachary Martell, Brian McNemar to 114 Response In Opposition. (Auvil, Walt)
10/12/2021	116	ORDER setting a Telephonic Conference concerning discovery issues, and if necessary, issues concerning ESI for 10/14/2021 at 10:00 AM before Magistrate Judge Cheryl A. Eifert. Signed by Magistrate Judge Cheryl A. Eifert on 10/12/2021. (cc: counsel of record; any unrepresented parteis) (hkl)
10/13/2021	117	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' First Supplemental Response to Plaintiff's First Set of Requests for Production to Defendants Crouch, Beane and WVDHHR BMS. (Bandy, Kimberly)
10/14/2021	118	TELEPHONE CONFERENCE held by Magistrate Judge Cheryl A. Eifert on 10/14/2021; Court Reporter: CourtSmart. (hkl)
10/15/2021	119	JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, The Health Plan of West Virginia, Inc. to Stay Certain Case Schedule Deadlines. (Attachment: # 1 Proposed Order Granting Joint Motion to Stay Certain Case Schedule Deadlines)(Auvil, Walt) (Modified on 10/15/2021 to add party filer) (mkw).
10/15/2021	120	MEMORANDUM by Christopher Fain, Zachary Martell, Brian McNemar in support of 119 JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, The Health Plan of West Virginia, Inc. to Stay Certain Case Schedule Deadlines. (Auvil, Walt) (Modified on 10/15/2021 to add party filer) (mkw).
10/18/2021	121	ORDER GRANTING JOINT MOTION TO STAY CERTAIN CASE SCHEDULE DEADLINES granting the 119 JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, The Health Plan of West Virginia, Inc. to Stay Certain Case Schedule Deadlines; the remaining deadlines in the case schedule are stayed with respect to the claims of Plaintiffs Zachary Martell and Brian McNemar against The Health Plan until the Court rules on the parties' anticipated motion for preliminary approval of a class settlement; if that motion is denied, The Health Plan, Mr. Martell, and Mr. McNemar shall file a status report within 10 days of the Court's ruling with the parties' recommendations regarding further proceedings; the remaining deadlines in the case schedule are stayed with respect to the claims of Plaintiffs Zachary Martell and Brian McNemar against Defendant Cheatham until the Court rules on Plaintiffs' pending 109 AMENDED MOTION to file a First Amended Complaint; the 10/18/2021 deadline in the case schedule to serve discovery requests as to claims against Defendant Cheatham is stayed until seven days after the Court rules on the motion to amend the complaint. Signed by Judge Robert C. Chambers on 10/18/2021. (cc: counsel of record; any unrepresented parties) (jsa)
10/18/2021	122	NOTICE OF CHANGE OF ATTORNEY INFORMATION by Carl Solomon Charles updating name and/or firm information on behalf of Christopher Fain, Zachary Martell, Brian McNemar. (Charles, Carl)
10/18/2021	123	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' Subpoenas Duces Tecum to UniCare Health, Aetna Better Health, and the Health Plan. (Auvil, Walt)
10/18/2021	124	NOTICE OF CHANGE OF ATTORNEY INFORMATION by Tara L. Borelli updating name and/or firm information. (Borelli, Tara) (Modified on 10/18/2021 to convert event

		to notice of change of attorney information) (ts).
10/18/2021	125	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
10/18/2021	126	AMENDED CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Set of Interrogatories, Requests for Admission and Requests for Production of Documents to Plaintiff Christopher Fain. (Bandy, Kimberly)
10/19/2021	127	STIPULATION AND ORDER: ESI PROTOCOL stipulating and directing that the following protocol shall govern the discovery of documents and electronically stored information ("ESI"). Signed by Magistrate Judge Cheryl A. Eifert on 10/19/2021. (cc: counsel of record; any unrepresented parties) (hkl)
10/19/2021	128	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' Third Set of Interrogatories. (Auvil, Walt)
10/19/2021	129	CERTIFICATE OF SERVICE by Christopher Fain, Zachary Martell, Brian McNemar for Plaintiffs' Second Set of Requests for Production. (Auvil, Walt)
10/20/2021	130	JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Fact Discovery Deadline to 3/1/2022. (Auvil, Walt) (Modified on 10/20/2021 to add party filers)
10/20/2021	131	MEMORANDUM by Christopher Fain, Zachary Martell, Brian McNemar, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of 130 JOINT MOTION by Christopher Fain, Zachary Martell, Brian McNemar, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Fact Discovery Deadline to 3/1/2022. (Auvil, Walt) (Modified on 10/20/2021 to add party filers) (mkw).
10/20/2021	132	PROPOSED ORDER Order Granting Joint Motion for Extension of Discovery Deadline by Christopher Fain, Zachary Martell, Brian McNemar, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Auvil, Walt) (Modified on 10/20/2021 to add party filers) (mkw).
10/21/2021	133	ORDER GRANTING JOINT MOTION FOR EXTENSION OF DISCOVERY DEADLINE granting the parties' 130 JOINT MOTION for Extension of Fact Discovery Deadline; the deadline for fact discovery in this case is 3/1/2022. Signed by Judge Robert C. Chambers on 10/21/2021. (cc: counsel of record; any unrepresented parties) (jsa)
10/21/2021	134	AFFIDAVIT OF SERVICE of Cover Letter, Subpoena and Exhibits on Aetna Better Health of West Virginia, dated 10/19/2021, filed on behalf of Zachary Martell, Christopher Fain, Brian McNemar. (Auvil, Walt)
10/21/2021	135	AFFIDAVIT OF SERVICE of Cover Letter, Subpoena and Exhibits on The Health Plan of West Virginia, dated 10/18/2021, filed on behalf of Zachary Martell, Christopher Fain, Brian McNemar. (Auvil, Walt)
10/21/2021	136	AFFIDAVIT OF SERVICE of Cover Letter, Subpoena and Exhibits on Unicare Health Plan of West Virginia, Inc., dated 10/19/2021, filed on behalf of Zachary Martell, Christopher Fain, Brian McNemar. (Auvil, Walt)
10/25/2021	137	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia

		Department of Health and Human Resources, Bureau for Medical Services for Response to Plaintiff's Second Set of Interrogatories. (Bandy, Kimberly)
10/27/2021	138	NOTICE OF MEDIATION by Christopher Fain, Zachary Martell, Brian McNemar. (Auvil, Walt)
10/28/2021	139	MEMORANDUM OPINION AND ORDER granting Plaintiffs' 109 AMENDED MOTION for Leave to File First Amended Complaint; Plaintiffs' first 106 MOTION to File First Amended Complaint is DISMISSED as moot. Signed by Judge Robert C. Chambers on 10/28/2021. (cc: counsel of record; any unrepresented parties) (jsa)
10/28/2021	140	FIRST AMENDED CLASS ACTION COMPLAINT by Zachary Martell, Christopher Fain, Brian McNemar, Shawn Anderson, Leann James against Cynthia Beane, Ted Cheatham, William Crouch, The Health Plan of West Virginia, Inc., West Virginia Department of Health and Human Resources, Bureau for Medical Services. (jsa)
10/29/2021	141	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Second Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
10/29/2021	142	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Supplemental Response to Plaintiff's Second Set of Interrogatories. (Bandy, Kimberly)
11/03/2021	143	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action to UMR, Inc. (Auvil, Walt)
11/03/2021	144	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action to CVS Caremark. (Auvil, Walt)
11/05/2021	145	CERTIFICATE OF SERVICE by Leann James for Plaintiff James's First Set of Requests for Production of Documents and Things to Defendant Ted Cheatham, Plaintiff's James's First Set of Requests for Admissions to Defendant Ted Cheatham, and Plaintiff James's First Set of Interrogatories to Defendant Ted Cheatham. (Auvil, Walt) Modified on 11/5/2021 to correct party filer (jsa).
11/05/2021	146	RETURN OF SERVICE ON SUBPOENA for UMR, Inc. (Auvil, Walt) (Modified on 11/8/2021 to convert event to a return of service on subpoena and to remove link to #143 certificate of service) (mkw).
11/05/2021	147	RETURN OF SERVICE ON SUBPOENA for CVS Caremark. (Auvil, Walt) (Modified on 11/8/2021 to convert event to a return of service on subpoena and to remove link to #144 certificate of service) (mkw).
11/10/2021	148	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Plaintiffs' Subpoena to the Health Plan of West Virginia. (Auvil, Walt)
11/11/2021	149	PROPOSED ORDER Agreed Order for Substitution of Parties by Ted Cheatham, Christopher Fain, Zachary Martell, Brian McNemar. (Oxley, Perry) (Modified on 11/12/2021 to add party filers) (mkw).
11/11/2021	150	STIPULATION REGARDING ANSWER DEADLINE by Christopher Fain, Zachary Martell, Brian McNemar, Ted Cheatham; said parties stipulate and agree that the deadline for an Answer or response to the 140 First Amended Complaint is 11/18/2021. (Oxley,

		Perry) (Modified on 11/12/2021 to add party filers and to add link to #140 first amended complaint) (mkw).
11/12/2021		RESET DEADLINE: Ted Cheatham answer due 11/18/2021. (mkw)
11/12/2021	151	ANSWER to Plaintiffs' 140 First Amended Complaint, by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services; Jury demand. (Bandy, Kimberly)
11/12/2021	152	MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Time to Serve Written Discovery on Recently Added Plaintiff Shauntae Anderson. (Bandy, Kimberly)
11/12/2021	153	MEMORANDUM OF LAW by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of 152 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Time to Serve Written Discovery on Recently Added Plaintiff Shauntae Anderson. (Bandy, Kimberly)
11/12/2021	154	PROPOSED ORDER Granting Motion to Extend Time to Serve Written Discovery on Recently Added Plaintiff Shauntae Anderson by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Bandy, Kimberly)
11/15/2021	155	AGREED ORDER FOR SUBSTITUTION OF PARTIES directing that Jason Haught, Interim Director of the West Virginia Public Employees Insurance Agency, shall be substituted as a defendant in place and stead of Ted Cheatham, former Director of the West Virginia Public Employees Insurance Agency; directing the Clerk to update the party names accordingly. Signed by Judge Robert C. Chambers on 11/15/2021. (cc: counsel of record; any unrepresented parties) (jsa)
11/15/2021	156	ORDER GRANTING DEFENDANTS' MOTION TO EXTEND TIME TO SERVE WRITTEN DISCOVERY ON RECENTLY ADDED PLAINTIFF SHAUNTAE ANDERSON granting 152 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Time to Serve Written Discovery on Recently Added Plaintiff Shauntae Anderson; directing that Defendants may serve written discovery requests on Plaintiff Shauntae Anderson within seven (7) days from entry of this Order. Signed by Judge Robert C. Chambers on 11/15/2021. (cc: counsel of record; any unrepresented parties) (jsa)
11/17/2021	157	CERTIFICATE OF SERVICE by Christopher Fain for Plaintiff Fain's Responses to Defendant Crouch, Beane, and WVDHHR, Bureau for Medical Services' First Set of Interrogatories. (Auvil, Walt) Modified on 11/17/2021 to correct party filers (jsa).
11/17/2021	158	CERTIFICATE OF SERVICE by Christopher Fain for Plaintiff Fain's Responses to Defendants Crouch, Beane, and WVDHHR, Bureau for Medical Services' First Set of Requests for Admissions. (Auvil, Walt) Modified on 11/17/2021 to correct party filers (jsa).
11/17/2021	159	CERTIFICATE OF SERVICE by Christopher Fain for Plaintiff Fain's Responses to Defendants Crouch, Beane, and WVDHHR, Bureau for Medical Services' First Set of Requests for Production of Documents. (Auvil, Walt) Modified on 11/17/2021 to correct party filers (jsa).
11/17/2021	160	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Responses to Plaintiffs' Second Set of Requests for Production of Documents and Things. (Bandy, Kimberly)

11/17/2021	161	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Answers to Plaintiffs' Third Set of Interrogatories. (Bandy, Kimberly)
11/18/2021	162	MOTION by Jason Haught for Abstention. (Oxley, Perry)
11/18/2021	163	MEMORANDUM OF LAW by Jason Haught in support of 162 MOTION by Jason Haught for Abstention. (Oxley, Perry) M
11/19/2021	164	ANSWER to 140 First Amended Class Action Complaint with Jury Demand by Jason Haught. (Oxley, Perry)
11/19/2021	165	STIPULATION REGARDING ANSWER DATE TO 140 FIRST AMENDED CLASS ACTION COMPLAINT by The Health Plan of West Virginia, Inc., Christopher Fain, Zachary Martell, Brian McNemar, Shawn Anderson, Leann James; said parties stipulate that said Defendant does not need to answer the First Amended Class Action Complaint in this matter, as the newly added claims/allegations do not apply to The Health Plan. (Boone, Aaron) (Modified on 11/19/2021 to add party filers) (kew).
11/22/2021	166	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Set of Interrogatories, Requests for Admission and Requests for Production of Documents to Plaintiff Shauntae Anderson. (Bandy, Kimberly)
11/30/2021	167	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Supplemental Response to Plaintiff's First Set of Interrogatories. (Bandy, Kimberly)
11/30/2021	168	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Second Supplemental Response to Second Set of Interrogatories. (Bandy, Kimberly)
11/30/2021	169	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Supplemental Responses to Second Set of Requests for Production of Documents and Things. (Bandy, Kimberly)
11/30/2021	170	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Third Supplemental Response to First Set of Requests for Production. (Bandy, Kimberly)
12/02/2021	171	OPPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar in opposition to 162 MOTION by Jason Haught for Abstention. (Auvil, Walt)
12/09/2021	172	REPLY by Jason Haught to 171 Opposition. (Salyers, Eric)
12/13/2021	173	CERTIFICATE OF SERVICE by Jason Haught for Defendant Jason Haught's Responses to Plaintiff James' First Set of Interrogatories. (Salyers, Eric)
12/13/2021	174	CERTIFICATE OF SERVICE by Jason Haught for Defendant Jason Haught's Responses to Plaintiff James' First Set of Requests for Admissions. (Salyers, Eric)
12/13/2021	175	CERTIFICATE OF SERVICE by Jason Haught for Defendant Jason Haught's Responses to Plaintiff James' First Set of Requests for Production of Documents. (Salyers, Eric)
12/16/2021	176	REPORT OF MEDIATION by Donald B. O'Dell. (jsa)
12/20/2021	177	CERTIFICATE OF SERVICE by Shawn Anderson for Plaintiff Shauntae Anderson's Responses to Defendants William Crouch, Cynthia Beane, and West Virginia Department

		of Health and Human Resources, Bureau for Medical Services' First Set of Interrogatories. (Auvil, Walt) Modified on 12/20/2021 to correct party filer (jsa).
12/20/2021	178	CERTIFICATE OF SERVICE by Shawn Anderson for Plaintiff Shauntae Anderson's Responses to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services' First Set of Requests for Admissions. (Auvil, Walt) Modified on 12/20/2021 to correct party filer (jsa).
12/20/2021	179	CERTIFICATE OF SERVICE by Shawn Anderson for Plaintiff Shauntae Anderson's Responses to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services' First Set of Request for Production of Documents. (Auvil, Walt) Modified on 12/20/2021 to correct party filer (jsa).
01/05/2022	180	STIPULATION OF DISMISSAL With Prejudice by Zachary Martell, Brian McNemar, The Health Plan of West Virginia, Inc.; said parties stipulate and agree that The Health Plan and Plaintiffs have reached a settlement to compromise all claims that exist between them, as more fully set forth herein; Plaintiffs' claims against Defendant Haught are also dismissed with prejudice; Plaintiffs and The Health Plan request that the Court direct the Clerk of the Court to remove Plaintiff Zachary Martell, Plaintiff Brian McNemar, and The Health Plan from the style of the case; further, the remaining litigants in this matter need not include The Health Plan on any further documents served in this civil action, including pleadings or discovery. (Boone, Aaron) (Modified on 1/5/2022 to add party filers) (mkw).
01/13/2022	181	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Plaintiffs' Produced Documents Bates-Stamped CFain0002640 - CFain0004791. (Auvil, Walt)
01/14/2022	182	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Rule 26(a)(2) Expert Testimony Disclosures. (Auvil, Walt)
01/14/2022	183	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Rule 26(a)(2) Expert Testimony Disclosures. (Auvil, Walt)
01/18/2022	184	NOTICE by Jason Haught of Withdrawal of 162 MOTION by Jason Haught for Abstention. (Attachment: # 1 Exhibit)(Oxley, Perry) (Modified on 1/18/2022 to replace image for attachment #1) (mkw).
01/18/2022	185	ORDER denying as moot the 92 MOTION by The Health Plan of West Virginia, Inc. to Certify Appeal of the Court's June 28, 2021 63 Memorandum Opinion and Order. Signed by Judge Robert C. Chambers on 1/18/2022. (cc: counsel of record; any unrepresented parties) (jsa)
01/18/2022	186	ORDER denying as moot Defendant Jason Haught's 162 MOTION for Abstention, pursuant to Defendant's 184 Notice of Withdrawal of the Motion. Signed by Judge Robert C. Chambers on 1/18/2022. (cc: counsel of record; any unrepresented parties) (jsa)
01/18/2022		NOTICE OF DOCKET CORRECTION re: 184 NOTICE OF WITHDRAWAL. Error: The image for attachment #1 contained personal identifiers. Correction: Replaced unredacted image for redacted image. (mkw)
01/21/2022	187	MOTION by Shawn Anderson, Christopher Fain, Leann James for Leave to File Second Amended Complaint. (Attachments: # 1 Exhibit - Proposed Second Amended Complaint, # 2 Declaration of Walt Auvil, # 3 Proposed Order)(Auvil, Walt) (Modified on 1/21/2022 to remove party filers) (mkw).

01/21/2022	188	MEMORANDUM by Shawn Anderson, Christopher Fain, Leann James in support of 187 MOTION by Shawn Anderson, Christopher Fain, Leann James for Leave to File Second Amended Complaint. (Auvil, Walt) (Modified on 1/21/2022 to remove party filers) (mkw).
02/01/2022	189	CERTIFICATE OF SERVICE by William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' Fourth Supplemental Response to Plaintiffs' First Set of Requests for Production to Defendants. (David, Caleb) Modified on 2/2/2022 to correct party filers (jsa).
02/01/2022	190	CERTIFICATE OF SERVICE by William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' Second Supplemental Responses to Plaintiffs' Second Set of Request for Production of Documents and Things. (David, Caleb) Modified on 2/2/2022 to correct party filers (jsa).
02/03/2022	191	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' Fifth Supplemental Response to Plaintiffs' First Set of Requests for Production. (Cyrus, Lou)
02/03/2022	192	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' Third Supplemental Responses to Plaintiffs' Second Set of Requests for Production of Documents and Things. (Cyrus, Lou)
02/09/2022	193	JOINT MOTION by Christopher Fain, Shawn Anderson, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Fact Discovery Deadline to April 29, 2022, re: 133 Order. (Bandy, Kimberly) (Modified on 2/10/2022 to add party filers and to add link to #133 order) (mkw).
02/09/2022	194	MEMORANDUM OF LAW by Christopher Fain, Shawn Anderson, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of 193 JOINT MOTION by Christopher Fain, Shawn Anderson, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Extension of Fact Discovery Deadline to April 29, 2022. (Bandy, Kimberly) (Modified on 2/10/2022 to add party filers) (mkw).
02/09/2022	195	PROPOSED ORDER Order Granting Joint Motion for Extension of Fact Discovery Deadline by Christopher Fain, Shawn Anderson, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Bandy, Kimberly) (Modified on 2/10/2022 to add party filers) (mkw).
02/10/2022	196	ORDER GRANTING JOINT MOTION FOR EXTENSION OF FACT DISCOVERY DEADLINE granting the parties' 193 JOINT MOTION for Extension of Fact Discovery Deadline; the deadline for fact discovery in this case is 4/29/2022. Signed by Judge Robert C. Chambers on 2/10/2022. (cc: counsel of record; any unrepresented parties) (jsa)
02/10/2022	197	JOINT MOTION by Leann James, Jason Haught to Stay Deadlines, re: 75 Scheduling Order. (Attachment: # 1 Proposed Order)(Oxley, Perry) (Modified on 2/11/2022 to add party filer) (mkw).
02/11/2022	198	ORDER GRANTING JOINT MOTION TO STAY DEADLINES granting the 197 JOINT MOTION by Defendant Jason Haught and Plaintiff Leanne James to Stay the

		deadlines in the Scheduling Order with respect to the claims of Plaintiff James against Defendant Haught; staying the fact discovery deadline for Defendant Haught and Plaintiff James until a ruling occurs on the Plaintiffs' 187 MOTION for Leave to File the Second Amended Complaint, as more fully set forth herein. Signed by Judge Robert C. Chambers on 2/11/2022. (cc: counsel of record; any unrepresented parties) (jsa)
02/15/2022	199	JOINT MOTION by Cynthia Beane, William Crouch, Jason Haught, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Defendants' Expert Witness Deadline to February 21, 2022. (Attachments: # 1 Exhibit A) (Salyers, Eric)
02/15/2022	200	PROPOSED ORDER Order Granting Joint Motion to Extend Defendants Expert Witness Deadline by Cynthia Beane, William Crouch, Jason Haught, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Salyers, Eric)
02/15/2022	201	CERTIFICATE OF SERVICE by Jason Haught for Rule 26(a)(2) Expert Testimony Disclosures. (Salyers, Eric)
02/16/2022	202	ORDER directing that Plaintiffs must respond by the end of the day today, 2/16/2022, raising good cause to deny Defendants' 199 JOINT MOTION to Extend Time to File Expert Witness Disclosure to 2/21/2022. Signed by Judge Robert C. Chambers on 2/16/2022. (cc: counsel of record; any unrepresented parties) (jsa)
02/16/2022	203	OPPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar in opposition to 199 JOINT MOTION by Cynthia Beane, William Crouch, Jason Haught, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Extend Defendants' Expert Witness Deadline to February 21, 2022. (Auvil, Walt)
02/17/2022	204	ORDER granting Defendants' 199 JOINT MOTION for an Extension of Defendants' Expert Witness Deadline to tomorrow, 2/18/2022; commensurately extending Plaintiffs' rebuttal deadline to 3/18/2022. Signed by Judge Robert C. Chambers on 2/17/2022. (cc: counsel of record; any unrepresented parties) (jsa)
02/18/2022	205	NOTICE OF VIDEOTAPED 30(B)(6) DEPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar of Frederick Lewis, Sarah Young, Secretary Crouch, Secretary Crouch, Commissioner Beane, Dr. Becker, Brandon Lewis, Jennifer Myers, Becky Manning on 2/25/2022, 3/11/2022, 3/17/2022, 3/18/2022, 3/29/2022, 3/30/2022, 4/4/2022, 4/8/2022, 4/12/2022 at 9:00 am, 9:00 am, 11:30 am, 12:30 pm, 9:00 am, 8:00 am, 10:00 am, 9:00 am, 10:00 am (Auvil, Walt)
02/18/2022	206	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, Jason Haught, West Virginia Department of Health and Human Resources, Bureau for Medical Services for First Supplemental Rule 26(a)(2) Expert Witness Disclosure. (Salyers, Eric)
02/22/2022	207	AMENDED NOTICE OF VIDEOTAPED 30(b)(6) DEPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar of Frederick Lewis, Sarah Young, Secretary Crouch, Secretary Crouch, Commissioner Beane, Dr. Becker, Brandon Lewis, Jennifer Myers, Becky Manning on 2/25/2022, 3/11/2022, 3/17/2022, 3/18/2022, 3/29/2022, 3/30/2022, 4/5/2022, 4/8/2022, 4/12/2022 at 9:00 am, 9:00 am, 11:30 am, 12:30 pm, 9:00 am, 8:00 am, 10:00 am, 9:00 am, 10:00 am (Auvil, Walt)
02/24/2022	208	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Sixth Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
02/24/2022	209	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia

		Department of Health and Human Resources, Bureau for Medical Services for Third Supplemental Response to Second Set of Interrogatories. (Bandy, Kimberly)
03/01/2022	210	SECOND AMENDED NOTICE OF VIDEOTAPED 30(b)(6) DEPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar of Sarah Young, Secretary Crouch, Secretary Crouch, Commissioner Beane, Dr. Becker, Frederick Lewis, Brandon Lewis, Jennifer Myers, Becky Manning, Brian Thompson on 3/11/2022, 3/17/2022, 3/18/2022, 3/29/2022, 3/30/2022, 4/4/2022, 4/5/2022, 4/8/2022, 4/12/2022, 4/13/2022 at 9:00 a.m., 11:30 a.m., 12:30 p.m., 9:00 a.m., 8:00 a.m., 9:00 a.m., 10:00 a.m., 9:00 a.m., 10:00 a.m., 9:00 a.m. (Auvil, Walt)
03/09/2022	211	NOTICE OF VIDEO DEPOSITION by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar of William Crouch on 3/17/2022 and 3/18/2022 at 11:30 a.m. and 12:30a.m. (Auvil, Walt)
03/09/2022	212	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendant William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services's Fourth Supplemental Responses to Plaintiffs' Second Set of Requests for Production of Documents and Things. (Bandy, Kimberly)
03/09/2022	213	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Defendants' Seventh Supplemental Response to Plaintiffs' First Set of Requests for Production to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services. (Bandy, Kimberly)
03/16/2022	214	SUGGESTION OF DEATH by Jason Haught suggesting the death of Plaintiff, Leanne James, upon the record. (Attachment: # 1 Exhibit A)(Salyers, Eric)
03/17/2022	215	MOTION by Jason Haught for Relief as a Result of Suggestion of Death, re: 214 Suggestion of Death. (Attachment: # 1 Proposed Order)(Salyers, Eric)
03/18/2022	216	ORDER directing Plaintiffs to respond to the 215 MOTION by Jason Haught for Relief as a Result of Suggestion of Death by 3/24/2022. Signed by Judge Robert C. Chambers on 3/18/2022. (cc: attys; any unrepresented parties) (mkw)
03/18/2022	217	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Rule 26(a)(2) Expert Testimony Disclosures (Expert Rebuttal Report of Dr. Johanna Olson-Kennedy, M.D., M.S.). (Auvil, Walt)
03/18/2022	218	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Rule 26(a)(2) Expert Testimony Disclosures (Expert Disclosure Report of Dan H. Karasic, M.D.). (Auvil, Walt)
03/18/2022	219	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain, Leann James, Zachary Martell, Brian McNemar for Rule 26(a)(2) Expert Testimony Disclosures (Expert Rebuttal Report of Loren S. Schechter, M.D.). (Auvil, Walt)
03/22/2022	220	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Eighth Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
03/22/2022	221	NOTICE OF CHANGE OF ATTORNEY INFORMATION by Nora Huppert updating name and/or firm information on behalf of Shawn Anderson, Christopher Fain. (Huppert, Nora)
03/23/2022	222	RESPONSE by Shawn Anderson, Christopher Fain to 215 MOTION by Jason Haught for

		Relief as a Result of Suggestion of Death. (Attachment: # 1 Declaration of Tammy St. Clair)(Auvil, Walt) (Modified on 3/23/2022 to remove link to #216 order and add link to #215 motion) (mkw).
03/23/2022	223	NOTICE OF DEPOSITION Duces Tecum of Loren S. Schechter, M.D by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (David, Caleb)
03/25/2022	224	PROPOSED ORDER Order Granting Defendant Jason Haught's Motion for Relief as a Result of Suggestion of Death by Jason Haught. (Salyers, Eric)
03/25/2022	225	ORDER granting Defendant Jason Haught's 215 MOTION for Relief as a Result of Suggestion of Death; denying as moot Plaintiffs' 187 MOTION for Leave to File Second Amended Complaint; dismissing Ms. James' existing equal protection claim found in the 140 First Amended Complaint; directing the Clerk to remove Plaintiff Leanne James from the style of the case; further directing that Defendant Haught be DISMISSED from this action without prejudice. Signed by Judge Robert C. Chambers on 3/25/2022. (cc: counsel of record; any unrepresented parties) (jsa)
03/25/2022	226	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Second Supplemental Response to Plaintiff's First Set of Interrogatories. (Bandy, Kimberly)
03/25/2022	227	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Ninth Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
03/31/2022	228	STIPULATION OF PLAINTIFFS AND DEFENDANTS by Shawn Anderson, Christopher Fain, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services; the parties enter this stipulation to clarify the testimony that Dr. Becker provided in his deposition testimony on certain topics in this case as an organizational representative for the Department of Health and Human Resources, Bureau of Medical Services, pursuant to Federal Rule of Civil Procedure 30(b)(6), as more fully set forth herein. (Auvil, Walt) (Modified on 4/1/2022 to provide party filers) (mkw).
04/01/2022	229	CERTIFICATE OF SERVICE by Shawn Anderson, Christopher Fain for Certificate of Service for Subpoena to Testify at a Deposition in a Civil Action to Dr. Stephen Levine. (Auvil, Walt)
04/06/2022	230	NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Christopher Fain on 04/28/22 at 10:00 am (Cyrus, Lou)
04/06/2022	231	NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Shawn Anderson a/k/a Shauntae Anderson on 04/22/22 at 10:00 am (Cyrus, Lou)
04/07/2022	232	NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Dr. Johanna Olson-Kennedy, M.D., M.S. on April 25, 2022 at 11:30 A.M. EDT (David, Caleb)
04/07/2022	233	NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Dan H. Karasic, M.D. on April 15, 2022 at 12:00 P.M. EDT (David, Caleb)
04/12/2022	234	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia

		Department of Health and Human Resources, Bureau for Medical Services for Tenth Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
04/20/2022	235	AMENDED NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Christopher Fain on 04/28/22 at 10:00 am (Cyrus, Lou)
04/20/2022	236	AMENDED NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Shawn Anderson a/k/a Shauntae Anderson on 04/22/22 at 10:00 am (Cyrus, Lou)
04/20/2022	237	AMENDED NOTICE OF VIDEOTAPED DEPOSITION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services of Dr. Johanna Olson-Kennedy, M.D., M.S on 04/25/22 at 11:30 a.m. (EST) (8:30 a.m. PST) (Cyrus, Lou)
04/21/2022	238	JOINT MOTION by Shawn Anderson, Christopher Fain, Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Continue Scheduling Conference. (Attachment: # 1 Certificate of Service) (Auvil, Walt) (Modified on 4/21/2022 to remove party filers and to add party filers) (mkw).
04/22/2022	239	ORDER granting the parties' 238 JOINT MOTION to Continue Scheduling Conference; canceling the 5/16/2022 Scheduling Conference and scheduling a case management conference for 7/11/2022 at 11:00 a.m.; Counsel will appear in person; the Court will determine the subject matter of the conference at a later date. Signed by Judge Robert C. Chambers on 4/22/2022. (cc: counsel of record; any unrepresented parties) (jsa)
04/29/2022	240	CERTIFICATE OF SERVICE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Eleventh Supplemental Response to Plaintiff's First Set of Requests for Production. (Bandy, Kimberly)
05/06/2022	241	NOTICE AND UNOPPOSED MOTION by Shawn Anderson, Christopher Fain to Amend Case Caption. (Attachment: # 1 Proposed Order Granting Unopposed Motion to Amend Case Caption)(Auvil, Walt)
05/09/2022	242	ORDER GRANTING UNOPPOSED MOTION TO AMEND CASE CAPTION granting Plaintiffs' 241 UNOPPOSED MOTION to Amend Case Caption; directing that the caption in this matter shall now read, as more fully set forth herein. Signed by Judge Robert C. Chambers on 5/9/2022. (cc: counsel of record; any unrepresented parties) (jsa)
05/30/2022	243	MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Exceed Page Limit for Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment. (David, Caleb)
05/30/2022	244	PROPOSED ORDER Order Granting Defendants' Motion to Exceed Page Limit by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services. (David, Caleb)
05/31/2022	245	JOINT MOTION by Shauntae Anderson, Christopher Fain, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services to File Exhibits Under Seal. (Attachments: # 1 Exhibit A - Redacted Karasic Expert Report, # 2 Exhibit B - Redacted Myers Affidavit, # 3 Proposed Order)(Auvil, Walt) (Modified on 5/31/2022 to add party filers)

05/31/2022	246	MEMORANDUM by Shauntae Anderson, Christopher Fain, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of 245 JOINT MOTION by Shauntae Anderson, Christopher Fain, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services to File Exhibits Under Seal. (Auvil, Walt) (Modified on 5/31/2022 to add party filers) (mkw).
05/31/2022	247	ORDER GRANTING DEFENDANTS' MOTION TO EXCEED PAGE LIMIT granting Defendants' 243 MOTION to Exceed Page Limit; Defendants are permitted to file a Memorandum not to exceed twenty-five (25) pages; Plaintiffs are permitted to file a response Memorandum not to exceed twenty-five (25) pages. Signed by Judge Robert C. Chambers on 5/31/2022. (cc: attys; any unrepresented party) (mkw)
05/31/2022	248	MOTION by Shauntae Anderson, Christopher Fain for Class Certification Pursuant to Fed. R. Civ. P. 23. (Attachments: # 1 Affidavit of Walt Auvil, # 2 Affidavit of Nicole J. Schladt, # 3 Exhibit A to Schladt Decl. -- Nichols Kaster firm resume, # 4 Affidavit of Avatara Smith-Carrington, # 5 Exhibit A to Smith-Carrington Decl. -- Smith-Carrington C.V., # 6 Exhibit B to Smith-Carrington Decl. -- Borelli C.V., # 7 Exhibit C to Smith-Carrington Decl. -- Charles C.V., # 8 Exhibit D to Smith-Carrington Decl. -- Buchert C.V., # 9 Exhibit E to Smith-Carrington Decl. -- Huppert C.V., # 10 Proposed Order) (Auvil, Walt)
05/31/2022	249	MEMORANDUM by Shauntae Anderson, Christopher Fain in support of 248 MOTION by Shauntae Anderson, Christopher Fain for Class Certification Pursuant to Fed. R. Civ. P. 23. (Auvil, Walt)
05/31/2022	250	MOTION by Shauntae Anderson, Christopher Fain for Summary Judgment. (Attachments: # 1 Affidavit of Christopher Fain, # 2 Affidavit of Shauntae Anderson, # 3 Affidavit of Walt Auvil, # 4 Exhibit 1 -- Defs Resp. to First RFAs, # 5 Exhibit 2 -- Defs Resp. to First Rogs, # 6 Exhibit 3 -- Defs Resp. to Second Rogs, # 7 Exhibit 4 -- Defs First Supp. Resp. to First Rogs, # 8 Exhibit 5 -- Defs Second Supp. Resp. to Second Rogs, # 9 Exhibit 5(a) -- Defs. Second Suppl. Respon. to Pls. Second Rogs, # 10 Exhibit 6 -- Fain Dep. Tr., # 11 Exhibit 7 -- Anderson Dep. Tr., # 12 Exhibit 8 -- Crouch Dep. Tr., # 13 Exhibit 9 -- Beane Dep. Tr., # 14 Exhibit 10 -- Becker Dep. Tr., # 15 Exhibit 11 -- Lewis Dep. Tr., # 16 Exhibit 12 -- Manning Dep. Tr., # 17 Exhibit 13 -- Thompson Dep. Tr., # 18 Exhibit 14 -- Young Dep. Tr., # 19 Exhibit 15 -- Karasic Dep. Tr., # 20 Exhibit 16 -- Karasic Expert Rep., # 21 Exhibit 17 -- Karasic Rebuttal Rep., # 22 Exhibit 18 -- Schechter Dep. Tr., # 23 Exhibit 19 -- Schechter Expert Rep., # 24 Exhibit 20 -- Schechter Rebuttal Rep., # 25 Exhibit 21 -- Olson-Kennedy Dep. Tr., # 26 Exhibit 22 -- Olson-Kennedy Rebuttal Rep., # 27 Exhibit 23 -- BMS Manual Ch. 100, # 28 Exhibit 24 -- BMS Manual Ch. 519, # 29 Exhibit 25 -- Composite -- Health Plans, # 30 Exhibit 26 -- Composite -- InterQual Criteria, # 31 Exhibit 27 -- Medicaid 101, # 32 Exhibit 28 -- Medicaid.gov printout, # 33 Exhibit 29 -- BMS Contract with Aetna, # 34 Exhibit 30 -- BMS Contract with UniCare, # 35 Exhibit 31 -- BMS Contract with The Health Plan, # 36 Exhibit 32 -- Email dated Oct. 13, 2020, # 37 Exhibit 33 -- Composite on Cost of Care)(Auvil, Walt)
05/31/2022	251	MEMORANDUM OF LAW by Shauntae Anderson, Christopher Fain in support of 250 MOTION by Shauntae Anderson, Christopher Fain for Summary Judgment. (Auvil, Walt)
05/31/2022	252	MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Summary Judgment. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15-A, # 16 Exhibit 15-B, # 17 Exhibit 15-

		C, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Exhibit 18-A, # 21 Exhibit 18-B, # 22 Exhibit 18-C)(Bandy, Kimberly)
05/31/2022	253	MEMORANDUM OF LAW by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in support of 252 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Summary Judgment. (Bandy, Kimberly)
05/31/2022	254	MOTION by Shauntae Anderson, Christopher Fain to Exclude Expert Testimony of Stephen B. Levine M.D. (Attachments: # 1 Affidavit of Carl Charles, # 2 Exhibit A -- Dr. Levine Expert Disclosure, # 3 Exhibit B -- Dr. Levine Fain Dep. Tr., # 4 Exhibit C -- Dr. Levine Kadel Dep. Tr., # 5 Exhibit D -- Soneeya Bench Trial Day 1 Tr., # 6 Exhibit E -- Beane Dep. Tr., # 7 Exhibit F -- Dr. Levine Claire Dep. Tr., # 8 Exhibit G -- Dahlen Article, # 9 Exhibit H -- Dr. Bowers Statement, # 10 Exhibit I -- Cass Review Website About Page, # 11 Exhibit J -- Dr. Olson Kennedy Rebuttal Rep., # 12 Exhibit K -- Dhejne Thesis Excerpt, # 13 Exhibit L -- Dhejne Article, # 14 Exhibit M -- Simonsen Article, # 15 Exhibit N -- DSM V Excerpt, # 16 Exhibit O -- Dr. Karasic Dep. Tr., # 17 Exhibit P-- Defs. Interqual Sheets, # 18 Exhibit Q -- Correction to Littman Article, # 19 Exhibit R -- Bauer Article, # 20 Exhibit S -- Defs. Resp. to Pls. Second Set of Interrogs., # 21 Exhibit T -- Dr. Levine B.P.J. Dep. Tr., # 22 Proposed Order)(Auvil, Walt)
05/31/2022	255	MEMORANDUM OF LAW by Shauntae Anderson, Christopher Fain in support of 254 MOTION by Shauntae Anderson, Christopher Fain to Exclude Expert Testimony of Stephen B. Levine M.D. (Auvil, Walt)
06/01/2022	256	ORDER GRANTING JOINT MOTION TO FILE EXHIBITS UNDER SEAL granting the parties' 245 JOINT MOTION to File Exhibits Under Seal; directing that paragraphs 47-93 of Exhibit A and paragraphs 3(a)-(v) and 5(a)-(q) of Exhibit B to the Parties' motion are ACCEPTED UNDER SEAL. Signed by Judge Robert C. Chambers on 6/1/2022. (cc: counsel of record; any unrepresented parties) (jsa)
06/01/2022	257	EXHIBIT A - Paragraphs 47-93 and EXHIBIT B - Paragraphs 3(a)-(v) and 5(a)-(q) filed by Shauntae Anderson, Cynthia Beane, William Crouch, Christopher Fain, West Virginia Department of Health and Human Resources, Bureau for Medical Services; filed under seal pursuant to the 256 Order. (Attachment: # 1 Exhibit B) (jsa)
06/10/2022	258	CORRECTED STIPULATION OF PLAINTIFFS AND DEFENDANTS by Christopher Fain, Shauntae Anderson, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services; the parties correct and supersede the 228 Stipulation. (Bandy, Kimberly) (Modified on 6/10/2022 to add party filers) (mkw).
06/14/2022	259	RESPONSE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in opposition to 248 MOTION by Shauntae Anderson, Christopher Fain for Class Certification Pursuant to Fed. R. Civ. P. 23. (Green, Roberta) (Modified on 6/15/2022 to remove link to #249 memorandum) (mkw).
06/14/2022	260	RESPONSE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in opposition to 254 MOTION by Shauntae Anderson, Christopher Fain to Exclude Expert Testimony of Stephen B. Levine M.D. (Attachment: # 1 Exhibit A)(David, Caleb) (Modified on 6/15/2022 to remove link to #255 memorandum) (mkw).
06/14/2022	261	RESPONSE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in opposition to 250 MOTION by

		Shauntae Anderson, Christopher Fain for Summary Judgment. (Attachments: # 1 Exhibit 19-A, # 2 Exhibit 19-B)(Bandy, Kimberly) (Modified on 6/15/2022 to remove link to #251 memorandum and to replace image for attachment #2) (mkw).
06/14/2022	262	OPPOSITION by Shauntae Anderson, Christopher Fain to 252 MOTION by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services for Summary Judgment. (Attachments: # 1 Affidavit of Walt Auvil (Supplemental), # 2 Exhibit 34 InterQual, Male Mammoplasty, # 3 Exhibit 35 InterQual, Adolescent Mammoplasty, # 4 Exhibit 36 Anderson Dep. Tr. Excerpt, # 5 Exhibit 37 Kadel v. Folwell, slip op.)(Auvil, Walt)
06/15/2022		NOTICE OF DOCKET CORRECTION re: 261 RESPONSE. Error: The image for attachment #2 was missing the pages of the exhibit. Correction: Replaced incorrect image with correct image. (mkw)
06/21/2022	263	REPLY by Shauntae Anderson, Christopher Fain to 259 Response In Opposition. (Auvil, Walt)
06/21/2022	264	REPLY by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services to Plaintiffs' 262 Opposition. (Bandy, Kimberly)
06/21/2022	265	REPLY MEMORANDUM by Shauntae Anderson, Christopher Fain to 261 Response In Opposition. (Auvil, Walt)
06/21/2022	266	REPLY MEMORANDUM OF LAW by Shauntae Anderson, Christopher Fain to 260 Response In Opposition. (Attachments: # 1 Declaration of Carl S. Charles, # 2 Exhibit U - Olson-Kennedy Deposition Transcript)(Auvil, Walt)
06/27/2022	267	ORDER canceling the current hearing set for 7/11/2022 and rescheduling the hearing for 7/13/2022 at 1 p.m. in Huntington; the Court intends to hear argument on the cross-motions for summary judgment at 1 p.m. and will hear argument on the motion for class certification immediately thereafter; granting permission for Plaintiffs' attorney to appear virtually to argue the motion for class certification. Signed by Judge Robert C. Chambers on 6/27/2022. (cc: counsel of record; any unrepresented parties) (jsa)
07/13/2022	268	CASE MANAGEMENT CONFERENCE held by Judge Robert C. Chambers on 7/13/2022; Court Reporter: Kathy Swinhart. (trj)
07/27/2022	269	TRANSCRIPT OF PROCEEDINGS of Case Management Conference held on July 13, 2022, before Judge Robert C. Chambers. Court Reporter Kathy Swinhart, Telephone number 304-528-7583. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due 8/8/2022. Redaction Request due 8/17/2022. Redacted Transcript Deadline set for 8/29/2022. Release of Transcript Restriction set for 10/25/2022. (kls)
08/02/2022	270	MEMORANDUM OPINION AND ORDER granting Plaintiffs' 248 MOTION for Class Certification. Signed by Judge Robert C. Chambers on 8/2/2022. (cc: counsel of record; any unrepresented parties) (jsa)
08/02/2022	271	MEMORANDUM OPINION AND ORDER granting Plaintiffs' 250 MOTION for Summary Judgment and denying Defendants' 252 MOTION for Summary Judgment; denying as moot the 254 MOTION to Exclude Expert Testimony of Stephen B. Levine, M.D. Signed by Judge Robert C. Chambers on 8/2/2022. (cc: counsel of record; any unrepresented parties) (jsa)
08/17/2022	272	JOINT STATUS REPORT by Shauntae Anderson, Christopher Fain, William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for

		Medical Services. (Attachment: # <u>1</u> Proposed Judgment Order)(Auvil, Walt) (Modified on 8/17/2022 to add party filers) (mkw).
08/17/2022	<u>273</u>	JUDGMENT ORDER directing that judgment is entered in favor of plaintiffs Christopher Fain, Shauntae Anderson, and the certified Rule 23 Class against defendants William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services (the State actors and agencies responsible for administering the Medicaid Program in West Virginia) declaring that the West Virginia State Medicaid Program's exclusion of gender-confirming surgical treatment for transgender West Virginia Medicaid participants violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116; the Medicaid Act's Availability Requirement, 42 U.S.C. § 1396a(a)(10)(A); and the Medicaid Act's Comparability Requirement, 42 U.S.C. § 1396a(a)(10)(B); further directing that defendants William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services are PERMANENTLY ENJOINED from enforcing or applying the exclusion; further directing that plaintiffs shall have up to and including 45 days after the date of entry of this judgment to file a bill of costs, and a motion for attorney's fees and costs; further directing that the court retains jurisdiction to enforce the judgment. Signed by Judge Robert C. Chambers on 8/17/2022. (cc: attys; any unrepresented party) (mkw)
08/17/2022	<u>274</u>	TRANSMITTED CERTIFIED COPY of <u>273</u> Judgment Order to attorneys and any unrepresented party. (mkw)
08/26/2022	<u>275</u>	LETTER to Clerk of Court, from Brianna Ann Sunshine (non-party) dated 8/23/2022, re: requesting docket sheet and documents. (kew)
08/31/2022	<u>276</u>	LETTER to Brianna Ann Sunshine, from Rory L. Perry II dated 8/31/2022, re: <u>275</u> letter requesting docket sheet and documents. (klc)
08/31/2022	<u>277</u>	NOTICE OF APPEAL WITH FEE PAID by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services as to <u>270</u> Memorandum Opinion and Order, <u>271</u> Memorandum Opinion and Order and <u>273</u> Judgment Order. Filing Fee \$505. Receipt # AWVSDC-8261232. (Bandy, Kimberly)
09/01/2022	<u>278</u>	TRANSMITTAL OF NOTICE OF APPEAL TO 4CCA via APPEAL TRANSMITTAL SHEET re: <u>277</u> Notice of Appeal to the 4CCA of <u>270</u> Memorandum Opinion and Order, <u>271</u> Memorandum Opinion and Order and <u>273</u> Judgment Order. (cla)
09/06/2022	<u>279</u>	NOTICE OF APPELLATE CASE OPENING BY 4CCA re: <u>277</u> Notice of Appeal to the 4CCA, in 4CCA Case No. 22-1927. Case Manager: Richard H. Sewell. (jsa)
09/06/2022	<u>280</u>	LETTER to Clerk of Court, from Brianna Ann Sunshine (non-party) dated 9/1/2022, re: requesting documents from docket sheet. (kew)
09/08/2022	<u>281</u>	NOTICE OF CHANGE OF ATTORNEY INFORMATION by Avatara Antoinette Smith-Carrington updating name and/or firm information on behalf of Shauntae Anderson, Christopher Fain. (Smith-Carrington, Avatara)
09/12/2022	<u>282</u>	LETTER to Brianna Ann Sunshine, from Rory L. Perry II dated 9/12/2022, re: <u>280</u> letter requesting documents from docket sheet. (klc)
09/30/2022	<u>283</u>	PROPOSED BILL OF COSTS by Shauntae Anderson, Christopher Fain (Attachments: # <u>1</u> Exhibit A - Itemization of Transcript Costs, # <u>2</u> Exhibit B - Transcript Invoices)(Auvil, Walt)
09/30/2022	<u>284</u>	MOTION by Shauntae Anderson, Christopher Fain for Attorneys' Fees and Expenses. (Attachments: # <u>1</u> Affidavit of Avatara Smith-Carrington, # <u>2</u> Exhibit A to Smith-

		Carrington Decl. Smith-Carrington CV, # <u>3</u> Exhibit B to Smith-Carrington Decl. Smith-Carrington Time Record, # <u>4</u> Exhibit C to Smith Carrington Decl. Borelli Time Record, # <u>5</u> Exhibit D to Smith-Carrington Decl. Charles Time Record, # <u>6</u> Exhibit E to Smith-Carrington Decl. Buchert Time Record, # <u>7</u> Exhibit F to Smith-Carrington Decl. Huppert Time Record, # <u>8</u> Exhibit G to Smith-Carrington Decl. Clanton-Lockhart Time Record, # <u>9</u> Exhibit H to Smith-Carrington Decl. Itemized Costs, # <u>10</u> Affidavit of Anna Prakash, # <u>11</u> Exhibit A to Prakash Decl. Nichols Kaster Time Record, # <u>12</u> Affidavit of Walt Auvil, # <u>13</u> Exhibit A to Auvil Decl. Employment Law Center Time Record, # <u>14</u> Affidavit of Amy C. Crossan, # <u>15</u> Affidavit of Michael J. Farrell, # <u>16</u> Proposed Order)(Auvil, Walt)
09/30/2022	<u>285</u>	MEMORANDUM OF LAW by Shauntae Anderson, Christopher Fain in support of <u>284</u> MOTION by Shauntae Anderson, Christopher Fain for Attorneys' Fees and Expenses. (Auvil, Walt) (Modified on 9/30/2022 to remove link to #283 bill of costs) (mkw).
10/14/2022	<u>286</u>	RESPONSE by Cynthia Beane, William Crouch, West Virginia Department of Health and Human Resources, Bureau for Medical Services in opposition to <u>284</u> MOTION by Shauntae Anderson, Christopher Fain for Attorneys' Fees and Expenses (David, Caleb)

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.

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, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTHPLAN OF WEST VIRGINIA, INC.,

Defendants.

Civil Action No. 3:20-cv-00740

CLASS ACTION COMPLAINT

INTRODUCTION

1. This case is about discrimination in health care and employment. Plaintiffs bring this suit to challenge discrimination under West Virginia state health insurance plans that deprive transgender people of essential, and sometimes life-saving, health care. These state health plans facially, and categorically, exclude coverage for health care that transgender people require. The exclusions in the state health plans described in paragraphs 61 and 64 use antiquated and improper language, but their targeting of transgender people on explicitly sex-based terms is unmistakable. The exclusions all categorically deny transgender people coverage for gender-confirming care. Gender-confirming care includes, but is not limited to, counseling, hormone

replacement therapy, and surgical care. Accordingly, as used herein, gender-confirming care includes the care denied pursuant to each of those exclusions. While cisgender people¹ receive coverage for those forms of health care as a matter of course, transgender people are targeted for discrimination by exclusions in the state health plans. This kind of discrimination is unlawful under federal constitutional and statutory guarantees of freedom from discrimination based on sex and transgender status. Because these exclusions constitute a sweeping, uniform denial of care for all transgender people, Plaintiffs bring this class action suit on behalf of themselves and those similarly situated.

2. Defendants violate the law in two ways. First, Defendants discriminate against low-income transgender people who are Medicaid participants. Inflicting grave harm on a particularly vulnerable group of people, Defendants deny low-income transgender Medicaid participants the same health coverage others receive, targeting them for discrimination based on their sex and transgender status. This care is for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual’s gender identity and sex assigned at birth—and is also known as gender-confirming care. Defendants categorically deny gender-confirming care to transgender Medicaid participants, even though it is medically necessary and can be life-saving, while routinely providing cisgender participants the same treatments.

3. Second, Defendants discriminate against state employees and their dependents, by denying coverage for gender-confirming care, even though cisgender people receive the same kinds of treatments as a matter of course. As part of compensation for employment, the State of West Virginia provides health care coverage for employees and their eligible dependents through

¹ “Cisgender” refers to people who are not transgender.

the Public Employees Insurance Agency (“PEIA”). All available health plans deny coverage for gender-confirming care, and unlawfully discriminate against people who either are transgender or have transgender family members who depend on them for health care coverage. In other words, Defendants deny equal compensation for equal work to employees who are transgender or have transgender dependents, and harm employees’ transgender family members who depend on them for health care.

4. The blanket exclusions of gender-confirming care are stated expressly in the health plans offered to Medicaid participants, and to state employees. While phrased in slightly different terms across the plans, the exclusions all single out transgender people for differential treatment and rely explicitly on sex-based considerations. Plaintiffs challenge the exclusions, and any other source of law, regulation, policy, or practice that denies gender-confirming care to West Virginia Medicaid participants, state employees, and eligible dependents of state employees (references herein to the “Exclusions” refer collectively to all such exclusions for gender-confirming care).

5. The Exclusions fly in the face of the medical consensus that gender-confirming care is the only safe and effective medical treatment for gender dysphoria, and wholly disregard the harms of denying transgender people access to critical health care. The Exclusions unlawfully deny medically necessary care to transgender Medicaid participants, and state employees and their dependents. The state’s coverage of the same treatments to address health conditions other than gender dysphoria underscores that West Virginia treats its transgender Medicaid and state health plan participants in an unfair and discriminatory manner. In doing so, Defendants expose a particularly vulnerable group to significant and avoidable harms to their

health and wellbeing, and inflict needless suffering and financial hardship in violation of the U.S. Constitution and federal law.

6. Plaintiffs bring this lawsuit on behalf of themselves and other similarly situated Medicaid participants, state employees, and eligible dependents of state employees seeking a declaratory judgment that the Exclusions violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Section 1557 (“Section 1557”) of the Patient Protection and Affordable Care Act (“ACA” or “Affordable Care Act”), 42 U.S.C. § 18116, and the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B); preliminary and permanent injunctions barring Defendants from enforcing the Exclusions to deny gender-confirming care; reasonable attorneys’ fees and costs; and such other relief as the Court deems just and equitable.

7. In their individual capacities, the named Plaintiffs also seek compensatory and consequential damages for the injuries they have suffered as a result of Defendants’ unlawful conduct.

PARTIES

8. Plaintiff Christopher Fain resides in Huntington, West Virginia. Mr. Fain is a 44-year-old transgender man. Mr. Fain has been enrolled for Medicaid coverage at all times material to this complaint.

9. Plaintiff Zachary Martell resides in Barboursville, West Virginia. Mr. Martell is a 33-year-old transgender man. Mr. Martell is married to Brian McNemar, a state employee. As the legal spouse of Mr. McNemar, Mr. Martell is an eligible dependent and has been enrolled for state employee health coverage through Mr. McNemar at all times material to this complaint.

10. Plaintiff Brian McNemar resides in Barboursville, West Virginia. Mr. McNemar is a 37-year-old cisgender man. Mr. McNemar is a state employee who works at the Mildred Mitchell Bateman Hospital as an Accountant Auditor. Mr. McNemar is married to Mr. Martell.

11. Defendant William Crouch is sued in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources. As Cabinet Secretary, Mr. Crouch is responsible for “[d]evelop[ing] a managed care system to monitor the services provided by the [M]edicaid program to individual clients.” W. Va. Code § 9-2-9(a)(1). Mr. Crouch is authorized to “[p]repare and submit state plans which ... meet the requirements of federal laws, rules governing federal-state assistance.” W. Va. Code § 9-2-6(12). Additionally, Mr. Crouch is responsible for preparing recommendations “to be submitted to the joint committee on government and finance,” and in developing these recommendations Mr. Crouch may “[r]eview ... [M]edicaid services which are optional under federal [M]edicaid law and identif[y] ... services to be retained, reduced or eliminated.” W. Va. Code § 9-2-9(b)(1). Mr. Crouch exercises his authority as Cabinet Secretary to ensure that gender-confirming care is designated as an excluded service in the state Medicaid program—targeting transgender Medicaid participants for discriminatory treatment on the basis of their sex and transgender status. Defendant Crouch is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

12. Defendant Cynthia Beane is sued in her official capacity as Commissioner for the Bureau for Medical Services. As Commissioner, Ms. Beane’s duties include managing and overseeing project development, implementation of health policies, and assuring compliance with federal laws and regulations. Ms. Beane also led policy implementation for changes to bring West Virginia’s Medicaid coverage into compliance with the Affordable Care Act.

Despite having the authority to implement health policies to assure compliance with federal law, including the Affordable Care Act, Ms. Beane exercises her authority to ensure that gender-confirming care is designated as a noncovered service for Medicaid participants, thus targeting transgender people for discriminatory treatment on the basis of their sex and transgender status. Defendant Beane is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

13. Defendant West Virginia Department of Health and Human Resources, Bureau for Medical Services (“BMS”) is the “single state agency” charged with the responsibility of administering “the [M]edicaid program” in West Virginia. W. Va. Code §§ 9-1-2(n), 9-2-13(a)(3). BMS establishes eligibility standards for Medicaid providers, determines benefits, sets payment rates, and reimburses providers. Additionally, BMS maintains the West Virginia Medicaid State Plan and files amendments to the plan with the appropriate regulatory authorities. West Virginia Medicaid is jointly funded by the state of West Virginia and the federal government. BMS is a recipient of federal funds from the U.S. Department of Health and Human Services (“HHS”), including Medicaid funding. The federal assistance BMS receives makes BMS a “covered entity” subject to the nondiscrimination requirements of Section 1557 of the ACA, which prohibit discrimination on the basis of sex and other protected characteristics.

14. Defendant Ted Cheatham is sued in his official capacity as Director of PEIA. As Director, Mr. Cheatham is the Chief Administrative Officer of PEIA and is responsible for the “administration and management of the Public Employees Insurance Agency.” W. Va. Code § 5-16-3(c). This responsibility includes, but is not limited to, “manag[ing] on a day-to-day basis the group insurance plans” for state employees through “administrative contracting, studies, analyses and audits, ... provider negotiations, provider contracting and payment, *designation of*

covered and noncovered services, [and] offering of additional coverage options or cost containment incentives.” *Id.* (emphasis added). Mr. Cheatham has authority to “make all rules necessary to effectuate” his responsibilities under the statute. *Id.* Mr. Cheatham exercises this authority to ensure that gender-confirming care is designated as a noncovered service in each and every health plan available to state employees and their dependents, thus targeting them for discriminatory treatment on the basis of their, or their dependent’s, sex and transgender status. Defendant Cheatham is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

15. Defendant The Health Plan of West Virginia, Inc. (“The Health Plan”) was established in 1979 through provisions under the federal Health Maintenance Organization (“HMO”) Act, 42 U.S.C. §300e, et seq. The Health Plan is a federally qualified and state-certified 501(c)(4) not-for-profit HMO. The Health Plan is West Virginia’s largest HMO, with more than 200,000 members, and its service area encompasses all 55 counties in West Virginia. Many of The Health Plan’s members, including Mr. Martell and Mr. McNemar, are enrolled through their state employers; others are enrolled through state Medicaid and Medicare Advantage plans. The Health Plan is offered through PEIA as a health insurance option for qualifying state employees. More than 15,000 of The Health Plan’s members are state employees who have obtained coverage through the PEIA. The Health Plan receives federal financial assistance and is a “covered entity” for purposes of Section 1557 of the ACA.

16. Defendants, through their respective duties and obligations, are responsible for the discriminatory Exclusions of gender-confirming health care to state employees and dependents who are transgender. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aid and/or abet in some manner the acts

alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure the plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant and their successors, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE

17. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution; Section 1557 of the ACA, 42 U.S.C. § 18116; and the Medicaid Act's availability and comparability requirements, 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(10)(B).

18. The Court has jurisdiction over the claims asserted herein under 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States; and pursuant to 28 U.S.C. § 1343(a)(3) and (4) because the action is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the U.S. Constitution and seeks to secure damages and equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights.

19. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

20. Under 28 U.S.C. § 1391(b)(1) and (2), venue is proper in the Southern District of West Virginia because Defendants reside there and all Defendants are residents of West Virginia in which the district is located; and in this district and division because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred herein.

21. This Court has personal jurisdiction over Defendants because they are all domiciled within the State of West Virginia.

FACTS

A. Sex, Gender Identity, and Gender Dysphoria

22. Every individual's sex is multifaceted, and comprised of a number of characteristics, including but not limited to chromosomal makeup, hormones, internal and external reproductive organs, secondary sex characteristics, and most importantly, gender identity.

23. Gender identity is a person's internal sense of their sex. It is an essential element of human identity that everyone possesses, and a well-established concept in medicine. Gender identity is innate, immutable, and has biological underpinnings, such as the sex differentiation of the brain that takes place during prenatal development.

24. For everyone, gender identity is the most important determinant of a person's sex and a fundamental component of human identity.

25. A person's sex is generally assigned at birth based solely on a visual assessment of external genitalia at the time of birth. External genitalia are only one of several sex-related characteristics and are not always indicative of a person's sex.

26. For most people, these sex-related characteristics are all aligned, and the visual assessment performed at birth serves as an accurate proxy for that person's gender.

27. Where a person's gender identity does not match that person's sex assigned at birth, however, gender identity is the critical determinant of that person's sex.

28. The ability to live in a manner consistent with one's gender identity is vital to the health and wellbeing of transgender people.

29. Scientific consensus recognizes that attempts to change an individual's gender identity to bring their gender identity into alignment with the sex assigned at birth are ineffective and harmful.

30. Attempts to force transgender people to live in accordance with their sex assigned at birth, a practice often described as "conversion therapy," is known to cause profound harm. Such efforts are now widely considered unethical and, in many places, are unlawful.

31. For transgender people, an incongruence between their gender identity and sex assigned at birth can result in a feeling of clinically significant stress and discomfort known as gender dysphoria. Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; the World Health Organization's International Classification of Diseases, which is the diagnostic and coding compendia for medical professionals; and by other leading medical and mental health professional groups, including the American Medical Association ("AMA") and the American Psychological Association ("APA").

32. In addition to clinically significant distress, untreated gender dysphoria can result in severe anxiety, depression, or even suicidality.

33. Untreated gender dysphoria often intensifies with time. The longer an individual goes without or is denied adequate treatment for gender dysphoria, the greater the risk of severe harms to the individual's health.

34. Gender dysphoria can be treated in accordance with internationally recognized Standards of Care formulated by the World Professional Association for Transgender Health ("WPATH"). WPATH is an international, multidisciplinary, professional association whose mission is to promote evidence-based health care protocols for transgender people. WPATH

publishes Standards of Care that are based on the best available science and expert professional consensus, and which are widely accepted as best practices for treating gender dysphoria.

35. Under the WPATH Standards of Care, medically necessary treatments may include, among other things, “[h]ormone therapy” and “[s]urgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring).”

36. The Standards of Care are recognized as authoritative by national medical and behavioral health organizations such as the AMA and APA, which have both called for an end to exclusions of gender-confirming care from health insurance plans.

37. The individualized steps that many transgender people take to live in a manner consistent with their gender, rather than the sex they were assigned at birth, are known as transitioning.

38. Transitioning is particular to the individual but typically includes social, legal, and medical transition.

39. Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life. For example, social transition can include wearing attire, following grooming practices, and using pronouns consistent with that person’s gender identity. The steps a transgender person can take as part of their social transition help align their gender identity with all aspects of everyday life.

40. Legal transition involves steps to formally align a transgender individual’s legal identity with their gender identity, such as legally changing one’s name and updating the name and gender marker on their driver’s license, birth certificate, and other forms of identification.

41. Medical transition, a critical part of transitioning for many transgender people, includes gender-confirming care that bring the sex-specific characteristics of a transgender person's body into alignment with their gender. Gender-confirming care can involve counseling to obtain a diagnosis of gender dysphoria, hormone replacement therapy, surgical care, or other medically necessary treatments for gender dysphoria.

42. Hormone replacement therapy involves taking hormones for the purpose of bringing one's secondary sex characteristics into typical alignment with one's gender identity. Secondary sex characteristics are bodily features not associated with external and internal reproductive genitalia (primary sex characteristics). Secondary sex characteristics include, for example, hair growth patterns, body fat distribution, and muscle mass development. Hormone replacement therapy can have significant masculinizing or feminizing effects and can assist in bringing a transgender individual's secondary sex characteristics into alignment with their true sex, as determined by their gender identity, and therefore is medically necessary care for transgender people who need it to treat their gender dysphoria.

43. Gender-confirming surgical care might be sought by a transgender person to better align primary or secondary sex characteristics with their gender identity. Surgical care can include, but is not limited to, hysterectomies, gonadectomies, mammoplasties, mastectomies, orchiectomies, vaginoplasties, and phalloplasties. These treatments are for the purpose of treating gender dysphoria.

44. These various components associated with transition—social, legal, and medical transition—do not change an individual's gender, as that is already established by gender identity, but instead bring the individual's appearance, legal identity, and sex-related characteristics into greater alignment with the individual's gender identity and lived experience.

45. The consequences of untreated, or inadequately treated, gender dysphoria are dire. Symptoms of untreated gender dysphoria include intense emotional suffering, anxiety, depression, suicidality, and other attendant mental health issues. Untreated gender dysphoria is associated with higher levels of stigmatization, discrimination, and victimization, contributing to negative self-image and the inability to function effectively in daily life. When transgender people are provided with access to appropriate and individualized gender-confirming care in connection with treatment of gender dysphoria, these symptoms can be alleviated and even prevented.

46. The AMA, APA, American Psychiatric Association, Endocrine Society, American College of Obstetricians and Gynecologists, American Academy of Family Physicians, and other major medical organizations have recognized that gender-confirming care is medically necessary, safe, and effective treatment for gender dysphoria—and that access to such treatment improves the health and well-being of transgender people. Each of these groups has publicly opposed exclusions of insurance coverage by private and public health insurers, like the Exclusions at issue here.

47. WPATH has stated that, like hormone replacement therapy and other gender-confirming treatments, the “medical procedures attendant to sex reassignment are not ‘cosmetic’ or ‘elective’ or for the mere convenience of the patient,” but instead are “medically necessary for the treatment of the diagnosed condition.” Nor are they experimental, because “decades of both clinical research and medical research show that they are essential to achieving well-being for the [transgender] patient.”

B. Defendants' Targeted and Discriminatory Exclusion of Gender-Confirming Care

1. Medicaid health coverage

48. Authorized under Title XIX of the Social Security Act of 1965, Medicaid is a joint federal-state program that provides access to health care for Medicaid-eligible individuals. 42 U.S.C. § 1396-1396w-5 (“Medicaid Act”). The purpose of Medicaid is to enable states to “furnish [] medical assistance” to individuals “whose income and resources are insufficient to meet the cost of necessary medical services.” 42 U.S.C. § 1396-1.

49. States are not required to participate in the Medicaid program—but all states do. States that choose to participate must comply with the Medicaid Act and its implementing regulations.

50. The Medicaid Act requires each participating state to establish or designate a single state agency charged with administering or supervising the state’s Medicaid program. 42 U.S.C. § 1396a(a)(5). Additionally, each participating state must maintain a comprehensive state plan (“Medicaid Plan”) for medical assistance, approved by the Secretary of the U.S. Department of Health and Human Services. 42 U.S.C. § 1396a.

51. The Medicaid Plan must describe how the state will administer its Medicaid program and affirm the state’s commitment to comply with the Medicaid Act and its implementing regulations. Additionally, the Medicaid Plan “sets out groups of individuals to be covered, services to be provided, methodologies for providers to be reimbursed and the administrative activities that are underway in the state.”

52. The federal government reimburses participating states for a substantial portion of the cost of providing medical assistance.

53. Under the Medicaid Act, “the medical assistance made available to any individual ... shall not be less in amount, duration or scope than the medical assistance made available to any other such individual.” 42 U.S.C. § 1396a(a)(10)(B)(i).

54. Additionally, a state “Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service ... to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.” 42 C.F.R. § 440.230(c).

55. States must ensure that “[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.” 42 C.F.R. § 440.230(b). Moreover, state Medicaid programs must provide medical assistance “in a manner consistent with ... the best interests of the recipients.” 42 U.S.C. § 1396a(a)(19).

56. The State of West Virginia participates in the federal Medicaid program.

57. Defendant BMS is the designated single state agency charged with the responsibility of administering the Medicaid program in West Virginia. W. Va. Code §§ 9-1-2(n); 9-2-13(a)(3).

58. Defendant BMS maintains the state’s Medicaid Plan and files amendments to the Medicaid Plan with the appropriate regulatory authorities. Additionally, Defendant BMS determines benefits, sets payment rates, and reimburses providers.

59. Mountain Health Trust is West Virginia’s Medicaid managed care program, which is administered by the BMS. BMS contracts with several managed care organizations (“MCO”), which are health plans that coordinate services to provide health coverage to Medicaid participants. As part of the Mountain Health Trust program, eligible Medicaid participants may select a primary care provider and one of three MCOs: (1) UniCare Health Plan of West Virginia, Inc., (2) The Health Plan, and (3) Aetna Better Health of West Virginia.

60. Each MCO provides Medicaid participants with Medicaid-covered health services through their defined network of providers and hospitals. These MCO networks are monitored by Defendant BMS.

61. Although Defendant BMS, in its administration of the state's Medicaid program, "strives to assure access to appropriate, medically necessary and quality health care services for all members," the Medicaid Policy Manual provides that the Medicaid Plan does not cover "[t]ranssexual surgery." Additionally, each MCO contains a similar exclusion of gender-confirming care in each of their managed care plans: (1) UniCare excludes coverage for "[s]ex transformation procedures and hormone therapy for sex transformation procedures;" (2) The Health Plan provides that "[s]ex change, hormone therapy for sex transformation, and gender transition procedures/expenses will not be paid for by The Health Plan;" and (3) Aetna Better Health excludes coverage for "[s]ex transformation procedures and hormone therapy for sex transformation procedures."

62. At all relevant times, the state's Medicaid Plan and managed care plans have categorically excluded coverage for gender-confirming care, through the exclusions in paragraph 61, even though the same treatments are covered for cisgender people who are Medicaid participants.

2. State employee health coverage

63. Qualifying state employees and their eligible dependents can choose from multiple health plan options. Covered services under the state employee health plans generally include coverage of medically necessary prescriptions, counseling, and surgical care at inpatient and outpatient facilities. These plans are distinguished primarily by coverage ratios, deductible amounts, and general costs to the insured employee and their eligible dependent enrollees. The

health plans offered to state employees do, however, have at least one feature in common. At all relevant times, all health plans offered to state employees have contained categorical exclusions of coverage for gender-confirming care, even though the same care is covered for cisgender people.

64. State employees can choose from among seven health insurance plans. These options include (A) four preferred provider benefit plan options through PEIA provided by Defendant Cheatham, and (B) three HMO and point of service plans provided by Defendants Cheatham and The Health Plan.

A. **Four preferred provider benefit plan options through PEIA provided by Defendant Cheatham:** State employees can enroll for health coverage through four Preferred Provider Benefit plans: (1) “PEIA PPB Plan A,” a comprehensive health plan; (2) “PEIA PPB Plan B,” which offers lower premiums but higher deductibles and other costs; (3) “PEIA PPB Plan C,” an IRS-qualified high-deductible health plan; and (4) “PEIA PPB Plan D,” which offers no out-of-state benefits with limited exceptions. All handbooks for these plans contain an identical exclusion for “[s]urgical or pharmaceutical treatments associated with gender dysphoria or any physical, psychiatric, or psychological examinations, testing, treatments or services provided or performed in preparation for, or as a result of, sex transformation surgery.” That exclusion appears in the 2020 and 2021 plan year handbooks. Member handbooks for plan years 2013 through 2019 similarly excluded “[s]ex transformation operations and associated services and expenses.”

B. **Three HMO and point of service plans provided by Defendants Cheatham and The Health Plan:** State employees can also choose from insurance plans approved by Defendant Cheatham and offered through Defendant The Health Plan, which offers

three health plans: (a) HMO Plan A; (b) HMO Plan B; and (c) a point of service (“POS”) plan.

All three plans include a blanket exclusion of coverage for gender-confirming care.

65. All seven health plans available to West Virginia state employees exclude coverage for gender-confirming care.

66. There is no non-discriminatory health plan option for state employees and their dependents.

67. Transgender people may require varying forms of gender-confirming care. The blanket Exclusions, however, unilaterally and uniformly prevent transgender people from receiving coverage for gender-confirming care regardless of their need. As a result, the Exclusions maintained across all state employee health plans discriminatorily target transgender people, denying coverage for medically necessary gender-confirming care. Cisgender enrollees receive coverage for medically necessary mental health, prescription drug, and surgical needs; whereas, transgender enrollees do not because of the Exclusions and based on their sex and transgender status.

C. The Denial of Care to Plaintiffs

1. Plaintiff Christopher Fain (Medicaid)

68. Mr. Fain is 44 years old. Mr. Fain was born in West Virginia and has resided in West Virginia for the vast majority of his life.

69. Mr. Fain is studying nonprofit leadership at Marshall University, and currently works as a store associate at a retail clothing store located in Huntington, West Virginia.

70. Mr. Fain is a man.

71. Mr. Fain is also transgender. Although his sex assigned at birth was female, his gender identity is male.

72. Mr. Fain experiences dysphoria related to the distress arising from the incongruence between his gender identity and his sex assigned at birth.

73. Mr. Fain has been aware of his gender identity since he was six years old, and since that first awareness has identified as male. Mr. Fain delayed his transition for many years, however, for fear that discrimination and stigma against transgender people would prevent him from being able to support his family.

74. Delaying this vital care took an enormous toll on Mr. Fain, and he eventually came out to his family. Mr. Fain's children are very supportive of Mr. Fain's transition.

75. Mr. Fain began counseling to help address his gender dysphoria, and was diagnosed with gender dysphoria in or around December 2018.

76. Mr. Fain obtained a legal name change to reflect his gender identity through a West Virginia court order on April 6, 2018.

77. Mr. Fain updated his name to reflect his male gender identity on his Social Security account in April 2018, and updated his West Virginia driver's license with his new name in May 2018.

78. Mr. Fain lives in all ways in accordance with his male gender identity and is recognized as male by his family, his friends, his classmates, and his professors.

79. Mr. Fain has been enrolled as a Medicaid participant for most of his adult life.

80. Mr. Fain receives coverage through the MCO UniCare Health Plan of West Virginia, Inc., an Anthem Company.

81. In or around February 2019, Mr. Fain's mental health provider recommended that he begin hormone therapy to alleviate his gender dysphoria by aligning his physical characteristics with his gender identity. Mr. Fain began hormone care on or around March 2019.

82. In or around June 2019, Mr. Fain was informed by his pharmacist that his current MCO plan would not cover hormone care to treat gender dysphoria.

83. Because Medicaid will not cover his testosterone prescription, in or around June 2019, Mr. Fain began purchasing needles and related supplies out-of-pocket through an online private vendor and purchasing hormones out-of-pocket through his pharmacy.

84. Mr. Fain has since paid out-of-pocket for his hormone care and continues to do so. The Medicaid Plan's exclusion of coverage for Mr. Fain's medically necessary care has caused Mr. Fain economic hardship, emotional distress, lowered self-esteem, embarrassment, humiliation, and stigma.

85. In order to avoid being incorrectly identified as female and to reduce the severe distress and embarrassment over the presence of typically female-appearing breasts on his body, Mr. Fain often wears a "binder," which is a compression garment that flattens or reduces the profile of a person's chest, which is an ongoing source of his gender dysphoria.

86. Mr. Fain experiences intense discomfort with prolonged use of a binder, which often chafes his skin, and sometimes creates sores and leads to difficulty breathing. Nonetheless, to help manage his gender dysphoria, he sometimes wears the binder for 16 hours at a time.

87. Mr. Fain requires a bilateral mastectomy as medically necessary care to treat his gender dysphoria and eliminate the need for the ongoing use of a binder. This surgical procedure is a widely accepted and effective treatment for gender dysphoria. However, the blanket exclusion in the Medicaid Plan bars him from receiving this medically necessary care. Mr. Fain accordingly is forced to delay this urgently-needed procedure as a direct and proximate result of Defendants' continuing refusal to cover medically necessary gender-confirming care. As a result, Mr. Fain's symptoms of gender dysphoria and related distress have increased.

2. Plaintiffs Zachary Martell and Brian McNemar (PEIA)

88. Mr. McNemar works as an Accountant Auditor in the accounting department of the Mildred-Mitchell Bateman Hospital, a state psychiatric hospital in Huntington, West Virginia, that is operated, supported, and subject to oversight by the state. Mr. McNemar began working in this position on February 18, 2018.

89. Mr. Martell is a full-time student at Mountwest Community and Technical College (“Mountwest College”) in Huntington, West Virginia. Mountwest College does not offer health insurance to students.

90. At all relevant times, both Mr. McNemar and Mr. Martell have been enrolled in a health plan through PEIA and have relied on that plan for health care coverage. As the spouse and eligible dependent of Mr. McNemar, Mr. Martell is enrolled in the HMO Plan A approved by Defendant Cheatham and offered by Defendant The Health Plan.

91. Mr. Martell is a man.

92. Mr. Martell is also transgender. Although his sex assigned at birth was female, his gender identity is male.

93. Mr. Martell has been medically diagnosed with gender dysphoria. He experiences dysphoria related to the disconnect between his primary and secondary sex characteristics and his gender identity.

94. From an early age, Mr. Martell felt different: he understood that he was not female and felt discomfort with his primary and secondary sex characteristics. He preferred masculine clothing from a young age. However, he did not have the language or conceptual understanding to describe these feelings. It was not until age 30, with the support of his husband and friends, that he accepted and came to understand himself as transgender.

95. Mr. Martell changed his legal name by West Virginia court order on February 19, 2019. He also updated the name and gender marker on his West Virginia driver's license and his Social Security records. Additionally, Mr. Martell is recognized as male by his friends, classmates, and professors.

96. As part of his medical transition, Mr. Martell has received treatment for gender dysphoria, including hormone replacement therapy in the form of testosterone, to alleviate his gender dysphoria by aligning his physical characteristics with his gender identity.

97. In order to avoid being incorrectly identified as female, and to reduce the severe distress and embarrassment over the presence of typically female-appearing breasts on his body, when he leaves the house, Mr. Martell often uses a binder, which flattens or reduces the profile of his chest. However, even with the use of a binder, Mr. Martell experiences distress over the presence of his chest, which is an ongoing source of his gender dysphoria.

98. Mr. Martell experiences intense discomfort with prolonged use of a binder, which can be painful and cause difficulty breathing, among other health risks. As a result, Mr. Martell must carefully limit the amount of time that he uses a binder. Prior to the current COVID-19 pandemic, Mr. Martell's class schedule required him to be on campus for more than nine hours, forcing him to forego the use of a binder on certain days, and exposing him to increased risk of being incorrectly identified as female, which causes him significant anxiety.

99. Mr. Martell requires a bilateral mastectomy as medically necessary care to treat his gender dysphoria and eliminate the need for the ongoing use of a binder. This surgical procedure is a widely accepted and effective treatment for gender dysphoria. However, the categorical Exclusion in HMO Plan A bars him from receiving this medically necessary care. Mr. Martell is accordingly forced to delay a medically necessary and urgently-needed procedure

as a direct and proximate result of Defendants' continuing refusal to cover gender-confirming care through the Exclusions. As a result, Mr. Martell's symptoms of gender dysphoria and related distress have increased.

100. On or around April 2018, Mr. Martell began attending counseling as part of his medical transition. On or about November 13, 2018, his mental health provider assessed him as ready to begin hormone replacement therapy and recommended that he do so. When Mr. Martell first sought to begin hormone replacement therapy in the form of testosterone with the guidance of his medical and mental health providers, The Health Plan denied coverage both for the prescriptions and his office visits with the health care provider who managed his hormone replacement therapy.

101. On or about February 13, 2019, Mr. Martell received a Notice of Adverse Benefit Determination from Defendant The Health Plan. The notice informed Mr. Martell that coverage for his medically necessary hormone replacement therapy would be denied. The notice stated that Mr. Martell "asked us to cover testosterone. After review we are denying the request. Treatments for gender identity issues are excluded from the benefit."

102. As a result of this denial of medically necessary health care, Mr. Martell and Mr. McNemar were forced to pay out-of-pocket for Mr. Martell's testosterone prescriptions. At times, this expense was too much for Mr. Martell and Mr. McNemar to meet, forcing Mr. Martell to temporarily to forego medically necessary health care to make ends meet. This lapse in health care coverage exacerbated Mr. Martell's anxiety, and suspended the physical changes that were an essential part of his medical transition.

103. Mr. Martell's medical and mental health providers have recommended that he continue to receive hormone therapy to alleviate his ongoing symptoms of gender dysphoria.

Defendants Cheatham and The Health Plan's categorical exclusion of such medical care, however, denies coverage for this treatment, forcing Mr. Martell and Mr. McNemar to pay out-of-pocket for medically necessary health care. The denials of coverage for this care have caused Mr. Martell emotional distress, lowered self-esteem, embarrassment, humiliation, and stigma.

104. Additionally, the denials of coverage for Mr. Martell's care have caused his spouse, Mr. McNemar, intense frustration, despair, and aggravation. Mr. McNemar not only experienced the distress of watching his spouse suffer without coverage for essential medical care, but also the distress of being discriminated against in his compensation. Other cisgender state employees receive coverage for their spouses' hormone-related therapy and surgical care, while Mr. McNemar is denied that important form of compensation simply because his spouse is transgender. This harms Mr. McNemar by depriving him of equal compensation for equal work, causes him distress, and stigmatizes both Mr. Martell and Mr. McNemar.

105. Because of the Exclusions of gender-confirming health care from the state health plans, the named Plaintiffs have suffered emotional distress, humiliation, degradation, embarrassment, emotional pain and anguish, violation of their dignity, loss of enjoyment of life, and other compensatory damages, in an amount to be established at trial.

CLASS ACTION ALLEGATIONS

106. Plaintiffs, on behalf of themselves and all similarly situated individuals, bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

107. Plaintiffs assert their claims against all Defendants on behalf of the following Classes and Subclass, collectively, "the Classes").

Medicaid Class

108. The proposed Medicaid Class is defined as: All transgender people who are or

will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions.

State Employee Health Plan Class

109. The proposed State Employee Health Plan Class is defined as: All people who are enrolled in a State Employee Health Plan and who are either transgender and have sought or will seek gender-confirming care, and/or people whose transgender dependents have sought or will seek gender-confirming care, barred by the Exclusions.

The Health Plan Subclass

110. The proposed The Health Plan Subclass is a subclass of the State Employee Health Plan Class and is defined as: All State Employee Health Plan Class Members who are enrolled in The Health Plan.

111. Plaintiffs and the proposed Classes have been equally affected by Defendants' violations of law.

112. The persons in the proposed Classes are so numerous that joinder of all members is impracticable. While the precise number of class members has not been determined at this time, upon information and belief, there are more than 40 individuals in the proposed Classes and/or the class members are so numerous that joinder would be impractical.

113. The common questions of law and fact include, but are not limited to:

A. Whether Defendants' Exclusions, facially and as applied to members of the proposed Classes, violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

B. Whether Defendants' Exclusions, facially and as applied to members of the proposed Classes, violate the prohibitions on sex discrimination under Section 1557 of the

Affordable Care Act;

C. Whether Defendants' Exclusions, facially and as applied to members of the proposed Medicaid Class, violate the availability and comparability provisions of the Medicaid Act; and

D. Whether Defendants should be enjoined from enforcing the Exclusions and denying Plaintiffs coverage for and access to gender-confirming care.

114. The questions of law and fact listed above will yield common answers for Plaintiffs and the proposed Classes.

115. Plaintiffs' claims are typical of those members of the proposed Classes. Mr. Fain is transgender, is a participant in West Virginia Medicaid, and is denied coverage for gender-confirming care because of an Exclusion. Mr. Martell is transgender, an eligible dependent of Mr. McNemar, and has been denied access to medically necessary gender-confirming care because of an Exclusion. Mr. McNemar is a state employee whose dependent has been denied coverage for gender-confirming care because of an Exclusion. Mr. Fain, representing the Medicaid Class, and Mr. Martell and Mr. McNemar, representing the State Employee Health Plan Class and The Health Plan Subclass, and members of the proposed Classes share the same legal claims under the Equal Protection Clause and Section 1557.

116. Plaintiffs will fairly and adequately represent the interests of the proposed Classes and have retained counsel experienced in complex class action litigation. Plaintiffs are represented by Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), the nation's oldest and largest legal organization dedicated to the rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV. Lambda Legal has extensive federal court experience litigating on behalf of LGBT people, including regarding transgender

people's access to health care, and has served as class counsel and putative class counsel in a number of LGBT-related cases. Plaintiffs are also represented by Nichols Kaster, PLLP, a leading law firm with significant expertise representing plaintiffs across the country in employment and class action matters, and Walt Auvil of The Employment Law Center, PLLC ("The Employment Law Center"). Mr. Auvil is a West Virginia-based litigator with more than 30 years of experience protecting workers' rights, including through complex class action litigation.

117. Class treatment is appropriate under Fed. R. Civ. P. 23(b)(2) because Defendants have acted on grounds that apply generally to the proposed Classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the proposed Classes as a whole.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection U.S. Const. Amend. XIV

Plaintiff Christopher Fain, on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

Plaintiffs Zachary Martell and Brian McNemar, on Behalf of the State Employee Health Plan Class and The Health Plan Subclass, Against Defendant Cheatham for Declaratory and Injunctive Relief

118. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

119. Plaintiffs state this cause of action on behalf of themselves and members of the proposed Classes against Defendant Crouch, Defendant Beane, and Defendant Cheatham in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenge Defendants' enforcement of the discriminatory sex-based classifications in the Exclusions both facially and as applied to Plaintiffs and the proposed Classes.

120. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

121. Defendant Crouch is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiff Fain and the proposed Medicaid Class equal protection of the law. Through his duties and actions to develop a managed care program that excludes coverage for gender-confirming care, Defendant Crouch has unlawfully discriminated, and continues to discriminate, against Plaintiff Fain and the members of the proposed Medicaid Class based on sex-related considerations.

122. Defendant Beane is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiff Fain and the proposed Medicaid Class equal protection of the law. Through her duties and actions to implement health policies for BMS which exclude gender-confirming care, Defendant Beane has unlawfully discriminated, and continues to discriminate, against Plaintiff Fain and the members of the proposed Medicaid Class based on sex-related considerations.

123. Defendant Cheatham is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs Martell and McNemar and the proposed State Employee Health Plan Class equal protection of the law. Through his duties and actions to administer and manage the group insurance plans for state employees and dependents—which includes authority and responsibility for designating noncovered services such as the Exclusions of gender-confirming care, and his actions to ensure that state employees have no nondiscriminatory options—Defendant Cheatham has unlawfully

discriminated, and continues to discriminate, against Plaintiffs Martell and McNemar and the members of the proposed State Employee Health Plan Class based on sex-related considerations.

124. The Exclusions, on their face and as applied to Plaintiffs and the proposed Classes, impermissibly discriminate on the basis of sex, and on the basis of transgender status, and violate their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

125. The Exclusions treat Plaintiffs and members of the proposed Classes differently from other persons who are similarly situated. Under the Exclusions, transgender Medicaid and state health plan participants who require gender-confirming care are denied coverage for that medically necessary care, while cisgender Medicaid and state health plan participants can access the same kinds of treatments, including when related to their sex. Similarly, state health plan enrollees with a transgender dependent are denied coverage for that medically necessary care, while enrollees with a cisgender dependent are not denied coverage for the same kinds of treatments, including when related to their sex.

A. Discrimination on the Basis of Sex

126. By maintaining and enforcing the categorical Exclusions of gender-confirming care in the Medicaid and state employee health plans, Defendant Crouch, Defendant Beane, and Defendant Cheatham respectively engage in constitutionally impermissible discrimination on the basis of sex.

127. Discrimination on the basis of transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition constitutes discrimination on the basis of sex.

128. Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

129. By ensuring that coverage for gender-confirming care is categorically excluded regardless of medical necessity in all health coverage options for Medicaid and state employee health plan participants, Defendants Crouch, Beane, and Cheatham engage in constitutionally impermissible sex-based discrimination against Plaintiffs and members of the proposed Classes, and violate their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

B. Discrimination on the Basis of Transgender Status

130. By maintaining and enforcing the categorical Exclusions of gender-confirming care, Defendants Crouch, Beane, and Cheatham engage in constitutionally impermissible discrimination on the basis of transgender status.

131. As the Fourth Circuit recently confirmed, under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to “at least” heightened scrutiny. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020). That is because:

A. Transgender people have suffered a long history of discrimination and continue to suffer such discrimination to this day.

B. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit state and federal protections to protect them against discrimination through the legislative process.

C. A person's transgender status bears no relation to a person's ability to contribute to society.

D. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment. Gender identity generally is highly resistant to change through intervention.

132. Because the Exclusions on their face and as applied to Plaintiffs and the proposed Classes deprive transgender Medicaid and state employee health plan enrollees of their right to equal dignity, liberty, and autonomy by stigmatizing them and branding them as inferior to cisgender health plan enrollees, Defendants Crouch, Beane, and Cheatham deny transgender persons equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment. The categorical Exclusions similarly serve to stigmatize state health plan enrollees whose dependents are transgender, depriving them of their equal treatment and dignity.

133. Defendants' enforcement of the Exclusions has not, and does not serve even a legitimate state interest, let alone one that is important, or compelling. Nor are the Exclusions adequately tailored to any such state interest. Rather, the Exclusions serve only to prevent Plaintiffs and members of the proposed Classes from obtaining gender-confirming care when cisgender enrollees are able to receive the same care as long as it is not required for purposes of treating gender dysphoria. In effect, the Exclusions punish vulnerable transgender people for being transgender and taking necessary—and sometimes life-saving—steps to live in accordance with their gender identity.

134. Without injunctive relief from the Exclusions of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT TWO
Violation of Section 1557 of the
Patient Protection and Affordable Care Act
42 U.S.C. § 18116

Plaintiff Christopher Fain, on Behalf of the Medicaid Class, Against Defendant BMS, Defendant Crouch, and Defendant Beane for Declaratory and Injunctive Relief, and Individually Against Defendant BMS for Compensatory Damages

Plaintiffs Zachary Martell and Brian McNemar, on Behalf of the State Employee Health Plan Class Against Defendant Cheatham for Declaratory and Injunctive Relief, on Behalf of The Health Plan Subclass Against Defendant The Health Plan and Defendant Cheatham for Declaratory and Injunctive Relief, and Individually Against Defendant The Health Plan for Compensatory Damages

135. Plaintiffs re-allege and incorporate each and every foregoing allegation contained in the preceding paragraphs of this complaint, as though fully set forth herein.

136. Plaintiffs state this cause of action on behalf of themselves and members of the proposed Classes for purposes of seeking declaratory and injunctive relief, and challenge the discriminatory sex-based classifications in the Exclusions both facially and as applied to Plaintiffs and the proposed Classes. Named Plaintiffs also state this cause of action for compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

137. Under Section 1557 of the Affordable Care Act, “an individual shall not ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)” on the basis of sex. 42 U.S.C. § 18116.

138. “[A]ny health program or activity”:

A. Defendant BMS, which administers and supervises the state's Medicaid Plan, constitutes a health program or activity within the meaning of the statute.

B. Defendant The Health Plan, as a health maintenance organization serving more than 200,000 people covered through its health plans, constitutes a health program or activity within the meaning of the statute.

139. *“[A]ny part of which is receiving Federal financial assistance”:*

A. Defendant BMS receives federal financial assistance such that it is a “covered entity” for purposes of Section 1557 of the ACA. The Centers for Medicare & Medicaid Services (“CMS”), operating within HHS, provide federal financial assistance to BMS for the state's participation in the Medicaid Program.

B. Defendant The Health Plan receives federal financial assistance such that it is a “covered entity” for purposes of Section 1557 of the ACA. The Health Plan's “Provider Procedural Manual,” which provides guidance to medical providers who care for patients insured through The Health Plan, explains that, “The Health Plan has entered into a contract with the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers the Medicare program. Under this contract, CMS makes a monthly payment to The Health Plan for each Medicare beneficiary who enrolls in our Plan. ... The Health Plan receives a set rate for each member plus any enrollee premium.”

140. The categorical Exclusions maintained by Defendants BMS, The Health Plan, Crouch, Beane, and Cheatham, on their face and as applied to Plaintiffs and members of the proposed Classes, violate Section 1557's prohibition against discrimination on the basis of sex in a health program or activity receiving federal financial assistance.

141. Defendants Crouch, Beane, and Cheatham's actions under color of state law to maintain the categorical Exclusions deprive Plaintiffs and members of the proposed Classes of the protection from sex discrimination secured by Section 1557.

142. Discrimination on the basis of transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition are all encompassed by the prohibition of discrimination on the basis of sex under Section 1557.

143. By categorically excluding gender-confirming care regardless of medical necessity, Defendants BMS, The Health Plan, Crouch, Beane, and Cheatham have drawn a classification that has and continues to unlawfully discriminate against Plaintiffs and members of the proposed Classes based on sex, in violation of Section 1557.

144. Because Defendant BMS and Defendant The Health Plan receive federal funding that flows to health programs or activities, Plaintiffs and the proposed Classes have a right under Section 1557 to receive health insurance through BMS and The Health Plan free from discrimination on the basis of transgender status, sex, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition.

145. Defendants BMS, The Health Plan, Crouch, Beane, and Cheatham have discriminated against Plaintiffs and the proposed Classes on the basis of sex in violation of Section 1557 and have thereby denied Plaintiffs and the proposed Classes the full and equal participation in, benefits of, and right to be free from discrimination in a health program or activity.

146. Plaintiffs and the proposed Classes have been and continue to be injured by the application of the Exclusion by Defendants BMS, The Health Plan, Crouch, Beane, and Cheatham to deny coverage for gender-confirming care and have suffered harm as a result.

147. The named Plaintiffs have also suffered emotional distress, stigmatization, humiliation, and a loss of dignity because of BMS' and The Health Plan's targeted discrimination against transgender Medicaid participants and The Health Plan enrollees respectively, which wrongly deems their health care needs as unworthy of equal coverage. By knowingly and intentionally offering health care coverage to Plaintiffs that discriminates on the basis of sex, Defendant BMS and Defendant The Health Plan have intentionally violated the ACA, for which named Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

148. Without injunctive relief from the Exclusions of coverage for gender-confirming care, Plaintiffs and the proposed Classes will continue to suffer irreparable harm in the future.

COUNT THREE

Violation of the Medicaid Act's Availability Requirements 42 U.S.C. § 1396a(a)(10)(A)

Plaintiff Christopher Fain, on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

149. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

150. Plaintiff Fain states this cause of action on behalf of himself and members of the proposed Medicaid Class against Defendants Crouch and Beane in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenges Defendants' enforcement of the Exclusions both facially and as applied to Mr. Fain and the proposed Medicaid Class.

151. The Medicaid Act's Availability Requirements, 42 U.S.C. § 1396a(a)(10)(A), require that a state plan must "provide for making medical assistance available ... to" eligible individuals.

152. The categorical Exclusions maintained and enforced by Defendants Crouch and Beane eliminate mandatory Medicaid coverage of medically necessary services and render them unavailable to Plaintiff Fain and members of the proposed Medicaid Class, thereby violating Medicaid's availability requirement, 42 U.S.C. § 1396a(a)(10)(A), which is enforceable by Plaintiff Fain under 42 U.S.C. § 1983.

COUNT FOUR
Violation of the Medicaid Act's Comparability Requirements
42 U.S.C. § 1396a(a)(10)(B)

Plaintiff Christopher Fain, on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

153. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

154. Plaintiff Fain states this cause of action on behalf of himself and members of the proposed Medicaid Class against Defendants Crouch and Beane in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenges Defendants' enforcement of the Exclusions both facially and as applied to Mr. Fain and the proposed Medicaid Class.

155. The Medicaid Act's Comparability Requirements, 42 U.S.C. § 1396a(a)(10)(B), require that the "medical assistance made available to [eligible individuals] shall not be less in amount, duration, or scope than the medical assistance made available to" other eligible or ineligible individuals.

156. The categorical Exclusions maintained and enforced by Defendants Crouch and Beane, and the denial of medically necessary services and treatments to Plaintiff Fain and members of the proposed Medicaid Class, while the same or similar services and treatments are covered for cisgender Medicaid beneficiaries, violates Medicaid's comparability requirement, 42 U.S.C. § 1396a(a)(10)(B), which is enforceable by Plaintiff Fain under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs as class representatives, on behalf of themselves and the proposed Classes, respectfully request that this Court enter judgment in their favor and against Defendants on all claims, as follows:

- A. Certification of a class action pursuant to Fed. R. Civ. P. 23 on behalf of the proposed Classes;
- B. Appointment of Plaintiffs as class representatives and their counsel as class counsel;
- C. Issuance of a preliminary and permanent injunction enjoining any further enforcement or application of the Exclusions, and directing Defendants and their agents to provide access to coverage for all gender-confirming care without regard to the Exclusions;
- D. Declaratory judgment that the Exclusions, facially and as applied to Plaintiffs and members of the proposed Classes:
 1. Violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition), and on the basis of transgender status;
 2. Violate Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition);
 3. Violate the Medicaid Act's availability requirement, 42 U.S.C. § 1396a(a)(10)(A); and,

4. Violate the Medicaid Act's comparability requirement, 42 U.S.C.

§ 1396a(a)(10)(B);

E. An award of the declaratory and injunctive relief requested in this action against Defendants' officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them;

F. An award of compensatory and consequential damages to the individual Plaintiffs in an amount that would fully compensate Plaintiffs for their financial harm, emotional distress and suffering, embarrassment, humiliation, pain and anguish, violations of their dignity, and other damages that have been caused by the conduct of Defendants BMS and The Health Plan in violation of the ACA;

G. An award of reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 and all other applicable statutes; and

H. Such other and further relief as the Court may deem just and proper.

* * *

Dated: November 12, 2020

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WWSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Anna P. Prakash*
Nicole J. Schladt*
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Tara L. Borelli*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
Phone: 470-225-5341
Facsimile: 404-897-1884
tborelli@lambdalegal.org

Sasha Buchert*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Nora Huppert*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Attorneys for Plaintiffs

* Statement of Visiting Attorney and Designation of Local Counsel forthcoming

**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,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

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, BUREAU FOR MEDICAL
SERVICES; 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.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS WILLIAM CROUCH,
CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES'S MOTION FOR
PARTIAL DISMISSAL OF PLAINTIFFS' CLASS ACTION COMPLAINT**

Now come Defendants William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services ("WVDHHR"), by counsel Lou Ann S. Cyrus, Roberta F. Green, Caleb B. David, Kimberly M. Bandy, and Shuman McCuskey Slicer PLLC, and submit this memorandum of law in support of their request that the Plaintiffs' Class Action Complaint be dismissed in part against them. The WVDHHR moves, pursuant to

Rule 12(b)(1) of the Federal Rules of Civil Procedure, or, in the alternative, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of Plaintiff Christopher Fain's claim for compensatory damages asserted in Count II of the Complaint on the basis that the claim is barred by the Eleventh Amendment to the United States Constitution. Additionally, Defendants William Crouch, Cynthia Beane, and the WVDHHR move to dismiss Plaintiffs' request for class certification.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiffs' Class Action Complaint was filed on November 12, 2020, in the United States District Court for the Southern District of West Virginia. Plaintiff Christopher Fain brings suit against William Crouch, Cynthia Beane, and the WVDHHR, claiming that he has been the subject of discrimination as a Medicaid participant on the basis of his sex and his transgender status.¹ On behalf of himself, and on behalf of a proposed class of Medicaid participants, Plaintiff Fain seeks declaratory and injunctive relief against Defendants Crouch, Beane, and the WVDHHR.² Mr. Fain individually seeks compensatory damages from the WVDHHR for violation of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. §18116.³ Plaintiffs Zachary Martell and Brian McNemar assert discrimination claims against Defendants Ted Cheatham and The Health Plan of West Virginia, Inc., related to health insurance for State employees and their dependents.⁴ The claims of Martell and McNemar (and the related proposed state employee class or subclass) are not directed at Defendants Crouch, Beane, or the WVDHHR.

¹ Compl., at ¶¶1, 82-87.

² Compl., Counts One, Two, Three, and Four.

³ Compl., Count Two.

⁴ Compl., Counts One and Two.

STANDARD OF REVIEW

Rule 8 of the Federal Rules of Civil Procedure requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” F.R.C.P. 8(a)(2). Defendants Crouch, Beane, and the WVDHHR are entitled to dismissal of the claims for class action certification pursuant to Federal Rule of Civil Procedure 12(b)(6) because the subject portions of the Complaint fail to state a claim upon which relief can be granted.

While no specific form of pleading is required, the Plaintiffs must set forth sufficient factual allegations in the Complaint that, if true, would constitute a legal cause of action. For purposes of a motion to dismiss under Rule 12(b)(6), Courts must consider the Complaint’s factual allegations as true, but need not do so with respect to mere conclusory legal allegations, which need not be given such consideration. “To survive a motion to dismiss, a Complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Additionally, the WVDHHR is entitled to dismissal of Mr. Fain’s claim for compensatory damages pursuant to the Eleventh Amendment to the United States Constitution. It appears to be unsettled in the United States Court of Appeals for the Fourth Circuit whether Eleventh Amendment immunity is to be considered under Rule 12(b)(1) for lack of subject matter jurisdiction, or Rule 12(b)(6) for failure to state a claim upon which relief can be granted.⁵ To the extent that the specific Rule to be utilized is unsettled, relief is requested in the alternative.

⁵ *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (2000) (“Our cases have been unclear on whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)”).

However, under either Rule, the WVDHHR is entitled to immunity from suit for compensatory damages.

ANALYSIS

I. THE WVDHHR IS ENTITLED TO DISMISSAL OF PLAINTIFF CHRISTOPHER FAIN'S CLAIM FOR COMPENSATORY DAMAGES PURSUANT TO THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT IS A STATE AGENCY.

Mr. Fain's claim against the WVDHHR for compensatory damages is a claim against the State of West Virginia and is barred by the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment to the United States Constitution states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." THE CONSTITUTION OF THE UNITED STATES, Amendment XI. The Supreme Court of the United States has construed the Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'"⁶

The WVDHHR is a State agency as recognized in Chapter 9 of the West Virginia Code.⁷ Suits against a State or a State agency in federal court for monetary damages are barred by the Eleventh Amendment to the United States Constitution.⁸ Therefore, Mr. Fain cannot maintain his claim for compensatory damages against the WVDHHR.

⁶ *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872, 109 L. Ed. 2d 264, 271 (1990), (additional citations omitted).

⁷ W.Va. Code §§9-1-2, 9-2-1a.

⁸ *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45, 55 (1989).

Sovereign immunity constitutes “an important constitutional limitation on the power of the federal courts.”⁹ Eleventh Amendment immunity can be waived in certain limited circumstances. For example, in enacting legislation, the United States Congress can condition the receipt of federal funds on waiver of sovereign immunity. However, such condition must be “‘unequivocally expressed’ in the text of the relevant statute.”¹⁰ The State receiving such funds must be able to clearly ascertain and understand the condition, in order to make a knowing and voluntary waiver of sovereign immunity.¹¹ To determine whether the declaration is clear and unambiguous, the court “must view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds.”¹² The Supreme Court of the United States has directed that the “test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.”¹³

Without a clear declaration of such intent, waiver does not occur. “A State’s consent to suit must be ‘unequivocally expressed’ in the text of the relevant statute.”¹⁴ “Only by requiring this ‘clear declaration’ by the State can we be ‘certain that the State in fact consents to suit.’”¹⁵ Waiver

⁹ *Sossamon v. Texas*, 563 U.S. 277, 284, 131 S. Ct. 1651, 1657, 179 L. Ed. 2d 700, 708 (2011), citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

¹⁰ *Sossamon*, 563 U.S. at 284, 131 S. Ct. at 1658, 179 L. Ed. 2d at 708, quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (additional citation omitted).

¹¹ *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S. Ct. 2455, 2459, 165 L. Ed. 2d 526, 533-534 (2006), citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

¹² *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. at 296, 126 S. Ct. at 2459, 165 L. Ed. 2d at 534.

¹³ *Sossamon v. Texas*, 563 U.S. at 284, 131 S. Ct. at 1658, 179 L. Ed. 2d at 708, quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (internal quotation marks omitted).

¹⁴ *Sossamon*, 563 U.S. at 284, 131 S. Ct. at 1658, 179 L. Ed. 2d at 708-709 (additional citation omitted).

¹⁵ *Id.*

will not be implied.”¹⁶ Waiver of sovereign immunity “will be strictly construed, in terms of its scope, in favor of the sovereign.”¹⁷ Additionally, the waiver of sovereign immunity “must extend unambiguously” to claims for money damages.¹⁸

Plaintiff Fain seeks compensatory damages for violation of § 1557 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. §18116, which states:

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.¹⁹

On its face, 42 U.S.C. §18116 does not specify an unequivocal expression of waiver of sovereign immunity in exchange for the receipt of federal funds under the ACA. Therefore, it does not meet the strict requirements for waiver as outlined by the Supreme Court of the United States. Accordingly, the WVDHHR is entitled to sovereign immunity and the claims against the WVDHHR for money damages are barred.

II. PLAINTIFFS’ CLASS ALLEGATIONS MUST BE DISMISSED BECAUSE PLAINTIFFS’ ALLEGED CAUSES OF ACTION REQUIRE PARTICULAR PROOF OF INDIVIDUALIZED HARM TO EACH ALLEGED CLASS MEMBER.

Class action claims constitute a deviation from the general rule that litigation must be

¹⁶ *Id.*

¹⁷ *Sossamon v. Texas*, 563 U.S. at 285, 131 S. Ct. at 1658, 179 L. Ed. 2d at 709, quoting *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996).

¹⁸ *Sossamon*, 563 U.S. at 285, 131 S. Ct. at 1658, 179 L. Ed. 2d at 709, quoting *Lane v. Pena*, 518 U.S. at 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486.

¹⁹ 42 U.S.C. §18116(a).

conducted by and on behalf of the individual named parties only.²⁰ That deviation is justified only to the extent the class representatives possess *inter alia* the same interests and suffer the same injury as the proposed class members.²¹ The Supreme Court of the United States has found that class form is appropriate only where economical to combine the claims and that the determination as to whether it is economical is a practical one – when a common injury can be addressed and resolved by a class litigation without doing damage to either, it makes sense to do so as a class action. Here, however, the economies of the class form are unavailable, as particularized discovery would be necessary to determine the individualized facts relative to Defendants’ duty to each class member, the underlying facts of the breach of that duty as experienced by each class member, and any causation between that breach and each particular class member’s alleged damages, such that the class structure would be counterproductive, uneconomical, and contraindicated.²² Plaintiffs’ class claims fall outside Federal Rule of Civil Procedure Rule 23 (a)(2), which requires that “there are questions of law or fact common to the class,” such that dismissal as a matter of law of the class claims herein is necessary and proper at this time.

A class action for monetary damages to determine the scope of Medicaid regulations in any number of specific factual health situations and claims histories undercuts any economies inherent in the Rule 23 process and is substantively improper for class treatment. To the extent Plaintiffs have particularized their claims to their precise diagnosis, their precise medical needs, and their precise claims histories, then Rule 23 offers no economies to what must become multiple separate litigations, joined only in the broadest sense. Even taking Plaintiffs’ claims in the light

²⁰ *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 349 (2011), quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

²¹ *Dukes*, 564 U.S. at 349, quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlessinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974)).

²² *Cyrus ex rel. McSweeney v. Walker*, 233 F.R.D. 467, 470 (SD WV 2005), relying upon *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

most favorable to them, the class is ‘common’ only in the very broadest sense, in that, allegedly, each of the Plaintiffs would like to ensure that coverage, and thereby, the requisite care, would not be denied them on the basis that they are transgender, suggesting that the best remedy might be legislative or administrative in nature. *See* Complaint, generally.²³ While more usually commonality would be addressed at the certification stage,²⁴ where, as here, the proposed class action by logical necessity inescapably falls outside Rule 23, the time to address the issue is now. After all, pursuant to Federal Rule of Civil Procedure Rule 23, a plaintiff may bring suit on behalf of a class of individuals “only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a).²⁵ Because the majority of the factual, and, therefore, legal questions are unique to each class member, Plaintiffs’ class claim must fail as a matter of law.

Plaintiffs have alleged by pertinent example that Defendants “[v]iolate[d] Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 [ACA], by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics,

²³ Indeed, in the broadest sense and taken as a matter of fact and law, the Plaintiffs are challenging the healthcare underwriting system itself, such that their claims are largely unrelated to any particular person’s experience, suggesting that the true remedy is through administrative or legislative challenge.

²⁴ *Rhodes v. E.I. DuPont de Nemours & Co.*, 253 F.R.D. 365, 367, 370 (SD WV 2008), noting that this liberal standard must be subjected to rigorous analysis, especially in the instance of medical claims, which finally are not ‘cohesive enough’ to gain any economies through class action.

²⁵ While Plaintiffs have alleged a class of ‘more than forty’ or in any event, a number sufficient to meet Plaintiffs’ numerosity mandate under Rule 23(a), Compl. at 112, it is more striking that the number of affected persons and the need to particularize the claims both mitigate in favor of jettisoning the class format and adding the putative plaintiffs as named parties. In point of fact, Plaintiffs’ Complaint includes requisite language: the class is so large that it would be impractical or impossible to add the persons as named parties. However, to the extent that Plaintiffs fail to identify sufficient numbers and given the need for such individualized claims, Plaintiffs will have a high hurdle at certification if they have the same small number of exceedingly individual claims. *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-53 (1974).

gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition),”²⁶ which creates a class of injured persons that would be either overly particularized (if this litigation needs to determine diagnosis, medical care requested, basis for the request, and claims history relative to that request) or insufficiently particularized to the extent that this litigation would focus solely on the catchall: violation of the ACA on the basis of sex. Any effort to particularize the allegations more pointedly would further complicate use of the class format for these claims in that each class member will need to be vetted for inclusion within the rubric (diagnosis, presenting complaints, claim submission, outcome, basis for denial, review sought). Additionally, Plaintiffs’ effort to “enjoin enforcement or application of the Exclusions,”²⁷ while seeking common relief, is meaningless with healthcare claims, which by their very nature are dependent upon particularized assessment and review of individual claims – once again, a poor fit for Rule 23. Whereas Plaintiffs allege the State engaged in categorical denials, even assuming *arguendo* that it was true for purposes of this motion, it would be improper – arguably unconstitutional -- to change contractual relationships and burdens by enforcing coverage categorically.²⁸

The Supreme Court of the United States in *Wal-Mart Stores, Inc., v. Dukes* clarified and particularized the issue of which claims are suitable for class consideration, in particular, as relates to commonality. Specifically, in *Dukes*, the Supreme Court recognized that, if plaintiffs generalize their claims broadly enough, certainly any and all persons could qualify as class members so as to meet the commonality mandate. However, the *Dukes* Court cautioned that, while such artful

²⁶ Compl. at Prayer for Relief at D (2).

²⁷ Compl. at Prayer for Relief at C.

²⁸ *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992), questioning whether a change in state law that undercuts contractual relationships violates the due process and contract clauses of the Constitution.

pleading alone may appear to reflect commonality,²⁹ it is incumbent on courts, indeed, this Court, to probe beyond the pleadings to ensure that Plaintiffs do not raise common questions, but rather, seek to generate common answers. In *Dukes*, the Court considered common questions that, finally, were generalized to the point that they no longer meaningfully constituted a basis of commonality: “Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?”³⁰ While all of the *Dukes* plaintiffs truly had these questions at the heart of their claims, the *Dukes* Court found the questions too broad to provide meaningful class inquiry or relief.

Per *Dukes*, it is insufficient to achieve commonality by having a would-be class of plaintiffs allege commonality based on nothing more than violations of the same statute or law. The fact that the *Dukes* plaintiffs alleged violations of Title VII was insufficient alone to make plaintiffs’ claims ‘common’ pursuant to Federal Rules of Civil Procedure Rule 23 (a)(2), which reads that “there are questions of law or fact common to the class.” Rather, the class claims must be particularized to a common contention, which the Supreme Court in *Dukes*, an employment discrimination action, suggested could be discriminatory bias on the part of the same supervisor. Yet, the *Dukes* Court declined to extend evidence of one plaintiff’s experience to the other class members, absent particularized allegations and proof.³¹ Therefore, citing alleged violations of the Affordable Care Act, absent more, will not constitute commonality. Relying upon the named Plaintiffs’ health and claims histories, absent more, will not constitute commonality with the putative plaintiffs. To the extent Plaintiffs were to particularize the experiences of each putative

²⁹ *Dukes*, 564 U.S. at 349, citing Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-132 (2009).

³⁰ *Id.*

³¹ *Dukes*, 564 U.S. at 356, finding that “[o]ne named plaintiff’s experience of discrimination is insufficient to infer that discriminatory treatment is typical of an employer’s employment practices.”

plaintiff, then the economies of class are lost. Relative to the instant suit, class claims add nothing to the challenge and complicate any ‘class’ handling of allegations that are too broad or proof patterns that are too narrow.

Beyond the particulars necessary for commonality, the *Dukes* Court further specified that the class model is only available where common answers are apt to drive the resolution of the litigation. The relevant inquiry is whether resolution of that particularized common contention is “capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 431 U.S. at 350. Therefore, per *Dukes*, what matters is not raising common questions, regardless of how numerous, but rather, whether the class action process will generate common answers that will resolve the litigation. A failure to ensure true commonality inescapably impedes the generation of common answers. *Dukes*, 431 U.S. at 350, quoting Nagareda, *supra*, at 132. As the United States District Court for the Northern District of West Virginia has clarified,

“[a] common question is one that can be resolved for each class member in a single hearing, such as the question of whether an employer engaged in a pattern and practice of unlawful discrimination against a class of its employees. A question is not common, by contrast, if its resolution turns on a consideration of the individual circumstances of each class member.” *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (internal quotations and citations omitted). “The common questions must be dispositive and over-shadow other issues.” *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).³²

The Supreme Court of the United States in *Dukes* further advised that, “[w]ithout some glue holding the alleged reasons for all those decisions together,” “it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the

³² *Paulino v. Dollar Gen. Corp.*, 2014 U.S. Dist. LEXIS 64233 (3:12-CV-75) (ND WV 2014).

crucial question *why was I disfavored.*” *Dukes*, 431 at 351.³³ Therefore, while the need for a particularized determination of damages alone will not bar class litigation, the claims are unsuitable for class litigation where the initial alleged breach requires particularized factual inquiry: social and health history, diagnosis, scope of coverage, claims history, denial of claim, explanation of benefits, appeal or challenge, outcome.

Applying *Dukes* to the instant matter, Plaintiffs’ class allegations must fail as a matter of law on the basis that they have failed to raise claims that can be particularized sufficiently to be meaningful and yet remain available for a single resolution. Because Plaintiffs’ claims by necessity focus on coverage determinations under particularized policies and the applicability of coverage to individual health issues, Plaintiffs’ claims are inherently poorly suited for class treatment in a post-*Dukes* world. For instance, Plaintiffs’ Complaint raises broad claims “about discrimination in health care and employment” and is intended “to challenge discrimination under West Virginia state health insurance plans that deprive transgender people of essential, and sometimes life-saving, health care.” Complaint at ¶ 1. Plaintiffs further allege broadly that the suit is necessary because “transgender people are targeted for discrimination by exclusions in the state health plans.” Complaint at ¶ 1. In violation of *Dukes*, Plaintiffs’ proposed class is broadly cast as well: “All transgender people who are or will be enrolled in West Virginia Medicaid and who

³³ See also *Paulino* at *13, citing *Cuming v. South Carolina Lottery Comm. Civil No. 3:05-CV—03608-MBS*, 2008 U.S. Dist. LEXIS 26917, 2008 WL 906705 at *4 (holding plaintiffs failed to establish commonality because “the court would be required to conduct an inquiry into the individual circumstances and motivations of each class member”); *Levitt v. Fax.com*, Civil No. WMN-05-949, 2007 U.S. Dist. LEXIS 83143, 2007 WL 3169078, * 3 (D. Md. May 25, 2007) (holding plaintiffs failed to meet the commonality requirement under Rule 23(a) because of the “need to make a determination for each class member as to whether the facsimile transmission was unsolicited”).

are seeking or will seek gender-confirming care barred by Exclusions.”³⁴ The similarities to the *Dukes* exemplar of the forbidden class are striking:

“Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?”

That is, in this instance,

Are all of us plaintiffs indeed transgender? Do the insurers categorically exclude gender-confirming care? Is that an unlawful practice? What remedies should we get?

In *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), the Supreme Court of the United States struck down a class of persons “comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs” for failure of commonality and typicality, citing a conceptual disconnection:

“Conceptually, there is a wide gap between (a) an individual’s claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claims will share common questions of law or fact and that the individual’s claim will be typical of the class claims.”

Dukes, 431 U.S. at 353, quoting *Falcon*, 457 U.S. at 157-158. Here, accepting Plaintiffs’ claims as true for the purposes of this motion, Plaintiffs have been denied insurance coverage on discriminatory grounds. However, there is a wide gap between that allegation and the assertion that there exists a class of persons who have suffered the same injury, that they all share common issues of law or fact, and that the Plaintiffs’ claims will be typical of that class. Whereas the *Falcon* Court suggests two workarounds, neither will work for the instant claims. That is, a diverse group of plaintiffs could find commonality in a biased testing procedure (not applicable here) or a general

³⁴ Complaint at ¶ 108.

policy of discrimination that applied to all class members. Here, Plaintiffs allege an exclusionary policy related solely on the basis of their transgender status. However, of note, a word search of the Medicaid State Plan contains not a single instance of the use of the words “transgender,” “gender-confirming care,” or “gender dysphoria,” those characterizations and conditions against which the Plaintiffs contend the Medicaid State Plan discriminates – and Plaintiffs have failed to cite to any express provisions of the Plan that so provide.

Beyond the allegations and the State Plan, the Plaintiffs’ claims themselves evidence the individualized complexities of coverage determinations, which further mitigate against the commonality necessary for class action. Specifically, the Complaint dedicates twenty paragraphs to particularizing *inter alia* Plaintiff Fain’s medical need, presenting history, status of gender transition, and relationships with friends/family. Compl. at ¶¶ 68-87. The Complaint also dedicates eighteen paragraphs to particularizing *inter alia* Plaintiffs Martell’s and McNemar’s allegations of domestic situation, employment benefits, medical need, and claim denial history. Compl. at ¶¶ 88-105. By dedicating nearly one-quarter of the Complaint to the named Plaintiffs’ estimations of particularized need and unlawful denial, the Plaintiffs unwittingly prove the wisdom of the *Dukes* Court in that each person’s medical need, presenting complaints, documented condition and medical recommendations are by necessity different, individual to that person, such that any determination of whether coverage was, first, for medically indicated care; second, denied; third, on what basis; and, fourth, whether that basis was discriminatory, is cumbersome with an individual plaintiff -- and voluminous and unwieldy with a class of persons. Plaintiffs’ claims by necessity will involve a particularized determination of the Defendants’ duty, if any, to each Plaintiff and putative plaintiff, such that “it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I*

disfavored."³⁵ Whereas the Complaint references 'categorical exclusions,'³⁶ the terms of the Complaint itself demonstrate through the Plaintiffs' individualized allegations that careful and particularized determinations will have to be made as a predicate to determining, *inter alia*, the applicability of the care and coverage sought.

Pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) as construed,

"a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). To determine whether a claim has crossed "the line from conceivable to plausible," the Court must employ a "context-specific" inquiry, drawing on the court's "experience and common sense." *Iqbal*, 556 U.S. at 679-80 (quoting *Twombly*, 550 U.S. at 570). When performing this inquiry, the Court accepts "all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). The Court need not, however, accept unsupported legal conclusions, *Revene v. Charles Cnty. Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), nor must it agree with legal conclusions couched as factual allegations, *Iqbal*, 556 U.S. at 678, or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979); *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009).³⁷

While Plaintiffs must be prepared to defend the suitability of maintaining this suit as a class action at the class certification stage, the class claims can be challenged on 12(b)(6) motion to ensure that, pursuant to *Dukes*, Plaintiffs' claims sounding in coverage determinations and employment benefits are capable of classwide resolution. That is, the Court need not allow discovery on the propriety of any class claims but can determine on a 12(b)(6) motion that the claims are unsuitable for class determination.³⁸ Here, whereby their very nature, the class claims cannot and will not

³⁵ *Dukes*, 431 at 351.

³⁶ *See, e.g.*, Complaint at ¶¶ 1, 2, 62, 63, 99.

³⁷ *Williams v. Potomac Family Dining Group Oper. Co., LLC*, 2019 U.S. Dist. LEXIS 181604, *18.

³⁸ *Bessett v. Avco Fin. Serv.*, 279 F.R. 442 (2002).

achieve the requisite commonality, dismissal of the class claims alone will allow the named Plaintiffs' claims to proceed. While Defendants maintain that global relief is better achieved through administrative or legislative change, nonetheless, the class of putative plaintiffs have no role in an insurance coverage determination.

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to challenge the sufficiency of a plaintiff's complaint, and that challenge should be granted where plaintiff has failed to 'state a plausible claim for relief.'³⁹ The Fourth Circuit has joined the Supreme Court in finding that plaintiffs are required in their complaints to provide a "'showing' rather than a blanket assertion of entitlement to relief."⁴⁰ Plaintiffs must provide "enough facts to state a claim to relief that is plausible on its face," that is, that "contain[s] 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"⁴¹ The *Fain* Complaint by its express terms demonstrates the impropriety of the class form for this claim. Rather than await class certification only to determine that the class form will not work with medical complaints and coverage determinations, Defendants Crouch, Beane, and WVDHHR move this Court to dismiss the class claims at this time. Whereas Plaintiffs' individual claims would remain as would other avenues more appropriate for systemic challenges,⁴² the parties could avoid the investment of time and resources inherent in proving further that, per *Dukes*, the actual, not presumed, conformance with Rule 23(a), including in particular commonality, is a mandate that is undercut by these putative class members' medical complaints and claims-

³⁹ *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012).

⁴⁰ *Johnson v. Prosperity Mortgage Corp.*, 2011 U.S. Dist. Lexis at *4-5.

⁴¹ *Johnson*, 2011 U.S. Dist. Lexis, quoting *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 554 (4th Cir. 2013) in reliance upon *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 350 U.S. 544 (2007).

⁴² N.B., however, these Defendants attest and assert, and in no manner waive, the additional grounds for dismissal set forth herein.

handling experiences. Defendants seek an early determination that any class claims constitute medical claims, which finally are not ‘cohesive enough’ to gain any economies through class action.⁴³

CONCLUSION

Plaintiff Christopher Fain’s claim for compensatory damages against the WVDHHR is barred by the Eleventh Amendment to the United States Constitution because it is a claim against the State of West Virginia. Additionally, the Plaintiffs’ request for class certification should be dismissed. Wherefore, these Defendants request that their Motion for Partial Dismissal be granted, that the subject claims be dismissed against them, with prejudice, and for such other and further relief as the court may direct.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By counsel

/s/ Lou Ann S. Cyrus

Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

⁴³ *Rhodes v. E.I. DuPont de Nemours & Co.*, 253 F.R.D. 365, 367, 370 (S.D.W. Va. 2008).

**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,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

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, BUREAU FOR MEDICAL
SERVICES; 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.

CERTIFICATE OF SERVICE

Now come Defendants, William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 11th day of January, 2021, the foregoing **“MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES’S MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS’ CLASS ACTION COMPLAINT”** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to, and constitutes service on:

Walt Auvil (WVSB#190)
The Employment Law Center, PLLC
1208 Market Street

Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

and

Avatara Smith-Carrington, Visiting Attorney
Lambda Legal
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

/s/ Lou Ann S. Cyrus
Lou Ann S. Cyrus, Esquire (WVSB 6588)
Roberta F. Green, Esquire (WVSB#6598)
Caleb B. David, Esquire (WVSB#12732)
Kimberly M. Bandy, Esquire (WVSB 10081)

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RESOURCES, BUREAU FOR MEDICAL
SERVICES; 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.

AFFIDAVIT OF ANGELA WOWCZUK, DOCTOR OF PHARMACY, BCPS, AAHIVE

STATE OF WEST VIRGINIA,

COUNTY OF Monongalia

I, Angela Wowczuk, Doctor of Pharmacy, BCPS, AAHIVE, duly sworn, make oath upon
my knowledge as follows

1. I currently serve as Director of the Rational Drug Therapy Program at the West
Virginia University School of Pharmacy in Morgantown, West Virginia

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2. The Rational Drug Therapy Program is part of West Virginia University School of Pharmacy's Department of Pharmaceutical Systems and Policy and supported through a contract with the West Virginia Bureau for Medical Services (WVBMS). The program provides prior authorization and consultative services for West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program.

3. I have reviewed the Prior Authorization history for Christopher Fain. Mr. Fain had an approval for testosterone from March 8, 2019, to February 20, 2020.

4. A Prior Authorization request for testosterone for Mr. Fain came in by fax on May 12, 2020. The Prior Authorization request was for a non-standard dosing regimen, so more information was needed from the provider for a decision. The Rational Drug Therapy Program sent a fax back to the provider that same day, seeking clarification because the patient had been on weekly dosing, and the new request sought dosing every 5 days. (General Drug Prior Authorization Form, attached as Exhibit 1 to this Affidavit). Prior Authorizations are drug and dose specific.

5. The Rational Drug Therapy Program did not receive information back from the provider in response to the request to clarify the change in dosing. Therefore, the Prior Authorization for testosterone did not go beyond a "pending" status.


6. The Prior Authorization request for testosterone for Mr. Fain that came in by fax on May 12, 2020 has not been denied. It has neither been denied nor approved because additional information requested from the provider regarding dosing was not received. The Rational Drug Therapy Program has not sent anything to Mr. Fain indicating either approval or denial.

7. In providing prior authorization services for the West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program, the Rational Drug Therapy Program does not have a policy of denying testosterone for treatment of gender dysphoria. The patient history for

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Christopher Fain indicates that testosterone was approved for quite some time. It was only the dose change that required additional information for Prior Authorization, which was not received from the provider.

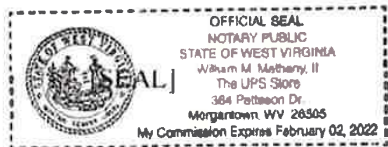
AND FURTHER AFFIANT SAYETH NOT.


Angela Wowczuk, Doctor of Pharmacy, BCPS,
AAHIVE
Director
Rational Drug Therapy Program

Sworn and subscribed to before me this 2nd day of February, 2021.

My commission expires: 2-2-2022


NOTARY PUBLIC





West Virginia Medicaid
Drug Prior Authorization Form
<http://www.dhs.gov/medicaid/medicaid>

Rational Drug Therapy Program
WVU School of Pharmacy
PO Box 9011 HSCN
Martinsburg, WV 26606
Fax: 1-800-331-7787
Phone: 1-800-647-3859



General Drug Prior Authorization Form

Patient Name (Last)	(First)	(MI)	WV Medicaid 11 Digit ID#	Date of Birth (mm/dd/yyyy)
Fain	Christopher			

Prescriber Name (Last)	(First)	(MI)	
Prescriber Address (Street)	(City)	(State)	(Zip)
	Bowling Green	WV	25804
Prescriber 10-Digit NPI#	Phone # (111-222-3333)	Fax # (111-222-3333)	

Pharmacy Name (if applicable)

Pharmacy Address (Street)	(City)	(State)	(Zip)
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Pending- Please clarify the every 5 day dosing. This was previously reported as qweek dosing

By RDTP ID# 6019 at 3:25 pm on May 12, 2020

Important Notes: Prior authorization for medical necessity does not guarantee payment. The use of pharmaceutical samples will not be considered when evaluating the medical necessity or your prescription history for drugs that require prior authorization.

Drug Name	Strength	Route of Administration
Testosterone Cypionate 100MG/ML Solution	100MG/ML	Intramuscular

Directions	Diagnosis	ICD Diagnosis Code (if available)
30ML @ 5day	Transgender	F64.0

Previous Treatment History

Other Pertinent Information

Attestation: Your signature (manually or electronically) certifies that the above request is medically necessary, does not exceed the medical needs of the member, and is documented in your medical records. Medical/Pharmacy records must be made available upon request.

Check here for electronic signature

Date



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,

Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge

v.

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, BUREAU FOR MEDICAL
SERVICES; 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.

AFFIDAVIT OF BRIAN THOMPSON, M.S. PharmD

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha

I, Brian Thompson, M.S., PharmD, duly sworn, make oath upon my knowledge as follows:

1. I currently serve as Director of Pharmacy Services in the Office of Pharmacy Services, West Virginia Bureau for Medical Services (WVBMS).

2. I have reviewed the patient history for Christopher Fain as it relates to a prior authorization request for testosterone faxed on May 12, 2020 to the Rational Drug Therapy

Program. The prescription requires Prior Authorization to be covered under the Medicaid pharmaceuticals program. Prior Authorization services are provided by The Rational Drug Therapy Program through a contract with WVBMS.

3. The West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program does not have a policy of denying testosterone for treatment of gender dysphoria.

4. Based on my review of the patient history, neither the Rational Drug Therapy Program nor WVBMS actively denied coverage of testosterone for Mr. Fain. The request was placed on "pending" status, and clarification was requested from the provider regarding dosing.

5. Mr. Fain could have contacted WVBMS directly at any time to determine the coverage status of his medication. WVBMS did not receive an Appeal from Mr. Fain or from anyone on his behalf regarding testosterone to be administered every 5 days for gender dysphoria.

AND FURTHER AFFIANT SAYETH NOT.

Brian Thompson

Brian Thompson, M.S., PharmD,
Director of Pharmacy Services
West Virginia Bureau for Medical Services

Sworn and subscribed to before me this 1st day of February, 2021.

My commission expires: May 30, 2022

Tina M. Harrison

NOTARY PUBLIC



**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. 3:20-0740

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, BUREAU FOR
MEDICAL SERVICES;
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.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendant Ted Cheatham's Motion to Dismiss the Complaint (ECF No. 22), and Defendants William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services' (collectively, "WVDHHR Defendants") Motion for Partial Dismissal of Plaintiffs' Class Action Complaint (ECF No. 23) and Motion to Dismiss (ECF No. 32). For the reasons stated below, the motions are **DENIED**.

Also pending before the Court is Plaintiffs' Motion for Leave to file Sur-Reply (ECF No. 56). For good cause shown, this motion is **GRANTED**.

JA101

I. BACKGROUND

The putative Class Action Complaint asserts several claims, each of which is rooted in the same theory: that Defendants discriminated against Plaintiffs by denying coverage for gender-confirming health care. The Complaint defines “gender-confirming care” as health care which “includes, but is not limited to, counseling, hormone replacement therapy, and surgical care for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual’s gender identity and sex assigned at birth” *Compl.* ¶¶ 1-2. According to the Complaint, these treatments are denied to transgender individuals despite being available to cisgender individuals.¹

Based on this overarching theory, the Complaint raises two types of individual and class action claims: (1) those brought by Medicaid recipients against the WVDHHR Defendants and (2) those brought by state employees and their dependents against Ted Cheatham, the Director of the West Virginia Public Employee Insurance Administration, and The Health Plan, a health maintenance organization permitted to offer health plans to state employees through PEIA.²

(1) WVDHHR Defendants

Christopher Fain, a transgender male, brings four discrimination claims individually and on behalf of the proposed Medicaid Class against the WVDHHR Defendants. As a Medicaid recipient, Fain relies on WVDHHR Medicaid plans for insurance coverage. However, Fain alleges that he has been denied hormone replacement therapy and surgical care (double mastectomy), despite needing that care to treat his gender dysphoria diagnosis. According to Fain, WVDHHR has denied this treatment under its Medicaid Policy Manual, which excludes “[t]ranssexual surgery” from coverage (the “Exclusion”). *Compl.* ¶ 61. Fain challenges the Exclusion as well as

¹ The Complaint defines “cisgender” as “people who are not transgender.” *Compl.* ¶ 1 n.1.

² The Health Plan filed a separate motion to dismiss (ECF No. 20), which the Court will address in a subsequent opinion.

similar policies adopted by the three managed care organizations (“MCO”) in the Mountain Health Trust system. This includes Fain’s MCO, UniCare, which excludes coverage for “[s]ex transformation procedures and hormone therapy for sex transformation procedures.” *Id.* at ¶ 61.

Since lodging the Complaint, WVDHHR Defendants submitted an affidavit stating that, “[i]n providing prior authorization services for the West Virginia Bureau of Medical Services’ pharmaceuticals program, the Rational Drug Therapy Program does not have a policy of denying testosterone for treatment of gender dysphoria.” *Wowczuk Aff.* ¶ 7, ECF No. 32-1. Based on this affidavit, Fain agreed not to pursue his claims based on denial of hormone therapy. *See Stipulation* ¶ 10, ECF No. 53.

With surgical care as his sole basis for recovery, Fain alleges that WVDHHR Defendants’ policies are discriminatory because “the same treatments are covered for cisgender people who are Medicaid participants.” *Compl.* ¶ 62. According to Plaintiffs, this discrimination violates (1) the Equal Protection clause, (2) the nondiscrimination clause under Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116), (3) the Medicaid Act’s Availability Requirements (42 U.S.C. § 1396a(a)(10)(A)), and (4) the Medicaid Act’s Comparability Requirements (42 U.S.C. § 1396a(a)(10)(B)). Fain seeks declaratory and injunctive relief for himself and the Medicaid Class as to each of these claims. He also individually seeks compensatory damages under the ACA.

(2) Defendants Cheatham

Plaintiff Brian McNemar is a state employee who is insured through West Virginia’s PEIA. McNemar is married to Plaintiff Zachary Martell, who is McNemar’s dependent. Martell is a transgender man diagnosed with gender dysphoria and is seeking both hormone replacement therapy and surgical care to treat that diagnosis. McNemar and Martell bring two claims

individually and on behalf of the proposed State Employee Class and The Health Plan Subclass.

Like Plaintiff Fain, McNemar and Martell challenge PEIA and The Health Plan policies and practices which exclude gender-confirming care. According to the Complaint, the PEIA plans exclude “[s]urgical or pharmaceutical treatments associated with gender dysphoria or any physical, psychiatric, or psychological examinations, testing, treatments or services provided or performed in preparation for, or as a result of, sex transformation surgery.” *Compl.* ¶ 64. Additionally, there is a similar exclusion in all plans provided by The Health Plan, which are approved by Cheatham. *Id.* Plaintiffs allege Cheatham’s approval of discriminatory policies and failure to offer a non-discriminatory option violates the Equal Protection clause. They seek declaratory and injunctive relief on behalf of the class.³

II. WVDHHR DEFENDANTS’ MOTIONS TO DISMISS

On January 11, 2021, WVDHHR Defendants moved for partial dismissal (ECF No. 23), challenging Fain’s claim for compensatory damages under the Eleventh Amendment and the sufficiency of Fain’s class action allegations. On February 2, 2021, WVDHHR Defendants filed a second motion to dismiss (ECF No. 32), this time challenging standing and ripeness, as well as Fain’s ability to represent the proposed class. With the filing of Plaintiffs’ Unopposed Motion for Leave to File Sur-Reply in Opposition to WVDHHR Defendants’ Motion to Dismiss on April 5, 2021, the motions became ripe for review.

(1) Eleventh Amendment Immunity

The first jurisdictional issue raised by WVDHHR Defendants is whether Fain’s claim for compensatory damages against WVDHHR under the ACA must be dismissed. WVDHHR argues that this claim is barred by the Eleventh Amendment, whereas Plaintiff argues that WVDHHR

³ Plaintiffs also alleged that Cheatham violated the ACA but have voluntarily dismissed that claim. *Order*, ECF No. 38.

waived its Eleventh Amendment immunity by accepting federal assistance.

The waiver exception applies if a state “voluntarily participat[es] in federal spending programs [and] Congress expresses ‘a clear intent to condition participation in the programs . . . on a State’s consent to waive its constitutional immunity.’” *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999) (quoting *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir.1997)). Such a waiver must be a “clear and unambiguous” condition of the funding. *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Here, Fain argues that Congress clearly and unambiguously conditioned federal Medicaid funding on states’ waiver of immunity for nondiscrimination provisions when it enacted Section 1003 of the Civil Rights Remedies Equalization Act of 1986. That Section reads:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). According to Plaintiff, the so-called Residual Clause (“or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance”) incorporates Section 1557 of the ACA, which is a nondiscrimination provision. The Court agrees.

The text of the Residual Clause unequivocally waives immunity against violations of “provisions of any other Federal statute prohibiting discrimination.” Section 1557 is unambiguously a federal statute which prohibits discrimination by recipients of Federal financial assistance; it states:

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part

of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

42 U.S.C. § 18116. Although there is not yet⁴ controlling precedent on Section 1003's application to the ACA, several district courts have held that the Residual Clause incorporates Section 1557. *See, e.g., Kadel v. Folwell*, 446 F. Supp. 3d 1, 17 (M.D.N.C. 2020) (“[T]he Court concludes that Section 1557, when read in conjunction with CRREA, effectuates a valid waiver of sovereign immunity.”); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wis. 2018) (same); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *9 (E.D. La. Oct. 24, 2017) (same).

Defendants argue that Section 1003 is not a sufficient waiver because the Supreme Court requires waivers to be “unequivocally expressed *in the text of the relevant statute.*” *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) (emphasis added). WVDHHR Defendants reason that because Section 1557 does not contain an express waiver, Plaintiffs' claim must be dismissed.

WVDHHR's reading of *Sossamon* is oversimplified and ignores the final section of the opinion. After the Court remarked that the waiver must be “in the text of the relevant statute,” it declined to invalidate Section 1003 or the Residual Clause. Instead, it held: “[e]ven assuming that a residual clause like the one in § 1003 could constitute an unequivocal textual waiver, § 3 [of the Religious Land Use and Institutionalized Persons Act] is not unequivocally a ‘statute prohibiting discrimination’ within the meaning of § 1003.” *Sossamon*, 563 U.S. at 292. This analysis supports the finding that Section 1003 may constitute a “relevant statute” under *Sossamon*.

In addition to being undermined by *Sossamon*'s analysis, the Court rejects WVDHHR's

⁴ The issue was recently submitted to the Fourth Circuit in *Kadel v. N.C. State Health Plan*, No. 20-1409 (4th Cir. argued March 11, 2021).

reasoning because it would lead to untenable results. If the Court held that Section 1557 cannot be read in conjunction with Section 1003, it would invalidate the waivers for Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964. That contradicts Congress' intent in enacting Section 1003, states' longstanding acceptance of these waivers, and the body of case law upholding Section 1003. *See, e.g., Litman*, 186 F.3d at 554. The Court cannot disregard this longstanding precedent.

In sum, the Court finds that West Virginia waived its immunity from suit under Section 1557 by accepting federal assistance under the ACA, as provided by Section 1003's Residual Clause. WVDHHR's Motion is denied as to immunity.

(2) Standing and Ripeness

WVDHHR Defendants next argue that Fain lacks standing and that his claims are not ripe for review because he has not requested the gender-confirming surgery he claims to have been denied. Consequently, says WVDHHR, Fain's injuries are speculative, and his claims are not ripe.

Federal courts do not have jurisdiction over a suit unless the plaintiff can establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In general, standing requires three elements: (1) an injury in fact that is both concrete and actual or imminent; (2) a causal connection between the injury and the defendant's alleged wrongdoing; and (3) a substantial likelihood that a favorable judgment will redress the injury. *Id.*

Ripeness, like standing, is a constitutional and prudential doctrine that limits federal courts' jurisdiction to the "cases" and "controversies" described in Article III, § 2 of the United States Constitution. The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative

policies.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). In evaluating whether a dispute is ripe, courts must consider “(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013). “A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.” *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

Fain argues that the Complaint meets these standards because he has alleged injury from the denial of care established by the WVDHHR Exclusion, which renders any request for surgery futile. As indicated in the Complaint, the WVDHHR Medicaid Policy Manual excludes coverage for “[t]ranssexual surgery.” *Compl.* ¶ 61. According to Fain, this Exclusion dispels WVDHHR’s argument that its denial is speculative because it demonstrates that WVDHHR has *already* made the decision to exclude the surgery he requires. The Court again agrees with Plaintiff.

Assuming that the Plaintiffs’ allegations are true, as the Court must at the pleading stage, WVDHHR enacted a clear policy that excludes gender-confirming surgical care with no exceptions. In doing so, WVDHHR caused a concrete injury to Plaintiff Fain by constructing an allegedly discriminatory barrier between him and health insurance coverage. This barrier constitutes a concrete, non-speculative injury. Given this injury, Fain has standing to sue, and his claims challenging the policy are ripe for review.

To the extent that the Exclusion does not constitute an outright denial, the Court finds that a request for gender-confirming surgery would be futile. To hold otherwise would require an individual to request a benefit even when he or she knows that the defendant maintains a clear policy to deny that request. Such a request would be nothing more than a formality and is unnecessary for the purposes of Plaintiffs’ claims, which are purely legal. Courts do not require

plaintiffs to perform such futile acts, especially when those acts could subject them to “personal rebuffs.” *See, e.g., Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (“If an employer should announce his policy of discrimination by a sign reading ‘Whites Only’ on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.”); *see also Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) (quoting same).

This is not the first time a court has extended the futile gesture doctrine to allegations of health care discrimination. In *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015), *aff’d on mot. for reconsideration* 195 F.Supp.3d 554 (July 5, 2016), the transgender plaintiffs challenged a New York Medicaid policy which excluded all “cosmetic” procedures, including gender confirming surgeries. *Id.* at 336. The court held that plaintiffs were not required to seek coverage for their gender-confirming procedures before filing suit because such an attempt would have been futile under the blanket cosmetic exclusion. *Id.* at 349. The court also noted that the question was purely legal, which rendered such fact development unnecessary. *Id.*

WVDHHR contends that Fain should have been required to request the surgery because it is possible that that the request will be granted. In support of this argument, WVDHHR Defendants point to previous approvals of Fain’s hormone therapy, despite its policy excluding coverage for “hormone therapy for sex transformation procedures.” *WVDHHR Defs.’ Reply* 4-5, ECF No. 55. However, WVDHHR’s past approvals for hormonal therapy are inapposite because WVDHHR did not just grant an exception for Fain, it filed an affidavit stating that it was not their policy to deny hormone therapy. WVDHHR Defendants do not contest that their explicit policy is to deny gender confirming surgical care without exception. Moreover, even if WVDHHR is earnest in assertion that Fain’s surgical request may be granted, dismissing the suit on that ground would

allow defendants to dodge liability by granting litigants' requests, all while maintaining an allegedly discriminatory policy and practice for anyone who does not file suit. Such a loophole cannot be permitted.

WVDHHR's final argument is that Fain's request would not be futile because it could be denied on grounds other than the Exclusion. However, Plaintiffs allege that the Exclusion denies of coverage without exception. Accordingly, WVDHHR's policy acts as a barrier to Fain's surgery in every instance and renders alternative grounds for denial irrelevant. The Court rejects this argument and concludes that Plaintiffs have plausibly alleged a ripe claim for which they have standing to bring.

(3) Sufficiency of Class Allegations

Lastly, WVDHHR Defendants argue that the class allegations should be dismissed because the Complaint does not sufficiently allege a viable class action under Federal Rule Civil Procedure 23(c)(1)(A). Rule 23 provides that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” Because this determination requires a “rigorous” factual and legal analysis, it is rare for a court to make a class determination at the pleadings stage. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal citation omitted). As recently held in this District, class allegations should be stricken only when “it is clear from the face of the complaint that the plaintiff cannot and could not meet Fed. R. Civ. P. 23’s requirements for certification” *Sommerville v. Union Carbide Corp.*, No. 2:19-CV-00878, 2020 WL 2945541, at *3 (S.D. W. Va. June 3, 2020) (Goodwin, J.) (quoting *Williams v. Potomac Family Dining Grp. Operating Co.*, No. GJH-19-1780, 2019 WL 5309628, at *5 (D. Md. Oct. 21, 2019)) (internal quotation marks omitted).

WVDHHR argues that Plaintiffs will not be able to meet the commonality requirement under Fed. R. Civ. Pro. 23(a)(2), which mandates “questions of law or fact common to the class.” Although “[a] single common question will suffice, . . . it must be of such a nature that its determination ‘will resolve an issue that is central to the validity of each one of the claims in one stroke.’” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014) (quoting *Wal-Mart*, 564 U.S. at 350). This is evident when the “plaintiff shows that the class members have suffered the same injury,” and when the common injury arises from “a common contention.” *Wal-Mart*, 564 U.S. at 349.

In the discrimination context, the common contention acts as the “glue” which holds each of the claims together and ensures “that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.” *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015) (quoting *Wal-Mart*, 564 U.S. at 349) (emphasis in original) (internal quotation marks omitted). This requirement can be met when the plaintiff shows that the defendant “operated under a general policy of discrimination.” *Wal-Mart*, 564 U.S. at 353 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)) (internal quotation marks omitted).

Plaintiffs’ allegations are consistent with this standard. As noted above, Plaintiffs allege that the class members suffer from a common injury which arises from a general policy of discrimination: the denial of coverage for “[t]ranssexual surgery” in the WVDHHR Medicaid Policy Manual. *Compl.* ¶ 61. As alleged, this denial generally effects the proposed class, which includes “[a]ll transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions.” *Id.* at ¶ 108.⁵

Based on this common contention, Plaintiffs have appropriately framed the common

⁵ To the extent that this definition must be amended to reflect the parties’ Stipulation (ECF No. 53), the Court finds that the class certification stage is the appropriate time to do so.

questions as follows: (1) whether WVDHHR's Exclusion facially, and as applied to the proposed Class, violates the U.S. Constitution, the ACA, and the federal Medicaid Act; and (2) whether WVDHHR should be enjoined from enforcing the Exclusion and denying Mr. Fain and members of the proposed Medicaid Class coverage for and access to gender-confirming care. *See Compl.* ¶¶ 118-56. These questions are primarily legal and have the potential to relieve the common injury "in one stroke." *See Wal-Mart*, 564 U.S. at 350.

WVDHHR Defendants attempt to rebut this common contention by representing that "a word search of the Medicaid State Plan contains not a single instance of the use of the words 'transgender,' 'gender-confirming care,' or 'gender dysphoria.'" *WVDHHR Defs.' Mot. for Part. Dismissal* 14, ECF No. 25. This is a classic red herring. The Policy Manual's exclusion of "[t]ranssexual surgery" and Plaintiffs' resulting injury are not disproved by the absence of other terms in the State Plan. This is especially true given WVDHHR's apparent refusal to deny the Exclusion's application to Plaintiffs' alleged surgical needs.

WVDHHR's further attempts to reframe the Complaint are also unconvincing. Defendants argue that Plaintiffs will not be able to establish commonality because "the majority of the factual, and, therefore, legal, questions are unique to each class member" *WVDHHR Defs.' Mot. for Part. Dismissal* 8, ECF No. 25. WVDHHR Defendants have it backwards; legal standards inform the necessary fact findings. Having started with the conclusion that particularized discovery will be required, Defendants crafted a legal standard which resembles a common negligence claim:

particularized discovery would be necessary in order to determine the individualized facts relative to Defendants' duty to each class member, the underlying facts of the breach of that duty as experienced by each class member, and any causation between that breach and each particular class member's alleged damages. . . .

WVDHHR Defs.' Motion to Dismiss 9, ECF No. 55. Plaintiffs neither assert a negligence claim,

nor do they seek compensatory damages on behalf of the class. Additionally, their Equal Protection, ACA, and Medicaid Act claims do not require evidence of individual “duty” or “breach.” These claims are purely legal and require little to no fact development. Having failed to identify any ground upon which the Parties will be required to make particularized and individualized factual findings, WVDHHR’s argument must be rejected. The Court denies WVDHHR’s Motion for Partial Dismissal of Plaintiffs’ Class Action Complaint (ECF No. 23) and Motion to Dismiss (ECF No. 32).

III. CHEATHAM MOTION TO DISMISS

On January 11, 2021, Defendant Cheatham moved for dismissal, arguing that McNemar and Martell lack standing and have failed to state an Equal Protection Clause claim. For the reasons stated below, the Court finds that dismissal is unwarranted on both grounds.

(1) Standing

Unlike WVDHHR, Cheatham does not contest injury; he argues that Plaintiffs McNemar and Martell’s injuries are neither traceable to nor redressable by him. First, Cheatham argues that Plaintiffs’ injuries cannot be traced back to PEIA because the insurance policy at issue is drafted, created, and offered by The Health Plan. According to Cheatham, PEIA only facilitates this contractual relationship and “do[es] not contract with these outside agencies on the basis of what is covered under their policies.” *Cheatham Mot. to Dismiss* 7-8, ECF No. 24. Second, Cheatham argues that the claims are not redressable by PEIA because the insurance policy is under the control of The Health Plan. Accordingly, PEIA cannot change that plan even if the Court grants Plaintiffs’ request for an injunction. As explained below, the Court rejects both arguments.

Traceability

Traceability requires a causal connection between the defendant’s conduct and the plaintiff’s injury such that “there is a genuine nexus” between the two. *Friends of the Earth, Inc. v.*

Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000). However, as the Fourth Circuit has explained, “the fairly traceable standard is not equivalent to a requirement of tort causation.” *Hutton v. Nat’l Bd. of Exam’rs in Optometry, Inc.*, 892 F.3d 613, 623 (4th Cir. 2018). At the pleading stage, “general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Lujan*, 504 U.S. at 561.

As noted above, Defendant Cheatham argues that Plaintiffs’ injuries are not traceable to him because the policy precluding coverage for Martell’s gender-confirming care is contained in The Health Plan’s HMO policy. However, that does not accurately address Plaintiffs’ allegations. Plaintiffs have alleged that their injuries can be traced to Cheatham because he only approves the discriminatory policies (including The Health Plan’s HMO policy) and refuses to provide a non-discriminatory alternative. Both allegations are plausible because Cheatham is statutorily responsible for administering PEIA, including overseeing “provider negotiations, provider contracting and payment, designation of covered and noncovered services, [and] offering of additional coverage options or cost containment incentives.” W. Va. Code § 5-16-3(c).⁶ Therefore, the Court finds that Plaintiffs’ have plausibly alleged traceability.

Redressability

The same statutory authority under West Virginia Code § 5-16-3(c) enables Cheatham to redress Plaintiffs’ injuries if such relief is granted. The Complaint requests an order “directing Defendants and their agents to provide access to coverage for all gender-confirming care without regard to the Exclusion[.]” *Compl.* at p. 37(C). According to Plaintiffs, this type of order would prevent Defendant Cheatham from contracting for private plans with a discriminatory policy,

⁶ Although Cheatham denies that he intentionally chooses discriminatory plans, that is a factual dispute that cannot be resolved at the pleading stage. Even if it could, Cheatham has not submitted any evidence supporting this argument.

prohibit enforcement of discriminatory policies in those plans, or affirmatively require him to provide access to gender-confirming care.

Cheatham provides evidence that he does not have control over existing policies under the PEIA's agreement with The Health Plan.⁷ However, even if the Court were to accept this assertion, Cheatham has not shown that the other proposed remedies are inadequate. Given that Cheatham is tasked with "designation of covered and noncovered services" and "offering [] additional coverage options," W. Va. Code § 5-16-3(c), he is statutorily authorized to grant Plaintiffs access to gender-confirming care. Therefore, the Court finds that Plaintiffs' have sufficiently alleged that their injuries are redressable.

(2) Failure to State an Equal Protection Clause Claim

Cheatham's last argument is that Plaintiffs failed to state an Equal Protection claim upon which relief may be granted because the PEIA policy passes heightened scrutiny. In short, Cheatham argues that there are three important government interests which are substantially related to PEIA's policies: (1) "guarantee[ing] the health and safety of the enrollees," (2) "maintain[ing] the medical standards of physicians and other entities that accept the insurance of enrollees," and (3) "sav[ing] taxpayer dollars from use for procedures that are not medically necessary, or FDA approved." *Cheatham Mot.* 11-12, ECF No. 24.

As Plaintiffs argue in their Response, Cheatham's argument is improper because it relies on facts outside of the Complaint. For example, Cheatham's representations regarding patient "safety" and "medically necessary [procedures]" assume facts that are neither in the Complaint nor

⁷ See Exhibit A, ECF No. 24-1 ("The responsibility for determining and providing appropriate health care services in a competent manner to enrollees shall remain with the HMO and the enrollees[,], treating physicians and other health care professionals and facilities, not PEIA.").

the record. In fact, the Complaint alleges the opposite: that gender-confirming care is medically necessary and safe. *See Compl.* ¶ 67. Therefore, the Court will not entertain Cheatham's fact-based arguments at this stage and denies Cheatham's Motion to Dismiss (ECF No. 22.)

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendant Cheatham's Motion to Dismiss the Complaint (ECF No. 22), and WVDHHR Defendants' Motion for Partial Dismissal of Plaintiffs' Class Action Complaint (ECF No. 23) and Motion to Dismiss (ECF No. 32). The Court also **GRANTS** Plaintiffs' Motion for Leave to file Sur-Reply (ECF No. 56).

The Clerk is **DIRECTED** to send a copy of this Opinion to counsel of Record and any unrepresented party.

ENTER: May 19, 2021



ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

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

CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR; SHAWN
ANDERSON a/k/a SHAUNTAE ANDERSON;
and LEANNE JAMES, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

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, BUREAU FOR MEDICAL
SERVICES; 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.

Civil Action No.

**FIRST AMENDED CLASS ACTION
COMPLAINT**

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

INTRODUCTION

1. This case is about discrimination in health care and employment. Plaintiffs bring this suit to challenge discrimination under West Virginia state health insurance plans that deprive transgender people of essential, and sometimes life-saving, health care. These state health plans facially, and categorically, exclude coverage for health care that transgender people require. The exclusions in the state health plans described in paragraphs 63 and 66 use antiquated and improper language, but their targeting of transgender people on explicitly sex-based terms is unmistakable. The exclusions all categorically deny transgender people coverage for gender-

confirming care. Gender-confirming care includes, but is not limited to, counseling, hormone replacement therapy, and surgical care. Accordingly, as used herein, gender-confirming care includes the care denied pursuant to each of those exclusions. While cisgender people¹ receive coverage for those forms of health care as a matter of course, transgender people are targeted for discrimination by exclusions in the state health plans. This kind of discrimination is unlawful under federal constitutional and statutory guarantees of freedom from discrimination based on sex and transgender status. Because these exclusions constitute a sweeping, uniform denial of care for all transgender people, Plaintiffs bring this class action suit on behalf of themselves and those similarly situated.

2. Defendants violate the law in two ways. First, Defendants discriminate against low-income transgender people who are Medicaid participants. Inflicting grave harm on a particularly vulnerable group of people, Defendants deny low-income transgender Medicaid participants the same health coverage others receive, targeting them for discrimination based on their sex and transgender status. This care is for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual’s gender identity and sex assigned at birth—and is also known as gender-confirming care. Defendants categorically deny gender-confirming care to transgender Medicaid participants, even though it is medically necessary and can be life-saving, while routinely providing cisgender participants the same treatments.

3. Second, Defendants discriminate against state employees and their dependents by denying coverage for gender-confirming care, even though cisgender people receive the same kinds of treatments as a matter of course. As part of compensation for employment, the State of

¹ “Cisgender” refers to people who are not transgender.

West Virginia provides health care coverage for employees and their eligible dependents through the Public Employees Insurance Agency (“PEIA”). The health plans offered through PEIA deny coverage for gender-confirming care, and unlawfully discriminate against people who either are transgender or have transgender family members who depend on them for health care coverage. In other words, Defendants deny equal compensation for equal work to employees who are transgender or have transgender dependents, and harm employees’ transgender family members who depend on them for health care.

4. The blanket exclusions of gender-confirming care are stated expressly in the health plans offered to Medicaid participants, and to state employees. While phrased in slightly different terms across the plans, the exclusions all single out transgender people for differential treatment and rely explicitly on sex-based considerations. Plaintiffs challenge the exclusions, and any other source of law, regulation, policy, or practice that denies gender-confirming care to West Virginia Medicaid participants, state employees, and eligible dependents of state employees (references herein to the “Exclusions” refer collectively to all such exclusions for gender-confirming care).

5. The Exclusions fly in the face of the medical consensus that gender-confirming care is the only safe and effective medical treatment for gender dysphoria, and wholly disregard the harms of denying transgender people access to critical health care. The Exclusions unlawfully deny medically necessary care to Medicaid participants, and state employees and their dependents, who are transgender. The state’s coverage of the same treatments to address health conditions other than gender dysphoria underscores that West Virginia treats its transgender Medicaid and state health plan participants in an unfair and discriminatory manner. In doing so, Defendants expose a particularly vulnerable group to significant and avoidable

harms to their health and wellbeing, and inflict needless suffering and financial hardship in violation of the U.S. Constitution and federal law.

6. Plaintiffs bring this lawsuit on behalf of themselves and other similarly situated Medicaid participants, state employees, and eligible dependents of state employees seeking a declaratory judgment that the Exclusions violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Section 1557 (“Section 1557”) of the Patient Protection and Affordable Care Act (“ACA” or “Affordable Care Act”), 42 U.S.C. § 18116, and the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B); preliminary and permanent injunctions barring Defendants from enforcing the Exclusions to deny gender-confirming care; reasonable attorneys’ fees and costs; and such other relief as the Court deems just and equitable.

7. In their individual capacities, the named Plaintiffs also seek compensatory and consequential damages for the injuries they have suffered as a result of Defendants’ unlawful conduct.

PARTIES

8. Plaintiff Christopher Fain resides in Huntington, West Virginia. Mr. Fain is a 45-year-old transgender man. Mr. Fain has been enrolled for Medicaid coverage at all times material to this complaint.

9. Plaintiff Shauntae Anderson² resides in Charleston, West Virginia. Ms. Anderson is a 45-year-old transgender woman. Ms. Anderson has been enrolled for Medicaid coverage at all times material to this complaint.

² Ms. Anderson is currently in the process of changing her legal name, which is reflected in the caption, to Shauntae Anderson. Accordingly, the complaint refers to her as Shauntae Anderson throughout.

10. Plaintiff Leanne James resides in Hurricane, West Virginia. Ms. James is a 43-year-old transgender woman. Ms. James is a public employee who works for the Kanawaha County Board of Education as a Micro Computer Technician. Ms. James has been enrolled for public employee health coverage at all times material to this complaint.

11. Plaintiff Zachary Martell resides in Barboursville, West Virginia. Mr. Martell is a 34-year-old transgender man. Mr. Martell is married to Brian McNemar, a state employee. As the legal spouse of Mr. McNemar, Mr. Martell is an eligible dependent and has been enrolled for state employee health coverage through Mr. McNemar at all times material to this complaint.

12. Plaintiff Brian McNemar resides in Barboursville, West Virginia. Mr. McNemar is a 38-year-old cisgender man. Mr. McNemar is a state employee who works at the Mildred Mitchell Bateman Hospital as an Accountant Auditor. Mr. McNemar is married to Mr. Martell.

13. Defendant William Crouch is sued in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources. As Cabinet Secretary, Mr. Crouch is responsible for “[d]evelop[ing] a managed care system to monitor the services provided by the [M]edicaid program to individual clients.” W. Va. Code § 9-2-9(a)(1). Mr. Crouch is authorized to “[p]repare and submit state plans which ... meet the requirements of federal laws, rules governing federal-state assistance.” W. Va. Code § 9-2-6(12). Additionally, Mr. Crouch is responsible for preparing recommendations “to be submitted to the joint committee on government and finance,” and in developing these recommendations Mr. Crouch may “[r]eview ... [M]edicaid services which are optional under federal [M]edicaid law and identif[y] ... services to be retained, reduced or eliminated.” W. Va. Code § 9-2-9(b)(1). Mr. Crouch exercises his authority as Cabinet Secretary to ensure that gender-confirming care is designated as an excluded service in the state Medicaid program—targeting transgender

Medicaid participants for discriminatory treatment on the basis of their sex and transgender status. Defendant Crouch is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

14. Defendant Cynthia Beane is sued in her official capacity as Commissioner for the Bureau for Medical Services. As Commissioner, Ms. Beane’s duties include managing and overseeing project development, implementation of health policies, and assuring compliance with federal laws and regulations. Ms. Beane also led policy implementation for changes to bring West Virginia’s Medicaid coverage into compliance with the Affordable Care Act. Despite having the authority to implement health policies to assure compliance with federal law, including the Affordable Care Act, Ms. Beane exercises her authority to ensure that gender-confirming care is designated as a noncovered service for Medicaid participants, thus targeting transgender people for discriminatory treatment on the basis of their sex and transgender status. Defendant Beane is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

15. Defendant West Virginia Department of Health and Human Resources, Bureau for Medical Services (“BMS”) is the “single state agency” charged with the responsibility of administering “the [M]edicaid program” in West Virginia. W. Va. Code §§ 9-1-2(n), 9-2-13(a)(3). BMS establishes eligibility standards for Medicaid providers, determines benefits, sets payment rates, and reimburses providers. Additionally, BMS maintains the West Virginia Medicaid State Plan and files amendments to the plan with the appropriate regulatory authorities. West Virginia Medicaid is jointly funded by the state of West Virginia and the federal government. BMS is a recipient of federal funds from the U.S. Department of Health and Human Services (“HHS”), including Medicaid funding. The federal assistance BMS receives

makes BMS a “covered entity” subject to the nondiscrimination requirements of Section 1557 of the ACA, which prohibit discrimination on the basis of sex and other protected characteristics.

16. Defendant Ted Cheatham is sued in his official capacity as Director of PEIA. As Director, Mr. Cheatham is the Chief Administrative Officer of PEIA and is responsible for the “administration and management of the Public Employees Insurance Agency.” W. Va. Code § 5-16-3(c). This responsibility includes, but is not limited to, “manag[ing] on a day-to-day basis the group insurance plans” for state employees through “administrative contracting, studies, analyses and audits, ... provider negotiations, provider contracting and payment, *designation of covered and noncovered services*, [and] offering of additional coverage options or cost containment incentives.” *Id.* (emphasis added). Mr. Cheatham has authority to “make all rules necessary to effectuate” his responsibilities under the statute. *Id.* Mr. Cheatham exercises this authority to ensure that gender-confirming care is designated as a noncovered service in each and every health plan available to state employees and their dependents, thus targeting them for discriminatory treatment on the basis of their, or their dependent’s, sex and transgender status. Defendant Cheatham is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this complaint.

17. Defendant The Health Plan of West Virginia, Inc. (“The Health Plan”) was established in 1979 through provisions under the federal Health Maintenance Organization (“HMO”) Act, 42 U.S.C. §300e, et seq. The Health Plan is a federally qualified and state-certified 501(c)(4) not-for-profit HMO. The Health Plan is West Virginia’s largest HMO, with more than 200,000 members, and its service area encompasses all 55 counties in West Virginia. Many of The Health Plan’s members, including Mr. Martell and Mr. McNemar, are enrolled through their state employers; others are enrolled through state Medicaid and Medicare

Advantage plans. The Health Plan is offered through PEIA as a health insurance option for qualifying state employees. More than 15,000 of The Health Plan's members are state employees who have obtained coverage through the PEIA. The Health Plan receives federal financial assistance and is a "covered entity" for purposes of Section 1557 of the ACA.

18. Defendants, through their respective duties and obligations, are responsible for the discriminatory Exclusions of gender-confirming health care to Medicaid participants, state employees, and dependents who are transgender. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aid and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure the plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant and their successors, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE

19. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution; Section 1557 of the ACA, 42 U.S.C. § 18116; and the Medicaid Act's availability and comparability requirements, 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(10)(B).

20. The Court has jurisdiction over the claims asserted herein under 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States; and pursuant to 28 U.S.C. § 1343(a)(3) and (4) because the action is brought to redress deprivations, under color of state authority, of rights, privileges, and immunities secured by the

U.S. Constitution and seeks to secure damages and equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights.

21. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

22. Under 28 U.S.C. § 1391(b)(1) and (2), venue is proper in the Southern District of West Virginia because Defendants reside there and all Defendants are residents of West Virginia in which the district is located; and in this district and division because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred herein.

23. This Court has personal jurisdiction over Defendants because they are all domiciled within the State of West Virginia.

FACTS

A. Sex, Gender Identity, and Gender Dysphoria

24. Every individual's sex is multifaceted, and comprised of a number of characteristics, including but not limited to chromosomal makeup, hormones, internal and external reproductive organs, secondary sex characteristics, and most importantly, gender identity.

25. Gender identity is a person's internal sense of their sex. It is an essential element of human identity that everyone possesses, and a well-established concept in medicine. Gender identity is innate, immutable, and has biological underpinnings, such as the sex differentiation of the brain that takes place during prenatal development.

26. For everyone, gender identity is the most important determinant of a person's sex and a fundamental component of human identity.

27. A person's sex is generally assigned at birth based solely on a visual assessment of external genitalia at the time of birth. External genitalia are only one of several sex-related characteristics and are not always indicative of a person's sex.

28. For most people, these sex-related characteristics are all aligned, and the visual assessment performed at birth serves as an accurate proxy for that person's gender.

29. Where a person's gender identity does not match that person's sex assigned at birth, however, gender identity is the critical determinant of that person's sex.

30. The ability to live in a manner consistent with one's gender identity is vital to the health and wellbeing of transgender people.

31. Scientific consensus recognizes that attempts to change an individual's gender identity to bring their gender identity into alignment with the sex assigned at birth are ineffective and harmful.

32. Attempts to force transgender people to live in accordance with their sex assigned at birth, a practice often described as "conversion therapy," is known to cause profound harm. Such efforts are now widely considered unethical and, in many places, are unlawful.

33. For transgender people, an incongruence between their gender identity and sex assigned at birth can result in a feeling of clinically significant stress and discomfort known as gender dysphoria. Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; the World Health Organization's International Classification of Diseases, which is the diagnostic and coding compendia for medical professionals; and by other leading medical and mental health professional groups, including the American Medical Association ("AMA") and the American Psychological Association ("APA").

34. In addition to clinically significant distress, untreated gender dysphoria can result in severe anxiety, depression, or even suicidality.

35. Untreated gender dysphoria often intensifies with time. The longer an individual goes without or is denied adequate treatment for gender dysphoria, the greater the risk of severe harms to the individual's health.

36. Gender dysphoria can be treated in accordance with internationally recognized Standards of Care formulated by the World Professional Association for Transgender Health ("WPATH"). WPATH is an international, multidisciplinary, professional association whose mission is to promote evidence-based health care protocols for transgender people. WPATH publishes Standards of Care that are based on the best available science and expert professional consensus, and which are widely accepted as best practices for treating gender dysphoria.

37. Under the WPATH Standards of Care, medically necessary treatments may include, among other things, "[h]ormone therapy" and "[s]urgery to change primary and/or secondary sex characteristics (*e.g.*, breasts/chest, external and/or internal genitalia, facial features, body contouring)."

38. The Standards of Care are recognized as authoritative by national medical and behavioral health organizations such as the AMA and APA, which have both called for an end to exclusions of gender-confirming care from health insurance plans.

39. The individualized steps that many transgender people take to live in a manner consistent with their gender, rather than the sex they were assigned at birth, are known as transitioning.

40. Transitioning is particular to the individual but typically includes social, legal, and medical transition.

41. Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life. For example, social transition can include wearing attire, following grooming practices, and using pronouns consistent with that person's gender identity. The steps a transgender person can take as part of their social transition help align their gender identity with all aspects of everyday life.

42. Legal transition involves steps to formally align an individual's legal identity with their gender identity, such as legally changing one's name and updating the name and gender marker on their driver's license, birth certificate, and other forms of identification.

43. Medical transition, a critical part of transitioning for many transgender people, includes gender-confirming care that brings the sex-specific characteristics of a transgender person's body into alignment with their sense of their gender. Gender-confirming care can involve counseling to obtain a diagnosis of gender dysphoria, hormone replacement therapy, surgical care, or other medically necessary treatments for gender dysphoria.

44. Hormone replacement therapy involves taking hormones for the purpose of bringing one's secondary sex characteristics into typical alignment with one's gender identity. Secondary sex characteristics are bodily features not associated with external and internal reproductive genitalia (primary sex characteristics). Secondary sex characteristics include, for example, hair growth patterns, body fat distribution, and muscle mass development. Hormone replacement therapy can have significant masculinizing or feminizing effects and can assist in bringing transgender individuals' secondary sex characteristics into alignment with their gender identity, and therefore is medically necessary care for transgender people who need it to treat their gender dysphoria.

45. Gender-confirming surgical care might be sought by transgender people to better align primary or secondary sex characteristics with their gender identity. Surgical care can include, but is not limited to, hysterectomies, gonadectomies, mammoplasties, mastectomies, orchiectomies, vaginoplasties, and phalloplasties. These treatments are for the purpose of treating gender dysphoria.

46. These various components associated with transition—social, legal, and medical transition—do not change an individual’s gender, as that is already established by gender identity, but instead bring the individual’s appearance, legal identity, and sex-related characteristics into greater alignment with the individual’s gender identity and lived experience.

47. The consequences of untreated, or inadequately treated, gender dysphoria are dire. Symptoms of untreated gender dysphoria include intense emotional suffering, anxiety, depression, suicidality, and other attendant mental health issues. Untreated gender dysphoria is associated with higher levels of stigmatization, discrimination, and victimization, contributing to negative self-image and the inability to function effectively in daily life. When transgender people are provided with access to appropriate and individualized gender-confirming care in connection with treatment of gender dysphoria, these symptoms can be alleviated and even prevented.

48. The AMA, APA, American Psychiatric Association, Endocrine Society, American College of Obstetricians and Gynecologists, American Academy of Family Physicians, and other major medical organizations have recognized that gender-confirming care is medically necessary, safe, and effective treatment for gender dysphoria—and that access to such treatment improves the health and well-being of transgender people. Each of these groups

has publicly opposed exclusions of insurance coverage by private and public health insurers, like the Exclusions at issue here.

49. WPATH has stated that, like hormone replacement therapy and other gender-confirming treatments, the “medical procedures attendant to sex reassignment are not ‘cosmetic’ or ‘elective’ or for the mere convenience of the patient,” but instead are “medically necessary for the treatment of the diagnosed condition.” Nor are they experimental, because “decades of both clinical research and medical research show that they are essential to achieving well-being for the patient.”

B. Defendants’ Targeted and Discriminatory Exclusion of Gender-Confirming Care

1. Medicaid health coverage

50. Authorized under Title XIX of the Social Security Act of 1965, Medicaid is a joint federal-state program that provides access to health care for Medicaid-eligible individuals. 42 U.S.C. § 1396-1396w-5 (“Medicaid Act”). The purpose of Medicaid is to enable states to “furnish [] medical assistance” to individuals “whose income and resources are insufficient to meet the cost of necessary medical services.” 42 U.S.C. § 1396-1.

51. States are not required to participate in the Medicaid program—but all states do. States that choose to participate must comply with the Medicaid Act and its implementing regulations.

52. The Medicaid Act requires each participating state to establish or designate a single state agency charged with administering or supervising the state’s Medicaid program. 42 U.S.C. § 1396a(a)(5). Additionally, each participating state must maintain a comprehensive state plan (“Medicaid Plan”) for medical assistance, approved by the Secretary of the U.S. Department of Health and Human Services. 42 U.S.C. § 1396a.

53. The Medicaid Plan must describe how the state will administer its Medicaid program and affirm the state's commitment to comply with the Medicaid Act and its implementing regulations. Additionally, the Medicaid Plan "sets out groups of individuals to be covered, services to be provided, methodologies for providers to be reimbursed and the administrative activities that are underway in the state."

54. The federal government reimburses participating states for a substantial portion of the cost of providing medical assistance.

55. Under the Medicaid Act, "the medical assistance made available to any individual ... shall not be less in amount, duration or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i).

56. Additionally, a state "Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service ... to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

57. States must ensure that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). Moreover, state Medicaid programs must provide medical assistance "in a manner consistent with ... the best interests of the recipients." 42 U.S.C. § 1396a(a)(19).

58. The State of West Virginia participates in the federal Medicaid program.

59. Defendant BMS is the designated single state agency charged with the responsibility of administering the Medicaid program in West Virginia. W. Va. Code §§ 9-1-2(n); 9-2-13(a)(3).

60. Defendant BMS maintains the state's Medicaid Plan and files amendments to the Medicaid Plan with the appropriate regulatory authorities. Additionally, Defendant BMS determines benefits, sets payment rates, and reimburses providers.

61. Mountain Health Trust is West Virginia's Medicaid managed care program, which is administered by the BMS. BMS contracts with several managed care organizations ("MCO"), which are health plans that coordinate services to provide health coverage to Medicaid participants. As part of the Mountain Health Trust program, eligible Medicaid participants may select a primary care provider and one of three MCOs: (1) UniCare Health Plan of West Virginia, Inc., (2) The Health Plan, and (3) Aetna Better Health of West Virginia.

62. Each MCO provides Medicaid participants with Medicaid-covered health services through their defined network of providers and hospitals. These MCO networks are monitored by Defendant BMS.

63. Although Defendant BMS, in its administration of the state's Medicaid program, "strives to assure access to appropriate, medically necessary and quality health care services for all members," the Medicaid Policy Manual provides that the Medicaid Plan does not cover "[t]ranssexual surgery." Additionally, each MCO contains a similar exclusion of gender-confirming care in each of their managed care plans: (1) UniCare excludes coverage for "[s]ex transformation procedures and hormone therapy for sex transformation procedures;" (2) The Health Plan provides that "[s]ex change, hormone therapy for sex transformation, and gender transition procedures/expenses will not be paid for by The Health Plan;" and (3) Aetna Better Health excludes coverage for "[s]ex transformation procedures and hormone therapy for sex transformation procedures."

64. At all relevant times, the state's Medicaid Plan and managed care plans have categorically excluded coverage for gender-confirming care, through the exclusions in paragraph 63, even though the same treatments are covered for cisgender people who are Medicaid participants.

2. State employee health coverage

65. Qualifying state employees and their eligible dependents can choose from multiple health plan options. Covered services under the state employee health plans generally include coverage of medically necessary prescriptions, counseling, and surgical care at inpatient and outpatient facilities. These plans are distinguished primarily by coverage ratios, deductible amounts, and general costs to the insured employee and their eligible dependent enrollees. The health plans offered to state employees do, however, have at least one feature in common. At all relevant times, all health plans offered to state employees have contained categorical exclusions of coverage for gender-confirming care, even though the same care is covered for cisgender people.

66. State employees can choose from among seven health insurance plans. These options include (A) four preferred provider benefit plan options through PEIA provided by Defendant Cheatham, and (B) three HMO and point of service plans provided by Defendants Cheatham and The Health Plan.

A. Four preferred provider benefit plan options through PEIA provided by Defendant Cheatham: State employees can enroll for health coverage through four Preferred Provider Benefit plans: (1) "PEIA PPB Plan A," a comprehensive health plan; (2) "PEIA PPB Plan B," which offers lower premiums but higher deductibles and other costs; (3) "PEIA PPB Plan C," an IRS-qualified high-deductible health plan; and (4) "PEIA PPB Plan D," which offers

no out-of-state benefits with limited exceptions. All handbooks for these plans contain an identical exclusion for “[s]urgical or pharmaceutical treatments associated with gender dysphoria or any physical, psychiatric, or psychological examinations, testing, treatments or services provided or performed in preparation for, or as a result of, sex transformation surgery.” That exclusion appears in the 2020 and 2021 plan year handbooks. Member handbooks for plan years 2013 through 2019 similarly excluded “[s]ex transformation operations and associated services and expenses.”

B. Three HMO and point of service plans provided by Defendants

Cheatham and The Health Plan: State employees can also choose from insurance plans approved by Defendant Cheatham and offered through Defendant The Health Plan, which offers three health plans: (a) HMO Plan A; (b) HMO Plan B; and (c) a point of service (“POS”) plan.

All three plans include a blanket exclusion of coverage for gender-confirming care.

67. All seven health plans available to West Virginia state employees exclude coverage for gender-confirming care.

68. Transgender people may require varying forms of gender-confirming care. The blanket Exclusions, however, unilaterally and uniformly prevent transgender people from receiving coverage for gender-confirming care regardless of their need. As a result, the Exclusions maintained across all state employee health plans discriminatorily target transgender people, denying coverage for medically necessary gender-confirming care. Cisgender enrollees receive coverage for medically necessary mental health, prescription drug, and surgical needs; whereas, transgender enrollees do not because of the Exclusions and based on their sex and transgender status.

C. The Denial of Care to Plaintiffs

1. Plaintiff Christopher Fain (Medicaid)

69. Mr. Fain is 45 years old. Mr. Fain was born in West Virginia and has resided in West Virginia for the vast majority of his life.

70. Mr. Fain is an adjunct professor at Mountwest Community and Technical College (“Mountwest College”).

71. Mr. Fain is a man.

72. Mr. Fain is also transgender. Although his sex assigned at birth was female, his gender identity is male.

73. Mr. Fain experiences dysphoria related to the distress arising from the incongruence between his gender identity and his sex assigned at birth.

74. Mr. Fain has been aware of his gender identity since he was six years old, and since that first awareness has identified as male. Mr. Fain delayed his transition for many years, however, for fear that discrimination and stigma against transgender people would prevent him from being able to support his family.

75. Delaying this vital care took an enormous toll on Mr. Fain, and he eventually came out to his family. Mr. Fain’s children are very supportive of Mr. Fain’s transition.

76. Mr. Fain began counseling to help address his gender dysphoria, and was diagnosed with gender dysphoria in or around December 2018.

77. Mr. Fain obtained a legal name change to reflect his gender identity through a West Virginia court order on April 6, 2018.

78. Mr. Fain updated his name to reflect his male gender identity on his Social Security account in April 2018 and, updated his West Virginia driver’s license with his new name in May 2018 and correct sex designation in August 2021.

79. Mr. Fain lives in all ways in accordance with his male gender identity and is recognized as male by his family, his friends, his classmates, and his professors.

80. Mr. Fain has been enrolled as a Medicaid participant for most of his adult life.

81. Mr. Fain receives coverage through the MCO UniCare Health Plan of West Virginia, Inc., an Anthem Company.

82. In or around February 2019, Mr. Fain's mental health provider recommended that he begin hormone therapy to alleviate his gender dysphoria by aligning his physical characteristics with his gender identity. Mr. Fain began hormone care on or around March 2019.

83. In order to avoid being incorrectly identified as female and to reduce the severe distress and embarrassment over the presence of typically female-appearing breasts on his body, Mr. Fain often wears a "binder," which is a compression garment that flattens or reduces the profile of a person's chest, which is an ongoing source of his gender dysphoria.

84. Mr. Fain experiences intense discomfort with prolonged use of a binder, which often chafes his skin, and sometimes creates sores and leads to difficulty breathing. Nonetheless, to help manage his gender dysphoria, he sometimes wears the binder for 16 hours at a time.

85. Mr. Fain requires a bilateral mastectomy as medically necessary care to treat his gender dysphoria and eliminate the need for the ongoing use of a binder. This surgical procedure is a widely accepted and effective treatment for gender dysphoria. However, the blanket exclusion in the Medicaid Plan bars him from receiving this medically necessary care. Mr. Fain accordingly is forced to delay this urgently-needed procedure as a direct and proximate result of Defendants' continuing refusal to cover medically necessary gender-confirming care. As a result, Mr. Fain's symptoms of gender dysphoria and related distress have increased.

86. The Medicaid Plan's exclusion of coverage for Mr. Fain's medically necessary care has caused Mr. Fain economic hardship, emotional distress, lowered self-esteem, embarrassment, humiliation, and stigma.

2. Plaintiff Shauntae Anderson (Medicaid)

87. Ms. Anderson is 45 years old. Ms. Anderson was born in West Virginia and has resided in West Virginia for the vast majority of her life.

88. Ms. Anderson is a woman.

89. Ms. Anderson is also transgender. Although her sex assigned at birth was male, her gender identity is female.

90. Ms. Anderson experiences gender dysphoria related to the disconnect between her primary and secondary sex characteristics and her gender identity.

91. For much of Ms. Anderson's younger years and into early adulthood, Ms. Anderson was forced to suppress her gender identity due to family disapproval and societal stigma. As a child, Ms. Anderson never felt "right" in her body. Ms. Anderson was incredibly shy and was uncomfortable being raised and socialized as a boy.

92. Around the age of six years old, Ms. Anderson started using her mother's makeup and playing with her sister's toys. In or around ninth grade, Ms. Anderson attempted to socially transition at school by dressing in a more typically feminine manner and wearing makeup.

93. In 2010, Ms. Anderson began to medically transition. Ms. Anderson lacked access to health coverage for this care, but her need to transition was so urgent that she was forced to self-treat. Ms. Anderson began taking estrogen in the form of birth control pills to help feminize her appearance. While birth control pills are not remotely adequate as a substitute for hormone therapy, Ms. Anderson's gender dysphoria was so severe that even a modest feminizing effect helped relieve some of her gender dysphoria.

94. Ms. Anderson subsequently served time in federal prison. While incarcerated, Ms. Anderson continued the process of socially transitioning, and formally began to medically transition in consultation with and under the care of medical professionals.

95. During her time in the Bureau of Prisons, Ms. Anderson updated her name to not only reflect her gender identity but also ensure that she would be recognized and treated as a transgender woman for the purpose of security checks. Additionally, Ms. Anderson was evaluated by medical professionals and received approval to wear typically feminine underwear as part of her transition.

96. Ms. Anderson began counseling to help address her gender dysphoria, and was diagnosed with gender dysphoria.

97. In or around 2019, Ms. Anderson's health care providers recommended that she begin hormone therapy to alleviate her gender dysphoria by further aligning her physical characteristics with her gender identity. Ms. Anderson began hormone therapy in or around May 2019.

98. Ms. Anderson has been enrolled as a Medicaid participant since 2020.

99. Ms. Anderson receives coverage through the MCO Aetna Better Health of West Virginia.

100. Surgical treatment is medically necessary for treatment of Ms. Anderson's gender dysphoria.

101. Ms. Anderson experiences significant distress related to her genitalia and breasts that negatively impact her daily life. She particularly experiences such distress when she gets dressed and when she is using the restroom. For example, when Ms. Anderson is using the

bathroom, she is often reminded of the fact that there are aspects of her physical body that do not feel right.

102. In order to avoid being incorrectly identified as male and to reduce the severe distress and embarrassment over the presence of her typically male-appearing features, Ms. Anderson often employs the use of shapewear, like push-up bras, to help with further feminizing her body. These coping techniques, however, are not adequate to treat her gender dysphoria and do not alleviate her need for medical care.

103. Ms. Anderson requires gender-confirming surgery, including but not limited to vaginoplasty and breast reconstruction surgery. These surgical procedures are medically necessary care to treat her gender dysphoria and, are widely accepted and effective treatments for gender dysphoria.

104. However, the blanket exclusion in the Medicaid Plan bars her from receiving this medically necessary care. Ms. Anderson, accordingly, is forced to delay this urgently-needed care as a direct and proximate result of Defendants' continuing refusal to cover medically necessary gender-confirming care. As a result, Ms. Anderson's symptoms of gender dysphoria and related distress have increased.

105. The Medicaid Plan's exclusion of coverage for Ms. Anderson's medically necessary care has caused Ms. Anderson emotional distress, lowered self-esteem, embarrassment, and stigma.

3. Plaintiff Leanne James (PEIA)

106. Ms. James is 43 years old. Ms. James was born in West Virginia and has resided in West Virginia for her entire life.

107. Ms. James is currently employed as a Programmer at the Information Systems Department for the Kanawha County Board of Education. She began working for the Kanawha County Board of Education on February 5, 2008.

108. As part of the terms, conditions, privileges, and status of her employment with the Kanawha County Board of Education, Ms. James is and, at all relevant times, has been enrolled in a health plan through PEIA and relies on that plan for health care coverage. Ms. James is enrolled in the PPB Plan A approved and offered by Defendant Cheatham.

109. Ms. James is a woman.

110. Ms. James is also transgender. Although her sex assigned at birth was male, her gender identity is female.

111. Ms. James experiences gender dysphoria related to the disconnect between her primary and secondary sex characteristics and her gender identity.

112. Ms. James ultimately came to terms with her female gender identity in adulthood after realizing she could no longer ignore or suppress it.

113. In 2011, Ms. James began her social transition. However, due to concerns regarding Ms. James' ability to retain employment, which is necessary for ensuring the ongoing care of her daughter, Ms. James delayed certain aspects of her transition. Ms. James was concerned that transitioning on the job might subject her to stigma and discrimination.

114. In January 2019, Ms. James was diagnosed with gender dysphoria.

115. After realizing she could no longer delay her transition, in 2019 Ms. James began hormone therapy to alleviate her gender dysphoria by aligning her physical characteristics with her gender identity.

116. Ms. James changed her legal name by West Virginia court order on July 23, 2021. She also updated the name on her West Virginia driver's license and birth certificate. Ms. James is recognized as female by her family, friends, and colleagues.

117. As part of her treatment plan, Ms. James requires routine appointments for bloodwork. Ms. James has been, and continues to be, denied coverage for her bloodwork appointments pursuant to the Exclusion. Because of this, Ms. James is forced to pay out-of-pocket for her bloodwork, which typically costs her \$354.00.

118. Additionally, Ms. James is forced to pay out-of-pocket for her routine visits with her OB-GYN, Dr. Patton, because of Defendant Cheatham's categorical exclusion of such medical care. Ms. James is typically required to pay upwards of \$110.00 per visit for her examinations.

119. Surgical treatment is medically necessary for treatment of Ms. James' gender dysphoria.

120. Ms. James experiences significant distress related to her genitalia and breasts that negatively impact her daily life.

121. In order to reduce the severe distress and embarrassment over the presence of her typically male-appearing features, Ms. James often employs the use of breast prosthetics to help feminize her body. This coping technique, however, is not adequate to treat her gender dysphoria and does not alleviate her need for medical care.

122. Ms. James requires gender-confirming surgery, including but not limited to vaginoplasty and breast reconstruction surgery. These surgical procedures are medically necessary care to treat her gender dysphoria and are widely accepted and effective treatments for gender dysphoria.

123. However, the categorical exclusion in Defendant Cheatham and PEIA's PPB Plan A bars her from receiving this medically necessary care. Ms. James is forced to delay this urgently-needed care as a direct and proximate result of Defendant Cheatham and PEIA's continuing refusal to cover medically necessary gender-confirming care.

124. Ms. James has timely submitted a charge to the Equal Employment Opportunity Commission ("EEOC") for sex discrimination in violation of Title VII.

125. Ms. James will seek leave to amend her complaint to add a claim under Title VII once her claims has been exhausted before the EEOC.

126. The blanket exclusion of gender-confirming care sends a deeply stigmatizing message to Ms. James that her worth as a public employee is lesser than others, since the exclusion deprives her of compensation that cisgender employees receive. Additionally, the exclusion is particularly humiliating and degrading because PEIA provides coverage for the same medically necessary gender-confirming care for state employees and their dependents who are not transgender.

4. Plaintiffs Zachary Martell and Brian McNemar (PEIA)

127. Mr. McNemar works as an Accountant Auditor in the accounting department of the Mildred-Mitchell Bateman Hospital, a state psychiatric hospital in Huntington, West Virginia, that is operated, supported, and subject to oversight by the state. Mr. McNemar began working in this position on February 18, 2018.

128. Mr. Martell is a part-time student at Mountwest Community and Technical College in Huntington, West Virginia. Mountwest College does not offer health insurance to students.

129. At all relevant times, both Mr. McNemar and Mr. Martell have been enrolled in a health plan through PEIA and have relied on that plan for health care coverage. As the spouse

and eligible dependent of Mr. McNemar, Mr. Martell is enrolled in the HMO Plan A approved by Defendant Cheatham and offered by Defendant The Health Plan.

130. Mr. Martell is a man.

131. Mr. Martell is also transgender. Although his sex assigned at birth was female, his gender identity is male.

132. Mr. Martell has been medically diagnosed with gender dysphoria. He experiences dysphoria related to the disconnect between his primary and secondary sex characteristics and his gender identity.

133. From an early age, Mr. Martell felt different; he understood that he was not female and felt discomfort with his primary and secondary sex characteristics. He preferred masculine clothing from a young age. However, he did not have the language or conceptual understanding to describe these feelings. It was not until age 30, with the support of his husband and friends, that he accepted and came to understand himself as transgender.

134. Mr. Martell changed his legal name by West Virginia court order on February 19, 2019. He also updated the name and gender marker on his West Virginia driver's license and his Social Security records. Additionally, Mr. Martell is recognized as male by his friends, classmates, and professors.

135. As part of his medical transition, Mr. Martell has received treatment for gender dysphoria, including hormone replacement therapy in the form of testosterone, to alleviate his gender dysphoria by aligning his physical characteristics with his gender identity.

136. In order to avoid being incorrectly identified as female, and to reduce the severe distress and embarrassment over the presence of typically female-appearing breasts on his body, when he leaves the house, Mr. Martell often uses a binder, which flattens or reduces the profile

of his chest. However, even with the use of a binder, Mr. Martell experiences distress over the presence of his chest, which is an ongoing source of his gender dysphoria.

137. Mr. Martell experiences intense discomfort with prolonged use of a binder, which can be painful and cause difficulty breathing, among other health risks. As a result, Mr. Martell must carefully limit the amount of time that he uses a binder. Prior to the current COVID-19 pandemic, Mr. Martell's class schedule required him to be on campus for more than nine hours, forcing him to forego the use of a binder on certain days, and exposing him to increased risk of being incorrectly identified as female, which causes him significant anxiety.

138. Mr. Martell requires a bilateral mastectomy as medically necessary care to treat his gender dysphoria and eliminate the need for the ongoing use of a binder. This surgical procedure is a widely accepted and effective treatment for gender dysphoria. However, the categorical Exclusion in HMO Plan A bars him from receiving this medically necessary care. Mr. Martell is accordingly forced to delay a medically necessary and urgently-needed procedure as a direct and proximate result of Defendants' continuing refusal to cover gender-confirming care through the Exclusions. As a result, Mr. Martell's symptoms of gender dysphoria and related distress have increased.

139. On or around April 2018, Mr. Martell began attending counseling as part of his medical transition. On or about November 13, 2018, his mental health provider assessed him as ready to begin hormone replacement therapy and recommended that he do so. When Mr. Martell first sought to begin hormone replacement therapy in the form of testosterone with the guidance of his medical and mental health providers, The Health Plan denied coverage both for the prescriptions and his office visits with the health care provider who managed his hormone replacement therapy.

140. On or about February 13, 2019, Mr. Martell received a Notice of Adverse Benefit Determination from Defendant The Health Plan. The notice informed Mr. Martell that coverage for his medically necessary hormone replacement therapy would be denied. The notice stated that Mr. Martell “asked us to cover testosterone. After review we are denying the request. Treatments for gender identity issues are excluded from the benefit.”

141. As a result of this denial of medically necessary health care, Mr. Martell and Mr. McNemar were forced to pay out-of-pocket for Mr. Martell’s testosterone prescriptions. At times, this expense was too much for Mr. Martell and Mr. McNemar to meet, forcing Mr. Martell to temporarily to forego medically necessary health care to make ends meet. This lapse in health care coverage exacerbated Mr. Martell’s anxiety, and suspended the physical changes that were an essential part of his medical transition.

142. Mr. Martell’s medical and mental health providers have recommended that he continue to receive hormone therapy to alleviate his ongoing symptoms of gender dysphoria. Defendants Cheatham and The Health Plan’s categorical exclusion of such medical care, however, denies coverage for this treatment, forcing Mr. Martell and Mr. McNemar to pay out-of-pocket for medically necessary health care. The denials of coverage for this care have caused Mr. Martell emotional distress, lowered self-esteem, embarrassment, humiliation, and stigma.

143. Additionally, the denials of coverage for Mr. Martell’s care have caused his spouse, Mr. McNemar, intense frustration, despair, and aggravation. Mr. McNemar not only experienced the distress of watching his spouse suffer without coverage for essential medical care, but also the distress of being discriminated against in his compensation. Other cisgender state employees receive coverage for their spouses’ hormone-related therapy and surgical care, while Mr. McNemar is denied that important form of compensation simply because his spouse is

transgender. This harms Mr. McNemar by depriving him of equal compensation for equal work, causes him distress, and stigmatizes both Mr. Martell and Mr. McNemar.

144. Because of the Exclusions of coverage for gender-confirming health care in the state health plans, the named Plaintiffs have suffered emotional distress, humiliation, degradation, embarrassment, emotional pain and anguish, violation of their dignity, loss of enjoyment of life, and other compensatory damages, in an amount to be established at trial.

CLASS ACTION ALLEGATIONS

145. Plaintiffs, on behalf of themselves and all similarly situated individuals, bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

146. Plaintiffs assert their claims against all Defendants on behalf of the following Classes and Subclass, collectively, “the Classes”).

Medicaid Class

147. The proposed Medicaid Class is defined as: All transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions.

State Employee Health Plan Class

148. The proposed State Employee Health Plan Class is defined as: All people who are enrolled in a State Employee Health Plan and who are either transgender and have sought or will seek gender-confirming care, and/or people whose transgender dependents have sought or will seek gender-confirming care, barred by the Exclusions.

The Health Plan Subclass

149. The proposed The Health Plan Subclass is a subclass of the State Employee Health Plan Class and is defined as: All State Employee Health Plan Class Members who are enrolled in The Health Plan.

150. Plaintiffs and the proposed Classes have been equally affected by Defendants' violations of law.

151. The persons in the proposed Classes are so numerous that joinder of all members is impracticable. While the precise number of class members has not been determined at this time, upon information and belief, there are more than 40 individuals in the proposed Classes and/or the class members are so numerous that joinder would be impractical.

152. The common questions of law and fact include, but are not limited to:

A. Whether Defendants' Exclusions, facially and as applied to members of the proposed Classes, violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

B. Whether Defendants' Exclusions, facially and as applied to members of the proposed Classes, violate the prohibitions on sex discrimination under Section 1557 of the Affordable Care Act;

C. Whether Defendants' Exclusions, facially and as applied to members of the proposed Medicaid Class, violate the availability and comparability provisions of the Medicaid Act; and

D. Whether Defendants should be enjoined from enforcing the Exclusions and denying Plaintiffs coverage for and access to gender-confirming care.

153. The questions of law and fact listed above will yield common answers for Plaintiffs and the proposed Classes.

154. Plaintiffs' claims are typical of those members of the proposed Classes. Mr. Fain and Ms. Anderson are both transgender, are participants in West Virginia Medicaid, and are denied coverage for gender-confirming care because of an Exclusion. Ms. James is transgender, a public employee, and is denied access to medically necessary gender-confirming care because of an Exclusion. Mr. Martell is transgender, an eligible dependent of Mr. McNemar, and has been denied access to medically necessary gender-confirming care because of an Exclusion. Mr. McNemar is a state employee whose dependent has been denied coverage for gender-confirming care because of an Exclusion. Mr. Fain and Ms. Anderson, representing the Medicaid Class; Ms. James representing the State Employee Health Plan Class; and Mr. Martell and Mr. McNemar, representing the State Employee Health Plan Class and The Health Plan Subclass, and members of the proposed Classes share the same legal claims under the Equal Protection Clause and Section 1557 respectively.

155. Plaintiffs will fairly and adequately represent the interests of the proposed Classes and have retained counsel experienced in complex class action litigation. Plaintiffs are represented by Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), the nation's oldest and largest legal organization dedicated to the rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV. Lambda Legal has extensive federal court experience litigating on behalf of LGBT people, including regarding transgender people's access to health care, and has served as class counsel and putative class counsel in a number of LGBT-related cases. Plaintiffs are also represented by Nichols Kaster, PLLP, a leading law firm with significant expertise representing plaintiffs across the country in employment and class action matters, and Walt Auvil of The Employment Law Center, PLLC ("The Employment Law Center"). Mr. Auvil is a West Virginia-based litigator with more than

30 years of experience protecting workers' rights, including through complex class action litigation.

156. Class treatment is appropriate under Fed. R. Civ. P. 23(b)(2) because Defendants have acted on grounds that apply generally to the proposed Classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the proposed Classes as a whole.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection

U.S. Const. Amend. XIV

Plaintiffs Christopher Fain and Shauntae Anderson on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

Plaintiffs Leanne James, Zachary Martell, and Brian McNemar, on Behalf of the State Employee Health Plan Class Against Defendant Cheatham for Declaratory and Injunctive Relief

Plaintiffs Zachary Martell and Brian McNemar, on Behalf of The Health Plan Subclass Against Defendant Cheatham for Declaratory and Injunctive Relief

157. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

158. Plaintiffs state this cause of action on behalf of themselves and members of the proposed Classes against Defendant Crouch, Defendant Beane, and Defendant Cheatham in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenge Defendants' enforcement of the discriminatory sex-based classifications in the Exclusions both facially and as applied to Plaintiffs and the proposed Classes.

159. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

160. Defendant Crouch is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs Fain, Anderson, and the proposed Medicaid Class equal protection of the law. Through his duties and actions to develop a managed care program that excludes coverage for gender-confirming care, Defendant Crouch has unlawfully discriminated, and continues to discriminate, against Plaintiffs Fain, Anderson, and the members of the proposed Medicaid Class based on sex-related considerations.

161. Defendant Beane is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs Fain, Anderson, and the proposed Medicaid Class equal protection of the law. Through her duties and actions to implement health policies for BMS which exclude gender-confirming care, Defendant Beane has unlawfully discriminated, and continues to discriminate, against Plaintiffs Fain, Anderson, and the members of the proposed Medicaid Class based on sex-related considerations.

162. Defendant Cheatham is a person acting, at all relevant times, under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs James, Martell, and McNemar and the proposed State Employee Health Plan Class and The Health Plan Subclass equal protection of the law. Through his duties and actions to administer and manage the group insurance plans for state employees and dependents—which includes authority and responsibility for designating noncovered services such as the Exclusions of gender-confirming care, and his actions to ensure that state employees have no nondiscriminatory options—Defendant Cheatham has unlawfully discriminated, and continues to discriminate, against Plaintiffs James, Martell, and McNemar and the members of the proposed State Employee Health Plan Class and The Health Plan Subclass based on sex-related considerations.

163. The Exclusions, on their face and as applied to Plaintiffs and the proposed Classes, impermissibly discriminate on the basis of sex, and on the basis of transgender status, and violate their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

164. The Exclusions treat Plaintiffs and members of the proposed Classes differently from other persons who are similarly situated. Under the Exclusions, transgender Medicaid and state health plan participants who require gender-confirming care are denied coverage for that medically necessary care, while cisgender Medicaid and state health plan participants can access the same kinds of treatments, including when related to their sex. Similarly, state health plan enrollees with a transgender dependent are denied coverage for that medically necessary care, while enrollees with a cisgender dependent are not denied coverage for the same kinds of treatments, including when related to their sex.

A. Discrimination on the Basis of Sex

165. By maintaining and enforcing the categorical Exclusions of gender-confirming care in the Medicaid and state employee health plans, Defendant Crouch, Defendant Beane, and Defendant Cheatham respectively engage in constitutionally impermissible discrimination on the basis of sex.

166. Discrimination on the basis of transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition constitutes discrimination on the basis of sex.

167. Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

168. By ensuring that coverage for gender-confirming care is categorically excluded regardless of medical necessity in all health coverage options for Medicaid and state employee health plan participants, Defendants Crouch, Beane, and Cheatham engage in constitutionally impermissible sex-based discrimination against Plaintiffs and members of the proposed Classes, and violate their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

B. Discrimination on the Basis of Transgender Status

169. By maintaining and enforcing the categorical Exclusions of gender-confirming care, Defendants Crouch, Beane, and Cheatham engage in constitutionally impermissible discrimination on the basis of transgender status.

170. As the Fourth Circuit recently confirmed, under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to “at least” heightened scrutiny. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020). That is because:

A. Transgender people have suffered a long history of discrimination and continue to suffer such discrimination to this day.

B. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit state and federal protections to protect them against discrimination through the legislative process.

C. A person’s transgender status bears no relation to a person’s ability to contribute to society.

D. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment. Gender identity generally is highly resistant to change through intervention.

171. Because the Exclusions on their face and as applied to Plaintiffs and the proposed Classes deprive transgender Medicaid and state employee health plan enrollees of their right to equal dignity, liberty, and autonomy by stigmatizing them and branding them as inferior to cisgender health plan enrollees, Defendants Crouch, Beane, and Cheatham deny transgender persons equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment. The categorical Exclusions similarly serve to stigmatize state health plan enrollees whose dependents are transgender, depriving them of their equal treatment and dignity.

172. Defendants' enforcement of the Exclusions has not, and does not serve even a legitimate state interest, let alone one that is important, or compelling. Nor are the Exclusions adequately tailored to any such state interest. Rather, the Exclusions serve only to prevent Plaintiffs and members of the proposed Classes from obtaining gender-confirming care when cisgender enrollees are able to receive the same care as long as it is not required for purposes of treating gender dysphoria. In effect, the Exclusions punish vulnerable transgender people for being transgender and taking necessary—and sometimes life-saving—steps to live in accordance with their gender identity.

173. Without injunctive relief from the Exclusions of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT TWO
Violation of Section 1557 of the
Patient Protection and Affordable Care Act
42 U.S.C. § 18116

Plaintiffs Christopher Fain and Shauntae Anderson on Behalf of the Medicaid Class, Against Defendant BMS, Defendant Crouch, and Defendant Beane for Declaratory and Injunctive Relief, and Individually Against Defendant BMS for Compensatory Damages

Plaintiffs Zachary Martell and Brian McNemar, on Behalf of the State Employee Health Plan Class and on Behalf of The Health Plan Subclass Against Defendant The Health Plan for Declaratory and Injunctive Relief, and Individually Against Defendant The Health Plan for Compensatory Damages

174. Plaintiffs re-allege and incorporate each and every foregoing allegation contained in the preceding paragraphs of this complaint, as though fully set forth herein.

175. Plaintiffs state this cause of action on behalf of themselves and members of the proposed Classes for purposes of seeking declaratory and injunctive relief, and challenge the discriminatory sex-based classifications in the Exclusions both facially and as applied to Plaintiffs and the proposed Classes. Named Plaintiffs also state this cause of action for compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

176. Under Section 1557 of the Affordable Care Act, “an individual shall not ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)” on the basis of sex. 42 U.S.C. § 18116.

177. “[A]ny health program or activity”:

A. Defendant BMS, which administers and supervises the state’s Medicaid Plan, constitutes a health program or activity within the meaning of the statute.

B. Defendant The Health Plan, as a health maintenance organization serving more than 200,000 people covered through its health plans, constitutes a health program or activity within the meaning of the statute.

178. “[A]ny part of which is receiving Federal financial assistance”:

A. Defendant BMS receives federal financial assistance such that it is a “covered entity” for purposes of Section 1557 of the ACA. The Centers for Medicare & Medicaid Services (“CMS”), operating within HHS, provide federal financial assistance to BMS for the state’s participation in the Medicaid Program.

B. Defendant The Health Plan receives federal financial assistance such that it is a “covered entity” for purposes of Section 1557 of the ACA. The Health Plan’s “Provider Procedural Manual,” which provides guidance to medical providers who care for patients insured through The Health Plan, explains that, “The Health Plan has entered into a contract with the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers the Medicare program. Under this contract, CMS makes a monthly payment to The Health Plan for each Medicare beneficiary who enrolls in our Plan. ... The Health Plan receives a set rate for each member plus any enrollee premium.”

179. The categorical Exclusions maintained by Defendants BMS, The Health Plan, Crouch, and Beane, on their face and as applied to Plaintiffs and members of the proposed Classes, violate Section 1557’s prohibition against discrimination on the basis of sex in a health program or activity receiving federal financial assistance.

180. Defendants Crouch and Beane's actions under color of state law to maintain the categorical Exclusions deprive Plaintiffs and members of the proposed Classes of the protection from sex discrimination secured by Section 1557.

181. Discrimination on the basis of transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition are all encompassed by the prohibition of discrimination on the basis of sex under Section 1557.

182. By categorically excluding gender-confirming care regardless of medical necessity, Defendants BMS, The Health Plan, Crouch, and Beane have drawn a classification that has and continues to unlawfully discriminate against Plaintiffs and members of the proposed Classes based on sex, in violation of Section 1557.

183. Because Defendant BMS and Defendant The Health Plan receive federal funding that flows to health programs or activities, Plaintiffs and the proposed Classes have a right under Section 1557 to receive health insurance through BMS and The Health Plan free from discrimination on the basis of transgender status, sex, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition.

184. Defendants BMS, The Health Plan, Crouch, and Beane have discriminated against Plaintiffs and the proposed Classes on the basis of sex in violation of Section 1557 and have thereby denied Plaintiffs and the proposed Classes the full and equal participation in, benefits of, and right to be free from discrimination in a health program or activity.

185. Plaintiffs and the proposed Classes have been and continue to be injured by the application of the Exclusion by Defendants BMS, The Health Plan, Crouch, and Beane to deny coverage for gender-confirming care and have suffered harm as a result.

186. The named Plaintiffs have also suffered emotional distress, stigmatization, humiliation, and a loss of dignity because of BMS' and The Health Plan's targeted discrimination against transgender Medicaid participants and The Health Plan enrollees respectively, which wrongly deems their health care needs as unworthy of equal coverage. By knowingly and intentionally offering health care coverage to Plaintiffs that discriminates on the basis of sex, Defendant BMS and Defendant The Health Plan have intentionally violated the ACA, for which named Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

187. Without injunctive relief from the Exclusions of coverage for gender-confirming care, Plaintiffs and the proposed Classes will continue to suffer irreparable harm in the future.

COUNT THREE
Violation of the Medicaid Act's Availability Requirements
42 U.S.C. § 1396a(a)(10)(A)

Plaintiffs Christopher Fain and Shauntae Anderson on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

188. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

189. Plaintiffs Fain and Anderson state this cause of action on behalf of themselves and members of the proposed Medicaid Class against Defendants Crouch and Beane in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenge Defendants' enforcement of the Exclusions both facially and as applied to Mr. Fain and Ms. Anderson, and the proposed Medicaid Class.

190. The Medicaid Act's Availability Requirements, 42 U.S.C. § 1396a(a)(10)(A), require that a state plan must "provide for making medical assistance available ... to" eligible individuals.

191. The categorical Exclusions maintained and enforced by Defendants Crouch and Beane eliminate mandatory Medicaid coverage of medically necessary services and render them unavailable to Plaintiffs Fain, Anderson, and members of the proposed Medicaid Class, thereby violating Medicaid’s availability requirement, 42 U.S.C. § 1396a(a)(10)(A), which is enforceable by Plaintiffs Fain and Anderson under 42 U.S.C. § 1983.

COUNT FOUR
Violation of the Medicaid Act’s Comparability Requirements
42 U.S.C. § 1396a(a)(10)(B)

Plaintiffs Christopher Fain and Shauntae Anderson on Behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

192. Plaintiffs re-allege and incorporate by reference the allegations in each of the preceding paragraphs of this complaint, as though fully set forth herein.

193. Plaintiff Fain and Anderson state this cause of action on behalf of themselves and members of the proposed Medicaid Class against Defendants Crouch and Beane in their official capacity, for purposes of seeking declaratory and injunctive relief, and challenges Defendants’ enforcement of the Exclusions both facially and as applied to Mr. Fain, Ms. Anderson, and the proposed Medicaid Class.

194. The Medicaid Act’s Comparability Requirements, 42 U.S.C. § 1396a(a)(10)(B), require that the “medical assistance made available to [eligible individuals] shall not be less in amount, duration, or scope than the medical assistance made available to” other eligible or ineligible individuals.

195. The categorical Exclusions maintained and enforced by Defendants Crouch and Beane, and the denial of medically necessary services and treatments to Plaintiffs Fain, Anderson, and members of the proposed Medicaid Class, while the same or similar services and treatments are covered for cisgender Medicaid beneficiaries, violates Medicaid’s comparability

requirement, 42 U.S.C. § 1396a(a)(10)(B), which is enforceable by Plaintiffs Fain and Anderson under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs as class representatives, on behalf of themselves and the proposed Classes, respectfully request that this Court enter judgment in their favor and against Defendants on all claims, as follows:

- A. Certification of a class action pursuant to Fed. R. Civ. P. 23 on behalf of the proposed Classes;
- B. Appointment of Plaintiffs as class representatives and their counsel as class counsel;
- C. Issuance of a preliminary and permanent injunction enjoining any further enforcement or application of the Exclusions, and directing Defendants and their agents to provide access to coverage for all gender-confirming care without regard to the Exclusions;
- D. Declaratory judgment that the Exclusions, facially and as applied to Plaintiffs and members of the proposed Classes:
 1. Violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition), and on the basis of transgender status;
 2. Violate Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, by discriminating against Plaintiffs and all similarly situated individuals on the basis of sex (including transgender status, sex characteristics, gender, gender identity, sex assigned at birth, nonconformity with sex stereotypes, and gender transition);

3. Violate the Medicaid Act's availability requirement, 42 U.S.C.

§ 1396a(a)(10)(A); and,

4. Violate the Medicaid Act's comparability requirement, 42 U.S.C.

§ 1396a(a)(10)(B);

E. An award of the declaratory and injunctive relief requested in this action against Defendants' officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them;

F. An award of compensatory and consequential damages to the individual Plaintiffs in an amount that would fully compensate Plaintiffs for their financial harm, emotional distress and suffering, embarrassment, humiliation, pain and anguish, violations of their dignity, and other damages that have been caused by the conduct of Defendants BMS and The Health Plan in violation of the ACA;

G. An award of reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 and all other applicable statutes; and

H. Such other and further relief as the Court may deem just and proper.

* * *

Dated: September 23, 2021

Respectfully submitted,

/s/ Walt Auvil
Walt Auvil, WVSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-219-4455
asmithcarrington@lambdalegal.org

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Tara L. Borelli, Visiting Attorney
Carl Charles, Visiting Attorney
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Sasha Buchert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Nora Huppert, Visiting Attorney
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Attorneys for Plaintiffs

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

**CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR, SHAWN
ANDERSON a/k/a SHAUNTAE ANDERSON;
and LEANNE JAMES, individually and on
behalf of all others similarly situated,**

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

**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, BUREAU FOR MEDICAL
SERVICES; 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.

**DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES'
ANSWER TO PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT**

NOW COME the Defendants, William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services (“these Defendants”), by counsel, Lou Ann S. Cyrus, Roberta F. Green, Caleb B. David, Kimberly M. Bandy, and Shuman McCuskey Slicer PLLC, and for their Answer to Plaintiffs’ First Amended Class Action Complaint state and aver as follows:

INTRODUCTION

1. Paragraph 1 of Plaintiffs' First Amended Class Action Complaint states legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 1 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

2. Paragraph 2 of Plaintiffs' First Amended Class Action Complaint states legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 2 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

3. Responding to Paragraph 3 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny the allegation in the first sentence and demand strict proof thereof. The second sentence of Paragraph 3, referring to the State of West Virginia providing health care coverage for employees and their eligible dependents through the Public Employees Insurance Agency ("PEIA") does not apply to these Defendants, so no response is deemed necessary. The remaining allegations contained in Paragraph 3 of Plaintiffs' First Amended Class Action Complaint state legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 3 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

4. Paragraph 4 of Plaintiffs' First Amended Class Action Complaint states legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny any and all allegations of wrongdoing, express or implied, raised

against them in Paragraph 4 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further specifically deny that the Medicaid Plan contains "Exclusions" as described therein and demand strict proof thereof.

5. Paragraph 5 of Plaintiffs' First Amended Class Action Complaint states legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 5 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further specifically deny that the Medicaid Plan contains "Exclusions" as described therein and demand strict proof thereof.

6. Paragraph 6 of Plaintiffs' First Amended Class Action Complaint states legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants state, consistent with their contemporaneously filed Motion to Dismiss Class Allegations, that the Plaintiffs' First Amended Class Action Complaint does not meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and, therefore, must be stricken. Additionally, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 6 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny that Plaintiffs are entitled to any of the relief requested against them.

7. Paragraph 7 of Plaintiffs' First Amended Class Action Complaint states legal conclusions and definitions to which no response is required. To the extent a response is deemed required, these Defendants deny that Plaintiffs are entitled to any of the relief requested against them and demand strict proof thereof.

PARTIES

8. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 8 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

9. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 9 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

10. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 10 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

11. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 11 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

12. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 12 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

13. Responding to Paragraph 13 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that William Crouch is Cabinet Secretary of the West Virginia Department of Health and Human Resources and that Defendant Crouch was acting under the color of state law at all times relevant to Plaintiffs' First Amended Class Action Complaint. The remaining allegations contained in Paragraph 13 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the remaining allegations as written and demand strict proof thereof. Further, these Defendants deny any and all allegations of wrongdoing, express or implied, raised

against William Crouch in Paragraph 13 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

14. Responding to Paragraph 14 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that Cynthia Beane is Commissioner of the Bureau for Medical Services and that Defendant Beane was acting under the color of state law at all times relevant to Plaintiffs' First Amended Class Action Complaint. The remaining allegations contained in Paragraph 14 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the remaining allegations as written and demand strict proof thereof. Further, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against Cynthia Beane in Paragraph 14 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

15. Responding to Paragraph 15 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that Defendant West Virginia Department of Health and Human Resources, Bureau for Medical Services ("BMS") is a state agency that administers the Medicaid program within West Virginia. These Defendants further admit that Defendant BMS maintains the West Virginia Medicaid State Plan and files amendments to the plan with the appropriate regulatory authorities. These Defendants further admit that West Virginia Medicaid is jointly funded by the State of West Virginia and the federal government. These Defendants admit that BMS is a recipient of federal funds from the U.S. Department of Health and Human Services, including Medicaid funding. The remaining allegations contained in Paragraph 15 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit that BMS plays a role in setting payment rates, subject to review and approval by The Centers for Medicare & Medicaid Services ("CMS"), admit that BMS reimburses providers for services that are outside of managed

care, and deny the remaining allegations as written and demand strict proof thereof. Further, these Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 15 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

16. The allegations contained in Paragraph 16 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. Further, the allegations contained in Paragraph 16 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny such allegations as written and demand strict proof thereof.

17. The allegations contained in Paragraph 17 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. Further, the allegations contained in Paragraph 17 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny such allegations as written and demand strict proof thereof.

18. These Defendants deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 18 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny that Plaintiffs are entitled to any of the relief requested against them. These Defendants further specifically deny that the Medicaid Plan contains "Exclusions" as described therein and demand strict proof thereof.

JURISDICTION AND VENUE

19. The allegations contained in Paragraph 19 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response

is deemed required, these Defendants deny the allegations contained in Paragraph 19 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

20. The allegations contained in Paragraph 20 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 20 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

21. The allegations contained in Paragraph 21 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 21 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

22. The allegations contained in Paragraph 22 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 22 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

23. The allegations contained in Paragraph 23 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants do not dispute that this Court has personal jurisdiction over these Defendants.

FACTS

A. Sex, Gender Identity, and Gender Dysphoria

24. The allegations contained in Paragraph 24 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph

24 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the same and demand strict proof thereof.

25. The allegations contained in Paragraph 25 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants are without knowledge to admit or deny the allegations contained in Paragraph 25 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 25 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

26. The allegations contained in Paragraph 26 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 26 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 26 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

27. The allegations contained in Paragraph 27 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 27 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 27 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

28. The allegations contained in Paragraph 28 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and,

therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 28 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 28 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

29. The allegations contained in Paragraph 29 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 29 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 29 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

30. The allegations contained in Paragraph 30 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 30 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 30 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

31. The allegations contained in Paragraph 31 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 31 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations

contained in Paragraph 31 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

32. The allegations contained in Paragraph 32 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 32 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 32 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

33. The allegations contained in Paragraph 33 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 33 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 33 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

34. The allegations contained in Paragraph 34 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 34 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 34 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

35. The allegations contained in Paragraph 35 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 35 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 35 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

36. The allegations contained in Paragraph 36 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 36 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 36 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

37. The allegations contained in Paragraph 37 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 37 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 37 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

38. The allegations contained in Paragraph 38 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants

lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 38 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 38 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

39. The allegations contained in Paragraph 39 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 39 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 39 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

40. The allegations contained in Paragraph 40 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 40 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 40 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

41. The allegations contained in Paragraph 41 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 41 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations

contained in Paragraph 41 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

42. The allegations contained in Paragraph 42 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 42 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 42 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

43. The allegations contained in Paragraph 43 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 43 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 43 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

44. The allegations contained in Paragraph 44 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 44 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 44 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

45. The allegations contained in Paragraph 45 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 45 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 45 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

46. The allegations contained in Paragraph 46 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 46 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 46 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

47. The allegations contained in Paragraph 47 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 47 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 47 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

48. The allegations contained in Paragraph 48 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants

lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 48 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 48 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

49. The allegations contained in Paragraph 49 of Plaintiffs' First Amended Class Action Complaint state generalized allegations that are not directed at these Defendants and, therefore, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 49 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 49 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

B. Defendants' Targeted and Discriminatory Exclusion of Gender-Confirming Care¹

1. Medicaid health coverage

50. The allegations contained in Paragraph 50 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit that Medicaid is a joint federal-state program that provides health insurance for Medicaid-eligible individuals. These Defendants deny the remaining allegations contained in Paragraph 50 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof.

¹ These Defendants have included the headings from Plaintiffs' First Amended Class Action Complaint *only* for ease of reference and convenience of the Court and the parties. These Defendants neither admit nor endorse the contents of any heading. Indeed, these Defendants specifically deny that any "Targeted and Discriminatory Exclusion" exists.

51. The allegations contained in Paragraph 51 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit, upon information and belief, the allegations contained in Paragraph 51 of Plaintiffs' First Amended Class Action Complaint.

52. The allegations contained in Paragraph 52 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 52 of Plaintiffs' First Amended Class Action Complaint.

53. The allegations contained in Paragraph 53 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 53 of Plaintiffs' First Amended Class Action Complaint.

54. The allegations contained in Paragraph 54 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants state that the phrase "substantial portion of the cost of providing medical assistance" is vague, ambiguous, and capable of multiple meanings, and therefore, these Defendants are unable to admit or deny the allegations contained in Paragraph 54 of Plaintiffs' First Amended Class Action Complaint as written, and therefore, deny the same and demand strict proof thereof.

55. The allegations contained in Paragraph 55 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 55 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof. Further, these Defendants deny that they have violated the stated provision and demand strict proof thereof.

56. The allegations contained in Paragraph 56 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 56 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof. Further, these Defendants deny that they have violated the stated provision and demand strict proof thereof.

57. The allegations contained in Paragraph 57 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 57 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof. Further, these Defendants deny that they have violated the stated provision and demand strict proof thereof.

58. These Defendants admit the allegations contained in Paragraph 58 of Plaintiffs' First Amended Class Action Complaint.

59. The allegations contained in Paragraph 59 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 59 of Plaintiffs' First Amended Class Action Complaint.

60. Responding to Paragraph 60 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that Defendant BMS maintains the West Virginia Medicaid State Plan and files amendments to the plan with the appropriate regulatory authorities. These Defendants deny the remaining allegations contained in Paragraph 60 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof.

61. These Defendants admit the allegations contained in Paragraph 61 of Plaintiffs' First Amended Class Action Complaint.

62. Responding to Paragraph 62 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that each MCO provides Medicaid participants with access to Medicaid-covered health services through their defined network of providers and hospitals. These Defendants deny the remaining allegations contained in Paragraph 62 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof.

63. Responding to Paragraph 63 of Plaintiffs' First Amended Class Action Complaint, these Defendants admit that the Medicaid Policy Manual provides that the Medicaid Plan does not cover, *inter alia*, transsexual surgery. These Defendants admit: that Unicare excludes coverage for, *inter alia*, "[s]ex transformation procedures and hormone therapy for sex transformation procedures;" that The Health Plan provides that "[s]ex change, hormone therapy for sex transformation, and gender transition procedures/expenses will not be paid for by The Health Plan;" These Defendants further admit that Aetna Better Health excludes coverage for, *inter alia*, "[s]ex transformation procedures and hormone therapy for sex transformation procedures." These Defendants deny the remaining allegations contained in Paragraph 63 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof.

64. These Defendants deny the allegations contained in Paragraph 64 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

2. State employee health coverage

65. The allegations contained in Paragraph 65 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 65 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 65 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

66. The allegations contained in Paragraph 66, including sub-sections (A) and (B) of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 66, including sub-sections (A) and (B) of Plaintiffs' First Amended Class Action Complaint and therefore, deny the same and demand strict proof thereof.

67. The allegations contained in Paragraph 67 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 67 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 67 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

68. The allegations contained in Paragraph 68 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 68 of Plaintiffs' First Amended Class Action Complaint and therefore, deny the allegations contained in Paragraph 68 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

C. The Denial of Care to Plaintiffs

1. Plaintiff Christopher Fain (Medicaid)

69. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 69 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

70. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 70 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

71. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 71 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

72. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 72 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

73. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 73 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

74. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 74 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

75. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 75 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

76. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 76 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

77. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 77 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

78. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 78 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

79. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 79 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

80. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 80 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

81. These Defendants admit the allegations contained in Paragraph 81 of Plaintiffs' First Amended Class Action Complaint.

82. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 82 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

83. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 83 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

84. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 84 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

85. These Defendants deny the allegations contained in Paragraph 85 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

86. These Defendants deny the allegations contained in Paragraph 86 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

2. Plaintiff Shauntae Anderson (Medicaid)

87. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 87 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

88. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 88 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

89. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 89 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

90. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 90 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

91. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 91 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

92. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 92 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

93. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 93 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

94. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 94 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

95. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 95 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

96. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 96 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

97. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 97 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

98. Upon information and belief, these Defendants admit the allegations contained in Paragraph 98 of Plaintiffs' First Amended Class Action Complaint.

99. Upon information and belief, these Defendants admit the allegations contained in Paragraph 99 of Plaintiffs' First Amended Class Action Complaint.

100. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 100 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

101. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 101 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

102. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 102 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

103. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 103 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

104. These Defendants deny the allegations contained in Paragraph 104 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

105. These Defendants deny the allegations contained in Paragraph 105 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

3. Plaintiff Leanne James (PEIA)

106. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 106 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

107. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 107 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

108. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 108 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

109. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 109 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

110. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 110 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

111. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 111 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

112. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 112 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

113. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 113 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

114. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 114 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

115. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 115 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

116. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 116 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

117. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 117 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

118. The allegations contained in Paragraph 118 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 118 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

119. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 119 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

120. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 120 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

121. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 121 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

122. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 122 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

123. The allegations contained in Paragraph 123 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 123 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

124. The allegations contained in Paragraph 124 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To

the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 124 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

125. The allegations contained in Paragraph 125 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 125 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

126. To the extent Paragraph 126 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiffs were denied coverage because they are transgendered, these Defendants deny the allegations contained in Paragraph 126 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. To the extent Paragraph 126 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiff was denied coverage because Plaintiff is transgendered, these Defendants deny the allegations contained in Paragraph 126 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

4. Plaintiffs Zachary Martell and Brian McNemar (PEIA)

127. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 127 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

128. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 128 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

129. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 129 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

130. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 130 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

131. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 131 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

132. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 132 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

133. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 133 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

134. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 134 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

135. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 135 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

136. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 136 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

137. These Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 137 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

138. These Defendants deny the allegations contained in Paragraph 138 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

139. The allegations contained in Paragraph 139 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 139 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

140. The allegations contained in Paragraph 140 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 140 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

141. The allegations contained in Paragraph 141 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 141 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof.

142. The allegations contained in Paragraph 142 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 142 of Plaintiffs' First

Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof. To the extent Paragraph 142 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiffs were denied coverage because they are transgendered, these Defendants deny the allegations contained in Paragraph 142 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

143. The allegations contained in Paragraph 143 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants lack sufficient information or knowledge to admit or deny the allegations contained in Paragraph 143 of Plaintiffs' First Amended Class Action Complaint and, therefore, deny the same and demand strict proof thereof. To the extent Paragraph 143 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiffs were denied coverage because they are transgendered, these Defendants deny the allegations contained in Paragraph 143 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

144. To the extent Paragraph 144 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiffs were denied coverage because they are transgendered, these Defendants deny the allegations contained in Paragraph 144 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. To the extent Paragraph 144 of Plaintiffs' First Amended Class Action Complaint intends to allege that Plaintiffs were denied coverage because they are transgendered, these Defendants deny the allegations contained in Paragraph 144 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

CLASS ACTION ALLEGATIONS

145. The allegations contained in Paragraph 145 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a

response is deemed required, these Defendants deny that Plaintiffs meet the prerequisites for class treatment pursuant to Rule 23 of the Federal Rules of Civil Procedure and demand strict proof thereof.

146. The allegations contained in Paragraph 146 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny that Plaintiffs meet the prerequisites for class treatment pursuant to Rule 23 of the Federal Rules of Civil Procedure and demand strict proof thereof.

Medicaid Class

147. Responding to Paragraph 147 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. These Defendants further deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 147 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

State Employee Health Plan Class

148. Responding to Paragraph 148 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. These Defendants further deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 148 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

The Health Plan Subclass

149. Responding to Paragraph 149 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. These Defendants further deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 149 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

150. Responding to Paragraph 150 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. Further, the allegations contained in Paragraph 150 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 150 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

151. Responding to Paragraph 151 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. The allegations contained in Paragraph 151 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 151 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants specifically deny that a number of approximately 40 prospective plaintiffs is "so numerous that joinder of all members is impracticable," such that a class action is warranted.

152. The allegations contained in Paragraph 152 and subparagraphs A through D thereto of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 152 and subparagraphs A through D thereto of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

153. Responding to Paragraph 153 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. The allegations contained in Paragraph 153 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny

the allegations contained in Paragraph 153 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

154. Responding to Paragraph 154 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. The allegations contained in Paragraph 154 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 154 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

155. Responding to Paragraph 155 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. The allegations contained in Paragraph 155 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 155 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

156. Responding to Paragraph 156 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. The allegations contained in Paragraph 156 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 156 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection

U.S. Const. Amend. XIV

Plaintiffs Christopher Fain and Shauntae Anderson, on behalf of the Medicaid Class, Against Defendants Crouch and Beane for Declaratory and Injunctive Relief

Plaintiffs Leanne James, Zachary Martell, and Brian McNemar, on behalf of the State Employee Health Plan Class Against Defendant Cheatham for Declaratory and Injunctive Relief

Plaintiffs Zachary Martell and Brian McNemar, on Behalf of The Health Plan Subclass Against Defendant Cheatham for Declaratory and Injunctive Relief

157. These Defendants restate and reincorporate their responses to Paragraphs 1 through 156 of Plaintiffs' First Amended Class Action Complaint as if fully set forth herein.

158. The allegations contained in Paragraph 158 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 158 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

159. The allegations contained in Paragraph 159 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants state that the Fourteenth Amendment to the United States Constitution speaks for itself. Further, these Defendants deny any alleged violation of same and demand strict proof thereof.

160. These Defendants deny the allegations contained in Paragraph 160 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants specifically deny any wrongdoing or unlawful discrimination, intentional or otherwise, by Defendant Crouch, and demand strict proof thereof.

161. These Defendants deny the allegations contained in Paragraph 161 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants specifically deny any wrongdoing or unlawful discrimination, intentional or otherwise, by Defendant Beane, and demand strict proof thereof.

162. The allegations contained in Paragraph 162 of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 162 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

163. These Defendants deny the allegations contained in Paragraph 163 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

164. These Defendants deny the allegations contained in Paragraph 164 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

A. Discrimination on the Basis of Sex

165. These Defendants deny the allegations contained in Paragraph 165 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

166. The allegations contained in Paragraph 166 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a

response is deemed required, these Defendants deny the allegations contained in Paragraph 166 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof. These Defendants further deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 166 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

167. The allegations contained in Paragraph 167 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 167 of Plaintiffs' First Amended Class Action Complaint as written and demand strict proof thereof. These Defendants further deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 167 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

168. These Defendants deny the allegations contained in Paragraph 168 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

B. Discrimination on the Basis of Transgender Status

169. These Defendants deny the allegations contained in Paragraph 169 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

170. The allegations contained in Paragraph 170 and subparagraphs A through D thereto of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 170 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny any and all allegations of wrongdoing, express or

implied, raised against them in Paragraph 170 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

171. These Defendants deny the allegations contained in Paragraph 171 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

172. These Defendants deny the allegations contained in Paragraph 172 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

173. These Defendants deny the allegations contained in Paragraph 173 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants state that there are no "Exclusions" as described as it pertains to the Medicaid Plan and demand strict proof thereof.

COUNT II
Violation of Section 1557 of the
Patient Protection and Affordable Care Act
42 U.S.C. § 18116

Plaintiff Christopher Fain and Shauntae Anderson on behalf of the Medicaid Class, Against Defendant BMS, Defendant Crouch, and Defendant Beane for Declaratory and Injunctive Relief, and Individually Against Defendant BMS for Compensatory Damages

Plaintiffs Zachary Martell and Brian McNemar, on behalf of the State Employee Health Plan Class and on Behalf of The Health Plan Subclass Against Defendant The Health Plan for Declaratory and Injunctive Relief, and Individually Against Defendant The Health Plan for Compensatory Damages

174. These Defendants restate and reincorporate their responses to Paragraphs 1 through 173 of Plaintiffs' First Amended Class Action Complaint as if fully set forth herein.

175. Responding to Paragraph 175 of Plaintiffs' First Amended Class Action Complaint, these Defendants deny that Plaintiffs can maintain a class action. Additionally, the allegations contained in Paragraph 175 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 175 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

176. The allegations contained in Paragraph 176 of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants state that the Section 1557 of the Affordable Care Act speaks for itself.

177A. The allegations contained in Paragraph 177A of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 177A of Plaintiffs' First Amended Class Action Complaint.

177B. The allegations contained in Paragraph 177B of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 177B of Plaintiffs' First Amended Class Action Complaint.

178A. The allegations contained in Paragraph 178A of Plaintiffs' First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 178A of Plaintiffs' First Amended Class Action Complaint.

178B. The allegations contained in Paragraph 178B of Plaintiffs' First Amended Class Action Complaint are not directed at these Defendants, and, as such, no response is required. To

the extent a response is deemed required, these Defendants admit the allegations contained in Paragraph 178B of Plaintiffs' First Amended Class Action Complaint.

179. These Defendants deny the allegations contained in Paragraph 179 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny that the Medicaid Plan contains an "Exclusion" as described.

180. These Defendants deny the allegations contained in Paragraph 180 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny that the Medicaid Plan contains an "Exclusion" as described.

181. The allegations contained in Paragraph 181 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 181 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

182. The allegations contained in Paragraph 182 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 182 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. These Defendants further deny that the Medicaid Plan contains an "Exclusion" as described.

183. The allegations contained in Paragraph 183 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 183 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof.

184. These Defendants deny the allegations contained in Paragraph 184 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants specifically deny any and all allegations of wrongdoing, express or implied, raised against them in

Paragraph 184 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof.

185. These Defendants deny the allegations contained in Paragraph 185 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants specifically deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 185 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof. Additionally, these Defendants deny that the Medicaid Plan contains an “Exclusion” as described.

186. These Defendants deny the allegations contained in Paragraph 186 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof. Further, these Defendants specifically deny any and all allegations of wrongdoing, express or implied, raised against them in Paragraph 186 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof.

187. These Defendants deny the allegations contained in Paragraph 187 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof.

COUNT THREE
Violation of the Medicaid Act’s Availability Requirements
42 U.S.C. § 1396a(a)(10)(A)

Plaintiff Christopher Fain and Shauntae Anderson on behalf of the Medicaid Class, Against Defendant Crouch and Beane for Declaratory and Injunctive Relief

188. These Defendants restate and reincorporate their responses to Paragraphs 1 through 187 of Plaintiffs’ First Amended Class Action Complaint as if fully set forth herein.

189. The allegations contained in Paragraph 189 of Plaintiffs’ First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 189 of Plaintiffs’

First Amended Class Action Complaint and demand strict proof thereof. Additionally, these Defendants deny that the Medicaid Plan contains an “Exclusion” as described.

190. The allegations contained in Paragraph 190 of Plaintiffs’ First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a response is deemed required, these Defendants state that 42 U.S.C. § 1396a(a)(10)(A) speaks for itself.

191. The allegations contained in Paragraph 191 of Plaintiffs’ First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 191 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof. Additionally, these Defendants deny that the Medicaid Plan contains an “Exclusion” as described.

COUNT FOUR
Violation of the Medicaid Act’s Comparability Requirements
42 U.S.C. § 1396a(a)(10)(B)

Plaintiff Christopher Fain and Shauntae Anderson on behalf of the Medicaid Class, Against Defendant Crouch and Beane for Declaratory and Injunctive Relief

192. These Defendants restate and reincorporate their responses to Paragraphs 1 through 191 of Plaintiffs’ First Amended Class Action Complaint as if fully set forth herein.

193. The allegations contained in Paragraph 193 of Plaintiffs’ First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 193 of Plaintiffs’ First Amended Class Action Complaint and demand strict proof thereof. Additionally, these Defendants deny that the Medicaid Plan contains an “Exclusion” as described.

194. The allegations contained in Paragraph 194 of Plaintiffs’ First Amended Class Action Complaint state a legal conclusion to which no response is required. To the extent a

response is deemed required, these Defendants state that 42 U.S.C. § 1396a(a)(10)(B) speaks for itself.

195. The allegations contained in Paragraph 195 of Plaintiffs' First Amended Class Action Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, these Defendants deny the allegations contained in Paragraph 195 of Plaintiffs' First Amended Class Action Complaint and demand strict proof thereof. Additionally, these Defendants deny that the Medicaid Plan contains an "Exclusion" as described.

PRAYER FOR RELIEF

196. Responding to the *ad damnum* paragraph and subparagraphs A through H and all sub-subparagraphs thereto of Plaintiffs' First Amended Class Action Complaint, these Defendants deny any and all allegations of wrongdoing raised against them in Plaintiffs' First Amended Class Action Complaint and deny that Plaintiffs are entitled to any of the relief requested therein as against them.

197. These Defendants deny any and all allegations not specifically admitted herein.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' First Amended Class Action Complaint is/may be barred by the applicable statute of limitations.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' First Amended Class Action Complaint fails to state a claim against these Defendants upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

These Defendants deny that they breached any affirmative duty or standard of care with respect to the Plaintiffs or putative class members or that any of their acts or omissions proximately caused or contributed to any injuries or damages to the Plaintiffs or putative class members.

FOURTH AFFIRMATIVE DEFENSE

These Defendants assert the defenses of assumption of risk, contributory negligence and/or comparative negligence, as the facts and circumstances as they are developed may indicate that these defenses are appropriate.

FIFTH AFFIRMATIVE DEFENSE

These Defendants reserve the right to assert such claims, counterclaims, cross-claims, third-party claims or other claims as investigation and discovery may prove applicable, and hereby reserve all of their rights associated with any such claim or potential claim.

SIXTH AFFIRMATIVE DEFENSE

These Defendants reserve the right to have the fault, and/or negligence of all persons determined in the manner provided by law and hereby reserve their right of contribution and/or indemnity, as the same may prove applicable.

SEVENTH AFFIRMATIVE DEFENSE

These Defendants assert the affirmative defense of superseding and intervening cause. These Defendants assert all of its rights and privileges to introduce evidence at trial regarding the negligence of another party or a non-party as set forth in *Sydenstricker v. Mohan*, 618 S.E.2d 561 (W.Va. 2005) and/or West Virginia Code 55-7-13d.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' allegations are inappropriate for class certification, as the purported class lacks the requisite numerosity, commonality, adequacy, superiority, and predominance requirements.

NINTH AFFIRMATIVE DEFENSE

These Defendants deny that the Plaintiffs are entitled to recover any amount whatsoever against them. In particular, Defendants deny that the Plaintiffs are entitled to recover exemplary damages, including punitive damages, attorneys' fees, and costs, against them.

TENTH AFFIRMATIVE DEFENSE

Pursuant to *Pittsburgh Elevator v. W. Va. Board of Regents*, 310 S.E.2d 675 (W. Va. 1983) and *Parkulo v. West Virginia Board of Probation and Parole*, 483 S.E.2d 507 (W. Va. 1996), these Defendants assert that they have full and complete immunity from liability for all damages sought by Plaintiffs to the extent such damages may exceed or are excluded by the insurance coverage extended to these Defendants by the State of West Virginia.

ELEVENTH AFFIRMATIVE DEFENSE

To the extent Plaintiffs seek to recover punitive damages from these Defendants, these Defendant assert that any such damages are precluded pursuant to West Virginia Code § 55-17-4.

TWELFTH AFFIRMATIVE DEFENSE

These Defendants are entitled to absolute immunity from this litigation by virtue of the Eleventh Amendment to the United States Constitution and Article VI, Section 35 of the West Virginia Constitution, which prohibit suits against agents of the State of West Virginia.

THIRTEENTH AFFIRMATIVE DEFENSE

Qualified immunity shields these Defendants from liability because their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person in the position of these Defendants would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to exhaust their administrative remedies, and, therefore, their claims are barred as a matter of law.

FIFTEENTH AFFIRMATIVE DEFENSE

These Defendants deny that they deprived any Plaintiff of Equal Protection under the Fourteenth Amendment to the United States Constitution, deny that they violated Section 1557 of the Patient Protection and Affordable Care Act, and deny that they violated the Medicaid Act.

SIXTEENTH AFFIRMATIVE DEFENSE

These Defendants deny that the Plaintiffs are entitled to any compensatory, injunctive, or declaratory relief as against them.

SEVENTEENTH AFFIRMATIVE DEFENSE

These Defendants specifically reserve the right to plead any and all affirmative defenses not specifically raised herein that may arise during discovery or otherwise.

WHEREFORE, having fully answered Plaintiffs' First Amended Class Action Complaint filed herein, Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services demand that Plaintiffs' First Amended Class Action Complaint against them be dismissed, with prejudice, and that they be awarded costs expended herein and such other relief as the Court deems appropriate.

THESE DEFENDANTS REQUEST A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

**WILLIAM CROUCH, CYNTHIA
BEANE, and WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, BUREAU FOR
MEDICAL SERVICES,
By Counsel,**

/s/Kimberly M. Bandy
Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

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

**CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR, SHAWN
ANDERSON a/k/a SHAUNTAE ANDERSON;
and LEANNE JAMES, individually and on
behalf of all others similarly situated,**

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

**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, BUREAU FOR MEDICAL
SERVICES; 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.

CERTIFICATE OF SERVICE

Now come the Defendants, William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 12th day of November, 2021, the foregoing **“DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES’S ANSWER TO PLAINTIFFS’ FIRST AMENDED CLASS ACTION COMPLAINT”** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to, and constitutes service on:

Walt Auvil (WVSB#190)

Counsel for Plaintiffs

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney

Nicole J. Schladt, Visiting Attorney

Counsel for Plaintiffs

Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney

Counsel for Plaintiffs

Lambda Legal Defense and Education Fund,
Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
sbuchert@lambdalegal.org

Avatara Smith-Carrington, Visiting Attorney

Counsel for Plaintiffs

Lambda Legal Defense and Education Fund,
Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Nora Huppert, Visiting Attorney

Counsel for Plaintiffs

Lambda Legal Defense and Education Fund,
Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600
(213) 351-6050
nhuppert@lambdalegal.org

Carl. S. Charles, Visiting Attorney

Counsel for Plaintiffs

Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 30030
(404) 897-1880
(404) 506-9320 (fax)
ccharles@lambdalegal.org

Tara L. Borelli, Visiting Attorney

Counsel for Plaintiffs

Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 30030
tborelli@lambdalegal.org

Perry W. Oxley (WVSB#7211)

David E. Rich (WVSB#9141)

Eric D. Salyers (WVSB#13042)

Christopher K. Weed (WVSB#13868)

Oxley Rich Sammons, PLLC

Counsel for Ted Cheatham

517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/Kimberly M. Bandy
Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

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

CHRISTOPHER FAIN, *et al.*,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the EXPERT DISCLOSURE REPORT OF DAN H. KARASIC,
M.D. was served electronically on the 14th day of January, 2022 on the following counsel for

Defendants in the above-captioned case:

Lou Ann S. Cyrus (WVSB # 6558)
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
Kimberly M. Bandy (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953, Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

*Attorneys for Defendants William Crouch;
Cynthia Beane; and West Virginia
Department of Health and Human Resources,
Bureau for Medical Services*

Eric D. Salyers (WVSB #13042)
Perry W. Oxley (WVSB # 7211)
David E. Rich (WVSB #9141)
Christopher K. Weed (WVSB #13868)
OXLEY RICH SAMMONS, PLLC
P.O. Box 1704
517 9th Street, Suite 1000
Huntington, West Virginia 25718
Phone: (304) 522-1138
Fax: (304) 522-9528
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Attorneys for Defendant Jason Haught

Dated: January 14, 2022

Respectfully submitted,

s/ Walt Auvil

Walt Auvil, WV Bar No. 190

THE EMPLOYMENT LAW CENTER, PLLC

1208 Market Street

Parkersburg, WV 26101

Phone: 304-485-3058

Facsimile: 304-485-3058

auvil@theemploymentlawcenter.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
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CHRISTOPHER FAIN, *et al.*, individually and
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Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS

**PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION
PURSUANT TO FED. R. CIV. P. 23**

Pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2), Plaintiffs Christopher Fain and Shauntae Anderson (“Plaintiffs”) respectfully move this Court for an order certifying the following class: All transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusion. In addition, Plaintiffs move the Court to appoint Plaintiffs as Class Representatives, and Nichols Kaster, PLLP; Lambda Legal Defense and Education Fund, Inc.; and The Employment Law Center, PLLP, as Class Counsel.

This Motion is made based on the accompanying Memorandum of Law, Declaration of Nicole J. Schladt and the exhibit affixed thereto, Declaration of Avatara Smith-Carrington and the exhibits affixed thereto, Declaration of Walt Auvil, and all of the files, records, and proceedings in this matter.

Dated: May 31, 2022

Respectfully submitted,

/s/ Walt Auvil

Walt Auvil, WVSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-6344
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, MD Bar*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585
Facsimile: 214-489-9140
asmithcarrington@lambdalegal.org

Anna P. Prakash, MN Bar No. 0351362*
Nicole J. Schladt, MN Bar No. 0400234*
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4700
Minneapolis, MN 55402
Phone: 612-256-3200
Facsimile: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Tara L. Borelli, GA Bar No. 265084*
Carl Charles, NY Bar No. 5427026*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
158 West Ponce De Leon Ave., Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Sasha Buchert, OR Bar No. 070686*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
Facsimile: 202-429-9574
sbuchert@lambdalegal.org

Nora Huppert, CA Bar No. 330552*
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600
Facsimile: 213-351-6050
nhuppert@lambdalegal.org

Attorneys for Plaintiffs

* Admitted *pro hac vice*

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

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, and any attachments, were served electronically on May 31, 2022 on the following counsel for Defendants in this case:

Lou Ann S. Cyrus (WVSB # 6558)
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
Kimberly M. Bandy (WVSB #10081)
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953, Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com, rgreen@shumanlaw.com
cdavid@shumanlaw.com, kbandy@shumanlaw.com

Attorneys for Defendants William Crouch; Cynthia Beane; and West Virginia Department of Health and Human Resources, Bureau for Medical Services

Dated: May 31, 2022

Respectfully submitted,

s/ Walt Auvil

Walt Auvil, WV Bar No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058
Facsimile: 304-485-3058
auvil@theemploymentlawcenter.com

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Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

DECLARATION OF THE EMPLOYMENT LAW CENTER, PLLC

1. Counsel for the Plaintiffs, Walt Auvil, is the owner and sole member of The Employment Law Center, PLLC a three-lawyer firm practicing in Wood County, West Virginia.

2. Walt Auvil was admitted to the West Virginia State Bar and the State and Federal Courts of West Virginia in 1981.

3. Auvil is a founder and past president of the West Virginia Employment Lawyers Association, national affiliate of the National Employment Lawyers Association.

4. Auvil is the Chairman of the West Virginia State Bar Labor and Employment Law Committee.

5. Auvil has served as lead counsel on dozens of discrimination cases in State and Federal Courts throughout the State of West Virginia and has served as lead counsel on several class action matters during the past 30 years.

6. Auvil is a Fellow of the College of Labor and Employment Lawyers, the first such Fellow in West Virginia. Auvil is the past chair of the College of Labor and Employment Lawyers Fourth Circuit Credentials Committee.

7. Auvil is the co-author along with Eric Kinder of an article titled “Rule 30(b)(6) at 45: Is it still your Friend?” published by the American Bar Association, Section of Litigation Pre-Trial Practice and Discovery Newsletter in 2015.

8. Auvil is also contributing editor to several employment law publications of the American Bar Association and is a frequent speaker on matters of pre-trial procedure for state and National legal conventions.

Further Affiant Sayeth Not.

Date: May 31, 2022

/s/ Walt Auvil
WALT AUVIL

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

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS

**DECLARATION OF NICOLE J. SCHLADT IN SUPPORT OF PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23**

I, Nicole J. Schladt, declare the following:

1. I am an attorney with the law firm of Nichols Kaster, PLLP and counsel for Plaintiffs in the above-captioned matter. I make this Declaration to support Plaintiffs' Motion for Class Certification Pursuant to Fed. R. Civ. P. 23.

2. To date, Plaintiffs have responded to multiple motions to dismiss, have filed two motions for leave to amend the complaint, and have engaged in significant and proactive discovery with Defendants.

3. Plaintiffs Christopher Fain and Shauntae Anderson will be exceptional Class Representatives. Their claims and legal interests are aligned with the members of the proposed class. They have remained actively engaged throughout the litigation. Mr. Fain assisted me and my co-counsel with preparing the Complaints, collected and produced documents, responded to written discovery, and sat for a deposition in which he demonstrated his adequacy as a class representative. Ms. Anderson has participated fully in the litigation by assisting with the preparation of the Amended Complaint, responding to discovery requests, collecting and

producing documents, and sitting for a deposition about her claims.

4. My co-counsel and I are also adequate to represent the proposed class. The accomplishments and experience of Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) and The Employment Law Center, PLLC (“ELC”) are explained in their declarations, filed in support of this instant Motion. The resume for my firm, Nichols Kaster, PLLP (“NK”), is attached hereto as Exhibit A and summarized below.

5. NK has been engaged in the practice of law for over 40 years, and is devoted to plaintiff-side litigation, with extensive class action and collective action experience. The firm has been appointed lead counsel or co-counsel on hundreds of class and collective actions, and has recovered significant monetary and injunctive relief for its clients over the years. In 2020, the National Trial Lawyers and ALM named NK the Employment Rights Law Firm of the Year.

6. I graduated *summa cum laude* from the University of Kentucky in 2014 and graduated with honors from Emory University College of Law in Atlanta, Georgia, in 2018. Since 2019, I have practiced law with NK and have primarily handled civil rights class actions. *See, e.g., Amezcua Peregrina v. SEAM Group*, No. 1:20CV01032 (N.D. Ohio Aug. 30, 2021) (approving a \$1.25 million settlement on behalf of a class of TN visa holders alleging human trafficking violations); *Pearson, et al. v. Michigan Department of Corrections, et al.*, No. 19-10707, 2021 WL 3079898 (E.D. Mich. July 21, 2021) (denying defendants’ motions to dismiss in a proposed class action involving eighth amendment conditions of confinement claims); *Dale Carmen v. Health Carousel, LLC*, No. 1:20-CV-313, 2021 WL 2476882, at *1 (S.D. Ohio June 17, 2021) (denying defendant’s motions to dismiss and strike class allegations in a proposed class action on behalf of immigrant nurses). I also have experience with cases involving sex discrimination in public institutions. *See Doe v. Indep. Sch. Dist. 31*, No. 20-CV-226 (SRN/LIB), 2020 WL 4735503, at *1

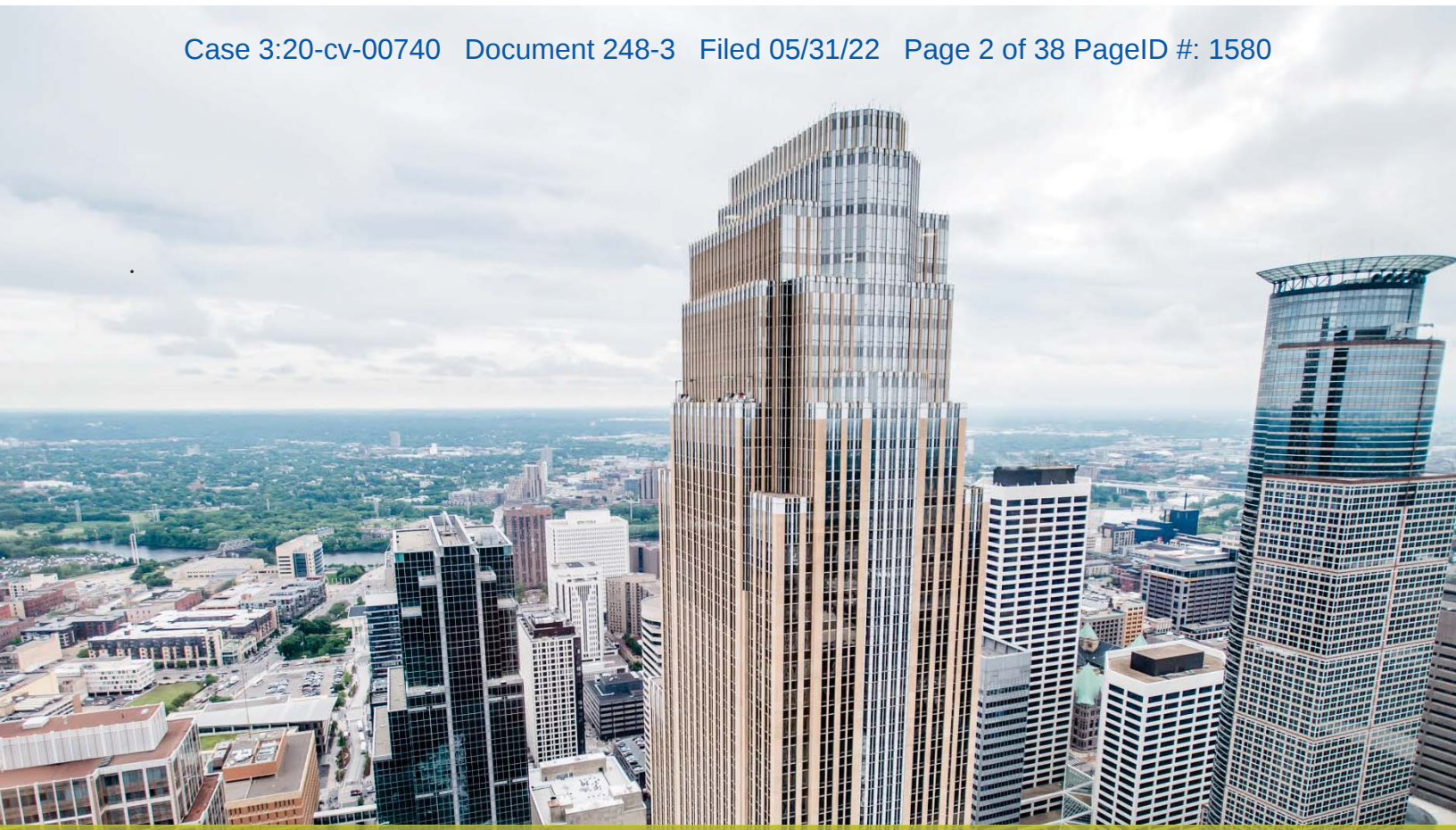
(D. Minn. Aug. 14, 2020).

7. I shared responsibility for the prosecution of this action at my firm with Anna P. Prakash. Ms. Prakash graduated from Cornell Law School in Ithaca, New York, in 2005, and after working for the state and federal governments, she joined NK in March of 2009. She became a partner at the firm in 2016. She is one of the leaders of the firm's Civil Rights and Impact Litigation practice group, has led the firm's National Consumer Class Action practice group, has been a member of the firm's National Wage & Hour practice group, and has authored and argued class and individual appeals at the state and federal level. Ms. Prakash has extensive class action experience and has represented thousands of class and collective members in federal and state courts. *See e.g., Hart v. Rick's Cabaret Int'l, Inc.*, 60 F. Supp. 3d 447 (S.D.N.Y. 2014) (granting plaintiffs' affirmative motion for summary judgment on damages, holding that no reasonable jury could conclude that the Rule 23 class of approximately 2,200 employees were owed less than \$10.8 million dollars and denying decertification of the Rule 23 class and FLSA collective); *Monroe v. FTS USA, LLC*, Court File No. 08-cv-02100 (W.D. Tenn.) (jury verdict for an approximately 300-person collective); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015) (reversing motion to dismiss in proposed class action over student loan practices), reh'g en banc denied, 807 F.3d 839 (7th Cir. 2015), cert. denied, 136 S. Ct. 1607 (2016).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 31, 2022

By: Nicole Schladt
Nicole J. Schladt



Nichols Kaster, PLLP

Firm Resume

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Firm Overview

For more than forty-five years, Nichols Kaster has enjoyed a sterling reputation as a top employment and consumer plaintiffs’ litigation firm. We have represented hundreds of thousands of employees and consumers nationwide on a variety of legal issues arising under both state and federal laws.

The Firm’s National **Wage and Hour** team represents employees in class and collective actions seeking to recover unpaid wages in circumstances where employers misclassify workers or otherwise fail to compensate them for all hours worked, pursuant to minimum wage and overtime rates, or as required by contract. The Firm also represents groups of employees seeking to recover unpaid commissions and unlawfully pooled tips.

Nichols Kaster represents people who have endured **discrimination**, who have had their **civil rights** violated, and who have suffered other unfair conditions and treatment in a variety of settings, including as a worker, consumer, student, new immigrant, and person incarcerated. The Firm’s employment group is also dedicated to assisting individual employees in Minnesota and surrounding states with a variety of legal needs, including addressing discrimination; harassment; retaliation; accommodation and leave issues; contract, severance, and non-compete disputes; as well as defending against licensure complaints.

The Firm also assists employees and retirement plan participants in protecting their **401(k) investments and other benefits**. Nichols Kaster challenges breaches of fiduciary duty relating to

excessive fees, underperforming funds, imprudently managed accounts, and failure to properly pay benefits.

Nichols Kaster is dedicated to protecting **consumer rights**. Over the years, the Firm has represented consumers with a variety of violations, primarily on a class-wide basis. The Firm led the way in forced-placed flood and hazard litigation and with claims under the Fair Credit and Reporting Act.

Nichols Kaster also represents **whistleblowers and relators** who have “blown

Employee Representation

- Wage & Hour Violations
- 401(k) and Benefit Breaches
- Qui Tam/False Claims
- Wage Fixing
- Equal Pay Violations
- Harassment
- Discrimination
- Retaliation
- Medical leave
- Failure to Accommodate
- Federal Railway Safety Act Violations
- Breach of Contract
- Severance
- Non-Compete Agreements
- Defamation

Consumer Representation

- Forced-Placed Insurance
- Credit Reporting
- Improper Background Checks
- Student Loans
- Predatory Lending
- Interest Overcharges and Misapplication of Loan Payments
- Billing Practices
- Deceptive Practices
- Debt Collection Violations

the whistle” on illegal activity. These cases involve the reporting of possible government fraud, mishandling of toxic substances, violations of tax or securities laws, discrimination in education, failure to provide access to public facilities, and more. Nichols Kaster represents individuals who have brought claims on behalf of the government against entities who have defrauded the government under the False Claims Act (also known as “qui tam” lawsuits).

No matter the type of claim, Nichols Kaster helps everyday people seek redress against big corporations.

Accolades

The NATIONAL TRIAL LAWYERS AND ALM have named Nichols Kaster, PLLP the Employment Rights Law Firm of The Year. According to an ALM spokesperson,

[T]he lawyers and law firms selected this year from more than 250 submissions have demonstrated repeated success in cutting-edge work on behalf of plaintiffs over the last 15 months. They possess a solid track record of client wins over the past three to five years. The 2020 Elite Trial Lawyers finalists delivered results for clients across a wide range of cases with some of the most difficult sets of facts, very challenging circumstances, often filing uphill battles for years. Many were up against some of the most prominent defense firms on the globe... The winners stood out based on the uniqueness and importance of their cases as well as the results delivered for their clients.

The U.S. NEWS & WORLD REPORT has continued to name Nichols Kaster as a **Best Law Firm®** and honored individual lawyers at the Firm as **Best Lawyers®**, consecutively since 2012. LAW360 has listed Nichols Kaster as a top plaintiffs’ employment law firm, and MINNESOTA LAWYER has declared it one of Minnesota’s top 100 firms. In 2019, nine of Nichols Kaster’s attorneys were named as part of the 500 leading plaintiff employment lawyers on Lawdragon.com’s list of the nation’s best employment lawyers. In 2019, nine of Nichols Kaster’s attorneys were named **Super Lawyers®** and eight **Rising Stars** by SUPER LAWYERS MAGAZINE. Steve Smith and Matthew Frank were announced as the 2017 Minnesota Lawyers of the Year. On Martindale Hubbell, the firm has a 5 out of 5 peer rating.

Together the National Law Journal and LAW.COM named Nichols Kaster a top 50 firm for **Elite Trial Lawyers** “that are doing the most creative and substantial work on the plaintiffs side.” *Introducing America’s Elite Trial Lawyers*, THE NAT’L LAW J. (Sept. 8, 2014).

In 2009, Nichols Kaster was ranked as one of the top ten busiest FLSA firms in the country by Litigation Almanac 360, which conducted a study of over 500,000 federal cases and received input from more than 200 law firms. Nichols Kaster was the only plaintiffs’ firm in the top ten.

Judicial Recognition

Nichols Kaster provides employees and consumers with significant results, including substantial settlements, trial victories, and ground-breaking determinations on important legal questions. The Firm's attorneys fight hard for their clients, vigorously litigating complex actions against top national defense firms. Courts have recognized Nichols Kaster's successes and extensive experience and have appointed the Firm as lead or co-lead counsel on hundreds of **class and collective actions**. Below are just a few examples of this recognition.

"...Class Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this."

The Honorable Judge Michael H. Watson

Karpik v. Huntington Bancshares Inc., No. 2:17-cv-1153 (S.D. Ohio, Feb. 18, 2021).

And it's not inappropriate to say, at this juncture, how deeply appreciative the Court is of the lawyering here, and I'm appreciative of the lawyering in two most important respects. One, there's been outstanding advocacy here. I have, um, wrestled with the matters in dispute, found them most challenging, and counsel has behaved throughout with both high ethics and zeal and true advocacy on the part of their clients, and I don't want that to go without saying I appreciate it. At the same time, and equally important, we sometimes lose track in advocacy of the desirability of resolving differences. You people have proved yourselves skilled negotiators willing to compromise, realistic, and the Court honors that as well.

The Honorable Judge William G. Young

Moitoso v. FMR, LLC, et al., No. 1:18-cv-12122-WGY (USDC MA., Jan. 12, 2021).

Class Counsel displayed skill and determination. It is unsurprising that only a few firms might invest the considerable resources to ERISA class actions such as this, which require considerable resources and hold uncertain potential for recovery.

The Honorable Judge Catherine C. Eagles

Sims v. BB&T Corp., No. 1:15-cv-841 (M.D.N.C., May 5, 2019).

[C]lass counsel achieved a strong result through skillful litigation and settlement negotiation. After filing a detailed complaint and amended complaint, working through a substantial discovery process, litigating a motion to dismiss, and undergoing mediation and settlement discussions, class counsel obtained a settlement of \$14 million and a mandatory request for proposal that will help ensure quality management of class members' 401(k) funds down the road. Regarding quality of representation, the litigation and settlement appear by all measures to be the work of skillful and experienced attorneys with significant expertise in the ERISA context.

The Honorable Judge Nathanael M. Cousins

Johnson v. Fujitsu Tech. & Bus. of Am., Inc., No. 5:16-cv-03698 (N.D. Cal., May 11, 2018).

The high quality of Nichols Kaster's representation strongly supports approval of the requested fees. The Court has previously commended counsel for their excellent lawyering. The point is worth reiterating here. Nichols Kaster was energetic, effective, and creative throughout this long litigation. The Court found Nichols Kaster's briefs and arguments first-rate. And the documents and deposition transcripts which the Court reviewed in the course of resolving motions revealed the firm's far-sighted and strategic approach to discovery . . . Further, unlike in many class actions, plaintiffs' counsel did not build their case by piggybacking on regulatory investigation or settlement . . . The lawyers at Nichols Kaster can genuinely claim to have been the authors of their clients' success.

The Honorable Judge Paul A. Engelmayer

Hart v. RCI Hospital Holdings, Inc., No. 09 Civ. 3043, 2015 WL 5577713 (S.D.N.Y. Sept. 22, 2015)

I want to commend all of you for the excellent work that you did in conjunction with the special master and the court's technical advisor . . . I'm satisfied that this settlement is fair and reasonable given all the risk and expense of further litigation . . .

Honorable Judge Kathryn Vratil

Sibley v. Sprint Nextel Corp., No. 08-cv-2063 (D. Kan. Dec. 20, 2018)

[T]he attorneys at Nichols Kaster, PLLP are qualified, experienced, and competent, as evidenced by their background in litigating class-action cases involving FCRA violations. . . . As noted above, Plaintiffs' attorneys are experienced and skilled consumer class action litigators who achieved a favorable result for the Settlement Classes.

The Honorable Chief Judge Deborah Chasanow

Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665 (D. Md. 2013)

*[T]his case's early resolution can partly be attributed to **counsel's experience** representing thousands of employees in wage and hour cases for thirty years, particularly within the oil and gas industry.*

The Honorable Judge Dale Drozd

McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc., No. 1:16-cv-00157 (E.D. Cal. Nov. 2, 2017)

*Plaintiffs retained counsel with **significant experience** in prosecuting force-placed insurance cases, and other courts in this district have appointed them class counsel in force-placed insurance cases . . . Counsel have **worked vigorously** to identify and investigate the claims in this case, and, as this litigation has revealed, understand the applicable law and have represented their clients vigorously and effectively.*

The Honorable Magistrate Judge Laurel Beeler

Ellsworth v. U.S. Bank, N.A., No. C 12-02506, 2014 WL 2734953 (N.D. Cal. June 13, 2014)

*Thank you for all of your good work here. I know that it was really **an extraordinarily complex case**, and so well done.*

The Honorable Judge Kathryn Vratil

Harlow v. Sprint Nextel Corp., No. 08-2222 (D. Kan. Dec. 10, 2018)

*[Nichols Kaster has] **considerable experience** in litigating wage and hour class and collective actions.*

The award . . . follows efficient effort on the part of Class Counsel to achieve a sizeable recovery for the Class Members.

The Honorable Magistrate Judge Katherine Menendez

Allen v. All Temporaries, Inc., No. 16:cv-04409 (D. Minn. Feb. 14, 2018)

*[T]he quality of representation, as evidenced by the substantial recovery and the qualifications of the attorneys, is high. As then District Judge Gerard E. Lynch recognized, Nichols Kaster is "a reputable plaintiff-side employment litigation boutique with a nationwide practice and **special expertise** prosecuting FLSA cases."*

The Honorable Judge Sidney H. Stein

Febus v. Guardian 1st Funding Grp., LLC, 870 F. Supp. 2d 337 (S.D.N.Y. 2012)

*[T]his court finds that counsel possess more than sufficient experience to represent Plaintiffs fairly and adequately in reaching a fair and equitable settlement in this FLSA collective action . . . The parties are represented by **competent and reputable** counsel.*

The Honorable Judge Tony N. Leung

Mayfield-Dillard v. Direct Home Health Care, No. 1:16-cv-3489 (D. Minn., Dec. 18, 2017)

I think it was just some very efficient and good work on the part of the plaintiffs' attorney that brought you to the point [of settlement]."

The Honorable Judge Josephine L. Staton

Urakhchin v. Allianz Asset Mgm't of Am., L.P., No. 8:15-cv-01614 (C.D. Cal. July 27, 2018)

*Counsel's experience in vigorously litigating class/collective wage and hour actions, plus their **experience with this industry** were essential in obtaining this favorable and efficient result.*

The Honorable Magistrate Judge Jonathon E. Hawley

Woods v. Club Cabaret, Inc., 1:15-cv-01213, 2017 WL 4054523 (C.D. IL, May, 17, 2017)

*The settlement was the result of arm's-length negotiations between experienced counsel. Class Counsel is **well known** by this Court for their expertise in wage and hour litigation.*

The Honorable Judge Michael J. Davis

Burch v. Qwest Commc'ns Intl., No. 06-03523 (D. Minn. Sept. 14, 2012)

I want to say that both sides here have performed at an admirable level. And I wish that the lawyers of all cases would perform at your level. I say this to both of you, because you have been of assistance to the Court.

The Honorable Judge William Alsup

Hofstetter v. Chase Home Fin., LLC, No. 10-01313 (N.D. Cal. Nov. 7, 2011) (transcript)

*The Court finds that counsel is **competent and capable** of exercising all responsibilities as Class Counsel for the Settlement Class.*

The Honorable Judge Richard H. Kyle
Bible v. Gen. Revenue Corp., 12-CV-1236 (D. Minn. Jan. 7, 2014)

*Over the past two years, Class Counsel has been active in all stages of litigation and has particularly benefitted Plaintiffs through **capable handling of motion practice**. For example, Plaintiffs obtained summary judgment on a key issue involving the Morillion doctrine and defeated summary judgment on Defendants' de minimis defense.*

The Honorable Judge Virginia A. Phillips
Cervantez v. Celestica Corp., No. 07-729, 2010 WL 11465133, *7 (C.D. Cal. Oct. 29, 2010)

*[T]he combined **experience** of Plaintiffs' counsel as well as the fact that employment law, particularly the representation of employees, forms a large part of both the firm and counsel's practice persuades this Court that the law firm of Nichols Kaster, PLLP, and its attorneys Steven Andrew Smith and Anna P. Prakash will more than adequately protect the interests of the Class Members.*

The Honorable Magistrate Judge Tony N. Leung
Fearn v. Blazin' Beier Ranch, Inc., No. 11-743 (D. Minn. Jan. 30, 2012)

*Plaintiffs have shown good cause under Rule 16(b) because Plaintiffs' new counsel has shown the necessary diligence. Plaintiffs brought on Nichols Kaster, an experienced employment law firm of **high repute** as lead counsel in May 2012. Since that time, Plaintiffs have made a concerted effort to comply with this Court's orders and deadlines.*

The Honorable Magistrate Judge Tony N. Leung
Alvarez v. Diversified Main. Sys., Inc., No. 11-3106 (D. Minn. Aug. 21, 2012)

*Plaintiff's counsel are qualified, experienced attorneys that are fully capable of conducting this class action litigation . . . they are highly **qualified, knowledgeable attorneys** that are willing to invest the resources necessary to fully prosecute this case.*

The Honorable Judge Gary Larson
Karl v. Uptown Drink, LLC, No. 27-CV-10-1926 (Minn. Dist. Ct. Nov. 17, 2010)

*Plaintiffs' Counsel are **qualified attorneys** with extensive experience in class action and wage and hour litigation and are hereby appointed as Class Counsel.*

The Honorable Judge Susan Richard Nelson of the U.S.D.C. D. Minn.:

Alvarez v. Diversified Main. Sys., Inc., No. 11-3106 (D. Minn. Feb. 14, 2013) (appointing class counsel and preliminarily certifying the class for settlement purposes).

*However, the difficulty of the legal issues involved [and] the **skill and experience** of Plaintiffs' counsel in FLSA cases . . . make an enhancement of the lodestar amount appropriate in this case.*

The Honorable Judge Thomas D. Schroeder

Latham v. Branch Banking & Trust Co., No. 1:12-cv-00007, 2014 WL 464236 (M.D.N.C. Jan. 14, 2014)

The Court must consider the work counsel has done in identifying or investigating potential claims in the actions, counsels' experience in handling class actions and other complex litigation and claims of the type asserted in the present action, counsels' knowledge of the applicable law, and the resources counsel will commit to representing the class. Fed.R.Civ.P. 23(g)(1)(C). After reviewing the record, the Court is satisfied that the firms of Nichols Kaster, PLLP and Stueve Siegel Hanson LLP satisfy these criteria and will adequately represent the interests of the class as counsel.

The Honorable Judge Kathryn Vratil

Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 677 (D. Kan. 2008)

*The Arbitrator also notes that the briefs submitted by Claimant's counsel and the performance at the hearing by Claimant's counsel were of a **very high quality**.*

Arbitrator Joel Grossman, Esq.

Green v. CashCall, Inc., JAMS Arbitration No. 1200047225 (JAMS Aug. 22, 2014)

Plaintiffs' counsel are adequate legal representatives for the class. They have done work identifying and investigating potential claims, have handled class actions in the past, know the applicable law, and have the resources necessary to represent the class. The class will be fairly and adequately represented.

The Honorable Judge Susan M. Robiner

Spar v. Cedar Towing & Auction, Inc., No. 27-CV-411-24993 (Minn. Dist. Ct. Oct. 16, 2012)

[Defendant] doesn't question whether Plaintiffs are represented by qualified and competent counsel, and it's obvious that they are. Plaintiffs' are represented by a national law firm, Nichols Kaster, that specializes in employment and class action law.

The Honorable Judge Larry Alan Burns
Norris-Wilson v. Delta-T Grp., Inc., 270 F.R.D. 596 (S.D. Cal. 2010)

Notable Litigation Results

| Settlement Results

In *Moitoso v. FMR LLC*, 1:18-cv-12122 (D. Mass. Jan. 22, 2021), the court granted final approval of the parties' \$28.5 million settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of the Employee Retirement Income Security Act ("ERISA").

In *Intravaia v. National Rural Electric Cooperative Ass'n.*, No. 1:19-cv-00973 (E.D. Va. Feb. 2, 2021), the court granted final approval of the parties' \$10 million settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of ERISA.

In *Karpik v. Huntington Bancshares, Inc.*, 2:17-cv-1153 (S.D. Ohio Feb. 18, 2021), the court granted final approval of the parties' \$10.5 million settlement, resolving plaintiffs' claims against defendants under ERISA.

In *Bhatia v. McKinsey & Co., Inc.*, 1:19-cv-01466 (S.D.N.Y. Feb. 17, 2021), the court granted final approval of the parties' \$39.5 million settlement for a class of current and former participants in the McKinsey & Company, Inc. Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. Money Purchase Pension Plan.

In *Reetz v. Lowe's Companies Inc.*, 5:18-cv-00075 (W.D.N.C. September 9, 2021), the court granted final approval of the \$12.5 million settlement with defendant Lowe's Companies, Inc. for a class of current and former participants in the Lowe's 401(k) Plan.

In *Baker v. John Hancock Life Insurance Co. (U.S.A.)*, 1:20-cv-10397 (D. Mass. Sept. 30, 2021), the court granted final approval of the parties' \$14 million settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of ERISA.

In *Bowers v. BB&T Corp.*, No. 1:15-cv-00732 (M.D.N.C. May 6, 2019), the court granted final approval of the parties' \$24 million settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of ERISA.

In *Moreno v. Deutsche Bank Americas Holding Corp.*, 1:15-cv-09936 (S.D.N.Y. March 1, 2019), the court granted final approval of the parties' \$21.9 million settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of ERISA.

In *Sibley v. Sprint Nextel Corp.*, No. 08-cv-2063 (D. Kan. Dec. 20, 2018), the court granted final approval of a commissions settlement for retail store sales employees totaling **\$30.5 million**.

In *Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101 (S.D. Fla. Dec. 20, 2018), the court granted final approval of the parties' **\$5.9 million** settlement in a case where plaintiffs alleged the defendants breached their fiduciary duties in violation of ERISA.

In *Harlow v. Sprint Nextel Corp.*, No. 08-2222 (D. Kan. Dec. 10, 2018), the court granted final approval of a commissions settlement of **\$3,650,000** for business channel sales employees.

In *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 8:15-cv-01614 (C.D. Cal. July 30, 2018), the court granted final approval of the parties' **\$12 million** settlement in a case where plaintiffs allege the defendants breached their fiduciary duties in violation of ERISA.

In *Johnson v. Fujitsu Technology Business of America, Inc.*, No. 5:16-cv-03698 (N.D. Cal. May 11, 2018), the court granted final approval of the parties' **\$14 million** settlement, and approved a class of current and former participants in the Fujitsu Group Defined Contribution and 401(k) Plan

In *Vongkhamchanh v. All Temporaries Midwest, Inc.*, 17:cv-00976 (D. Minn. Apr. 27, 2018), the court approved a settlement for health care workers who would receive over **84% of their unpaid overtime wages**, explaining that the Firm's "considerable experience litigating wage and hour class and collective actions, and informed opinions of the fairness of the settlement" provided support for approval of the hybrid state and federal action.

In *Main v. American Airlines, Inc.*, 4:16-cv-00473 (N.D. Tex. Feb. 21, 2018), the court granted final approval of the parties' **\$22 million** settlement for a class of current and former participants in the American Airlines, Inc. 401(k) Plan.

In *Allen v. All Temporaries, Inc.*, No. 16:cv-04409 (D. Minn. Feb. 14, 2018), the court granted final approval of a Rule 23 class action and FLSA collective action for settlement of home health workers' overtime claims. The court noted that "Class Members will recover over **99% of their unpaid overtime wages** after the deduction for attorneys' fees, costs, and a class-representative service payment."

In *Mayfield-Dillard v. Direct Home Health Care.*, No. 1:16-cv-3489 (D. Minn. Dec. 18, 2017) the court approved the parties' joint motion for settlement approval finding that the settlement was a **substantial benefit** to the collective as the eligible individuals who accept the settlement will receive all their alleged overtime wage loss. The court found that "counsel possess more than sufficient experience to represent Plaintiffs fairly and adequately in reaching a fair and equitable settlement in this FLSA collective action" and that "[t]he parties are represented by competent and reputable counsel."

In *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157 (E.D. CA, Nov. 22, 2017), the court approved the settlement finding that **\$3,000,000** was fair and reasonable and reflected

a settlement payoff of 92% of the estimated potential value of the class members' claims. The judge commended Nichols Kaster stating, "[T]his case's early resolution can partly be attributed to counsel's experience representing thousands of employees in wage and hour cases for thirty years, particularly within the oil and gas industry."

In *Andrus v. New York Life Ins. Co.*, 1:16-cv-05698 (S.D.N.Y. June 15, 2017), the court granted final approval of the parties' \$3,000,000 settlement in a case where plaintiffs alleged that the defendants breached their fiduciary duties in violation of ERISA.

In *Henderson v. 1400 Northside Drive, Inc.*, No. 1:13-cv-03767 (N.D. Ga. Mar. 17, 2017), the Firm achieved a \$1,360,000 settlement on the eve of trial on behalf of 37 male exotic dancers who were misclassified as independent contractors and required to pay to work through the imposition of mandatory house fees, fines, and tip-outs of other workers.

In *Vaughan v. M-Entermt Props., LLC*, No. 1:14-CV-914 (N.D. Ga. May 16, 2017), the court approved a \$1,100,000 settlement a week before trial for 28 female exotic dancers who the Court previously found were misclassified as independent contractors and were required to pay to work through fines, fees, and tip-outs to other workers.

In *Febus v. Guardian First Funding Group, LLC*, 90 F. Supp. 3d 240 (S.D.N.Y. Mar. 4, 2015), plaintiffs brought a motion to enforce a wage and hour settlement from which one of the individual defendants defaulted. The court ordered the defendant pay the amount due, imposed an additional thirty percent penalty on the amount due, and awarded interest. The court noted that Nichols Kaster had been "attempting, in vain, to collect," and emphasized that defendant "cannot avoid his contractual obligations because he has decided that the settlement terms no longer suit his interests."

In *Hart v. Rick's Cabaret Int'l, Inc.*, No. 09 Civ. 3043, 2015 WL 5577713 (S.D.N.Y. Sept. 22, 2015), the court granted final approval of a class-wide \$15,000,000 gross settlement, finding the settlement to be fair, reasonable, and adequate and further awarding plaintiffs' counsel's attorneys' fees, expenses, and service awards to the named plaintiffs and discovery participants.

In the consolidated lawsuits of *Casey v. Citibank, N.A.*, No. 5:12-cv-0820 (N.D.N.Y. Aug. 21, 2014) and *Coonan v. Citibank, N.A.*, No. 1:13-cv-00353, 2014 WL 4120599 (N.D.N.Y. Aug. 21, 2014), the court granted final approval of an approximately \$110,000,000 settlement on behalf of settlement classes who were force-placed with flood or hazard insurance by Citibank, N.A. The settlement also provides substantial injunctive relief, forbidding Citibank and its affiliates from accepting commissions or any other form of compensation in connection with force-placed insurance for a period of six years, places limits on the amount of insurance coverage that Citibank may require borrowers to maintain, and requires Citibank to offer class members the opportunity to reduce their flood insurance coverage if Citibank had increased their coverage amount to an amount in excess of the amount required under federal law. The court found the settlement to be "fair, reasonable, and adequate, in the best interests of the Settlement Classes" and overruled nine objections.

In *Bible v. General Revenue Corp.*, No. 12-cv-01236 RHK (D. Minn. June 27, 2014), the court granted final approval of a \$1,250,000 settlement on behalf of approximately 134,000 class members, more than double the statutory cap for a Fair Debt Collection Practices Act class action.

In *Farmer v. Bank of America, N.A.*, No. 5:11-cv-00935 (W.D. Tex. Oct. 18, 2013), the court granted final approval of the parties' multi-million-dollar settlement with significant prospective injunctive relief, finally certifying a class of 25,000 Texas mortgagors who had been sent letters requesting proof of hazard insurance in violation of the language of their deeds of trust, and appointing Nichols Kaster as class counsel.

In *Singleton v. Domino's Pizza, LLC*, No. 8:11-cv-01823 (D. Md. Oct. 2, 2013), the court approved the parties' \$2,500,000 million settlement for a class of over 50,000 under the Fair Credit Reporting Act in a case where plaintiffs alleged that the defendant employer had improperly procured consumer reports on employees and applicants and had failed to comply with the pre-adverse action notice requirements of the Act.

In *Ulbrich v. GMAC Mortgage*, No. 11-CIV-62424, 2013 WL 8692404 (S.D. Fla. May 10, 2013), the court granted final settlement approval and appointed Nichols Kaster as class counsel for a 2,000+ nationwide class. The case involved claims against GMAC Mortgage, LLC and Balboa Insurance Services, Inc. relating to force-placed wind insurance.

In *Eldredge v. City of Saint Paul*, No. 09-2018 (D. Minn. Aug. 29, 2011), plaintiff Eldredge reached a settlement of his case that was the second largest paid by the City of Saint Paul in an employment lawsuit.

In *Hofstetter v. JPMorgan Chase Bank, N.A.*, No. C- 10-01313, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011), Nichols Kaster was appointed class counsel for four classes encompassing approximately 40,000 mortgagors against Chase Bank. In the same case, Nichols Kaster secured an approximately \$10,000,000 settlement for the classes. *Hofstetter*, 2011 WL 5545912 (N.D. Cal. Nov. 14, 2011).

| Appellate Achievements

In *Oman v. Delta Air Lines, Inc.*, 2021 WL 351960 (9th Cir. Feb. 2, 2021) and the companion case *Ward v. United Airlines, Inc.*, 2021 WL 345578 (9th Cir. Feb. 2, 2021), the Ninth Circuit held that California's wage statement and pay timing requirements apply to flight attendants who are based at California airports, rejecting the airlines' argument that compliance with these state laws would impermissibly burden interstate commerce. This ruling followed a decision from the California Supreme Court on certified questions, which held that California's wage statement and pay timing statutes apply to interstate employees who work less than 50% of their time in any one state if the employee's base of operations is in California. See *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762 (2020); *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020).

In *Brotherston v. Putnam Investments, LLC*, 907 F.3d 17 (1st Cir. 2018), the First Circuit reversed the district court's grant of defendants' directed verdict motion, holding that plaintiffs had met their burden of proving loss causation, and that plaintiffs' damages model constituted a viable measurement of the losses suffered by Putnam's employees as a result of defendants' fiduciary breaches. The defendant filed a writ of certiorari to the U.S. Supreme Court, and in *Putnam Investments, LLC v. Brotherston*, No. 18-926, 2020 WL 129535 (U.S. Jan. 13, 2020), the Supreme Court denied defendants' petition. The case is remanded to the district court for continued trial proceedings under the First Circuit's holding that the burden to prove causation is on defendants and plaintiffs presented sufficient evidence of losses to the plan as a result of defendants' mismanagement.

In *Ray v. County of Los Angeles*, 935 F.3d 703 (9th Cir. 2019), the Ninth Circuit ruled for the plaintiffs on two distinct issues. First, the Court upheld the District Court's ruling that the County of Los Angeles was not entitled to Sovereign Immunity as an arm of the state for its role in implementing the In-Home Supportive Services program for homecare workers in Los Angeles County. In so holding, the Court declined to overturn long-standing Ninth Circuit precedent outlining the "arm of the state" doctrine, and it determined that, under the existing five-factor test, four of the factors weighed against immunity for the County. In the second part of its ruling, the Court reversed the District Court's holding regarding the effective date of Department of Labor regulations governing homecare workers employed by third parties, holding that the regulations at issue were effective January 1, 2015, despite industry challenges to the regulations that were successful at the district court level but ultimately unsuccessful on appeal.

In *Wingate v. Metropolitan Airport Commission A19-0226* (August 19, 2019), Wingate appealed the district court's summary judgment finding in favor of Metropolitan Airport Commission (MAC) dismissing the whistleblower claim. The court of appeals reversed the district court's decision ruling the evidence presented by Wingate including his positive performance reviews, his supervisor's remarks, MAC's promotion patterns, and a sergeant's similar report of retaliatory conduct support an inference that Wingate's engagement in protective activity was the true reason that MAC did not promote him to sergeant, thus raising a material fact dispute on the issue of pretext.

In *Moore v. City of New Brighton*, A18-2111, (July 29, 2019), the parties filed cross appeals where Moore appealed the district court's summary judgment decision and the city appealed the district court and the Court of Appeals subject-matter jurisdiction over the case. In a published decision, the Minnesota Court of Appeals reversed the district court's summary judgment decision, finding that the evidence showing the city maintained the administrative, home-bound leave for a period so long and so inconsistent with its purported reason for commencing the leave creates a material fact dispute as to whether the city's actions "penalized" the sergeant under the Minnesota Whistleblower Act and whether the city's reason is pretextual. Further, both the district court and the court of appeals rejected the city's jurisdictional argument and held that both courts have subject-matter jurisdiction over Moore's claim under the Minnesota Whistleblower Act.

Frost v. BNSF Railway, Co., 914 F.3d 1189 (9th Cir. 2019), was tried to a jury in Montana in December 2016. Mr. Frost alleged that he was retaliated against when BNSF terminated his

employment after he reported suffering from PTSD. Mr. Frost was diagnosed with PTSD after he was nearly struck by an oncoming train while repairing a section of the track after his supervisor released track authority but failed to inform him and his fellow crew members. Pursuant to the Defendant's request, the jury was provided an honest belief instruction and a defense verdict resulted. Mr. Frost appealed, arguing that the instruction was error because it conflicted with the clear language of the Federal Railway Safety Act ("FRSA") and granted the jury a short-cut to rule for BNSF while ignoring evidence of retaliation. The Ninth Circuit agreed. In a unanimous decision, the Ninth Circuit definitively held there was no requirement that FRSA plaintiffs separately prove discriminatory intent under the FRSA's contributing factor standard, and thus the instruction was error. The Ninth Circuit reversed the trial verdict and remanded for a new trial.

In *McKeen-Chaplin v. Provident Savings Bank, FSB*, 862 F.3d 847 (9th Cir. 2017), the Ninth Circuit reversed the district court's grant of summary judgment to the defendant, finding that the defendant's mortgage underwriters did not fit within the administrative exemption to the Fair Labor Standards Act and remanding for judgment in the plaintiffs' favor on the issue.

In *Clark v. Centene Co. of Texas, L.P.*, 656 F. App'x 688 (5th Cir. 2016) (per curiam), the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court decision that appeals nurses do not fall within the administrative or professional exemptions of the FLSA overtime requirements.

In *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47 (2d Cir. 2016), the U.S. Court of Appeals for the Second Circuit vacated and remanded the district court's dismissal of plaintiff's complaint, finding that plaintiffs had Article III standing to bring this action regarding the excessive fees for providing copies of plaintiffs' medical records charged by defendants, and stating that "because the complaint alleged that each name plaintiff "through [her or his] counsel" had "paid" the charges demanded for the records, and that the "ultimate expense" was borne by the plaintiffs, the complaint plausibly alleged that plaintiffs, as principals acting through their agents, had been injured by the alleged overcharges."

In *Monroe v. FTS USA, LLC*, 815 F.3d 1000 (6th Cir. 2016), the U.S. Court of Appeals for the Sixth Circuit upheld the lower court's denial of defendant's motion to decertify the collective and affirmed the trial verdict in favor of plaintiffs. The Sixth Circuit ruled that Plaintiff's presentation of representative testimony was appropriate at trial for proving liability for the collective and estimated average approach to calculating damages.

In *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015), *reh'g. en banc denied*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016), the U.S. Court of Appeals for the Seventh Circuit reversed the district court's dismissal of plaintiff's complaint against a student loan guarantor for wrongfully charging collection fees on a defaulted student loan, finding that plaintiff's claims for breach of contract and for violations of the RICO Act were not preempted by the Higher Education Act, and stating that "a guaranty agency may not impose collection costs on a borrower who is in default for the first time but who has timely entered into and complied with an alternative repayment agreement."

In *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015), the United States Supreme Court ruled unanimously in favor of a group of employees represented by Nichols Kaster. The Court upheld a Department of Labor interpretation granting minimum wage and overtime compensation for mortgage loan officers.

In *Karl v. Uptown Drink, LLC*, 835 N.W.2d 14 (Minn. Aug. 14, 2013), the Minnesota Supreme Court ruled that under Minnesota law, employers cannot require employees to reimburse them from their tips for items such as cash register shortages, unsigned credit card receipts, and customer walk outs. The Court also found that employees do not have to show that because of the deductions their wages fell below the minimum wage in order to prove a violation of Minn. Stat. § 181.79. In this case, the plaintiffs were over 750 employees who worked at three different bars/night clubs in Minneapolis. At a jury trial in 2011, the plaintiffs prevailed on their record-keeping and certain minimum wage claims, but lost on the unlawful deductions claims. Nichols Kaster appealed the deductions issue, and took it all the way to the Minnesota Supreme Court, where the Court agreed with plaintiffs and instructed the lower court to enter judgment on the plaintiffs' behalf on this claim.

In *Boaz v. Federal Express Customer Info. Services, Inc.*, 725 F.3d 603 (6th Cir. 2013), the U.S. Court of Appeals for the Sixth Circuit ruled that plaintiff, a FedEx project manager who had claimed that FedEx had failed to pay her overtime wages, in violation of the Fair Labor Standards Act, and paid her less than male coworkers performing the same job, in violation of the Equal Pay Act, could pursue her overtime and gender discrimination claims. The federal laws at issue provide employees three years to file a lawsuit and FedEx had plaintiff sign an application which stated that lawsuits had to be brought within 6 months or claims were lost. The lower court had dismissed plaintiff's claims, citing the application. The Sixth Circuit unanimously sided with plaintiff, reversed the dismissal and remanded the case for trial.

In *Calderon v. GEICO General Insurance Co.*, 809 F.3d 111 (4th Cir. 2015), the U.S. Court of Appeals for the Fourth Circuit affirmed a district court's grant of affirmative summary judgment in favor of approximately one hundred current and former Security Investigators, finding that they were not covered by the administrative exemption. Specifically, the Appellate Court found that plaintiffs' primary job duty was not the performance of work directly related to general business operations.

In *Lass v. Bank of America, N.A.*, 695 F.3d 129 (1st Cir. 2012), the U.S. Court of Appeals for the First Circuit struck down the district court's ruling that had dismissed plaintiff's claims. The court found that plaintiff's allegations regarding excessive flood insurance and improper kickbacks had been properly alleged and that the case should proceed.

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), the U.S. Supreme Court found in favor of the plaintiff and held that "an oral complaint of a violation of the Fair Labor Standards Act is protected conduct under the [Act's] anti-retaliation provision." This was a huge win for employees all over the country, as the Supreme Court's decision set a new FLSA anti-retaliation standard.

| Trial Verdicts and Arbitration Awards

In *Cummings v. Chevron Corp.*, JAMS Case No. 1100086694 (June 8, 2018), an arbitrator issued a final award in the amount of \$511,533.95 in favor of Donnie Cummings, a Well Site Supervisor who worked for Chevron. The arbitrator ruled that Chevron misclassified Cummings as an independent contractor and also misclassified him as exempt from the overtime provisions of state and federal law. The arbitrator awarded Cummings \$284,270.15 in unpaid overtime, liquidated damages, and meal and rest period premiums, and awarded attorneys' fees and costs in the amount of \$227,263.80.

In *Kaiser v. Gortmaker et al.*, No. 15-cv-01030, (District of South Dakota, Dec. 21, 2017) following a five-day trial in Aberdeen, South Dakota, a six-person jury returned a \$1.2 million verdict in favor of former South Dakota Division of Criminal Investigation agent, Laura Zylstra-Kaiser. At the conclusion of trial, the jury found in favor of Kaiser on both her retaliation and gender discrimination claims. The jury awarded Kaiser \$311,812.00 in lost wages, \$498,929.00 in lost retirement benefits, and \$400,000.00 in emotional distress damages.

In *Clark v. Centene Company of Texas, LP*, 104 F. Supp. 3d 813 (W.D. Tex. 2015), upon the conclusion of a bench trial, the court awarded damages to a collective action of utilization review nurses. The court found that plaintiffs submitted sufficient evidence to create a just and reasonable inference as to overtime hours worked by the collective and awarded liquidated damages. This victory followed the court's order on the parties' cross-motions for summary judgment and defendant's motion for decertification last year, holding that the defendant misclassified its utilization nurses. 44 F. Supp. 3d 674 (W.D. Tex. 2014). The court ruled that plaintiffs are not exempt from the Fair Labor Standards Act's overtime laws and are thus eligible for overtime pay. The court further held that defendant's claim that each plaintiff's claim would need to be analyzed individually to determine liability and damages was without merit.

In *Rhodes v. CashCall*, JAMS Ref. No. 1200047475, *Garcia v. CashCall*, JAMS Ref. No. 1200047422, *Good v. CashCall*, JAMS Ref. No. 1200047220, and *Green v. CashCall, Inc.*, JAMS Ref. No. 1200047225 (2014), a JAMS arbitrator ruled that CashCall misclassified Rhodes and Green, loan processors, and Garcia and Good, underwriters, as exempt from the overtime requirements of California and federal law. The arbitrator awarded Rhodes \$15,000 in unpaid overtime plus an additional \$15,000 in liquidated damages, along with \$88,179 in attorneys' fees and costs, Green was awarded \$15,067.72 in damages, as well as \$54,165.50 in attorneys' fees and costs. The arbitrator also awarded Garcia \$10,000 in unpaid overtime plus an additional \$10,000 in liquidated damages, along with \$98,709 in attorneys' fees and costs, and Good was awarded \$43,631 in unpaid overtime, as well as \$50,627.49 in attorneys' fees and costs.

In *Walsten v. Shank Power Products Co., Inc.*, No. 19HA-CV-12-1094 (Minn. Dist. Ct., Sept. 9, 2013), a minority shareholder case, an advisory jury returned a \$700,000 verdict for the plaintiff, finding for him on his claims for breach of fiduciary duty and violation of his reasonable expectation of continuing employment. The trial judge subsequently issued an order sustaining the \$700,000 advisory verdict and awarding \$200,000 in attorneys' fees.

In *Monroe v. FTS USA, LLC*, No. 2:08-cv-21 (W.D. Tenn. Oct. 2011), the jury found that defendants willfully violated the Fair Labor Standards Act by failing to pay nearly 300 cable installers for all overtime hours worked. The district court entered judgment with damages for the plaintiffs.

| Summary Adjudication

In *Mass v. Regents of the University of California*, No. RG17879223 (Cal. Super. Ct., Alameda Cnty. Nov. 19, 2021), the court denied defendants' motion for summary judgment, finding that there were triable issues of material fact as to whether defendants as trustee/plan administrator owed a duty to the UCRP beneficiaries and the contours of any such duty, whether defendants breached the alleged owed duty, and whether any breach by defendants caused members of the class to suffer any injury.

In *Deluca v. Farmers Ins. Exchange*, 386 F.Supp.3d 1235 (N.D. Cal. 2019), the court granted in part Plaintiffs' affirmative summary judgment motion and denied Defendant's summary judgment motion. The court found that Farmers could not satisfy either duties prong of the administrative exemption. As a result, the court determined that plaintiffs and class members were misclassified as exempt under state and federal law and are entitled to overtime premiums.

In *Rego v. Liberty Mutual Managed Care, LLC*, 367 F. Supp. 3d 849 (E.D. Wis. 2019), the court found as a matter of law that a defendant insurance company misclassified its utilization management nurses as exempt from overtime protections under the administrative and the professional exemptions. The plaintiffs primary job duty consisted of reviewing medical authorization requests against well-established guidelines to determine whether the criteria for medical necessity are satisfied. The court held in part that this work involved the performance of routine mental work, likened to inspection-type duties as opposed to bedside nursing.

In *Henderson v. 1400 Northside Drive, Inc.*, No. 1:13-cv-3767, 2016 WL 3125012 (N.D. Ga. June 3, 2016), the district court granted in part Plaintiffs' affirmative motion for summary judgment on the issues of: (1) whether the owner qualified as a joint employer, (2) the viability of the defendants' counterclaims, and (3) whether minimum wage damages includes recovery for fines, fees, and tipouts paid by the employee to the employer. In an earlier order, the court also the court granted plaintiffs' motion for partial summary judgment on the issues of: (1) the creative professional exemption, finding that defendants misclassified adult entertainers as exempt from the overtime and minimum wage requirements of the FLSA; and (2) offset, finding that defendants could not offset their minimum wage obligations with tips paid by customers to adult entertainers. 110 F. Supp. 3d 1318 (N.D. Ga. 2015).

In *Vaughan v. M-Enterm't Props., LLC*, No. 1:14-CV-914, 2016 WL 7365201 (N.D. Ga. Mar. 15, 2016), the district court granted in part exotic dancer plaintiffs' affirmative motion for summary judgment on the issues of (1) whether entertainers qualify as employees under the FLSA, (2) whether related entity defendants qualified as joint employers, (3) the viability of the defendants' offset defense, and (4) the viability of the defendants' counterclaims.

In *Heaton v. Social Finance, Inc.*, No. 3:14-cv-05191-the, 2015 WL 6003119 (N.D. Cal. Oct. 15, 2015), the court denied defendants' motion for summary judgment, finding that there were triable issues of fact as to whether defendants had violated the statutes at issue, whether the alleged violations were willful, and finding that defendants had failed to meet their burden as to plaintiffs' claims under the California Unfair Competition Law.

In *Hart v. Rick's Cabaret Int'l, Inc.*, the court denied decertification of the FLSA Collective and Rule 23 Class of approximately 2,300 adult entertainers at Rick's Cabaret in New York and granted, in part, plaintiffs' affirmative motion for partial summary judgment on damages, finding that no reasonable jury could conclude the Class was owed less than \$10.8 million. No. 09-Civ-3043, 2014 WL 6238175 (S.D.N.Y. Nov. 14, 2014). This significant ruling came approximately one year after the court ruled that the Class and Collective Members are employees as a matter of law under the FLSA and New York Labor Law and that Rick's Cabaret violated both laws by failing to pay wages. The court further held that the money entertainers received from Rick's Cabaret's customers were tips and not service charges that could offset wage obligations and that Rick's Cabaret violated New York Labor Law by charging Class and Collective Members fines and fees as a condition of employment. 967 F. Supp. 2d 901 (S.D.N.Y. Sept. 10, 2013).

In *Wolfram v. PHH Corp.*, No. 1:12-cv-599, 2014 WL 2737990 (S.D. Ohio June 17, 2014), the court granted plaintiffs' motion for partial summary judgment, finding that the assigned real estate offices from where plaintiffs, who are current or former loan officers employed by defendant, worked where all serving as the "employer's place of business" under the outside sales exemption of the Fair Labor Standards Act. This established that an employee may work from multiple sites, not technically owned or operated by the employer, and each of those sites can be considered the "employer's place of business" under the regulations, therefore any work performed at these sites is not "outside" work under the outside sales exemption.

In *MacIntyre v. Lender Processing Services, Inc.*, No. 3:13-cv-89-J-25JBT (M.D. Fla. Apr. 29, 2014), the court granted affirmative summary judgment to plaintiff (a Minnesota resident) on a breach of contract claim for an unpaid bonus and used its discretion to enforce Minnesota state law for defendant's (a Florida company) failure to promptly pay wages. The court simultaneously denied defendant's motion to dismiss plaintiff's gender discrimination claims ruling, in part, that defendant's actions toward plaintiff constituted direct evidence of gender discrimination.

In *Huff v. Pinstripes, Inc.*, 972 F. Supp. 2d 1065 (D. Minn. 2013), the court ruled in plaintiffs' favor on cross-motions for summary judgment, finding that Pinstripes had violated the Minnesota Fair Labor Standards Act's provisions on tip-pooling by requiring its servers to share their tips with "server assistants," who act as servers' support staff at the restaurant.

In *Ernst v. DISH Network, LLC*, No. 12-8794-LGS (S.D.N.Y. Sept. 22, 2014), the court ruled on plaintiffs' and two of the defendants' cross-motions for partial summary judgment, granting plaintiff's motion and denying defendants' motion. The court ruled that the summary report received by two of the defendants was a "consumer report" for purposes of the Fair Credit Reporting Act because it

“communicated information bearing on Plaintiff’s character, general reputation, or mode of living, and the information was collected and expected to be used for ‘employment purposes.’”

In *Kirsch v. St. Paul Motorsports, Inc.*, No. 11-cv-02624, 2013 WL 1900620 (D. Minn. May 7, 2013), the court denied defendants’ motion for summary judgment in its entirety, finding that plaintiff had put forth sufficient evidence for a prima facie claim of age discrimination.

In *Bollinger v. Residential Capital*, 863 F. Supp. 2d 1041 (W.D. Wash. 2012), the court granted plaintiffs’ motion for partial summary judgment, finding that defendants misclassified the underwriter plaintiffs under the administrative exemption, and rejected defendants’ argument that there was no evidence of willful violation of the FLSA, stating that “a jury could conclude that Defendants knowingly and recklessly” misclassified plaintiffs.

In *Clincy v. Galardi South Enterprises, Inc.*, 808 F. Supp. 2d 1326 (N.D. Ga. 2011), the court granted plaintiffs’ motion for partial summary judgment on the issue of misclassification, finding that defendants misclassified adult entertainers as independent contractors and that the entertainers were in fact employees covered by the FLSA.

| Class and Collective Certification

In *Brayman v. Keypoint Government Solutions*, No. 18-cv-550-WJM-NRN Dkt 365 (D. Colo. March 31, 2022) the court granted Plaintiffs’ Amended Motion for Final Certification of the FLSA Collective and Plaintiffs’ Amended Motion for Rule 23 Class Certification and denied Defendant’s Amended Motion for Decertification. The court found that the material terms of Plaintiffs’ employment, including policies and practices to which they were uniformly subjected to, as well as the similarities of the Plaintiffs’ job functions, weighed in favor of finding Plaintiffs to be similarly situated for purposes of maintaining an FLSA collective. Further, Plaintiffs met all four requirements of a Rule 23 class and the court found that all class members’ claims arise from the same course of conduct favoring certification and granted Plaintiffs’ Motion for Rule 23 Class Certification.

In *MacDonald, et al. v. CashCall, Inc., et al.*, No. 2:16-cv-02781-MCA-ESK, Dkt 102 (D. N.J. Oct. 31, 2019) the court granted Plaintiffs’ motion for class certification and appointed Nichols Kaster, PLLP class counsel in case involving more than 11,000 borrowers where Defendants are alleged to have violated usury law, the New Jersey Consumer Fraud Act, and RICO.

In *Brotherston v. Putnam Investments, LLC*, No. 1:15-cv-13825 (D. Mass. Dec. 13, 2016), the court certified a class of current and former participants in the Putnam Retirement Plan and appointed Nichols Kaster as class counsel. Plaintiffs alleged that Defendants mismanaged the plan and engaged in prohibited transactions in breach of their fiduciary duties under ERISA.

In *Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 620 (D. Neb. 2019), Nichols Kaster won class certification and was appointed class counsel for a class of over 7,000 railroad employees who plaintiffs alleged had been removed from their jobs in violation of the Americans with Disabilities Act

In *Ayala v. GEICO*, No. 7:18-cv-03583 (Dec. 5, 2018), the district court certified a collective class under the FLSA for Auto Adjuster Trainees who alleged they were not paid for all their overtime worked during training.

In *Bell v. Michigan Civil Service Commission and Jan Winters, State Personnel Director*, No. 17-003861-CV (Mich. Cir. Ct., Nov. 17, 2018), Nichols Kaster won class certification and was appointed class counsel for a class of over 600 African-American applicants who plaintiffs alleged had been discriminated against by defendants through the use of their entry-level law enforcement examination.

In *Dunham-Sunde v. The Copper Hen Cakery*, No. 27-CV-17-17288 (Minn. Dist. Ct., Aug. 28, 2018), the court certified a class of over one hundred restaurant servers to pursue claims against a local restaurant for its unlawful tip-sharing practices in violation of the Minnesota Fair Labor Standards Act.

In *Deluca v. Farmers Ins. Exch.*, No. 17-cv-00034, 2018 WL 1981393 (N.D. Cal. Feb. 27, 2018), the court granted class certification of California state law overtime claims and related claims for a group of special investigators who allege that Farmers misclassified them as exempt from overtime. The court previously granted conditional certification of the plaintiffs' FLSA overtime claims.

In *Wildman v. American Century Serv., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017), the court certified a class of current and former participants in the American Century Retirement Plan and appointed Nichols Kaster as class counsel. Plaintiffs alleged that defendants breached their fiduciary duties and engaged in prohibited transactions.

In *Ganci v. MBF Inspection Svcs., Inc.*, 323 F.R.D. 249 (S.D. Ohio 2017), the court granted class certification of a class of pipeline inspectors who worked for MBF and were paid based on a day rate, who sought unpaid overtime under Ohio state law. The court had previously granted conditional collective certification of the plaintiffs' FLSA overtime claims. 2016 WL 5104891 (S.D. Ohio Sept. 20, 2016).

In *Moreno v. Deutsche Bank Americas Holding Corp.*, 1:15-cv-09936, 2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017), the court certified a class of current and former participants in the Deutsche Bank Matched Savings Plan and appointed Nichols Kaster as class counsel. Plaintiffs alleged that Defendants mismanaged the plan in breach of their fiduciary duties under ERISA.

In *Sims v. BB&T Corp.*, No. 1:15-cv-732, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017), the district court certified a class of current and former participants in the BB&T Corporation 401(k) Savings Plan and appointed Nichols Kaster as co-class counsel. Plaintiffs alleged that Defendants breached their fiduciary duties to the Plan.

In *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 8:15-cv-01614, 2017 WL 2655678 (C.D. Cal. June 15, 2017), the district court certified a class of current and former participants in the Allianz Asset Management of America L.P. 401(k) Savings and Retirement Plan and appointed Nichols Kaster as class

counsel. Plaintiffs alleged that defendants improperly managed plan assets and breached their fiduciary duties.

In *Mayfield-Dillard v. Direct Home Health Care, Inc.*, No. 0:16-cv-3489, 2017 WL 945087 (D. Minn. Mar. 10, 2017), the district court granted Plaintiffs' motion for conditional certification, certifying a group of home health care workers who challenged Defendant's practice of paying straight-time only, for overtime hours worked.

In *McQueen v. Chevron*, No. C 16-02089, 2017 WL 8948943 (N.D. Cal. Feb. 21, 2017), the Court granted conditional certification of an FLSA collective for well site managers and drill site managers who performed services for Chevron throughout the country, rejecting Chevron's arguments that the various intermediary staffing companies and differing contractual terms put the workers on different footing.

In *Tamez v. BHP Billiton Petroleum (Americas), Inc.*, No. 5:15-cv-330, 2015 WL 7075971 (W.D. Tex. Oct. 5, 2015), the court granted plaintiffs' motion for conditional certification, conditionally certifying a class of employees alleging violations of the overtime wage provisions of the Fair Labor Standards Act by a multinational corporation that produces major commodities including oil and gas.

In *Miller v. Fleetcor Technologies Operating Co., LLC*, 118 F. Supp. 3d 1351 (N.D. Ga. 2015), the court denied defendant's motion for decertification, agreeing with plaintiffs that each individual claim and the case as a whole should be kept together, allowing plaintiffs to move forward as a collective group.

In *Pearsall-Dineen v. Freedom Mortgage Corp.*, No. 13-cv-06836-JEI-JS, 2014 WL 2873878 (D. N.J. June 25, 2014), the court conditionally certified the Fair Labor Standards Act overtime case as a collective action. The judge's order authorized notice of the lawsuit to be disseminated to all mortgage underwriters who worked for Freedom Mortgage in the last three years, providing them the opportunity to join the lawsuit and to assert their overtime claims against the defendant for failing to pay them overtime hours.

In *Ellsworth v. U.S. Bank, N.A.*, No. C 12-2506-LB, 2014 WL 2734953 (N.D. Cal. June 13, 2014), the court issued a broad class certification ruling on behalf of plaintiff-borrowers who were force-placed with flood insurance. In its order, the court certified multi-state classes of borrowers spanning forty different states to pursue claims against U.S. Bank for breach of their mortgage agreements stemming from U.S. Bank's force-placed insurance practices. In addition, the court separately certified classes of borrowers in California and New Mexico to pursue claims against U.S. Bank and its force-placed insurance vendor, ASIC, for unjust enrichment, unfair business practices, and/or breach of the covenant of good faith and fair dealing.

In *Arnett v. Bank of America, N.A.*, No. 3:11-cv-01372-SI (D. Or. Apr. 17, 2014), the court preliminarily approved a \$31 million settlement for approximately 625,000 class members, the largest common fund settlement ever negotiated in a case involving force-placed flood insurance.

In *Ernst v. DISH Network, LLC*, No. 12-8794-LGS (S.D.N.Y. July 23, 2013), the court appointed Nichols Kaster as interim class counsel for the putative class with claims against Defendant Sterling Infosystems, Inc., finding that Nichols Kaster had “demonstrated it is able fairly and adequately to represent the interests of the putative class.

In *Gustafson v. BAC Home Loan Services, LP*, No. 8:11-cv-00915 (C.D. Cal. Feb. 27, 2013), Judge Josephine Staton Tucker appointed Nichols Kaster as co-lead interim class counsel for multiple putative classes in a force-placed insurance case against Bank of America and other defendants.

In *Spar v. Cedar Towing & Auction, Inc.*, Case No. 27-CV-11-24993 (Minn. Dist. Ct., Oct. 16, 2012), Nichols Kaster won class certification and was appointed class counsel for a class of approximately six thousand Minneapolis consumers who plaintiffs alleged had been charged illegal towing fees by defendant.

| Denial of Motions to Dismiss

In *Carmen v. Health Carousel, LLC*, No. 1:20-cv-313 (DRC) (S.D. Ohio June 17, 2021), the court denied a healthcare recruiting company’s motion to dismiss and strike class allegations of labor trafficking.

In *Fain v. Crouch*, No. 3:20-0740 (RCC) (D. W. Va. May 19, 2021), the court denied defendants’ motion to dismiss and strike class allegations that defendants discriminated against and violated the rights of transgender people by failing to provide gender confirming health care coverage.

In *Padilla v. Caliper Building Systems, LLC et al.*, No. 20-cv-00658 (SRN/KMM) (D. MN, Sep. 21, 2020) the court denied defendant’s motion to dismiss, holding that construction laborers working for a framing subcontractor through a labor broker plausibly alleged facts supporting joint employer status under federal and state law.

In *Jane Doe 1 et al v. Independent School District 31*, No. 20-cv-226(SRN/LIB) (D. MN, August 14, 2020) the court denied defendant’s motion to dismiss, finding that plaintiffs pled sufficient facts to support plausible Title IX, Section 1983, negligence, negligent supervision, and negligent retention claims. Specifically, the court found that the complaint plausibly alleged a duty of care arising from a special relationship between the school district and plaintiffs, taking into account the elevated status of the school official who sexually exploited plaintiffs, the egregiousness of the sexual exploitation that occurred on district-owned devices, and the fact that the district had clear notice. Further, the court found that plaintiffs plausibly alleged that the district’s own conduct created a foreseeable risk of injury to plaintiffs and that the district owed them a duty to prevent the sexual harassment and bullying faced by plaintiffs after the school official’s arrest. Additionally, the court held that the complaint plausibly alleged that the district acted with deliberate indifference, resulting in a hostile education environment and peer harassment under Title IX and Section 1983. Finally, plaintiffs sufficiently alleged a pattern of constitutional violations that put the district on notice that “its employees’ responses to recurring sex discrimination were insufficient to protect Plaintiffs’ constitutional rights.”

In *Intravaia v. National Rural Electric Cooperative Association*, No. 1:19-CV-973, 2020 WL 58276 (E.D. Va. Jan. 2, 2020), the court denied defendants' motion to dismiss in full, holding plaintiffs adequately alleged breaches of fiduciary duty and prohibited transactions under ERISA relating to the administration of the National Rural Electric Cooperative Association's 401(k) plan.

In *Reetz v. Lowe's Companies, Inc.*, No. 518CV00075, 2019 WL 4233616 (W.D.N.C. Sept. 6, 2019), the court denied defendants' motion to dismiss in substantial part, holding plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the Lowe's 401(k) plan.

In *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2019 WL 7482134 (S.D. Ohio Sept. 26, 2019), the court denied defendants' motion to dismiss in substantial part and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management and monitoring of Huntington Bank's 401(k) plan.

In *Belt v. P.F. Chang's*, No. 18-cv-03831 (E.D. Pa. Aug. 15, 2019), the court denied defendant's motion for judgment on the pleadings, holding that the DOL's new interpretation of the FLSA was unreasonable and not subject to deference, confirming that Plaintiffs had stated a claim for minimum wage violations due to P.F. Chang's failing to pay its servers the full minimum wage when they performed related yet untipped labor, such as side work, for more than 20% of their time in a workweek.

In *Nelsen v. Principal Global Investors Trust Co.*, No. 4:18-cv-00115 (S.D. Iowa, Jan. 24, 2019), the court denied defendants' motion to dismiss in substantial part, holding plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of Principal's collective investment trusts.

In *In re M&T Bank Corp. ERISA Litig.*, No. 16-cv-375, 2018 WL 4334807 (W.D.N.Y. Sept. 11, 2018), the court denied defendants' motion to dismiss in substantial part, holding plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the M&T Bank Corporation Retirement Savings Plan.

In *Velazquez v. Massachusetts Fin. Servs. Co.*, 320 F. Supp. 3d 252 (D. Mass. 2018), the court denied defendants' motion to dismiss in substantial part and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the Massachusetts Financial Services Company MFSavings Retirement Plan and the Massachusetts Financial Services Company Defined Contribution Plan.

In *Beach v. JP Morgan Chase Bank*, No. 1:17-cv-00563 (S.D.N.Y. Mar. 28, 2018), the court denied defendants' motion to dismiss in substantial part and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA.

In *Wildman v. American Century Serv., LLC*, 237 F. Supp. 3d 902 (W.D. Mo. 2017), the court denied defendants' motion to dismiss, finding that plaintiffs adequately alleged breaches of fiduciary duty and prohibited transactions by defendants in connection with the American Century Retirement Plan.

In *Johnson v. Fujitsu Technology Business of America, Inc.*, 250 F. Supp. 3d 460 (N.D. Cal. April 11, 2017), the court denied defendants' motions to dismiss, and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the Fujitsu Group Defined Contribution and 401(k) Plan.

In *Moreno v. Deutsche Bank Americas Holding Corp.*, 1:15-cv-09936, 2016 WL 5957307 (S.D.N.Y. Oct. 13, 2016), the court denied defendants' motion to dismiss in substantial part and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the Deutsche Bank Matched Savings Plan.

In *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 8:15-cv-01614, 2016 WL 4507119 (C.D. Cal. Aug. 5, 2016), the court denied defendants' motion to dismiss in substantial part and held that plaintiffs adequately alleged breaches of fiduciary duty under ERISA relating to the management of the Allianz Asset Management of America L.P. 401(k) Savings and Retirement Plan.

In *Bowers v. BB&T Corporation*, No. 1:15-cv-732-CCE-JEP (M.D.N.C. Apr. 18, 2016), the court denied defendant's motion to dismiss, finding that plaintiff's allegations regarding Employment Retirement Income Security Act ("ERISA") violations related to defendant's management of plaintiffs' 401(k) Savings Plans are sufficient for litigation to move forward.

In *Brotherston v. Putnam Investments, LLC*, No. 1:15-cv-13825, 2016 WL 1397427 (D. Mass. Apr. 7, 2016), the court denied defendant's motion to dismiss, finding that plaintiff's allegations regarding Employment Retirement Income Security Act ("ERISA") violations related to defendant's management of plaintiffs' 401(k) Savings Plans are sufficient for litigation to move forward.

In *Johnson v. Casey's Gen. Stores, Inc.*, 116 F. Supp. 3d 944 (W.D. Mo. 2015), the court denied defendant's motion to dismiss, finding that plaintiff's allegations regarding Fair Credit Reporting Act violations and the willfulness of defendant's conduct sufficient for litigation to move forward.

In *Lengel v. HomeAdvisor, Inc.*, 102 F. Supp. 3d 1202 (D. Kan. 2015), the court denied defendant's motion to dismiss, finding that plaintiff's allegations regarding Fair Credit Report Act violations and the willfulness of defendant's conduct sufficient for litigation to move forward.

In *Holmes v. Bank of America, N.A.*, No. 3:12-cv-00487, 2013 WL 2317722 (W.D.N.C. May 28, 2013), the court denied four motions to dismiss plaintiffs' claims regarding force-placed insurance and allowing the case to proceed.

In *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-cv-00673, 2012 WL 3096660 (W.D. Ky. July 30, 2012), a case regarding force-placed flood insurance, the court denied defendant's motion to dismiss, stating that the plaintiff's mortgage agreement did not explicitly provide that the lender's flood insurance requirement could change at will and that Kentucky contracts contain provisions which can impose limits on discretion afforded by a contract, thus rejecting defendant's interpretation of plaintiff's mortgage agreement for purposes of the motion.

| Defeat of Motions to Compel Arbitration

In *Doll House, Inc. v. Tapia*, Nos. 5D16-4235, 5D16-4455 (Fla. DCA Nov. 21, 2017), the Florida District Court of Appeal for the Fifth District affirmed per curiam a trial court ruling denying defendant's motion to compel arbitration. The court of appeals found that the parties never formed a binding agreement, and alternatively that the agreement at issue was unconscionable and therefore unenforceable.

In *Payne v. WBY, Inc.*, 141 F. Supp. 3d 1344 (N.D. Ga. 2015) the court denied defendant's motion to compel arbitration of opt-in plaintiffs in an FLSA conditionally certified collective action. The court held that the defendant's alleged posting of an arbitration agreement on a bulletin board in the breakroom without additional notice to workers of its existence, its terms, or its binding nature was insufficient to establish an offer or acceptance of its terms.

Nichols Kaster Attorneys

| Partner Biographies

James H. Kaster is a Civil Trial Law Specialist who has tried well over 100 cases to verdict or decision. He has also handled many significant cases on appeal, including a successful case in front of the United States Supreme Court (*Kasten v. Saint-Gobain Performance Plastics Corp.*). He was ranked by Chambers USA as number one among plaintiffs' employment lawyers in Minnesota, was named Lawyer of the Year by Best Lawyers in 2012, and 2016, and has been listed by Super Lawyers of Minnesota as one of the top 10 lawyers in the State. Jim's success in the courtroom includes earning many million dollar and multi-million dollar recoveries for plaintiffs. Jim is also a frequent lecturer before local, state, and national organizations on damage recovery and trial skills. He was selected as a Fellow of the American College of Trial Lawyers, a premier professional trial organization in America whose membership is limited to 1% of the trial lawyers in any state or province. He was also selected to be a member of the College of Labor and Employment Lawyers. **Education:** B.A. Marquette University 1976, J.D. Marquette University 1979.

Lucas J. Kaster is a skilled and seasoned trial lawyer focused on aggressive advocacy, creative solutions, and responsiveness to clients. As a member of Nichols Kaster's individual rights team, Lucas represents clients in a wide-range of employment matters, including harassment, retaliation and discrimination claims. Lucas also represents clients in civil rights claims, such as police misconduct and prisoner rights. Over his career, Lucas has tried many cases to verdict or decision. Most recently, Lucas represented a South Dakota law enforcement officer in a retaliation and sexual harassment lawsuit that resulted in a \$1.2 million jury verdict. In a separate lawsuit, Lucas represented four golf course employees who were subject to harassment and retaliation in a court trial that resulted in a plaintiff's verdict and treble damages under the Minnesota Human Rights Act ("MHRA"). Lucas uses this unique trial experience to drive litigation strategy and provide his clients the best possible representation. Lucas is also an experienced appellate advocate. In 2018, Lucas successfully argued before the Ninth

Circuit Court of Appeals in *Michael Frost v. BNSF Railway Co.*, 9:15-cv-000124-DWM. The Ninth Circuit's decision addressed a hotly debated subject under the Federal Railway Safety Act ("FRSA"). The question before the Court was whether the honest belief instruction was proper because the FRSA's contributing factor standard required plaintiffs to separately prove discriminatory intent. In the opinion, the Ninth Circuit definitively held that there is no requirement that FRSA plaintiffs separately prove discriminatory intent, and thus the instruction was error. Due to his experience, Lucas is a well-respected and sought-after speaker. Lucas is a frequent presenter at the ABA's Labor and Employment and Employment Rights and Responsibilities conferences. In February 2019, Lucas also spoke at the College of Labor and Employment Lawyer's Regional Program for the 4th and 11th Circuits in Charleston, South Carolina. Lucas participated in a three-member panel titled: *The #MeToo Movement One Year Later: Where Are We Now?* Lucas is a member Twin Cities Diversity in Practice's Emerging Leaders Group and a contributor to Nichols Kaster's training and marketing committees. **Education:** B.A. Villanova University 2004, J.D. Marquette University Law School 2011.

Paul J. Lukas is one of the co-leaders of the firm's ERISA Class Action Team. Mr. Lukas also has extensive experience litigating class and collective actions and has tried over 50 cases over the course of his career. Mr. Lukas has been recognized by his peers as one of "The Best Lawyers in America" and is frequently named to the Minnesota Super Lawyers list. He also has had many publications and speaking engagements about issues and strategies for plaintiff class action lawyers and the plaintiffs' bar. **Education:** B.A. St. John's University 1988, J.D. William Mitchell College of Law 1991.

Brandon T. McDonough is a member of Nichols Kaster's ERISA litigation team where he represents current and former employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. Prior to joining the firm, Brandon practiced plaintiffs-side consumer and civil rights law. **Education:** B.A. University of Chicago 2007, J.D. University of Minnesota Law School 2012 *cum laude*.

Steven Andrew Smith has been named "Lawyer of the Year" for Employment Law in Minneapolis by Best Lawyers for 2021 and 2022, named "Attorney of the Year" twice by Minnesota Lawyer for his work protecting employees' rights, named one of "The Best Lawyers in America" for the last eight years, named to the Minnesota Super Lawyers "Top 100" list five times, and named to the Minnesota Super Lawyers list for 20 consecutive years. In 2020, Steve was elected as a Fellow of the College of Labor and Employment Lawyers. Steve was honored by the Minnesota Chapter of the National Employment Lawyers Association as the recipient of the 2014 Karla Wahl Dedicated Advocacy Award. The Award is given to recipients "for their ceaseless and courageous efforts" to protect and advance the rights of Minnesota employees. Steve was also the recipient of the 2011 Distinguished Pro Bono Service Award from the United States District Court for the District of Minnesota, was selected for the Merit Selection Panel regarding the Re-Appointment of U.S. Magistrate Judge Arthur J. Boylan (D. Minn. 2012), was further recognized in 2014 by the United States District Court and Chief Judge Michael J. Davis for his involvement in the Pro Se Project, a project by the United States District Court of Minnesota for assisting individuals representing themselves in federal court, and has received the Martindale Hubble AV Preeminent rating. Steve's trial experience includes trials to verdict in sexual

harassment, whistleblower, reprisal/retaliation, commission, contract, gender discrimination, marital status discrimination, disability, and wage and hour claims. Steve has also litigated several notable cases having substantial effect on employees' rights under state and federal employment laws. Steve is often invited to lecture on employment issues both nationally and locally. He has also authored a number of articles on employment law issues such as sexual harassment in the workplace. **Education:** B.A. Concordia College 1990, J.D. William Mitchell College of Law 1995 *cum laude*.

Michele R. Fisher is a managing partner, and Chair of the Firm's Business Development and Marketing Groups, which originate class and collective actions and market the firm. She has dedicated her career to litigating wage and hour cases in an aggressive, creative, and strategic manner. She is one of the leaders of a practice group that has been described as a "powerhouse" for mass wage and hour litigation and arbitration. Michele has the experience, resources, and staff to take on any company regardless of size. She has handled several jury trials and arbitrations in her fight for employee rights and prides herself on the firm's reputation as a leader in national wage and hour class and collective action litigation. Michele has litigated hundreds of class and collective actions involving positions such as home health aides, loan officers, retail salespersons, oil and gas workers, assistant managers, field service engineers, call center representatives, exotic dancers, inside sales representatives, restaurant workers, insurance adjusters, property specialists, property managers, installers, service technicians, and road construction laborers. She is additionally admitted to practice before the United States Court of Federal Claims.

Michele is active in several organizations. She is a Co-Chair and faculty member of the Practicing Law Institute's Wage & Hour Litigation and Compliance conference, and the Co-Chair of the ABA Labor and Employment Law Section's Annual Conference Planning Committee. She has served as the Co-Chair of the ABA Labor and Employment Law Section's Federal Labor Standards Legislation Committee, Co-Editor-in-Chief of the ABA Labor and Employment Law Section's Federal Labor Standards Legislation Committee FLSA Midwinter Report, the Co-Chair of the ABA Labor and Employment Law Section's Revenue and Partnership Development Committee, Track Coordinator for the ABA Labor and Employment Law Section's annual conference, an editorial board member for BNA's the Fair Labor Standards Act Treatise, and a chapter editor for BNA's Wage and Hour Laws: A State-by-State Survey. She is a Fellow in the College of Labor and Employment Lawyers, has been named to the Best Lawyers, Super Lawyers, Top Women Attorneys, Lawyers of Distinction, and Rising Star lists repeatedly, is a member of the Top 10 Wage and Hour Lawyers, Top 100 National Trial Lawyers, Top 100 High Stakes Litigators, and LawDragon 500 Leading Plaintiff Employment Lawyers. Michele volunteers as an attorney for a foster child through the Children's Law Center. She also created and administers arbitratorrater.com. **Education:** B.A. St. Cloud State University 1997, J.D. William Mitchell College of Law 2000.

Matthew H. Morgan is a managing partner at the Firm and a Minnesota State Bar Association Civil Trial Specialist. Much of Matt's career has focused on litigating class and collective actions on behalf of individuals seeking minimum wage and overtime pay and fighting discrimination. Recently, Matt first-chaired a nineteen-day age discrimination class action trial on behalf of nearly 1000 people against the federal government. Matt has been recognized as a Super Lawyer every year since 2014,

and has been named to the Who's Who in Employment Law by Minnesota Law and Politics. Matt formerly served as an adjunct faculty member at William Mitchell College of Law (now Mitchell Hamline) teaching representation skills to first-year students and advanced advocacy to second- and third-year students. Matt is a frequent lecturer at legal seminars, focusing on litigation-related topics including trials and taking 30(b)(6) depositions. **Education:** B.A. University of Minnesota 1996, J.D. William Mitchell College of Law 2000.

Rachhana T. Srey is a Partner at Nichols Kaster, PLLP who has extensive litigation experience, primarily dedicating her legal practice to national wage and hour complex class and collective action employment litigation. She has been a zealous advocate for thousands of employees over her 14-year career, representing a wide variety of workers in many industries including those who work in healthcare, insurance, financial services, communications, retail, manufacturing, and security industries as well as federal sector employees. Rachhana's exceptional case management and advocacy skills, dedication to her clients, strong work ethic and outgoing personality have earned her the respect of her clients and of her colleagues in the legal community. Rachhana has tried several wage and hour cases, most notably obtaining a jury verdict that was upheld by the Sixth Circuit in favor of a group of nearly three hundred cable installers. In addition to her wage and hour practice, Rachhana is also currently litigating a large age discrimination class case venued at the EEOC. She is active in several organizations, holding leadership positions in a few. Rachhana is currently the Co-Chair of the National Employment Lawyer Association's ("NELA") Wage & Hour Committee and Practice Group and the Co-Chair of the Association of Justice's ("AAJ") Wage & Hour Litigation Group. She is also an active Board Member of Mid-Minnesota Legal Aid. Rachhana is often invited to speak nationally and locally on a wide range of topics including class and collective action litigation strategies, wage and hour litigation, discovery issues, recent developments in the law, and age and gender discrimination. **Education:** B.A. University of Minnesota 2000, J.D. William Mitchell College of Law 2004 *cum laude*.

Matthew C. Helland is an experienced and tenacious litigator who has fought for workers' and consumers' rights throughout his career. Matt serves as the managing partner of Nichols Kaster's San Francisco office, where he focuses his practice on class and collective wage and hour cases filed in California and throughout the country. Handling both large class actions and individual matters throughout this career, Matt has developed a record of success in significant and complex litigation. Matt litigates each of his cases with the same zealous advocacy and passionate protection of his clients' rights, whether the case involves millions of dollars and thousands of clients, or thousands of dollars and one individual. In addition to representing workers across the country in wage and hour actions, Matt has also handled cases involving WARN Act violations, breach of contract, and severance negotiations. Matt is licensed in both California and Minnesota. Matt is an active volunteer at Workers' Rights Clinics through Legal Aid Work, where he supervises student attorneys in providing legal assistance to low wage workers. While attending the University of Minnesota Law School, Matt was a staff member and Managing Tribute Editor of the University of Minnesota Journal of Global Trade. He also participated in the Child Advocacy Clinic, representing the interests of children as a student attorney in both Family and Juvenile Court. **Education:** B.A. Rhodes College 2002 *magna cum laude*, J.D. University of Minnesota Law School 2005 *magna cum laude*.

David E. Schlesinger David Schlesinger is an experienced attorney who has been recognized for the quality of his work for employees. He is an MSBA Certified Employment Law Specialist who has been selected as a Super Lawyer for the last seven years. He teaches Law in Practice at the University of Minnesota Law School and is the former president of the Minnesota Chapter of the National Employment Lawyers Association. David has successfully litigated a wide variety of employment claims, including several significant cases involving gender discrimination, cases under the Americans with Disabilities Act, and many other claims. His practice also includes an emphasis on the intersection of employment and business disputes, including litigation of breach of fiduciary duty and minority shareholder claims. He has effectively defended employees from non-compete and trade secret claims brought by their former employers. **Education:** B.A. Mary Washington College 2001 *cum laude*, J.D. University of Minnesota Law School 2006 *cum laude*.

Anna P. Prakash is one of the leaders of the firm's Civil Rights and Impact Litigation practice group. Her practice focuses on complex class and multi-plaintiff actions on behalf of protected groups. Over the course of her time at the firm, Anna has led the firm's National Consumer Class Action practice group, been a member of the firm's National Wage & Hour practice group, and authored and argued class and individual appeals. She fights for her clients, brings a high level of skill and intellect to the fight, and has achieved success for her clients in state and federal courts around the country, including and as referenced above: the summary judgment victories in *Huff*, *Hart*, and *Clincy*; the successful appeal in *Bible v. United Student Aid Funds*; class certification in *MacDonald v. CashCall, Inc.*; considerable settlements in each of those cases; the defeat of motions to dismiss and strike class allegations in *Carmen* and *Fain*; and the trial verdict in *FTS*. Anna is also involved in numerous professional organizations. She serves on the Board of Directors of the People's Parity Project, as well as the Board of Directors of the Public Justice Foundation, a nationwide organization supporting high-impact lawsuits to combat injustice. Anna is also a member of Twin Cities Diversity and Practice's Professional Development Committee, the employee-side co-chair of the American Bar Association's Occupational Safety and Health Committee, and a member of the Nominating Committee for the National Association of Consumer Advocates. Anna previously served on the Board of Directors of Standpoint, an organization that exists to serve domestic and sexual violence survivors and professionals working within the justice system in Minnesota, and is also a past board member of the Minnesota Chapter of the National Employment Lawyers' Association. She is a frequent speaker at national legal seminars and an adjunct professor of legal writing at the University of Minnesota Law School. **Education:** B.A. University of Michigan 2002, J.D. Cornell Law School 2005.

Rebekah L. Bailey is a tireless advocate dedicated to civil rights and social justice. She has helped tens of thousands of employees and consumers recover millions of dollars primarily in complex class and collective actions across the country. Rebekah has worked on the firm's wage and hour team and was a founding member of the consumer practice area as well as the firm's civil rights and impact litigation group. Rebekah has been recognized as a Minnesota Super Lawyer every year since 2014. Over the years, she has served on numerous trial and arbitration teams, successfully first-chairing her first bench trial. Rebekah has achieved several affirmative summary judgment determinations and certification

decisions, including in *Rego*, *Dunham-Sunde*, *Henderson*, *Vaughan*, *Spar*, and *Norris-Wilson*, mentioned above. Rebekah leads the firm's e-discovery committee. She has spoken at national seminars on various topics, including electronic discovery, class litigation, arbitration, equal pay, and various wage and hour issues. Rebekah is a practical instructor for the University of Minnesota's Law & Practice course. She is a member of the District of Minnesota's Federal Practice Committee, and a board member for the Complex Litigation eDiscovery Forum. She is very involved in the ABA's Labor and Employment Law section. She serves as the employee vice chair of the section's treatise committee; she is an associate editor for the FLSA Committee's Mid-Winter Report; and she serves as a FLSL liaison to the ABA/LEL CLE Coordinating & Resources Committee. **Education:** B.S. Grand Valley State University 2004 *magna cum laude*, J.D. University of Minnesota Law School 2008 *magna cum laude*.

Reena I. Desai is a partner at Nichols Kaster, PLLP, in the firm's Minneapolis office. She is a skilled and meticulous litigator, who has represented thousands of employees in class and collective actions to recover unpaid overtime, minimum wages, commissions, and other types of compensation. Reena has also advocated for employees in cases involving race, age and disability discrimination. She is a board member of a legal non-profit and frequently speaks at legal seminars and conferences across the country. Reena has dedicated the majority of her career to helping employees combat wage theft and recover unpaid overtime compensation, minimum wages, and other unpaid compensation. She has represented employees in a variety of industries, including investigators, home health care workers, loan officers, mortgage underwriters, field service technicians, sales representatives, and restaurant workers. Reena has also litigated discrimination cases on both a class and individual level, advocating for employees whose employers have discriminated against them because of their age, race or disability. Reena has been asked to share her knowledge and experience with her peers, serving as a speaker at several national conferences. She has lectured on topics including wage and hour litigation, electronic discovery issues, attorney-client privilege and mediation/settlement. Reena also serves on the Board of Directors for the Minnesota Justice Foundation, a legal non-profit in Minnesota, and has been named a Rising Star by Minnesota Super Lawyers every year since 2014. **Education:** B.A. George Washington University 2002 *magna cum laude*, J.D. University of Minnesota Law School 2007 *cum laude*.

Robert L. Schug is a partner on Nichols Kaster's Civil Rights and Impact Litigation team. Robert has more than a decade of experience litigating cases through trial in both court and arbitration. He has represented employees across the country on a variety of issues, including race, gender, and disability discrimination, employee misclassification, unpaid overtime, and unpaid wages. Robert previously served as Director of Litigation at the Impact Fund, a nationally recognized non-profit law firm in Berkeley, California devoted to achieving social justice through large scale impact litigation. He has been recognized as a Rising Star by Northern California and Minnesota Super Lawyers. He is licensed in California and Minnesota. **Education:** B.S. Middle Tennessee State University 2003 *summa cum laude*; J.D. William Mitchell College of Law 2006 *summa cum laude*.

Brock J. Specht is partner on Nichols Kaster's ERISA litigation team. He represents retirees in lawsuits against some of the country's largest corporations, holding these companies accountable when

they fail to deal fairly and honestly with their employees and customers. His recent cases have led to the recovery of millions of dollars in retirement benefits for thousands of participants in 401(k) plans nationwide. Prior to joining the firm, Brock worked with a major Twin Cities law firm, and as a law clerk for two judges on the Minnesota Court of Appeals. Brock also has worked as a Special Assistant State Public Defender, *pro bono*, and as an Adjunct Professor of Law at the University of St. Thomas School of Law. **Education:** B.A. University of Minnesota 2002, J.D. University of St. Thomas School of Law 2007 *magna cum laude*.

| Associate Biographies

Ben J. Bauer is a member of Nichols Kaster's ERISA litigation team where he represents employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. Prior to joining the firm, Ben clerked for Judge Tom Fraser in Hennepin County District Court. During law school, he interned for the Minnesota Department of Human Rights, the ACLU of Minnesota, and earned the Law School Public Service Award. Prior to law school, Ben taught 7th grade English in Tulsa, Oklahoma and continued to work in schools while completing his law degree in Mitchell Hamline's night program. **Education:** B.A., St. John's University, 2011, *magna cum laude*, J.D., Mitchell Hamline School of Law, 2017, *magna cum laude*.

Caroline E. Bressman is a member of the firm's national wage and hour litigation team where she fiercely advocates for workers' rights. Caroline is dedicated to furthering social justice and equity in the workplace on behalf of employees challenging their employers' unfair practices. Caroline is a contributing editor to the Fair Labor Standards Act Midwinter Report of the ABA Section of Labor and Employment Law. During law school, Caroline served as a staffer, and subsequently Symposium Articles Editor, for the *Minnesota Law Review* and clerked for a nonprofit legal and policy advocacy organization focused on addressing gender inequality. Caroline was also the recipient of the ABA-Bloomberg BNA Award for Excellence in Health Law. **Education:** B.A. St. Olaf College 2015 *magna cum laude*, J.D. University of Minnesota Law School 2018 *cum laude*.

Daniel S. Brome worked with the California Labor Commissioner while in law school and served as the Editor-in-Chief of the Berkeley Journal of Employment and Labor Law, and as Director of the Workers' Rights Clinic. After law school, Daniel worked with a California law firm representing workers and unions in arbitrations and litigation. Daniel continues pursuing his passion for employment law at Nichols Kaster, working with the firm's national wage and hour team out of the San Francisco office. **Education:** B.A. Princeton University 2005, J.D. University of California Berkeley School of Law 2011.

Grace Chanin is a member of Nichols Kaster's ERISA litigation team where she represents employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. Prior to joining the firm, Grace clerked for Judge Connolly, Judge Larkin, and Judge Bjorkman at the Minnesota Court of Appeals. She graduated *magna cum laude* from the Mitchell Hamline School of Law and received three separate CALI awards for her work as the top-performing student in a class. During law school, she was a member of

the Mitchell Hamline law review, worked as a law clerk for a Minneapolis business law firm, and received the Law School Public Service Award for her work as a pro bono law clerk at a top Minneapolis law firm. **Education:** B.A., Minnesota State University 2012 *magna cum laude*, J.D. Mitchell Hamline School of Law 2018 *magna cum laude*

H. Clara Coleman is a member of Nichols Kaster's National Wage and Hour litigation Team where she fights for employees' right to hard-earned wages. Prior to joining Nichols Kaster, Clara served an Attorney-Advisor to the Honorable Christopher Larsen at the U.S. Department of Labor, Office of Administrative Law Judges in San Francisco where she collaborated with ALJ Larsen to manage and decide employment-related matters. Clara also focused on the advancement of workers' rights throughout law school. She advocated for employees in her two clerkship positions at plaintiff-side employment firms, and represented a wage and hour client as a student-attorney for the Public Justice Advocacy Clinic. **Education:** B.A., Loyola University Maryland, *summa cum laude*; J.D., George Washington University School of Law, *with honors*.

Patricia C. Dana is a member of Nichols Kaster's ERISA litigation team where she represents current and former employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. Prior to joining Nichols Kaster, she clerked for Justice Anne McKeig on the Minnesota Supreme Court. During law school, she was an editor of the *University of St. Thomas Law Journal*, worked as a law clerk at Mid-Minnesota Legal Aid, clerked for Judge Michael Browne in Hennepin County District Court, and received the Judge Earl R. Larson Award for excellence in the study of federal law and practice. Prior to law school, Patty represented Medicare and Medicaid recipients in administrative appeals at The Legal Aid Society in New York. **Education:** B.A., Carleton College, *cum laude*; J.D., University of St. Thomas, *summa cum laude*.

Charles A. Delbridge is a member of Nichols Kaster's Civil Rights and Impact Litigation Team where Charlie focuses on class actions on behalf of employees, consumers, and other protected groups. Charlie's cases challenge discrimination of all types, fraud, and other unfair practices. He has nearly a decade of experience as a civil litigator across a broad range of substantive practice areas. Charlie has been recognized as a "Minnesota Rising Star" by *Super Lawyers* magazine, and an "Up & Coming Attorney" by *Minnesota Lawyer*. He is active in professional organizations, having served as a member of the Board of Directors of both the Minnesota State Bar Association and Minnesota Continuing Legal Education. **Education:** B.A. University of Wisconsin-Madison 2003, J.D. William Mitchell College of Law 2006 *magna cum laude*.

Laura A. Farley is a member of Nichols Kaster's individual rights litigation team and is dedicated to protecting the rights of current and former employees who face a wide-range of employment-related issues, including discrimination, harassment, retaliation, minority shareholder, and contract disputes. Prior to joining Nichols Kaster, Laura worked as an associate for a Minneapolis litigation firm, focusing on minority shareholder, employment, and contract disputes. During law school, Laura was on the Executive Board of the *Minnesota Law Review*, the board of the Women's Legal Student Association, and volunteered with the Advocates for Human Rights. Prior to attending law school, Laura worked for a

Fortune 100 company in business-to-business sales supporting operations and logistics in small businesses. **Education:** B.A. University of St. Thomas 2010 *magna cum laude*, J.D. University of Minnesota Law School 2015.

Kate Fisher is a Case Development Attorney for the Nichols Kaster's Civil Rights and Impact Litigation Practice Group. In this role, she investigates new cases and works with other members of the Group to advance litigation. Kate formerly served as an Associate Attorney for the firm's Individual Practice Group, where she represented employees in a wide range of employment-related matters, including but not limited to, allegations of discrimination, harassment, retaliation, violations of the Family and Medical Leave Act, and whistleblower claims. In addition to her practice, Kate has also served as an Adjunct Professor at St. Thomas Law School and Mitchell Hamline School of Law. **Education:** B.A. College of St. Catherine 2006 *summa cum laude*, J.D. University of St. Thomas School of Law 2011 *cum laude*.

Matthew A. Frank was named a 2017 Minnesota Lawyer of the Year. Matt attended the University of Michigan Law School as a Clarence Darrow Scholar. At graduation, he received the Robert S. Feldman Award for outstanding work in labor and employment law. Prior to joining Nichols Kaster in 2016, Matt clerked for the Hon. Susan N. Burke in Hennepin County District Court and practiced plaintiffs' employment law at another Twin Cities firm. Matt is part of Nichols Kaster's individual rights team. **Education:** B.A. University of Colorado Boulder 2002 *summa cum laude*, Philosophy Ph.D. (ABD) University of Minnesota, J.D. University of Michigan Law School 2013 *cum laude*.

Melanie A. Johnson is a member of Nichols Kaster's Civil Rights and Impact Litigation team. Prior to joining the firm, Melanie clerked for Judge Matthew E. Johnson at the Minnesota Court of Appeals. During law school, she served as a managing editor of the *Minnesota Law Review*, student director of the Child Advocacy and Juvenile Justice Clinic, research assistant in the area of juvenile law, and board member of the student chapter of the Minnesota Justice Foundation. She received the Mondal Hall Engagement Award in 2019. **Education:** B.A. University of Oregon 2010 *magna cum laude*, J.D. University of Minnesota Law School 2019 *cum laude*.

Kayla M. Kienzle is a member of Nichols Kaster's National Wage and Hour Litigation Team where she advocates on behalf of workers seeking unpaid wages in class and collective actions across the country. Kayla is also a contributing author to the ABA Fair Labor Standards Act Midwinter Report. Prior to joining the firm, Kayla clerked for the Honorable John R. Rodenberg and the Honorable Michelle A. Larkin at the Minnesota Court of Appeals. During law school, she served as Submissions Editor for the University of St. Thomas Law Journal and as President of the Women Law Students Association. She also worked as a law clerk at the Hennepin County Public Defender's Office and a legal intern at the United States Department of Justice, Office of Justice Programs, Office for Civil Rights. Prior to attending law school, Kayla worked in retail management. **Education:** B.A., Iowa State University, J.D., University of St. Thomas School of Law, *cum laude*.

Michelle L. Kornblit is a member of Nichols Kaster's individual rights practice group and assists employees with a wide-range of claims, including discrimination, harassment, retaliation and whistleblower protection. Michelle has been dedicated to employee rights and challenging unfair employment practices her entire career. While in law school, Michelle interned with an Administrative Law Judge of the U.S. Equal Employment Opportunity Commission, and with the Women's Rights Project of the American Civil Liberties Union. Prior to joining Nichols Kaster, Michelle was an associate with a leading employment litigation firm in New York, representing employees in individual, multi-party and class action cases. **Education:** B.A. New York University 2010 *cum laude*, J.D. Benjamin N. Cardozo School of Law 2014 *cum laude*.

Jennifer K. Lee is a member of the firm's national class-action ERISA team. She is a skilled litigator who has dedicated her legal career to advocating on behalf of the vulnerable. As a member of Nichols Kaster's ERISA practice, she is proud to represent employees whose hard-earned retirement savings have been squandered due to excessive fees, imprudent investments, and employer self-dealing. Through class action litigation, Jenny has helped recover tens of millions of dollars in retirement savings for her clients. Prior to joining Nichols Kaster, Jenny worked as Pro Bono Counsel at a national law firm, a staff attorney with the American Civil Liberties Union's national office in New York, and as an associate at the corporate law firm Cravath, Swaine and Moore in New York City. During law school, Jenny served as Editor-in-Chief of the *University of Chicago Legal Forum* and interned for New York's Legal Aid Society's Prisoners' Rights Project, Planned Parenthood Federation of America, and the ACLU of Illinois. **Education:** B.A. Yale University 2010 *cum laude*, J.D. University of Chicago Law School 2006 with honors.

Neil Pederson has been practicing law with the firm since October 2017. Prior to that, he clerked for the Honorable Karen A. Janisch in Hennepin County State District Court. His practice has focused on national class action employment discrimination litigation and national wage and hour class and collective action litigation. He has represented hundreds, if not thousands, of workers who have been discriminated against or who are seeking to recover lost wages, including overtime pay and minimum wages, through collective, class, and hybrid actions. Since he started at Nichols Kaster, Neil has worked on multiple class and collective actions, involving positions such as railroad workers, home health aides, delivery drivers, oil field workers, and nurses. Neil has handled managing discovery and filing class certification and other motions in these cases. In addition to being a litigation associate at the firm, Neil also works with its Business Development Group, which originates class and collective actions. Neil is also a contributing editor to the ABA Section of Labor and Employment Law's Fair Labor Standards Act Midwinter Report. Neil volunteers as an attorney for the Mid-Minnesota Legal Aid's Housing Section. **Education:** B.A. University of Minnesota 2007 *summa cum laude*, Political Science Ph.D. work University of Chicago 2008-2010, J.D. William Mitchell College of Law 2015 *summa cum laude*.

Chloe A. Raimey is a member of Nichols Kaster's Civil Rights and Impact Litigation group. Prior to joining Nichols Kaster, she clerked for Justice Anne McKeig on the Minnesota Supreme Court. During law school, Chloe served as the editor-in-chief of the *University of St. Thomas Law Journal*, worked as a litigation law clerk for the League of Minnesota Cities, interned with the Advocates for Human

Rights, and represented consumers in Chapter 7 bankruptcy proceedings. Prior to law school, Chloe gained additional writing experience as well as employee benefits knowledge as a communications specialist with a focus on human resources topics. **Education:** B.A. University of Florida 2008 *summa cum laude*, J.D. University of St. Thomas School of Law 2016 *magna cum laude*.

Nicole J. Schladt is a member of Nichols Kaster's Civil Rights and Impact Litigation group. Prior to joining Nichols Kaster, Nicole served as a judicial law clerk for the Honorable Susan M. Robiner in Minnesota's Fourth Judicial District. During her time in law school, Nicole co-founded Emory LGBTQ Legal Services (ELLS), an organization created to provide pro bono legal assistance to members of Atlanta's queer community. Her work with ELLS led to her receiving the 2018 Marion Luther Brittain Award, Emory University's highest student honor, as well as the 2018 National LGBT Bar Association Student Leadership Award. Nicole's academic research prior to law school explored the intersections of international human rights law, feminist theory, and international politics. **Education:** B.A. University of Kentucky 2014 *summa cum laude*, M. Phil. University of Cambridge 2015, J.D. Emory University School of Law 2018 *with honors*.

Jacob T. Schutz is a member of Nichols Kaster's ERISA litigation team where he represents current and former employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. In law school, Jacob was an editor of the ABA Journal of Labor & Employment Law and published an article on the association provision of the Americans with Disabilities Act. Prior to joining Nichols Kaster, he was an associate in a firm acting as general counsel for Taft-Hartley employee benefit funds. **Education:** B.A. University of Pennsylvania 2010, J.D. University of Minnesota Law School 2013 *magna cum laude*.

Mark E. Thomson is a member of Nichols Kaster's ERISA team where he represents current and former employees whose retirement accounts have been shortchanged due to excessive fees, imprudent investments, employer self-dealing, and general mismanagement. Prior to joining Nichols Kaster, he clerked for Justice David Lillehaug and Justice Anne McKeig on the Minnesota Supreme Court. During law school, Mark was an editor of the *Harvard Civil Rights-Civil Liberties Law Review* and interned with the Consumer Financial Protection Bureau, the National Consumer Law Center, and the Massachusetts Attorney General's Office. **Education:** B.A. University of Minnesota 2011 *summa cum laude*, J.D. Harvard Law School 2016.

| Staff Attorney and Of Counsel Biographies

Laura A. Baures is a staff attorney dedicated to fighting for employees and applicants who have been discriminated against for unlawful reasons including on the bases of their age, disability, race, color, national origin, religion, and sex. In addition, she helps employees pursue their fair and equal wages owed in the eyes of the law. Her work focuses primarily on representing classes fighting against discrimination. Laura has experience in both federal and private sector matters. During law school, Laura won the MSBA Labor and Employment Law Section Law Student Award in Labor Law. Laura participated in the AAJ Regional Trial Competition, was president of the Women Law Students Association, and volunteered for over 100 hours through the Minnesota Justice Foundation working as

certified student attorney for the Washington County Public Defender's Office and at Eldercare Rights Alliance. She also completed an externship with the Honorable Gail Chang Bohr at Minnesota's Second Judicial District. Before law school, Laura worked for a local company that provides residential care for people with disabilities where she discovered her passion for employment law. **Education:** B.A. University of Wisconsin – Eau Claire *cum laude*, J.D. William Mitchell College of Law.

Carl F. Engstrom is of counsel and a subject matter expert on Nichols Kaster's ERISA Litigation Team. As a founding member of the ERISA litigation group, Carl has been counsel of record in every case brought by the group since its inception in 2015. In that time, the ERISA litigation group has negotiated settlements totaling approximately \$80 million on behalf of retirement plan participants shortchanged by excessive fees and imprudent retirement plan investments. Before joining Nichols Kaster, Carl clerked for judges at both the Minnesota Court of Appeals and Hennepin County District Court. Prior to entering the legal profession, he spent six years working as a financial advisor, providing retirement and investment advice to hundreds of clients, and earning the Certified Financial PlannerTM designation. **Education:** B.A. Harvard College 1998, J.D. University of Minnesota Law School 2012 *magna cum laude*.

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

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

**DECLARATION OF AVATARA SMITH-CARRINGTON IN SUPPORT OF
PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION**

I, Avatara Smith-Carrington, declare as follows:

1. I am a Staff Attorney with Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), and counsel for Plaintiffs in this litigation. I have practiced law since 2019, and have maintained a full-time practice in civil rights issues for lesbian, gay, bisexual, and transgender people since then. I am licensed to practice law in the State of Maryland, and am practicing before this Court as a Visiting Attorney in accordance with the requirements of Local Rule of Civil Procedure 83.6. I submit this declaration in support of Plaintiffs’ Motion for Class Certification. I make this declaration of my own personal knowledge, and, if called as a witness, I could and would testify competently to the matters stated herein.

2. Lambda Legal is committed to the vigorous, effective, and efficient prosecution of the interests of Plaintiffs and the proposed class (the “Class”).

3. Based on my co-representation of Plaintiffs in this matter with the law firms of The Employment Law Center, PLLC (“ELC”) and Nichols Kaster, PLLP (“NK”), it is my belief that the attorneys of ELC and NK are likewise committed to the vigorous, effective, and efficient

prosecution of this matter.

4. Since the filing of the complaint in this action, Lambda Legal, ELC, and NK (collectively, “Plaintiffs’ counsel”) have dedicated many hours to the investigation and research of Plaintiffs’ claims, motion practice, written discovery, and fact and expert depositions.

5. Lambda Legal has dedicated, and will continue to commit, substantial resources to the representation of the Class.

6. Plaintiffs’ counsel have agreed to act jointly as Class counsel, if the Court so designates them.

I. Experience of Lambda Legal

7. ***Lambda Legal’s experience with civil rights cases on behalf of transgender people.*** Lambda Legal has extensive experience in the law surrounding the civil rights of transgender people. Lambda Legal is the oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has been party counsel and counsel for *amici curiae* in numerous constitutional and civil rights law challenges seeking equal treatment for transgender people. Lambda Legal’s work to secure equal treatment and dignity for transgender people has included:

A. Representing transgender individuals facing healthcare discrimination, *Kadel v. Folwell*, No. 19-cv-00272 (M.D.N.C.); *C.P. v. Blue Cross Blue Shield of Illinois*, No. 20-cv-06145-RJB (W.D. Washington); *Fain v. Crouch*, No. 3:20-cv-00740 (S.D. W.Va.); *Fletcher v. State of Alaska*, 443 F. Supp. 3d 1024, 1026 (D. Alaska 2020); *Simonson v. Oswego Cty.*, No. 5:17-cv-01309-MAD-DEP (N.D.N.Y.); *Conforti v. St. Joseph’s Healthcare System*, No. 2:17-cv-

00050 (D.N.J.); *Esquivel v. State of Oregon*, No. 11C17487 (Or. Cir. Ct. 2011); *Lawrence v. Cobert*, No. 510-2014-00396X (E.E.O.C.).

B. Representing transgender athletes and students denied access to participation in scholastic sports, *B.P.J. v. West Virginia State Board of Education*, No. 21-cv-00316 (S.D. W.Va.); *L.E. v. Lee*, No. 21-cv-00835 (M.D. Tenn.); *Hecox v. Little*, No. 20-35813 (9th Cir.) (*amicus*).

C. Representing transgender soldiers and prospective enlistees challenging the President's ban on their open service in the military and seeking access to gender-confirming healthcare, *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

D. Representing transgender students seeking access to restrooms matching their gender identity, *Adams v. St. Johns County School District*, No. 18-13592 (11th Cir.); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016).

E. Representing school administrators as *amici curiae*, along with colleagues at Pillsbury, Winthrop, Shaw, Pittman, LLP ("Pillsbury"), in cases involving transgender students' access to sex-separated facilities, *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), *and vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016).

F. Representing transgender employees facing anti-transgender job discrimination, *Roberts v. Clark Cty, Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) (*amicus*);

Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1168 (N.D. Ga. 2014), *aff'd in part, rev'd in part sub nom. Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883 (11th Cir. 2016) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

G. Representing transgender prisoners denied basic respect for their gender identity, *Yoakam v. Virginia Dep't of Corrections*, No. 3:21-cv-31 (W.D. Va.); *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764 (E.D. Mo. Feb. 9, 2018).

H. Representing transgender people seeking the ability to correct their identity documents, *Corbitt v. Taylor*, No. 21-10486 (11th Cir.) (*amicus*); *Fowler v. Stitt*, No. 22-cv-00115-GFK-SH (N.D. Okla.); *Campos v. Cohen*, No. 21-cv-00880 (M.D.N.C.); *Gore v. Lee*, No. 19-cv-00328 (M.D. Tenn.); *Ray v. McCloud*, 507 F. Supp. 3d 925, 929 (S.D. Ohio 2020); *Arroyo Gonzalez v. Rossello Nevaes*, 305 F. Supp. 3d 327 (D.P.R. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018).

8. Lambda Legal's work on behalf of transgender people also is integrally tied to Lambda Legal's 45-year history of advancing sex and sexual orientation anti-discrimination doctrines on behalf of the LGBT community, which has led to Lambda Legal's involvement as party counsel, and on behalf of *amici curiae*, in leading Supreme Court cases addressing the rights of LGBT people. *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (*amicus*); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (party counsel); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (*amicus*); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (*amicus*); *Lawrence v. Texas*, 539 U.S. 558 (2003) (party counsel); *Romer v. Evans*, 517 U.S. 620 (1996) (party counsel).

9. ***Lambda Legal's experience with class action cases.*** Lambda Legal also has experience handling both putative and certified class action suits, including *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (counsel for plaintiff-intervenor class); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (counsel for plaintiff class certified in subsequent proceedings); *Thornton v. Comm'r of Soc. Sec.*, No. C18-1409JLR, 2020 WL 5494891 (W.D. Wash. Sept. 11, 2020) (counsel for plaintiff class); *Ely v. Saul*, No. 18-cv-0557, 2020 WL 2744138 (D. Ariz. May 27, 2020), appeal dismissed (Nov. 2, 2021) (counsel for plaintiff class); *Being v. Crum*, No. 3:19-cv-00060 (D. Alaska filed March 4, 2019) (counsel for putative plaintiff class); *Birchfield v. Armstrong*, No. 4:15-cv-00615, 2017 WL 1433032, at *1 (N.D. Fla. Mar. 23, 2017) (counsel for plaintiff class); *Torres v. Rhoades*, No. 3:15-cv-00288-bbc (N.D. Ill. filed May 13, 2015) (counsel for putative plaintiff class); *Inniss v. Aderhold*, No. 1:14-cv-01180-WSD (N.D. Ga. filed April 22, 2014) (counsel for putative plaintiff class); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (counsel for plaintiff class); *East v. Blue Cross & Blue Shield of La.*, No. 3:14-CV-00115 (M.D. La. filed Feb. 20, 2014) (counsel for putative plaintiff class).

II. Experience of Counsel in this Case

10. I, Avatara Smith-Carrington graduated from the University of Maryland Francis King Carey School of Law in 2019, and I have practiced law continuously since that time. I have worked full-time at Lambda Legal on civil rights cases for the LGBT community and people living with HIV since 2019. In addition to serving as lead counsel in this case, I also am counsel in, most relevant here, *B.P.J. v. West Virginia State Board of Education*, No. 21-cv-00316 (S.D. W.Va.), a federal lawsuit challenging West Virginia's law banning girls and women who are transgender from participating in school sports and *Campos v. Cohen*, No. 21-cv-00880

(M.D.N.C.), a federal lawsuit challenging North Carolina’s policy requiring transgender people to have undergone “sex reassignment surgery” in order to obtain an accurate birth certificate. A true and correct copy of my resume is attached hereto as Exhibit A.

11. Tara L. Borelli graduated from the University of California, Berkeley School of Law in 2001, and has practiced law continuously since that time, including at the Los Angeles office of Proskauer Rose, LLP and the Seattle law firm of Newman & Newman, LLP (now, Newman DuWors, LLP). Ms. Borelli has worked full-time at Lambda Legal on civil rights cases for the LGBT community since 2006. Ms. Borelli has worked on an extensive number of cases involving equal treatment for transgender people, including most relevant here: serving as lead counsel in *Fletcher v. State of Alaska*, 443 F. Supp. 3d 1024, 1026 (D. Alaska 2020), in which she secured summary judgment for the plaintiff and eliminated the exclusion for gender-confirming surgical care in the Alaska state employee health plan; serving as lead counsel in *Kadel v. Folwell*, No. 19-cv-00272 (M.D.N.C.), challenging the blanket exclusion of gender-confirming care in the North Carolina state employee health plan; serving as counsel in *Being v. Crum*, No. 3:19-CV-00060-HRH (D. Alaska), a federal lawsuit and putative class action that secured removal of the exclusion of coverage for gender-confirming care in the State of Alaska’s Medicaid program; and serving as lead counsel in *Adams v. St. Johns County School District*, No. 18-13592 (11th Cir.), securing judgment after a trial on behalf of a young transgender man seeking equal access to boys’ restrooms at school. Ms. Borelli also was co-counsel in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), which helped secure access to gender-confirming care for transgender service members and established that heightened scrutiny applies to discrimination based on transgender status.

12. In addition, among the putative and certified class action cases listed above, Ms. Borelli has been counsel in *Bostic v. Schaefer*; *Diaz v. Brewer*; *Ely v. Saul*; *Thornton v. Comm'r of Soc. Sec.*; *Being v. Crum*; *Birchfield v. Armstrong*; and *Inniss v. Aderhold*. A true and correct copy of Ms. Borelli's resume is attached hereto as Exhibit B.

13. Carl S. Charles graduated from the University of Denver Sturm College of Law in Denver, Colorado in 2013, and has practiced law continuously since that time. Mr. Charles has practiced civil rights law at several nonprofit legal advocacy groups and government entities, including the Jon L. Stryker and Slobodan Randjelovic LGBT & HIV Project at the American Civil Liberties Union, the New York City Commission on Human Rights, A Better Balance, and Lambda Legal. Mr. Charles has worked full-time at Lambda Legal on civil rights cases for the LGBT community since 2019. Mr. Charles has worked on several cases involving equal treatment for transgender people, including most relevant here: serving as lead counsel in *Being v. Crum*, No. 3:19-CV-00060-HRH (D. Alaska), a federal lawsuit and putative class action challenging the State of Alaska's Medicaid program's exclusion of coverage for gender confirming care; counsel in *B.P.J. v. West Virginia State Board of Education*, No. 21-cv-00316 (S.D. W.Va.), a federal lawsuit challenging West Virginia's law banning girls and women who are transgender from participating in school sports; and counsel in *Kadel et al. v. Folwell et al.*, No. 19-cv-00272 (M.D.N.C.), a federal lawsuit challenging North Carolina's State Employee Health Insurance Plan's exclusion of coverage for gender affirming care for state employees and their dependents. A true and correct copy of his resume is attached hereto as Exhibit C.

14. Sasha Buchert graduated from Willamette Law School in 2005 and has practiced law since 2007. Ms. Buchert has maintained a full-time practice in civil rights issues for lesbian, gay, bisexual, and transgender people since 2013. Prior to joining Lambda Legal, full-time, in

2017, Ms. Buchert practiced civil rights law at the Transgender Law Center. Ms. Buchert has worked on several cases involving equal treatment for transgender people, including most relevant here: *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), a federal challenge to a school policy in Kenosha, Wisconsin prohibiting students from using restrooms in accordance with their gender identity; *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), a federal challenge to a ban imposed by the Department of Defense prohibiting transgender people from enlisting, denying healthcare or living openly as transgender; *Gore v. Lee*, No. 19-cv-00328 (M.D. Tenn.), a federal challenge to the State of Tennessee's policy of denying birth certificate amendments of gender on birth certificates issued in the state; *Yoakam v. Virginia Dep't of Corrections*, No. 3:21-cv-31 (W.D. Va.); *L.E. v. Lee*, No. 3:21-cv-835 (M.D. Tenn), a federal challenge to the State of Tennessee's ban on the participation of transgender students in sex-specific sports in middle school and high school. A true and correct copy of her resume is attached hereto as Exhibit D.

15. Nora Huppert graduated from Columbia Law School in 2019 and has practiced law continuously since that time. Ms. Huppert has worked on several cases involving equal treatment for transgender people, including most relevant here: *Being v. Crum*, No. 3:19-CV-00060-HRH (D. Alaska); *F.V. v. Jeppesen*, 477 F. Supp. 3d 1144 (D. Idaho 2020); and *Chandler v. Cal. Dep't of Corrs. & Rehab.*, 1:21-CV-01657-NE-HBK (E.D. Cal.) (representing Proposed Intervenors). A true and correct copy of her resume is attached hereto as Exhibit E.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2022


Avatara Smith-Carrington

AVATARA SMITH- CARRINGTON

asmith-carrington@lambdalegal.org ✉

www.linkedin.com/in/avatara-smith-carrington 

Licensed to Practice in Maryland

EXPERIENCE

Staff Attorney | Lambda Legal Defense and Education Fund

09.2019 – PRESENT

- Handling all aspects of litigation including, but not limited to, client and case development, legal research, pleadings, motions practice, written discovery, depositions, expert witness work, administrative work, settlement negotiation, and amicus work. Maintaining issue area leadership and expertise, engaging stakeholders, collaborating with other movement organizations, and pursuing opportunities that specifically address and remedy inequities and disparities in both law and policy for TLGBQIA Black, Indigenous and People of Color (“BIPOC”) and BIPOC living with HIV.
- Current casework includes serving as lead counsel in *Fain v. Crouch*, a federal lawsuit challenging West Virginia’s blanket exclusion of coverage for gender-confirming care in its state health insurance plans; counsel in *B.P.J. v. West Virginia Board of Education*, a federal lawsuit challenging West Virginia’s law banning girls and women who are transgender from participating in school sports; counsel in *Campos v. Cohen*, a federal lawsuit challenging North Carolina’s policy requiring transgender people to have undergone “sex reassignment surgery” in order to obtain an accurate birth certificate; and counsel in *The Diversity Center v. Trump*, a federal lawsuit challenging the Trump administration’s Executive Order on Combating Race and Sex Stereotyping that prohibits federal contractors and grantees from conducting workplace diversity trainings or engaging in grant-funded work that explicitly acknowledges and addresses the existence and persistence of structural racism and sexism in the United States.
- Member of the legal team that secured the release of two asylum seekers living with HIV whose detention at an ICE detention facility in eastern Texas placed them in grave danger of illness and/or death from COVID-19.
- Within my first year as the former Tyron Garner Memorial Law Fellow, I secured a settlement against a multiple employer trust providing employee benefits on behalf of a nonbinary person whose plan excluded coverage for gender confirming care. The settlement agreement included compensatory damages; removal of the exclusion from the plan; inclusion of an express statement that gender confirming care is covered for all plan participants; and the provision of notice on the insurer’s website of the policy change to all plan participants.

Researcher | Institute for Technology Law & Policy at Georgetown Law

01.2020 – 06.2020

- As a Researcher on the Institute’s project on algorithmic fairness and disability rights, I explored, analyzed, and provided written work on the use of risk and threat assessments in the K-12 setting.

Linda Kennedy Fellow in Advocacy | Homeless Persons Representation Project

09.2018 – 05.2019

- Engaged in community-led, strategic policy advocacy aimed at funding the Ending Youth Homelessness Act and drafted policy recommendations for State agencies and nongovernmental entities that promote an end to homelessness in the state of Maryland.

Research Assistant to Professor. Taunya L. Banks | Francis King Carey School of Law

05.2018 – 07.2019

- Researched, analyzed, and drafted memoranda pertaining to hostile work environment jurisprudence in both conventional tort law and constitutional law with an emphasis on remedies available for employees experiencing race- and/or gender-based verbal harassment in the workplace.

Intern | Whitman-Walker Health

05.2018 – 08.2018

- Researched and drafted memoranda, compliance guidelines, and informed consent forms to ensure competent and informed care for transgender, nonbinary and/or gender-nonconforming adolescents seeking medical interventions for gender-confirming purposes.

Intern | FreeState Justice

09.2017 – 05.2018

- Conducted legal research and drafted policy materials as part of a comprehensive advocacy model that encompasses community outreach and education.

Case Alert Author | ABA Standing Committee on Federal Judicial Improvements' Media Alerts Project

08.2017 – 01.2018

- Drafted and edited case summaries on recent decisions issued by the United States Court of Appeals for the Fourth Circuit for publication on the American Bar Association's digital platform.

Access to Justice Tech Fellow | Maryland Volunteer Lawyers Service

05.2017 – 08.2017

- Retrieved and compiled judicial data using Structured Query Language to assist attorneys with various data-driven impact litigation projects.

EDUCATION**Juris Doctor | University of Maryland Francis King Carey School of Law**

MAY 2019

Honors & Activities: Maryland Law Review, Associate Editor; Rose Zetzer Fellow; CALI Excellence for the Future Award (Advanced Legal Research); CALI Excellence for the Future Award (Citizenship Seminar); Co-Chair, OutLaw; Community Service Chair, Black Law Students Association

Bachelor of Arts | Rutgers, The State University of New Jersey

MAY 2015

PROFESSIONAL ACTIVITIES

- 2020-Present | Board Member | Transgender Education Network of Texas
- 2018-2019 | Student Member to the Executive Board of Directors | FreeState Justice
- 2019-Present | Advisory Board Member | Kairos Fellowship

SELECTED PRESENTATIONS AND PANELS

- 2021 | American Bar Association, Young Lawyers Division | “The Lawyer’s Role in Social Movements”
- 2021 | The LGBTQ+ Project at Indiana University Maurer School of Law | “Let’s Talk About Gender: Racialization & Liberation in LGBT Rights Work”
- 2021 | Silicon Flatirons Center at University of Colorado Law School | “Categories of Control: The Regulation of Sexuality & Gender”
- 2021 | Law for Black Lives | “Black History is Now: Building the Power of Black Lead Movements”
- 2020 | ACLU of Texas | “Empowering Trans Voters in Texas”
- 2020 | Nelson Mullins Riley & Scarborough LLP | “Beyond Bostock: Protections and Barriers for the LGBTQ+ Community”
- 2020 | Texas Child Protection Services | “Disproportionality Series: LGBTQ and Race Equity”
- 2020 | Outten & Golden LLP | “Employment Discrimination and the Transgender Community”
- 2020 | Fried, Frank, Harris, Shriver & Jacobson LLP | Michael R. Diehl Civil Rights Forum “Pride Was a Riot: Reflecting on the History and Progress of the LGBTQ+ Movement”
- 2020 | State Bar of Texas Annual Meeting - Diversity Forum | “The Promises of the 15th and 19th Amendments in the Wake of Shelby, Voter Suppression, and Disenfranchisement: How You Can Secure Reform”
- 2020 | Columbia University in the City of New York | Lavender Graduation Keynote Speaker
- 2020 | Creating Change | “Policing of the Sex Trade: Advocacy Skills for Local, State, and Federal Policy Change”
- 2020 | Creating Change | “Texas Trans Kids: Creative Strategies for Advancing Trans Rights”
- 2020 | Creating Change | Day-Long Policing Institute
- 2019 | Resource Center | “LGBT Workers and the Supreme Court: What You Need to Know and What You Can Do”

SELECTED PUBLICATIONS AND MEDIA CREDITS

- 2021 | [“Texas governor orders investigation of ‘pornographic’ books in schools”](#) | Courthouse News
- 2021 | [“In Pursuit of Trans Liberation”](#) | American Constitution Society, Broken Law Podcast
- 2021 | [“‘Children will die’: Transgender advocates warn about risks as more states consider banning gender-affirming care for kids”](#) | USA Today
- 2021 | [“How AI lets bigots and trolls flourish while censoring LGBTQ+ voices”](#) | Mic
- 2020 | [“Donald Trump executive order banning diversity training blocked by federal judge”](#) | USA Today
- 2020 | [“The Legal Discrimination Still Keeping LGBTQ People Out of Work”](#) | Bloomberg

TARA L. BORELLI

Pronouns: she/hers

Lambda Legal:
making the case for equality



CONTACT



Tel: 470-225-5341
Fax: 404-506-9320



tborelli@lambdalegal.org



1 West Court Square,
Ste. 105
Decatur, GA 30030



www.lambdalegal.org

EDUCATION

UNIVERSITY OF CALIFORNIA
Berkeley, J.D., 2001

UNIVERSITY OF CALIFORNIA
Davis, B.A., 1998

BAR ADMISSIONS

Georgia

Washington

California



PROFILE SUMMARY



Tara Borelli is Senior Counsel in the Southern Regional Office of Lambda Legal Defense and Education Fund, Inc., the oldest and largest national legal organization committed to achieving full recognition of the civil rights of LGBTQ people and people with HIV. Her work focuses on bringing test cases to advance equality and liberty for LGBTQ people.



EXPERIENCE



L.E. v. Lee, No. 3:21-cv-00835 (M.D. Tenn.)
Counsel in challenge to state law banning transgender students from interscholastic sports.

B.P.J. v. West Virginia State Bd. of Educ., No. 2:21-cv-11111 (S.D.W.V.)
Counsel in challenge to state law banning all transgender girls from interscholastic sports.

Fain v. Crouch, No. 3:20-cv-00740 (S.D.W.V.) (putative class action)
Counsel in challenge to discriminatory exclusions of gender-confirming health care in state employee and Medicaid health plans.

Kadel v. Folwell, No. 1:19-cv-00272 (M.D.N.C.)
Counsel for North Carolina state employees and dependents denied access to gender-confirming health care under state employee insurance plan.

Adams v. St. Johns Cty. Sch. Dist., Fla., 968 F.3d 1286 (11th Cir. 2020)
Counsel for transgender boy seeking the right to use the boys' restroom at his high school.

Gore v. Lee, No. 3:19-cv-00328 (M.D. Tenn.)
Counsel in challenge to Tennessee statute prohibiting transgender people from obtaining accurate birth certificates.

Lawrence v. Rigas, No. 510-2014-00396X (E.E.O.C.)
Counsel for transgender retiree in federal sector EEO proceedings seeking non-discriminatory access to health insurance coverage under Title VII.



TARA L. BORELLI

COURT ADMISSIONS

EXPERIENCE, CONT'D ...

U.S. Supreme Court	Ely v. Saul , No. 4:18-cv-00557, 2020 WL 2744138 (D. Ariz. May 27, 2020) (class action)
U.S. Court of Appeals for the Fourth Circuit	Colosimo v. Saul , No. 1:18-cv-00170 (W.D.N.C.) Gonzales v. Saul , No. 1:18-cv-00603 (D.N.M.) Counsel in suits securing access to Social Security benefits for same-sex spousal survivors blocked from qualifying by unconstitutional marriage laws. <i>Ely</i> was certified as a class action, and declared the denial of benefits unconstitutional.
U.S. Court of Appeals for the Ninth Circuit	
U.S. Court of Appeals for the Eleventh Circuit	Thornton v. Comm'r of Social Security , No. 2:18-cv-01409, 2020 WL 5494891 (W.D. Wash. Sept. 11, 2020) (class action) Counsel in class action lawsuit securing access to Social Security benefits for unmarried same-sex survivors blocked from qualifying by unconstitutional marriage laws.
U.S. Court of Appeals for the D.C. Circuit	
U.S. Court of Appeals for the Federal Circuit	Grimm v. Gloucester Cty. Sch. Bd. , 972 F.3d 586 (4th Cir. 2020) Parents for Privacy v. Barr , 949 F.3d 1210 (9th Cir. 2020) Doe v. Boyertown Area Sch. Dist. , 897 F.3d 518 (3d Cir. 2018) Whitaker v. Kenosha Unified Sch. Dist. , 858 F.3d 1034 (7th Cir. 2017) Highland v. U.S. Dep't of Educ. , 208 F. Supp. 3d 850 (S.D. Ohio 2016) Counsel for amici curiae school administrators explaining why policies inclusive of transgender students are critical to uphold educators' obligation to treat all students equally.
U.S. District Court for the Central, Southern, and Northern Districts of California	
U.S. District Court for the Western District of Washington	Rolfingsmeyer v. OPM , No. 20-1735 (Fed. Cir.) Counsel for amici curiae supporting a surviving spouse of a federal employee blocked from a survivor's annuity by unconstitutional marriage laws; the case was resolved.
U.S. District Court for the Northern District of Georgia	
U.S. District Court for the Northern District of Florida	Mize v. Pompeo , 482 F. Supp. 3d 1317 (N.D. Ga. 2020) Local counsel in successful challenge to the U.S. State Department's refusal to recognize the citizenship of a married same-sex couple's daughter.
Supreme Court of Georgia	Being v. Crum , No. 3:19-cv-00060 (D. Ak.) (putative class action) Counsel in putative class action challenging exclusion of transition-related care in Alaska's Medicaid program; resulted in a settlement agreement eliminating the exclusion and awarding damages to plaintiffs.
Georgia Court of Appeals	
Superior Court of DeKalb County, State of Georgia	



TARA L. BORELLI



Gender and Sexuality Alliance v. Spearman, No. 2:20-00847, 2020 WL 1227345 (D.S.C. March 11, 2020)

Counsel in challenge resulting in consent decree declaring South Carolina anti-LGBTQ curriculum law unconstitutional and barring its enforcement.

Fletcher v. Alaska, 443 F. Supp. 3d 1024 (D. Alaska 2020)

Counsel in case securing summary judgment on Title VII claim for transgender woman denied gender-confirming surgery by state employer.

Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019)

Counsel in challenge to ban on open military service by transgender people; resulted in Ninth Circuit ruling that discrimination against transgender people receives heightened scrutiny.

Carcaño v. Cooper, No. 1:16-cv-236, 2019 WL 3302208 (M.D.N.C. July 23, 2019)

Counsel in case challenging North Carolina's H.B. 2, which targeted transgender people for discriminatory treatment in sex-separated facilities; secured consent decree ensuring nondiscriminatory access to public facilities.

Birchfield v. Armstrong, No. 4:15-cv-00615, 2017 WL 1433032 (N.D. Fla. March 23, 2017) (class action)

Counsel in class action case holding that State of Florida must provide corrected death certificates to same-sex widows and widowers who had been denied recognition of their marriage.

Carson v. Heigel, No. 3:16-cv-00045, 2017 WL 624803 (D.S.C. Feb. 15, 2017)

Counsel in suit holding that South Carolina's refusal to recognize same-sex spouses on birth certificates violates the Fourteenth Amendment.

Lively v. Fletcher Hospital, Inc., D/B/A Park Ridge Health, No. 1:16-CV-00031 (W.D.N.C. 2016)

Counsel in Title VII case challenging denial of spousal health coverage to employee's same-sex spouse; the matter was resolved.

Hall v. BNSF Ry. Co., No. 13-cv-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014)

Counsel for amicus curiae supporting successful opposition to motion to dismiss complaint in challenge to employer's discriminatory denial of same-sex spousal health coverage.

Sevcik v. Sandoval, consolidated for decision with **Latta v. Otter**, 771 F.3d 496 (9th Cir. 2014)

Counsel in federal constitutional challenge that secured the freedom to marry for same-sex couples in Nevada and throughout the Ninth Circuit.

Inniss v. Aderhold, No. 1:14-cv-01180 (N.D. Ga. 2014)

Counsel in federal putative class action; secured judgment declaring Georgia's ban on marriage for same-sex couples unconstitutional.

TARA L. BORELLI



Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014)

Counsel for intervenor plaintiff class, certified in **Harris v. Rainey**, 299 F.R.D. 486 (W.D. Va. 2013), in case that secured access to marriage for same-sex couples in Virginia and throughout the Fourth Circuit.

GlaxoSmithKline v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014)

Counsel for amici curiae arguing that sexual orientation-based peremptory strikes warrant heightened constitutional scrutiny and violate the federal Equal Protection Clause under *Batson v. Kentucky*, 476 U.S. 79 (1986), which the court held in its decision.

United States v. Windsor, 133 S. Ct. 2675 (2013)

Counsel for amici curiae arguing that Section 3 of the federal Defense of Marriage Act (“DOMA”) required meaningful constitutional scrutiny.

Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011)

Counsel in federal class action suit that protected domestic partner health coverage for Arizona state employees after the legislature voted to strip that coverage from lesbians and gay men.

Golinski v. U.S. Office of Personnel Management, 824 F. Supp. 2d 968 (N.D. Cal. 2012)

Counsel for plaintiff challenging DOMA; obtained district court ruling that DOMA is unconstitutional, and that classifications based on sexual orientation are entitled to heightened constitutional review.

Esquivel v. State of Oregon, No. 11C17487 (Or. Cir. Ct. 2011)

Counsel in a first-of-its-kind lawsuit deploying state anti-discrimination law to obtain insurance coverage for a transgender public employee denied transition-related care; resulted in settlement removing restrictions on transition-related care for all transgender employees of the State of Oregon.

Young v. Abercrombie, No. 10-1-1621-07 (Haw. Cir. Ct. 2010)

Counsel in a challenge seeking civil unions for same-sex couples in Hawaii, which the legislature approved in 2011 after Lambda Legal filed its lawsuit.

Munson v. Del Taco, Inc., 46 Cal. 4th 661 (2009)

Counsel for amici curiae HIV service providers throughout California, successfully arguing that California’s public accommodations law does not impose a separate intent requirement for individuals who have proven a violation of the Americans with Disabilities Act.

Strauss v. Horton, 46 Cal. 4th 364 (2009)

Counsel for petitioners in writ of mandate involving California’s Prop. 8; the court ruled that the 18,000 same-sex couples who married before Prop. 8’s enactment remain validly married.



TARA L. BORELLI

EXPERIENCE, CONT'D ...

Cal. Educ. Comm. v. Schwarzenegger, No. 07-02246 (S.D. Cal. 2008)

Cal. Educ. Comm. v. Schwarzenegger, No. 37-2008-00077546 (Cal. Super. Ct. San Diego 2008)

Cal. Educ. Comm. v. O'Connell, No. 34-2008-00026507 (Cal. Super. Ct. Sacramento 2009)

Counsel for proposed intervenor and amici curiae seeking to defend California laws that protect lesbian, gay, bisexual and transgender students; after initial proceedings in each case, defendants voluntarily dismissed all challenges.

Ellis v. Arriaga, 162 Cal. App. 4th 1000 (Cal. App. 4th 2008)

Counsel in appeal confirming that registered domestic partners have the same rights and responsibilities as different-sex spouses under California state law.

deGroen v. City of Bellevue, No. 07-2-12286-9 (Wash. Super. Ct. 2007)

Counsel for plaintiff city employees seeking domestic partner health coverage; resulted in a city policy change granting the relief sought in the suit.

RECOGNITION AND AWARDS

Distinguished Service to the Community Award, Georgia Stonewall Bar Association (2021)

Barry Goldwater Human Rights Award, Equality Arizona (2013)

Top 100 Lawyers in California, *Daily Journal* (2012)

Top Women Lawyers of 2012, *Daily Journal* (2012)

2012 Legal Service Award, Bay Area Lawyers for Individual Freedom (2012)

Honoree, EEOC San Francisco District Office LGBT Pride Celebration (2012), for work on *Golinski v. OPM*

Certificates of Recognition presented by the California State Assembly (2012) and California State Senate (2012), for work on *Golinski v. OPM*

Best Lesbian, Gay, Bisexual and Transgender (LGBT) Lawyers Under the Age of 40 Award, National LGBT Bar Association (2011)

Chancellor's Community Service Award, University of California, Berkeley (2001)

PROFILED

"Top 100 Lawyers in California," *Daily Journal* (September 12, 2012)

"Tara Borelli Is A Valued Lambda Legal Team Member," *LawCrossing.com* (June 8, 2012)

"Top Women Lawyers of 2012," Tara L. Borelli, *Daily Journal* (May 9, 2012)



TARA L. BORELLI

OTHER RELEVANT EMPLOYMENT

Newman DuWors LLP, then Newman & Newman, LLP, Seattle, Washington (2005-2006)
Contract attorney and associate at law firm with an emphasis on intellectual property litigation.

Break the Cycle, Los Angeles, California (2003-2005)
Senior Staff Attorney with a focus on assisting young adult survivors of domestic violence with restraining order and family law proceedings.

Proskauer Rose LLP, Los Angeles, California (2001-2003)
Associate in the Litigation Department.

APPOINTMENTS

Gay & Lesbian Medical Association (2013, 2011)
Member of the Gay & Lesbian Medical Association's ("GLMA") Conference Peer-Review Committee, which reviews and evaluates workshop proposals for GLMA's Annual Conference.

The Joint Commission (Sept. 2010 – Oct. 2011)
Member of Expert Advisory Panel for publication, "The Joint Commission: Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide," released Oct. 2011.

Mautner Project, National Lesbian Health Organization (March 2010 – March 2011)
Member of the Mautner Project's Technical Advisory Council.

LifeWorks Mentoring, now with the L.A. Gay & Lesbian Center (Dec. 2007 – Dec. 2008)
Member of the Board of Directors and Program Committee Chair.

COMMUNITY ENGAGEMENT

Nelson, Mullins, Riley & Scarborough LLP, "Third Annual Pride Seminar: Housing, Healthcare, and Education in the Covid-19 Pandemic," October 8, 2021 (virtual)
Participated in firm's third annual pride seminar regarding the effect of the Covid-19 pandemic on access to resources for the LGBTQ community.

Eversheds Sutherland, "Trends in LGBTQ+ Rights Litigation," June 29, 2021 (virtual)
Provided CLE regarding cutting edge developments in impact litigation for the LGBTQ community.



TARA L. BORELLI

COMMUNITY ENGAGEMENT, CONT'D ...

Nelson, Mullins, Riley & Scarborough LLP, “Beyond Bostock: Protections and Barriers for the LGBTQ+ Community,” October 8, 2020 (virtual)

Participated in panel discussion regarding challenges and opportunities for the LGBTQ opportunity after the Supreme Court’s landmark ruling in *Bostock v. Clayton County*.

LGBTQ+ Lawyers Association of Los Angeles, August 20, 2020 (virtual)

Provided CLE course regarding the Eleventh Circuit’s ruling in *Adams v. St. Johns County School Board*, and the status of protections for transgender students throughout the country.

Grady Health System Gender Center, May 4, 2020 (virtual)

Provided presentation to medical providers who serve the Grady Health System Gender Center in Atlanta, Georgia health care protections for transgender people, and related impact litigation.

Merrill Lynch, March 12, 2020, Chattanooga, Tennessee

Provided presentation regarding Lambda Legal’s work to Merrill Lynch employees, with a focus on the organization’s impact litigation in the South.

Vanderbilt Law School, “Social Justice and the Legal Profession,” October 21, 2019, Nashville, Tennessee

Participated in panel discussion discussing public interest lawyering to enforce *Obergefell v. Hodges*, and advancing LGBT rights.

Osborn Maledon, P.A., “Transgender Students: Bathrooms and Beyond,” April 18, 2019, Phoenix, Arizona

Provided presentation to clients of the firm’s education law practice about developments in the law regarding transgender students.

State Bar of Georgia, Institute of Continuing Legal Education, Family Law Issues for the Modern Family, “Surveying

the Landscape of Current Legal Cases Relevant to Your Transgender Client,” March 14, 2019, Atlanta, Georgia
Provided CLE course reviewing current legal issues facing families with transgender children.

Stonewall National Education Project, Plenary, “Looking Ahead: Where We Are in the Courts Towards

Achieving Trans Equity in Schools,” March 5, 2019, Boca Raton, Florida

Participated in plenary panel discussion of status of federal legal protections for transgender students.

Virginia Equality Bar Association, “How Transgender Litigation is Shaping Sex Discrimination Law,” October 26, 2018, webinar

Provided CLE presentation regarding the way in which sex discrimination jurisprudence is being shaped by cases on behalf of transgender plaintiffs.

Voices for Trans Youth Campaign, “Legal Rights Workshop,” March 24, 2018, Knoxville, Tennessee

Participated in panel discussion regarding the status of federal protections for transgender youth.

TARA L. BORELLI



COMMUNITY ENGAGEMENT, CONT'D ...

State Bar of Georgia, Institute of Continuing Legal Education, Family Law Issues for the Modern Family, March 15, 2018, Atlanta, Georgia

Provided update on family-law related impact cases seeking to implement *Obergefell v. Hodge's* mandate of equal access to marriage.

Morehouse College, April 19, 2018, Atlanta, Georgia

Provided lecture to sociology course on civil rights and social movements, as illustrated by the LGBT advocacy movement.

Eversheds Sutherland, "Transgender Rights," June 29, 2017, Atlanta, Georgia

Participated in panel broadcast to Eversheds Sutherland's offices across the country regarding the state of transgender rights and litigation developments.

Emory University School of Law, OUTLaw Conference, "State of the Union," January 14, 2017, Atlanta, Georgia

Participated in panel discussion focusing on the state of marriage equality after *Obergefell v. Hodges*, and ongoing efforts to implement that landmark ruling.

National Organization of Lawyers for Education Associations, "Transgender Student Rights: Cutting Edge Legal Developments & Best Practices," October 6, 2016, Boston, Massachusetts

Provided session on the current state of legal protections for transgender students, and best practices for supporting them in schools.

Vanderbilt Law School, "Practicing Public Interest Law in the South Conference," September 10, 2016, Nashville, Tennessee

Participated in panel discussion regarding public interest career pathways to LGBTQ+ advocacy.

White & Case LLP, "Civil Rights Roundtable," June 15, 2016, Miami, Florida

Participated in panel discussion regarding recent legal developments in cases involving the LGBT community, gender equity, and racial equality.

Georgia State University College of Law, March 9, 2016, Atlanta, Georgia

Provided guest lecture on the strategy behind the marriage equality victory in *Obergefell v. Hodges*.

U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace, December 7, 2015, Washington, D.C.

Provided testimony regarding dynamics unique to harassment based on sexual orientation and gender identity in the workplace.

Bryan Cave LLP, Retreat for LGBT Attorneys, October 24, 2014, Washington D.C.

Speaker for firm reception regarding the state of marriage equality litigation, and the role of private law firms in such litigation across the country.



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COMMUNITY ENGAGEMENT, CONT'D ...



American Association for Justice, “Same Sex Marriage—Changing Laws, Societal Needs, and the Impact on Marriage, Divorce and Child Custody,” July 20, 2013, San Francisco, California

Panel discussion analyzing the effect of *United States v. Windsor*, *Hollingsworth v. Perry*, and other national developments on family law issues for same-sex couples.

Anti-Defamation League, “State of the Union: Marriage Equality Cases at the Supreme Court,” April 4, 2013, Los Angeles, California

CLE course analyzing the March 26 and 27, 2013 oral arguments the Supreme Court held in *United States v. Windsor* and *Hollingsworth v. Perry*.

Sheppard Mullin Richter & Hampton LLP, Retreat for LGBT Attorneys, Oct. 19, 2012, Los Angeles, California

CLE course reviewing trends in litigation surrounding marriage equality, Section 3 of DOMA, and health coverage for domestic partners and transgender employees.

State Bar of Texas Annual Meeting, “Breaking News: Updates on DOMA and Beyond,” June 15, 2012, Houston, Texas (via teleconference)

CLE course on developing litigation and jurisprudence surrounding the federal “Defense of Marriage Act,” and marriage equality litigation for same-sex couples.

Morrison & Foerster, LLP, “LGBT Legal Update: Is the Door Closing on DOMA?” December 6, 2011, San Francisco, California

Panel discussion analyzing legal challenges across the country to Section 3 of DOMA.

Irell & Manella, LLP, December 6, 2010, Los Angeles, California

Panel discussion analyzing the U.S. Ninth Circuit Court of Appeals oral arguments in *Perry v. Brown*, the federal marriage equality challenge to California’s Proposition 8.

Davis Wright Tremaine, LLP and Microsoft Corporation, “Marriage, Democracy, The First Amendment and Federalism,” October 25, 2010, Seattle and Redmond, Washington

Panel discussions at the law firm of Davis Wright Tremaine, LLP and the Microsoft Corporation campus regarding marriage equality and free speech developments in Washington and the U.S. Supreme Court.

Gay & Lesbian Medical Association, September 22-23, 2010, San Diego, California

Workshop entitled “Legal Trends in Fighting Health Care Discrimination: Eliminating Insurance Barriers for LGBT People and People with HIV,” and led a luncheon discussion reviewing recent relationship recognition developments for same-sex couples.

Lesbian and Gay Psychotherapy Association of Los Angeles, “Civil Rights Litigation Update,” June 27, 2010, Beverly Hills, California

Continuing education course for mental health professionals regarding marriage equality litigation across the country.

TARA L. BORELLI



COMMUNITY ENGAGEMENT, CONT'D ...

University of Southern California, Transgender Studies Class, November 4, 2009, Los Angeles, California
Participated in a panel discussing best practices in representation of and advocacy for transgender adolescents.

Equality Hawaii, "Family Equality Coalition Community Forum: Legal Perspectives on the Equality Movement,"
August 13, 2009, Honolulu, Hawaii
Panel discussing the evolving relationship recognition landscape nationally for same-sex couples, and Hawaii's unique contribution to that movement. The panel included Hawaii Supreme Court Justice Levinson (Ret.), who authored *Baehr v. Lewin*, which launched the modern marriage equality movement.

Southern California Lambda Medical Association Banquet, Keynote Address, June 15, 2008, Los Angeles, California
Keynote address regarding the California Marriage Cases and litigation relating to healthcare fairness, including legal considerations relating to the intersection of state civil rights laws and physicians' religious objections.

Washington Appellate Judges' Conference, "Update on Marriage Litigation, Legislation and the State of Same Sex Unions," April 7, 2008, Hood Canal, Washington
Forum for Washington appellate judges regarding the status of marriage litigation for same-sex couples and recent legislative changes to registered domestic partnership in Washington.

American Academy of Matrimonial Lawyers, "Custody Litigation with Same-Sex Couples and Domestic Partnership Update," March 21, 2008, Seattle, Washington
CLE course regarding relationship recognition protections for same-sex couples nationally, and recent legislative changes to registered domestic partnership in Washington.

Annual Southern California Employment Round Table, "Transgender Discrimination – Understanding a Very Complex Topic," Nov. 8, 2007, Los Angeles, California
CLE course regarding employment protections in California for transgender people and developments in Title VII cases involving transgender plaintiffs nationally.

MCLE Course, "Update on Marriage Litigation/Legislation and the State of Same Sex Unions," Oct. 16, 2007, Seattle, Washington
CLE course about relationship recognition for same-sex couples, developments in domestic partnership laws in California and Washington, and issues raised by cross-jurisdiction actions for dissolution of same-sex relationships.

Press Conference Announcing the Filing of Amicus Curiae Brief by 63 Asian American Organizations in the "In Re Marriage Cases" California Marriage Equality Case Before the California Supreme Court, Sept. 26, 2007, Los Angeles, California
Provided comments on behalf of the party counsel and clients in the California marriage equality case recognizing the historic and uniquely authoritative amicus curiae brief filed by a coalition of Asian American advocacy organizations.

TARA L. BORELLI



COMMUNITY ENGAGEMENT, CONT'D ...

Medical Student Training, USC Keck School of Medicine, “An Introduction to Culturally Competent Healthcare for Lesbian, Gay, and Bisexual Patients,” Sept. 10, 2007; Sept. 18, 2006, Los Angeles, California
Provided training about disparate health outcomes for LGBT patients, and culturally sensitive practices for medical care providers treating LGBT patients.

MCLE Course, “Volunteer Attorney Educator Training: Domestic Violence and the Law,” Sept. & Oct. 2003, March 2004, January 2005, Los Angeles, California
CLE course about dynamics of domestic violence experienced by teens, preventive strategies, and laws related to mandated reporting.

In-Service Training, Youth Organizations Understanding Today’s Health Risks Conference, “Transgendered & Intersex Youth and Domestic Violence,” April 30, 2004, Los Angeles, California
Training about unique dynamics experienced by transgender and intersex youth in abusive relationships, and legal and non-legal remedies for youth seeking protection from an abusive partner.

Legislative Testimony, May 8, 2003, Sacramento, California
Legislative testimony before a hearing of the California Assembly Select Committee on Domestic Violence regarding proposed legislation Senate Bill 874. Testified about issues raised by current status of legislation providing habeas relief for women who have been battered.

CARL S. CHARLES

404.897.1880 Ext. 6235 | CCharles@lambdalegal.org

EDUCATION

University of Denver Sturm College of Law, Denver, CO

J.D., December 2013

Honors: Skadden Fellow Class of 2014; Most Outstanding Evening Student; Evening Division Class Rank No. 7; Rocky Mountain Legal Diversity Merit Scholarship Recipient.

Activities: University of Denver College of Law OUTLaws Co-President; Student Bar Association Evening Division Vice President.

University of Northern Colorado, Greeley, CO

B.A. in English (Emphasis Secondary Education), December 2006

Honors: Dean's List, 2002-2003, Awarded for 4.0 G.P.A.

EXPERIENCE

Lambda Legal, Atlanta, GA

February 2019 to Present

Senior Attorney

Advocate for LGBTQ people and people living with HIV through litigation, policy advocacy, and public education. Pursue complex litigation strategies using federal constitutional and statutory employment law. Engage in complaint drafting, client interviews, drafting of client declarations, retaining and interviewing expert witnesses, drafting, filing and oral argument of both procedural and dispositive motions and other briefs, discovery practice, including taking and defending expert witness and client depositions. Lead settlement negotiations and case mediation.

A Better Balance, New York, NY

July 2018 to February 2019

Staff Attorney

Serve as legal counsel for state and federal legislative campaigns advocating for paid sick time and paid family and medical leave for workers. Draft municipal, state, and federal legislation to present to lawmakers at their respective levels of government. Review and analyze other municipal, state, and federal legislation, and existing legal landscape in each relevant jurisdiction. Review and interpret relevant case law, monitor recently filed and pending litigation for impacts on draft legislation. Provide legal analysis in answer to complex questions of state and municipal employment and labor law.

Lambda Legal, New York, NY

June 2017 to July 2018

Transgender Rights Project Fellow

Serve as legal counsel in a variety of cases seeking legal remedies for discrimination against transgender people using city, state, or federal policies or laws. Initiate litigation using state and federal anti-discrimination law on behalf of transgender people experiencing discrimination in employment, healthcare, education and state custody. Spearhead plaintiff search and complaint drafting, shepherd plaintiff employment complaints through regional EEOC offices, respond to and prepare discovery requests, engage in motions practice, assist in preparations for trial and participate in settlement negotiations.

NYC Commission on Human Rights, New York, NY

August 2016 to May 2017

Staff Attorney, Law Enforcement Bureau

Enforcing and upholding the New York City Human Rights Law, the most comprehensive municipal anti-discrimination law. Meet with potential victims/complainants at intake meetings, investigate individual factual allegations, draft and serve complaints on defendants, dual file employment claims with the EEOC regional office, make recommendations to the Commissioner about the strength of cases and whether they should be referred to the Office of Administrative Trials and Hearings for further adjudication, settled between the parties, or dismissed. Maintain a case load of approximately 65 cases which included allegations of discrimination across a wide variety of protected classes and in various settings but focused primarily upon employment discrimination.

American Civil Liberties Union, New York, NY

September 2014 to August 2016

LGBT & HIV Project Skadden Legal Fellow and Staff Attorney

Draft state and federal district court complaints challenging discrimination based on sex and transgender status and engage in fact investigation in support of claims of discrimination. Conduct interviews of service providers, watch criminal and juvenile court proceedings (when not closed to the public), and interview youth while working with their case workers, social workers, or legal aid attorneys to learn about how and where discrimination may have occurred. Provided legal research, legal memo drafting, draft brief writing in other cases that the ACLU LGBT & HIV Project was litigating or preparing to litigate and other potential matters regarding transgender people's right to access public accommodations, including restrooms, free from discrimination. Provide continuing legal education trainings to attorneys primarily practicing employment law in New York State, California, and Pennsylvania through conferences focused on the provision of legal services to LGBT people.

BAR and COURT ADMISSIONS

Massachusetts, New York

E.D.N.Y, S.D.N.Y, Second Circuit Court of Appeals, Fourth Circuit Court of Appeals, Ninth Circuit Court of Appeals, Eleventh Circuit Court of Appeals

Sasha J. Buchert

1776 K Street, N.W., 8th Floor, Washington DC, 20006 | (202) 804-6245 ext. 7595 | sbuchert@lambdalegal.org

PROFESSIONAL EXPERIENCE, LEGAL:

Lambda Legal, *Senior Attorney*, 2017 – Present

- Conducted extensive federal and state legislative and policy efforts on a wide range of issues including judicial nominations, criminal justice reform policy and health care initiatives.
- Built extensive relationships with congressional offices and oversight committees, commented on a wide range of administrative rules, reviewed and edited state and federal legislation, led our day-to-day work on reviewing judicial nominations and managed numerous opposition campaigns. Worked closely with numerous coalitions. Helped lead a team that sent out a weekly email amplifying recent regulatory, legislative and litigation developments. Worked closely with litigation teams to disseminate information about impending regulations and congressional activity. Helped prepare members of congress for numerous hearings. [Testified](#) on behalf of Lambda Legal before the U.S. House of Representatives Education and Labor Subcommittee on Civil and Human Services. Contributed to publications such as the international Trans Legal Mapping Report and Trans Bodies Trans Selves.
- Spearheaded successful legislative campaigns in California and in D.C.
- Provided extensive media appearances on behalf of LGBTQ people, including video appearances on [CSPAN](#), [CNN](#), [BBC](#), [PBS NewsHour](#), [Vox](#), and [Newsy](#). Wrote numerous op-eds for a wide range of publications, including for [Fox News](#), [Them](#), [USA Today](#), and [Out.com](#), and radio appearances on [NPR](#) and many other outlets.
- Litigated cases expanding and solidifying federal civil rights protections for LGBTQ people, including a lawsuit challenging the ban on open transgender military service, a challenge to a discriminatory birth certificate policy in Tennessee, challenges to rulemaking by the U.S. Health and Human Services Agency, and other litigation. I have deposed two experts and have defended a client in a deposition. I have worked on numerous legal briefs.

Transgender Law Center, *Staff Attorney*, 2014 – 2017

- Spearheaded state legislation that reduced barriers to identity documents and criminal justice reform on behalf of transgender and gender nonconforming people.
- Conducted key litigation that helped advance the clarification that sex discrimination protections encompass protections for LGBTQ people and expanded protections for transgender prisoners.

Basic Rights Oregon, *Communications Manager*, 2012-2014

- Helped develop effective messaging on marriage equality and transgender health care.
- Managed the organization's social media platforms.
- Educated members of the legislature on issues relating to transgender people.
- Served as a member of the Legal Advisory Committee for the organization that helped to inform the organization's strategic planning.

EDUCATION:

- Willamette Law School, Juris Doctorate.
- Portland State University, Bachelor of Arts, Master of Arts in English Literature.

ADDITIONAL:

- First openly transgender person to be appointed to an Oregon state board (served as Chair on the Oregon State Hospital Advisory Board).
- Served proudly in the United States Marine Corps.

NORA HUPPERT (she/her)

65 E. Wacker Pl., Suite 2000, Chicago, IL 60601 nhuppert@lambdalegal.org

ADMISSIONS

Admitted in California and Illinois.

Admitted to the Ninth, Tenth, and Eleventh Circuit Courts of Appeals.

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY

Juris Doctor, May 2019

Honors: Harlan Fiske Stone honors (2017-2018 & 2018-2019)

Allan Morrow Sexuality and Gender Law Prize

Activities: *Columbia Journal of Law and Social Problems* (articles editor)

Publication: “The Illinois Millionaire’s Exemption and the Utility of Campaign Contribution Limits,”
(COLUM. J.L. & SOC. PROBS., 2019)

Association: National Trans Bar Association (member)

FRANKLIN & MARSHALL COLLEGE, Lancaster, PA

Bachelor of Arts in Government, *cum laude*, May 2014

EXPERIENCE

Lambda Legal

Staff Attorney, Chicago, IL

Sept. 2021 – present

Renberg Fellow, Los Angeles, CA

Sept. 2019 – Sept. 2021

Responsible for developing and executing impact litigation advancing LGBT rights. Engaged in litigation that halted enforcement of Idaho’s 2020 anti-transgender birth certificate law. Participated in litigation challenging exclusion of gender-confirming care in Alaska Medicaid health plan. Represented transgender employee in EEOC proceedings. Drafted complaints, various motions, demand letters, declarations, and interviewed potential plaintiffs in various LGBTQ+ rights cases. Assisted in drafting amicus briefs, including in immigration matters. Represented Lambda Legal on coalition that drafted and advocated for SB132, which enacted housing protections for trans people incarcerated in California. Helped to obtain consent decree enjoining South Carolina anti-LGBT curriculum law.

Transgender Rights Project, Lambda Legal

New York, NY

Legal Intern

Spring 2019

Conducted legal research and drafted research memos.

Sexuality and Gender Law Clinic, Columbia Law School

New York, NY

Clinic Student

Spring 2019

Represented trans asylee in seeking asylum. Assisted in research project into New York Family Court system in partnership with Bronx Defenders.

New York City Campaign Finance Board

New York, NY

Legal Intern

Summer 2018

Conducted legal research and drafted memoranda for staff. Assisted in drafting filings in Board’s enforcement and collections proceedings in state court.

Criminal Appeals Externship, Center for Appellate Litigation

New York, NY

Extern

Spring Term 2018

Drafted and edited appellant's brief in a criminal appeal. Argued the appeal at oral argument before an Appellate Term panel in March 2019.