

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

C. P., by and through his parents, Patricia Pritchard and Nolle Pritchard; S.L. by and through her parents, S.R. and R.L.; EMMETT JONES, each individually and on behalf of similarly situated others; and PATRICIA PRITCHARD, individually,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFF CLASS'S REPLY TO  
DEFENDANT'S SUPPLEMENTAL  
BRIEFING

**Note on Motion Calendar:  
October 20, 2023**

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## I. INTRODUCTION

BCBSIL concedes, as it must, that “Section 1557 adopts the enforcement mechanisms of Title IX” including the “remedies traditionally available in suits for breach of contract.” Dkt. No. 179, p. 5, *citing Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568 (2022). In *Cummings*, the Supreme Court confirmed that the normal contract remedies, including injunctive relief, are available for claims of discrimination under Section 1557. *Id.* at 1568, 1571. The recent holding in *Wit* confirms that injunctive relief can include reprocessing of wrongfully denied claims, even in litigation to enforce ERISA rights. *Wit v. United Behavioral Health*, 79 F.4th 1068, 1084 (9th Cir. 2023) (“*Wit 3*”).<sup>1</sup>

The Ninth Circuit’s decision in *Wit 3* broadly repudiates its previous, now withdrawn decision in that case and embraces the reprocessing remedy in most circumstances. *Id.* at 1088–89. BCBSIL’s Motion to Decertify the Class (Dkt. No. 156) should be denied, and Plaintiffs’ Motion for Classwide Declaratory and Permanent Injunctive Relief (Dkt. No. 153) should be granted. Specifically, the Court has concluded that BCBSIL engages in illegal discrimination when it administers the gender-affirming medical care Exclusions. Dkt. No. 148. Despite this Order, BCBSIL continues to administer the Exclusions with impunity. *See* Dkt. Nos. 176, 177. To prevent further irreparable harm, the Court should issue an order that:

- (1) Declares that BCBSIL, as a covered entity subject to Section 1557, cannot administer a discriminatory exclusion, even at the request of an employer or plan sponsor.
- (2) Excuses all class members from appeals deadlines and exhaustion requirements for claims for gender affirming care services and treatments that were denied under the

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<sup>1</sup> This case brought a single claim under Section 1557 of the Affordable Care Act, not under ERISA. Given the Court’s request for supplemental briefing regarding *Wit*, Plaintiffs note that if at all relevant, *Wit 3* supports Plaintiffs’ argument that the requested relief, injunctive reprocessing, is proper.

1 Exclusions as either pre-service authorizations or post-service claims, pursuant to the  
2 doctrines of equitable tolling and anticipatory repudiation.

3 (3) Enjoins BCBSIL to administer any claims for gender-affirming care (where the date  
4 of service is during the class period or in the future), without applying the Exclusions,  
5 but consistent with all other terms and conditions in effect at the date of service,  
6 including payment of any valid and approved claims by BCBSIL as described in the  
7 existing contracts.

8 (4) Provides notice to all class members of the Court’s order at BCBSIL’s expense.

9 **II. ARGUMENT**

10 **A. An Injunctive Order Requiring Classwide Reprocessing Without Application**  
11 **of the Exclusion is Proper under *Wit 3*.**

12 BCBSIL misrepresents *Wit 3*, asserting, *without citation*, that “the class must be defined  
13 so that there is no question that there would be coverage upon remand.” Dkt. No. 179, p. 3:17–  
14 18. *Wit 3* does not stand for this proposition. At most, *Wit 3* holds that a class seeking to enforce  
15 ERISA requirements must demonstrate that “all class members were denied a full and fair review  
16 of their claims or that such a common showing is possible” by the defendants’ challenged actions.  
17 79 F.4th at 1086. Although the Class does not seek to enforce ERISA here, it has nonetheless  
18 shown that all class members were denied a “full and fair review” of their pre-service requests  
19 and post-service claims.

20 As a standard practice, BCBSIL applied the illegal discriminatory Exclusion to each class  
21 member’s pre-service requests and post-service claims for gender-affirming medical care, or will  
22 do so in the future. *See* Dkt. No. 148, p. 11:11–13 (“Parties do not dispute that Blue Cross denied  
23 other class members gender affirming care under exclusions in other self-funded plans”). The  
24 Court previously concluded, the “trigger for the application of the Exclusion and a denial of  
25 coverage was a diagnosis of ‘gender dysphoria’ for C.P. and other class members.” *Id.*, p. 11:20–  
26 22. This is unlawful discrimination, as “[g]ender dysphoria cannot be understood without

1 referencing sex....” Dkt. No. 148 at 12, *quoting Kadel v. Folwell*, 2022 U.S. Dist. LEXIS 190506,  
2 at \*12 (M.D.N.C. Oct. 19, 2022); *see also Dekker v. Weida*, 2023 U.S. Dist. LEXIS 107421, at  
3 \*40 (N.D. Fla. June 21, 2023) (“To know whether treatment ... is covered, one must know  
4 whether the patient is transgender. And to know whether treatment ... is covered, one must know  
5 the patient’s natal sex.”). No “full and fair review” is possible when the review is tainted by  
6 illegal discrimination. The remedy for such illegal discrimination is a “do-over” without the  
7 application of the discriminatory Exclusions. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747,  
8 764 (1976) (Courts have broad “equitable powers to fashion the most complete relief possible ...  
9 [so that class members may be] restored to a position where they would have been were it not for  
10 the unlawful discrimination,” *citing* 118 Cong. Rec. 7166, 7168 (1972)); *Sangster v. United Air*  
11 *Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980); *Ollier v. Sweetwater Union High Sch. Dist.*, 768  
12 F.3d 843, 868 (9th Cir. 2014).

13 Nonetheless, BCBSIL argues that decertification is required because it theorizes that  
14 some class members’ claims may have been denied for “reasons wholly independent” of the  
15 gender-affirming medical care Exclusions and are therefore not properly part of the Class. Dkt.  
16 No. 179, p. 1, *citing Wit 3*.

17 There are at least four problems with BCBSIL’s hypothesis:

18 **First**, BCBSIL ignores the fact that the Class as defined by the Court includes only class  
19 members who were denied coverage based on the Exclusions or will be in the future. The Class  
20 definition is limited to people who are enrolled in a plan with an illegal Exclusion and who “were,  
21 are or will be denied” preauthorization or post-treatment services due to the Exclusion. *See* Dkt.  
22 No. 143, p. 2 (The Class definition is limited to enrollees in BCBSIL-administered plans that  
23 contain categorical exclusions of gender affirming care and who “were, are or will be denied pre-  
24 authorization or coverage of treatment with **excluded** Gender Affirming Health Care Services”)  
25 (emphasis added). All class members were, are, or will be subject to the illegal Exclusion, if  
26 BCBSIL’s practices are not enjoined.

1           **Second**, it is undisputed that BCBSIL applied and will continue to apply the Exclusions  
2 to class members’ requests for excluded gender-affirming medical care. As BCBSIL’s  
3 Rule 30(b)(6) witness testified, the denials in these plans are triggered by the mere presence of a  
4 diagnosis of gender dysphoria. *See* Dkt. No. 100-5 at 40:17–22. Indeed, as part of its effort to  
5 identify the health plans that contain the Exclusions, BCBSIL worked backwards from the  
6 denials with a diagnostic code for gender dysphoria to identify the plan exclusions that were  
7 generating such denials. *Id.*, pp. 23:15–24:6, 36:5–24, 37:9–16, 40:4–10. When BCBSIL  
8 considered class members’ claims, it never reached other reasons for the denials, such as medical  
9 necessity, because the Exclusion blocks all consideration of other reasons: the presence of a  
10 diagnosis of gender dysphoria on the claim triggers the automatic application of the Exclusions.  
11 Accordingly, each class member was or will be subject to unlawful discrimination when  
12 submitting claims for excluded gender-affirming medical care. Dkt. No. 148 at 11:16–17:6.

13           **Third**, BCBSIL hypothesizes that some class members may have been denied gender-  
14 affirming medical care for independent reasons—*in addition to the Exclusion*—but offers no  
15 evidence of any such denials. As a practical matter, assuming some class members’ claims were  
16 or could be denied based on the Exclusions *and* other reasons, if those class members submit a  
17 claim for reprocessing to BCBSIL, their claim will simply be denied based upon that independent  
18 reason, but this time without the illegal Exclusion blocking any meaningful appeal.

19           **Fourth**, and finally, should the Court be concerned about the class definition in light of  
20 *Wit 3*—and it should not be—there is a simple solution: The Court can amend the class definition  
21 to state more clearly that the Class is limited to only enrollees in BCBSIL-administered plans  
22 that contain the Exclusions whose claims “were, are or will be” denied pursuant to the  
23 Exclusions. Fed. R. Civ. P. 23(c)(1). The Class maintains that the class definition is sufficiently  
24 clear that class members are all denied either pre-service authorization or post-service claims  
25 based on the Exclusions but does not object to any rewording that the Court concludes would be  
26 helpful.

1 **B. Class Members Who Are No Longer in Plans Administered by BCBSIL Are**  
2 **Entitled to Reprocessing.**

3 BCBSIL baldly asserts that it cannot reprocess claims for class members with whom it  
4 has “no current relationship.” Dkt. No. 179, p. 3:19–22. BCBSIL identifies no authority for this  
5 proposition. The Court’s remedies for BCBSIL’s illegal discrimination are not dependent on  
6 whether there is a current relationship between BCBSIL and class members. Rather, courts have  
7 “wide discretion” to put in place “the most complete relief possible” to restore those injured to  
8 where they would have been but for the unlawful discrimination. *Sangster*, 633 F.2d at 867;  
9 *Ollier*, 768 F.3d at 868 (“the district court had broad powers to tailor equitable relief so as to  
10 vindicate the rights” protected under Title IX). The Court’s authority to order a “make whole”  
11 remedy does not depend on whether BCBSIL continues to administer a health plan to class  
12 members.

13 BCBSIL’s argument about enrollees for whom it does not currently administer benefits  
14 is irrelevant for a second reason: BCBSIL has an ongoing contractual relationship with each  
15 employer for whom it administered the Exclusion in the past. As BCBSIL’s Rule 30(b)(6)  
16 witness testified, *in every instance*, BCBSIL insisted on an indemnification agreement that the  
17 employer would reimburse BCBSIL for any expenses incurred related to the Exclusions. *See* Dkt.  
18 No. 160-2 at 9; Dkt. No. 160-3 at 131:15–133:3. Those indemnification agreements remain in  
19 force, and BCBSIL offers no evidence to the contrary.

20 In any event, BCBSIL is not relieved of its reprocessing and payment obligations even if  
21 the indemnification agreements are invalid or ineffective. BCBSIL agreed to engage in illegal  
22 discrimination on behalf of its employer-customers and actively administered the Exclusions in  
23 a discriminatory manner. BCBSIL cannot evade liability for its discriminatory acts by pointing  
24 the finger at its contracting employers. *See* 29 U.S.C. § 1144(d); Dkt. No. 148 at 16–17.  
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1 **C. ERISA Does Not Limit the Remedies Available for Violations of**  
 2 **Section 1557.**

3 BCBSIL claims that reprocessing is unavailable under Section 1557 because such an  
 4 order would “pick apart ERISA’s ‘comprehensive scheme of civil remedies.’” Dkt. No. 179 at  
 5 4:16–18. BCBSIL seems to argue that Congress did not intend to provide remedies outside of  
 6 ERISA when it enacted Section 1557, but it fails to identify any caselaw, statute, regulation,  
 7 federal guidance, or other evidence in support of this argument.

8 BCBSIL’s argument is precluded by the law of the case. “The law of the case doctrine is  
 9 a ‘guide to discretion,’ under which ‘a court is generally precluded from reconsidering an issue  
 10 that has already been decided by the same court.’” *Straitshot Commc’ns, Inc. v. Telekenex, Inc.*,  
 11 2011 U.S. Dist. LEXIS 138859, at \*6 (W.D. Wash. Dec. 1, 2011), *quoting United States v.*  
 12 *Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). This Court has already held that “ERISA expressly  
 13 provides that it is not to be construed to impair laws like Section 1557.” Dkt. No. 148, at 16; *id.*  
 14 at 16–17 (“ERISA specifically provides that its requirements are not to be construed to invalidate  
 15 or impair laws like Section 1557 ... Section 1557 supplements the ERISA requirements.”).

16 In any event, to determine whether Congress intended Section 1557’s remedies to be  
 17 limited to only those authorized under ERISA, the Court must first consider the plain language  
 18 of the statute, within the context of the ACA as a whole. *See King v. Burwell*, 576 U.S. 473, 497–  
 19 98 (2015). The plain language of Section 1557 does not limit remedies to only those under  
 20 ERISA, but rather calls out a different statute, Title IX, to describe Section 1557’s enforcement  
 21 remedies:

22 [A]n individual shall not, on the ground prohibited under ... title IX of the  
 23 Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) ... be excluded from  
 24 participation in, be denied the benefits of, or be subjected to discrimination under,  
 25 any health program or activity, any part of which is receiving Federal financial  
 26 assistance.... ***The enforcement mechanisms provided for and available under***  
***... title IX ... shall apply for purposes of violations of this subsection.***

1 42 U.S.C. § 18116(a) (emphasis added). Congress could have—but did not—limit enforcement  
2 of Section 1557 to only the remedies available under ERISA.<sup>2</sup>

3 Similarly, the U.S. Supreme Court and the Ninth Circuit have concluded that the available  
4 remedies for violations of Section 1557 are those applicable to claims under Title IX, not ERISA.  
5 *See Cummings*, 142 S. Ct. at 1568; *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022); *see, e.g.,*  
6 *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1210 (9th Cir. 2020); *Schmitt v. Kaiser Found.*  
7 *Health Plan of Wash.*, 965 F.3d 945, 950 (9th Cir. 2020) (allowing *Doe* and *Schmitt* plaintiffs to  
8 assert Section 1557 discrimination claims in group health plans that are governed by ERISA).  
9 ***No court has limited the remedies available under Section 1557 to only those available under***  
10 ***ERISA.***

11 Consistent with the plain language of the statute and existing jurisprudence, other courts,  
12 in addition to this one, have concluded that ERISA and Section 1557 give rise to separate and  
13 distinct claims, each with their own remedies. For example, in *Scott v. St. Louis Univ. Hosp.*, a  
14 plaintiff brought a claim under Section 1557 challenging a similar gender-affirming medical care  
15 exclusion. The defendant in that case argued that since ERISA is a “comprehensive statute,” only  
16 ERISA remedies could address a violation of Section 1557 when imposed in a health plan  
17 governed by ERISA, making the same arguments BCBSIL makes here. *Id.*, 600 F. Supp. 3d 956,  
18 959 (E.D. Mo. 2022). The federal district court unequivocally rejected this argument:

19 Plaintiff has not alleged a claim pursuant to ERISA, and is not  
20 “seeking to enforce [her] rights under an ERISA plan.” Instead,  
21 Plaintiff admits the Plan expressly excludes coverage for sex  
22 transition and she has no rights to enforce under the Plan. ***ERISA***  
***does not preempt other federal law claims, including Plaintiff's***  
***claims pursuant to Title VII and the ACA.***

23 *Id.*, (emphasis added, cleaned up). *See also Grossman v. Dirs. Guild of Am., Inc.*, 2017 U.S. Dist.  
24 LEXIS 223142, at \*15–17 (C.D. Cal. Mar. 6, 2017) (Section 1557 is not incorporated into ERISA

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26 <sup>2</sup> Section 1557 is ***not*** incorporated into ERISA, and ERISA does not limit remedies available  
under Section 1557. *See* Dkt. No. 169, at 2:3–8.

1 but was established by Congress as having a separate private right of action and independent  
 2 remedies); *York v. Wellmark, Inc.*, 2017 U.S. Dist. LEXIS 199888, at \*53 (S.D. Iowa Sep. 6,  
 3 2017) (The plain meaning of Section 1557 “is clear and unambiguous – claims for discrimination  
 4 are available on the grounds prohibited in the four listed federal civil rights statutes, and are to  
 5 be addressed under the provided for and available corresponding enforcement mechanisms of the  
 6 four statutes”); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 739 n.4 (N.D. Ill. 2017)  
 7 (“The ACA creates a private right of action specifically for § 1557”); *SEPTA v. Gilead Scis.,*  
 8 *Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015) (Section 1557 provides “both a private right and  
 9 a private remedy for violations of Section 1557”).

10 BCBSIL concedes, as it must, that Section 1557’s remedies are governed by Title IX.<sup>3</sup>  
 11 Dkt. No. 179, at 5:5 *citing to Cummings*, 142 S. Ct. at 1568. *Cummings* holds that remedies  
 12 “normally available for contract actions” are available under Section 1557, including injunctive  
 13 relief. *Id.* at 1568, 1571. BCBSIL does not disagree. Dkt. No. 179, at 5.

14 BCBSIL then mistakenly argues that ERISA remedies under 29 U.S.C. § 1132(a)(3) are  
 15 the same as those “traditionally available contract remedies,” in order to shoehorn this case into  
 16 the *Wit 3* holding. *See* Dkt. No. 179 at 5:9–15. BCBSIL is flatly wrong. ERISA claims and  
 17 remedies are far more limited than those normally available for contract actions because ERISA  
 18 claims are limited to the specific remedies described in statute, 29 U.S.C. § 1132(a), as “guided  
 19 by principles of trust law.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)  
 20 (emphasis added); *Ramos v. Banner Health*, 1 F.4th 769, 778 (10th Cir. 2021) (“In developing  
 21 the remedies for violations of ERISA, ‘Congress intended the federal courts to draw on principles  
 22 of traditional trust law.’”). Normally available contract remedies are far broader than ERISA  
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24  
 25 <sup>3</sup> None of the cases relied upon by BCBSIL for its claim that ERISA’s “comprehensive  
 26 scheme” limits Section 1557 remedies actually address Section 1557 and its interaction, if any,  
 with ERISA. *See* Dkt. No. 179, at 4–5. Indeed, all of the cases cited by BCBSIL for this  
 proposition date from before passage of the ACA. *See id.*

1 remedies, and include injunctive and equitable relief, even when sought for Section 1557 claims.  
 2 *See Cummings*, 142 S. Ct. at 1568. BCBSIL offers no authority to the contrary.

3 Courts have traditionally ordered injunctive and equitable relief to remedy discrimination  
 4 violations. *See, e.g., Thornton v. Comm’r of Soc. Sec.*, 2020 U.S. Dist. LEXIS 220711, at \*8–9  
 5 (Remedy for discriminatory denial of certain federal benefits to same sex married couples was  
 6 reprocessing of wrongfully denied benefits); *Hart v. Colvin*, 310 F.R.D. 427, 438–39 (N.D. Cal.  
 7 2015) (Remedy for wrongful denial of disability benefits is reprocessing); *Huynh v. Harasz*, 2015  
 8 U.S. Dist. LEXIS 154078, at \*30 (N.D. Cal. Nov. 12, 2015) (where “[d]efendants implemented  
 9 a uniform, blanket, and illegal policy in denying all reasonable accommodation requests”  
 10 reprocessing of those requests is an appropriate form of injunctive relief for a class certified under  
 11 Rule 23(b)(2)). This is true for Section 1557 and Title IX cases as well. *See, e.g., Gebser v. Lago*  
 12 *Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998)(injunctive or equitable relief fulfills Title IX’s  
 13 focus on protecting individuals from discriminatory practices); *Sangster*, 633 F.2d at 867; *Ollier*,  
 14 768 F.3d at 868; *Kadel v. Folwell*, 2022 U.S. Dist. LEXIS 218104, at \*10 (M.D.N.C. Dec. 5,  
 15 2022) (granting summary judgment on claims for injunctive relief under Section 1557); *Fain v.*  
 16 *Crouch*, 2022 U.S. Dist. LEXIS 137084, at \*45 (S.D. W. Va. Aug. 2, 2022) (enjoining defendants  
 17 “from enforcing or applying [a gender-affirming care] exclusion” under Section 1557); *Flack v.*  
 18 *Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1003 (W.D. Wis. 2019) (same); *Boyden v.*  
 19 *Conlin*, 341 F. Supp. 3d 979, 1005 (W.D. Wis. 2018) (plaintiffs have a right to pursue equitable  
 20 relief for violations of Section 1557). The Court is not limited to ERISA remedies in this case.<sup>4</sup>

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 22 \_\_\_\_\_  
 23 <sup>4</sup> Nor must Class members show that they are unequivocally entitled to benefits even if  
 24 ERISA remedies applied. *See* Dkt. No. 179, p. 3 (“the class must be defined so that there is no  
 25 question that there would be coverage upon remand”). BCBSIL misreads *Wit 3*, which only  
 26 requires that class members with an ERISA claim for benefits show that they “might” be eligible  
 for benefits – a standard met by the requests for pre-service authorization and post-service claims  
 submitted by Class members. *See Wit 3*, 79 F.4th at 1084. Here, since all claims were denied  
 based upon the Exclusion, a “positive benefits determination” under ERISA occurred when the  
 Court ruled that the standard denial is illegal. Dkt. No. 148; *see Hendricks v. Aetna Life Ins. Co.*,  
 344 F.R.D. 237, 246 (C.D. Cal. 2023).

1 **D. Equitable and Injunctive Relief, Including Reprocessing, is Proper for the**  
 2 **Plaintiff Class Certified under Rule 23(b)(1) and (b)(2).**

3 BCBSIL argues that reprocessing is not available when a class is certified under Rule  
 4 23(b)(1) or (b)(2). Dkt. No. 179 at 5–6. This is nothing more than a rehash of its previous  
 5 argument that the injunctive relief sought here is really a form of money damages only available  
 6 under Rule 23(b)(3) based on the *Wit 2* decision. *See id.*, citing to Dkt. No. 156 (BCBSIL’s  
 7 briefing before *Wit 3* was issued). The Ninth Circuit rejected this argument when it withdrew *Wit*  
 8 *2* and confirmed in *Wit 3* that reprocessing is a proper remedy, without regard for the type of  
 9 class certified under Rule 23. *See Wit 3*, 79 F. 4th at 1084–85. BCBSIL misrepresents *Wit 3* when  
 10 it asserts otherwise.

11 Reprocessing is a form of injunctive relief available for classes certified under Rule  
 12 23(b)(1) and (b)(2) when a defendant applied an illegal standard, as a general practice. In that  
 13 situation, classes are entitled to “make whole” remedies, including reprocessing that places them  
 14 in the position they would have been, but for the application of the illegal standard.<sup>5</sup> *See, e.g.*,  
 15 *Tech. Access Found. Health Benefit Plan v. Grp. Health Coop. (In re Z.D.)*, 2012 U.S. Dist.  
 16 LEXIS 149610, at \*29 (W.D. Wash. Oct. 17, 2012) (Ordering injunctive relief in the form of  
 17 reprocessing for classes certified under Rule 23(b)(1) and (b)(2)); *Meidl v. Aetna, Inc.*, 2017 U.S.  
 18 Dist. LEXIS 70223, at \*57 (D. Conn. May 4, 2017) (citing similar cases); *Des Roches v. Cal.*  
 19 *Physicians’ Serv.*, 320 F.R.D. 486, 509 (N.D. Cal. 2017) (“[T]here is substantial support for  
 20 Plaintiffs’ argument that a ‘reprocessing’ injunction is an appropriate basis for class certification  
 21 under Rule 23(b)(2)”; *Hendricks*, 344 F.R.D. at 246–47 (rejecting similar arguments about the  
 22 incompatibility of reprocessing with class certification under Rule 23(b)(1) and (b)(2)); *Doe v.*

23 \_\_\_\_\_  
 24 <sup>5</sup> The fact that reprocessing relief may result in the payment of benefits does not transform it  
 25 into monetary relief. *Pauma Band of Luiseno Mission Indians of the Pauma & Yuina Reservation*  
 26 *v. California*, 813 F.3d 1155, n.19 (9th Cir. 2015) (“equitable relief, which may take the form of  
 money, is different than monetary damages...”); *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir.  
 1993) (claims seeking “invalidation of a rule used to determine eligibility for benefits” did not  
 amount to claim for the underlying benefits themselves).

1 *Ladapo*, No. 4:23-cv-00114-RH-MAH, Dkt. No. 166 (*App. I*).<sup>6</sup> (Permitting class certification,  
 2 holding that “[i]f this action results in a ruling that the challenged statute and rules [excluding  
 3 access to gender-affirming medical care] are unconstitutional, the individual class members will  
 4 be able to seek individualized medical care....”).

5 **E. The Relief Sought by Plaintiff Class is “Final.”**

6 BCBSIL argues that the declaratory and injunctive relief sought against BCBSIL is not  
 7 “final” because an injunctive order requiring reprocessing and payment by BCBSIL does not  
 8 bind non-party employers to reimburse BCBSIL for the cost of class members’ approved claims.<sup>7</sup>  
 9 Dkt. No. 179 at 7. The fact that BCBSIL may have to take action, on its own, to obtain  
 10 reimbursement from third parties does not make the injunctive relief sought any less “final” as  
 11 between BCBSIL and the Class.

12 In sum, BCBSIL has an independent duty not to discriminate under Section 1557.  
 13 BCBSIL is responsible to ensure that it complies with the law in all of its activities, including  
 14 when acting as a TPA. Since the Court has concluded that BCBSIL discriminates on the basis of  
 15 sex when it administers the Exclusions, even at the request of an employer, BCBSIL is  
 16 responsible for the required remedy for its illegal actions.

17 If BCBSIL is ordered to administer class members’ pre-service requests and post-service  
 18 claims without the Exclusions, consistent with its standard contracts, BCBSIL must pay all valid  
 19 and approved claims and then decide whether to seek reimbursement from the relevant  
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21 <sup>6</sup> The *Doe v. Lapado* decision has not been published on LEXIS as of Friday October 20,  
 22 2023, so the actual order is attached as *Appendix I*.

23 <sup>7</sup> *Takeda v. Nw. Nat. Life Ins. Co.*, 765 F.2d 815 (9th Cir. 1985), cited by BCBSIL at Dkt.  
 24 No. 179 at 6, is inapplicable. The plan administrator in *Takeda* was a necessary party because it  
 25 was unclear whether the plan administrator or the TPA made the decision at issue in the case. *Id.*  
 26 at 820. Here, BCBSIL agreed to include the Exclusions in the plan design and actually  
 administered the Exclusions, conduct that the Court concluded is illegal discrimination. The non-  
 party employers are not necessary parties. See *Carr v. United Healthcare Servs.*, 2016 U.S. Dist.  
 LEXIS 182561, at \*9 (W.D. Wash. May 31, 2016) (Denying motion by defendant TPA to join  
 employer as necessary party even when an indemnity agreement was in place).

1 employers. Dkt. No. 160-1, § 15.3 and *Exh. 2*, § 6; Dkt No. 160-2 at 9. As a practical matter,  
2 BCBSIL may also obtain such reimbursement pursuant to the indemnification agreements that  
3 BCBSIL put in place. Dkt. No. 160-3 at 131:14–133:3. But the fact that BCBSIL may later pursue  
4 a third party for its losses if it decides to seek such reimbursement does not render the proposed  
5 injunctive relief any less “final.” So long as BCBSIL complies with the Court’s declaratory and  
6 injunctive relief, there is nothing further for the Court to adjudicate the claim in this case,  
7 rendering the decision “final.” *See, e.g., Des Roches*, 320 F.R.D. at 510 (distinguishing *Kartman*  
8 *v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 886 (7th Cir. 2011), relied upon by BCBSIL).

9 **F. BCBSIL’s Other Arguments.**

10 BCBSIL argues that the Class should be decertified, apart from the Ninth Circuit’s recent  
11 holding in *Wit 3*. Dkt. No. 179 at 7, citing to its previous briefing at Dkt. No. 156. The Court has  
12 repeatedly rejected these arguments and should do so again. *See* Dkt. Nos. 113, 143.

13 **III. CONCLUSION**

14 The Court should order the proposed classwide declaratory, equitable, and injunctive  
15 relief, as well as nominal damages for C.P. and Patricia Pritchard.

16 DATED: October 20, 2023.

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19 /s/ Eleanor Hamburger

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# Appendix 1

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

JANE DOE et al.,

Plaintiffs,

v.

CASE NO. 4:23cv114-RH-MAF

JOSEPH A. LADAPO et al.,

Defendants.

\_\_\_\_\_ /

**ORDER CERTIFYING CLASSES**

This proposed class action presents a constitutional challenge to Florida statutes and rules that prohibit transgender *minors* from receiving specific kinds of medical treatment. Grandfather provisions allow some minors to continue receiving the treatment but only with restrictions. The statute and rules restrict, but do not prohibit, analogous medical care for transgender *adults*. The most important restriction is a requirement for in-person treatment by a physician—no telehealth, even by a physician, and no treatment, even in person, only by a different kind of healthcare professional without a physician.

The named plaintiffs are four transgender adults and the parents of seven transgender minors. The parents assert the claims of their transgender children. The

adult plaintiffs and the parents of grandfathered minors challenge the restrictions on treatment. The parents of minors who are not grandfathered challenge the prohibition on treatment.

The defendants, all in their official capacities, are the Florida Surgeon General, the Florida Board of Medicine and its members, the Florida Board of Osteopathic Medicine and its members, and the State Attorney for Florida's Fifth Judicial Circuit. Florida's other 19 State Attorneys have agreed to be bound by the rulings for or against the State Attorney for the Fifth.

The plaintiffs have moved to certify three classes. This order grants the motion but reconfigures the classes to include a class of adults, a class of minors, and a subclass of minors who are not grandfathered.

### *The Merits*

A class-certification motion does not call for a decision on the merits, but the required analysis may “entail some overlap with the merits . . . . That cannot be helped.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Here, the merits have been discussed at some length in orders granting one motion for a preliminary injunction and denying another. No further discussion is needed in connection with class certification.

It is enough to say this: one can reasonably argue both sides of the constitutional issues, but one cannot reasonably deny that the issues are substantial.

Indeed, challenges to similar restrictions on transgender care for minors already present a circuit conflict. *Compare Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (affirming a preliminary injunction against enforcement of a prohibition of care to minors) *with Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205 (11th Cir. 2023) (reversing a similar preliminary injunction) *and L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (same).

### ***Class Certification***

Federal Rule of Civil Procedure 23 governs class certification. Before turning to the required “rigorous analysis” of the specific prerequisites to certification, *see, e.g., Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009), a more general observation is in order: this is the very paradigm of a case appropriate for certification under Rule 23(b)(2). That provision applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” The defendants are state officials whose duties include enforcing the prohibition and restrictions on the medical treatment at issue. They have acted, and will continue to act unless enjoined, on grounds that apply generally to the class: the statute and rules that the plaintiffs assert are unconstitutional.

A party who seeks class certification has the burden to establish all four requirements set out in Rule 23(a) and at least one of the requirements set out in Rule 23(b). *See, e.g., Vega*, 564 F.3d at 1265; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997).

### ***Rule 23(a)***

The Rule 23(a) elements are often referred to as “numerosity, commonality, typicality, and adequacy of representation.” *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) (quoting *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187–88 (11th Cir. 2003)). This order addresses each in turn.

Rule 23 refers to a class “representative,” not to a named plaintiff, because the rule applies to defendant classes as well as plaintiff classes. This case involves only plaintiff classes, so this order uses “representative” and “named plaintiff”—and sometimes simply “plaintiff”—interchangeably.

***Numerosity.*** The numerosity element requires the class to be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[W]hile there is no fixed numerosity rule, ‘generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.’” *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). A named plaintiff “need not show the precise number of members in the class.”

*Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983). But numerosity is not satisfied by speculative inferences. *Vega*, 564 F.3d at 1267.

What matters here is the number of transgender individuals in each proposed class. If, as set out below, there should be two classes—one for adults and one for minors, with an additional subclass of minors—the issue is the number of transgender adults or minors in Florida who seek the kind of care at issue. The record shows that there are thousands of transgender adults and thousands of transgender minors in Florida. ECF No. 121-6 at 11. And the record shows that roughly 65% of transgender individuals seek hormone therapy, while roughly 8% seek gender-affirming surgery. *See* Decl. of Dr. Kellan E. Baker, ECF No. 175-6 at 6 ¶ 14 in *Dekker v. Weida*, No. 4:22cv325 (N.D. Fla. 2023) (accepted as part of this record by stipulation) (citing his peer-reviewed article *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, 50 J. L. Med. & Ethics 456 (2022)). These numbers are imprecise but accord with what is obvious anyway: the statutes and rules at issue affect far more than enough adults and minors to meet the numerosity requirement. In their memorandum in response to the class-certification motion, the defendants did not assert the contrary.

The plaintiffs have met the numerosity requirement.

**Commonality.** The commonality element requires that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The action “must involve issues that are susceptible to class-wide proof.” *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). A common contention must be “capable of classwide resolution” such 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*, 564 U.S. at 350. Courts should not fully consider the merits at the certification stage, but courts do look to the elements of a claim to determine whether commonality exists. *See, e.g., Vega*, 564 F.3d at 1272 (looking at the elements of a breach of contract claim to establish commonality).

This case will turn almost entirely on common issues with common answers. The plaintiffs assert the statute and rules are subject to strict or intermediate scrutiny; for each challenged provision, the level of scrutiny will be the same for every affected class member, without exception. The plaintiffs assert the statute and rules are not supported by a sufficient state interest as measured under whatever level of scrutiny applies; for each challenged provision, the sufficiency of the state interest will be the same for every affected class member, without exception. The plaintiffs assert the statute and rules were the product of discriminatory animus; that will be true or not true for every class member, without exception. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 810 (11th Cir.

2022) (“[A] disparate impact on a group offends the Constitution when an otherwise neutral policy is motivated by purposeful discrimination.”); *Thompson v. Alabama*, 65 F.4th 1288, 1297 (11th Cir. 2023) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). The factors a court properly considers to determine animus will be the same—with the same answer—for every class member. *See Greater Birmingham Ministries v. Sec’y of State*, 992 F.3d 1299, 1321 (11th Cir. 2021) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977)).

The defendants assert, though, that providing class relief will require individual determinations of the circumstances and appropriate care of each individual. Not so. Commonality requires common questions with common answers and is not defeated just because a case also presents individual issues. Indeed, nearly all class actions potentially present individual questions about whether individuals qualify for whatever classwide relief may ultimately be granted. Thus, for example, class actions in the decade following enactment of the Civil Rights Act of 1964 resulted in injunctions desegregating large public and private employers, despite individual questions about whether any individual class member would qualify for the jobs or pay at issue:

Once class-wide discrimination has been demonstrated to result in disproportional earnings, a class-wide decision that back pay is appropriate can be discerned without deciding which members of the class are entitled to what amounts. This is no different than

affirmative injunctive relief, in the form of red circling or advance entry, which on remand will be applied to particular individuals and not the whole class.

*Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974) (Tuttle, J.) (citations omitted).

If this action results in a ruling that the challenged statute and rules are unconstitutional, the individual class members will be able to seek individualized medical care, just as they could do before the statute and rules were adopted. The class members—and for minors, the parents—will decide, in consultation with their healthcare professionals, what medical care to obtain. Except to the extent necessary to prevent state officials from acting in violation of the United States Constitution, the court will not address individualized treatment issues.

The plaintiffs have met the commonality requirement.

**Typicality.** The typicality element requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The plaintiffs must “possess the same interest and suffer the same injury as the class members.” *Dukes*, 564 U.S. at 348–49 (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

Here each named plaintiff has the same interest and has suffered the same injury as the class the named plaintiff will represent. The interest is to obtain appropriate medical care related to transgender identity and, for the parents, to

direct their children's medical care. The injury is the state's prohibition of that care for minors who are not grandfathered and, for all plaintiffs, restrictions on that care.

The minors Susan Doe, Gavin Goe, and Lisa Loe are not grandfathered and so are affected by the prohibition. If they obtain the requested relief from the prohibition, they will be affected by the restrictions, so they can—perhaps must—pursue their challenge to the restrictions as part of this case. The minors Freya Foe and Paul Poe are grandfathered and so are affected by the restrictions, not the prohibition. The parents' interests track those of their children. The adult plaintiffs are affected by the restrictions.

Each named plaintiff's claims are typical of the class the plaintiff will represent. The plaintiffs have met the typicality requirement.

***Adequacy.*** The final Rule 23(a) requirement is that the named plaintiffs will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This encompasses two separate inquiries: whether any substantial conflict of interest exists between the named plaintiff and the class and whether the named plaintiffs will adequately prosecute the action. *See, e.g., Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Class counsel also must be adequate. *See* Fed. R. Civ. P. 23(g).

Here there are no conflicts between the named plaintiffs and the class. The named plaintiffs are adequate representatives. Their attorneys are adequate class counsel. The plaintiffs have met the adequacy requirement.

### ***Rule 23(b)(2)***

Having met the requirements of Rule 23(a), the plaintiffs must also meet one of the requirements of Rule 23(b). Under Rule 23(b)(2), class treatment is appropriate when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

This case presents a proper (b)(2) class. The parties opposing the class—the defendants—will, unless enjoined, enforce the challenged statute and rules. They will do this because the statute and rules require it—a ground that applies generally to the classes. The plaintiffs have met the 23(b)(2) conditions.

### ***Ascertainability***

Rule 23(a) does not explicitly speak to “ascertainability”—to whether the members of the class can be presently ascertained. The Eleventh Circuit recently said, in a case involving a proposed 23(b)(3) class, that ascertainability is an “implied prerequisite” to certification. *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). The same is not true, however, for a (b)(2) class. *See*

*Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970) (“It is not necessary that the members of the class be so clearly identified that any member can be presently ascertained.”). *Carpenter* is binding authority in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Because *Cherry* and *Carpenter* involve different parts of Rule 23, their *holdings* apparently are not in conflict. And the different treatment is understandable: ascertainability presents a much different issue under Rule 23(b)(3) than under Rule 23(b)(2). But if the decisions were deemed in conflict, *Carpenter*, as the prior decision, would control. See *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) (“Our adherence to the prior-panel rule is strict, but when there are conflicting prior panel decisions, the oldest one controls”); see also *Jones v. DeSantis*, No. 4:19-cv-300-RH, 2020 WL 5646124, \*5–6 (N.D. Fla. Apr. 7, 2020) (adhering to *Carpenter*).

None of this matters here. These classes are ascertainable. They are at least as ascertainable as untold dozens if not hundreds of class actions in the 1960s and 1970s through which district courts in the old Fifth Circuit, including in Florida, desegregated the South. Indeed, the same could be said of the entire Rule 23 analysis of this action. This action presents claims of discrimination on new grounds—transgender status, not race or gender—but the case is, at bottom, another in a long line of cases alleging unconstitutional discrimination by state

actors. Cases like this have long been adjudicated through class actions, precisely as the drafters of Rule 23 intended. Better to have one action and resolve the dispute for all concerned.

### *Class Definition*

The affected individuals are transgender Florida residents who seek medical care of the kind at issue: puberty blockers, cross-sex hormones, gender-affirming surgery. The individuals need not suffer gender dysphoria; the statute and rules prohibit or impose conditions on these treatments regardless of whether the patient is or is not dysphoric. *See* Fla. Stat. §§ 456.001(9)(a) (defining “sex-reassignment prescriptions or procedures” without reference to dysphoria) & 456.52 (imposing the prohibition and other restrictions without reference to dysphoria).

The affected individuals can be readily divided into two groups: adults and minors. All the adults are affected by challenged conditions that apply to adults. All the minors are or may be affected by challenged conditions that apply to minors. This is so because the grandfathered minors are affected now, and the others will be affected if they prevail on their challenge to the prohibition of these treatments. The challenged prohibition affects only the minors who have not been grandfathered, so they comprise a proper subclass.

The defendants seem to suggest that every class representative and every class member must be affected in the same way by the same provisions, so that, for

example, if one individual already gets treatment in person from an advanced registered nurse practitioner, the individual cannot be a representative for a class that challenges not only the physician-only condition but also the in-person condition. Otherwise, the defendants suggest, they will not know who challenges what and will not have a fair opportunity to present their defense. This is wrong, as addressed in the commonality section of this order.

Properly understood, this is a case-management problem no different from case-management issues presented in non-class actions. It is always necessary to define the issues and to try a case efficiently, with each side having a full and fair opportunity to take its best hold. The parties should come to the pretrial conference prepared to make this happen.

If the plaintiffs prevail, relief will be tailored so that directly affected individuals obtain their constitutional due. No more and no less. The classes as certified by this order will allow that to happen and will reduce both unnecessary complication in this action and unnecessary duplication in other litigation.

### ***Conclusion***

For these reasons,

IT IS ORDERED:

1. The plaintiffs' class-certification motion, ECF No. 120, is granted in part.
2. Two classes and a subclass are certified:

- (a) The first class consists of all transgender adults in Florida who seek gender-affirming treatment with puberty blockers, cross-sex hormones, or surgery.
- (b) The second class consists of all transgender minors in Florida who seek gender-affirming treatment with puberty blockers or cross-sex hormones and their parents.
- (c) The subclass—a subset of the second class—consists of all transgender minors in Florida who seek but are prohibited by state law from obtaining gender-affirming treatment with puberty blockers or cross-sex hormones and their parents.

3. The class representatives for the first class are named plaintiffs Lucien Hamel, Olivia Noel, Rebecca Cruz Evia, and Kai Pope.

4. The class representatives for the second class are named plaintiffs Jane Doe, individually and on behalf of Susan Doe; Fiona Foe, individually and on behalf of Freya Foe; Gloria Goe, individually and on behalf of Gavin Goe; Linda Loe, individually and on behalf of Lisa Loe; and Patricia Poe, individually and on behalf of Paul Poe.

5. The class representatives for the subclass are Jane Doe, individually and on behalf of Susan Doe; Gloria Goe, individually and on behalf of Gavin Goe; and Linda Loe, individually and on behalf of Lisa Loe.

6. Class counsel are Thomas Redburn, Simone Chriss, and Jennifer Levi.

SO ORDERED on October 18, 2023.

s/Robert L. Hinkle  
United States District Judge