

No. 18-35846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREA SCHMITT, and ELIZABETH MOHUNDRO,
each on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs/Appellants,

v.

KAISER FOUNDATION HEALTH PLAN OF WASHINGTON, KAISER
FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC., KAISER
FOUNDATION HEALTH PLAN OF THE NORTHWEST, and KAISER
FOUNDATION HEALTH PLAN, INC.,

Defendants/Appellees.

On Appeal from the United States District Court for the
Western District of Washington
The Honorable Robert S. Lasnik, U.S. District Judge
(Seattle, Case No. 2:17-cv-01611-RSL)

**APPELLEES' RESPONSE TO MOTIONS FOR LEAVE TO FILE
AMICUS CURIAE BRIEFS**

Appellees Kaiser Foundation Health Plan of Washington, *et al.* (“Kaiser”), respectfully oppose the two motions for leave to submit *amicus curiae* briefs, filed by: (1) National Health Law Program and Northwest Health Law Advocates; and (2) Disability Rights Education and Defense Fund, the National Association of the Deaf, the Bazelon Center for Mental Health Law, the Hearing Loss Association of

America, the Hearing Loss Association, Oregon State Association, the Washington State Communication Access Project, the Oregon Communication Access Project, and the California Communication Access Project (collectively, the “Movants”).

At issue in this case is the legal question of whether Congress changed the longstanding definition of disability “discrimination” when it enacted Section 1557 of the Patient Protection and Affordable Care Act (“ACA § 1557”), such that all health insurers are now required to provide coverage for hearing aids. Kaiser’s health plan contains an exclusion of coverage for certain types of hearing aids that applies equally to all plan participants, and thus does not treat the hearing disabled any differently than non-disabled persons. This benefit design complies with the anti-discrimination provisions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and the lower court held that the same discrimination standards apply under the ACA §1557. Appellants appeal the lower court’s dismissal of their Amended Complaint for failure to state a cognizable claim.

The Kaiser health plan at issue *covers* hearing aids and devices for more serious hearing loss, such as cochlear implants, which may be disabling. In contrast, the exclusion applies to hearing aids which can improve non-disabling hearing loss and applies to all plan participants, including those who do not have a hearing disability as defined under 42 U.S.C. § .12102(1)-(2) (a hearing impairment is a disability only if it “substantially limit[s]” an individual’s hearing or major life

activity). The focus of the Movants on the hearing disabled is misplaced and not helpful to the court. For the reasons stated herein, the motions should be denied.

This Court has broad discretion to allow amicus participation. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). “The privilege of being heard amicus rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise.” *Community Ass’n for Restoration of Environment (CARE) v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D. Wash. 1999) (citing *Hoptowit*, 682 F.2d at 1260). Leave to file an amicus brief should be denied unless a party is not represented competently or at all, a decision in the present case may affect the interest of the amicus in another case in which it has an interest, or the amicus has “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Id.* (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556, 24 S. Ct. 119, 48 L. Ed. 299 (1903)).

The Movants do not meet any of the criteria to justify amicus status. Appellants are represented by competent counsel, who have advanced the same arguments as those in the Movants’ proposed briefs. They have not alleged that the present case will affect any interest the Movants have in any other case. Nor do the Movants have any unique information or perspectives that would help the Court decide the issues presented by the parties.

The Movants proposed briefs are entirely duplicative of Appellants' opening brief, and offer nothing new beyond supporting Appellants' cause with re-worded arguments. They are public interest groups with varying missions of advancing equality for the hearing impaired, removing discriminatory barriers to health care, and fostering access to affordable healthcare. It is not clear that their missions in fact would at all be served if the limited exclusion for certain hearing aids is rendered void and such hearing aids become a mandated benefit. For example, since the limited exclusion applies to all plan participants, the non-disabled would gain the most if the exclusion were removed. Further, the availability of a rider for such hearing aid coverage was offered but rejected by the plan sponsor due to cost. Thus, if Appellants were to prevail, hearing aid coverage could become mandatory in all health plans and premiums would increase dramatically. Despite this conflict with the goal of ensuring affordable health care, Movants are demonstrably biased in favor of Appellant's cause.

Generally, the purpose of amicus curiae is to provide "impartial information on matters of law[.]" *Miller-Wohl Co. v. Commissioner of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir.1982). "Historically, amicus curiae is an *impartial* individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, *rather than to advocate a point of view so that a cause may be won by one*

party or another.” Community Ass’n for Restoration of Environment (CARE) v. DeRuyter Bros. Dairy, 54 F.Supp.2d 974, 975 (E.D. Wash. 1999) (emphasis added).

Movants are not neutral or disinterested, and are not able to provide impartial information that would assist the Court in determining the legal issue whether a health plan’s exclusion of coverage for hearing aids constitutes “discrimination” under ACA § 1557. The proposed amicus briefs do not “supplement the efforts of counsel” nor do they “draw the court’s attention to law that escaped consideration.” *Miller-Wohl*, 694 F.2d at 204. The economic implications of this case to the nation’s health care industry are enormous, and the Movants’ predisposed positions do not add anything beyond rehashing the arguments Appellants’ counsel has competently made. The Movants offer no legal or other substantive information or perspective that has not already been represented to the Court by Appellants in their opening brief. This Court should therefore deny the motions for leave to file *amicus* briefs.

RESPECTFULLY SUBMITTED this 8th day of February, 2019.

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CERTIFICATE OF SERVICE

I, Sherelyn Anderson, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104.

On this day, I electronically filed the foregoing Appellees' Response to Motions for Leave to File *Amicus Curiae* Briefs with the Clerk of the Court and caused it to be served upon the below counsel of record using the CM/ECF system.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Dated this 8th day of February, 2019, at Seattle, Washington.

/s/ Sherelyn Anderson
Legal Assistant