

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREA SCHMITT; ELIZABETH  
MOHUNDRO; and O.L. by and through her  
parents, J.L. and K.L., each on their own  
behalf, and on behalf of all similarly situated  
individuals,

Plaintiffs,

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.

NO. 2:17-cv-1611-RSL

PLAINTIFFS' MOTION FOR LEAVE  
TO FILE FIFTH AMENDED  
COMPLAINT

**Note on Motion Calendar:  
April 14, 2023**

**I. INTRODUCTION/RELIEF REQUESTED**

Plaintiffs move for leave to file the proposed Fifth Amended Complaint, attached  
in redline format to this Motion as *Appendix A*, pursuant to Fed. R. Civ. P. 15 (a)(2) and  
LCR 15.

## II. FACTS

### A. Procedural History

This lawsuit was filed on October 31, 2017. Dkt. No. 1. An Amended Complaint was filed on December 13, 2017, before Defendants filed any responsive pleading. The Second Amended Complaint adding an additional plaintiff without modifying any of the claims alleged was filed on February 28, 2018. *See* Dkt. Nos. 28-29.

The Court dismissed the lawsuit with prejudice on September 14, 2018. Dkt. No. 42. Plaintiffs appealed, and the Ninth Circuit reversed, concluding that dismissal with prejudice was improper and directing the trial court to permit Plaintiffs to amend their complaint, consistent with the Ninth Circuit's decision. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945 (9th Cir. 2020). The Ninth Circuit's decision was only the second appellate decision nationwide on the Affordable Care Act's anti-discrimination clause, Section 1557. *See* 42 U.S.C. § 18116.

On October 20, 2020, Plaintiffs filed their Third Amended Complaint, as directed by the Ninth Circuit. Dkt. No. 58. On November 19, 2020, Plaintiffs moved to add an additional named plaintiff, which Defendants did not oppose. *See* Dkt. Nos. 61, 63. The Court granted Plaintiffs' motion, and the Fourth Amended Complaint was filed on December 15, 2020. Dkt. Nos. 64-65.

Defendants moved to dismiss the Fourth Amended Complaint on March 18, 2021. Dkt. No. 72. The Court denied Defendants' Motion on August 4, 2022. Dkt. No. 81.

Plaintiffs diligently pursued discovery, taking the Rule 30(b)(6) deposition of defendant Kaiser Foundation Health Plan of Washington and Kaiser Foundation Health Plan of Washington Options on December 23, 2023. *See* Dkt. No. 91, *Exh. B*. Plaintiffs also served four separate requests for written discovery during this time period. Hamburger Decl., ¶2. Discovery is ongoing and has been extended to July 7, 2023. Dkt.

1 No. 110. Plaintiffs expect to take multiple depositions of Defendants' fact witnesses in  
2 April, 2023. Hamburger Decl., ¶2.

3 Plaintiffs moved for class certification on January 12, 2023. Dkt. No. 90. At the  
4 request of defense counsel, the noting date was extended to allow Defendants additional  
5 time to respond. Dkt. Nos. 98-99. The Motion is now fully briefed for the Court's  
6 consideration. Dkt. Nos. 102, 107.

7 Defendants served their first discovery requests on Plaintiffs on March 3, 2023.  
8 Hamburger Decl., ¶3.

9 **B. Changes in the Fifth Amended Complaint**

10 The proposed Fifth Amended Complaint modifies the class definition to be  
11 consistent with that in the pending Motion for Class Certification. *See* Dkt. No. 90.

12 It also expressly pleads a claim for disparate impact discrimination, consistent  
13 with the Ninth Circuit's decisions in *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020)  
14 and *Payan v. L.A. Cmty. College Dist.*, 11 F.4th 729 (9th Cir. 2021). Both of these decisions  
15 were issued after the Fourth Amended Complaint was before the Court. Moreover, *Doe*  
16 was pending before the U.S. Supreme Court until November 12, 2021, when the parties  
17 in that litigation stipulated to dismiss the writ of certiorari. *See*  
18 <https://www.scotusblog.com/case-files/cases/cvs-pharmacy-inc-v-doe/> (last visited  
19 3/23/23).

20 After the Court's decision denying Defendants' Motion to Dismiss, Plaintiffs  
21 engaged in extensive discovery, as detailed in Plaintiffs' Motion for Class Certification.  
22 *See* Dkt. No. 90. Based upon that discovery and the current status of disparate impact  
23 claims under Section 1557 and Section 504, Plaintiffs concluded that they should add a  
24 claim for disparate impact discrimination.

25 Plaintiffs' counsel informed defense counsel of Plaintiffs' intent to amend the  
26 Complaint to include a disparate impact claim and provided defense counsel with a

1 redlined version of the proposed Fifth Amended Complaint. Hamburger Decl., ¶4.  
2 Defense counsel did not agree to stipulate to the amendment. *Id.*

### 3 III. ARGUMENT

4 Fed. R. Civ. P. 15 (a)(2) provides that “a party may amend its pleading only with  
5 the opposing party’s written consent or the court’s leave. The court should freely give  
6 leave when justice so requires.” The policy favoring amendment of pleadings “should  
7 be applied with extreme liberality.” *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 186  
8 (9th Cir. 1987). A court may deny a motions to amend are only based on the presence of  
9 four factors: bad faith, undue delay, undue prejudice to the opposing party and futility  
10 of amendment. *Id.*

11 None of the factors is present here. Although this case was filed in 2017, it is still  
12 at the discovery stage. Plaintiffs move to amend the Complaint to clarify the class  
13 definition, consistent with the pending Motion for Class Certification, and to expressly  
14 include a claim for disparate impact discrimination under Section 1557.

15 There was no “undue delay” in adding the disparate impact claim. Defendants  
16 were on notice that a disparate impact discrimination claim could be added because of  
17 its close connection to the existing “proxy discrimination” claim. “The difference  
18 between proxy discrimination and facially neutral overdiscrimination [disparate impact]  
19 is merely one of degree.” *Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach*, 730 F.3d  
20 1142, 1160, n. 23 (9th Cir. 2013).

21 Moreover, the viability of a disparate impact claim was in doubt until November  
22 2021, when the *Doe* writ of certiorari was withdrawn. *See CVS Pharmacy, Inc., et al. v.*  
23 *Does*, 2021 U.S. LEXIS 3572, 141 S. Ct. 2882 (2021) (granting *certiorari* to address only the  
24 disparate impact issues raised in the Petition); 2021 U.S. LEXIS 5789 (U.S. Nov. 12, 2021)  
25 (dismissing *certiorari*). By that time, the Court was already considering Defendants’  
26

1 Motion to Dismiss the Fourth Amended Complaint, which was not decided until August  
2 2022.

3 Plaintiffs did not amend immediately upon the Court's denial of the Motion to  
4 Dismiss, because they sought discovery to determine the viability of a disparate impact  
5 claim. *See Bagwell v. CBS Broad., Inc.*, 2020 U.S. Dist. LEXIS 264906, at \*4 (C.D. Cal.  
6 Nov. 17, 2020) ("plaintiffs should not feel required to plead claims that they may not  
7 have an appropriate basis for on fear of losing the opportunity to amend based on  
8 discovery responses"). Based upon the discovery produced to date, and the testimony  
9 of the Rule 30(b)(6) witness, Plaintiffs conclude that the addition of the claim is proper.

10 Defendants have plenty of time to conduct discovery related to the disparate  
11 impact claim, as the expert witness and discovery deadlines are still several months in  
12 the future. Defendants only just began their discovery efforts in this matter and have  
13 not taken any depositions. *Hamburger Decl.*, ¶3. Should Defendants believe that they  
14 need additional time, Plaintiffs are open to an extension of the case schedule including  
15 the trial date.

16 Nor is there any prejudice to Defendants due to the pending class certification  
17 motion. The additional claim does not impact the class definition nor any of the  
18 considerations under class certification.

#### 19 IV. CONCLUSION

20 This Motion should be granted and Plaintiff directed to submit the Fifth Amended  
21 Complaint attached as *Appendix A* to this Motion.



# **APPENDIX A**

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREA SCHMITT; ELIZABETH  
~~MOHONDROMOHUNDRO~~; and O.L. by and  
through her parents, J.L. and K.L., each on their  
own behalf, and on behalf of all similarly  
situated individuals,

Plaintiffs,

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.

NO. 2:17-cv-01611-RSL

~~FOURTH~~ **FIFTH** AMENDED  
COMPLAINT  
(CLASS ACTION)

**I. INTRODUCTION**

1. An estimated 48 million Americans have a hearing loss that measurably interferes with their ability to understand speech. The vast majority of those people take no action - indeed, most are likely unaware that they have a deficit. Others, though, experience a reduction in their ability to undertake important daily activities, and seek



1 to remedy that situation through an evaluation for, and fitting of, hearing aids and/or  
2 other treatment.

3 2. Hearing aids improve health and life for many people. People who wear  
4 hearing aids do so because they find that otherwise, they are significantly limited in their  
5 ability to work, participate in daily activities or to engage socially. They are rarely, if  
6 ever, sought unnecessarily because hearing aids are not comfortable, affordable, or  
7 stylish. Indeed, they are highly stigmatized as associated with old age and disability.  
8 Virtually everyone who obtains professionally prescribed and fitted hearing aids is a  
9 person with a disability within the meaning of the Affordable Care Act's Section 1557,  
10 which incorporates, through Section 504, the definitions of disability found in the  
11 Americans with Disabilities Act as amended in 2008.

12 3. Health policies issued by defendants Kaiser Foundation Health Plan of  
13 Washington, Kaiser Foundation Health Plan of Washington Options, Inc., Kaiser  
14 Foundation Health Plan of the Northwest, and Kaiser Foundation Health Plan, Inc.  
15 ("Kaiser") specifically exclude coverage for all treatment associated with hearing loss  
16 (*i.e.*, hearing aids, examinations and associated services) except for cochlear implants.  
17 (Hereinafter the "Hearing Loss Exclusion" or "Exclusion"). Plaintiffs initially alleged  
18 that the Exclusion violates Section 1557 of the Affordable Care Act, which bars health  
19 insurers from discriminating on the basis of disability. This Court granted defendants'  
20 motion to dismiss without leave to amend, reasoning that the Exclusion is not  
21 discriminatory because it applies both to people whose hearing loss would qualify as a  
22 disability and to people without a hearing disability.

23 4. The Ninth Circuit reversed and remanded the case with a directive that  
24 plaintiffs be allowed to amend to show "that the [E]xclusion is likely to predominately  
25 affect disabled persons," *Schmitt v. Kaiser*, 965 F.3d 945, 959, n. 8 (9th Cir. 2020), and that  
26

1 coverage for cochlear implants fails to meet the needs of most people with hearing loss.  
 2 *Id.* at 959. For reasons set forth in this Amended Complaint, plaintiffs allege that virtually  
 3 all people who wear professionally prescribed hearing aids are “disabled” under the  
 4 pertinent federal definition, and that very few of those individuals with disabling  
 5 hearing loss can have their needs met by treatment with cochlear implants.

6 5. After this case was remanded, the Ninth Circuit affirmed that disability  
 7 discrimination under Section 1557 can also be pled through allegations showing a  
 8 disparate impact on the disabled. *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020).  
 9 *See also Payan v. L.A. Cmty. College Dist.*, 11 F.4th 729 (9th Cir. 2021). Specifically,  
 10 discrimination exists if (1) the Hearing Loss Exclusion eliminates aspects of otherwise  
 11 covered durable medical equipment/prosthetic and outpatient medical benefits, that  
 12 hearing disabled insureds require and deem critical to their health; *Doe*, 982 F.3d at 1210;  
 13 and (2) the Exclusion prevents hearing disabled insureds from obtaining meaningful  
 14 access to their durable medical equipment/prosthetic and outpatient medical benefits.  
 15 *Id.*, at 1211. In other words, the Exclusion prevents hearing disabled insureds from  
 16 receiving effective treatment for their disabling condition. *Id.*, at 1212. Plaintiffs also  
 17 allege that Kaiser’s Exclusions have a disparate impact on its hearing disabled insureds  
 18 such that the Exclusions are discriminatory.

19 5.6. Since this case was originally filed, the Washington Legislature has passed  
 20 its own broad anti-discrimination statute that applies to health care plan design,  
 21 RCW 48.43.0128. This statute prohibits all non-grandfathered health plans from  
 22 discriminating on the basis of “present or predicted disability,” or “health condition,” in  
 23 the design of benefits. *Id.* In 2020, the provision was expanded from individual and  
 24 small group plans to all “non-grandfathered” health plans, with an effective date of  
 25 June 11, 2020. *Id.* The statute is an additional “term” of the Kaiser’s health plans in  
 26

1 Washington. *See* RCW 48.18.510. Accordingly, plaintiffs plead an additional Breach of  
2 Contract claim due to Kaiser’s ongoing violation of RCW 48.43.0128.

3 **II. PARTIES**

4 **6.7. Andrea Schmitt.** Plaintiff Andrea Schmitt is diagnosed with disabling  
5 hearing loss. Schmitt is insured under a Kaiser Foundation Health Plan of Washington  
6 insured health plan that was issued and delivered in King County, Washington.  
7 Schmitt’s health coverage is through her employment at Columbia Legal Services, which  
8 is headquartered in Seattle, Washington.

9 **7.8. Elizabeth Mohundro.** Plaintiff Elizabeth Mohundro is diagnosed with  
10 disabling hearing loss. Mohundro was insured under a Kaiser Foundation Health Plan  
11 of Washington Options Inc. health plan that was issued and delivered in King County  
12 Washington. Mohundro’s coverage was through her employment at World Association  
13 for Children and Parents (WACAP), a nonprofit international adoption and child  
14 assistance agency headquartered in Renton, Washington. On April 1, 2019, WACAP  
15 merged with another agency named Holt International Children’s Services. As a result  
16 of the merger, her health coverage was changed from Kaiser to Providence Health Plan.

17 **8.9. O.L. by and through her parents J.L. and K.L.** Plaintiff O.L. is a twelve-year  
18 old child with disabling hearing loss. O.L. is insured in a Kaiser Foundation Health Plan  
19 of Washington Options, Inc. health plan issued and delivered in Seattle, Washington  
20 through her mother’s employment at Richmark Label, a Seattle label manufacturer.

21 **9.10. Kaiser.** Defendants Kaiser Foundation Health Plan of Washington, Kaiser  
22 Foundation Health Plan of Washington Options, Inc. and Kaiser Foundation Health Plan  
23 of the Northwest are health care service carriers that do business in the state of  
24 Washington. Kaiser Foundation Health Plan of Washington and Kaiser Foundation  
25 Health Plan of Washington Options do business in King County, Washington. Based on  
26

1 information and belief, all three are wholly-owned subsidiaries of Kaiser Foundation  
 2 Health Plan, Inc., a California nonprofit corporation. For the purpose of this Complaint,  
 3 all are referred to as a single defendant, "Kaiser."

4 **III. JURISDICTION AND VENUE**

5 ~~10.11.~~ This action arises under the Patient Protection and Affordable Care Act  
 6 ("Affordable Care Act" or "ACA") § 1557, 42 U.S.C. § 18116.

7 ~~11.12.~~ Jurisdiction of this Court also arises pursuant to 28 U.S.C. §§ 1331, 1343.  
 8 Jurisdiction for Plaintiffs' breach of contract claim arises under 28 U.S.C. § 1367.

9 ~~12.13.~~ Venue is proper under 28 U.S.C. § 1391(b)(1) and (2), because, *inter alia*, a  
 10 defendant resides or may be found in this district and a substantial part of the events  
 11 giving rise to the claims occurred in King County, Washington.

12 **IV. NATURE OF THE CASE**

13 ~~13.14.~~ Plaintiffs seek to end Kaiser's standard discriminatory practice of generally  
 14 excluding benefits for treatment of hearing loss, except for cochlear implants.  
 15 Specifically, when this lawsuit was filed, Kaiser's insured health plans in Washington  
 16 contain the following benefit exclusion:

<b>Hearing Examinations and Hearing Aids</b>	<b>Preferred Provider Network</b>	<b>Out of Network</b>
Hearing aids including hearing aid examinations.	Not covered; <i>Member pays 100%</i> of all charges	Not covered; <i>Member pays 100%</i> of all charges
<b>Exclusions:</b> <i>Programs or treatments for hearing loss</i> or hearing care including, but not limited to, externally worn hearing aids or surgically implanted hearing aids and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests including but not limited to non-cochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary		

to implant them other than for cochlear implants; hearing screening tests required under Preventive Services.

See Dkt. No. 18, pp. 29 of 66 (emphasis in original and added). (In this Complaint, the condition is referred hereafter to as “Hearing Loss” and Kaiser’s exclusion as the “Hearing Loss Exclusion.”) Kaiser excludes benefits for Hearing Loss even when the treatment is medically necessary to treat qualified individuals with disabilities such as the named Plaintiffs. Kaiser applies its Hearing Loss Exclusion even though it covers the same benefits for other health conditions, including coverage of outpatient office visits and durable medical equipment or prosthetic devices.

14-15. In Kaiser’s 2020 health plan issued to Plaintiff Schmitt, the Exclusion is worded differently but has essentially the same effect:<sup>1</sup>

Hearing Examinations and Hearing Aids	Preferred Provider Network	Out of Network
Hearing exams for hearing loss and evaluation and diagnostic testing for cochlear implants.  Cochlear implants or Bone Anchor Hearing Aids (BAHA) when in accordance with KFHPWAO clinical criteria.  Covered services for cochlear implants and BAHA include implant surgery, pre-implant testing, post implant follow-up, speech therapy,	<p><b>Hospital - Inpatient:</b> After Deductible, Member pays 10% of Plan Coinsurance</p> <p><b>Hospital - Outpatient:</b> After Deductible, Member pays 10% of Plan Coinsurance</p> <p><b>Outpatient Services:</b> Office visits: Member pays \$20</p>	<p><b>Hospital - Inpatient:</b> After Deductible, Member pays 50% Plan Coinsurance</p> <p><b>Hospital - Outpatient:</b> After Deductible, Member pays 50% of Plan Coinsurance</p>

<sup>1</sup> The key difference is that in the 2020 Kaiser plan, Kaiser now covers Bone Anchored Hearing Aids (“BAHAs”) in addition to cochlear implants. See *Appendix A*, p. 28.

<p>programming and associated supplies (such as transmitter cable and batteries).</p>	<p>Copayment for primary care provider office visits or \$35 Copayment for specialty care provider office visits</p> <p>All other services including surgical services: After Deductible, Member pays 10% Plan Coinsurance</p> <p>Enhanced Benefit:</p> <p>Office visits: Member pays \$10 Copayment for primary care Provide office visits or \$25 Copayment for specialty care provider office visits</p> <p>Deductible and coinsurance do not apply to primary and specialty care office visits</p> <p>All other services, including surgical services, After Deductible, Member pays 10% Plan Coinsurance</p>	
<p>Hearing aids including hearing aid examinations</p>	<p>Not covered; Member pays 100% of all charges</p>	<p>Not covered; Member pays 100% of all charges</p>

**Exclusions:** Hearing care, routine hearing examinations, programs or treatments for hearing loss including but not limited to, externally worn hearing aids or surgically implanted hearing aids, and the surgery and services necessary to implant them except as described above, and hearing screening tests required under Preventive Services.

See *Appendix A*, pp. 28-29. Kaiser excludes benefits for Hearing Loss even when the treatment is medically necessary to treat qualified individuals with disabilities such as the named Plaintiffs. Kaiser applies its Hearing Loss Exclusion even though it covers the same benefits for other health conditions, including coverage of outpatient office visits and durable medical equipment or prosthetic devices.

15.16. By excluding coverage of all treatment for hearing loss (except for cochlear implants and, according to the 2020 Kaiser Plan, BAHAs), Kaiser engages in illegal disability discrimination. The Affordable Care Act prohibits discrimination on the basis of disability by covered entities, including health insurers like Kaiser. See 42 U.S.C. § 18116. Specifically, Section 1557 provides that “an individual shall not, on the ground prohibited under ... Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) be excluded from participation in, **denied the benefits of** or be subjected to discrimination under **any health program** or activity....” 42 U.S.C. § 18116(a) ~~(emphasis added)~~.

16.17. Kaiser is a covered “health program or activity” that must comply with the Affordable Care Act’s § 1557.

17.18. Kaiser violates § 1557 and engages in illegal discrimination on the basis of disability by designing its health plans to include the Hearing Loss Exclusion.

18.19. Kaiser’s Hearing Loss Exclusion was an intentional, deliberate act. It was done without evaluating the service for efficacy, medical necessity or whether it is experimental or investigational, as Kaiser does with other excluded services.

19.20. This lawsuit seeks remedies under the Affordable Care Act arising out of Kaiser’s failure to comply with § 1557. It seeks a court order declaring Kaiser’s Hearing



1 Loss Exclusion void and unenforceable, enjoining Kaiser from continuing to apply the  
 2 Exclusion and requiring corrective notice to all Kaiser insureds concerning its required  
 3 coverage of Hearing Loss. It also seeks damages stemming from Kaiser's deliberate  
 4 discriminatory exclusion of medically necessary care that, but for the application of its  
 5 Exclusion, would otherwise be covered.

6 20-21. Kaiser's Hearing Loss Exclusion also violates Washington's "mini-Section  
 7 1557," RCW 48.43.0128. The Washington statute prohibits Kaiser from applying in its  
 8 non-grandfathered health plans any benefit design that discriminates on the basis of  
 9 disability or health condition. *Id.* This state law enters into the Kaiser contracts of  
 10 insurance and eliminates all non-conforming terms, such as the Hearing Loss Exclusion.  
 11 RCW 48.18.510.

12 21-22. This lawsuit also alleges that Kaiser breached its contract with Plaintiffs  
 13 and the proposed class when it failed to modify its non-grandfathered health plans,  
 14 including those in which Plaintiffs are enrolled, to comply with RCW 48.43.0128, by  
 15 eliminating the Hearing Loss Exclusion.

## 16 V. CLASS ALLEGATIONS

17 22-23. *Definition of Class.* The class consists of all individuals who:

- 18 (1) have been, are or will be insured under a Washington  
 19 health insurance plan that has been, is or will be delivered,  
 20 issued for delivery, or renewed by (a) Kaiser; (b) any  
 21 affiliate of Kaiser; (c) predecessors or successors in interest  
 22 of any of the foregoing; and (d) all subsidiaries or parent  
 23 entities of any of the foregoing, at any time on or after  
 24 October 30, 2014 and excluding Medicare Advantage  
 25 plans; and
- 26 (2) have required, require or will require treatment for  
 Hearing Loss other than treatment associated with  
 cochlear implants, or treatment associated with Bone



1 Anchored Hearing Aids (BAHAs) after Kaiser began to  
2 provide coverage for BAHAs.

3 23-24. *Size of Class.* The class of Kaiser insureds who have required, require or  
4 will require treatment for Hearing Loss, excluding treatment associated with cochlear  
5 implants and for BAHAs, after Kaiser began providing such coverage, is so numerous  
6 that joinder of all members is impracticable.

7 24-25. *Class Representatives Schmitt, Mohundro and O.L.* At all relevant times,  
8 named plaintiffs Schmitt, Mohundro and O.L. were enrollees in a Kaiser insured health  
9 plan in the State of Washington. Plaintiffs Schmitt and O.L. remain enrolled in a Kaiser  
10 insured health plan. All have disabling Hearing Loss that requires treatment other than  
11 with cochlear implants or BAHAs. All are “qualified individuals with a disability”  
12 under the Affordable Care Act and Section 504 of the Rehabilitation Act. All require  
13 outpatient office visits (such as to licensed audiologists) and durable medical equipment  
14 and/or prosthetic devices (such as hearing aids) to treat their Hearing Loss. Consistent  
15 with the written language of the policy, Kaiser confirmed to each Plaintiff that they had  
16 no coverage for all benefits for Hearing Loss (except that related to cochlear implants)  
17 including coverage of hearing aids and outpatient office visits to the audiologist because  
18 of Kaiser’s Hearing Loss Exclusion. Nonetheless, Plaintiffs Mohundro and O.L.  
19 presented claims for treatment for hearing loss to Kaiser, which were denied by Kaiser  
20 under the Hearing Loss Exclusion. Plaintiffs’ claims are typical of the claims of the other  
21 members of the class. Plaintiffs Schmitt, Mohundro and O.L., by and through her  
22 parents J.L. and K.L. will fairly and adequately represent the interests of the class.

23 25-26. *Common Questions of Law and Fact.* This action requires a determination  
24 of whether Kaiser’s Hearing Loss Exclusion violates the requirements of the Affordable  
25 Care Act’s § 1557 and discriminates against Plaintiffs on the basis of their disability,  
26 Hearing Loss. Adjudication of this issue will in turn determine whether Kaiser may be

1 enjoined from enforcing the Hearing Loss Exclusion, and found liable under the  
2 Affordable Care Act for injunctive relief, classwide damages and other relief. This action  
3 further requires a determination of whether Kaiser's Hearing Loss Exclusion violates the  
4 requirements of RCW 48.43.0128 and discriminates against Plaintiffs on the basis of their  
5 disability. Finally, this action requires a determination of whether Kaiser breached its  
6 contracts with Plaintiffs and the class by designing and applying a written exclusion that  
7 is rendered void and unenforceable by RCW 48.18.200(2), RCW 48.43.0128, and other  
8 Washington law.

9 26-27. *Kaiser Has Acted on Grounds Generally Applicable to the Class.* Kaiser,  
10 by imposing a uniform exclusion of all coverage for Hearing Loss except for cochlear  
11 implants and BAHAs, after Kaiser began providing such coverage, has acted on grounds  
12 generally applicable to the class, rendering declaratory relief appropriate respecting the  
13 whole class. Certification is therefore proper under FRCP 23(b)(2).

14 27-28. *Questions of Law and Fact Common to the Class Predominate Over*  
15 *Individual Issues.* The claims of the individual class members are more efficiently  
16 adjudicated on a classwide basis. Any interest that individual members of the class may  
17 have in individually controlling the prosecution of separate actions is outweighed by the  
18 efficiency of the class action mechanism. Upon information and belief, there has been  
19 no class action suit filed against these defendants for the relief requested in this action.  
20 This action can be most efficiently prosecuted as a class action in the Western District of  
21 Washington, where several of the Kaiser defendants have their principal place of  
22 business, do business, and where the disputed health insurance plans were issued.  
23 Plaintiffs also reside in the Western District of Washington. Issues as to Kaiser's conduct  
24 in applying standard policies and practices towards all members of the class

1 predominate over questions, if any, unique to members of the class. Certification is  
2 therefore additionally proper under FRCP 23(b)(3).

3 28-29. *Class Counsel.* Plaintiffs have retained experienced and competent class  
4 counsel.

## 5 VI. FACTUAL BACKGROUND

### 6 A. Kaiser's Hearing Loss Exclusion Predominately Affects Disabled Persons

#### 7 1. Hearing Aids Under Washington Law

8 29-30. Washington state law defines "hearing instrument," as "any wearable  
9 prosthetic instrument or device designed for or represented as aiding, improving,  
10 compensating for, or correcting defective human hearing and any parts, attachments, or  
11 accessories of such an instrument or device," RCW 18.35.010(12). "Hearing instruments"  
12 are different from volume-amplifying "assistive listening systems," RCW 18.35.010(1).  
13 Hearing aids are "hearing instruments" within the meaning of Washington law.

14 30-31. The fitting and dispensing of hearing instruments is limited by law to  
15 licensed audiologists and licensed hearing-aid specialists. RCW 18.35.020. Audiologists  
16 must have doctoral-level education and experience, [https://www.doh.wa.gov/  
17 LicensesPermitsandCertificates/ProfessionsNewReneworUpdate/Audiologist/License  
18 Requirements](https://www.doh.wa.gov/LicensesPermitsandCertificates/ProfessionsNewReneworUpdate/Audiologist/LicenseRequirements) (last visited 10/9/20) Hearing-aid specialists must have two years of  
19 college-level education plus supervised experience, RCW 18.35.040, and pass a state-  
20 mandated examination, RCW 18.35.070. Both licensed audiologists and hearing-aid  
21 specialists are defined as "hearing health care professionals." RCW 18.35.010(11).

22 31-32. For purposes of this Complaint, "hearing instrument" and "hearing aid"  
23 are used interchangeably to mean devices prescribed by hearing health-care  
24 professionals, and do not include self-prescribed and self-fitted products such as  
25  
26

1 Personal Sound Amplification Products (PSAPs) or over-the-counter products marketed  
2 as “hearing aids.”

3 **2. The Definition of Disability Under Federal and State Law**

4 32.33. For purposes of § 1557, disability” is defined and construed according to  
5 Section 504 of the Rehabilitation Act, which, in turn “incorporates the definition of  
6 disability in the Americans with Disabilities Act (ADA), as amended.” 45 C.F.R.  
7 § 92.102(c).

8 33.34. The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, as amended  
9 in 2008, defines “disability” as “a physical or mental impairment that substantially limits  
10 one or more major life activities *of such individual*,” 42 U.S.C. § 12102(1)(A) (emphasis  
11 added), a singular and specific reference to activities actually undertaken by the  
12 individual in question.

13 34.35. “Major life activities” include, among other things, “hearing,  
14 communicating and working.” 42 U.S.C. § 12102(2)(A).

15 35.36. The presence of a disability is to be assessed “without regard to the  
16 ameliorative effects of mitigating measures such as ... hearing aids or cochlear  
17 implants.” 42 U.S.C. § 12102(4)(E)(i)(I). The question in assessing a hearing disability  
18 under the ADA is not what the person can do with hearing aids, but rather, what the  
19 person *cannot do without* hearing aids.

20 36.37. The applicable regulations state that the term “substantially limits” is to be  
21 construed “broadly,” is not meant to be a “demanding standard,” 29 C.F.R.  
22 § 1630.2(j)(1)(i).

23 37.38. The definition of “disability” under Washington law is broader than the  
24 ADA definition. *See* RCW 49.60.040(7)(a) (“Disability means the presence of a sensory,  
25 mental or physical impairment that: (i) [i]s medically cognizable or diagnosable; or  
26

1 (ii) [e]xists as a record or history; or (iii) [i]s perceived to exist whether or not it exists in  
2 fact.”).

3 38.39. Under Washington law, a diagnosis with hearing loss is a “disability”  
4 because it is a physiological disorder or condition that affects the body systems listed in  
5 RCW 49.60.040(7)(c)(i). *See Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 617,  
6 444 P.3d 606 (2019).

7 39.40. Under both the federal and Washington definitions of “disability,”  
8 Plaintiffs Schmitt, Mohundro and O.L. are “disabled” due to their hearing loss.

9 **3. Hearing and Hearing Loss**

10 40.41. Hearing involves a complex process by which sound waves are converted  
11 to vibrations that are transmitted through the eardrum to the middle-ear bones, then to  
12 the fluid-filled cochlea in the inner ear. The cochlea contains tiny hair cells that respond  
13 to specific frequencies and emit microscopic electrical impulses to the auditory nerve,  
14 from which the brain decodes the sound. [https://www.asha.org/  
15 public/hearing/How-We-Hear/](https://www.asha.org/public/hearing/How-We-Hear/) (last visited 10/13/20). Hearing loss is the result of  
16 damage to one or more of those components. [https://www.asha.org/public/  
17 hearing/Types-of-Hearing-Loss/](https://www.asha.org/public/hearing/Types-of-Hearing-Loss/). (last visited 10/13/20).

18 41.42. A common preliminary screening for hearing loss is a pure-tone test, in  
19 which subjects are presented with tones at different frequencies (pitches), measured in  
20 Hertz (Hz), at increasing volume, measured in decibels (dB). The subjects are asked to  
21 indicate when they hear those tones. The threshold loudness at which a tone becomes  
22 audible is recorded on an audiogram. [https://www.asha.org/public/  
23 hearing/audiogram/](https://www.asha.org/public/hearing/audiogram/) (last visited 10/13/20).

1           42.43. The critical metric from an audiogram is the average decibel threshold in  
2 the frequencies involving speech, which are the frequencies of 500, 1,000, 2,000 and 4,000  
3 cycles per second, measured in Hertz (Hz).

4           43.44. The generally accepted standard for normal hearing is a threshold of 25 dB.  
5 If the tones must be louder than 25dB to be audible, the subject has worse-than-normal  
6 hearing. An average decibel threshold greater than 25 dB in the speech frequencies is  
7 generally considered the point at which “hearing loss begins to impair communication  
8 in daily life,” Lin, et al., *Hearing Loss Prevalence in the United States*, Archives of Internal  
9 Medicine Vol. 14, No. 20 at pp. 1831-32, Nov. 14 (2011). [https://jamanetwork.com/  
10 journals/jamainternalmedicine/fullarticle/1106004](https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1106004) (last visited 10/13/20).  
11 Extrapolating from actual audiograms of a large and randomly selected population, Lin  
12 et al. estimate that 48 million Americans age 12 and over have impairing hearing loss in  
13 at least one ear. The prevalence of hearing loss, and particularly sensorineural hearing  
14 loss (“SNHL”), is age-related, increasing from relatively small numbers in the 12-19 age  
15 band (approximately 100,000 people nationally) to 5.7 million people age 60-69. *Id.*

16           44.45. Based on information and belief, the proposed class includes few if any  
17 individuals over the age of 65, since most, if not all, of Washington insured Kaiser  
18 enrollees lose their private Kaiser coverage when they become eligible for Medicare,  
19 even if they transfer to a Kaiser Medicare Advantage plan.

20           45.46. There are varying degrees of hearing loss, ranging from mild to profound.  
21 An individual with a speech-frequency average decibel threshold of 25-40 dB is classified  
22 as having a mild loss, and may have some difficulty hearing softly voiced sounds. A  
23 person with a moderate loss (40-70dB) will have difficulty understanding speech at  
24 normal levels, a person with a severe loss (70-90dB) will hear almost no speech and a

1 person with a profound loss (greater than 90dB) will hear almost nothing.  
2 <https://www.cdc.gov/ncbddd/hearingloss/types.html> (last visited 10/13/20).

3 ~~46.47.~~ Most people significantly underestimate their own degree of hearing loss  
4 because they have no way of knowing what they are not hearing, unless informed by  
5 others. Based on self-reports from large-sample interviews, the U.S. Census Bureau  
6 estimates that just under 9.2 million Americans under age 65 self-reported having  
7 “serious” difficulty hearing, including 3.6 million adults who self-report as being deaf.  
8 [https://www.census.gov/content/dam/Census/library/publications/2018/demo/p](https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf)  
9 [70-152.pdf](https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf) (last visited 10/13/20) (explanatory text at p.7 and charts on pp. 21 (adults)  
10 and 31 (children)).

11 ~~47.48.~~ The most common form of hearing loss is sensorineural hearing loss  
12 (“SNHL”), in which the inner-ear hair cells are damaged. [https://www.asha.org/](https://www.asha.org/public/hearing/Sensorineural-Hearing-Loss/)  
13 [public/hearing/Sensorineural-Hearing-Loss/](https://www.asha.org/public/hearing/Sensorineural-Hearing-Loss/) (last visited 10/13/20). That damage is  
14 generally not correctible through surgery or medication, and can be mitigated only  
15 through hearing aids or, in extreme cases, cochlear implants. See  
16 [https://www.hearingloss.org/hearing-help/hearing-loss-basics/types-causes-and-](https://www.hearingloss.org/hearing-help/hearing-loss-basics/types-causes-and-treatment/)  
17 [treatment/](https://www.hearingloss.org/hearing-help/hearing-loss-basics/types-causes-and-treatment/) (last visited 10/13/20). Schmitt, Mohundro and O.L. have SNHL.

18 ~~48.49.~~ Conductive hearing loss occurs when damage to the outer or middle ear  
19 prevents sound from reaching the inner ear. [https://www.asha.org/public/](https://www.asha.org/public/hearing/Conductive-Hearing-Loss/)  
20 [hearing/Conductive-Hearing-Loss/](https://www.asha.org/public/hearing/Conductive-Hearing-Loss/) (last visited 10/13/20). Conductive hearing loss  
21 can sometimes be corrected surgically, or can be addressed with a bone-anchored  
22 hearing aid (BAHA), which bypasses the damaged middle-ear structures and transmits  
23 sound directly to the cochlea and the hair cells. [https://www.hopkinsmedicine.org/](https://www.hopkinsmedicine.org/otolaryngology/specialty_areas/hearing/hearing-aids/baha.html)  
24 [otolaryngology/specialty\\_areas/hearing/hearing-aids/baha.html](https://www.hopkinsmedicine.org/otolaryngology/specialty_areas/hearing/hearing-aids/baha.html) (last visited  
25 10/13/20).



1            49.50. Some people are diagnosed with both SNHL and conductive hearing loss.  
2 See <https://www.healthyhearing.com/help/hearing-loss/types> (last visited 10/13/20).

3            **4. Hearing Aids**

4            50.51. Even people who acknowledge having “serious” hearing difficulties resist  
5 hearing aids, particularly people under 65. According to the Census Bureau, only 2.354  
6 million people under 65 – about 25% of the 9.2 million people who self-report serious  
7 hearing difficulties – have used hearing aids. [https://www.census.gov/content/  
8 dam/Census/library/publications/2018/demo/p70-152.pdf](https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf), (last visited 10/13/20)  
9 (pp. 21 (children) and 31 (adults)).

10            51.52. The Hearing Industry Association, the trade group for hearing-aid  
11 manufacturers and distributors, conducts an annual survey of its members that asks,  
12 among other things, why people do or do not purchase hearing aids. The most recent  
13 survey indicates that in addition to cost concerns, people avoid hearing aids because  
14 they consider hearing aids uncomfortable, unattractive and embarrassing, and because  
15 they believe their hearing is adequate. [https://www.audiologyonline.com/  
16 articles/20q-understanding-today-s-consumers-26648](https://www.audiologyonline.com/articles/20q-understanding-today-s-consumers-26648), (last visited 10/13/20) (20Q  
17 Consumer Insights, item #4).

18            52.53. People who believe their hearing is adequate for their purposes, even if  
19 their hearing is in fact impaired, have made a determination that their own major life  
20 activities are not substantially limited by their hearing loss. They are therefore not people  
21 with disabilities within the meaning of the Section 504 and ACA irrespective of their  
22 actual degree of hearing loss. Conversely, virtually all people who seek or obtain hearing  
23 aids do so because they have experienced limitations in their own life activities, such as  
24 hearing, communicating, learning or working, which experiences make them people  
25 with disabilities under Section 504 and ACA.  
26



1           53.54. The needs of hearing disabled persons differ from the needs of persons  
2 whose hearing is merely impaired. Those who are disabled by their hearing loss  
3 experience its impact on their work, health and/or other daily activities of living. They  
4 seek treatment from hearing health care professionals to ameliorate their disabling  
5 condition.

6           54.55. Conversely, those whose hearing is impaired, but does not interfere with  
7 their major life activities, do not generally seek formal treatment from medical  
8 professionals, and rarely, if ever, seek hearing instruments.

9           55.56. Self-described and self-fitted hearing products not recommended by a  
10 hearing health care professional would fall within Kaiser’s exclusion for devices or  
11 treatment that is not “medically necessary,” which includes treatment provided  
12 (1) “primarily for the convenience of the patient,” (2) in the most appropriate level of  
13 service or supply which can be safely provided to the Member, (3) are appropriate and  
14 consistent with the diagnosis and which, in accordance with accepted medical standards  
15 in the State of Washington, could not be omitted without adversely affecting the  
16 Member’s condition. Dkt. No. 18-1, p. 63 of 66; *See Appendix A*, pp. 75-76

17           56.57. Thus, based upon the above data, and information and belief, if any non-  
18 disabled enrollees with hearing loss seek coverage of hearing examinations and/or  
19 hearing aids, and they meet Kaiser’s medical necessity standards but are still subject to  
20 denial of their claims under Kaiser’s Hearing Loss Exclusion, the number of those  
21 enrollees is extremely small, if they exist at all.

22           57.58. Excluding coverage for hearing aids and hearing treatment exclusively or  
23 almost exclusively affects people with disabling hearing loss as defined by both  
24 Section 504, Section 1557 of ACA and RCW 48.43.0128.

1 58.59. Based upon the above information and information and belief, Kaiser's  
2 Hearing Loss Exclusion is rarely, if ever, applied to medically necessary claims  
3 submitted by non-disabled Kaiser enrollees. On information and belief, the internal  
4 records of Kaiser's denial of claim under the Hearing Loss Exclusion will show that most,  
5 if not all, individuals denied are disabled for the reasons set forth herein.

6 59.60. Even if the Hearing Loss Exclusion is applied to claims submitted by non-  
7 disabled enrollees, Kaiser designed the Exclusion intentionally to deny services to  
8 insureds with disabling hearing loss.

9 60.61. Given Kaiser's existing Medical Necessity definition which prohibits  
10 coverage that is not consistent with general medical standards, the only purpose of the  
11 Hearing Loss Exclusion is to eliminate coverage of medically necessary hearing  
12 treatment and equipment, *e.g.*, the precise coverage needed by those disabled by hearing  
13 loss.

14 61.62. The design of the Hearing Loss Exclusion, uniquely and specifically  
15 targeted at insureds with disabling hearing loss, was an intentional decision made by  
16 Kaiser to ensure that the treatment needed by disabled insureds that would not be  
17 denied under the medical necessity requirement, would nonetheless be excluded.

18 62.63. The cost of hearing evaluations and hearing aids is relatively inexpensive  
19 when compared to other treatment, including cochlear implants and BAHAs. The  
20 average cost for hearing aids and associated services, including diagnosis, fitting and  
21 adjustments, is less than \$2,400 per hearing aid.  
22 <https://www.hearingtracker.com/how-much-do-hearing-aids-cost> (last visited  
23 10/19/20). Cochlear implant costs, including the device and the surgery, range from  
24 \$50,000 to \$100,000, depending on the hospital where the implantation is performed and  
25 the features of the particular implant. <https://health.costhelper.com/cochlear->

1 [implant.html](#) (last visited 10/19/20). The average cost of the surgery for a BAHA, and  
 2 the sound processor is between \$15,000-\$25,000.  
 3 <https://www.healthyhearing.com/help/hearing-aids/bone-anchored> (last visited  
 4 10/19/20).

5 ~~63-64~~. In 2018, Washington's Medicaid program added coverage of hearing aids  
 6 and hearing examinations for adults. See Washington Health Care Authority Fiscal Note  
 7 for House Bill No. 1264 (2018), at [https://fortress.wa.gov/  
 8 FNSPublicSearch/GetPDF?packageID=47296](https://fortress.wa.gov/FNSPublicSearch/GetPDF?packageID=47296) (last visited 10/12/20). Adding the  
 9 benefit for nearly 1 million enrollees cost approximately \$4 million annually, or just \$0.33  
 10 per person per month. *Id.*

11 **B. Cochlear Implants and BAHAs Do Not Serve the Needs of Most Individuals  
 12 With a Hearing Disability.**

13 ~~64-65~~. A cochlear implant ("CI") is a mitigating measure for a limited class of  
 14 people with severe to profound SNHL. A CI bypasses the damaged hair cells in the inner  
 15 ear. A CI consists of an external microphone and processor that send electronic signals  
 16 to an array of electrodes embedded in a filament that is threaded into the cochlea. Those  
 17 electrodes substitute for the damaged hair cells by sending electronic impulses directly  
 18 to the auditory nerve, creating a sensation of sound. [https://www.mayoclinic.org/  
 19 tests-procedures/cochlear-implants/about/pac-20385021](https://www.mayoclinic.org/tests-procedures/cochlear-implants/about/pac-20385021) (last visited 10/13/20).

20 ~~65-66~~. The implantation is done under general anesthesia, often but not always  
 21 on an outpatient basis. The recipient must undertake a considerable effort at  
 22 rehabilitation to enable the brain to make sense of the information received through the  
 23 implant and "translate" it into recognizable sound.

24 ~~66-67~~. CI is only available to people with severe to profound hearing loss who  
 25 cannot be adequately treated with hearing aids. [https://bulletin.entnet.org/article/  
 26 cochlear-implantation-who-is-a-candidate-in-2018/](https://bulletin.entnet.org/article/cochlear-implantation-who-is-a-candidate-in-2018/) (last visited 10/13/20).

1 67-68. Using the same data as the prevalence estimate referenced in ¶44, Goman  
 2 and Lin determined the national prevalence of hearing loss by severity. *See Appendix B,*  
 3 Adele M. Goman, Ph.D., Frank R. Lin, M.D., Ph.D., “Prevalence of Hearing Loss by  
 4 Severity in the United States,” *AJPH* October 2016, Vol. 106, No. 10. They determined  
 5 that 340,000 people age 12-59 have severe or profound losses, as do 360,000 people aged  
 6 60-69. Making the extremely conservative assumption that half of the people in the 60-  
 7 69 age group are under 65, that would indicate that roughly 520,000 people under 65  
 8 would be potentially eligible for a CI, or just 5.6% of the 9.2 million people under 65 with  
 9 self-reported hearing losses.

10 68-69. Cochlear-implant usage in practice is far less than the number of people  
 11 who might be eligible. As of 2012, the last year for which data has been located, the  
 12 National Institute on Deafness and Communication Disorders found that only 58,000  
 13 U.S. adults had cochlear implants, just over 10% of those who might be eligible.  
 14 [https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing#:~:text=One%  
 15 20in%20eight%20people%20in,based%20on%20standard%20hearing%20examinations.  
 16 &text=About%202%20percent%20of%20adults,adults%20aged%2055%20to%2064](https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing#:~:text=One%20in%20eight%20people%20in,based%20on%20standard%20hearing%20examinations.&text=About%202%20percent%20of%20adults,adults%20aged%2055%20to%2064) (last  
 17 visited 10/13/20).

18 69-70. Cochlear-implant usage in children is higher – the NIDCD reported that  
 19 38,000 children under 18 have been implanted, or 3.2% of the 1,176,000 children with  
 20 self-reported hearing loss. As the NIDCD stated, implantation is more aggressive with  
 21 children because of the importance of providing access to sound during the years that  
 22 speech develops.

23 70-71. Based on the data, cochlear implants treat the needs of only a very small  
 24 fraction of the total population of people with hearing loss. As a result, Kaiser’s coverage  
 25 of cochlear implants serves only a very small percentage of its enrollees with disabling  
 26

1 Hearing Loss. The inclusion of coverage for cochlear implants does not serve the needs  
2 of hearing disabled people as a group.

3 ~~71:72.~~ Similarly, BAHAs meet the needs of only a tiny portion of hearing disabled  
4 enrollees. It is a treatment for conductive and mixed hearing loss, as well as unilateral  
5 SNHL. [https://www.evms.edu/patient\\_care/specialties/ent\\_surgeons/services/  
6 otology/patient\\_education/bone\\_anchored\\_hearing\\_aids\\_baha/](https://www.evms.edu/patient_care/specialties/ent_surgeons/services/otology/patient_education/bone_anchored_hearing_aids_baha/) (last visited  
7 10/20/20).

8 ~~72:73.~~ BAHAs meet the needs of only a tiny portion of hearing disabled enrollees.  
9 Current estimates are that 75,000 Americans have received BAHAs. *Id.* There is no  
10 breakdown of BAHA recipients by age. Based on the Census Bureau estimates that over  
11 18 million Americans of all ages self-report serious hearing loss, fewer than 1% treat that  
12 condition using BAHAs.

13 ~~73:74.~~ Of the estimated 18 million Americans of all ages who self-report serious  
14 hearing loss, only 171,000 – less than 1% – are currently being treated by either CIs or  
15 BAHA hearing aids. By comparison, according to the Census Bureau, some 8.3 million  
16 Americans of all ages use hearing aids. Based on those numbers, CIs and BAHA hearing  
17 aids together account for just over 2% of treatments for hearing loss.  
18 [https://www.census.gov/content/dam/Census/library/publications/2018/demo/p  
19 70-152.pdf](https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf) (last visited 10/14/20) (explanatory text at p.7 and charts on pp. 21 (adults)  
20 and 31 (children)).

21 **C. Plaintiffs' Need for Hearing Treatment**

22 ~~74:75.~~ Plaintiff Schmitt has a significant loss in the higher frequencies, and is  
23 therefore unable to hear softly voiced consonant sounds like p, h, sh, ch, k, t, f, s and th.  
24 She hears vowel sounds at normal volume, but without hearing many of the consonants,  
25 she is unable to understand speech without her hearing aids.  
26

1           75:76. Without her hearing aids, Schmitt is significantly limited in the major life  
2 activity of hearing. Among other things, she cannot understand her four-year-old child,  
3 hear her baby crying in the next room, have any conversations in a moving car, carry on  
4 a conversation in a noisy situation such as a busy restaurant, use the phone, hear a smoke  
5 alarm or any kind of warning beep, understand people speaking in a darkened room,  
6 use a drive-through window or go to a movie theater, live theater or concert and  
7 understand what is being said.

8           76:77. Without her hearing aids, Schmitt is significantly limited in the major life  
9 activity of working. She is an attorney with Columbia Legal Services, and works  
10 primarily with low-wage immigrants. Without hearing aids, she cannot participate in  
11 telephone conferences or remote proceedings, is extremely limited in a courtroom,  
12 cannot attend seminars or large meetings, cannot participate in group discussions,  
13 cannot speak Spanish to her clients either in person or over the telephone, cannot observe  
14 or participate in legislative committee hearings and cannot review audio recordings.

15           77:78. Schmitt got her first pair of hearing aids at age 16 when her mother  
16 observed that Schmitt could not hear in the car even though her friends could. Schmitt  
17 tried to participate in debate, but had great difficulty keeping up. She quit playing the  
18 violin, again because she couldn't keep up with the other students. She realized she had  
19 trouble hearing on the phone. As a result of those limitations, she got hearing aids and  
20 has used them ever since.

21           78:79. Plaintiff Mohundro works as an international adoption counselor. Like  
22 Schmitt, she has a high- and mid-frequency hearing loss that makes it difficult for her to  
23 hear consonants and understand speech.

24           79:80. Without her hearing aids, Mohundro is limited in the major life activity of  
25 hearing. She cannot understand her children's speech, cannot understand speech in a  
26

1 moving car or in a crowded place, and cannot tell that someone is speaking to her unless  
2 they initially attract her attention. She cannot hear warning beeps.

3 80-81. Without her hearing aids, Mohundro is limited in major life activities  
4 including her work. Much of her work is over the phone, and she cannot consistently  
5 follow conversations on the phone without her hearing aids. Without her aids, she  
6 cannot participate in group conversations or conversations in a noisy environment.

7 81-82. Mohundro got hearing aids at age 13 after failing hearing tests at school.  
8 She had considerable difficulties socially beginning in roughly fifth grade because she  
9 couldn't participate fully in conversations. Other children thought she was ignoring  
10 them when they spoke, and her friends found it annoying that they had to repeat  
11 themselves so often when speaking to her.

12 82-83. Plaintiff O.L. has bilateral sloping moderate to severe hearing loss.  
13 Newborn hearing screenings from birth through 12 months were inconclusive, but her  
14 parents suspected that she had some hearing loss. She was diagnosed with hearing loss  
15 after undergoing a sedated procedure to evaluate her hearing at Seattle Children's  
16 Hospital when she was 14 months old. She received her first hearing aids one month  
17 later.

18 83-84. Plaintiff O.L. wears her hearing aids all day, during all activities and at  
19 home. She uses the FM system at school and receives other educational  
20 accommodations. She is enrolled at TOPS K-8 with a cohort of deaf and hard of hearing  
21 students as well as typical hearing students and attends classes where there are sign  
22 language interpreters. Although there are sign language interpreters in her classroom,  
23 Plaintiff O.L. is a beginning learner of sign language; it is not her main method of  
24 communication.



1           84.85. Plaintiff O.L. wears hearing aids full time but even with her hearing aids,  
2 she misunderstands approximately 20% of the words spoken. Without her hearing aids,  
3 she mishears approximately 40-50% of spoken words, and she can only have a  
4 conversation with people who are physically close to her and facing her while speaking.  
5 She has to work quite hard to keep up with her peers due solely to her hearing loss.

6           85.86. Without hearing aids she would not be able to participate successfully in  
7 school or other group activities because she would be unable to hear most of the  
8 communication. Loss of access to hearing aids would further impact her development,  
9 health and safety. For example, her uncorrected hearing is so limited that she cannot  
10 hear a fire alarm or talk on the telephone without hearing aids.

11           86.87. Plaintiff O.L.'s hearing aids and hearing evaluations have been repeatedly  
12 denied by Kaiser. For example, in 2019 and 2020, coverage for Plaintiff O.L.'s annual  
13 hearing evaluation at Seattle Children's Hospital was denied, in whole or in part, due to  
14 Kaiser's Hearing Loss Exclusion. Both Kaiser explanations of benefits in 2019 and 2020  
15 referenced the code "071." The 2019 explanation of benefits further states the following  
16 reason for denial of coverage: "071 - THE SERVICE REPORTED IS NOT A COVERED  
17 SERVICE UNDER YOUR CONTRACT."

18           87.88. Plaintiff O.L. requires a new pair of hearing aids in 2020. Plaintiff and her  
19 parents expect Kaiser to deny coverage of the claims for her new hearing aids based  
20 upon the exclusion of coverage in their Kaiser plan.

21           88.89. All three Plaintiffs are disabled under federal and state law.

22 **D. Class-wide Allegations**

23           89.90. During the relevant time periods, Schmitt, Mohundro, O.L. and members  
24 of the class have been insured in one or more Kaiser insured plans.



1           90-91. Plaintiffs Schmitt, Mohundro, O.L., and other members of the class have  
2 been diagnosed with Hearing Loss, a physical impairment that limits a major life activity  
3 so substantially as to require medical treatment. As a result, Schmitt, Mohundro and  
4 other members of the class are “qualified individuals with a disability.” *See* 28 C.F.R.  
5 § 39.103.

6           91-92. Plaintiffs Schmitt, Mohundro, O.L., and other members of the class have  
7 required, require and/or will require medical treatment for their Hearing Loss,  
8 excluding treatment with cochlear implants.

9           92-93. Kaiser is a “health program or activity” part of which receives federal  
10 financial assistance. 42 U.S.C. § 18116; 45 C.F.R. § 92.4.

11           93-94. As a result, Kaiser is a “covered entity” under the Affordable Care Act,  
12 § 1557.

13           94-95. Kaiser provided assurances to the U.S. Department of Health and Human  
14 Services that it complies with the requirements of § 1557. *See* 45 C.F.R. § 92.5.

15           95-96. It also provided similar statements to its Washington insured enrollees,  
16 confirming that it complies with the requirements of § 1557.

17           96-97. Despite these statements and assurances, Kaiser has designed, issued and  
18 administered Washington health plans that exclude all benefits for Hearing Loss, except  
19 for cochlear implants and BAHAs, to the extent Kaiser provided such coverage. Kaiser  
20 continues to do so, to date.

21           97-98. The Kaiser health plans in which Plaintiffs were and Schmitt and O.L.  
22 presently are enrolled are “non-grandfathered health plans” as described in the  
23 Washington Insurance Code.

24           98-99. Kaiser’s non-grandfathered insured health plans must comply with the  
25 requirements of RCW 48.43.0128.

1 ~~99.100.~~ Based upon the Hearing Loss Exclusion, Kaiser has a standard  
2 policy of denying coverage of medically necessary treatment and equipment for Schmitt,  
3 Mohundro and other members of the class, because the requested treatment and  
4 equipment would treat their diagnosed condition of Hearing Loss, and/or the treatment  
5 they seek is for “hearing treatment” and “hearing aids” such that the Exclusion is a form  
6 of intentional proxy discrimination.

7 ~~100.101.~~ Specifically, Kaiser designed the Hearing Loss Exclusion to target  
8 the health care needs of insureds with disabling hearing loss.

9 ~~101.102.~~ Non-disabled insureds rarely seek treatment for hearing loss. To  
10 the extent such insureds seek such treatment, their claims are already excluded under  
11 Kaiser’s medical necessity exclusion. Only disabled insureds with hearing loss are  
12 denied medically necessary treatment for their condition under the Hearing Loss  
13 Exclusion.

14 ~~102.103.~~ Kaiser does not meet the needs of disabled enrollees with hearing  
15 loss by permitting limited coverage for cochlear implants, and BAHAs, to the extent  
16 Kaiser provided such coverage. As alleged above, cochlear implants and BAHAs only  
17 serve the needs of a small percentage of Kaiser’s disabled insureds with hearing loss  
18 (approximately 5% or fewer).

19 ~~103.104.~~ As a result of its deliberate discriminatory actions, Kaiser insureds  
20 with disabling Hearing Loss, like Schmitt, Mohundro, and O.L., do not receive coverage  
21 for medically necessary outpatient office visits to audiologists or for medically necessary  
22 hearing aids, a type of durable medical equipment or prosthetic device.

23 ~~104.105.~~ Kaiser excludes all coverage for outpatient office visits and durable  
24 medical equipment to treat Hearing Loss, even though it covers outpatient office visits,  
25 durable medical equipment and prosthetic devices for other medical conditions.  
26



1 Exclusion to deny coverage of medically necessary audiological examinations, a type of  
2 out-patient office visit, and coverage of medically necessary hearing aids, a type of  
3 durable medical equipment or prosthetic device. Under the exclusion, only or  
4 predominantly people with disabling Hearing Loss, a qualifying disability, are denied  
5 access to the benefits that they require. Out-patient office visits and durable medical  
6 equipment/prosthetic devices are covered for many other health conditions under  
7 Kaiser's policies.

8 ~~113.114.~~ As described above, Kaiser's Hearing Loss Exclusion treats "hearing  
9 loss" as a proxy for disabling hearing loss, since the vast majority of treatment sought by  
10 hearing-disabled enrollees is excluded and few, if any, non-disabled Kaiser enrollees are  
11 subject to the Hearing Loss Exclusion.

12 ~~114.115.~~ Also, as alleged above, only a very small percentage of disabled  
13 hearing loss enrollees receive the treatment they need in the form of cochlear implants  
14 or BAHAs.

15 ~~115.116.~~ Accordingly, the Hearing Loss Exclusion is a form of proxy  
16 discrimination since the "fit" between the Hearing Loss Exclusion and disabling hearing  
17 loss is "sufficiently close" to make a discriminatory inference plausible. *See Schmitt*, 965  
18 F.3d at 958-959.

19 ~~116.117.~~ The drafting and inclusion of the Hearing Loss Exclusion was an  
20 inherently intentional act. It was done for the purpose of excluding coverage for  
21 insureds with disabling hearing loss since coverage for insureds with non-disabling  
22 hearing loss would be excluded under Kaiser's medical necessity clause. Kaiser  
23 understood that the only way to exclude *medically necessary* services and supplies for  
24 hearing loss - services and supplies that would only be provided to disabled insureds -  
25 was to put in place the broad Hearing Loss Exclusion.

1 117.118. The design and administration of the Hearing Loss Exclusion was  
2 an intentional choice or, at the very least, the result of deliberate indifference to the effect  
3 it would have on its insureds with disabling hearing loss.

4 118.119. This discriminatory decision directly resulted in Kaiser retaining  
5 money that it would otherwise would have been required to pay to cover services and  
6 equipment for disabled insureds. Kaiser made this calculus as part of its underwriting,  
7 and decided that its desire to retain money outweighed the medically necessary needs  
8 of its insureds with disabling hearing loss.

9 120. By excluding coverage of all health care related to hearing loss (except for  
10 cochlear implants and in 2020 for BAHAs), Kaiser has discriminated, and continues to  
11 discriminate against Plaintiffs and the class they seek to represent, on the basis of  
12 disability, in violation of Section 1557.

13 121. The hearing loss Exclusion also has a disparate impact on hearing disabled  
14 insureds. Separate from a proxy analysis, an insurer may also unlawfully discriminate  
15 through exclusions that have a disparate impact against those with a disability.

16 122. For the vast majority of these disabled insureds, a hearing aid and related  
17 outpatient medical care are the critical medical services and treatment that they require  
18 to effectively treat their medical condition. These health care devices, prosthetics, and  
19 services are excluded by Kaiser in its design of benefits, despite its general coverage of  
20 medical devices and outpatient visits. The exclusions are not based upon or grounded  
21 in any medical or scientific analysis or even cost-benefit analysis. They exist largely  
22 because Kaiser has always had them in place and never re-examined whether the  
23 Exclusions were proper.

24 123. Put simply, Kaiser discriminates against hearing disabled insureds by  
25 eliminating coverage of the key medical devices and related outpatient care required to  
26

1 treat the needs of most hearing disabled insureds. Hearing disabled insureds get  
2 virtually no coverage for the vast majority of medical treatment and devices that they  
3 require to treat their disability effectively. At the same time, non-hearing disabled  
4 insureds generally have their needs for medically effective durable medical equipment  
5 and outpatient medical care covered.

6 124. Kaiser’s hearing disabled insureds are thus denied meaningful access to  
7 the coverage that they require to treat their disability due to Kaiser’s discriminatory  
8 design of its health benefits policy. Kaiser’s policies have, at all relevant times, excluded  
9 coverage for hearing aids and associated care. Kaiser, however, generally provides  
10 coverage for medically necessary medical devices and prosthetics. Under Washington  
11 law, a hearing aid is a prosthetic device. RCW 18.35.010(12). Yet, it is excluded by Kaiser  
12 in its base policies, impacting its hearing disabled insureds in a targeted and unique way.  
13 The hearing aid and related care exclusion does not uniformly affect all Kaiser’s  
14 insureds; rather, it only affects the vast majority of hearing disabled insureds –  
15 individuals who need hearing aids – a device or prosthetic that would be covered “but  
16 for” Kaiser’s benefit design that excludes them.

17 125. Kaiser’s decision to draft and enforce policy terms that exclude hearing  
18 aids and related care for its hearing disabled insureds is an inherently intentional act. At  
19 minimum, the exclusion of hearing aids – a proven medical intervention to treat the  
20 hearing disabled – was undertaken with deliberate indifference to the needs of this  
21 population.

22 126. This intentionality or deliberate indifference is demonstrated by, among  
23 other things, Kaiser’s carving out from the Exclusion a very narrow exception thereto  
24 permitting coverage of cochlear implants and later BAHAs as well. It is also  
25 demonstrated by Kaiser’s offering a “rider” to large group employers for which the  
26

1 employer may pay extra to add a hearing care services benefit to the base plan otherwise  
2 offered to employers. Kaiser’s intentional choice to carve out the cochlear  
3 implant/BAHA coverage exception from the Exclusion and to offer a hearing services  
4 coverage rider only (at greater cost) only to large group customers demonstrates that  
5 Kaiser repeatedly over the years considered the scope of the Exclusion and its impact on  
6 its insureds and continued to choose not to offer coverage for hearing aids and related  
7 outpatient treatment for the large majority of its hearing disabled insureds.

8 119.127. Kaiser’s exclusion of hearing aids and related care  
9 disproportionately, indeed almost exclusively, affects people with hearing disabilities  
10 who require access to hearing aids and related treatment. The exclusion has the effect of  
11 systematically excluding people with disabling hearing loss from obtaining meaningful  
12 access to the health insurance benefits that they require.

13 **COUNT II – BREACH OF CONTRACT AND VIOLATION OF RCW 48.43.0128**

14 120.128. Plaintiffs re-allege all paragraphs above.

15 121.129. All Washington health plan incorporate the relevant requirements  
16 of the Insurance Code as additional terms and conditions of the contract, rendering any  
17 non-conforming terms void. *See* RCW 48.18.200(2); *Brown v. Snohomish Cty. Physicians*  
18 *Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334, 337 (1993); *accord UNUM Life Ins. v. Ward*, 526  
19 U.S. 358, 376 (1999).

20 122.130. RCW 48.43.0128 forbids Kaiser’s health plans from discriminating  
21 “in its benefit design or implementation of its benefit design, ... against individuals  
22 because of their ... present or predicted disability, ... or other health conditions” or  
23 otherwise “discriminate on the basis of .... disability.”

24 123.131. RCW 48.43.0128 renders Kaiser’s Hearing Loss Exclusion null and  
25 void, since the Exclusion is a form of benefit design discrimination targeted at disabled  
26



1 individuals with hearing loss. Specifically, since the plaintiffs are disabled under  
2 Washington law, and Kaiser’s health plans are subject to RCW 48.43.0128, the Hearing  
3 Loss Exclusion discriminates against Plaintiffs and violates their insurance contract since  
4 Plaintiffs’ disability is a “substantial factor” in the design and administration of the  
5 exclusion of coverage. *See Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319  
6 (1996).

7 124.132. By excluding coverage of all health care related to hearing loss,  
8 (except for cochlear implants and in 2020, BAHAs), Kaiser has discriminated, and  
9 continues to discriminate against Plaintiffs and the class they seek to represent, on the  
10 basis of disability, in violation of RCW 48.43.0128. As Kaiser’s contracts must be  
11 construed and applied without the Hearing Loss Exclusion pursuant to RCW 48.43.0128  
12 and Washington contract law, Kaiser’s use of the Exclusion to deny coverage is also a  
13 breach of contract.

14 **VIII. DEMAND FOR RELIEF**

15 WHEREFORE, Plaintiffs request that this Court:

16 1. Certify this case as a class action; designate the named Plaintiffs as class  
17 representatives; and designate SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC, Eleanor  
18 Hamburger, Richard E. Spoonemore, Daniel S. Gross, and John Waldo (of counsel) as  
19 class counsel;

20 2. Enter judgment on behalf of the Plaintiffs and the class due to Kaiser’s  
21 discrimination on the basis of disability under both Section 1557 and RCW 48.43.0128;

22 3. Declare that Kaiser may not apply the Hearing Loss Exclusion and/or  
23 other contract provisions, policies or practices that exclude or impermissibly limit  
24 coverage of medically necessary treatment on the basis of disability;





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s/ John F. Waldo

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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREA SCHMITT; ELIZABETH  
MOHUNDRO; and O.L. by and through  
her parents, J.L. and K.L., each on their own  
behalf, and on behalf of all similarly  
situated individuals,

Plaintiffs,

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.

NO. 2:17-cv-01611-RSL

**[PROPOSED]  
ORDER GRANTING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE FIFTH  
AMENDED COMPLAINT**

THIS MATTER comes before the Court on Plaintiffs' Motion for Leave to File the Fifth Amended Complaint, pursuant to Fed. R. Civ. P. 15(a)(2) and LCR 15. The Court has reviewed all the pleadings and filings in the record, including Plaintiffs' Motion, Defendants' Opposition, if any, and Plaintiffs' Reply, if any, and the proposed Fifth Amended Complaint in *Appendix A* to Plaintiffs' Motion.

1 Therefore, pursuant to Fed. R. Civ. P. 15(a)(2) and LCR 15, Plaintiffs Motion for  
2 Leave to File Fifth Amended Complaint is GRANTED. Plaintiffs may file the Fifth  
3 Amended Complaint.

4 DATED: April \_\_\_\_\_, 2023.

5  
6 \_\_\_\_\_  
7 Robert S. Lasnik  
8 United States District Judge

9 Presented by:

10 SIRIANNI YOUTZ  
11 SPOONEMORE HAMBURGER PLLC

12 /s/ Eleanor Hamburger

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