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 EXPERT REPORT OF VALARIE K. BLAKE, J.D., M.A.

I, Valarie Blake, J.D., M.A., declare under penalty of perjury and in accordance with the laws of the State of Washington and the United States that:

1. I am over the age of 18, not a party in the case and competent to testify to all matters stated herein. All statements are made upon my personal knowledge.

2. I am a Professor at the West Virginia University College of Law and the Associate Dean for Faculty Development and Research. I have been a member of the

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

faculty there since 2015. Prior, I was a Visiting Professor at the Duquesne School of Law from 2013-2015.

3. ***Exhibit A*** attached hereto is a true and accurate copy of my Curriculum Vitae that details my professional background in health law, disability law, insurance discrimination, and insurance regulation.

4. My educational experience is as follows: I have a Bachelors in Science degree from the University of Pittsburgh, a Masters in Arts in Bioethics degree from Case Western Reserve University, and a Juris Doctorate degree from the University of Pittsburgh School of Law. I completed a post-graduate fellowship in medical ethics and policy at the Cleveland Clinic after earning my J.D. degree.

5. I have been actively engaged in academic legal scholarship for fourteen years since the beginning of my fellowship. My scholarly focus is on disability discrimination, discrimination in health insurance, civil rights enforcement in health care payment and delivery, and health reform. I have written on topics ranging from insurance discrimination on the basis of sex and disability, insurance discrimination in the opioid crisis, standards of legal protections for disability discrimination pre- and post-Affordable Care Act, legal interpretations of Section 1557 of the Affordable Care Act, implications of health reform for civil rights enforcement, and impact of employer-based insurance on reproductive care. I am the author of *LexisNexis Civil Rights and Strategy Series: Federal Health Care Laws* (2021) which surveys civil rights laws in health insurance and health care delivery.

6. I have been retained as an expert in one other case at the stage of mediation (*Waring v. Roper St. Francis Physician Network*, AHLA Claim No. 3218, June, 2016).

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

7. At the request of Plaintiffs' attorneys, I authored a history of disability-based exclusions in commercial health coverage with a particular focus on the history of exclusions of durable medical equipment and more specifically, hearing aids.

8. I am being compensated for my time in this matter at the rate of $450 per hour for consultation and to draft and write this expert report or declaration and for deposition testimony. I will also be reimbursed for any travel-related expenses incurred while working on this case. This compensation is not contingent upon the nature of my findings or on the outcome of this litigation. I have worked approximately 14 hours to date.

Brief History of Commercial Health Insurance in the United States

9. Commercial health insurance took hold in the United States in the 1930s after commercial insurers observed success by nonprofit Blue Cross and Blue Shield plans. Michael A. Morrisey, *History of Health Insurance in the United States* 8-9 (2d ed. 2013). Employers began regularly offering insurance to employees in the 1940s-1950s, first to attract scarce workers during national wage freezes imposed by the Roosevelt administration to combat wartime inflation, and later as such employment benefits were bolstered by favorable tax policies that sheltered money spent on employee benefits from income tax. *Id.* at 10.

10. Commercial insurance products were designed with healthy, able-bodied workers in mind. The market for commercial insurance was overwhelmingly dominated by employers. And employers traditionally employed the able-bodied. The rise of commercial insurance products predated the passage of laws like Section 504 of the Rehabilitation Act (1973) and the Americans with Disabilities Act (1990) that prohibit employment discrimination based on disability and mandate that employers accommodate disability in the workplace. Prior to such laws, employers frequently

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

excluded people with disabilities from the workplace. A poll conducted pre-ADA showed that two-thirds of working-aged people with disabilities were not working and two-thirds of those wanted to be. National Council on Disability, *Equality of Opportunity: The Making of The Americans with Disabilities Act* 49 (2010), https://files.eric.ed.gov/fulltext/ED512697.pdf. Indeed, many people with physical or mental disabilities, including people with deafness, were absent from the workforce because they lived in institutions segregated from the rest of society. Irmo Marini, Noreen Graf, Michael Millington, *Psychosocial Aspects of Disability* 7-8 (2d ed. 2017); Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 Cardozo L. Rev. 1 (2012).

11. Employers' business and economic interests were health care benefits that would keep workers healthy and when ill or injured restore them to good health to maintain a productive work force. Ellen O'Brien, *Employer Benefits from Workers' Health Insurance*, 81 Milbank Quarterly 12 (2003).

12. The selection of healthy, often able-bodied people was also central to a commercial insurance's competitive business model. Blue Cross and Blue Shield plans were community rated, dividing costs of premiums equally across all enrollees. Commercial insurance, in contrast, was experienced rated, meaning a group could enjoy lower premiums if they were actuarially less likely to need health care services. In this way, commercial insurance grew and prospered by "cream-skimming," enrolling large numbers of low-risk insureds paying low premiums, leaving higher risk insureds to the Blues. Morrisey at 11. By design, these commercial plans met the needs of the healthy, whose concerns were protection from unexpected, catastrophic events, not routine health care expenses. The insureds whom insurers tried to avoid were frequently those who needed chronic care and daily supports, like those with preexisting conditions,

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

chronic illness, or disability. Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities*, 52 Ala. L. Rev. 83 (2000).

13. Insurance principles also dictated that some health care needs were not classically uninsurable. Early commercial insurance covered hospital and surgical care, not physician services. Hospitalization required admission by a physician, reducing concerns of moral hazard, or that insured people would seek out care unnecessarily simply because they had insurance and bore no personal cost. Morrisey at 8-9. Under this same logic, routine and anticipated health care expenses to support chronic illness or disability were conventionally excluded from coverage to minimize adverse selection, or insureds seeking insurance only once they had an immediate need for health care services.

14. Employers may have been motivated in the design or purchase of insurance plans to discourage people with disabilities from entering their workforce. A less generous insurance plan might attract a healthier, younger workforce, than a more robust insurance plan; likewise, a less generous plan might encourage workers to go work elsewhere as they age and become less healthy. Employers may be motivated to avoid hiring perceived "unhealthy" employees because of bias and stigma, or assumptions about increased health care costs, decreased worker safety and productivity, and impact on business image and workplace culture. Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 Iowa L. Rev. 579-89 (2014). By avoiding perceived unhealthy workers and their health care costs, too, "employers can make themselves more competitive by passing on some of the savings to workers in the form of higher pay." Jessica L. Roberts, *An Alternate Theory of Burwell v. Hobby Lobby*, 22 Conn. Ins. L.J. 100 (2015). For many of these same reasons, insurers may be motivated to avoid older workers and to craft benefit designs in ways that discourage an older

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

workforce from entering or remaining in employment as they age. Seth D. Harris, *Increasing Employment for Older Workers With Effective Protections Against Employment Discrimination*, Brookings Institute 22, https://www.brookings.edu/wp-content/uploads/2020/11/ES-11.19.20-Harris.pdf.

15. Collectively, these insurance principles, market forces, and employer motivations have converged to create a commercial insurance market that was not designed with the needs of people with disabilities in mind. Analogously, commercial plans historically excluded other groups for similar reasons. Health care needs of women, especially pregnant women, were also absent from commercial insurance products because women (and pregnant women) were largely excluded from the American workforce, and medical costs, especially of pregnancy, were in some respects more predictable and so not insurable. Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Georgetown L.J. 567, 595 (2010).

16. Many services typically unique to people with disabilities have been historically excluded from commercial insurance plans whether through explicit exclusions, caps, cost-shifting, or limits based on assessment of "medical necessity." M.J. Field & Allen Jette, *The Future of Disability in America* Ch. 9 (2007). The health insurance system, designed for able-bodied workers, focused on acute, episodic care designed to restore health and employment. Services required for disabled people to "maintain functional ability" like habilitative and rehabilitative services, durable medical equipment like hearing aids and wheelchairs, and personal care simply did not meet this model. National Council on Disability, *Sharing the Risk and Ensuring Independence: A Disability Perspective on Access to Health Insurance and Health-Related Services* (March 4, 1993), https://ncd.gov/publications/1993/March1993. Routine failure of insurers to cover durable medical equipment like wheelchairs and hearing aids is one example.

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

Steven B. Adams, Comment, *Who Will Hear? An Examination of the Regulation of Hearing Aids*, 11 J. CONTEMP. HEALTH L. & POL'Y 505, 509 (1995). Refusals of insurers to cover habilitative services for children with autism is another example. Amy Monahan, *The Regulatory Failure to Define Essential Health Benefits*, 44 AM. J. L. & MED. 551-52 (2018). Limits on speech therapy, physical, and occupational therapies is a third. Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L.J. 31-32 (2004). Services were sometimes only made available in institutional settings, rather than home or community-based settings, until *Olmstead v. L.C.*, 527 U.S. 581 (1999).

17. Individual insurance plans were costly and difficult to obtain for many people with health needs owing to preexisting condition exclusions, high prices, and various benefit restrictions. Gary Claxton, Cynthia Cox, Anthony Damico, Larry Levitt, Karen Pollitz, *Pre-Existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*, Kaiser Family Foundation (2016), https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/.

18. The passage of Medicaid and Medicare entrenched the role of commercial insurance as a product for the healthy and able-bodied. A public insurance program was now designed to cover the elderly and those with disabilities, leaving commercial insurance with even less of a market or incentive to design plans to meet the needs of those with disabilities.

The History of Kaiser and Group Health Cooperative

19. Kaiser's history as a health insurer finds correspondences in the traditional pathway of commercial insurance. Kaiser's predecessors initially served a population of workers who serviced massive constructions projects on the west coast, including building of the Grand Coulee Dam and the Colorado River Aqueduct. Kaiser

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

Permanente, *How It All Started* (July 21, 2011), https://about.kaiserpermanente.org/who-we-are/our-history/how-it-all-started. They then served the medical needs of a shipyard workforce numbering in the tens of thousands during World War II. When this body of workers moved on after the war, Kaiser's predecessor, the Permanente Health Plan, opened its health plan to the public, forging relationships with organized labor to ensure a steady stream of workers for its health plans. Kaiser Permanente, *Permanente Embraces Its Partnership With Labor* (Dec. 31, 2010), https://about.kaiserpermanente.org/who-we-are/our-history/permanente-embraces-its-partnership-with-labor. Group Health Cooperative formed similarly to Kaiser as a group health plan that built its membership through relationships with unions, serving their workers. Walt Crowley, *Group Health Cooperative (GHC), Part I: Planting the Seeds, 1911-1945*, https://www.historylink.org/File/7531.

The Era of Increased Regulation of Health Insurance

20. In 1945, amidst the rise of commercial health insurance, Congress passed the McCarran Ferguson Act, 15 U.S.C. § 1011, which delegates the regulation of the "business of insurance" to the states. Personal insurance products are heavily regulated at the state level in matters of solvency, consumer protection, market regulation, and other topics. National Association of Insurance Commissioners, State Insurance Regulation, https://content.naic.org/sites/default/files/inline-files/topics_white_paper_hist_ins_reg.pdf. The 1970s saw the passage of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, which began a special regulatory paradigm for health insurance offered by employers to employees as benefits.

21. Health insurance went largely unregulated by the federal government until the passage of the Health Insurance Portability and Accountability Act (HIPAA), 29 U.S.C. § 1811(a), in 1996. HIPAA was prompted by job lock, an economic problem of

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

people being unable to leave their jobs for fear of losing insurance. Prior to HIPAA, job loss could mean a period of uninsurance and preexisting condition exclusions or increased premiums upon reentry into insurance.

22. HIPAA was the beginning of greater federal regulation of health benefits. Free markets in health insurance, without any regulation, had the undesirable result of insuring the healthy only, while leaving the sick without reliable and affordable access to care, unless they qualified for a federal health program. Deborah Stone, *Protect the Sick: Health Insurance Reform in One Easy Lesson*, 36 J. L. MED. & ETHICS 652, 652–53 (2008). Federal regulation of health insurance with HIPAA and beyond has increasingly circumscribed insurers' ability to underwrite based on health status and, relatedly, disability.

Disability Antidiscrimination and Health Insurance

23. Disability antidiscrimination and civil rights laws have played an important role in regulating access to health insurance for people with disabilities.

24. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits recipients of federal financial assistance from discriminating in their programs and activities based on disability. Section 504 sought to resolve transportation, architectural, employment and other barriers to equality opportunity for people with disabilities. When passed, the law's impact on the insurance market mainly concerned disability discrimination in Medicaid, with privately funded commercial health insurance beyond its reach as federal regulators specifically excluded them. *See* 45 C.F.R. § 84.3(h) (excluding contracts of insurance from the definition of "federal financial participation" in Section 504).

25. In 1990, the Americans with Disabilities Act (ADA), 42 U.S.C § 12101, was passed. The ADA expressed a purpose to "provide a clear and comprehensive national

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

mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C § 12101(b). Title I extends to disability discrimination in employer-based benefits. Title II reached disability discrimination in public benefits programs. Title III addresses discrimination by public accommodations, of which "insurance office" is expressly included. 42 U.S.C § 12181(7)(F). The ADA marked the beginning of some disability antidiscrimination in commercial insurance, both in employment benefits and in commercial insurance in some instances.

26. Circuit courts have conflicted on whether Title III's public accommodation provision assures mere entry to an insurance office or also governs the benefits offered by the insurer. (*Compare Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th Cir. 1997) (interpreting Title III to only apply to access to office spaces of public accommodations) *with Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d. 12 (1st Cir. 1994) (interpreting Title III to apply to goods and services offered by public accommodations)). In jurisdictions that interpret the ADA to regulate benefits, some courts have interpreted Title III to grant equal access to the plan (say, an opportunity to enroll), but not equality in the content of the benefit. "Once a dispute is understood as being centered on the question of coverage design and content—meaning the amount of benefits, the range of benefits, and the definitions used to allocate benefits—the ADA ceases to offer a remedy, since any modification of coverage design itself arguably becomes a fundamental alteration." Sara Rosenbaum, *The Americans with Disabilities Act in a Health Care Context* in M.J. Field & Allen Jette, The Future of Disability in America (2007).

27. Moreover, the ADA has a statutory safe harbor that permits insurers to underwrite and classify risks so long as the activity is not a "subterfuge" to evade the ADA's antidiscrimination mandate. 42 U.S.C. § 12201(c). Legislative history of the ADA

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

suggests the provision was to appease the insurance industry and increase support for passage of the bill. Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities*, 52 Ala. L. Rev. 83, 85-86 (2000). The safe harbor permitted insurers to restrict and limit coverage for people with preexisting conditions or disabilities. Lisa I. Ienzzoni, Michael M. McKee, Michelle A. Meade, Megan A. Morris, Elizabeth Pendo, *Have Almost Fifty Years of Disability Civil Rights Law Achieved Equitable Care?*, 40 HEALTH AFFAIRS 1371, 1375 (2022).

The Sea-Change of the Affordable Care Act for Disability Antidiscrimination and Health Insurance

28. The Affordable Care Act (ACA) represents a near wholescale rejection of the medical underwriting and "fair" discrimination based upon disability and health status of the past. In this way, the ACA ends a major barrier to equality for people with disabilities and requires re-evaluation by health insurers of all long-standing exclusions in health plans.

29. The ACA enacts a broad antidiscrimination agenda in health insurance across enrollment, premiums and cost-sharing, and benefit design. "In addition to requiring group and individual insurers to guarantee the issue and renewability of insurance for anyone wishing to purchase it, these same insurers are longer permitted to exclude enrollees from insurance on the basis of preexisting condition or a host of other factors that might predict healthcare consumption. Insurers are also restricted in using health (or proxies for health) in determining premiums." Valarie K. Blake, *Civil Rights As Treatment for Health Insurance Discrimination*, 37 Wisconsin L. Rev. Forward 37, 40 (2016).

30. Lawmakers knew the ACA's many insurance reforms (such as the broad inclusion of people with preexisting conditions and disabilities in coverage) were a

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

substantial change over the insurance industry's existing business practices. Lawmakers enacted many provisions to offset market instability and the risk of adverse selection, such as through the individual mandate, the tax penalty, financial subsidies, and various risk adjustments. These provisions of the ACA are a testament to scope of the anticipated changes lawmakers expected because of the ACA's reforms.

31. The essential health benefits (EHB) provision of the ACA requires individual and group insured health plans to provide benefits in ten mandated categories to insureds. This provision specifically directs the Secretary of HHS to require insurers to "not make coverage decisions, determine reimbursement rates, establish incentive programs, or design benefits in ways that discriminate against individuals because of their age, disability, or expected length of life," to consider "the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups" and to "ensure that health benefits established as essential not be subject to denial to individuals against their wishes on the basis of …the individuals' present or predicted disability, degree of medical dependency, or quality of life." 42 U.S.C. § 18022(b)(4)(B)-(D). The EHB provision also mandates coverage of "rehabilitative and habilitative services and devices." 42 U.S.C. § 18022(b)(1)(G). The EHB provision is a sea change for disability health because "[t]he decision of whether a particular treatment or service is covered should turn solely on whether it is appropriate to a patient's health condition—not whether it will enable restoration or recovery … In the case of children and adults with disabilities, many treatments within the essential benefits classes are clinically justified not because they allow restoration or recovery but because they enable patients to attain good health, maintain their health, or avert the loss of functioning that could lead to a deterioration in health." Sara Rosenbaum, Joel Titelbaum, Katherine Hayes, *The Essential Benefits Provision of the Affordable Care Act:*

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

Implication for People With Disabilities, Commonwealth Fund (2011), https://publichealth.gwu.edu/departments/healthpolicy/DHP_Publications/pub_uploads/dhpPublication_E985318A-5056-9D20-3D44CD4E8D0F288B.pdf.

32. The ACA was intended to broadly reform commercial insurance to bring an end to its traditional practices of underwriting based on health status and disability. The law then permits certain discrete and bounded forms of discrimination. For example, the ACA permits age-rating in premiums. 42 U.S.C. § 300gg(a)(1)(A)(iii). Another example, the ACA permits wellness plans which allow some forms of differential treatment based on health status. *See generally* Jill R. Horwitz, Brenna D. Kelly, John E. DiNardo, *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting To Unhealthy Workers*, 32 Health Affairs 468 (2013).

33. Overlaying these insurance reforms, the ACA also creates the first health care specific civil rights law. Section 1557 of the ACA, 42 U.S.C. § 18116, prohibits age, race, sex, and disability discrimination by health programs and activities receiving federal financial assistance. Most commercial insurers were broadly swept under this provision upon accepting federal financial assistance in the form of subsidies for individuals who purchase insurance on exchanges. *See generally* Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform,. Race, and Equity*, 55 How. L. Rev. 855 (2012) (highlighting Section 1557 as a new and health specific civil rights paradigm designed to enhance equality in health care).

34. Section 1557 rule-making under the Biden administration stresses that medical management and medical necessity standards are permitted but generally that distinctions need to be on a case-by-case basis with use of objective medical and scientific criteria and done in a nondiscriminatory way. "Covered entities may employ reasonable medical management techniques, including medical necessity standards, for

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

determining coverage of a particular treatment based on whether it is medically appropriate under current generally accepted standards of care for an individual or whether the treatment is experimental or cosmetic, as long as the medical management standards are not discriminatory and are not otherwise prohibited under other applicable Federal and state law.… This determination involves a medical review of the patient's condition and the clinical appropriateness of the requested treatment in accordance with the covered entity's medical necessity guidelines. Such guidelines should be applied in a neutral manner and could raise concerns under this proposed rule if the guidelines establish more restrictive requirements for certain diseases or conditions without justification, for example, if the guidelines require a separate, more stringent review process only for mental health services." 87 Fed. Reg. 47873–74.

35. Taken as a whole, the ACA's civil rights protections and many insurance reforms and regulations were intended by Congress and regulators to reshape the health insurance industry to eliminate health status and, related, disability-based discrimination. For example, Senator Harry Reid said of the ACA: "[F]rom this day forward, insurance companies will not be able to deny coverage because of a preexisting disability." 110 CONG. REC. S13890 (December 24, 2009). *Also see* 81 Fed. Reg. 31379 ("[A] fundamental purpose of the ACA is to ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country"); 81 Fed. Reg. 31386 (A central purpose of the ACA is "ensuring that entities principally engaged in health services, health insurance coverage or other health coverage do not discriminate in any of their programs or activities, thereby enhancing access to services and coverage")).

36. The ACA generally, and Section 1557 specifically, represent a departure from earlier disability antidiscrimination approaches that sanctioned "fair" discrimination. The ADA's safe harbor was not brought into Section 1557, because

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

Section 1557 derives from Section 504, not the ADA. Likewise, the access/content distinction considered previously in ADA and Section 504 challenges is rejected by Section 1557 rulemaking and by the ACA's EHB provision, both of which recognize that benefit design can be discriminatory if based in health status and disability. Valarie K. Blake, *Restoring Civil Rights to the Disabled in Health Insurance*, 95 Nebraska L. Rev. 1071, 1105-1117 (2017).

Kaiser's Hearing Aid Exclusion Specifically

37. The ACA, as a sea-change in a heavily regulated industry like health insurance, required Kaiser to examine all its exclusions to make sure that they are not based on historic assumptions about the needs of disabled enrollees. Blanket caps, exclusions, or limits ought to have been revisited to determine if they are rooted in science and medicine, or situated in historical practices that are no longer permitted in a post-ACA universe. This is especially critical for services like habilitative and rehabilitative care and durable medical equipment, where there is a long historical tradition of exclusion, now unwound by the ACA.

38. Kaiser's hearing aid exclusion is a classic example of the "deliberate indifference" that led to disability discrimination in health insurance, and which has since been the target of the ACA and Section 1557.

39. Kaiser's hearing aid exclusion does not reflect the new reality of health insurance regulation post-ACA.

40. Kaiser's Rule 30(b)(6) witness testified that the origin of the hearing exclusion is unknown, but likely in place since before 1995, and possibly since the start of its predecessor, Group Health Cooperative (GHC). Deposition of Jessica Hamp. Kaiser's hearing aid exclusion is akin to the many blanket exclusions or restrictions placed on other habilitative and rehabilitative services and durable medical equipment

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

pre-dating the ACA. Such exclusions reflect an older model of commercial insurance, designed for a less diverse workforce, when insurance was freely permitted to cream-skim the healthiest as a fair business model.

41. The ACA bans health status and disability-based insurance practices to enable everyone the ability to purchase insurance if they wish. A hearing aid exclusion, a blanket denial of a benefit used by people with disabilities, should only be permitted if it is justified by clinical criteria or other reasonable medical management techniques. Such an exclusion is inconsistent with the many efforts by the ACA to bring people with disabilities into the mainstream of health coverage by requiring community rate premiums, eliminating annual and lifetime benefit caps, requiring continuation of insurance absent fraud, and many other reforms, all designed to make commercial insurance inclusive of those with pre-existing conditions and disabilities. Nor does the hearing aid exclusion fit within the permissible forms of "fair" discrimination outlined in the ACA, like age rating bans or wellness plans.

42. Rehabilitative and habilitative services and devices are now an essential health benefit, an intentional addition by Congress to eliminate the historical practices of excluding services commonly required by people with disabilities. This provision—and the mandate not to discriminate in benefit design regarding "age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions" has been codified into Washington law at Wash. Rev. Code § 48.43.0128. In broadly mandating habilitative and rehabilitative services and devices, and in denying benefit design rooted in disability discrimination, this statute seeks to end a longstanding historical practice of insurers denying *all* such services—hearing aids, wheelchairs, prosthetics, and therapy services—that are designed for people with disabilities to maintain function rather than improve it. As the

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

statute indicates, the makeup of essential benefits was to be designed in a way that did not discriminate against people with disabilities, because lawmakers were aware of the cream-skimming business model of commercial insurance and were purposefully moving away from an insurance industry that left the most vulnerable without benefits.

43. Regulators have read Section 1557 to reach benefit design and have warned against blanket bans that do not reflect medical and scientific judgment or individual need. Kaiser's hearing aid exclusion is not rooted in science, medicine, or individual assessment of need. Deposition of Jessica Hamp. No medical policy committee examined the medical efficacy of hearing aids. There is no evidence of any clinical justification for a hearing aid exclusion. Deposition of Jessica Hamp.

44. The ACA was passed in the spirit of making the U.S. health insurance system serve the people who most need it, the sick, in addition to those who offer it the greatest profit, the healthy. The law reflects a widespread effort to move commercial insurance away from the cream-skimming business model of the past, in favor of an insurance market available to all. In return, lawmakers offered federal subsidies, redistribution mechanisms, and other remedies to help support and stabilize the important work of health insurers. Blanket bans on services historically denied to people with disabilities have no place in this new era of insurance regulation. Like steps to a person who uses a wheelchair, blanket benefit bans for services like hearing aids deny equal opportunity for people with hearing disabilities to enjoy all aspects of American society and sufficient treatment of their medical needs.

DATED: May 11, 2023, at Pittsburgh, Pennsylvania.

Valarie Blake

Valarie K. Blake, J.D., M.A.

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

Exhibit A

VALARIE K. BLAKE

281 Colonial Drive Pittsburgh, PA 15216 | 814-243-7813 | valarie.blake@mail.wvu.edu

ACADEMIC APPOINTMENTS

Associate Dean of Faculty Development & Research, West Virginia University College of Law
July 2022-present
Professor, West Virginia University College of Law
May 2020-present
Associate Professor, West Virginia University College of Law
August 2015-May 2020
Courses: Torts, Legislation & Regulation, Health Care Law, Health Care Torts, Health Care Fraud & Abuse (in person and online), Disability Law, Bioethics & Law Seminar, Health Care Civil Rights Seminar, Health Care Law (MLA program online)

Affiliate Faculty, Center for Bioethics & Health Law, University of Pittsburgh
August 2015-present

Faculty, University of Pittsburgh Consortium Ethics Program
August 2015-present

Visiting Assistant Professor, Duquesne University School of Law
August 2013-June 2015
Courses: Professional Responsibility, Health Care Law, Health Care Financing and Delivery, Health Care Fraud & Abuse

HONORS

2023, West Virginia University College of Law Professor of the Year Award

2020, West Virginia University College of Law Significant Scholarship Award

2018-2019 Chair, AALS Disability Law Section

2017 AALS Works-in-Progress Winner for New Law School Teachers program organized by the Section on Law, Medicine and Health Care

2015 Recipient of Saint Louis University/American Society for Law Medicine and Ethics Health Scholars Award

LAW REVIEW ARTICLES

Employer-Sponsored Reproduction, 124 COLUMBIA L. REV. ___ (2024) (with Elizabeth McCuskey).

Health Care Civil Rights Under Medicare for All, 72 HASTINGS L. J. 773 (2021).

Ensuring an Underclass: Stigma in Insurance, 41 CARDOZO L. REV. 1441 (2020).
-Selected for WVU College of Law 2020 Significant Faculty Scholarship Award

Regulating Care Robots, 92 TEMPLE L. REV. 551 (2020).
-Selected by peer-review for presentation at Yale Law School's Annual Health Law Symposium

Seeking Insurance Parity During the Opioid Epidemic, 2019 UTAH L. REV. 811 (2019).

Engaging Health Insurers in the War on Prescription Painkillers, 11 HARVARD L. & POL'Y REV. 487 (2017).

-Reviewed in University of Pennsylvania Regulatory Review

Restoring Civil Rights to the Disabled in Health Insurance, 95 NEBRASKA L. REV. 1071 (2016).

Remedying Stigma-Driven Health Disparities in Sexual Minorities, 17 HOUSTON J. HEALTH L. & POL'Y 183 (2017)

- Selected from 2017 AALS Works-in-Progress Paper Series Section on Law, Medicine, & Health Care Panel.

Health Care at a Price: The Impact on Young Adults' Medical Privacy and Autonomy of Being Covered on Their Parents' Health Insurance Until Age Twenty-Six, 51 FAMILY LAW QUARTERLY 303 (2017) (with Jessica Haught).

An Opening for Civil Rights in Health Insurance After the Affordable Care Act, 36 BOSTON COLLEGE J. L. & SOCIAL JUSTICE 2 (2016).

- Selected for 2015 Saint Louis University/American Society for Law Medicine and Ethics Health Scholars Award

Narrow Networks, the Very Sick, and the Patient Protection & Affordable Care Act: Recalling the Purpose of Health Insurance and Reform, 16 MINN. J. L. SCI. & TECH. 63 (2015).

Ovaries, and Testicles, and Uteruses, Oh My! Regulating Reproductive Tissue Transplants, 19 WM. & MARY J. WOMEN & L. 353 (2013).

It's an ART Not a Science: State Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons, 12 MINN. J. L. SCI. & TECH. 651 (2011).

-Profiled in *The New Yorker*, 2019

PEER-REVIEW ARTICLES

Filling a Federal Void: Promises and Perils of State Law in Addressing Women's Health Disparities, 48 J MED ETHICS 485 (2020) (with Michelle McGowan)

Legal Remedies to Address Stigma-Based Inequalities and Improve Health Equity in the U.S.: Challenges and Opportunities, 97 MILBANK QUARTERLY 480 (2019) (with Mark Hatzenbuehler).

Financing Uterus Transplants: The United States Context, 32 BIOETHICS 527 (2018).

Rethinking the Americans With Disabilities Act's Insurance Safe Harbor, 6 LAWS 25 (2017).

Report by the American Medical Association's Council on Ethical and Judicial Affairs on Physicians' Exercise of Conscience. JOURNAL OF CLINICAL ETHICS 220 (2016) (with BJ Crigger, Patrick W. McCormick, Stephen L. Brotherton).

Uterus Transplantation: The Ethics of Moving the Womb 125 OBSTETRICS & GYNECOLOGY 971 (2015) (with Kavita Shah Arora).

Conflicts of Interest and Effective Oversight of Assisted Reproduction using Donated Oocytes, 43 J. L. MED. & ETHICS 410 (2015) (with Michelle McGowan & Aaron D. Levine).

Uterus Transplantation: Ethical and Regulatory Challenges, 40 J MED ETHICS 396 (2014) (with Kavita Shah).

The 2013 Review of the Children's Health Insurance Program Reauthorization Act: A Call to Action. 121 OBSTETRICS & GYNECOLOGY 1313 (2013) (with Kavita Shah).

Harmonization of Ethics Policies in Pediatric Research, 39 J. L. MED. & ETHICS 70 (2011) (with Steven Joffe & Eric Kodish).

BOOKS

Health Care Law (Learning Series) (West Academic Press) (forthcoming 2024) (with Zack Buck and Seema Mohapatra)

Lexis Civil Rights & Strategy Series: Federal Health Care Law (single author book that is part of a three-part series for Lexis on civil rights in health care, housing, and education) (LexisNexis 2020).

BOOK CHAPTERS

Privatized Abortion Benefits, in Private Law in Health Care (forthcoming Harvard book volume) (with Elizabeth McCuskey)

Rewritten Opinion, Doe v. Mutual of Omaha Insurance Co.., in Seema Mohapatra and Lindsay F. Wiley, FEMINIST JUDGMENTS: REWRITTEN HEALTH LAW OPINIONS (edited collection) (Cambridge University Press).

The Ethics of Safety and Formal Equality: A Review on Policies Regulating Blood Donation by Men Who Have Sex With Men, *in* ETHICAL ISSUES IN TRANSFUSION MEDICINE 2ED (with Kavita Shah Arora, Stephen L. Brotherton, Bette-Jane Crigger, Sharon P. Douglas).

Ethical Issues in Gestational Surrogacy, *in* THIRD PARTY REPRODUCTION: A COMPREHENSIVE GUIDE (James Goldfarb, ed. 2014) (with Hannah Kushnick*)*.

Human Subject Research Involving Children, *in* CLINICAL ETHICS IN PEDIATRICS: A CASE-BASED APPROACH, 194 (Diekema et al. eds., 2011) (with Eric Kodish).

SHORTER WORKS

The Infertility Shift, HARVARD PETRIE FLOM BILL OF HEALTH (invited symposium)(with Elizabeth McCuskey)(forthcoming)

Advancing Harm Reduction Services in the United States: The Untapped Role of the Americans with Disabilities Act (co-authored with Abigail Fletes, Maria Delos Reyes, and Leo Beletsky), 21 YALE J. HEALTH POL'Y, L. & ETHICS 61 (2022).

- Profiled in Harvard Public Health Magazine.

Transgender Rural Communities and Legal Rights to Gender-Affirming Health Care, 124 W. VA. L. REV. 877 (2022) (co-authored with Nathan Hamons)

Anti-Selection is Only the Beginning, 50 J. L. Med. & Ethics 155 (2022) (co-authored with Jessica Roberts)

Sex Discrimination in Health Care: LGBTQ Rights After Bostock, CALIFORNIA LAW REVIEW ONLINE (2021)(co-authored with Amy Post & Ashley Stephens)

The Opioid Crisis: Lessons for Health Reform, 21 J.L. SOC'Y 53 (2021)

Now Is the Time for a Sex-Based Civil Rights Movement in Health Care. HARVARD PETRIE FLOM BILL OF HEALTH. https://blog.petrieflom.law.harvard.edu/2021/05/11/section-1557-sex-discrimination-civil-rights/ (May 11, 2021) (invited symposium)

Telehealth and COVID-19 for Practicing Clinicians, WEST VIRGINIA MEDICAL JOURNAL (with Amy Post)

Why the Texas Ruling on Obamacare is on Shaky Ground, THE CONVERSATION (Dec. 17, 2018) (with Simon F. Haeder).

Regulating Social Robots in Health Care, BALKINIZATION, (Nov. 2, 2018).

Republicans Attacking Obamacare One More Time, THE CONVERSATION (March 5, 2018) (with Simon F. Haeder).

President Trump's Deregulation Agenda Clashes with the Cure for the Opioid Epidemic, AMERICAN CONSTITUTION SOCIETY BLOG (Nov. 2, 2017).

Civil Rights as Treatment for Health Insurance Discrimination, WISCONSIN LAW FORWARD (March 29, 2016).

Justice Scalia, Challenges to the Affordable Care Act, and a Missed Opportunity to Meaningfully Engage the Right to Healthcare, OXFORD HUMAN RIGHTS HUB (March 24, 2016).

WORKS-IN-PROGRESS

The Freedom Premium (law review article)

SELECT PRESENTATIONS

Panel, Mainstreaming Reproductive Health in Health Law
-Conference, UCLA School of Law (February 2022)

The Freedom Premium: The Hidden Cost of American Health Care
-Insurance and Social Justice panel at Association of American Law Schools Annual Conference (January 2023)
- Virtual Health Law Scholars Workshop (December 2022)
- Southeastern Association of Law Professors Current Events in Health Law (August 2022)
- ASLME 44th Annual Health Law Professors Conference (June 2021)
-University of Michigan Employee Benefits & Social Insurance Conference (April 2021)

Panel, Technological Responses to the Challenges of Access to Care
-Law Review Symposium, DePaul University College of Law (April 2021)

The Need for Health Reform to Combat the Ongoing U.S. Opioid Crisis
-Law Review Symposium, Wayne State University Law School (February 2021)

Health Justice: Engaging Critical Perspectives in Health Law and Policy
-virtual workshop with Loyola Law School, American University, and Change Lab (August 2020)

Opportunities for Advancement in Maternal Health
-American University Next Steps in Health Reform (October 2019)

Regulating the Bedside Robot
-Yale Law School, The Law and Policy of AI, Telemedicine, and Robotics in Health Care (November 2018)
-WVU Law Faculty Colloquium (March 2019)
-American Society for Bioethics and Humanities (October 2019)

Underregulating Insurance in the Opioid Crisis
-University of Utah S.J. Quinney College of Law, The Opioid Crisis: Paths Forward to Mitigate Regulatory Failure (November 2018)
-University of South Carolina School of Law, Annual Law Review Symposium (February 2019)

The Good, The Bad, and The Ugly: On Immigrants, Civil Rights, and Health Care
-IU McKinney School of Law, The Intersection of Immigration Law and Health Policy (October 2018)

Discrimination Against Pregnant Women in Health Care (with Jessica Roberts)
-ASLME 41h Annual Health Law Professors Conference (June 2018)
-Southeastern Association of American Law Schools (August 2018)

The Role of Healthcare Financing in Causing (and Curbing) Opioid Abuse
-Keynote Address, University of Pittsburgh's Annual Bioethics Symposium (March 2018)
-Plenary, Southern Illinois University Annual Health Law Policy Conference (May 2018)

If Discrimination Makes Us Sick, Then What Should Healthcare Providers Do About It?
-Keynote, Cleveland Clinic Bioethics Grand Rounds (April 2018)

Health Care as a Starting Point to Address Stigma
-ASLME 41h Annual Health Law Professors Conference (June 2017)
-Southeastern Association of American Law Schools (August 2017)

Poverty as a Driver of Health Disparities in West Virginia
-Meeting of the Minds Workshop, West Virginia Health Disparities Initiative (March 2017)

Remedying Stigma-Driven Health Disparities in Sexual Minorities
-2017 AALS Works-in-Progress for New Law School Teachers, Association of American Law Schools, (Jan 2017)

Uterus Transplantation: Should Social Programs Finance Reproductive Transplants?
-Invited Speaker, Ethics of Uterus Transplant, King's College, Lancaster University, UK (Sept. 2016)
-Invited Speaker, University of Houston School of Law, Center for Health Law (April 2016)

Restoring Civil Rights to the Disabled in Health Insurance
-ASLME 39th Annual Health Law Professors Conference (June 2016)
- Southeastern Association of American Law Schools (Aug. 2016)

A Role for Reproductive Ethics in Civil Rights Litigation
-Invited Speaker, American Society for Bioethics and Humanities- Reproductive Affinity Group (Oct. 2015)

A Civil Right to Healthcare?

- SLU Health Law Scholars Workshop (Oct. 2015)

Not It: Clarifying Physicians Ethical or Legal Duties to Coordinate Patient Care
-ASLME 38th Annual Health Law Professors Conference (June 2015)

Narrow Networks, the Very Sick, and the Patient Protection & Affordable Care Act: Recalling the Purpose of Health Insurance and Health Reform
- Cleveland Clinic, Emerging Ethical and Legal Challenges in Chronic Neurological Conditions (Oct. 2014)
-Pitt Center for Health Law & Bioethics Colloquium (Sept. 2014)
-ACBA Health Law Section (May 2014)

Grassroots Engagements: A New Kind of Representation in Bioethics
-American Society of Bioethics and Humanities Conference, Washington DC (Oct. 2012)

To Self-Regulate or Not: Empirical, Normative, and Legal Approaches to Conflicts of Interest in Egg Donation
-American Society of Bioethics and Humanities Conference, Minneapolis, Minnesota (Oct. 2011)

UNOS for Uteruses: Ethical Distribution in Uterine Transplant
-American Society of Bioethics and Humanities Conference, San Diego, California (Oct. 2010)

SELECTED MEDIA

US Supreme Court Upholds 'Obamacare' in GOP-led Challenge, *West Virginia Metro News* (June 17, 2021) (quoted)

"Keeps Me Up At Night": Doctors Who Care for Transgender Minors Brace for Bans, *NBC News* (May 27, 2021)(quoted)

U.S. Will Protect Gay and Transgender People Against Discrimination in Health Care, *NPR* (May 10, 2021) (quoted)

Inside President Biden's Plan to Shore Up the Affordable Care Act, *Newsy* (Jan 28, 2021) (video interview)

Talkline (Nov 2020) (radio interview on California v. Texas)

Politicians Who Want to Ditch Obamacare Say They'll Protect West Virginians with Preexisting Conditions. But It's Not That Easy, *Mountain State Spotlight* (Nov. 2020) (quoted)

Advanced Directives and Cancer Care, Living Beyond Cancer podcast, WVU Cancer Institute (June 2020)

Ensuring an Underclass, Stigma and Insurance, Cardozo Law Review podcast (May 2020)

Imagine Being Kicked Off Your Health Insurance Two Months After Giving Birth, *Vice News*, Nov. 12, 2019 (quoted)

The Case for Redefining Infertility, *The New Yorker*, June 18, 2019 (quoted and research profiled)

Why the Texas Ruling on Obamacare is on Shaky Legal Ground, *Pittsburgh Post-Gazette* (Dec. 19, 2018) (co-authored commentary)

West Virginia is First. Let's Keep It That Way. *The Register Herald*, Op-Ed, Sept. 26, 2018 (co-authored commentary)

Van Jones Show, *CNN,* Opioid Crisis in West Virginia (2018) (consultation)

Transplanted testicles will always make the donor's sperm, *The Verge*, April 26, 2018 (quoted)

Republicans take another swing at Obamacare, *Salon.com* (March 2, 2018) (co-authored featured article)

Opioid measures could go too far, say bioethics experts, Pittsburgh Post-Gazette (presentation profiled)

ACA Repeal, *West Virginia NPR*, November 2016 (radio)(quoted)

Consumers could lose out as insurers kill broker fees, *Houston Chronicle*, May 2016 (quoted)

Insurers get rid of pay to brokers, *Houston Chronicle*, May 2016 (quoted)

U.S. Attorney to Attack Fraud in Health Care, *Pittsburgh Post-Gazette*, Sept. 22, 2014 (quoted, teaching/research profiled)

Lab Accused of Paying Kickbacks to Doctors, *Pittsburgh Post-Gazette*, Sept. 5, 2014 (quoted)

Legality of IRS Subsidies Under Affordable Care Act, July 2014 (radio) (quoted)

Night Talk: Get to the Point, Affordable Care Act, March 2014 (WPXI television)

COMMITTEE WORK

National:

-Chair, Disability Law Section AALS (2018), Vice Chair (2017), Secretary (2016)
-SEALS Newer Law Professors Committee (2018-present)
-SEALS Health Law Task Force (2016-present)
- Review of Traumatic Brain Injury Research Grants for Department of Defense (2015-present)

College of Law:

-Obtained $40,000 grant, coordinated team of professors and students to produce legal annotations for American Medical Association's Code of Medical Ethics (2020-present)
-Acquired $200,000 funding for, hired, and supervised a health law fellow (fall 2019-spring 2021)
-Manage student-run legal column in WV Medical Journal (2019-present)
-Enrollment Management (2017-2019), Chair (2020-present)
-Faculty Development (2015-2016, 2019-present)
-Academic Planning (2017-present)
-Ad Hoc Hiring Committee (2017)
-Faculty Adviser, Health Law Club (2017-present)
-Coach, Health Law Moot Court/Transactional Contests (2016-present)

University:

-Graduate Council (Spring 2019))
-West Virginia State Opioid Task Force (2016-present)
-Medical Humanities and Health Studies Collaboration (2017-present)
-Mountaineers Health Initiative Steering Committee (2017-present)
-Steering Committee, Children's Health Summit (2017)

EDUCATION

Case Western Reserve University, Cleveland, Ohio
M.A. (medical ethics), August 2010, *GPA 4.0*

University of Pittsburgh School of Law, Pittsburgh, Pennsylvania
J.D., May 2009, *Cum Laude*
Bar Admission- Pennsylvania 2009
Health Law Certificate (Concentrations in Bioethics, Global Health and Human Rights)
ASLME Health Law Student of the Year Award
Topics Editor, PITTSBURGH JOURNAL OF ENVIRONMENTAL AND PUBLIC HEALTH LAW
Teaching Assistant, Legal Writing and Analysis
Albert Schweitzer Fellow

University of Pittsburgh, Pittsburgh, Pennsylvania
B.S. in Neuroscience, May 2005, *Cum Laude*
Certificate in History and Philosophy of Science

OTHER WORK EXPERIENCE

Senior Research Associate, Ethics, American Medical Association
May 2011-July 2013
Legal support for physician disciplinary proceedings
Legal and research support for development of AMA's *Code of Medical Ethics*
Secretary for Reference Committee on Ethics (policy making function)
Editor, health law column, *Virtual Mentor*
AMA policy input for World Medical Association and federal healthcare agencies

Advanced Bioethics Fellow, Cleveland Clinic
July 2009-April 2011
Bedside ethics consultations
Research and teaching in the areas of health law and medical ethics
Women's Veteran's Advisory Committee
Cleveland Veteran's Ethics Committee
Hospital policy development

SELECT PEER-REVIEW AND EDITORIAL WORK

California Law Review, Health Affairs, Journal of Narrative Ethics, Journal of Law, Medicine and Ethics, Bioethics, American Journal of Preventive Medicine

Exhibit B

EXHIBIT B

Schmitt v. Kaiser Foundation Health Plan of Washington, et al.
USDC (W.D. Wash.), No. 2:17-cv-01611-RSL

Documents Reviewed for Expert Report by Valarie K. Blake, J.D., M.A.

Source Documents

- Mary Helen McNeal, *Affordable and Accessible Hearing Health Care: Responding to a Public Health Concern*, Bifocal, Vol. 38, Issue 3, 2017.
- Amy B. Monahan, *The Regulatory Failure to Define Essential Health Benefits*, 44 Am. J.L. & Med. 529, 2018.
- Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 Ala. L. Rev. 51, 2000
- Valarie K. Blake, *Civil Rights as Treatment for Health Insurance Discrimination*, 2016 Wis. L. Rev. Forward 37, http://wisconsinlawreview.org/civilrights-as-treatment-for-health-insurancediscrimination/
- Ellen O'Brien, *Employers' Benefits from Workers' Health Insurance*, Milbank Q. 2003 Mar; 81(1): 5–43. doi: 10.1111/1468-0009.00037
- Michael A. Morrisey, *Chapter 1: History of Health Insurance in the United States*, Health Insurance, Second Edition
- Valarie K. Blake, *Restoring Civil Rights to the Disabled in Health Insurance*, 95 Neb. L. Rev. 1071 (2016) Available at: https://digitalcommons.unl.edu/nlr/vol95/iss4/5
- Valarie K. Blake, *Rethinking the Americans with Disabilities Act's Insurance Safe Harbor*, Laws 2017, 6, 25; doi:10.3390/laws6040025
- National Council on Disability, *Sharing the Risk and Ensuring Independence: A Disability Perspective on Access to Health Insurance and Health-Related Services*, A Report to the President and the Congress of the United States, March 4, 1993
- Sara Rosenbaum, *The Americans with Disabilities Act in a Health Care Context*, The Future of Disability in America, Washington (DC): National Academies Press (US); 2007
- Sara Rosenbaum, et al., *The Essential Health Benefits Provisions of the Affordable Care Act: Implications for People with Disabilities*, Realizing Health Reform's Potential, The Commonwealth Fund, 2011
- Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L.J. 1, 2004
- Nancy A. Miller, et al., *The Relation Between Health Insurance and Health Care Disparities Among Adults With Disabilities*, Am J Public Health. 2014 March; 104(3): e85–e93. Published online 2014 March. doi: 10.2105/AJPH.2013.301478
- Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, 9 Conn. Ins. L.J. 371 2002/2003
- Jill R. Horwitz, et al., *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers*, Health Affairs, Vol. 32, No. 3: Promoting Health & Wellness, 2013
- Steven B. Adams, *Who Will Hear? An Examination of the Regulation of Hearing Aids*, 11 J. Contemp. Health L. & Pol'y 505, 1995

Case Documents

- Proposed Brief of The National Health Law Program and Northwest Health Law Advocates as Amicus Curiae in Support of Plaintiffs-Appellants, 1/29/2019 (Dkt. 12-1)
- Brief of Disability Rights Education and Defense Fund, et al., as Amici Curiae in Support of Plaintiffs-Appellants, 01/30/2019 (Dkt. 16-1)
- Kaiser Appellees' Supplemental Brief, 10/28/2019 (Dkt. 42)
- Plaintiffs' Reply In Support Of Their Motion For Leave To File Fifth Amended Complaint, 04/14/2023 (Dkt. 119)
- Supplemental Declaration Of Eleanor Hamburger In Support Of Plaintiffs' Motion For Leave To File Fifth Amended Complaint, with exhibits, 04/14/2023 (Dkt. 120)
- Opening Brief Of Appellants Andrea Schmitt And Elizabeth Mohundro, 01/22/2019
- Appellants Andrea Schmitt's And Elizabeth Mohundro's Response To Appellees' Petition For Rehearing En Banc, 08/20/2020
- Exh. 24 NATIVE CONFIDENTIAL KAISER_002110-KAISER_002110
- Exh. 36 CONFIDENTIAL KAISER_003601
- Gender-Identity-Discrimination-Letter
- Deposition of Hamp, 30(b)(6), Jessica, 12/23/2022 Updated
- KAISER_001860-1862
- KAISER_002056-2061
- KAISER_002073-2076
- KAISER_003796-3815
- KAISER_003816-3875
- KAISER_003876-3916
- KAISER_003917-3922
- KAISER_003923-3937
- KAISER_003938-3941
- KAISER_003970
- KAISER_003973-4009
- KAISER_004010-4019
- Deposition of Porter, Susan AuD, 04/05/2023
- Deposition of Russell, Jodi, 04/11/2023
- Schmitt Reply Brief w-Addendum N, 05/13/2019
- Supplemental Brief of Appellants Schmitt and Mohundro re Doe v BCBSTN, 10/28/2019

EXHIBIT B (continued)

Schmitt v. Kaiser Foundation Health Plan of Washington, et al.
USDC (W.D. Wash.), No. 2:17-cv-01611-RSL

Documents Reviewed for Expert Report by Valarie K. Blake, J.D., M.A.

Additional Sources Documents:

- Deborah Stone, *Protect the Sick: Health Insurance Reform in One Easy Lesson*, 36 J. L. MED. & ETHICS 652, 652–53 (2008).
- Gary Claxton, Cynthia Cox, Anthony Damico, Larry Levitt, Karen Pollitz, *Pre-Existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*, Kaiser Family Foundation (2016), https://www.kff.org/healthreform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-theindividual-insurance-market-prior-to-the-aca/.
- Irmo Marini, Noreen Graf, Michael Millington, *Psychosocial Aspects of Disability* 7-8 (2d ed. 2017)
- Jessica L. Roberts, *An Alternate Theory of Burwell v. Hobby Lobby*, 22 Conn. Ins. L.J. 100 (2015).
- Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 Iowa L. Rev. 579-89 (2014).
- Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Georgetown L.J. 567, 595 (2010).
- Kaiser Permanente, *How It All Started* (July 21, 2011), https://about.kaiserpermanente.org/who-we-are/our-history/how-it-all-started.
- Kaiser Permanente, *Permanente Embraces Its Partnership With Labor* (Dec. 31, 2010), https://about.kaiserpermanente.org/who-we-are/our-history/permanenteembraces-its-partnership-with-labor
- Lisa I. Lezzoni, Michael M. McKee, Michelle A. Meade, Megan A. Morris, Elizabeth Pendo, *Have Almost Fifty Years of Disability Civil Rights Law Achieved Equitable Care?*, 40 HEALTH AFFAIRS 1371, 1375 (2022).
- National Association of Insurance Commissioners, State Insurance Regulation, https://content.naic.org/sites/default/files/inlinefiles/topics_white_paper_hist_ins_reg.pdf.
- National Council on Disability, *Equality of Opportunity: The Making of The Americans with Disabilities Act* 49 (2010), https://files.eric.ed.gov/fulltext/ED512697.pdf
- Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation,* 34 Cardozo L. Rev. 1 (2012)
- Seth D. Harris, *Increasing Employment for Older Workers With Effective Protections Against Employment Discrimination*, Brookings Institute 22, https://www.brookings.edu/wpcontent/uploads/2020/11/ES-11.19.20-Harris.pdf.
- Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform,. Race, and Equity*, 55 How. L. Rev. 855 (2012)
- Walt Crowley, Group Health Cooperative (GHC), Part I: *Planting the Seeds*, 1911-1945, https://www.historylink.org/File/7531.