UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON M. DELESSERT and CAROLINE CUMMINS, on their own behalf, and on behalf of all similarly situated individuals, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN, INC., Defendant.	NO. 2:24-cv-02087-JNW FIRST AMENDED COMPLAINT (CLASS ACTION)

I. INTRODUCTION

1. Plaintiff Jason Delessert ("Delessert") is an enrollee in a Kaiser Foundation Health Plan of Washington Inc. health plan. He has disabling hearing loss and requires prescription hearing aids[1] and related services as recommended by his licensed hearing

[1] In this Complaint, the terms "prescription" and "prescribe" are used to refer to prescriptions and/or recommendations from licensed hearing care professionals necessary to obtain a non-over-the-counter hearing aid and related treatment. *See* 21 C.F.R. § 800.30(b) (defining a "prescription hearing aid" as a hearing aid that is not an over-the-counter hearing aid). Before October 17, 2022, hearing aids were only available by prescription or written recommendation by a licensed hearing care professional. Since that date, over-the-counter hearing aids ("OTC hearing aids") are available for use by adults with mild to moderate hearing loss without a prescription. In this Complaint, "hearing aids" or "prescription hearing aids" refer to hearing aids that are only available with a written recommendation or prescription from a licensed hearing care professional. Hearing aids that can be purchased without a prescription are referred to as "OTC hearing aids."

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care provider. Delessert, however, cannot obtain coverage for this needed medical device because his Kaiser health plan excludes all coverage for hearing aids.

2. Plaintiff Caroline Cummins ("Cummins") is an enrollee in a Kaiser Foundation Health Plan of the Northwest health plan. She has disabling hearing loss and requires prescription hearing aids and related services as recommended by her licensed hearing care provider. Cummins, however, cannot obtain coverage for this needed medical device because her Kaiser health plan excludes all coverage for hearing aids.

3. This is illegal discrimination and Kaiser knows it. Another similar case was brought by a different Washington Kaiser enrollee in *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 948 (9th Cir. 2020).

4. In a landmark decision against Kaiser, the Ninth Circuit held that the Affordable Care Act ("ACA") prescribed a paradigm shift in the health insurance industry. So-called "fair discrimination" against people with disabilities, including people with disabling hearing loss, was outlawed:

> Prior to the ACA's enactment, an insurer could generally design plans to offer or exclude benefits as it saw fit without violating federal antidiscrimination law—in particular, the Rehabilitation Act—so long as the insurer did not discriminate against disabled people in providing treatment for whatever conditions it chose to cover. The primary issue before us is ***whether the ACA's nondiscrimination mandate imposes any constraints on a health insurer's selection of plan benefits. We hold that it does.***

Id. (emphasis added). Before the ACA, insurers could design benefits to avoid coverage of people with disabilities and chronic health conditions. *See, e.g.*, RCW 48.30.300(2). Now, however, health insurers and others subject to the ACA have "an affirmative obligation not to discriminate in the provision of health care—in particular, to consider the needs of disabled people and not design plan benefits in ways that discriminate against them." *Id.* at 955. This includes discrimination based on hearing disability.

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5. The *Schmitt* case was remanded and, in 2024, the case settled, providing coverage of hearing aids and related services for a class of certain Washington Kaiser-insured enrollees through December 31, 2023. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-1611-RSL, 2024 U.S. Dist. LEXIS 71166 (W.D. Wash. Apr. 18, 2024). Kaiser did not change its discriminatory practices in all of its health plans going forward, including those in which Plaintiffs Delessert and Cummins are enrolled.

6. Delessert is enrolled with Kaiser through the Washington Health Plan Finder (the ACA exchange in Washington State). He understood from speaking with a Kaiser customer service representative in the fall of 2023 that his hearing aids would be covered by Kaiser beginning in 2024. But Kaiser continued to exclude hearing aids in Delessert's 2024 health plan as it does in many other health plans across the country.

7. Cummins enrolled with Kaiser through her husband's employer in July 2019. She has never been able to obtain coverage for her hearing aids from her Kaiser plan and in 2025 Kaiser denied her coverage for hearing aids based on Kaiser's exclusion.

8. This type of discrimination is not new; rather, it follows from a long history of prejudice, exclusion, and stigmatization of people with disabilities in general. The Affordable Care Act's Section 1557, 42 U.S.C. § 18116, protects individuals with disabilities—including those diagnosed with hearing disabilities—from such discrimination in the design and administration of their health coverage. This case seeks to enforce those protections.

9. Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") discriminates on the basis of disability when it (or a subsidiary or affiliate) designs, insures, and administers health plans that exclude all coverage for hearing aids, a treatment required only by hearing disabled enrollees.

10. Specifically, prescription hearing aids are the essential piece of durable medical equipment that ensures that hearing disabled individuals are not isolated and

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segregated from the mainstream of American society. Hearing aids can profoundly improve the life, health and social engagement of hearing disabled insureds. In this sense, hearing aids are like wheelchairs for mobility disabled persons or insulin and supplies for diabetic individuals—they are the medical devices that offer Plaintiffs and the vast majority of hearing disabled insureds access to many daily activities and indeed, the world at large. For Plaintiffs and the proposed class, prescription hearing aids are the key to equal treatment and meaningful access to society.

11. Yet, Defendant Kaiser Foundation Health Plan Inc. ("Kaiser") excludes coverage for prescription hearing aids in many of its health plans designed and administered by it or by its affiliates and subsidiaries ("Hearing Aid Exclusion" or "Exclusion").

12. Plaintiff Jason Delessert is an adult diagnosed with disabling hearing loss who resides in King County, Washington. Delessert is enrolled in a Kaiser health plan issued by a Kaiser subsidiary/affiliate, Kaiser Foundation Health Plan of Washington, Inc. Delessert is diagnosed with disabling hearing loss and requires prescription hearing aids.

13. Plaintiff Caroline Cummins is an adult who resides in Clackamas County, Oregon. Cummins is enrolled in a Kaiser health plan issued by Kaiser subsidiary/affiliate, Kaiser Foundation Health Plan of the Northwest. Cummins is diagnosed with disabling hearing loss and requires prescription hearing airs.

14. Defendant Kaiser Foundation Health Plan, Inc. is a California nonprofit corporation that is the parent or holding company for various Kaiser health plans across the country, including Kaiser Foundation Health Plan of Washington, Inc. and Kaiser Foundation Health Plan of the Northwest, the health plans that issued and delivered Delessert's and Cummins' coverage. Kaiser is the parent/holding company of health insurers and administrators that engage in health programs or activities and receive

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federal financial assistance. Accordingly, Kaiser and all of its subsidiaries and affiliates are, collectively, a "covered entity" subject to the Affordable Care Act's anti-discrimination law, 42 U.S.C. § 18116, known as Section 1557.

15. Kaiser offers fully-insured plans, where individuals and/or employers pay a fixed premium to Kaiser to cover health care claims. It also acts as a claims administrator where, for a fee, it processes and pays claims, but where the employer ultimately reimburses Kaiser for the cost of any approved claims (this is referred to herein as acting as a "third party administrator" or "TPA").

16. Based on information and belief, Kaiser designs and administers health plans, whether insured or self-funded that exclude all coverage for prescription hearing aids. Based on information and belief, Kaiser offers employers that hire Kaiser as a TPA the option to exclude hearing aids from the self-funded health plans that they administer. In sum, Kaiser engages in discrimination against people who require hearing aids to treat their disability in both its fully-insured health plans, and the health plans that Kaiser administers.

17. Kaiser has historically excluded all coverage for treatment related to hearing loss. Over time, Kaiser has added coverage of cochlear implants ("CIs") and osseointegrated devices (commonly known as bone-anchored hearing aids or "BAHAs," but which are not considered prescription hearing aids), but in many of its health plans, Kaiser continues to exclude all coverage for hearing aids and the specialized health services related to the provision of hearing aids (referred to herein as "hearing aid related services" or "related services").

18. Delessert's Kaiser health plan excludes all coverage for hearing aids and hearing-aid related services. Delessert's Kaiser plan includes the following exclusion:

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Hearing Examinations and Hearing Aids	
Hearing exams for hearing loss and evaluation are covered only when provided at KFHPWA-approved facilities. Cochlear implants or Bone Anchor Hearing System (BAHS) when in accordance with KFHPWA clinical criteria. Covered services for initial cochlear implants and BAHS include diagnostic testing, pre-implant testing, implant surgery, post implant follow-up, speech therapy, programming and associated supplies (such as transmitter cable and batteries). Replacement devices and associated supplies – see Devices, Equipment and Supplies section.	**Hospital – Inpatient:** After Deductible, Member pays 30% Plan Coinsurance **Hospital – Outpatient:** After Deductible, Member pays 30% of Plan Coinsurance **Outpatient Services:** Office visits: After Deductible, Member pays $20 Copayment for primary care provider office visits or $45 Copayment for specialty care provider office visits Deductible does not apply to the first 5 office visit claims received and processed per calendar year. All other services including surgical services: After Deductible, Member pays 30% Plan Coinsurance
Hearing aids including hearing aid examinations	***Not covered; Member pays 100% of all charges***

19. Cummins' Kaiser plan provides limited coverage of hearing aids and related examinations but only for enrollees under the age of 26. For enrollees above that age limit, all coverage of hearing aids and hearing aid examinations are excluded.

20. But for Kaiser's Exclusion, the prescribed services would have been covered as they are considered medically necessary by Kaiser and are a form of durable medical equipment or prosthetic. As a result of Kaiser's discrimination, Delessert and Cummins and proposed class members do not have access to the essential medical equipment required to treat their disability. At the same time, other enrollees have access to the medical equipment needed to treat their diagnosed health conditions.

21. Based on information and belief and evidence gathered in the *Schmitt* litigation, in health plans like Delessert's, class members' medical diagnosis of hearing loss and the code for hearing aids, together, trigger the denial of coverage for the durable medical equipment that they need.

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22. In health plans like Cummins' plan, Kaiser imposes the Hearing Aid Exclusion only after an enrollee reaches a particular age, such as 18, 21 or, as in Cummins' plan, 26. The trigger for the denial of coverage is the class members' medical diagnosis, the code for hearing aids, together with their date of birth. Hearing disabled enrollees in these plans who cannot obtain hearing aid coverage are still discriminated against on the basis of disability, although they may also have a claim for discrimination based on their age.

23. Kaiser's categorical exclusion of coverage for hearing aids is grounded in the historic isolation and segregation of people with disabilities, including those with hearing disabilities, from the mainstream of American society. *See* 42 U.S.C. § 12101(a)(2)–(3). The Exclusion at issue here is one of many historical yet ongoing discriminatory barriers that individuals with disabilities continually encounter and that anti-discrimination law was designed to combat. *See* 42 U.S.C. § 12101(a)(5).

24. Categorical exclusions of a particular device or treatment were routinely applied when the device or treatment at issue was overwhelmingly required by disabled individuals and not the general population. *See* Blake, Valarie, *Restoring Civil Rights to the Disabled in Health Insurance,* 95 Neb. L. Rev. 1071, 1086 (2017) (hereinafter "Blake"). Indeed, before the Affordable Care Act, many health plans purposefully and legally excluded coverage of various durable medical devices in order to avoid covering people with disabilities. *Id.*

25. Historically Kaiser offered no coverage related to hearing loss and excluded other forms of durable medical equipment needed by disabled insureds, even including wheelchairs.

26. The Hearing Aid Exclusion is a remnant of the historic exclusionary treatment of people with disabilities by Kaiser. It persists in Kaiser's benefit design without medical or scientific justification.

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27. The historic exclusion of coverage for hearing aids was not reexamined by Kaiser when the ACA's anti-discrimination laws took effect. Such discrimination is no longer legal under the ACA. Kaiser's failure to evaluate whether its Exclusion was a form of disability discrimination is "thoughtless indifference" or "benign neglect" of the coverage needs of insureds with disabilities, and a form of discriminatory prejudice. *See Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 737 (9th Cir. 2021).

28. Hearing aids are only used by people with hearing loss or impairment. Hearing aids do not treat or ameliorate any other condition.

29. And, Kaiser's Hearing Aid Exclusion impacts only or nearly only hearing disabled insureds. Kaiser's Hearing Aid Exclusion directly targets hearing disabled people by eliminating the key medical device they need to treat and ameliorate their disability, resulting in illegal discrimination.

II. JURISDICTION AND VENUE

30. This action arises in part under Section 1557 of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), 42 U.S.C. § 18116.

31. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States.

32. Declaratory relief is authorized by Rules 57 and 65 of the Federal Rules of Civil Procedure and by 28 U.S.C. §§ 2201 and 2202.

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

34. The Court has personal jurisdiction over Kaiser because Kaiser and/or its subsidiaries do business in the Western District of Washington, including providing health insurance to thousands of Washington residents.

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III. PARTIES

35. ***Jason M. Delessert.*** Plaintiff Delessert is an adult diagnosed with disabling bilateral hearing loss who resides in King County, Washington. Delessert is enrolled in a Kaiser-insured health plan issued by Kaiser subsidiary/affiliate, Kaiser Foundation Health Plan of Washington, Inc. Delessert is diagnosed with disabling hearing loss and requires prescription hearing aids.

36. ***Caroline Cummins***. Plaintiff Cummins is an adult diagnosed with disabling bilateral sensorineural hearing loss who resides in Clackamas County, Oregon. Cummins is enrolled in a Kaiser-insured health plan issued by Kaiser subsidiary/affiliate, Kaiser Foundation Health Plan of the Northwest. Cummins is diagnosed with disabling hearing loss and requires prescription hearing aids.

37. ***Kaiser Foundation Health Plan, Inc.*** Defendant Kaiser Foundation Health Plan, Inc. is a California nonprofit corporation that is the parent/holding company of various Kaiser health plans across the country, including Kaiser Foundation Health Plan of Washington, Inc., and Kaiser Foundation Health Plan of the Northwest, the health plans that issued and delivered Plaintiffs' coverage. Kaiser is the parent/holding company of certain health insurers that engage in health programs or activities and receive federal financial assistance, such that Kaiser and all of its subsidiaries and affiliates are together a "covered entity" subject to the Affordable Care Act's anti-discrimination law, 42 U.S.C. § 18116, known as Section 1557.

IV. FACTUAL BACKGROUND

A. Hearing Loss Is Treated with Medically Necessary Hearing Aids and Cochlear Implants.

1. Hearing Loss.

38. Hearing involves a complex process by which sound waves are converted to vibrations that are transmitted through the eardrum to the middle-ear bones, then to the fluid-filled cochlea in the inner ear. The cochlea contains tiny hair cells that respond

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to specific frequencies and emit microscopic electrical impulses to the auditory nerve, from which the brain decodes the sound. Hearing loss is the result of damage to one or more of those components.

39. A common preliminary screening for hearing loss is a pure-tone test, in which subjects are presented with tones at different frequencies (pitches), measured in Hertzes (Hz), at increasing volume, measured in decibels (dB). The subjects are asked to indicate when they hear those tones. The threshold loudness at which a tone becomes audible is recorded on an audiogram.

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

41. The generally accepted standard for normal hearing is a threshold of 25 dB.[2] If the tones must be louder than 25 dB to be audible, the subject has worse-than-normal hearing. An average decibel threshold greater than 25 dB in the speech frequencies is generally considered, from a population wide basis, the point at which "hearing loss begins to impair communication in daily life." Lin, *et al.*, *Hearing Loss Prevalence in the United States,* Archives of Internal Medicine, Vol. 14, No. 20 at pp. 1831–32 (Nov. 14, 2011).

42. The most common form of hearing loss is sensorineural hearing loss ("SNHL"), in which the inner-ear and/or the nerves that carry sound information from the inner ear to the brain are damaged. That damage is generally not correctible through surgery or medication, and can be mitigated only through hearing aids or, in extreme cases, cochlear implants.

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[2] While the results of audiometric testing, standing alone, are not sufficient to define whether an individual is "disabled" under federal law or from a medical perspective, certain audiometric thresholds are used on an epidemiological basis to classify entire populations for public policy and scientific purposes.

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43. Conductive hearing loss occurs when damage to the outer or middle ear prevents sound from reaching the inner ear. Conductive hearing loss can be addressed with a bone-anchored hearing aid, which bypasses the damaged middle-ear structures and transmits sound directly to the cochlea and the hair cells. A bone-anchored hearing aid is a different device than a "cochlear implant" and, as the name makes clear, is considered to be a type of hearing aid.

44. Both Plaintiffs Delessert and Cummins are diagnosed with bilateral sensorineural hearing loss.

2. Prescription Hearing Aids.

45. Until October 2022, the fitting and dispensing of hearing aids were limited by law to licensed hearing care professionals. Even today, prescription hearing aids may only be obtained upon the written recommendation or prescription by a licensed hearing care professional.

46. Hearing aids are generally prescribed when a patient's hearing loss is confirmed by objective studies showing hearing loss together with subjective reports to a licensed hearing care professional of a significant impact from the hearing loss on their daily functioning. Licensed hearing care professionals do not typically prescribe hearing aids when these two requirements are not met.

47. As a result, all or very nearly all individuals who require prescription hearing aids are "disabled" under federal law, since they have an objectively diagnosed hearing loss that causes a substantial impact on their daily functioning leading to the prescription of hearing aids by a licensed hearing care professional. That is the case with Plaintiffs Delessert and Cummins.

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3. Cochlear Implants, Osseointegrated Devices and OTC Hearing Aids Do Not Meet the Needs of Most People with Hearing Disabilities.

48. A CI is a medical intervention and device for a limited class of people with severe to profound sensorineural hearing loss. A CI bypasses the damaged hair cells in the inner ear. It consists of an external microphone and processor that send electronic signals to an array of electrodes embedded in a filament that is threaded into the cochlea. Those electrodes substitute for the damaged hair cells by sending electronic impulses directly to the auditory nerve, creating a sensation of sound.

49. A CI is only available to people with severe to profound hearing loss who cannot be adequately treated with hearing aids.

50. CIs are implanted through an invasive surgical procedure. Once they are implanted, the insured cannot go back to using hearing aids or hear without the use of CIs. The devices do not restore hearing, and once implanted, the insured may need three to six months to adapt to hearing through the implant.

51. CIs only meet the needs of approximately 5% of people with moderate to severe hearing loss.

52. Osseointegrated devices or BAHAs are a treatment for conductive and mixed hearing loss, as well as unilateral SNHL. https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/baha--the-implantable-hearing-device (last visited 11/27/24).

53. Osseointegrated devices meet the needs of only a tiny portion of hearing disabled enrollees. Current estimates are that 75,000 Americans have received BAHAs. There is no breakdown of BAHA recipients by age. Based on the Census Bureau estimates that over 18 million Americans of all ages self-report serious hearing loss, fewer than 1% treat that condition using BAHAs.

54. Of the estimated 18 million Americans of all ages who self-report serious hearing loss, only 171,000—less than 1%—are currently being treated by either CIs or

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BAHA hearing aids. By comparison, according to the Census Bureau, some 8.3 million Americans of all ages use hearing aids. Based on those numbers, CIs and BAHA hearing aids together account for just over 2% of treatments for hearing loss. https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf (last visited 11/27/24) (explanatory text at p. 7 and charts on pp. 21 (adults) and 31 (children)).

55. Since October 17, 2022, adults may obtain OTC hearing aids without a prescription by a licensed hearing care professional. However, one recent report indicates that very few adults with hearing loss presently use OTC hearing aids. *See ASHA OTC Hearing Aid Survey,* September 12, 2023 found at: https://www.asha.org/news/2023/over-the-counter-hearing-aids-otcs-1-year-later/ (last visited 11/26/2024) (in August 2023, only 2% of survey respondents, all people over 40 with self-reported hearing difficulties had purchased an OTC hearing aid). The U.S. Food and Drug Administration ("FDA") recently concluded that it is too soon to determine the impact of OTC hearing aids on consumer access to hearing aids. *See* GAO Over-the-Counter Hearing Aids: Information on the New Medical Device Category, GAO-24-106854, May 7, 2024, found at: https://www.gao.gov/products/gao-24-106854 (last visited 11/26/24). And, while some very small percentage of hearing disabled enrollees may have their needs for hearing devices met with OTC hearing aids, since OTC hearing aids are purchased without a prescription, they are not eligible for health insurance coverage, even if the Hearing Aid Exclusion were removed.

56. In sum, CIs, BAHAs and OTC hearing aids do ***not*** meet the needs of most people with disabling hearing loss.

57. Delessert and Cummins, like all class members, require prescription hearing aids to treat their hearing loss. Like all class members, a licensed hearing care

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professional has determined that their hearing needs are best met with hearing aids and cannot be appropriately addressed by CIs, BAHAs or OTC hearing aids.

B. History of Disability-Based Exclusions in Health Coverage.

58. Based on information and belief, the Hearing Aid Exclusion is based on historic stigma and prejudice against people with hearing disabilities.

59. Kaiser, like other health plans, historically excluded coverage based on disability. During the twentieth century, health plans could freely avoid providing coverage to any category of people that were viewed as undesirable risks, including disabled individuals. *See* Blake, p. 1085. Kaiser's benefit design during this period did not provide coverage for many disability-related conditions, including hearing loss.

60. In 1965, the Medicare and Medicaid Act was signed into law. These two programs were intended to meet the needs of the elderly and disabled, two populations that were generally excluded from coverage by private insurance. Medicare coverage was modeled on the private coverage offered by Blue Cross and Blue Shield plans at the time. *See* De Lew, Nancy, *Medicare: 35 Years of Service*, Health Care Finance Rev. 2000 Fall; 22(1):75–103.

61. Thus, the exclusions imposed in the typical private health insurance plans were imported into Medicare. *Id.* This includes the exclusion of coverage for hearing aids.

62. Upon implementation of the ACA, health insurers should have reviewed and reconsidered whether such historic exclusions were the result of discrimination or were justified using the same medical and scientific standards applied to all other covered services. Based upon information and belief, Kaiser did not undertake such an analysis when the ACA was first implemented, nor even through today.

63. Kaiser includes the same or similar Hearing Aid Exclusion in various Kaiser health plans, whether insured or administered, across the country. For example, a variation of the Hearing Aid Exclusion eliminates all coverage of hearing aids and

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related services when an enrollee is over the age of 18. Even when the Exclusion is differently worded or starts at a different age, it has the same effect of eliminating all coverage for hearing aids and related services without any medical and scientific evidence to support the Exclusion.

C. Kaiser's Hearing Aid Exclusion Is Intentional Discrimination.

64. Kaiser's design and administration of the Hearing Aid Exclusion is a form of intentional discrimination. *See Schmitt*, 965 F.3d at 954.

65. Given the history discussed above and on information and belief, the Hearing Aid Exclusion, in one form or another, has been part of the benefit design in many of Kaiser's health plans.

66. Based on information and belief, Kaiser did not consider whether the Hearing Aid Exclusion in the health plans it insured and administered resulted from historic discrimination and prejudice, even when Kaiser evaluated whether its benefit design practices complied with the non-discrimination requirements in the ACA.

67. The only purpose of the Hearing Aid Exclusion is to eliminate coverage of medically necessary hearing aids, *i.e.*, the precise coverage often needed by disabled enrollees with hearing loss. Thus, the Hearing Aid Exclusion is targeted at eliminating otherwise medically necessary coverage for its hearing disabled enrollees.

68. By intentional design, the Hearing Aid Exclusion is uniquely and specifically targeted at hearing disabled enrollees to ensure that the hearing aids needed by most enrollees with disabling hearing loss would not be covered.

D. Kaiser's Hearing Aid Exclusion Is a Form of Proxy Discrimination.

69. In health plans with the Hearing Aid Exclusion, Kaiser provides some, albeit minimal, coverage for hearing loss (CIs, BAHAs and diagnostic evaluations). Accordingly, the Hearing Aid Exclusion is not a categorical exclusion of all coverage related to hearing loss. Rather, it is a form of proxy discrimination.

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70. Proxy discrimination occurs when a defendant enacts a policy that treats people differently on the basis of seemingly neutral criteria that are so closely associated with a protected group that the discrimination on the basis of those criteria is essentially intentional discrimination against the protected group. Proxy discrimination exists where "the needs of hearing disabled persons differ from the needs of persons whose hearing is merely impaired such that the exclusion is likely to predominately affect disabled persons." *Schmitt*, 965 F.3d at 959, n. 8.

71. Hearing aids are so intertwined with hearing disability that the exclusion of hearing aids is a proxy for excluding hearing disability.

72. Hearing aids are only used to treat forms of hearing loss and impairment. No other condition relies on hearing aids for medical treatment. Accordingly, an exclusion of coverage for hearing aids is targeted directly at hearing loss.

73. And, as described above, all people diagnosed with hearing loss and who require prescription hearing aids meet the definition of "disability" relied upon in Section 1557, such that an exclusion of all prescription hearing aids impacts only (or nearly only) people with disabling hearing loss.

74. In other words, there is a reasonably strong correlation between hearing disability and use of prescription hearing aids. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, No. C17-1611-RSL, 2022 U.S. Dist. LEXIS 138974, at *2 (W.D. Wash. Aug. 4, 2022) ("hearing loss is a viable proxy for hearing disability"); *E.S. v. BlueShield*, No. C17-1609-RAJ, 2024 U.S. Dist. LEXIS 48611, at *8 (W.D. Wash. Mar. 19, 2024) (same). In sum, the Hearing Aid Exclusion is illegal proxy discrimination because it targets hearing disabled enrollees who require prescription hearing aids. Here, hearing aids are a proxy for hearing disability.

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75. Thus, although the Exclusion applies only to hearing aids and not hearing loss, the "fit" of the Exclusion (*i.e.*, how closely it correlates to disability) is sufficiently close to constitute proxy discrimination.

E. Alternatively, Kaiser's Hearing Aid Exclusion Is Disparate Impact Discrimination.

76. Even if the Court were to conclude that the Hearing Aid Exclusion is not intentional/proxy discrimination, it disparately impacts enrollees who are hearing disabled. Specifically, Kaiser's Hearing Aid Exclusion disparately impacts enrollees who are hearing disabled by denying them "meaningful access" to the durable medical equipment and/or prosthetic device benefit, and to the administrative appeals and external review process.

77. At the same time, enrollees with other diagnosed health conditions have access to medically necessary durable medical equipment or prosthetics to treat their conditions and a meaningful appeals process if they are denied. In sum, the Exclusion results in the disproportionate denial of coverage of medically necessary medical devices for people with disabling hearing loss when compared to other enrollees.

78. The fact that Kaiser provides some coverage for hearing loss (CIs, BAHAs, and diagnostic evaluations) such that some hearing disabled enrollees may have their hearing needs met, does not immunize Kaiser from liability to Delessert, Cummins, and the proposed class. *See Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002) (a defendant's "appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of 'meaningful access.'").

79. Additionally, hearing disabled enrollees are denied meaningful access to Kaiser's administrative appeal and external review procedures. Plaintiffs' plans describe procedures for appeals and external review of adverse determinations that are available

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to all. However, these procedures are futile for enrollees who are denied coverage due to the Hearing Aid Exclusion in their plans.

F. Plaintiffs Delessert and Cummins and Other Enrollees Have Been and Continue to be Subject to and Harmed by Kaiser's Discriminatory Hearing Aid Exclusion.

1. Plaintiff Delessert.

80. Delessert is one of many enrollees in Kaiser's health plans that include a Hearing Aid Exclusion.

81. Delessert has bilateral sensorineural hearing loss that was identified in childhood. He has worn hearing aids since middle school. He is disabled due to his hearing loss under federal law.

82. Delessert's hearing loss is described as moderate to severe, with audiometric findings of 58 dB.

83. His most recent audiology assessment found that he cannot hear conversational speech clearly and requires the use of hearing aids. His hearing loss affects his communication, work, learning and many other daily activities.

84. His former hearing aids were in use for eight or more years.

85. Delessert contacted Kaiser when he was evaluating whether to change health plans during the Washington Health Plan Finder open enrollment in the fall of 2023. He was told by the Kaiser representative with whom he spoke that Kaiser would cover his hearing aids after January 1, 2024.

86. He also needed other coverage available through Kaiser that was not available to him through the health plan offered by his employer.

87. Based on these factors, Delessert remained enrolled in an individual Kaiser health plan for the plan year starting January 1, 2024.

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88. On January 16, 2024, Delessert went to see a Kaiser Permanente audiologist, Emily Morgan Battisti, Au.D. Dr. Battisti recommended that Delessert obtain new prescription hearing aids.

89. He was next evaluated and fitted for a hearing aid at the Kaiser Hear Center. By this time Delessert learned that he had been misinformed by Kaiser, and there was no coverage under his health plan for his hearing aids.

90. Delessert paid for his hearing aids out-of-pocket. He paid Kaiser's Hear Center $4,800 for his hearing aids.

91. He then submitted a claim to Kaiser for reimbursement of his hearing aids. On August 19, 2024, Kaiser denied coverage of Delessert's claim for reimbursement, asserting that "The service reported is not a covered service under your contract" and directing him to "see 'General Exclusions' section of your benefits booklet."

92. No administrative appeal is required before a claim under Section 1557 for disability discrimination may be brought. In any event, such an appeal would be futile given Kaiser's clearly articulated position that Delessert's plan does not cover hearing aids. *See Horan v. Anthem Steel Ret. Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991); 45 C.F.R. § 92.301; 81 Fed. Reg. 31441.

2. Plaintiff Cummins.

93. Cummins is one of many enrollees in Kaiser's health plans that applies a Hearing Aid Exclusion above a particular age.

94. Cummins has bilateral sensorineural hearing loss that was identified in childhood. She began wearing hearing aids when she was 18 years old. She is disabled due to her hearing loss under federal law.

95. Cummins' hearing loss is described as moderate to profound.

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96. Her most recent audiology assessment found that she cannot hear conversational speech clearly and requires the use of hearing aids. Her hearing loss affects her communication, work, learning and many other daily activities.

97. Her most recent former hearing aids were in use for over four years.

98. Cummins is enrolled in a Kaiser health plan through her husband's employee benefits and began coverage in July 2019. Since that time, Cummins has remained on the same plan.

99. In November 2024, Cummins saw audiologist Maralyn Martindale, Au.D. at Portland Audiology Group to obtain new behind-the-ear custom hearing aids. Dr. Martindale recommended that Cummins be fitted for a new pair of behind-the-ear custom hearing aids.

100. Cummins was evaluated by Dr. Martindale and is being fitted for new hearing aids. Dr. Martindale submitted a request for coverage of Cummins' new behind-the-ear hearing aids to Kaiser.

101. On July 1, 2025, Kaiser denied Cummins coverage. Kaiser provided the following reason for the denial: "Certain services may not be covered by your plan." The denial directed her to "See your plan documents for a list of covered services. . . " The Reason Code asserted in the document was, "PROCEDURE NOT COVERED."

102. As a result, Cummins must pay for the full $7,000.00 cost for her hearing aids out-of-pocket.

103. No administrative appeal is required before a claim under Section 1557 for disability discrimination may be brought. In any event, such an appeal would be futile given Kaiser's clearly articulated position that Cummins' plan does not cover hearing aids. *See Horan v. Anthem Steel Ret. Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991); 45 C.F.R. § 92.301; 81 Fed. Reg. 31441.

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3. Other Enrollees with Hearing Disabilities Require Hearing Aids.

104. Delessert and Cummins are not unique. Based upon the Hearing Exclusion, Kaiser has a standard policy of denying coverage of medically necessary prescription hearing aids to treat disabling hearing loss.

105. Based on information and belief and evidence in the *Schmitt* case, Kaiser designs and administers the Hearing Exclusion by denying all pre-authorization and post-service claims for prescription hearing aids to treat hearing loss in health plans with the Exclusion. That is exactly what occurred for Delessert.

106. In Kaiser plans in which some hearing aid coverage is provided to people under a particular age, such as 18 years, the Hearing Aid Exclusion is also triggered by pre-authorization and/or post-service claims that are for someone with hearing loss over that particular age limit. That is what occurred for Cummins.

107. As a direct result, Delessert and Cummins and some class members have been forced to pay out-of-pocket for prescription hearing aids. Other members of the class have been forced to forgo needed hearing aids.

108. As a result of Kaiser's deliberate discriminatory actions, Kaiser hearing disabled enrollees who require prescription hearing aids, like Delessert and Cummins, do not receive coverage for medically necessary treatment to treat their condition.

V. CLASSWIDE ALLEGATIONS

109. ***Class Definitions.*** Plaintiffs seek certification of two classes: a class of current and future Kaiser enrollees for prospective injunctive relief, and a class of current and past Kaiser enrollees for retrospective injunctive relief.

110. The ***Prospective Class*** consists of all individuals who:

(1) are or will be enrolled under a health plan (whether insured or "self-funded") that excludes hearing aids and related services (whether the exclusion is for all ages or occurs after a particular age, such as 18 years of age) and that is or will be administered or insured by

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(a) Kaiser; (b) any affiliate of Kaiser; (c) predecessors or successors in interest of any of the foregoing; and/or (d) all subsidiaries or parent entities of any of the foregoing;

(2) require or will require prescription hearing aids and related services while enrolled with Kaiser; and

(3) are not enrolled with Kaiser through a Medicare Advantage health plan.

111. The ***Retrospective Class*** consists of all individuals who:

(1) have been or are enrolled under a health plan (whether insured or "self-funded") that excluded or excludes hearing aids and related services (whether the exclusion is for all ages or occurs after a particular age, such as 18 years of age) and that was or is administered or insured by (a) Kaiser; (b) any affiliate of Kaiser; (c) predecessors or successors in interest of any of the foregoing; and/or (d) all subsidiaries or parent entities of any of the foregoing, at any time on or after December 18, 2020 through the date prospective injunctive relief is effective ("Class Period");

(2) have paid for prescription hearing aids and related services while enrolled with Kaiser during the Class Period that were or would have been denied under the Hearing Aid Exclusion;

(3) are not enrolled with Kaiser through a Medicare Advantage health plan; and

(4) are not individuals who: (a) were enrolled in a Kaiser Washington insured health plan; (b) terminated their coverage on or before December 31, 2023; (c) did not re-enroll with Kaiser in a health plan with an Exclusion after January 1, 2024; and (d) did not opt-out of *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. C17-1611-RSL ("Excluded *Schmitt* class members").

112. ***Size of Classes***. The classes are so numerous that joinder of all members is impracticable.

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113. ***Class Representative Delessert.*** Plaintiff Delessert has been, and is presently, an enrollee in a Kaiser health plan that contains a categorical exclusion of all coverage for hearing aids and related services. Delessert has disabling hearing loss that requires treatment with prescription hearing aids. His hearing loss cannot be addressed with OTC hearing aids, CIs or BAHAs. He is a "qualified individual with a disability" under the Affordable Care Act. Kaiser denied Delessert's claim for coverage of his prescription hearing aids, requiring him to pay out-of-pocket for them. Plaintiff Delessert's claims are typical of the claims of the other members of both classes. Plaintiff Delessert will fairly and adequately represent the interests of the classes.

114. ***Class Representative Cummins.*** Plaintiff Cummins has been, and is presently, an enrollee in a Kaiser health plan that contains a categorical exclusion of coverage for hearing aids and hearing aid examinations for people over the age of 26. Cummins has disabling hearing loss that requires treatment with prescription hearing aids. Her hearing loss cannot be addressed with OTC hearing aids, CIs or BAHAs. She is a "qualified individual with a disability" under the Affordable Care Act. Kaiser denied Cummins' claim for coverage of her prescription hearing aids, requiring her to pay out-of-pocket for them. Plaintiff Cummins' claims are typical of the claims of the other members of both classes. Plaintiff Cummins will fairly and adequately represent the interests of the classes.

115. ***Common Questions of Law and Fact***. This action requires a determination of whether Kaiser's Hearing Aid Exclusion violates the requirements of the Affordable Care Act's § 1557 and discriminates against Plaintiffs and the proposed classes on the basis of disability. Adjudication of this issue will in turn determine whether Kaiser is liable under the Affordable Care Act for declaratory judgment, prospective injunctive relief for the ***Prospective Class*** and retrospective injunctive relief, including reprocessing claims, for the ***Retrospective Class*** and other relief.

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116. ***Separate Suits Would Create a Risk of Varying Conduct Requirements***. The prosecution of separate actions by proposed class members against Kaiser would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct. Certification is therefore proper under Federal Rule of Civil Procedure 23(b)(1).

117. ***Kaiser Has Acted on Grounds Generally Applicable to the Classes.*** Kaiser, by imposing a uniform exclusion on all coverage for prescription hearing aids and related services, has acted on grounds generally applicable to both classes, rendering declaratory relief appropriate to both. Certification is therefore proper under Federal Rule of Civil Procedure 23(b)(2).

118. ***Questions of Law and Fact Common to the Classes Predominate Over Individual Issues.*** The claims of the individual class members are more efficiently adjudicated on a classwide basis. Any interest that individual members of each class may have in individually controlling the prosecution of separate actions is outweighed by the efficiency of the class action mechanism. Issues as to Kaiser's conduct in applying standard policies and practices towards all members of both classes predominate over questions, if any, unique to members of the class. Certification is therefore additionally proper under Federal Rule of Civil Procedure 23(b)(3).

119. ***No Other Litigation.*** Upon information and belief, there has been no class action suit filed against this defendant for the specific relief requested in this lawsuit. Plaintiffs' counsel filed a similar lawsuit in *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-1611-RSL (W.D. Wash.), that resulted in a settlement agreement with a settlement class of certain Washington Kaiser insureds limited to a class period of October 30, 2014 through December 31, 2023. The class definitions here exclude all *Schmitt* class members whose only claims against Kaiser related to hearing aids and related services were released as a result of the *Schmitt* settlement. Plaintiffs Delessert

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and Cummins each assert claims that are not released as a result of the *Schmitt* settlement and seek relief that is different from that provided in the *Schmitt* settlement.

120. ***Venue.*** This action can be most efficiently prosecuted as a class action in the Western District of Washington, where Kaiser conducts business, and where Delessert resides and received his denial of coverage for prescription hearing aids.

121. ***Class Counsel***. Plaintiffs have retained experienced and competent class counsel. Plaintiffs are represented by Sirianni Youtz Spoonemore Hamburger PLLC and Nichols Kaster, PLLP. Sirianni Youtz Spoonemore Hamburger PLLC is a Seattle-based law firm with significant experience representing individuals and classes who have been denied pension, health, or disability benefits under plans governed by federal and state law, including Section 1557 and ERISA. Nichols Kaster, PLLP is a law firm that, over the course of its 50-year history, has developed a sterling reputation in the legal community for representing consumers and employees in class and collective actions, including those under ERISA, Section 1557, and in insurance-related matters.

VI. CLAIM FOR RELIEF

Disability Discrimination
Under Section 1557 of the Affordable Care Act, 42 U.S.C. § 181116

122. Plaintiffs Delessert and Cummins and the proposed classes are "disabled" under the ACA.

123. Federal disability anti-discrimination law requires that Plaintiffs' allegations regarding disability be construed "broadly in favor of expansive coverage." 28 C.F.R. § 36.105(d)(1)(i); 29 C.F.R. § 1630.2(j)(1)(i). The application of anti-discrimination law under the ACA must also be considered in light of the ACA's purpose.

124. For example, the ACA is designed to ensure that health benefits, like durable medical equipment, are not "subject to denial … on the basis of the individuals'

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… present or predicted disability." 42 U.S.C. § 18022(4); *see also* 45 C.F.R. § 156.125 (extending anti-discrimination within health plans providing essential health benefits to discrimination based on disability and "other health conditions").

125. Because the ACA's purpose is to ensure broad access to health coverage when medically appropriate, regardless of disability or health condition, the ACA's Section 1557 allows for claims of disability discrimination, such as the challenge here to elimination of coverage for hearing aids, even when similar claims might not be viable under the Rehabilitation Act or the Americans with Disabilities Act. *See Schmitt*, 965 F.3d at 955.

126. Here, Plaintiffs state this cause of action under the ACA on behalf of themselves and members of the proposed classes for purposes of seeking declaratory and injunctive relief, and they challenge the disability-based discrimination arising out of the design and administration of the Hearing Aid Exclusion, both facially and as applied to Plaintiffs and the proposed classes.

127. Section 1557 of the ACA, 42 U.S.C. § 18116, 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, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance."

128. Kaiser is a "health program or activity" part of which receives federal financial assistance. 42 U.S.C. § 18116; 45 C.F.R. § 92.4. Thus, Kaiser is a "covered entity" under the Affordable Care Act, § 1557.

129. Kaiser and/or its subsidiaries or affiliates provided assurances to the U.S. Department of Health and Human Services that it complies with the requirements of § 1557. *See* 45 C.F.R. § 92.5.

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130. Through its subsidiary/affiliate, it also provided similar statements to its enrollees, confirming that it complies with the requirements of § 1557.

131. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, as amended in 2008, defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual," 42 U.S.C. § 12102(1)(A).

132. The applicable regulations state that the term "substantially limits" is to be construed "broadly," and is not meant to be a "demanding standard," 29 C.F.R. § 1630.2(j)(1)(i).

133. "Major life activities" include, among other things, "hearing, communicating and working." 42 U.S.C. § 12102(2)(A).

134. The presence of a disability is to be assessed "without regard to the ameliorative effects of mitigating measures such as … hearing aids or cochlear implants." 42 U.S.C. § 12102(4)(E)(i)(I).

135. Plaintiffs and the classes, as defined, are "qualified persons with a disability" under both Section 504 and Section 1557 and are protected from discrimination under these provisions.

136. Kaiser has discriminated against Plaintiffs and the members of the proposed classes on the basis of disability in violation of Section 1557 and has thereby denied Plaintiffs and members of the proposed classes the full and equal participation in, benefits of, and right to be free from discrimination in a covered health program or activity. They are entitled to equitable declaratory and injunctive relief in the form of prospective injunction and reprocessing of all claims denied under the discriminatory Hearing Aid Exclusion.

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137. Without reprocessing, declaratory, and prospective injunctive relief from Kaiser's ongoing, discriminatory actions, Plaintiffs and members of the proposed classes have suffered and will continue to suffer, irreparable harm.

138. This claim does not include any claims released as a result of the settlement agreement in *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-1611-RSL (W.D. Wash.).

VII. DEMAND FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Certify this case as a class action; designate the named Plaintiffs as class representatives of the ***Prospective Class*** and ***Retrospective Class***; and designate SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC, Eleanor Hamburger, Richard E. Spoonemore, Daniel S. Gross, and Ari Robbins Greene (of counsel), and NICHOLS KASTER, PLLP, Anna P. Prakash, Brock J. Specht, and Elizabeth M. Binczik, as class counsel;

2. Enter judgment on behalf of Plaintiffs Delessert and Cummins and the classes due to Kaiser's discrimination on the basis of disability under Section 1557, 42 U.S.C. § 18116;

3. Declare that Kaiser violated the rights of Plaintiffs Delessert and Cummins and members of the proposed classes under Section 1557 of the ACA when it designed, issued, delivered and/or administered the Hearing Aid Exclusion in their health plans;

4. Enjoin Kaiser from applying the same or similar Hearing Aid Exclusions now and in the future;

5. Require Kaiser, its agents, employees, successors, and all others acting in concert with them to reprocess and, when medically necessary and meeting the other terms and conditions under the relevant plans, provide coverage (payment) for all claims for coverage of hearing aids denied under the Hearing Aid Exclusion during the Class Period; provided, however, that the relief requested in this case excludes all claims that

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were released as a result of the settlement in *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-1611-RSL (W.D. Wash.);

6. Award reasonable attorney fees, costs and expenses; and

7. Award such other relief as is just and proper.

DATED: September 16, 2025.

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