Nos. 25-6143; 25-5803

In the United States Court of Appeals for the Ninth Circuit

L.B. and M.B., on behalf of their minor child A.B., and on behalf of similarly situated others; L.B.; M.B., C.M. and A.H., on behalf of their minor child J.M., and on behalf of similarly situated others; C.M.; and A.H.,

Plaintiffs-Appellees/Cross-Appellants,

v.

PREMERA BLUE CROSS,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the Western District of Washington, No. 2:23-cv-00953-TSZ, Hon. Thomas S. Zilly

CROSS-APPEAL SECOND BRIEF OF APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

Premera is a covered entity, engaging in activities that trigger the patient protections of the Patient Protection and Affordable Care Act ("ACA"), including an "affirmative obligation not to discriminate in the provision of health care." *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 955 (9th Cir. 2020). Premera nonetheless ignored this obligation,[1] and developed, implemented, and administered plans for Plaintiffs with categorical exclusions of coverage for medically necessary mastectomy only for ***adolescent individuals assigned female at birth***, but ***not for adolescent individuals assigned male at birth***, plainly discrimination because of sex in violation of Section 1557 of the ACA.

Premera downplays the actual language of the contested exclusion, avoiding any direct quotation of the policy until the final third of its Principal Brief, and then providing only a brief quote. Premera Blue Cross's Principal Brief ("Principal Brief") 51–52. Its aversion is understandable, because the exclusion is explicitly predicated on the sex of the individual seeking treatment:

[1] Congress forbade "any health program or activity, any part of which is receiving federal financial assistance," from "subject[ing]" an individual to discrimination on the basis of race, sex, age, or disability. 42 U.S.C. § 18116(a).

Surgical Services	Medically Necessary (except when otherwise stated in member contract language)

• **Breast/chest or "top surgery", mastectomy or breast reduction for:**
  ○ **Female to male patients**
  ○ **Female to non-binary/gender neutral patients**
• **Initial augmentation mammoplasty/breast augmentation (implants and/or lipofilling) for:**
  ○ **Male to female patients**
	One letter of recommendation or support for the surgery, or medical record documentation recommending or supporting the surgery, from a licensed mental health professional:
	• For prospective requests, this letter or medical record documentation must be based on a pre-surgery evaluation or psychotherapy or mental health treatment conducted within the last 12 months. (See Guidelines below)
	• For retrospective requests, this letter or medical record documentation must be based on an evaluation or psychotherapy or mental health treatment in the 12 months immediately preceding the surgery. (See Guidelines below)
	AND
	• Diagnosis of gender dysphoria (formerly gender identity disorder) confirmed by the licensed mental health professional
	AND
	• Individual is aged 18 years or older
	(See **Additional Information** below)

Figure 1: Premera's exclusion of gender-affirming chest surgery for only those under the age of 18with a birth-assigned female sex. 2-ER-275.

The care excluded from coverage for adolescent birth-assigned females (a mastectomy) is not denied to adolescent birth-assigned males:

Indication	Medical Necessity
Malignant (cancer) indications for mastectomy	**Mastectomy surgery for gynecomastia may be considered medically necessary for diagnosed malignancy (cancer) of the breast(s) regardless of age.**
Non-malignant (not cancer) indications for mastectomy in adults and adolescents	**Mastectomy surgery for gynecomastia may be considered medically necessary for non-malignant (not cancer) indications for adults and adolescents when ALL of the following criteria are met:** • Glandular (not fatty/adipose tissue) breast tissue is causing a physical functional impairment • Unilateral or bilateral Grade III or Grade IV gynecomastia is present (per modified McKinney and Simon, Hoffman and Kohn scales-see **Practice Guidelines and Position Statements**) • Persists 2 years after pathological causes (eg, hormonal, endocrine, or liver disease) are ruled out or treated • Persists after 6-month discontinuation of medications, nutritional supplements, or substances that could be the underlying cause, when medically appropriate and applicable (eg, testosterone, marijuana, anabolic steroids, topical lavender oil/tea tree oil, anti-androgens, tricyclic antidepressants, cimetidine, digoxin, and calcium channel blockers) • Pain and discomfort due to the distention and tightness from the hypertrophied breast(s) has not responded to medical management (eg, analgesics or anti-inflammatories) **Mastectomy for gynecomastia is considered not medically necessary when the above criteria are not met.**

Figure 2: Premera's coverage for a mastectomy (for gynecomastia) for those under 18with a birth-assigned male sex. 4-ER-889. Gynecomastia is defined as "swelling of breast tissue in boys or men…." 4-ER-888.

Yet, even if the exclusion did not explicitly limit coverage based on gender, but rather was a limitation on treatment for a diagnosis (*see, e.g.*, Principal Brief 38), that limitation serves as a proxy for sex discrimination against transgender individuals. *United States v. Skrmetti*, 605 U.S. 495 (2025); *Pritchard on behalf of C.P. v. Blue Cross Blue Shield of Illinois*, 159 F.4th 646 (9th Cir. 2025). As *Pritchard* explains, Premera's exclusion is facial sex discrimination if it is "a pretext

or proxy for invidious discrimination" against transgender beneficiaries like Plaintiffs. 159 F.4th at 671–72. And here, the exclusion's history, implementation, and circumstances demonstrate that it is indeed such pretext or proxy for discrimination against transgender beneficiaries

Premera's other bases for appeal have no merit. Premera had sufficient notice under the Spending Clause of the United States Constitution; the exclusion discriminates based on sex, one of Title IX's fundamental protections since its inception. And Premera cannot benefit from its own delays and litigation tactics in providing coverage for Plaintiffs to defeat their entitlement to relief.

Finally, on cross-appeal, the district court erred in dismissing Plaintiffs' age discrimination claim with prejudice. The ACA forbids age discrimination , and the court dismissed Plaintiffs' claim for failure to satisfy administrative prerequisites. Those prerequisites are not jurisdictional and should have been equitably modified. The dismissal, especially with prejudice, was in error, and the claim should proceed on remand.

JURISDICTIONAL STATEMENT

Appellees/Cross-Appellants agree with Appellant/Cross-Appellee's jurisdictional statement.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Premera's categorical exclusion of medically necessary health care for individuals with a birth-assigned female sex but not for individuals with a birth-assigned male sex was "textbook sex discrimination" and so violated the Affordable Care Act, Section 1557.

2. Whether Premera's exclusions were a proxy or pretext for invidious discrimination against transgender individuals, and so violated the Affordable Care Act, Section 1557.

3. Whether the district court correctly concluded that Plaintiffs were entitled to seek declaratory and other relief under the ACA.

4. Whether Premera had sufficient notice that it could not discriminate in plan design, implementation, or administration "because of sex" under the Spending Clause.

5. Whether the district court erred in concluding that Plaintiffs' Age Discrimination Act claims were barred by Plaintiffs' failure to comply with administrative requirements.

STATUTORY AND REGULATORY AUTHORITIES

Relevant statutory and regulatory authorities appear in the Addendum to Appellant's brief or the Addendum to this brief.

STATEMENT OF THE CASE

A.B. and J.M. (collectively "Plaintiffs") are transgender young men diagnosed with gender dysphoria. Each was enrolled in a health plan issued or administered by Defendant Premera Blue Cross ("Premera"). Plaintiffs were denied coverage for the same medically necessary treatment (gender-affirming chest surgery) while they were adolescents for one reason: Premera's medical policy categorically excludes that surgery from coverage for an adolescent patient whose birth-assigned sex is female. This appeal concerns whether that policy discriminates "on the basis of sex" or age in violation of Section 1557 of the ACA. The district court correctly held that the policy discriminates on the basis of sex[2] and incorrectly held that A.B. and J.M. were procedurally barred from proceeding on their age discrimination claim.

I. SECTION 1557 OF THE AFFORDABLE CARE ACT.

When Congress enacted the ACA, it took a historic step to eliminate discrimination in healthcare coverage. Through Section 1557, Congress provided that, for insurers that receive federal funding,[3] "an individual shall not, on the

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[2] The district court was clear that it was "***not*** ruling that gender-affirming surgeries for juveniles must always be covered; rather … a categorical ban (with unwritten, secret exceptions) on such procedures for 'female to male' or 'female to non-binary/gender neutral' adolescents runs afoul of ACA § 1557." 1-ER-34 (emphasis in the original).

[3] Premera does not deny federal financial assistance for some of its operations and this Court has applied an entity level analysis to determine coverage. *Pritchard*, 159 F.4th at 660.

ground prohibited under … title IX of the Education Amendments of 1972 … [or] the Age Discrimination Act [("AgeDA")] … 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." 42 U.S.C. § 18116(a). This Court recognized that Section 1557 imposes on covered entities an "affirmative obligation not to discriminate in the provision of health care." *Schmitt*, 965 F.3d at 955. By incorporating Title IX and the AgeDA, Section 1557 forbids covered entities from discriminating on the basis of sex or age in the provision of health care coverage. In order to succeed on their Section 1557 claim Plaintiffs must demonstrate that (1) Premera is a covered entity; (2) Plaintiffs were excluded from participation in, denied the benefits of, or subjected to discrimination under Premera's health program or activity; and (3) the exclusion, denial, or discrimination occurred because of the Plaintiffs' sex or age. *See, e.g.*, *C.P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021) (articulating the standard for a sex discrimination claim under Section 1557).

This Court held that Title IX's protections, and, *a fortiori*, Section 1557's protections against sex discrimination, are construed consistently with Title VII. *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022). Applying settled Title VII law, an action is taken "on the basis of sex" whenever sex is a but-for cause of the challenged treatment. *Bostock v. Clayton County*, 590 U.S. 644 (2020). "The statutory phrase

'because of' does not require biological sex to be the only cause animating discrimination. Instead, that phrase merely requires biological sex to be one such cause." *W. Virginia v. B.P.J. by Jackson*, 146 S. Ct. 2356, 2383 (2026) (Gorsuch, J., concurring). Thus, "discriminating against a person for being … transgender necessarily entails discriminating against that person at least in part because of his biological sex." *Id.* A categorical exclusion from coverage for a medically necessary treatment because of the sex of those excluded is unlawful sex discrimination under Section 1557.

The AgeDA provides that, subject to irrelevant exceptions, "no person … shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. A covered entity may take age into account only where doing so is "a factor necessary to the normal operation or the achievement of any statutory objective" of the program or is based on "a factor other than age" that bears a reasonable relationship to the program's objectives. *Id.* § 6103(b)(1). The AgeDA expressly authorizes a private right of action, affording injunctive relief, and conditions suit on the plaintiff's giving pre-suit notice and exhausting mandatory administrative remedies. *Id.* § 6104(e), (f). A categorical age cutoff for coverage of a treatment that is clinically effective for the excluded age group is unlawful age discrimination under Section 1557.

II. GENDER DYSPHORIA AND ITS MEDICALLY NECESSARY TREATMENT.

Every person has a gender identity; a core, internal sense of their sex. 1-SER-81 (Expert Report of Dr. Christine Brady). For many people, gender identity aligns with the sex they were assigned at birth. *Id.* For transgender people, it does not. *Id.* Being transgender is a normal variation of human development, not a disorder. 1-SER-86; 1-SER-232–233 (Expert Report of Dr. Dan Karasic). The incongruence between a transgender person's gender identity and their birth-assigned sex can cause clinically significant distress. 1-SER-233. The diagnosis for that distress is gender dysphoria, a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. *Id.*; *see generally Pritchard,* 159 F.4th at 653–654.

The consequences of untreated or inadequately treated gender dysphoria are serious. 1-SER-87; 1-SER-234. As this Court has recognized, gender dysphoria left untreated "can lead to debilitating distress, depression, impairment of function, substance use, self-surgery to alter one's genitals or secondary sex characteristics, self-injurious behaviors, and even suicide." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019) (*per curiam*). Conversely, when transgender people receive medically necessary, individualized gender-affirming care, those symptoms can be alleviated and even prevented; the treatment can be lifesaving and improve health outcomes over the short and long term. 1-SER-96–100; 1-SER-235.

And gender dysphoria is treatable. The World Professional Association for Transgender Health ("WPATH") and the Endocrine Society have published clinical practice guidelines establishing that treatment, commonly known as gender-affirming care. 1-SER-88–89. Gender-affirming care is the medically necessary course of treatments to alleviate the distress of gender dysphoria by bringing a patient's body into alignment with their gender identity. It may include hormone therapy and surgery, and its precise course is determined case-by-case by the patient's healthcare team, the patient, and in the case of minors, their parents. 1-SER-238–242. The nation's leading medical organizations recognize gender-affirming care as safe, effective, and medically necessary treatment for gender dysphoria, and support insurance coverage for it. 1-SER-237–238.

For some adolescents, gender-affirming chest surgery (a mastectomy and reconstruction, or "top surgery") can be medically necessary before the age of eighteen. 1-SER-129–132 (Expert Report of Dr. Loren S. Schechter). WPATH's Standards of Care confirm this, eschewing any bright-line age limitations in favor of patient needs, maturity, and the clinical judgment of their treatment team, and parental consent. 2-SER-303–310 (WPATH SOC-8, Statement of Recommendation 6.12). For a transgender adolescent, chest surgery can relieve the profound distress caused by gender dysphoria and allow the patient to live without the physical and functional limitations that untreated dysphoria imposes. 1-SER-135–140.

Premera's own gender-affirming care policy, in effect when it denied care for A.B. and J.M.,[4] identifies the WPATH Standards of Care as reflecting the "best available science and expert professional consensus." 2-SER-553 (Premera's September 2022 version of Medical Policy 7.01.557, Premera's Gender Transition/Affirmation Surgery and Related Services policy ("GTAS")); *compare* 4-ER-319–326 (Premera's September 2024 version of the GTAS). Premera in fact grants coverage for chest surgery to many transgender minors who request it, using undisclosed exception criteria. Principal Brief 1, 11, 31, 54.

A mastectomy to remove breast tissue in a cisgender male adolescent with gynecomastia "may be considered medically necessary … for adults ***and adolescents***," 4-ER-889 (emphasis supplied). Similarly, while Premera previously imposed no age limit on medically necessary mastectomy for cisgender female patients, 2-SER-317–323, it has since adopted a single medical policy that limits prophylactic mastectomy to birth-assigned female enrollees over the age of 18. 2-SER-311–316; 2-SER-363–364.[5] These procedures may have secondary

[4] Premera denied A.B. chest surgery on December 3, 2022, and denied J.M. chest surgery on August 25, 2023. 5-ER-1082 (Second Amended Complaint, ¶80); 5-ER-1086 (Second Amended Complaint, ¶103).

[5] Premera imposes no age limit on medically necessary breast reduction for cisgender female patients, a distinct procedure. *See* 2-SER-502–518 (Premera's Breast Reduction (Mammaplasty) policy).

requirements to render them "medically necessary" under Premera's policies,[6] as does the exclusion at issue here,[7] but the net effect is the same. The only circumstance in which Premera categorically refuses to cover a medically necessary mastectomy for an adolescent is when the surgery is sought by a transgender patient who was assigned female at birth.

III. PREMERA'S MEDICAL POLICIES COVER CHEST SURGERY BASED ON BIRTH-ASSIGNED SEX.

Premera administers coverage for gender-affirming surgery through the GTAS. 2-ER-271–326. GTAS terms, as they relate to chest surgery for birth-assigned females, turn expressly on birth-assigned sex. They provide that a mastectomy is excluded from coverage for "[f]emale to male patients" and "[f]emale to non-binary/gender neutral patients" who are under eighteen years of age. 2-ER-275.

Premera concurrently covers the very same surgery for patients whose birth-assigned sex is male. Under a separate policy, Medical Policy 7.01.521 (4-ER-888–

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[6] *E.g.*, for cisgender men or boys, gynecomastia requires that the condition persist "after 6-month discontinuation of medications, nutritional supplements, or substances that could be the underlying cause, when medically appropriate …." 4-ER-889. Birth-assigned females who are not transgender must have "well-documented symptoms of physical functional impairment for at least 6-months duration" in order to qualify for breast reduction. 2-SER-505.

[7] Birth-assigned females who are transgender must also have "a pre-surgery evaluation or psychotherapy or mental health treatment conducted within the last 12 months" pursuant to Premera's guidelines to qualify for coverage. 2-ER-275.

900), a mastectomy for gynecomastia (the swelling of breast tissue in individuals who are birth-assigned males) may be covered regardless of age. 4-ER-889. Tellingly, when Premera applies its secret exceptions, it covers chest surgery for adolescent birth-assigned female transgender persons when it determines that they have "severe gynecomastia" among other conditions. 2-SER-456–457 (deposition of Premera through Dr. Robert H. Small, "Small Dep." 147:9-148:16).

The record confirms that the exclusion for chest surgery for birth-assigned females in GTAS is an outlier and that Premera knew as much. The exclusion is the only surgical policy at Premera drafted and reviewed by a psychiatrist. 2-SER-429 (Small Dep. 44:15–21); 2-SER-396–397 (deposition of Dr. Christine Reynoso, "Reynoso Dep.," Premera's medical director 59:12–24, 63:1–8); 2-SER-368–371 (deposition of Premera through Dr. Neil K. Kaneshiro, "Kaneshiro Dep." 67:9–70:19). And the age exclusion is an outlier among Washington insurers. Regence, Aetna, Kaiser, United Health Care, and others all cover medically necessary chest surgery for patients under eighteen. 5-ER-904–1037 (policies from other insurers

covering chest surgery for adolescents).[8] Despite the fact that the age exclusion had been in the GTAS since 2014, Premera added a written "justification" for the exclusion only in 2016, in response to concerns raised during its own Section 1557 compliance review that, without an articulable clinical basis, the age restriction would constitute unlawful discrimination. 2-SER-432–434 (Small Dep. 57:13-59:24).

IV. PREMERA DENIED COVERAGE TO A.B. AND J.M. BECAUSE OF THEIR BIRTH-ASSIGNED SEX.

A.B. is a transgender young man assigned female at birth and diagnosed with gender dysphoria. His parents, treating providers, and surgeon all agreed that gender-affirming chest surgery and reconstruction was clinically appropriate. 5-ER-1070, -1082–1083, -1085 (Second Amended Complaint at ¶¶10, 75–80, 96–97). A.B.'s request for pre-authorization met every requirement for coverage under Premera's policy but one: as a person assigned female at birth, he was under eighteen. 2-SER-494–501; 2-SER-453–454 (Small Dep. 141:23-142:3). Premera denied coverage

[8] Premera's assertion that "the majority" of health insurers have minimum age requirements for comparable medical treatments is, at the very least, debatable. Principal Brief 10. The source of Premera's claim is its own deposition through Dr. Small, where he claims "from memory" that Regence (outside of Washington), Kaiser, First Choice, Humana, and TRICARE have an age limit. 2-ER-254–255. However, Plaintiffs submitted evidence that Aetna, Centene, Elevance, Cigna, Kaiser (with parental consent), Moda, Regence (in at least Oregon, Utah, Idaho and some Washington counties), and United Health Care (in Washington) cover gender-affirming chest surgery without an age limit. 5-ER-904–1037.

solely on that basis.[9] A.B. and his family paid $25,750 for the surgery out of pocket. 2-SER-490–493 (December 30, 2022 denial of appeal); 2-SER-405–407 (deposition of L.B. 202:24-203:2, 204:12-16); 2-ER-139.

J.M. is likewise a transgender man assigned female at birth and diagnosed with gender dysphoria, for which he received medical treatment. When J.M. was sixteen, his treatment team recommended gender-affirming chest surgery. 5-ER-1085–1086 (Second Amended Complaint at ¶¶100–102). Premera denied pre-authorization, stating only that "your requested surgical procedure requires a minimum age of 18 for consideration of approval." 2-SER-484. J.M.'s providers appealed; Premera denied the appeal again citing only his age. 5-ER-1085, -1088 (Second Amended Complaint at ¶¶104, 117).[10] As with A.B., every other requirement for coverage was met. *Id*. If Plaintiffs' assigned sex was male at birth, they would not have been denied care.

SUMMARY OF ARGUMENT

This appeal concerns facial discrimination by Premera. Premera covers a medically necessary mastectomy for an adolescent whose birth-assigned sex is male

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[9] Premera's description of A.B.'s medical history at Principal Brief 17–20 is therefore largely irrelevant.

[10] Again, Premera's description of J.M.'s medical history at Principal Brief 20–24 is therefore largely irrelevant. In addition to being irrelevant to a facial discrimination case such as this one, the district court found that Premera approved J.M. for chest surgery, one week ***before his eighteenth birthday***. 1-ER-25 & n.5.

but categorically refuses to cover the identical procedure for an adolescent whose birth-assigned sex is female. This age- and sex-based decision making violates Section 1557 of the Affordable Care Act. The judgment of the District Court that Premera's Exclusion constitutes sex discrimination under Section 1557 should be affirmed, and its erroneous dismissal of Plaintiffs' Section 1557 age claim reversed.

First, Premera is subject to Section 1557. It concedes that it receives federal financial assistance, and this Court held in *Pritchard* that an insurer receiving such assistance is bound by Section 1557 "for all of its operations." 159 F.4th at 660.

Second, Premera's policy fails the very test on which Premera relies. *Skrmetti* quoting *Bostock*, instructs courts to "change one thing at a time and see if the outcome changes" when analyzing whether a policy constitutes sex discrimination. 605 U.S. at 520 (quoting *Bostock*, 590 U.S. at 656 (2020)).[11] Change "one thing," here, the patient's birth-assigned sex, and Premera's coverage decision changes. Sex is a but-for cause of the denial. *Pritchard*, 159 F.4th at 671. This is textbook facial sex discrimination, turning only on the birth-assigned sex of the patient.

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[11] Though a panel of this Court held that "*Skrmetti*'s gloss on *Bostock* applies to statutory cases," *Pritchard*, 159 F.4th at 670, Plaintiffs respectfully disagree. Plaintiffs preserve for *en banc* and Supreme Court review their position that *Skrmetti* analyzed the proper standard of review for a legislative enactment under the Equal Protection Clause and specifically disclaimed any application of *Bostock*. *See* 1-SER-2–11.

Third, to the extent that Premera wishes to recast its openly sex-based exclusion as a diagnostic code exclusion, it fares no better. If the exclusion turns on a diagnosis of gender dysphoria, then it is still facial discrimination as it is a pretext or proxy discrimination against transgender beneficiaries. Discrimination against transgender people is discrimination "because of sex." *Bostock*, 590 U.S. at 669; *Pritchard*, 159 F.4th at 672. Indeed, gender dysphoria has such a "close fit" with being transgender that the exclusion in the GTAS policy applies because the patient is transgender. *Id.* at 671–672. And the circumstances surrounding the exclusion demonstrate that it is a pretext or proxy discrimination against transgender beneficiaries. The existence of some transgender individuals without gender dysphoria does not make this less true, and Premera's own concession that this surgery is medically necessary for some of the very patients it categorically excludes confirms that the diagnosis functions not as a neutral medical determination but as a stand-in for ***who the patient is***.

Fourth, Premera's Spending Clause argument is wholly without merit. Sex discrimination has been Title IX's core prohibition since 1972, and *Bostock* confirmed more than five years ago (prior to the Plaintiffs' denials) that discrimination against transgender people is discrimination because of sex. Premera's own 2016 compliance review flagged that its age restriction risked being

unlawful discrimination. Premera had adequate notice of the requirements of Title IX as relevant here.

Fifth, Plaintiffs are due declaratory relief. Premera concedes their standing to recover damages for its past denials and challenges only the accompanying declaratory judgment. That declaration is tied to a past injury for which Plaintiffs recovered, so it requires no independent showing of future harm.

Sixth, the District Court's erroneous dismissal of Plaintiffs' age-discrimination claims with prejudice for failure to exhaust administrative prerequisites should be reversed. The district court correctly held that the AgeDA's exhaustion requirements are non-jurisdictional, claims-filling procedures which can be equitably modified. They should have been modified here, allowing Plaintiffs' claims to proceed. Regardless, any defect in compliance with administrative requirements warranted, at most, a dismissal without prejudice.

STANDARD OF REVIEW

"The district court's ruling on cross-motions for summary judgment is reviewed *de novo*." *Hartstein v. Hyatt Corp.,* 82 F.4th 825, 828 (9th Cir. 2023). The Court "may affirm on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). Summary judgment is appropriate where "there is no genuine dispute of material fact" after

"viewing the evidence in the light most favorable to the nonmoving party." *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018).

ARGUMENT

I. PREMERA'S OPERATIONS ARE SUBJECT TO THE ACA'S REQUIREMENTS.

Section 1557 provides that "an individual shall not, on the ground prohibited under … title IX," "be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). Premera does not dispute that it receives federal financial assistance, or that its administration of health coverage is a "health program or activity." *See* Principal Brief 27 & n.10.

That concession is dispositive under *Pritchard*. "Because [the insurer] receives federal financial assistance, it is subject to Section 1557 for all of its operations," and "courts must analyze 'health program or activity' at the entity level, not the plan level." 159 F.4th at 658, 660. Premera is a covered entity, and Section 1557's non-discrimination mandate applies to the medical policies at issue. *See also Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022) (Section 1557 "outlaws discrimination … by healthcare entities receiving federal funds").

Premera "reserves the right" to ask the *en banc* Court or the Supreme Court to reconsider *Pritchard*'s funding holding. Principal Brief 74 & n.10. But a three-judge panel is bound by *Pritchard*, and Premera's reservation raises no question this

Court can resolve in its favor. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Section 1557 governs Premera's conduct.

II. PREMERA'S EXCLUSION OF GENDER-AFFIRMING CHEST SURGERY (MASTECTOMY) FACIALLY DISCRIMINATES ON THE BASIS OF SEX IN VIOLATION OF THE ACA.

Premera's care exclusion in this case categorically excludes "female to male" and "female to non-binary/gender neutral" individuals from receiving gender affirming mastectomy services if they are under 18 years of age. 2-ER-275. There is no such corresponding categorical exclusion for mastectomies for birth-assigned male individuals under the age of 18. 4-ER-888–901. The same procedure is performed far more often on cisgender boys and men than on transgender patients. 2-SER-324–328 (Dai *et al.*, *Prevalence of Gender-Affirming Surgical Procedures Among Minors and Adults in the US*, JAMA Network Open (June 27, 2024)). However, Premera labels the surgery, the only variable that determines whether Premera covers it is the patient's birth-assigned sex—not the procedure, and not the breast tissue it removes. While Premera covers other chest surgeries for cisgender females under the age of 18, it does not provide for coverage for *mastectomy* for birth-assigned females. -2-SER-311–316. As the district court correctly concluded, this is textbook sex discrimination.

That conclusion follows directly from the but-for causation standard that governs Section 1557 and that the Supreme Court reaffirmed in *Skrmetti*. Section

1557 incorporates the non-discrimination obligations of Title IX.42 U.S.C. § 18116(a), and this Court construes Title IX consistent with Title VII, *ipso facto* applying Title VII jurisprudence to sex-based violations of Section 1557. *Doe*, 28 F.4th at 114; *Pritchard*, 159 F.4th at 665 n.13.

Under well-established Title VII law, "an action is taken 'on the basis of sex' whenever sex is a but-for cause of the challenged treatment," and the but-for test "directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 590 U.S. at 656; *accord Skrmetti*, 605 U.S. at 520. Premera's exclusion cannot survive this test, and neither *Skrmetti* nor decisions applying it change the outcome.

A. Premera's exclusion applied to A.B. and J.M. because of their sex.

In *Pritchard*, this Court applied *Skrmetti* to a Section 1557 challenge and explained that where a plan does nothing more than "remov[e] [a] diagnosis from the range of conditions its insurance plans cover" making a treatment unavailable to everyone lacking a different qualifying diagnosis, ***and*** there is no indication that the exclusion is a pretext or a proxy for discrimination, "sex is not a but-for cause of the exclusions' operation." 159 F.4th at 669–670. But where the same treatment would be available to a patient of one sex, but not a patient of a different sex, sex ***is*** a but-for cause. *Id.* at 671. Premera's exclusion constitutes facial discrimination.

Premera's policies do not withdraw mastectomy from coverage for everyone, nor do they categorically exclude treatments for a gender dysphoria diagnosis. Premera covers a medically necessary mastectomy for an adolescent assigned male at birth whose breast tissue causes distress. 1-ER-19; 4-ER-888–901. It categorically refuses to cover the identical procedure for an adolescent assigned female at birth. 2-ER-275. Hold the procedure and the patient's age constant and change only birth-assigned sex: the female-assigned adolescent who is denied coverage becomes a male-assigned adolescent who can obtain it. Changing birth-assigned sex "does alter the application of" Premera's exclusion, so "sex is a but-for cause of the exclusion's operation." *Pritchard*, 159 F.4th at 671 (citation modified); *see* 1-ER-10 (district court order after supplemental briefing on *Skrmetti*, properly applying *Bostock*: "change the juvenile's sex and she becomes an adolescent boy whose request for a gender-affirming mastectomy is not subject to any age restriction").

B. Premera's arguments to the contrary are irrelevant or incorrect.

Premera insists that changing the patient's birth-assigned sex necessarily changes the diagnosis from gender dysphoria to gynecomastia so that the district court "changed two things." Principal Brief 53–54. That objection fails.

First, it proves too much. Premera's rationale would immunize any sex-based exclusion so long as the insurer attaches a different diagnostic label to each sex. *Skrmetti* itself recognized that it would constitute sex discrimination if a patient

could not obtain the sought treatment (testosterone in that case) because of "sex or transgender status," and here the birth-assigned male adolescent can obtain the covered mastectomy while the birth-assigned female adolescent cannot. 605 U.S. at 521.

Given this consideration, the proper comparison holds the medical procedure constant. The surgery Premera covers for a birth-assigned male adolescent with breast tissue causing distress, and the surgery it denies a birth-assigned female adolescent with breast tissue causing distress, are the same operation on the same anatomy: the surgical removal of breast tissue from the chest. As the district court put it, candidacy "for these surgeries" can be determined "solely from knowing [the patient's] sex assigned at birth." 1-ER-30. Nothing about the operation itself differs; only the patient's sex does.[12]

Second, wrapping the gender dysphoria diagnosis into the operation of the exclusion does not change the fact that birth-assigned sex is still dispositive for denying coverage. A birth-assigned male with gender dysphoria is not categorically excluded from treatment by Premera's GTAS. Chest surgery might be denied to the

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[12] Premera's observation that "all of the patients" who were covered and denied chest surgery "were biologically female and are transgender," Principal Brief 54, only underscores the discrimination. It confines the comparison to the very class the exclusion targets and erases the one comparator that matters, the birth-assigned male adolescent who obtains the identical mastectomy Premera denies A.B. and J.M. 2-ER-275; 4-ER-888–901.

birth-assigned male patient for other reasons, but it would not be due to Premera's categorical exclusion.

Premera's insistence that the GTAS "appl[ies] to all minors regardless of sex" because it governs *all* gender-affirming surgery, including penectomy and breast augmentation for birth-assigned "[m]ale to female patients," misses the point. Principal Brief 51–52. The question is not whether Premera's umbrella policy contains *other* sex-based restrictions on *other* procedures, it is whether coverage of a medically necessary mastectomy to remove breast tissue, the specific benefit Plaintiffs were denied, turns on birth-assigned sex. It plainly does. A birth-assigned male adolescent may obtain that very procedure under Premera's gynecomastia policy, while a birth-assigned female adolescent seeking the identical operation may not. 2-ER-275; 4-ER-888–901. That a separate provision also restricts a ***different*** surgery for birth-assigned males does not cure the sex-based line drawn here. If anything, it confirms that Premera sorts coverage by birth-assigned sex. Moreover, it is no defense that a facially discriminatory policy also burdens the opposite sex elsewhere. Premera cannot escape liability by "overdiscriminating." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013).

Finally, Premera devotes considerable space in its Principal Brief to its justifications for the exclusion in the GTAS policy at issue here. Principal Brief 9–17, 59–65 (supposed medical support, specific facts about Plaintiffs' treatment,

alleged "honest mistake" by Premera). None of these explanations are relevant here because Plaintiffs have alleged and proven facial discrimination. "By its very terms, facial discrimination is intentional. If Plaintiffs succeed in proving facial discrimination, no greater proof of mental state is necessary because intentional discrimination is synonymous with discrimination resulting in disparate treatment, as opposed to disparate impact." *Pritchard*, 159 F.4th at 664 (citation modified). In this framework "reframing the additional causes for the employer's decision does nothing to insulate the employers from liability. After all, intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view." *Id.* (citation modified). Premera's explanations for its intentions or motivations are irrelevant because its exclusion is facially discriminatory.

III. INDEPENDENTLY, PREMERA'S EXCLUSION IS FACIAL SEX DISCRIMINATION BECAUSE IT IS A PRETEXT OR PROXY FOR DISCRIMINATION AGAINST TRANSGENDER BENEFICIARIES.

The district court's judgment could be affirmed on a second, independent ground: to the extent Premera's exclusion operates through the diagnosis of gender dysphoria, it is a pretext or a proxy for discrimination based on transgender status and therefore for sex. 1-ER-32. Both the Supreme Court and this Court have been clear that in discriminating against individuals for being "transgender, the [perpetrator] must intentionally discriminate against individual men and women in

part because of sex. In such a case, the [perpetrator] has penalized a member of one sex for a trait or action that it tolerates in members of the other." *Skrmetti*, 605 U.S. at 520 (citation modified) (quoting *Bostock*, 590 U.S. at 662); *see Pritchard*, 159 F.4th at 669 ("[c]ertainly, 'discrimination based on … transgender status necessarily entails discrimination based on sex.'") (quoting *Bostock*, 590 U.S. at 669); *see also Roe v. Critchfield*, 137 F.4th 912, 928 (9th Cir. 2025) (interpreting Title IX consistent with *Bostock*); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (same).

Thus, because "Circuit precedent establishes that discrimination on the basis of transgender status is a form of sex-based discrimination," *Roe*, 137 F.4th at 928, and Premera's exclusion is "a pretext or proxy for invidious discrimination" based on transgender status, *Pritchard*, 159 F.4th at 672, the exclusion violates Section 1557. This ground is independently sufficient to affirm the ruling below.

A. The exclusion is a proxy or pretext for discrimination against transgender persons.

"What cannot be done directly cannot be done indirectly," *Cummings v. Missouri*, 71 U.S. 277, 325 (1867). Accordingly, a policy is facially discriminatory when it uses seemingly neutral criteria so closely associated with a disfavored group that it acts as a "proxy" for that group and discrimination can be inferred. *Pac. Shores Props.*, 730 F.3d at 1160 n.23 (9th Cir. 2013); *see McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (gray hair as a discriminatory proxy for age, exclusion of

service animals as a discriminatory proxy for disability); *see also Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (Polynesian ancestry as a discriminatory proxy for race); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("[a] tax on wearing yarmulkes is a tax on Jews."); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (racial classifications are presumptively invalid, and that invalidity "applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination;" covert sex-based classifications are subject to the same scrutiny as overt ones). The proxy method of proving discrimination is widely accepted in this Circuit. *See, e.g.*, *Pritchard*, 159 F.4th at 671–672 (approving its use in a Section 1557 discrimination case); *Schmitt*, 965 F.3d at 959 (same); *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019); *Pac. Shores Props.*, 730 F.3d at 1160 n.23.

Pretext and proxy discrimination may be adduced from the "totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), and weighing those facts "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Among other factors, courts may consider the impact of the policy and its foreseeability; its historical background; the sequence of events leading up to its adoption; procedural or substantive departures from the usual approach; contemporary statements and actions of key stakeholders; and the availability of less discriminatory alternatives. *See Arce v. Douglas*, 793 F.3d

968, 977 (9th Cir. 2015). "These factors are non-exhaustive." *Pac. Shores Props.*, 730 F.3d at 1159.

Here, consideration of the context of the exclusion and the circumstances surrounding its application demonstrates that the exclusion is a pretext or proxy for discrimination against transgender enrollees.

i. *The exclusion impacts only transgender persons, such that it is a proxy for transgender status.*

Premera knew that the GTAS exclusion, as designed and implemented, would impact only transgender persons. Indeed, "[o]nly transgender people can suffer from gender dysphoria." *Pritchard*, 159 F.4th at 672; *Skrmetti*, 605 U.S. at 497. In that sense, "[t]he fit between transgender people and people suffering from gender dysphoria is strong." *Pritchard*, 159 F.4th at 672. When considering the fit, "the crucial question is whether the proxy's fit is sufficiently close to make a discriminatory inference plausible." *Schmitt*, 965 F.3d at 959 (citation modified). That is, when an alleged proxy is so closely intertwined with the protected characteristic, it can be readily understood to be "discriminatory in purpose and operation." *Davis*, 932 F.3d at 838 (citation modified); *see also E.S. by & through R.S. v. Regence BlueShield*, 2024 U.S. Dist. LEXIS 48611, at *8 (W.D. Wash. Mar. 19, 2024) (holding that the proxy question is whether the healthcare denied "primarily affects" the disfavored group (quoting *Schmitt*, 965 F.3d at 959)). An exact match between the proxy and the protected trait is not required. *Davis*, 932

F.3d at 838 ("[t]hat ancestry is not always a proxy for race does not mean it never is"). Such is the case here and, under the circumstances, it should be sufficient.

Premera invites this Court to ignore the Court's previously articulated standards, and to instead adopt a reading of the proxy analysis that courts apply under the equal protection context. Principal Brief 40–41, 48–49, and 56–57. That is the wrong test. The Constitution's equal protection guarantees only reach facially neutral government action when a heightened level of intention is established: "more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. These cases, then, treat proxy as a method for proving that heightened level of intention, and presume it only where the challenged proxy is "such an irrational object of disfavor" that an intent to discriminate "can readily be presumed." *Bray*, 506 U.S. at 270.

To be sure, constitutional cases like *Bray* and *Feeney* may be helpful in understanding the contours of a proxy challenge in a statutory discrimination case, but the proof required by the Constitution is simply different from the proof required under Section 1557. *Schmitt* holds that, in cases like this one, a sufficiently close fit between proxy and protected category may be sufficient to show facial discrimination, for which more proof of motive is not required. *Schmitt*, 965 F.3d at 959. *Pritchard* endorses this reasoning. *Pritchard*, 159 F.4th at 664 n.11

(characterizing the proxy method of proof for discrimination based on transgender status as "facial discrimination" for which no further proof of intent is needed).[13]

The fit here is not merely close. It is complete in all relevant aspects. Premera's own corporate designee testified that it is the gender-dysphoria diagnostic code that triggers the age exclusion: a minor whose request for chest surgery carries that code is subject to the categorical bar, while the same request under a different code is not. 4-ER-872–873 (Small Dep. at 132:35-133:23). Sorting patients by a diagnosis that ***only*** transgender people can have is ***sorting them by transgender status***. The district court correctly held that Premera's policy "discriminates on the basis of sex … by using the proxy of gender dysphoria." 1-ER-32.

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[13] Even if this Court were to depart from *Schmitt*, Premera would fare no better. Constitutional proxy cases withhold an inference of discrimination only where the challenged proxy is supported by "legitimate, nondiscriminatory" bases. Principal Brief 40-41 (quoting *Anderson v. Crouch*, 169 F.4th 474, 490-491 (4th Cir. 2026)). For one, contrary to its claims, Premera has no such legitimate, nondiscriminatory reasons for its exclusion. *See* Section II.A, *supra*; Section III.B.ii, *infra*; Section IV, *infra*. A criterion administered in that way is not explicable on any ground other than the patient's transgender status. For another, if Plaintiffs succeed in proving facial discrimination via proxy or pretext, which is a form of facial discrimination, *see Pritchard*, 159 F.4th at 664 n.11, "no greater proof of mental state is necessary because intentional discrimination is synonymous with discrimination resulting in disparate treatment." *Id.* at 664 (citation modified). Indeed, for facial discrimination, courts consider the explicit terms of the discrimination, not why it is allegedly justified. *See Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991).

ii. *Premera's own exceptions prove the excluded surgery can be medically necessary.*

Premera's implementation of the exclusion in the GTAS policy demonstrates that chest surgery can be medically necessary for treating transgender individuals under the age of 18. Despite having no official policy allowing it, 2-SER-386–387 (Reynoso Dep. 39:3-40:1), Premera permits its assistant/associate medical directors to make exceptions to the exclusion in the GTAS policy, based on their "clinical judgment." 2-SER-360–362 (Kaneshiro Dep. 52:9-54:4). Premera does not tell its members that such exceptions are possible. 2-SER-388–392 (Reynoso Dep. 41:20-43:9, 44:23-45:9). These unwritten exception criteria include whether the patient is (1) engaging in breast-binding that is causing rib or skeletal injury, respiratory compromise, skin wounds or pain, (2) experiencing suicidal ideation, self-harm behaviors, or functional impairment due to the lack of chest surgery, and (3) experiencing "severe gynecomastia" such that binding is not feasible or the patient is not able to reduce their visible breast size. 2-SER-456–457 (Small Dep. 147:9–148:16). These exceptions have resulted in approving 35% of the requests by transgender adolescent birth-assigned females for chest surgery. 1-ER-19–20. The fact that such treatments are medically necessary raises the inference that something other than a medical determination "may be afoot," namely "invidious discrimination against transgender people." *Pritchard*, 159 F.4th at 672. As the district court correctly concluded, Premera's approval of a large proportion of

requests from excluded individuals "completely undermines its assertion" that adolescent immaturity or a dearth of sound studies is the "true reason[]" for the exclusion. 1-ER-20. Premera concedes its substantial approval[14] of these requests by application of its unwritten criteria, and that the surgery is medically necessary for some of the patients who are categorically barred by the exclusion. Principal Brief 1, 11, 31, 54. The very fact that Premera approved coverage for J.M.'s mastectomy *prior to his eighteenth birthday* but *after* this case filed is indicative of the pretextual nature of the exclusion.

That Premera's policy is riddled with exceptions undermines any of Premera's purported rationales and illustrates its pretextual nature. *Cf. Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) ("[t]he creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures").

iii. *Premera adopted a clinical justification only after its compliance review flagged discrimination.*

Despite having the exclusion in the GTAS policy since 2014, Premera only added a medical justification for the exclusion in 2016, after an internal review found

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[14] Premera asserts that 44% of the requests it received that were subject to the exclusion were ultimately approved. Principal Brief 1, 11, 31, 54; *see* 1-ER-19–20 (district court concluding that 28 of 63 requests for chest surgery by adolescent transgender birth-assigned females were ultimately approved, 22 by Premera's application of its secret exceptions to the exclusion, or 35%).

that the age limit could be discriminatory under Section 1557. 2-SER-432–434 (Small Dep. 57:13-59:24). During litigation below, Premera offered other *post hoc* justifications for its policy, including that a "federal mandate" required coverage for reconstructive breast surgery, so non-gender dysphoria mastectomies could not be age limited, and that non-transgender patients seeking mastectomies are having "pain" that transgender patients do not have. 2-SER-374–375 (Kaneshiro Dep. 76:12-77:8); *compare Edmo*, 935 F.3d at 771 ("[f]ailure to follow an appropriate treatment plan can expose transgender individuals to a serious risk of psychological and physical harm."). The lack of a non-discriminatory explanation for the exclusion until after concerns about litigation or litigation itself drove a self-serving explanation is evidence that exclusion is driven by invidious discrimination. *See Campbell v. AMTRAK*, No. C 05-5434 CW, 2009 U.S. Dist. LEXIS 80756, at *17–18 (N.D. Cal. Aug. 21, 2009) (the fact that an employer created a distinction between types of discipline after the discipline was issued permitted a jury to infer that the discipline was driven by discriminatory intent); *see also Lowe v. Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985) (cautioning courts to conduct a searching inquiry about motive, because otherwise "those acting for impermissible motives could easily mask their behavior beyond a complex web of *post hoc* rationalizations") (citation modified).

In any event, Premera's purported justifications do not hold water. Premera cannot justify the exclusion on concerns about maturity and regret when it permits other minor adolescents *of the same age* to obtain the same or similar surgeries. Nor can concerns about evidence quality justify the exclusion when Premera provides the same surgery (mastectomy) to others of the same age (adolescents under 18) based on the same quality evidence. 8-ER-895.

iv. *Premera abandoned its normal policy-development process.*

Premera departed from its own normal policy-development process when it created this exclusion. This action is precisely the kind of "departure[] from normal procedures" that *Arlington Heights* identifies as evidence of discriminatory purpose in the Equal Protection Clause context. 429 U.S. at 267. Premera's standard practice for a "homegrown" medical policy is to review the medical literature, professional-society guidelines, and peer insurers' policies, and to consult practitioners experienced in the care at issue. 2-SER-350–352, -356–357, -359 (Kaneshiro Dep. 27:11–28:10; 29:11–23; 47:1–12; 47:20–48:17, 50:4–12). The development of the policy at issue here did not follow this process: the GTAS exclusion was drafted by Dr. Small, a psychiatrist without a current clinical practice in this area, together with Dr. Chelle Moat, an internist with no training in gender-affirming care, and neither consulted a surgeon or any provider who delivers this treatment. 2-SER-417–419, -428–429 (Small Dep. 13:21-14:15, 16:3-6, 41:4–7, 44:15-18); 2-SER-332–333, -336

(Deposition of Dr. Chelle Moat, "Moat Dep." 12:21–13:1, 19:5-20). The exclusion is the only surgical policy Premera has ever had a psychiatrist draft. 2-SER-429 (Small Dep. 44:19–21); 2-SER-368–371 (Kaneshiro Dep. 67:9–70:19). And Premera must outsource appeals of its denials under the GTAS because no one on their staff has the specialty expertise to review them. 2-SER-420–423 (Small Dep. 19:15-20:11, 24:22-25:5; 2-SER-357 (Kaneshiro Dep. 48:1-17). Abandonment of its usual process for developing medical policies suggests that the motivations behind the exclusion was discriminatory. *Pritchard*, 159 F.4th at 672.

B. Premera's counterarguments are unavailing.

i. *Premera's burden-shifting and comparator defenses do not apply to facial discrimination, whether by proxy or otherwise.*

This Court should reject Premera's invitation to import inapposite defenses into its analysis. Premera urges application of discrimination law developed for cases where plaintiffs attempt to survive summary judgment by comparator evidence under a *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden shifting framework. Principal Brief 57–58, 64–66, 73. This framework simply does not apply here, where Plaintiffs have supplied direct and circumstantial evidence of discrimination. *See Pac. Shores Props.*, 730 F.3d at 1158 (*McDonnell Douglas* framework is not necessary to prove discrimination, a plaintiff "may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more

likely than not motivated the defendant …") (citation modified); *see also TWA v. Thurston,* 469 U.S. 111, 121 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2007) ("[t]he *McDonnell Douglas* test is inapplicable to Fair Housing Act challenges to a facially discriminatory policy."); *Bates v. UPS*, 511 F.3d 974, 988 (9th Cir. 2007) (declining to use a burden-shifting framework because "[t]he fact to be uncovered by … a [burden-shifting] protocol--whether the [defendant] made an employment decision on a proscribed basis … --is not in dispute"); 1-ER-24–25 n.4 (the district court opinion rejecting Premera's efforts to force *McDonnell Douglas* burden shifting analysis into the proxy analysis, quoting *Bates* and *Cmty. House*).

For example, Premera suggests that Plaintiffs must show "similarly situated"[15] patients are treated differently. Principal Brief 69. In *Pac. Shores Props.*, a facial discrimination by proxy case, this Court rejected an identical argument,

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[15] Premera defines "similarly situated" comparators as "seeking the same treatment for the same reasons." Principal Brief 69. That definition is circular. It writes the sex-linked, gender-dysphoria diagnosis Plaintiffs challenge into the comparison, ensuring that no birth-assigned female patient could ever be "similarly situated" to the birth-assigned male who obtains the identical mastectomy. *Bostock* forecloses that maneuver, because the proper comparison changes one thing (the patient's sex) and holds the procedure constant. *See* Part II.A, *supra*. Plaintiffs' identification of a birth-assigned male seeking a mastectomy, a more-favorably-treated comparator, establishes discrimination.

explaining that "*McDonnell-Douglas* simply *permits* a plaintiff to raise an inference of discrimination by identifying a similarly situated entity who was treated more favorably. It is not a straightjacket *requiring* the plaintiff to demonstrate that such similarly situated entities exist." 730 F.3d at 1159 (emphasis in the original). Any other rule would allow entities that openly admit to their intent to discriminate (as is the case here) to evade liability by (1) relying on a facially neutral law or policy and (2) "overdiscriminating" by applying the rule to those without the targeted protected characteristic. *Id*.

Premera separately contends that birth-assigned female transgender minors seeking chest surgery are not "similarly situated" to birth-assigned male cisgender minors seeking chest surgery because its gynecomastia policy requires a "physical functional impairment," whereas gender dysphoria is "a mental health diagnosis, not a physical functional limitation;" in Premera's telling, the age limit turns on a difference in diagnosis rather than sex. Principal Brief 64–66. As discussed, a plaintiff proving facial discrimination need not identify a similarly-situated comparator. And in any event, gender dysphoria may cause physical impairment. *See Williams v. Kincaid*, 45 F.4th 759, 771 (4th Cir. 2022) (noting that "the need for hormone therapy may well indicate that her gender dysphoria has some physical basis").

Regardless, Premera's factual premise is wrong on the record. The procedure and the anatomy are identical—the surgical removal of breast tissue from an adolescent chest—and the line Premera draws between "physical" and "mental" collapses given its actual administration of the exclusion. The unwritten criteria under which Premera approves chest surgery for birth-assigned female adolescents are themselves physical-harm criteria: whether the patient's chest binding is "causing rib or skeletal injury, respiratory compromise, skin wounds or pain," or whether the patient has "severe gynecomastia" such that binding is not feasible. 2-SER-456–457 (Small Dep. 147:9–148:16); 4-ER-879–880. Premera thus does demand physical functional impairment of the very patients it says are differently situated. If anything, Premera demands more of birth-assigned female transgender individuals, requiring the sort of acute physical harm (rib injury, respiratory compromise) that its gynecomastia policy never exacts of a birth-assigned male, for whom "pain or a complication like back pain" suffices. 4-ER-889, -891. The physical/mental distinction Premera advances on appeal is therefore contradicted by its own coverage practice because the only variable that consistently separates who is covered from who is categorically excluded is the patient's birth-assigned sex. That Premera demands greater physical suffering of transgender minors than of cisgender minors seeking the same operation does not make the two differently

situated; it is itself evidence that the gender-dysphoria diagnosis operates as a proxy. *See* Section III.B, *supra*; *Pritchard*, 159 F.4th at 672.

Further, Premera insists that Plaintiffs must show its proffered clinical reasons are "unworthy of credence." Principal Brief 62–69 (citing, *e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000)). But the "unworthy of credence" showing is simply the final step of the *McDonnell Douglas* inquiry. *Burdine*, 450 U.S. at 256. Plaintiffs' evidence that Premera employs a policy that discriminates on its face and by proxy is ***direct*** evidence; Plaintiffs need not show that Premera's justifications are not credible to establish liability. *Pac. Shores Props.*, 730 F.3d at 1158–60 & n.23; *see* Section III.A, *supra*. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on ***why*** the employer discriminates but rather on the explicit terms of the discrimination." *Johnson Controls*, 499 U.S. at 199 (emphasis supplied); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014) (an alleged justification for sex discrimination does not overcome facial discrimination); *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 608 (9th Cir. 1982) (for facially discriminatory policies "the plaintiff need not otherwise establish the presence of discriminatory intent."). And in all events, Premera's demand is self-

defeating. It is Premera's own concession that the excluded surgery is sometimes medically necessary that deprives its medical-necessity justification of credence. *See Pritchard*, 159 F.4th at 672 (an insurer that "admits [that] treatments are sometimes necessary … cannot justify its categorical exclusion by citing medical necessity").

Premera also attempts to raise its "honest belief" that its discriminatory exclusion was medically justified as defense to its proxy discrimination against transgender individuals, citing to *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). Principal Brief 63–64. Premera's "state of mind" is simply irrelevant because the policy is facially discriminatory. *See supra*.

ii. *Premera cannot loosen the fit between gender dysphoria and transgender status.*

Premera's attempt to loosen the fit between gender dysphoria and transgender identity is unavailing. That "[n]ot all transgender individuals have gender dysphoria, not all seek surgery, [and] not all are minors," Principal Brief 45–46, is beside the point; the only patients denied care under the exclusion are those with gender dysphoria, and only transgender people have that diagnosis. *Skrmetti*'s "lack of identity" observation, 605 U.S. at 518, on which Premera would like to rely, was

dictum in a case where plaintiffs did not argue proxy or pretext theories[16] and the decision was rendered in the equal protection context. More fundamentally, this Court already ruled on this issue. In *Pritchard*, this Court ***rejected*** the insurer's assertion that *Skrmetti*'s "lack of identity" language "forecloses Plaintiffs' proxy theory … ." 159 F.4th at 671–72. Where the proxy's "fit" is "sufficiently close to make a discriminatory inference plausible," the proxy theory for proving facial discrimination is available. *Id.* at 672 (quoting *Schmitt*, 965 F.3d at 959). And here, as in *Pritchard*, the fit "is strong," because "[o]nly transgender people can suffer from gender dysphoria." *Id.*[17]

Premera's contention that *Geduldig v. Aiello,* 417 U.S. 484 (1974), supports their position is likewise flawed. Principal Brief 44–45. *Geduldig* held only that a plan providing "equal risk coverage" to both sexes does not discriminate merely because it declines to cover a condition that one sex alone experiences. *Skrmetti*, 605

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[16] *Id.* at 519 ("The plaintiffs, moreover, have not argued that SB1's prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals. Under these circumstances, we decline to find that SB1's prohibitions on the use of puberty blockers and hormones exclude any individuals on the basis of transgender status.").

[17] *Pritchard* held that the Pregnancy Discrimination Act's rejection of *Geduldig*'s reasoning does not extend to gender-dysphoria coverage. 159 F.4th at 670. Plaintiffs respectfully preserve for *en banc* and Supreme Court review their position that, as the Supreme Court recognized in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983), Congress's disapproval of *Geduldig*'s reasoning was not limited to pregnancy and forecloses importing *Geduldig's* reasoning into Section 1557.

U.S. at 518–19. Premera's policy is different in kind because it does not provide equal coverage; instead Premera covers a medically necessary mastectomy for one birth-assigned sex and not the other.

Further *Geduldig*, like *Skrmetti*, applied its reasoning ***only*** where the challenged law was ***not*** a "mere pretext[] designed to effect an invidious discrimination against the members of one sex or the other." 417 U.S. at 496 n.20; *compare Skrmetti*, 605 U.S. at 519 (plaintiffs had "not argued that [the law's] prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals"). Plaintiffs here make precisely the pretext showing that the *Skrmetti* and *Geduldig* plaintiffs did not: as set forth *supra*, Premera's use of gender dysphoria as a disqualifying diagnosis functions as a proxy for excluding transgender individuals from care.

iii. *At most, the proxy question warrants remand.*

Premera's request that this Court not only reverse but direct entry of judgment in its favor on the pretext/proxy issue, Principal Brief 56–58, cannot be reconciled with the summary judgment standard. At a minimum, the record here would raise genuine issues of material fact, including whether Premera's secret, standardless exceptions, which the record indicates require transgender minors to demonstrate extraordinary physical and emotional suffering not demanded of minors seeking a mastectomy for gynecomastia, are evidence themselves of discriminatory motive.

As in *Pritchard*, the most that could follow from any doubt on this theory is a remand, not judgment for Premera. 159 F.4th at 672–673; *see Arlington Heights*, 429 U.S. at 266 ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

IV. PREMERA'S OTHER AUTHORITIES DO NOT REQUIRE REVERSAL OF THE DISTRICT COURT'S FINDING OF SEX DISCRIMINATION.

Notwithstanding the explicit and proxy use of sex as a determinant in providing coverage, Premera claims that *Skrmetti* resolves this case. Principal Brief 2. It does not. For one, *Skrmetti* decided a Constitutional question not presented by this case, under a standard of review that does not apply here and expressly reserved the statutory question that controls this matter. For another, as *Pritchard* acknowledged, *Skrmetti* "left open" arguments "based on a proxy-discrimination theory." 159 F.4th at 671, 672.

A. *Skrmetti* and its progeny do not require reversal.

Skrmetti held that a Tennessee state law prohibiting certain gender-transition treatments for minors was (1) subject to only rational basis review, and (2) did not violate the federal Equal Protection Clause. 605 U.S. at 523–525. Here, Plaintiffs do not advance a constitutional claim, nor do they challenge any governmental action. There is no call for this Court to analyze the level of scrutiny necessary to review governmental policy. 1-ER-7 (district court decision). And, critically, Premera's

policy is clearly distinguishable from the law at issue in *Skrmetti*: according to the Supreme Court, the Tennessee law applied to all minors "regardless of a minor's sex," *id.* at 511, while Premera's policy withholds a benefit from birth-assigned female adolescents only.[18]

Importantly, the Supreme Court has "not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context" and did not do so in *Skrmetti*. *Id*. at 520; *see Pritchard*, 159 F.4th at 670 (confirming that *Skrmetti* did not decide whether *Bostock* reaches constitutional claims). Section 1557 sex-based discrimination prohibitions follow Title VII and, therefore, *Bostock*. *Doe*, 28 F.4th at 114. Thus, *Bostock* is not a mere "candidate" rule for this case, but it is the governing rule, applying traditional but-for causation standards. Indeed, *Doe* and *Pritchard* are binding on this front.

Premera is correct that, in this Circuit, "*Skrmetti*'s gloss on *Bostock* applies to statutory cases like this one." *Pritchard*, 159 F.4th at 670. But here, that gloss does not help Premera. Its policy is the mirror-image of the Tennessee law which applied "regardless of a minor's sex." *Skrmetti*, 605 U.S. at 511. Premera's policy turns on

[18] Indeed, *Skrmetti* expressly distinguished a policy like Premera's: the Court cautioned that "[n]either our analysis nor *Geduldig* speaks to a law that … regulates a class of persons identified on the basis of a specified characteristic." 605 U.S. at 519 n.3.

birth-assigned sex, where "changing a minor's sex or transgender status" changes the application of the exclusion. *Id*. at 520; Section II.A, *supra*.

Further, *Skrmetti*'s observation that the mere reference to sex in the medical context does not help Premera. 605 U.S. at 512; *see Pritchard*, 159 F.4th at 670 (in the medical context, a policy's mere "reference to sex … may be relevant" to causation, but it is "not sufficient to trigger *Bostock*'s application"). Here, Premera's policy goes well beyond a "mere reference" to sex; the policy confers or withholds a benefit because of sex. That is not a ***reference*** to sex. It is a ***classification*** by sex.

Premera's citation to *B.P.J.*, fares no better. Principal Brief 41, 44, 72. *B.P.J.* addressed "the distinctive sports context," *id*. at 2377, and the Court was explicit that its reasoning was confined to that setting: "[s]ports are different from … a typical employment or educational opportunity where equal protection often may require that the government generally treat an individual ***without regard to the individual's sex.***" *Id*. at 2376 (emphasis in original). It is in that narrow context that the Court observed "Title VII and *Bostock* are not relevant." *Id.* Premera would inflate that statement into a general rule that Title IX and Title VII are "vastly different" and that *Bostock* never reaches a Title IX-based claim.

B.P.J. does no such thing. It did not disturb this Court's settled precedent that Title IX is construed consistently with Title VII. *Doe*, 28 F.4th at 114. To the contrary, Justice Gorsuch, *Bostock*'s author, wrote separately in *B.P.J.* to confirm

that the decision "did not depart from" *Bostock*'s holding that "discriminating against a person for being … transgender necessarily entails discriminating against that person at least in part because of his biological sex," and that Title VII's "because of" test "merely requires biological sex to be one such cause." *B.P.J.*, 146 S. Ct. at 2383 (Gorsuch, J., concurring). Nothing in *B.P.J.* loosens *Bostock*'s application to this statutory sex-discrimination claim.

Finally, Premera's reliance on the reversal of *Kadel v. Folwell,* 100 F.4th 122 (4th Cir. 2024), *rev'd,* 145 S. Ct. 2838 (2025), is misplaced. Principal Brief 48–49. The district court's judgment does not depend on *Kadel*. Rather, it is properly grounded in *Bostock* and this Court's decision in *Doe*. As the district court explained, "nothing in *Skrmetti* undermines the validity of *Bostock* or the extension of *Bostock* from Title VII to Title IX and … ACA § 1557 claims." 1-ER-11. This Court reviews the cross-motions *de novo* and "may affirm on any ground supported by the record," *Fresno Motors*, 771 F.3d at 1125, so the reversal of a decision the district court cited does not require reversal. In any event, *Pritchard*, which was decided after the reversal of *Kadel*, supplies the controlling framework here. The *Pritchard* court noted that while *Kadel* is "no longer good law," 159 F.4th at 670, it confirmed that a Section 1557 sex-discrimination claim remains viable where sex is a but-for cause of the disparity and where the gender-dysphoria criterion operates as a proxy for transgender status. *Id*. at 671–72.

B. Premera's out-of-circuit and constitutional authorities are distinguishable.

In addition to its misreading of controlling authority, Premera leans on out-of-circuit decisions and on constitutional challenges to state legislative enactments. None controls, and each is distinguishable.

i. *Anderson v. Crouch does not require reversal.*

In *Anderson v. Crouch*, the Fourth Circuit held that West Virginia's Medicaid exclusion of "sex change" surgery did not violate the Equal Protection Clause or Section 1557. 169 F.4th at 494. *Anderson* is inapposite. The proxy test Premera invites this Court to use is not the law of the Circuit, *see* Section III.A *supra*, and is not the test actually used by the *Anderson* court in analyzing the Section 1557 claim. Premera would have this Court adopt *Anderson*'s Equal Protection Clause proxy analysis here, along with its requirement that the challenged proxy must be "inexplicable on grounds other than intent to discriminate against a suspect class," even though it did not apply that test to the Section 1557 claim. 169 F.4th at 490 (citing, *inter alia*, *Feeney*, 442 U.S. at 272). When the Fourth Circuit reached the Section 1557 claim, it did not apply a proxy standard. It applied *Bostock*'s but-for test as glossed by *Skrmetti* and held only that "changing [a plaintiff's] sex or transgender status does not alter" West Virginia's coverage decision. *Id*. at 493–494. The *Anderson* court's reasoning adopted *Skrmetti*'s premise that a rule based on a diagnosis regulates a treatment rather than a person so that changing the sex of the

person changes the diagnosis. *Id.* at 487–89 & nn.11–12. Here, the record does not support such an analysis, as explained *infra*.

This Court's proxy standard, applied to Section 1557 claims, asks only "whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." *Schmitt*, 965 F.3d at 959; *see Davis*, 932 F.3d at 838 (in proxy discrimination "the fit between the classification at issue and the racial group it covers is so close that ***a classification on the basis of race can be inferred without more***.") (emphasis supplied). Proxy discrimination in this Circuit is itself a form of facial discrimination where the defendant's motive is irrelevant, *Pritchard*, 159 F.4th at 664 n.11, and this Court applied *Schmitt*'s "sufficiently close fit" standard to a Section 1557 gender-affirming-care exclusion after *Skrmetti*, finding the fit "strong." *Id*. at 672. *See* Section III, *supra*.

Regardless, this is an out-of-circuit decision that does not bind this court and differs from this case in at least two critical ways.

First, *Anderson* was about a state's Medicaid cost-rationing program, and the court repeatedly credited the state's "legitimate nondiscriminatory reasons … including cost and efficacy." *Id*. at 490–491. A private insurer administering federally assisted commercial coverage advances no comparable sovereign interest in protecting public funds. And as noted, *supra*, Premera's reasons are *irrelevant* if Plaintiffs succeed in demonstrating pretext or proxy.

Second, and more fundamentally, *Anderson* turned on a record unlike this one. The Fourth Circuit understood West Virginia's program to provide "equal risk coverage." 169 F.4th at 488–89 & n.12. The Fourth Circuit therefore concluded that the exclusion could be explained on "legitimate, nondiscriminatory" grounds. *Id.* at 490–91. Premera's exclusion does not draw that line. Premera pays for a medically necessary mastectomy for a birth-assigned male adolescent who satisfies its physical-impairment criteria, and it concedes the same operation is medically necessary for the transgender adolescents it categorically excludes. *See* Section II.A, III.B *supra*. It administers the challenged exclusion by the physical-harm criteria it says separate birth-assigned females and males, demanding more acute physical injury of transgender minors than its gynecomastia policy ever exacts of a cisgender boy. The district court here correctly concluded that "breast reductions performed for gender-affirming reasons are potentially available to males under the age of eighteen, but not to females under the age of eighteen," making Premera's policy "textbook sex discrimination," 1-ER-30, and it held that "a categorical ban (with unwritten, secret exceptions)" on such surgery for transgender adolescents "runs afoul of ACA § 1557," 1-ER-34. *Anderson* is not to the contrary: there, the excluded procedures were withheld from everyone, while here, the same procedure, leading to the same result, is available to one sex and categorically denied to the other. *Anderson*'s line was diagnosis. Premera's is sex.

ii. *Lange v. Houston County does not require reversal.*

Lange v. Houston County, a closely divided *en banc* decision of another circuit, does not bind this Court and is likewise distinguishable. 152 F.4th 1245 (11th Cir. 2025) (*en banc*). *Lange* is a case about an employer health plan that "d[id] not pay for a sex change operation for anyone regardless of their [birth-assigned] sex." *Id.* at 1252. Premera's policy is not so evenhanded: it pays for a mastectomy for one sex and not the other. *See* Section II.A, *supra*. And to the extent *Lange* applied *Skrmetti*'s gloss on *Bostock*, this Court applied the same gloss in *Pritchard* and held that it does not foreclose discrimination claims like these. *See Pritchard*, 159 F.4th at 671–72; Section III, *supra*.

iii. *Constitutional state-ban decisions do not require reversal.*

Other decisions cited by Premera concerning the constitutionality of state laws banning health care for transgender minors do not answer the questions in this case. *Brandt v. Griffin*, 147 F.4th 867 (8th Cir. 2025) (*en banc*), and *Poe v. Drummond*, 149 F.4th 1107 (10th Cir. 2025), were Equal Protection Clause and Due Process Clause challenges to statutes prohibiting the provision of care to minors. Each case applied rational-basis review, each held that the statute regulated procedures available for a diagnosis, not people, and each declined to decide whether *Bostock*'s

reasoning applied beyond Title VII. *Brandt*, 147 F.4th at 880–81;[19] *Poe*, 149 F.4th at 1123–24. They say nothing about a private insurer's obligation, under a sex-discrimination statute, not to withhold a covered benefit because of a patient's sex.

V. PREMERA'S SPENDING CLAUSE ARGUMENT IS UNAVAILING.

Premera contends that, if its policy violates Section 1557, it cannot be held liable because it lacked "clear notice" under the Spending Clause that the statute reached a "policy based on medical diagnosis." Principal Brief 70–72. To the contrary, Premera was on ample notice that it could not discriminate because of sex.

Spending Clause legislation must give recipients "clear notice" of the conditions attached to federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Cummings*, 596 U.S. at 220–22. But the conditions imposed by Section 1557 are not obscure. Title IX has prohibited discrimination "on the basis of sex" since 1972, 20 U.S.C. § 1681(a), and Section 1557 has incorporated that prohibition since 2010. 42 U.S.C. § 18116(a). No recipient of federal health funds could be surprised to learn that "sex discrimination" means what it says.

Premera's complaint is that it lacked notice that drawing lines based on transgender status through a gender-dysphoria diagnosis counts as sex discrimination. But *Bostock* settled that question in 2020, holding that discrimination

[19] The plaintiffs in *Brandt* similarly did not allege that "invidious sex-based discriminatory purpose motivated" the Arkansas legislature. *Id*. at 880.

"based on … transgender status necessarily entails discrimination based on sex." 590 U.S. at 669. And, as this Court already held in *Schmitt*, Section 1557 imposes on covered entities an "affirmative obligation not to discriminate in the provision of health care." Both decisions predate Premera's denial of coverage to A.B. in December 2022 and to J.M. in August 2023. So does *Doe*, which held in 2022 that *Bostock* applies to Section 1557 claims. A reasonable insurer in Premera's position had clear notice.

Further, Premera's notice was not merely constructive. The record shows that Premera added a written "justification" for its age exclusion in 2016, in response to concerns raised during its own Section 1557 compliance review that, without an articulable clinical basis, the age restriction would constitute unlawful discrimination. 2-SER-432–434 (Small Dep. 57:13-59:24). Premera cannot claim surprise at a theory of liability that its own compliance staff identified ten years ago.

Premera's authorities do not help it. *Cummings* addressed the kind of remedy available under Spending Clause statutes, not whether the underlying discrimination was prohibited. 596 U.S. at 229–30. Here the district court awarded only out-of-pocket losses and nominal damages, together with declaratory relief, the contract-like remedies *Cummings* confirms are available. *Id.* at 221; *see Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (monetary damages available for a Title IX violation). And *Roe v. Critchfield*, 137 F.4th 912 (9th Cir. 2025), addressed a policy

framed around transgender status and access to facilities, not a benefit conferred on one sex and denied to the other. *Id.* at 928 ("[t]hough we have extended *Bostock*'s reasoning to Title IX, *Bostock* … did not consider whether Title IX or its implementing regulations put states on notice that policies restricting access to [bathrooms] on the basis of gender assigned at birth may constitute unlawful discrimination against transgender persons"). The sex-based line Premera drew required no special notice; it is discrimination "because of sex" on the face of the policy.

VI. PREMERA'S STANDING AND MOOTNESS ARGUMENTS ARE UNAVAILING.

Premera does not challenge Plaintiffs' standing with respect to the money judgment of the district court below, A.B.'s $25,750 in out-of-pocket losses or the nominal damages awarded to each Plaintiff; nor could it. 1-ER-3; Principal Brief 75–78. Standing is assessed as of "the time the suit was filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), and both Plaintiffs had it then: J.M. was a seventeen-year-old who had not yet undergone surgery, 5-ER-1071 (Second Amended Complaint, ¶ 5), and A.B. had already incurred the out-of-pocket injury for which he recovered. 2-SER-490–493 (December 30, 2022 denial of appeal); 2-SER-405–407 (deposition of L.B. 202:24-203:2, 204:12-16); 2-ER-139.

The argument Premera raises sounds in mootness, the "doctrine of standing set in a time frame"; it argues that intervening events (the surgeries and J.M.'s

eighteenth birthday) extinguished the controversy between the parties. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 189–90 (2000).[20] Premera's argument fails, because a controversy remains live so long as some effective relief is available and Premera does not contend that the damages award is moot or that Plaintiffs lack standing to retain it. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

The declaratory judgment is not a freestanding request for prospective relief; it is the retrospective adjudication that Premera's denials violated Section 1557. This determination is identical to the finding of liability that supports the damages A.B. and J.M. recovered. A live claim for nominal damages *alone* suffices to keep that determination a justiciable controversy, and here there are actual damages in the form of A.B.'s compensatory award. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021).

Premera's authorities do not support reversal of the district court's declaratory judgment. In each, the declaratory or injunctive relief at issue was purely forward-looking, and none involved a declaration resting on an adjudicated, retrospective

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[20] Plaintiffs note that this argument, if accepted, raises the possibility that claims for prospective relief against Premera's age exclusion will routinely become moot before appellate review is complete, as each challenger ages out of the policy. *See A.D. v. Haw. Dep't of Educ.*, 727 F.3d 911, 913–14 (9th Cir. 2013) ("every 20-year-old challenger to [a special education law with an age cut-off of 22] will age out of special education within two years. The litigation window might never stay open long enough to resolve whether such students are entitled to stay-put injunctions, and the DOE is reasonably likely to face these challenges again.").

liability as this one does. For example, the plaintiff in *Mayfield* already settled his damages claims and bargained away every other remedy, leaving "only … a declaratory judgment" that a federal law's provisions were unconstitutional going forward. *Mayfield v. United States*, 599 F.3d 964, 972–73 (9th Cir. 2010); *see Phillips v. U.S. Customs & Border Prot.*, 74 F.4th 986 (9th Cir. 2023) (foreclosing purely forward-looking relief for document destruction); *see also Gest v. Bradbury*, 443 F.3d 1177 (9th Cir. 2006) (foreclosing future petition procedures). A.B. and J.M. are in the opposite posture. They retain, and prevailed on, the damages claim that redressed their injury, and the declaration that Premera's policy violates the ACA rests on that adjudicated violation. *Villa v. Maricopa County*, 865 F.3d 1224 (9th Cir. 2017), cuts the other way. The court there held the plaintiff lacked standing to seek prospective declaratory and injunctive relief for want of any real or immediate threat of future harm, while recognizing her Article III standing to pursue individual damages for the past harm, analyzing standing separately for retrospective and prospective relief, exactly as Plaintiffs urge here. 865 F.3d at 1229–30.

Premera's out-of-circuit authorities applied the declaratory-and-injunctive standing equivalence only to forward-looking relief. *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396 (6th Cir. 2019); *Garey v. James S. Farrin, P.C.*, 35 F.4th 917 (4th Cir. 2022). *Garey* expressly confined its holding to "prospective declaratory judgment," and neither addressed a declaration entered

together with a damages judgment for the same past conduct. *Garey,* 35 F.4th at 923 n.5; *accord Kanuszewski*, 927 F.3d at 406. Declaratory and injunctive relief are not, in any event, invariably coextensive for justiciability purposes: a declaratory claim may present a live controversy even where a request for an injunction would not. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974).[21]

At most, then, even if this Court concluded that A.B. and J.M. may not obtain a purely prospective declaration in their own names, the remedy would be to narrow the declaratory judgment, not to disturb the liability finding or the damages award. Standing "is not dispensed in gross"; it must be established "for each claim" and "for each form of relief," so a defect as to the declaration cannot reach the awards Premera concedes are justiciable. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–353 (2006); *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017).

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[21] Premera's reliance on *Cardenas v. Anzai*, 311 F.3d 929, 936 n.4 (9th Cir. 2002), for the holding that declaratory judgment without ongoing violations is categorically barred is misplaced. That statement is *dictum* drawn from Eleventh Amendment law. Restating *Green v. Mansour*, the court observed that although "declaratory relief is appropriate when ancillary to prospective relief," without that prospective relief, a declaration "would have much the same effect as a full-fledged award of damages or restitution" against the ***State*** "and is barred" by the Eleventh Amendment. *Id.*; *Green v. Mansour*, 474 U.S. 64, 73 (1985). *Cardenas* itself rejected the sovereign-immunity defense and allowed the declaratory and injunctive claims to proceed. *Cardenas*, 311 F.3d at 937–38. Neither *Cardenas* nor *Green* concerns a declaration entered together with a damages judgment against a private defendant.

VII. PLAINTIFFS' AGE DISCRIMINATION ACT CLAIMS ARE NOT BARRED BY ADMINISTRATIVE EXHAUSTION DOCTRINES.

On cross-appeal, Plaintiffs challenge the district court's dismissal with prejudice of their age discrimination claim under Section 1557 *via* its incorporation of the AgeDA. 42 U.S.C. § 18116(a); 42 U.S.C. §§ 6101 *et seq.* The district court held that Plaintiffs failed to satisfy AgeDA's pre-suit notice and administrative-complaint requirements, and dismissed the claim with prejudice. 1-ER-38, -39; 1-ER-43. That was in error. The administrative requirements did not bar the claim, and in any event a non-jurisdictional exhaustion defect cannot support a dismissal with prejudice. This Court reviews the underlying legal questions *de novo*. *Aguirre v. United States NRC*, 11 F.4th 719, 724 (9th Cir. 2021).

Although the district court dismissed the AgeDA claim for failure to complete administrative requirements and never reached its merits, the claim is a substantial one, which is why a dismissal with prejudice matters. The AgeDA permits an age-based distinction only in narrow circumstances, chiefly where age operates as a necessary and reasonable proxy for a characteristic that is impractical to assess individually. 42 U.S.C. § 6103(b)(1); 45 C.F.R. § 91.13. Premera's categorical age cutoff cannot meet that exception because Premera concededly conducts individualized, case-by-case medical-necessity review of every minor's request for this very surgery, confirming that individual assessment is not just possible but is Premera's own practice. *See* Section III *supra*. The Department of Health and

Human Services ("HHS") has treated categorical age limits on clinically effective treatment as presumptively discriminatory. 81 Fed. Reg. 31,434 n.258; 89 Fed. Reg. 37,602 n.182. Plaintiffs do not ask this Court to resolve the merits in the first instance; they note the claim's substance only to show that the with-prejudice dismissal foreclosed a meritorious claim and to preserve it for the remand they seek.

A. Administrative exhaustion requirements for the Age Discrimination Act are not jurisdictional and are subject to equitable relief.

The AgeDA imposes two distinct prerequisites to filing suit to vindicate its commands. First, a person bringing suit must give 30 days' pre-suit *notice* to the HHS Secretary, the Attorney General, and the defendant. 42 U.S.C. § 6104(e)(1). Second, suit may not be "brought … if administrative remedies have not been *exhausted*" and the statute deems those remedies exhausted upon the earlier of 180 days after an administrative complaint is filed without an agency finding or finding in favor of the recipient of federal funds. *Id.* §§ 6104(e)(2) (emphasis supplied),[22] 6104(f). Section 1557 adds no notice or exhaustion requirement of its own. 42 U.S.C. § 18116(a). Though the district court correctly concluded that these administrative

[22] The only administrative process identified below was the administrative challenge to Premera's actions under rule promulgated by HHS. The district court treated the permissive regulation for filing a complaint at 45 C.F.R. § 91.42(a) as mandatory. 1-ER-36. Given that the regulation allows, but does not require, the filing of an administrative complaint, one reading Section 6104(e)(2) is that there are no *required* administrative filings, leaving only the pre-suit notice.

requirements are not jurisdictional, 1-ER-37, -38 n. 13, it nonetheless treated Plaintiffs' non-compliance with these requirements as fatally inadequate and dismissed the AgeDA claim with prejudice. 1-ER-38, -39.

Neither prerequisite is jurisdictional. A statutory precondition is jurisdictional only where Congress "clearly states" that it is; absent that, courts "treat the restriction as nonjurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006); *accord Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1041–43 (9th Cir. 2011). Such administrative requirements are rarely jurisdictional: "[m]ost exhaustion requirements established by Congress do not result in a loss of subject matter jurisdiction," but "ordinarily constitute prudential affirmative defenses … ." *Maronyan*, 658 F.3d at 1040.

Section 6104 supplies no clear statement depriving a federal court of jurisdiction: its notice and exhaustion provisions do not "speak to a court's authority" or "refer in any way to the jurisdiction of the district courts." *Fort Bend County v. Davis*, 587 U.S. 541, 551 (2019) (citation modified). They are instead claim-processing rules that "merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised." *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (citation modified); *see Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1148 (9th Cir. 2024) (the requirement that a potential litigant under the Endangered Species Act provide pre-suit notice of its intent to file suit to the

Secretary of the Interior and the alleged violator "is a claims-processing rule and therefore subject to waiver and forfeiture"); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418–19 (2023) (administrative "[e]xhaustion is typically nonjurisdictional").

Because neither requirement is jurisdictional, both are claim-processing rules subject to equitable modification and the district court retained full power over the claim. *Kontrick*, 540 U.S. at 454. The district court should be reversed for two reasons based on equity. First, Plaintiffs substantially complied with both requirements and any defect in the *timing* of that compliance should be equitably tolled, which Premera's failure to identify any prejudice makes especially appropriate. *See* Sections VII.B-C, *infra*. Second, a non-jurisdictional, curable defect cannot support a dismissal with prejudice; at most, it warrants a dismissal without prejudice. *See* Section VII.D, *infra*.

B. Plaintiffs substantially complied with administrative prerequisites in this case.

Because the AgeDA's administrative requirements are non-jurisdictional claim-processing rules, *see* Section VII.A, *supra*, Plaintiffs were obligated to do no more than substantially comply with those rules, which they did.

The exhaustion requirement. Substantial compliance with the exhaustion requirement turns on whether the claimant gave the agency a complaint "sufficient to notify the agency that … discrimination is claimed," so that it could "investigate,

attempt conciliation, and, if necessary, engage the administrative process." *Sommatino v. United States*, 255 F.3d 704, 710 (9th Cir. 2001). A claimant who never presents the claim fails; a claimant who presents it and gives the agency a fair opportunity to act substantially complies. *Id.* at 708–710. The dividing line is *presentment*, not timing. Timeliness is a separate, non-jurisdictional matter subject to tolling. *Id.* at 708 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)); *see* Section VII.C, *infra*.

Plaintiffs are clearly substantially compliant with the administrative exhaustion requirement. Each filed a complaint with HHS's Office for Civil Rights presenting the very discrimination at issue here. 1-SER-52–57. Far from abandoning or obstructing the process, Plaintiffs pursued their complaints until the Department closed them. *Id.*; *cf. Vinieratos v. United States*, 939 F.2d 762, 772 (9th Cir. 1991) (abandonment or failure to cooperate defeats exhaustion). This is substantial compliance with presentment. Indeed, exhaustion was complete in advance of the district court's ruling: more than 180 days elapsed since presentment with no agency finding, so Plaintiffs' administrative remedies became "deemed exhausted" under § 6104(f) before judgment. 1-SER-52–57, (Plaintiffs' complaints were made on February 27, 2024 and March 11, 2024); 1-ER-13 (order granting and denying parties' motions for summary judgment entered on April 18, 2025). The only feature of Plaintiffs' administrative exhaustion the district court faulted was the *sequence*:

Plaintiffs sued before a finding of a violation was issued or 180 days elapsed. That is a timing objection, addressed *infra*.

The notice requirement. Pre-suit notice of the kind the AgeDA requires is meant to give the notified parties an opportunity to resolve the matter before litigation. *See Zipes,* 455 U.S. at 398 (a pre-suit notice requirement's "particular purpose" is "to give prompt notice to the [defendant]"); *Cascadia Wildlands*, 105 F.4th at 1154 (notice is adequate when it supplies enough information for the recipient to "identify and attempt to abate the violation") (citation modified).

Plaintiffs fulfilled that purpose as to Premera. More than thirty days before filing their initial complaint, Plaintiffs served Premera with written notice of their intent to sue, identifying the GTAS age limit as unlawful discrimination under Section 1557 and demanding its removal. 1-SER-72–75. That notice readily satisfied this Court's functional standard, which asks only whether, as judged by "the notice itself and the behavior of its recipients," the recipient "understood or reasonably should have understood the alleged violation." *Cascadia Wildlands*, 105 F.4th at 1154–55 (citation modified). Premera plainly understood. It produced the internal records Plaintiffs requested within weeks, 5-ER-1083 (Second Amended Complaint, ¶ 87), its counsel conferred with Plaintiffs' counsel, and it has defended the age exclusion throughout this litigation. Premera thus received precisely the opportunity to resolve the dispute before suit that the notice requirement exists to provide.

Plaintiffs also provided notice to the HHS Secretary and the Attorney General, the timing of that notice is addressed in Section VII.C *infra*.

C. Plaintiffs are entitled to equitable tolling of the administrative requirements.

The district court's objections to Plaintiffs' attempts to meet administrative requirements reduce to timing: the notice to the government came late, and the suit preceded either a finding for Premera or the running of § 6104(f)'s 180 days. 1-ER-36, -37. Those timing defects are subject to equitable tolling and modification because both requirements are non-jurisdictional. *Forester v. Chertoff*, 500 F.3d 920, 929 (9th Cir. 2007) (recognizing that the Age Discrimination in Employment Act's pre-suit notice and administrative enforcement processes are both non-jurisdictional requirements, subject to equitable modification). Equitable tolling presumptively attaches to non-jurisdictional requirements, even against the United States, and is available where the claimant "has actively pursued his judicial remedies by filing a defective pleading during the statutory period … ." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). In the Ninth Circuit, equitable modification of the timing for completing administrative prerequisites to filing suit considers "the plaintiff's excusable ignorance of the limitations period and … lack of prejudice to the defendant," and is warranted "where the danger of prejudice to the defendant is absent, and the interests of justice so require." *Forester*, 500 F.3d at 929 (citation

modified). Equitable tolling as to the timing of notice and exhaustion requirements is appropriate here.

A.B. filed this action on June 27, 2023, and added J.M. by the operative complaint on June 4, 2024. 5-ER-1097–1121; 5-ER-1070–1096. Plaintiffs commenced administrative enforcement proceedings by filing discrimination complaints with HHS's Office for Civil Rights: A.B. on February 27, 2024, and J.M. on March 11, 2024. 1-SER-65–75. More than 180 days later, on December 10, 2024, the Department closed both complaints "without further investigation," explaining that judicial orders staying and enjoining the rules implementing Section 1557 prevented it from acting. 1-SER-52–57. And, more than three months before the entry of judgment in this case, on January 13, 2025, Plaintiffs served written notice of this action, by registered mail, on the HHS Secretary and the Attorney General, with a copy to Premera's counsel. 1-SER-12–51. On this record the district court found that Plaintiffs (1) "did not provide notice to the HHS Secretary or the Attorney

General until … over a year and a half after this litigation commenced";[23] and (2) "did not wait the requisite 180 days after filing complaints with HHS before initiating or joining in this action." 1-ER-36–37. Every one of those objections goes to *when* Plaintiffs acted, not *whether* they did. The district court's dismissal of Plaintiffs' AgeDA claims is the paradigm of a non-jurisdictional timing defect that equitable tolling exists to cure.

The dispositive fact is that Premera has never claimed prejudice, not from the late notice, and not from the early filing of the Complaint.[24] That silence controls. In *Forester*, this Court equitably excused a premature age-discrimination claim

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[23] The district court also faulted Plaintiffs for "fail[ure] to file a complaint with HHS within 180 days" after learning of the denials. 1-ER-36–37. This was error. The only administrative filing rule considered by the district court, 45 C.F.R. § 91.42 is not a mandatory filing rule. *Compare* 1-ER-36 ("An AgeDA or ACA § 1557 plaintiff ***must*** also submit a prelitigation claim to the Department of Health and Human Services: [text of 45 C.F.R. § 91.42(a)]" to satisfy administrative exhaustion requirements) (emphasis supplied) *with* 45 C.F.R. § 91.42(a) ("[a]ny person, individually or as a member of a class or on behalf of others, ***may*** file a complaint with HHS, alleging discrimination prohibited by the" Age DA) (emphasis supplied). Thus, there is no administrative exhaustion ***requirement*** that a plaintiff file a claim with the Department.

[24] *E.g.*, Premera pleaded twelve affirmative defenses without ever asserting laches or claiming prejudice of any kind. 2-SER-464–482.

where the defendant showed no prejudice and the interests of justice favored relief. 500 F.3d at 931.[25] The same result follows here.

Plaintiffs, moreover, fit *Irwin*'s fact pattern closely: they "actively pursued [their] … remedies" throughout. 498 U.S. at 96. As to *exhaustion*, they filed and pursued administrative complaints through § 6104(f)'s 180-day period. *Cf. Vinieratos*, 939 F.2d at 772. As to *notice*, they served every statutory recipient more than thirty days before the court adjudicated the claim, so the notice period fully elapsed before judgment.

Premera had notice of this lawsuit more than thirty days before Plaintiffs filed, the Department processed and closed their claims, and the United States (under a new Administration) only belatedly sought to engage with this case, well after the order granting relief to Plaintiffs was entered. The equities favoring Plaintiffs are especially strong here, because Premera's age exclusion is one whose victims "age out" while litigation is pending.[26] Plaintiffs' delay did not harm Premera. The timing requirements for the notice and exhaustion prerequisites should be equitably tolled.

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[25] The *Forester* court approved equitable tolling even though the plaintiff was represented and it assumed, without finding, that there was no excusable ignorance on the part of the plaintiff. *Id*.

[26] *See* note 21, *supra*.

D. Dismissal "with prejudice" was error.

Finally, even if dismissal were warranted, dismissal *with prejudice* was not. The district court agreed that the AgeDA's exhaustion requirements are not jurisdictional. 1-ER-37–38 & n.13. A dismissal for failure to satisfy a non-jurisdictional, curable claim-processing rule is not an adjudication on the merits, and it cannot carry preclusive, with-prejudice effect. That is why courts applying *Forester* and its analogues dismiss such claims, if at all, without prejudice or with leave to cure. *See Lagapa v. Mabus*, 2012 U.S. Dist. LEXIS 32032, at *10–11 (D. Haw. Feb. 10, 2012) (allowing an ADEA claim with a notice defect to proceed), *adopted in relevant part*, 2012 U.S. Dist. LEXIS 31913 (D. Haw. Mar. 9, 2012); *Pena v. U.S. Postal Serv.*, 2019 U.S. Dist. LEXIS 24521, at *33–34 (N.D. Cal. Feb. 14, 2019) (dismissing untimely federal-sector claim "with leave to amend").

The district court's contrary rationale did not rest on satisfying administrative prerequisites. It reasoned that dismissal should be with prejudice because, in its view, no relief remained available: monetary damages are unavailable under the AgeDA, and the surgeries A.B. and J.M. underwent, together with J.M.'s reaching adulthood, left "no basis to seek an injunction." 1-ER-38–39. That reasoning cannot support a with-prejudice dismissal, for three reasons.

i. *A mootness holding cannot support a merits dismissal with prejudice.*

A determination that no live remedy remains is a holding of mootness, an Article III jurisdictional defect. A dismissal for lack of Article III jurisdiction cannot be an adjudication on the merits and must be entered without prejudice. *See Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1106–07 (9th Cir. 2006) (vacating a merits dismissal with prejudice entered for lack of standing and remanding "with instructions to dismiss without prejudice"). A court that has concluded it lacks a live controversy has no power to adjudicate the merits with preclusive effect; the two holdings are mutually exclusive.

ii. *In any event, live relief remains available.*

The premise that no relief remained is wrong, or at least premature, and cannot support a dismissal with prejudice in any event. The district court reasoned that the AgeDA affords "only injunctive relief," 1-ER-34, and that the completed surgeries and J.M.'s eighteenth birthday left "no basis to seek an injunction." 1-ER-38. But an age cutoff whose challengers necessarily "age out" before review can be completed is the paradigm of a controversy "capable of repetition, yet evading review" and "inherently transitory" conditions that preserve such claims rather than moot them. *A.D. v. Haw. Dep't of Educ.*, 727 F.3d at 913–14.[27] The injunctive claim therefore

[27] *See* note 21, *supra*.

was not properly treated as extinguished, and to the extent a live controversy remains, a declaration that the age cutoff violated the AgeDA is available under 28 U.S.C. § 2201. And even accepting the court's premise, a conclusion that no live remedy survives sounds in mootness, a jurisdictional defect that, for the reasons already given, requires a dismissal without prejudice rather than a merits adjudication with preclusive effect. *See supra*.

iii. *Any defect in Plaintiffs' compliance with administrative requirements was curable.*

The defect in timing the district court identified was curable, which alone forecloses a with-prejudice dismissal. HHS expressly invited Plaintiffs to refile and waived its 180-day deadline. A plaintiff who can cure claims-processing procedural defects must be permitted to do so; a with-prejudice dismissal forecloses the very cure the district court's own reasoning presupposed.

The district court's reliance on *Grant v. Alperovich*, 703 F. App'x 556, 557 (9th Cir. 2017), does not counsel otherwise.[28] The age-discrimination claim should be reinstated; if that relief is not granted, the dismissal should be modified to be without prejudice so that Plaintiffs may cure.

CONCLUSION

Premera covers a medically necessary mastectomy for an adolescent assigned male at birth but categorically denies the identical operation to an adolescent assigned female at birth. That is discrimination on the face of Premera's policy, and it is independently facial sex discrimination because the gender-dysphoria diagnosis through which the exclusion operates is a pretext or proxy for discrimination based on transgender status. Either ground is sufficient to affirm. Neither *Skrmetti* nor Premera's out-of-circuit authorities disturbs this Court's controlling decision in *Pritchard*, and Premera had ample notice under the Spending Clause that it could

[28] *Grant* is an unpublished memorandum disposition, *see* Ninth Circuit Rule 36-3(a), and is not on point. It was a pro se patient's medical-treatment suit where the plaintiff's only administrative step was an HHS complaint filed over two years after the alleged discrimination, which HHS rejected as untimely under the 180-day deadline. *See Grant v. Alperovich*, 2014 U.S. Dist. LEXIS 46350, at *14 (W.D. Wash. Apr. 1, 2014), *aff'd*, 703 F. App'x 556 (9th Cir. 2017). The panel affirmed without addressing substantial compliance, equitable modification, or futility, and without suggesting the deadline had been waived. 703 F. App'x at 557. Here, by contrast, HHS did not reject Plaintiffs' complaints as untimely; it waived the deadline and closed on enforcement-discretion grounds, and Plaintiffs satisfied § 6104(f) and served the § 6104(e) notice before judgment.

not withhold a covered benefit because of a patient's sex. This Court should therefore affirm the declaratory judgment that Medical Policy 7.01.557 violates Section 1557, together with the damages and nominal relief that Premera does not independently contest. To the extent the Court has any concern with the declaration's forward-looking dimension, the remedy is to narrow it, not to disturb the liability and damages judgment.

On cross-appeal, this Court should reverse the dismissal with prejudice of Plaintiffs' age-discrimination claim. The AgeDA's notice and exhaustion requirements are not jurisdictional; Plaintiffs substantially complied with them and are entitled to equitable tolling of any timing defect, which caused Premera no prejudice. At a minimum, a curable, non-jurisdictional defect cannot support a dismissal with prejudice.

For these reasons, the judgment should be affirmed in part and reversed in part, and the case remanded for further proceedings.

DATED: September 4, 2026. Respectfully submitted,

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