IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ATHENS DIVISION

SKYLER MUSGROVE, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, UNIVERSITY OF GEORGIA, JERE MOREHEAD, KARIN ELLIOTT, BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC., METROPOLITAN LIFE INSURANCE COMPANY, and METLIFE, INC. Defendants.	Civil Action No. 3:18-cv-00080-CDL JURY TRIAL DEMANDED

PLAINTIFF'S OPPOSITION TO DEFENDANT
BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC.'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff Skyler Musgrove ("Mr. Musgrove" or "Plaintiff"), by and through the undersigned counsel, hereby files his response in opposition to Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.'s ("BCBSHP" or "Defendant") Motion to Dismiss Plaintiff's Complaint. In support Plaintiff states as follows:

INTRODUCTION

Plaintiff Skyler Musgrove, a University of Georgia employee, was unlawfully denied coverage under his employer-based health plan for surgery to treat his medical condition, gender dysphoria. Defendant denied coverge not due to a lack of medical necessity, but rather pursuant to an animus-based treatment exclusion that Defendant itself was instrumental in creating and enforcing. Defendant's Motion to Dismiss reaches far beyond the mere sufficiency of the Complaint and should be denied as Mr. Musgrove's complaint properly alleges claims under Title VII, the Americans with Disabilities Act ("ADA"), and the Federal Rehabilitation Act ("Section 504") for redress of injuries caused by BCBSHP. Defendant's assertion that Mr. Musgrove's gender dysphoria is excluded from the ADA and Section 504 is contrary to the statutory language and, if adopted by this Court, would result in a constitutional violation.

STATEMENT OF FACTS

Mr. Musgrove receives employment compensation from his employer, the Georgia Board of Regents ("BOR") in the form of health care coverage under the Consumer Choice HSA Healthcare Plan ("Plan"). (Doc. 1 ¶ 1.) Mr. Musgrove underwent provider-recommended surgical treatment for gender dysphoria. (Doc. 1 ¶ 50.) His surgeon's preauthorization request was denied not due to lack of medical necessity, but solely on the basis of a plan exclusion for all treatments of gender dysphoira. (Doc. 1-4 at 2.)

On the same basis post-surgery, BCBSHP is the entity that denied Mr. Musgrove's claim for reimbursement, as noted in the explanation of benefits: "This product is administered by Blue Cross Blue Shield Healthcare Plan of Georgia[ ](BCBSHP). BCBSHP provides administrative claims payment services only and assumes no financial risk or obligation with respect to claims. Blue Cross Blue Shield of Georgia Inc[ ](BCBSGA) and BCBSHP are independent licensees of the Blue Cross Blue Shield Association." (Doc. 1-4 at 4.)

BCBSHP and Blue Cross Blue Shield of Georgia, Inc. ("BCBSGA"), collectively referred to herein as BCBS, offer a product that is an administrative services only ("ASO") healthcare plan. Mr. Musgrove alleges Defendant offers plans to employers that exclude treatment for gender dysphoria and offers to administer those plans. (Doc. 1 ¶ 78, 88, 109, 123, 134, 135.) The plans offered include not only the service of approving or denying claims, but also of providing the employer with model plan language for it to adopt, which in this case it did.

LEGAL STANDARD

In ruling on a 12(b)(6) motion to dismiss, the court must accept the allegations of the complaint as true and construe the facts alleged in the complaint in the light most favorable to the plaintiff. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994). The relevant inquiry is whether the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The motion "tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citation omitted). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *ICA Const. Corp. v. Reich*, 60 F.3d 1495, 1497 (11th Cir. 1995) (citations omitted).

ARGUMENT AND CITATION OF AUTHORITY

I. Mr. Musgrove has Article III standing to sue BCBSHP.

Mr. Musgrove's injuries—including paying $8,333.32 out of pocket for medically necessary health care and the stress of being denied and delayed in accessing care—are fairly traceable to BCBSHP. Mr. Musgrove's care was denied under an exclusion he alleges originated with BCBSHP. Mr. Musgrove, *inter alia*, alleges that BCBSHP's liability stems from "offering a policy that contained a transgender exclusion." (Doc. 1 ¶ 134.) BCBSHP did not simply carry out the BOR's bidding when it denied Mr. Musgrove's claim—it is the entity that uses an exclusionary model policy and provided it to the BOR. BCBS cannot deliver discriminatory plan language to the BOR and then say it is "shocked, shocked" to learn it must deny claims under such an exclusion. *Cf. Tovar v. Essentia Health*, No. 0:16-cv-00100-DWF-LIB, slip. op. at 9 (Sept. 20, 2018) (holding third-party administrator may be held liable for sex discrimination under Section 1557 of the Affordable Care Act ("ACA") for administering a self-funded plan containing an exclusion for gender reassignment treatments). Assuming that Mr. Musgrove's allegations about BCBS offering an exclusionary policy are true, the exclusion—and therefore the injury—are directly traceable to BCBS.

Mr. Musgrove's monetary and non-monetary injuries are redressable by BCBS. BCBS can compensate Mr. Musgrove monetarily for its role in crafting and enforcing a discriminatory exclusion. Mr. Musgrove, who requires additional surgeries to treat his gender dysphoria (Doc. 1 ¶ 61), can also seek injunctive relief against BCBS in the form of prohibiting it from offering model plan language that contains gender dysphoria exclusions.

II. Plaintiff's Complaint has stated facts sufficient to state his claims and should not be dismissed under Rule 12(b)(6).

A. BCBSHP denied Mr. Musgrove's claim and should not be dismissed.

The Complaint has raised a sufficient allegation that BCBSHP—not BCBSGA—denied Mr. Musgrove's claim. The explanation of benefits denying the claim distinguishes between BCBSHP and BCBSGA and plainly states that BCBSHP administers the plan. (Doc. 1-4 at 4.) Additionally, the Plan states, "Administered by Blue Cross Blue Shield Healthcare Plan of Georgia." (Doc. 1-2 at 109.) Given that the facts must be interpreted in favor of the Plaintiff, BCBSHP is a proper party, and his claims against BCBSHP must be allowed to proceed.

B. Mr. Musgrove has properly alleged a sex-based claim under Title VII.

That Title VII sex-based protections are available to transgender individuals is beyond doubt in 2018. The 11th Circuit has repeatedly stated that transgender people are protected from sex discrimination under Title VII. As *Evans v. Ga. Reg'l Hosp*., 850 F.3d 1248, 1254 (11th Cir. 2017) clarifies: "'[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype,' and … because those protections apply to everyone, a transgender individual [can]not be excluded" (citing *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011). *In spite of* the fact that transgender people are not proteced "as a class," they are still protected under Title VII. *Id.* at 1266 (Rosenbaum, J., concurring). No Court of Appeals post-*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) has held that transgender individuals may not state *any* Title VII claim.[1] Instead, courts have found that "[w]hether because of

[1] The pre-*Price Waterhouse* cases Defendant cites are called into question. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (upholding a Title VII sexual orientation discrimination claim and implicitly rejecting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)); *Hunter v. United Parcel Serv.*, 697 F.3d 697, 702 (8th Cir. 2012) (evaluating a transgender man's Title VII claim "based on his non-conformity to gender stereotypes or his being perceived as transgendered"); *U.S. v. S.E. Okla. State Univ.*,

differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics," a gender reassignment exclusion "on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII." *Boyden* v. *Conlin*, No. 3:17-cv-00264-wmc, slip op. at 47 (Sept. 18, 2018) (holding that an exclusion in the Wisconsin state employee health plan was sex discrimination under Title VII and the ACA). *See also Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 771 (N.D. Tex. 2017) (allowing a Title VII claim to proceed against an employer where a transgender worker was denied transgender-related health care); *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming that Title VII encompasses protection for transgender individuals, but dismissing health-plan based Title VII claim only because employee did not have standing for her dependent transgender son).

Transgender people do not conform with *the* core sex stereotype—namely that genitals at birth are the sole determinate of one's sex. Accordingly, "discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should have male anatomy" is actionable because "the employer discriminates because the employee does not comport with the employer's vision of what a member of that particular gender should be. It's just as simple as that." *Id.* at 1265-66; *see also Chavez v. Credit Nation Auto Sales*, 641 F. App'x 883, 883 (11th Cir. 2016) ("Sex discrimination includes discrimination against a transgender person for gender nonconformity."). Excluding medically necessary care simply because it is for the purpose of changing sex characteristics is based on sex stereotypes rather than science; it

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No. 5:15-CV-324, 2015 WL 4606079 at *2 (W.D. Okla. July 10, 2015) (rejecting a motion to dismiss premised on *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) and allowing claim based on harassment, health insurance exclusion, and termination based on gender transition to proceed as sex stereotyping discrimination under Title VII).

reflects a belief that someone labeled female at birth must have typical female anatomy, including breasts.

No reasonable interpretation of "sex" under Title VII could exclude the very physical characteristics that—along with brain sex—comprise and define one's sex, i.e., hormone levels, genital appearance, reproductive organs, and secondary sex characteristics, such as breasts. *See also* Recent Case, Macy v. Holder, *2012 WL 1435995 (E.E.O.C. Apr. 20, 2012)*, 126 HARV. L. REV. 1731 (2013) (describing how "transgender discrimination is based on sex because it is rooted in aversion to or assumptions about biological sex characteristics"). As the Sixth Circuit put it, "[b]ecause an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex." *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 578 (6th Cir. 2018).

Simlarly, prohibiting coverage for treatments that *change* sex characteristics is facially discrimination "because of sex." *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (noting that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'"). *Cf. Tovar*, slip. op. at 7 (relying on Title VII precedent to find that a transgender exclusion can be challenged as sex discrimination under the ACA).

Discomfort with medical treatment because it deliberately changes sex characteristics from one sex to another for the purpose of treating gender dysphoria qualifies as gender impermissibly playing a role in the decision. *See Price Waterhouse,* 490 U.S. at 244-45. As the Sixth Circuit notes, "[g]ender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse

employment decision." *Harris Funeral Homes,* 884 F.3d at 576. The Court continued, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id*.

Finally, if the Court shares Defandant's concerns about the manner in which Count Five was pled, Mr. Musgrove respectfully requests leave to amend his complaint to rectify any confusion or deficiencies.

C. BCBS is an "employer" for purposes of the ADA and Title VII, so Mr. Musgrove's claims may proceed.

Mr. Musgrove has properly alleged that BCBS is an agent of his employer and is thus a covered entity under the ADA and Title VII. Defendant argues that BCBS "has never been Plaintiff's employer." (Doc. 24-1 at 6.) Title I of the ADA prohibits a "covered entity" from discriminating based on disability. (Doc. 1 ¶ 63.) Statutorily that includes agents, the courts in *Cramer v. State of Fla.*, 117 F.3d 1258, 163-64 (11th Cir. 1997) and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 n.49 (9th Cir. 2000) made no reference to 42 U.S.C. § 12111(5)(A), which further defines "employer" to include "any agent" of the employer. The present situation—where BCBS is providing a vital funciton of employment—administering a benefits plan at the behest of the BOR as well as helping to set the terms, is fundamentally different from cases that are premised upon attempting to determine if an entity is an employer *at all* or that are trying to estabilish individual liability. Similarly, *Baker v. Aetna Life Ins. Co.*, 228 F.Supp.3d 764 (N.D. Tex. 2017) did not address and contradicts the plain language of Title VII's definition of "employer," which includes "any agent of [the employer]." 42 U.S.C. § 2000e(b).

Boyden slip op. at 31-32 found a third-party administrator that merely recommended terms to the entity that ultimately set the terms of the plan to be an agent for purposes of Title VII and therefore liable for a transgender exclusion. Here there was no dispute that BOR is

Musgrove's employer, so neither test need be employed to determine if BOR was the employer. As the claims administrator, BCBS exercises control over employment practices, namely compensation via fringe benefits, and is thus subject to Title VII. BCBS uses its discretion to determine if claims are medically necessary, Doc. 1-2 at 89; BOR hired them to delegate to them such responsibility for services that are outside the realm of expertise of BOR, including having a model plan provided to them. Given that "[a] liberal construction must be accorded to the term: employer," *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987), the Defendant's argument should be rejected.

The EEOC and numerous courts have concluded that insurance companies may be considered "agents" of employers and therefore "covered entities" for purposes of the ADA. *Compare* EEOC Compliance Manual, No. 915.003, 2-III(B)(2)(b)(2000), https://www.eeoc.gov/policy/docs/threshold.html (citing *Carparts*) (stating that "an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent"), *with e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) (holding that insurance company could be considered a covered entity for purposes of ADA if, inter alia, it "act[s] on behalf of the entity in the matter of providing and administering employee health benefits"); *accord. Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded sub nom*. *Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983), *reinstated on remand*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984) (Title VII); *Graf v. K-Mart Corp.*, No. 88-1254, 1989 WL 407247, at *2-4 (W.D. Pa. Aug. 28, 1989) (Title VII); *United States v. State of Illinois*, 3 A.D. Cases 1157, 1994 WL 562180, at *2 (N.D. Ill. 1994) ("There is no express requirement that the covered entity be an employer of the qualified individual.").

These authorities make clear that, when an insurer provides discriminatory benefits policies that affect the compensation, terms, conditions or privileges of employment, the insurer can be held liable under the ADA for its own discriminatory policies carried out within the agency relationship that it has with the employer. Precedent from the Eleventh Circuit, which has not directly addressed this issue but "accord[s] a liberal construction" to the definition of "employer," *Williams v. City of Montgomery*, 742 F.2d 586, 588 (11th Cir. 1984), supports this proposition. *See id.* at 588-89 (holding that third party was an agent of employer for purposes of Title VII based, in part, on third party's establishment of pay plan for all employees).

Although additional facts may be required to determine the extent of the Defendant's agency, this is a matter to be addressed on summary judgment after discovery—not on a motion to dismiss. *See Lundstedt v. City of Miami*, 1995 WL 852443, at *12 (S.D. Fla. 1995) ("Whether an employee-employer relationship exists for purposes of deciding if an entity is within the ambit of a particular statute is legal determination, although predicate factual questions which lead to that legal determination may be proper jury issues."). Mr. Musgrove has met his burden by alleging that the Defendant is an agent of his employers and therefore a covered entity within the meaning of the ADA.

D. Mr. Musgrove has sufficientally stated a claim under Title III of the ADA.

The Defendant concedes that the Eleventh Circuit has not addressed whether discriminatory insurance policies are prohibited by Title III of the ADA. (Doc. 24-1 at 10). The Defendant argues that such discrimination is not prohibited by Title III because insurance companies that administer health insurance plans are not "public accommodations" within the meaning of the statute. This interpretation should be rejected for two reasons.

First, because there is no binding law in this Circuit holding that insurance companies that administer health insurance plans are not "public accommodations" under Title III of the ADA, the Defendant's argument is inappropriate at the motion to dismiss stage. Mr. Musgrove has met his burden by alleging sufficient facts to show that the Defendant is a public accommodation. *See, e.g.*, *National Federation of the Blind of California v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073, 1083 (N.D. Cal. 2015) ("In the absence of clear law to the contrary, the Court finds that plaintiffs' allegations, when taken as true, demonstrate a plausible claim for Uber's ADA liability under [Title III]."") (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*); *accord. Briefer v. Carnival Corp.*, No. 98-1493, 1999 WL 1457329, at *2 (D. Ariz. 1999).

Second, the Defendant's assertion that it is not a public accommodation under Title III is flatly inconsistent with the plain language of the ADA, Department of Justice guidance, and lower court precedent. As detailed in the Complaint, the ADA explicitly states that "insurance office[s]" are "considered public accommodations for purposes of [Title III]." 42 U.S.C. § 12181(7)(F); Doc. 1 ¶ 103. A separate provision of the ADA further states that the ADA does not "prohibit or restrict . . . an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. § 12201(c); Doc. 1 ¶ 107. Naturally, the converse is also true: the ADA *does* prohibit "an insurer . . . from underwriting risks, classifying risks, or administering such risks" that are inconsistent with or not based on State law. *See* 42 U.S.C. § 12201(c).[2] The Department of Justice has concluded as

[2] Other Title III provisions support its coverage of insurance providers, including its general prohibition of discrimination "directly, or through contractual . . . arrangements," and, more specifically, its prohibition of the "application of eligibility criteria," "failure to make reasonable modifications in policies, practices, or procedures," and "failure to take such steps . . . to ensure

much, stating that insurers "may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer," and "may underwrite, classify, or administer risks that are based on or not inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA." U.S. Dep't of Justice, *ADA Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities* III-3.11000, https://www.ada.gov/taman3.html.

Accordingly, numerous lower courts have held that an insurance company that administers health insurance plans is a public accommodation under Title III. *See, e.g.*, *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994) (holding that district court erred in finding that Title III of the ADA did not apply to insurers because they were not places of public accommodation); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d Cir. 1999) (holding that Title III of the ADA regulates insurance underwriting practices); *accord. Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557, 562-63 (D. Minn. 1998); *Kotev v. First Colony Life Ins. Co*., 927 F. Supp. 1316, 1320-23 (C.D. Cal. 1996).[3]

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that no individual with a disability is excluded, denied services, or otherwise treated differently"—all of which easily apply to discriminatory insurance policies. *See* 42 U.S.C. § 12182; *see also* 42 U.S.C. § 12101(b)(1) ("provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

[3] Defendant cites three circuit court cases that refused to extend Title III coverage to insurance policies. (Doc. 24-1 at 11 (compiling cases)). These cases represent a circuit split on the issue and should be given no weight because they are at odds with the plain language of the ADA and with DOJ guidance, as discussed above. *See Winslow*, 29 F. Supp. 2d at 563 (discussing circuit split and concluding that "Title III of the ADA is applicable to insurance policies and not limited to access to actual physical structures" based on "the legislative history, the DOJ interpretation of Title III of the ADA, and the reasoning adopted by a growing number of district courts"). The Defendant's citation to *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am.*, 268 F.3d 456, 459 (7th Cir. 2001) and dictum in *Pallozi v. Allstate Life Ins. Co.* are likewise unavailing. (Doc. 24-1 at 11 n.4). Neither of those cases involved a disability-specific health

E. Mr. Musgrove has sufficientally stated a claim under Section 504.

Section 504 applies to BCBSHP because Mr. Musgrove alleges BCBSHP *directly* receives federal funds (Doc. 1 ¶ 121), which it in fact does. As a participant in the federal health insurance Marketplace, BCBSHP receives federal funds via premium tax credits. While Mr. Musgrove's claims are not based on funds funneled through the BOR, Defendant cites only inapposite authority in which the plaintiffs did not allege that insurers directly received funds.

F. Gender dysphoria is not excluded from the ADA or Section 504.

Defendant argues that Mr. Musgrove is foreclosed from pursuing a claim under the ADA and Section 504[4] based on gender dysphoria because the definition of disability under these statutes expressly exclude "gender identity disorders not resulting from physical impairments" and "transsexualism"[5] (the "GIDs Exclusion"). (Doc. 24-1 at 12). To be clear, this is the only

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insurance exclusion in the employment context, as is the case here, and so neither case held that Title III is inapplicable to such exclusions. *See Morgan*, 268 F.3d at 457; *Pallozi*, 198 F.3d at 32 n.3 (dictum). (Doc. 1 ¶ 44). Furthermore, the First Circuit's decision in *Carparts* drew no distinction between health insurance provided in and outside of the employment context. *See Carparts Distribution Ctr., Inc.*, 37 F.3d at 20.

[4] Because the definition of disability under the ADA and Rehabilitation Act is identical, *compare* 42 U.S.C. § 12102 (defining "disability"), *with* 29 U.S.C. §§ 705(9)(B), (20)(B) (cross-referencing ADA definition of "disability"), the analysis used by courts to determine disability is the same under both statutes. *See, e.g.*, *Crane v. Lifemark Hospitals, Inc.*, 898 F.3d 1130, 1134 (11th Cir. 2018) ("ADA and [Rehabilitation Act] claims are governed by the same substantive standard of liability.").

[5] Transsexualism has always been understood to be either interchangeable with, or a subtype of, gender identity disorder. *See* Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973,* in *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* Ch. 16-48 (Christine Michelle Duffy ed. Bloomberg BNA 2014) [hereinafter "Duffy"] ("It was not uncommon at the time [the ADA was being debated] for people to use the terms 'transsexualism' and 'GID' interchangeably."); *see also id.* at 16-98 to 16-103 (explaining that, beginning in 1980, successive versions of the DSM referred to transsexualism as a subtype of gender identity disorder applicable to adults and adolescents, until 1994, when transsexualism was removed from the DSM). Because the now obsolete diagnosis of transsexualism merely referred to gender identity disorder in adolescents and adults, the ADA's exclusion of *transsexualism* does not apply to gender dysphoria for the

reason Defendant provides in support of its argument that Mr. Musgrove does not have a disability under the ADA and Section 504. Defendant does not argue, and therefore concedes, that—but for the GIDs Exclusion—Mr. Musgrove has stated a claim that he has a "disability" under the ADA and Section 504, as amended by the ADA Amendments Act of 2008.[6] *See Brooks v. Warden*, 706 Fed. App'x 965, 968 (11th Cir. 2017) ("[U]nless one of the specified exceptions applies, a party cannot raise a defense in a second Rule 12 motion that it failed to raise in its first Rule 12 motion.").

Defendant is correct that the ADA and Section 504 exclude GIDs, but it erroneously assumes that the GIDs Exclusion necessarily applies to the new diagnosis of gender dysphoria in the DSM-5, which was published in 2013. It does not. As two federal district courts have held, as the U.S. Department of Justice has concluded in three separate cases in Pennsylvania, New Jersey, and Connecticut,[7] and as the ADA's text and legislative history make clear, gender dysphoria is not excluded under the ADA and Section 504. Defendant's contrary interpretation is therefore not a reasonable one. But even if it were—that is, if gender dysphoria *is* excluded under the ADA and Section 504—Defendant's interpretation results in a categorical exclusion of transgender people from coverage under the ADA and Section 504 that violates constitutional guarantees of equal protection.[8] Such an interpretation is to be avoided under basic principles of statutory interpretation.

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very same reasons that the ADA's exclusion of *gender identity disorders* does not apply to gender dysphoria.

[6] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-13 (2009) [hereinafter "ADAAA"] (expanding defining of disability under ADA and Section 504).

[7] *See infra* §(b).

[8] In tandem with this Plaintiff's Opposition to Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.'s Motion To Dismiss Plaintiff's Complaint, Plaintiff has filed a Notice of

a. No exclusion for gender dysphoria appears anywhere in the text of the ADA or Section 504.

Although the ADA and Section 504 exclude GIDs, 42 U.S.C. § 12211(b), they are silent as to gender dysphoria. As stated in the Complaint and discussed further below, gender dysphoria is different from gender identity disorder in key ways. (Doc. 1 ¶ 83). This Court should therefore reject Defendant's argument, which erroneously equates gender dysphoria with distinct conditions excluded by the ADA and Section 504. Construing the statute in this way is consistent with the ADA's and Section 504's plain language, particularly in light of the 2008 amendments, which clarify Congress' intent that the definition of disability should "be construed in favor of broad coverage of individuals . . . to the maximum extent permitted . . . ." 42 U.S.C. § 12102(4)(A).[9]

Defendant's argument based on the GIDs Exclusion ignores that the replacement of the diagnosis of "gender identity disorder" with gender dysphoria in the DSM-5 was more than semantic; it reflects a substantive difference between the medical conditions themselves. (Doc. 1 ¶ 83). Unlike the outdated diagnosis of gender identity disorder, the hallmark or presenting feature of gender dysphoria is *not* a person's gender identity. Rather, it is the clinically significant distress, termed dysphoria, that some people experience as a result of the mismatch

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Constitutional Question with the Attorney General of the United States, pursuant to Federal Rule of Civil Procedure 5.1, notifying the Attorney General of Plaintiff's challenge to the constitutionality of the GIDs Exclusion, 42 U.S.C. § 12211(b)(1).

[9] EEOC and Department of Justice regulations implementing the ADA, as amended by the ADA Amendments Act of 2008, strongly support a broad interpretation of the law. *See* 29 C.F.R. § 1630.1(c)(4) ("[T]he definition of 'disability' in [Title I] shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA."); 28 C.F.R. § 36.101(b) ("[T]he definition of 'disability' in [Title III] shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.").

between a person's gender identity and their assigned sex. *See* American Psychiatric Association, *Gender Dysphoria* 2 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [hereinafter APA, *Gender Dysphoria*] (stating that gender identity disorder connoted "that the patient is 'disordered'").

Reflecting this distinction, the diagnostic criteria for gender dysphoria in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [hereinafter DSM-5] are different than those for gender identity disorder. Gender identity disorder had been characterized by a "strong and persistent cross-gender identification" and a "persistent discomfort" with one's sex or "sense of inappropriateness" in the gender role of that sex. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 581 (4th ed., rev. 2000). In contrast, gender dysphoria is defined as a "marked incongruence" between gender identity and assigned sex, rather than a cross-gender identification *per se*. DSM-5, *supra*, at 452; *see also id.* at 814 (stating that DSM-5 "emphasiz[es] the phenomenon of 'gender incongruence' rather than cross-gender identification per se, as was the case in DSM-IV gender identity disorder"). Even though both gender identity disorder and gender dysphoria require clinical distress as an accompanying feature of the diagnosis, gender dysphoria focuses on the incongruity of a person's identity and sex and not on cross-gender identification, a significant change in the presenting feature of the diagnosis.

The criteria for gender dysphoria, unlike gender identity disorder, also include a "post-transition specifier for people who are living full-time as the desired gender." APA, *Gender Dysphoria* 1. The specifier was "modeled on the concept of full or partial remission," recognizing that treatment can relieve the distress associated with the diagnosis, but that someone who undergoes gender transition to alleviate that distress—putting them in remission—

can still have a gender dysphoria diagnosis. DSM-5, *supra*, at 815; *see also id.* at 451. Significantly, this substantive change means there are people with gender dysphoria that would not meet the criteria for gender identity disorder, underscoring that gender dysphoria is a different diagnosis.

Lastly, inclusion of a new and different diagnosis rests upon a growing body of new scientific research showing that gender dysphoria has a physical cause. DSM-5 includes a new section entitled "Genetic and Physiological," which specifically discusses the genetic and hormonal underpinnings of gender dysphoria. *See* DSM-5, *supra*, at 457. These findings, together with numerous recent medical studies, strongly suggest that gender dysphoria results from physical impairments—i.e., an atypical interaction of sex hormones and the brain. *See* Duffy, *supra*, at 16-72 to 16-74 & n.282 (citing numerous medical studies that "point in the direction of hormonal and genetic causes" of gender dysphoria).

Therefore, even if the GIDs Exclusion could be interpreted to exclude all persons with *gender identity disorder* from bringing claims, it does not apply to persons like Mr. Musgrove with *gender dysphoria*, a new and distinct diagnosis.[10] As the District of Massachusetts recently

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[10] Recently faced with the same argument presented in Defendant's Motion to Dismiss, the Eastern District of Pennsylvania advanced a separate reason for why the GIDs Exclusion does not apply to gender dysphoria. According to the court, "gender identity disorders," as used in the ADA, refers not to a medical condition but rather to "the condition of identifying with a different gender"—i.e., being transgender. *Blatt v. Cabela's Retail, Inc.,* No. 5:14-cv-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017). Like being gay, lesbian, or bisexual, the court reasoned, being transgender is, by itself, not a medical condition and therefore is not a disability under the ADA. *See id.* at *3. Gender dysphoria, by contrast, *is* a medical condition. "[A] condition like Blatt's gender dysphoria," the court concluded, "goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments." *Id.* at *2. Simply put, the GIDs Exclusion "exclud[es] certain *sexual identities* from the ADA's definition of disability"—not the *medical conditions* "that persons of those identities might have." *Id.* at *3 (emphasis added). As discussed in the Complaint, the same reasoning applies here: although Mr. Musgrove's male identity is excluded by the ADA, his medical diagnosis of gender dysphoria

held in *Doe v. Massachusetts Dep't of Corrections*, the ADA and Section 504 do not exclude gender dysphoria, in part, because it "is not merely another term for 'gender identity disorder,'" but is rather a distinct diagnosis with different diagnostic criteria. No. 17-12255, 2018 WL 2994403, at *7 (D. Mass. June 14, 2018).[11] Significantly, Defendant does not cite this case. Instead, Defendant devotes several paragraphs to *Parker v. Strawser Construction, Inc.*, in which the court concluded that "Congress intended to exclude from the ADA's protection both disabling and non-disabling *gender identity disorders* that do not result from a physical impairment." 307 F. Supp. 3d at 754 (emphasis added). *Parker* is inapposite; the plaintiff in that case did not argue, and the court did not address, the central question here: whether gender dysphoria and gender identity disorders are distinct medical conditions. The *Parker* court assumed, wrongly, that the two were one and the same. *See id.*[12]

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most certainly is not. (Doc. 1 ¶ 84). *But see Parker*, 307 F. Supp. 3d 744, 754-755 (S.D. Ohio 2018) (erroneously equating gender dysphoria with gender identity disorders, and ignoring *Blatt*'s conclusion that gender dysphoria refers to a medical condition that is *not* excluded from the ADA, whereas gender identity disorders—as used in the ADA—refer to transgender identity, which *is* excluded from the ADA).

[11] *Id.* at *6 ("In contrast to DSM-IV, which had defined 'gender identity disorder' as characterized by a 'strong and persistent cross gender-identification' and a 'persistent discomfort' with one's sex or 'sense of inappropriateness' in a given gender role, the diagnosis of GD in DSM-V requires attendant disabling physical symptoms, in addition to manifestations of clinically significant emotional distress."); *see also id.* (expressing agreement with plaintiff's argument that "the decision to treat 'Gender Dysphoria' in DSM-V as a freestanding diagnosis is more than a semantic refinement. Rather, it reflects an evolving re-evaluation by the medical community of transgender issues and the recognition that GD involves far more than a person's gender identification.").

[12] All of the other cases upon which Defendant rely are likewise distinguishable. Five cases were decided prior to 2013, before the diagnosis of gender dysphoria appeared in the DSM, and therefore bear no weight because the plaintiffs in those cases either did not or could not distinguish their medical conditions from gender identity disorder. *Compare Johnson v. Fresh Mark, Inc.*, 98 F. App'x 461 (6th Cir. 2004); *Michaels v. Akal Sec., Inc.*, No. 09–cv–01300, 2010 WL 2573988 (D. Colo. June 24, 2010); *James v. Ranch Mart Hardware, Inc.*, No. 94–2235, 1994 WL 731517 (D. Kan. Dec. 23, 1994); *Arledge v. Peoples Servs., Inc.*, No. 02-CVS-1569, 2002 WL 1591690 (N.C. Super. Ct. Apr. 18, 2002); *Conway v. City of Hartford*, No. CV-

b. Even if gender dysphoria is a "gender identity disorder," the ADA's GIDs exclusion does not apply to all claims based on that condition.

As the Complaint makes clear, the ADA and Section 504 exclude "gender identity disorders *not resulting from physical impairments*." 42 U.S.C. § 12211(b)(1) (emphasis added); Doc. 1 ¶ 82. Therefore, even if this Court were to disregard the significant differences between gender identity disorder and gender dysphoria as Defendant urge, this Court should not dismiss Mr. Musgrove's claim because, as discussed above, he will still be able to show that his medical condition results from a physical impairment. *See Mass. Dep't of Corr.*, 2018 WL 2994403, at *6 ("Doe has raised a dispute of fact that her GD may result from physical causes.").[13]

The burgeoning medical research underlying gender dysphoria points to a physical etiology. *See Mass. Dep't of Corr.*, 2018 WL 2994403, at *6 (noting "recent studies demonstrating that GD diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in utero development of dysphoria"); DSM-5, *supra*, at 457 (discussing genetic and hormonal underpinnings of gender dysphoria); Duffy, *supra*, at 16-72 to 16-74 & n.282 (citing studies); *see also* Aruna Saraswat, MD, Jamie D. Weinand, BA, BS & Joshua D.

950553003, 1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997), *with Mass. Dep't of Corr.*, 2018 WL 2994403, at *6 n.11 (distinguishing *Michaels* case). The three remaining cases were litigated by self-represented prisoners and likewise bear no weight. In two of those cases, the plaintiff, unlike Mr. Musgrove, never alleged having gender dysphoria. *See Williams v. Daley*, No. 18-55, 2018 WL 1937339 (E.D. Ky. Apr. 24, 2018); *Mitchell v. Wall*, No. 15-cv-108, 2015 WL 10936775 (W.D. Wis. Aug. 6, 2015). In *Gulley-Fernandez v. Wisconsin Dep't of Corr.*, No. 15-CV-995, 2015 WL 7777997 (E.D. Wis. Dec. 1, 2015), the plaintiff never alleged that gender dysphoria and gender identity disorder are distinct medical conditions, as Mr. Musgrove argues here, and so the court in that case summarily concluded in a single sentence, without any analysis whatsoever, that the plaintiff's gender dysphoria was excluded. *Id.* at *3.

[13] *Id.* ("While medical research in this area remains in its initial phases, Doe points to recent studies demonstrating that GD diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in utero development of dysphoria."). Notably, the plaintiff in *Parker* failed to allege that gender dysphoria results from a physical impairment. 307 F. Supp. 3d at 755.

Safer, MD, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (Feb. 2, 2015) (providing a review of data in support of a "fixed, biologic basis for gender identity" and concluding that "current data suggest a biologic etiology for transgender identity"). As the United States recently opined in the case of *Blatt v. Cabela's Retail, Inc.*, and as it has maintained in two additional cases:

> While no clear scientific consensus appears to exist regarding the *specific* origins of gender dysphoria (*i.e.*, whether it can be traced to neurological, genetic, or hormonal sources), the current research increasingly indicates that gender dysphoria has physiological or biological roots. . . . In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms "disability" and "physical impairment" be read broadly, the GID Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.

Sec. Statement of Int. of U.S. at 5-6, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822 (E.D. Pa. Nov. 16, 2015), ECF No. 67; Stat. of Int. of U.S. at 2-3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017), ECF No. 57; Stat. of Int. of U.S. at 2, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. July 17, 2017), ECF No. 49.[14]

Because Mr. Musgrove will show that gender dysphoria results from a physical impairment, there is no construction of the GIDs Exclusion that supports dismissal of his claim.

c. The GIDs exclusion is a transgender and sex-related classification that violates Equal Protection under the Fourteenth Amendment to the Constitution.

[14] *See* Duffy, *supra*, at 16-52, 16-76 (noting similarities between gender dysphoria and physical conditions with complex etiologies not fully understood by the medical community that are nevertheless protected by the ADA and Section 504, including polycystic ovary syndrome, cerebral palsy, strabismus, dyslexia, microvascular angina, stuttering, and Tourette syndrome—the latter two of which were once believed to be purely mental conditions).

Defendant's proposed construction of the GIDs Exclusion would preclude an ADA claim based on *any* medical condition associated with transgender people. For the reasons below, such a construction would create a facially discriminatory classification that violates equal protection and, under well-settled law, must therefore be avoided. *See Mass. Dep't of Corr.*, 2018 WL 2994403, at *7 (suggesting that the exclusion of gender dysphoria under the ADA and Section 504 would be "constitutionally suspect," particularly given "the pairing of gender identity disorders with conduct that is criminal or viewed by society as immoral or lewd"—raising "a serious question as to the light in which the drafters of this exclusion viewed transgender persons") (citing, *inter alia*, footnote 4 of *United States v. Carolene Prods Co.*, 304 U.S. 144 (1938)); *see also U.S. v. Stone*, 139 F.3d 822, 834 (11th Cir. 1998) ("The court must examine . . . at least, whether a reading of the statute reasonably supports two interpretations, one of which is a construction avoiding the likelihood of constitutional infirmity."); *accord. Crowell v. Benson,* 285 U.S. 22, 62 (1932).

By targeting transgender individuals for exclusion, Defendant's construction of the GIDs Exclusion constitutes a suspect/quasi-suspect classification under the United States Supreme Court's four-factor test and is therefore subject to strict or intermediate (collectively, "heightened scrutiny"). First, "transgender people have suffered a history of persecution and discrimination." *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *accord. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); *Doe v. Trump*, No. 17–1597, 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017) ("As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination."); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C.

2014) ("The hostility and discrimination that transgender individuals face in our society today is well-documented."). Second, an incongruence between a transgender person's assigned sex and gender identity "bears no relation to ability to contribute to society." *Adkins*, 143 F. Supp. 3d at 139; *Trump*, 2017 WL 4873042, at *27 ("[T]he Court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society"). Third, transgender people exhibit immutable distinguishing characteristics that are core to a person's identity. *Adkins*, 143 F. Supp. 3d at 139. And fourth, transgender people are a minority at 0.6% of the adult population and lack political power. *Id.* at 139; *Trump*, 2017 WL 4873042, at *27 ("[T]ransgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.").

A growing number of lower courts have applied heightened scrutiny to facially discriminatory transgender classifications based on these four factors. *E.g.*, *Karnoski v. Trump*, 2:17-cv-01297-MJP, 2018 WL 1784464 at *11 (W.D. Wash. Apr. 13, 2018) (applying strict scrutiny to transgender people as a protected class where defendants sought, *inter alia*, to deny transgender-related health care to military service members); *Stone v. Trump*, 280 F.Supp.3d 747, 768 (D. Md. 2017) (applying intermediate scrutiny to transgender people as a quasi-suspect class to find that military personnel denied coverage for surgery have an Equal Protection claim).

Apart from the four-factor test, Defendant's construction of the statute to exclude all transgender people warrants heightened scrutiny because a transgender classification is sex-based. A wall of established precedent recognizes that transgender-based classifications are sex-based—either because they reflect sex-stereotypes, or because the root of the discrimination is based on a person's change of sex or assigned sex at birth. *E.g.*, *Glenn v. Brumby*, 663 F.3d

1312, 1316-18 & n.5 (11th Cir. 2011) ("[S]ex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms.").

Additionally, the GIDs Exclusion fails under any level of review because it reflects animus toward a disfavored group. The legislative history associated with the GIDs Exclusion is replete with evidence of animus, including statements that erroneously equate medical conditions associated with being transgender with moral failure. *See, e.g.*, 135 Cong. Rec. S10734-02, 1989 WL 183115 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong) ("I could not imagine the [ADA] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content . . . ."); *id.* at S10765-01, 1989 WL 183216 (statement of Sen. Helms) ("What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business."); *see also id.* (statement of Sen. Rudman) ("In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand.").[15]

As the District of Massachusetts reasoned, such moral animus against transgender people is plainly insufficient to constitute a compelling, important, or even legitimate governmental interest. *See Mass. Dep't of Corr.*, 2018 WL 2994403, at *8; *see also Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (concluding that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest"—much less a compelling or important one)

[15] *See also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 574 (2016) ("Senators Armstrong, Helms, and Rudman repeatedly invoked immorality as the justification for the transgender exclusions, decrying the ADA's coverage of 'sexually deviant behavior.'").

(quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original). For that reason alone, Defendant's proposed construction cannot survive review.

G. Mr. Musgrove established a plausible case under the ADA, which does not require a safe-harbor provision allegation.

Mr. Musgrove alleged a prima facie case under the ADA. Mr. Musgrove alleged he has a disability, is a qualified individual, and was unlawfully subjected to discrimination because of his disability by being denied benefits because of his gender dysphoria. (Doc. 1 ¶¶ 75-81, 85-89.) No more is required. *Stewart v. Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1285 (11th Cir. 1997). The safe harbor provision is a defense, not an element of an ADA claim, so it need not be pled in a complaint. Mr. Musgrove did assert, however, that even if the Plan were consistent with Georgia law, "[t]he safe-harbor provision does not apply to the actions of BCBS … because there is no actuarial basis to price surgeries for gender dysphoria separately from any other type of surgery." (Doc. 1 ¶ 110.) But he safe-harbor provision is not an absolute defense as it cannot be subterfuge. 42 U.S.C. § 12201(c). Only the Plaintiff's allegations are assumed to be true, and on that basis, the claims must move forward because Mr. Musgrove has raised sufficient grounds that he can demonste that the exclusion is discrimination.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court deny Defendant's Motion to Dismiss Plaintiff's Complaint. If the Court is nonetheless inclined to grant any portion of Defendant's motion, Mr. Musgrove respectfully requests leave to amend his complaint.

Respectfully submitted this 21st day of September, 2018.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ATHENS DIVISION

SKYLER MUSGROVE, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, UNIVERSITY OF GEORGIA, JERE MOREHEAD, KARIN ELLIOTT, BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC., METROPOLITAN LIFE INSURANCE COMPANY, and METLIFE, INC., Defendants.	Civil Action No. 3:18-cv-00080-CDL JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed using the CM/ECF system, which will send electronic notification to all attorneys of record.

Respectfully submitted this 21st day of September, 2018.

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