

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

SKYLER MUSGROVE,)	Civil Action No.
)	
Plaintiff,)	3:18-cv-00080-CDL
)	
v.)	JURY TRIAL DEMANDED
)	
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.)	
)	
<u>Defendants.</u>)	

**PLAINTIFF’S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE
PARTIAL MOTION TO DISMISS ON BEHALF OF DEFENDANTS
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT**

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii-iv

INTRODUCTION1

ARGUMENT AND CITATION OF AUTHORITY2

I. *U.S. v. Georgia’s* “Actual Violation” Theory2

II. The Scope of Mr. Musgrove’s Rights Under the Equal Protection Clause8

III. Mr. Musgrove’s Complaint States an “Actual Violation” of the Equal
Protection Clause9

 A. Discrimination Based on Transgender Status10

 B. Discrimination Based on Sex12

 C. Discrimination Based on Disability14

IV. Mr. Musgrove’s ADA Claims Overcome Eleventh Amendment Immunity
Pursuant to *Georgia’s* “Actual Violation” Theory of Abrogation.15

CONCLUSION18

TABLE OF AUTHORITIES

CASES

<i>Adkins v. City of New York</i> , 143 F. Supp. 3d 134 (S.D.N.Y. 2015)	10, 11-12
<i>Alaska v. EEOC</i> , 564 F.3d 1062 (9th Cir. 2009)	3-4, 7, 16
<i>Association for Disabled Americans, Inc. v. Fla. Intern. University</i> , 405 F.3d 954 (11th Cir. 2005)	3
<i>Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016)	11
<i>Bd. of Trs. of the Univ. of Ala. v. Garrett</i> , 531 U.S. 356 (2001)	passim
<i>Black v. Wigington</i> , 811 F.3d 1259 (11th Cir. 2016)	5, 7, 18
<i>Brocksmith v. United States</i> , 99 A.3d 690 (D.C. 2014)	10
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	passim
<i>City of Cleburne v. Cleburne Living Ctr., Inc.</i> , 473 U.S. 432 (1985)	8, 15
<i>Evancho v. Pine-Richland Sch. Dist.</i> , No. 2:16-01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017)	11
<i>Fabian v. Hospital of Central Connecticut</i> , 172 F. Supp. 3d 509 (D. Conn. 2016)	11-12, 14
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)	8, 13-14
<i>Goodman v. Ray</i> , 449 F.3d 1152 (11th Cir. 2006) (per curiam)	6, 15
<i>Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.</i> , 633 F.3d 1297 (11th Cir. 2011)	3, 6, 16

Norsworthy v. Beard,
87 F. Supp. 3d 1104 (N.D. Cal. 2015)14

Rosa v. Park W Bank Trust Co.,
214 F.3d 213 (1st Cir. 2000)14

Schroer v. Billington,
577 F. Supp. 2d 293 (D.D.C. 2008)14

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000)14

Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 13-14

Tennessee v. Lane,
541 U.S. 509 (2004) 3-6

United States v. Georgia,
546 U.S. 151 (2006)passim

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,
858 F.3d 1034 (7th Cir. 2017) 10, 13-14

CONSTITUTIONAL PROVISIONS

U.S. CONST. amends. VIII, XIVpassim

STATUTES

42 U.S.C. § 19836, 15

42 U.S.C. §§ 12111-12134 passim

OTHER AUTHORITIES

Christine Michelle Duffy, *Federal Equal Protection, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE* ch. 15 (Christine Michelle Duffy ed., 2014)14

EEOC, *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*.....14

In response to this Court’s December 21, 2018 Order (ECF No. 48) (“Order”) directing the parties to provide supplemental briefing, Plaintiff Skyler Musgrove (“Mr. Musgrove” or “Plaintiff”), by and through the undersigned counsel, hereby files this supplemental brief in opposition to the Partial Motion to Dismiss on behalf of Defendants Board of Regents of the University System of Georgia, James Hull, Jere Morehead, and Karin Elliott, each in their official capacities. In support Plaintiff states as follows:

INTRODUCTION

As stated in the Plaintiff’s Opposition Brief, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), does not foreclose Plaintiff’s claim for monetary damages under Titles I and II of the ADA, 42 U.S.C. §§ 12111-12134. *See* Pl.’s Br. Opp. Bd. of Regents’ Part’l Mot. Dismiss at 7 & n.2, 8, 12-13 (ECF No. 44). *Garrett*, a 5-4 decision, explicitly declined to address whether plaintiffs “may sue their state employers for damages under Title II of the ADA.” 531 U.S. at 360 n.1; *see also id.* (“We are not disposed to decide the constitutional issue whether Title II . . . is appropriate legislation under § 5 of the Fourteenth Amendment . . .”). *Garrett* also did not—and, indeed, could not—address the availability of monetary damages under Titles I and II of the ADA based on the “actual violation” theory of abrogation articulated by a unanimous Court in the subsequent case of *United States v. Georgia*, 546 U.S. 151, 158 (2006). *See id.* at 157 (distinguishing *Garrett*).

This Court should deny the Defendants’ Partial Motion to Dismiss and hold that Mr. Musgrove’s claims for money damages under Titles I and II of the ADA are not barred by Eleventh Amendment immunity pursuant to *Georgia*’s “actual violation” theory of abrogation or, alternatively, that Mr. Musgrove’s claim for money damages under Title II of the ADA is not barred by Eleventh Amendment immunity pursuant to the congruence-and-proportionality theory of abrogation set forth in *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997). *See* Pl.’s Br. Opp. Bd. of Regents’ Part’l Mot. Dismiss at 3-5. As directed by this Court, this supplemental brief addresses only the former argument. Specifically, this brief begins with a discussion of *Georgia*’s “actual violation” theory before responding to the three specific questions enumerated in the Order: “what the scope of Musgrove’s rights are under the Equal Protection Clause, whether Musgrove’s Complaint states an ‘actual violation’ of the Clause and, if so, whether his ADA claims overcome the Eleventh Amendment pursuant to the ‘actual violation’ rationale.” Order at 3.

ARGUMENT AND CITATION OF AUTHORITY

I. *U.S. v. Georgia*’s “Actual Violation” Theory

According to the Eleventh Circuit:

It is well established that § 5 grants Congress the authority to abrogate state sovereign immunity for violations of the Fourteenth Amendment. *United States v. Georgia*, 546 U.S. 151, 158 (2006). There are two ways by which Congress may rely upon its § 5 power to

abrogate the States’ sovereign immunity. First, Congress may “creat[e] private remedies against the States for *actual* violations of [the Fourteenth Amendment].” *Georgia*, 546 U.S. at 158. . . . Second, Congress may pass prophylactic “legislation which deters or remedies [Fourteenth Amendment] violations . . . even if in the process it prohibits conduct which is not itself unconstitutional,” so long as “there [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997).

Nat’l Ass’n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1315–16 (11th Cir. 2011) (emphasis in original); *see also* Pl.’s Br. Opp. Bd. of Regents’ Part’l Mot. Dismiss at 4–5 (discussing *Georgia* and *City of Boerne* theories of abrogation).

The tripartite congruence-and-proportionality test set forth in *City of Boerne*, *Garrett*, and *Tennessee v. Lane*¹ “applies only to prophylactic legislation; it doesn’t apply to a direct remedy for unconstitutional conduct.” *Alaska v. EEOC*, 564 F.3d

¹ As stated in the Plaintiff’s Brief in Opposition to the Board of Regents’ Partial Motion to Dismiss, “[a]ccording to the Eleventh Circuit, the congruence and proportionality inquiry set forth in *Boerne* requires a determination of: ‘(1) the constitutional right or rights that Congress sought to enforce when it enacted the ADA, (2) whether there was a history of unconstitutional discrimination to support Congress’s determination that prophylactic legislation was necessary, and (3) whether Title II is an appropriate response to this history and pattern of unequal treatment.’” Pl.’s Br. Opp. Bd. of Regents’ Part’l Mot. Dismiss at 9 (quoting *Association for Disabled Americans, Inc. v. Fla. Intern. University*, 405 F.3d 954, 957 (11th Cir. 2005) (citing *Garrett* and *City of Boerne*)). As stated above, because this Court has directed the parties to provide supplemental briefing regarding whether Mr. Musgrove’s ADA claims overcome Eleventh Amendment immunity under *Georgia*’s “actual violation” theory of abrogation—not *City of Boerne*’s tripartite congruence-and-proportionality theory—this supplemental brief does not address the latter theory of abrogation.

1062, 1067–68 (9th Cir. 2009) (citing *City of Boerne* and *Garrett*); *see also Tennessee v. Lane*, 541 U.S. 509, 522-33 (2004) (applying “*Boerne* test”). Therefore, in determining whether state sovereign immunity has been abrogated, a court will

consider first whether [plaintiffs] allege actual violations of the Fourteenth Amendment by the [State]. If they do, [the court] needn’t decide whether [the statute] is valid prophylactic legislation. As *Georgia* indicates by its method, when legislation provides a direct remedy for unconstitutional conduct, the *Boerne* inquiry is superfluous.

Alaska, 564 F.3d at 1068.

In *U.S. v. Georgia*, the plaintiff, a state prisoner, filed a *pro se* complaint challenging the conditions of his confinement under both Title II of the ADA and the Constitution. 546 U.S. at 154–55. The Southern District of Georgia dismissed the plaintiff’s constitutional claims as insufficiently pled. *Id.* at 155. Relying on the Supreme Court’s decision in *Garrett*, the district court also “granted summary judgment to the state defendants on [the plaintiff’s] Title II claims for money damages, holding that those claims were barred by sovereign immunity.” *Id.* On appeal, the Eleventh Circuit affirmed the district court’s determination as to the Title II claims, but reversed the district court’s ruling on the constitutional claims, finding that the plaintiff “had alleged actual violations of the Eighth Amendment by state agents.” *Id.* at 156.

According to the Supreme Court, the Eleventh Circuit erred in holding that sovereign immunity barred the plaintiff's Title II claims for money damages. *Id.* at 159. The Court noted that, while there was disagreement “regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amendment” pursuant to *City of Boerne, Garrett, and Lane*,

no one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. . . . Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. The Eleventh Circuit erred in dismissing those of [plaintiff’s] Title II claims that were based on such unconstitutional conduct.

Georgia, 546 U.S. at 158-59 (emphasis in original).

Unlike the congruence-and-proportionality test at issue in *City of Boerne, Garrett, and Lane*, *Georgia*’s “actual violation” test is straightforward: Is the plaintiff’s claim for money damages against the State under the ADA based on conduct that “independently violated the provisions of § 1 of the Fourteenth Amendment”? *Georgia*, 546 U.S. at 158. This is not a difficult test to meet. *See Black v. Wigington*, 811 F.3d 1259, 1269 (11th Cir. 2016) (“[A]brogation is a valid exercise of Congress’s authority under section 5 of the Fourteenth Amendment when a plaintiff complains about conduct that violates both Title II and the Fourteenth Amendment.”) (citing *Georgia*); *see also id.* (“easily answer[ing] in the affirmative”

the question of whether “Congress abrogated sovereign immunity when a plaintiff alleges a simultaneous violation of Title II and the Equal Protection Clause”).

Accordingly, in order to satisfy *Georgia*’s “actual violation” test, the Eleventh Circuit requires only that the plaintiff “specify . . . in separate counts (1) what specific conduct he alleges violates the . . . Fourteenth Amendment[] and is actionable under 42 U.S.C. § 1983; [and] (2) to what extent the alleged conduct underlying [the plaintiff’s] constitutional claims also violates” the ADA. *Goodman v. Ray*, 449 F.3d 1152, 1153 (11th Cir. 2006) (per curiam), *on remand from U.S. v. Georgia*, 546 U.S. 151 (2006).² This test is met so long as the conduct alleged to violate the Fourteenth Amendment is identical to—or “based, at least in large part, on”—the conduct alleged to violate the ADA. *Georgia*, 546 U.S. at 157; *see also Nat’l Ass’n of Bds. of Pharm.*, 633 F.3d at 1316 n.32 (“In *Georgia*, the identical conduct that violated the Americans with Disabilities Act also violated the Eighth Amendment. . . . Here, [by contrast,] the action necessary to infringe [the statute] is

² In *Goodman*, the Eleventh Circuit also required the district court to determine, *inter alia*, “what specific conduct, if any, allegedly violates Title II of the ADA *but does not violate* the Eighth and Fourteenth Amendments.” 449 F.3d at 1153 (emphasis added); *see also Georgia*, 546 U.S. at 159 (remanding for determination of whether, “insofar as such misconduct violated Title II *but did not violate* the Fourteenth Amendment, . . . Congress’s purported abrogation of sovereign immunity as to that class of conduct is *nevertheless* valid”) (emphasis added). This requirement does not apply to *Georgia*’s “actual violation” test, but instead applies to the *City of Boerne/Garrett/Lane* congruence-and-proportionality test, which is not discussed in this brief. *See* Pl.’s Br. Opp. Bd. Regents’ Part’l Mot. Dismiss at 8-13 (discussing congruence-and-proportionality test).

arguably distinct from the conduct constituting [the plaintiff's constitutional] claim.”).

Importantly, as the Eleventh Circuit and other circuit courts have made clear, *Georgia* does not require a court to reach the *merits* of the Fourteenth Amendment claim. Whether the State “*actually* violate[s] the Equal Protection Clause” is irrelevant to the sovereign immunity analysis at this stage of the proceedings; what matters at this stage is that the plaintiff has alleged conduct that, if proven, *would* violate the Equal Protection Clause. *Black*, 811 F.3d at 1270 (distinguishing *Georgia*'s sovereign immunity analysis from a decision on the merits) (emphasis in original); *see also Alaska*, 564 F.3d at 1068 (“The merits of these claims (and [the State's] various defenses) aren't before us; we consider only whether each claim alleges conduct that, if it occurred and wasn't justified by a valid defense, would have violated the Fourteenth Amendment.”). According to the Eleventh Circuit, if a court concludes that Congress abrogated sovereign immunity for the type of claim at issue, “a plaintiff who alleges that type of claim has successfully invoked [the court's] jurisdiction unless his allegations are ‘immaterial and made solely for purpose of obtaining jurisdiction’ or ‘wholly insubstantial and frivolous.’ This standard is a ‘low bar.’” *Black*, 811 F.3d at 1270 (citations omitted); *see also id.* (holding that the state was “not entitled to sovereign immunity, whether or not the [plaintiffs'] argument under the Equal Protection Clause should have been dismissed

at summary judgment,” because the plaintiffs’ argument “was not wholly insubstantial or frivolous.”).

II. The Scope of Mr. Musgrove’s Rights Under the Equal Protection Clause

According to the Eleventh Circuit, “[t]he Equal Protection Clause requires the State to treat all persons similarly situated alike or, conversely, to avoid all classifications that are ‘arbitrary or irrational’ and those that reflect ‘a bare . . . desire to harm a politically unpopular group.’” *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985)). Although “[s]tates are presumed to act lawfully, and therefore state action is generally upheld if it is rationally related to a legitimate governmental purpose[,] . . . more than a rational basis”—that is, “heightened scrutiny”—“is required in certain circumstances.” *Glenn*, 663 F.3d at 1315, 1319-21. No matter what level of scrutiny is applied, the healthcare policy adopted by Defendants violates equal protection by treating Mr. Musgrove differently than other similarly situated individuals based on his transgender status, sex, and disability for no rational reason—much less an important or compelling one. *See* Compl. ¶¶ 156-63 (Seventh Cause of Action – Disability), 164-69 (Eighth Cause of Action – Sex), 170-73 (Ninth Cause of Action – Transgender Status).

III. Mr. Musgrove’s Complaint States an “Actual Violation” of the Equal Protection Clause

Mr. Musgrove is a transgender man; his “external sex characteristics at birth do not match [his] brain sex or psychological sex—the innate, internal sense of being male or female, that all people have.” Compl. ¶ 31. Mr. Musgrove also has gender dysphoria, which is

a serious medical condition and disability that arises when the sex of the brain develops on a divergent path from the external sex characteristics of the body. A well-established medical consensus finds that hormonal and surgical treatment to align external sex characteristics with the brain is successful in alleviating gender dysphoria. Accordingly, such medically necessary treatments are widely covered under public and private health insurance plans.

Id. ¶ 3; *see also id.* ¶¶ 29-39. The healthcare policy adopted by Defendants expressly excludes from coverage certain medically necessary procedures for treating gender dysphoria—including hormone therapy and surgery—while covering these same procedures for people without gender dysphoria. *Id.* ¶ 44 (discussing healthcare policy’s exclusion of “Sex Change – Services or supplies for a sex change and/or the reversal of a sex change,” and “Sex Change Drugs – Drugs for sex change surgery”); *see also id.* ¶¶ 36-39, 46-53, 61 (discussing Ms. Musgrove’s medically necessary care). The healthcare policy excludes these procedures “not because the treatment isn’t medically necessary or widely recognized as effective, but solely due to the historical stigmatization of his medical condition.” *Id.* ¶ 2. As discussed below, Mr. Musgrove has stated a claim for an actual violation of the Equal Protection Clause

by alleging that the Defendants' healthcare policy discriminates against him based on his transgender status, sex, and disability for no rational, important, or compelling reason. *See id.* ¶¶ 156-73.

A. Discrimination Based on Transgender Status

Mr. Musgrove alleges that Defendants have discriminated against him on the basis of his transgender status in violation of equal protection by excluding from coverage medically necessary care for gender dysphoria—a condition experienced only by transgender people—while covering medically necessary care for conditions that are not associated with transgender people. *Id.* ¶¶ 171-72; *see also id.* ¶¶ 31-32, 37-38 (discussing medical treatment for gender dysphoria, a condition that only transgender people experience).

Like racial discrimination, discrimination on the basis of transgender status constitutes a suspect—or, at least, quasi-suspect—classification under the Supreme Court's four-factor test and is therefore subject to heightened scrutiny. *Id.* ¶¶ 171-72. Specifically, “transgender people have suffered a history of persecution and discrimination”³; an incongruence between a transgender person's assigned sex and

³ *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *see, e.g., 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.”); *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.”).

gender identity “bears no relation to ability to contribute to society”⁴; transgender people exhibit immutable distinguishing characteristics that are core to a person’s identity⁵; and transgender people are a minority at 0.6% of the adult population and lack political power.⁶ See Compl. ¶ 172 (“Discrimination on the basis of transgender status is suspect and demands a heightened level of scrutiny” because “Defendants’ actions purposefully single out a minority group (transgender people) that historically have suffered discriminatory treatment and been relegated to a position of political powerlessness solely on the basis of stereotypes and myths regarding their transgender status—a characteristic that bears no relation to their ability to contribute to society and is immutable in that it is central to their core identity.”). A substantial number of lower courts have applied heightened scrutiny to transgender classifications based on these four factors.⁷

⁴ *Adkins*, 143 F. Supp. 3d at 139; accord. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016).

⁵ *Adkins*, 143 F. Supp. 3d at 139; see also *Bd. of Educ.*, 208 F. Supp. 3d at 874 (“[T]ransgender people have immutable [and] distinguishing characteristics that define them as a discrete group”) (citation omitted).

⁶ *Adkins*, 143 F. Supp. 3d at 139; see also *Bd. of Educ.*, 208 F. Supp. 3d at 874 (“[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group.”).

⁷ See, e.g., *Adkins*, 143 F. Supp. 3d at 139-40 (applying “intermediate scrutiny” because “transgender people are a quasi-suspect class”); accord. *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 WL 770619, at *13 (W.D. Pa. Feb. 27, 2017) (“heightened intermediate scrutiny standard”); *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874 (“heightened scrutiny”); cf. *Fabian v.*

B. Discrimination Based on Sex

Mr. Musgrove also alleges that the Defendants' exclusion of medically necessary care for gender dysphoria, while covering medically necessary care for other conditions, violates equal protection because it discriminates against him on the basis of sex in two ways. *See* Compl. ¶¶ 165-68. First, the Defendants' exclusion discriminates against Mr. Musgrove based on his nonconformance with sex stereotypes associated with both his natal (birth) sex as well as the sex with which he identifies. *See id.* ¶ 167 (stating that Defendants' exclusion of medical treatments "undertaken for the purpose of treating gender dysphoria, a medical condition that applies only to transgender people—i.e., those whose affirmed sex does not align with their assigned sex at birth"—necessarily "discriminates based on sex"); *see also* Pl.'s Br. Opp. BCBS's Mot Dismiss at 4-6 (ECF No. 32) (discussing discrimination under Title VII). For example, a female-to-male transgender person who undergoes chest surgery to have his breasts removed defies stereotypical assumptions about his natal sex—i.e., that women do not typically remove their breasts. A female-to-male transgender person also defies stereotypical assumptions about the sex with which he identifies—i.e., that men do not typically undergo chest surgery to remove

Hospital of Central Connecticut, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016) (citing *Adkins* for proposition that "transgender people are a 'quasi-suspect' class and therefore . . . disparate treatment alleged to violate the Equal Protection Clause is subject to the elevated 'intermediate scrutiny' standard").

breasts. Accordingly, transgender classifications like the one at issue here necessarily implicate stereotypical assumptions about sex.

Second, and, more straightforwardly, the Defendants' exclusion discriminates against Mr. Musgrove based on sex because it prohibits coverage for medical treatments that *change* sex characteristics. *See id.* ¶ 167 (stating that Defendants' exclusion of medical treatments that alter "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"—necessarily "discriminates based on sex"); *see also* Pl.'s Br. Opp. BCBS's Mot Dismiss at 6-7 (discussing discrimination under Title VII). A wall of established precedent in the Eleventh Circuit and elsewhere recognizes that transgender discrimination, like the healthcare exclusion at issue in this case, is sex-based discrimination entitled to heightened scrutiny under the Equal Protection Clause—either because it reflects sex-stereotypes, or because the root of the discrimination is based on a person's change of sex, a person's natal sex, or the sex with which a person identifies.⁸

⁸ *See, e.g., Whitaker*, 858 F.3d at 1051 (holding that school district's restroom policy that discriminated against transgender students was "inherently based upon a sex-classification" in violation of equal protection); *Glenn*, 663 F.3d at 1317-18 & n.5, 1321 (stating that "sex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms," and holding that employer's termination of transgender employee violated equal protection); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that transgender employee's "claims of gender discrimination . . . easily

C. Discrimination Based on Disability

Lastly, Mr. Musgrove alleges that the Defendants' exclusion of coverage of medically necessary care for gender dysphoria, while covering medically necessary care for other conditions, violates equal protection because it discriminates against

constitute a claim of sex discrimination grounded in the Equal Protection Clause”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (“[D]iscrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny.”).

The Eleventh Circuit and numerous circuit and district courts have similarly held that discrimination against transgender people is sex-based discrimination pursuant to *statute*. *See, e.g., Whitaker*, 858 F.3d at 1049 (holding that transgender discrimination was sex-based discrimination under Title IX); *Glenn*, 663 F.3d at 1321 (finding that employer's termination of transgender employee because of gender-nonconformity was sex discrimination under Title VII); *accord. Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park W Bank Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (Title VII); *Fabian*, 172 F. Supp. 3d at 527 (Title VII); *see also* EEOC, *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (compiling federal court decisions holding that discrimination against transgender people is sex-based discrimination). These statutory sex discrimination cases are significant because they inform the equal protection analysis. *See, e.g., Glenn*, 663 F.3d at 1316-18 (relying on Title VII case law in holding that discrimination against transgender employee was sex discrimination in violation of Equal Protection Clause); *accord Smith*, 378 F.3d at 577; *see also* Christine Michelle Duffy, *Federal Equal Protection, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE* 15-5 (Christine Michelle Duffy ed., 2014) (“Constitutional discrimination claims by LGBT employees often rely significantly on case law interpreting federal statutes that prohibit sex discrimination, including Title VII.”).

Mr. Musgrove on the basis of disability. Compl. ¶¶ 158-59. According to Mr. Musgrove, the Defendants’ exclusion of coverage for these procedures, which “are widely covered under public and private health insurance plans,” is “solely due to the historical stigmatization of [gender dysphoria].” *Id.* ¶¶ 2-3. As the Supreme Court stated in *Cleburne*, discrimination against people with disabilities that “appears to rest on an irrational prejudice” violates equal protection. 473 U.S. at 450 (invalidating a local zoning ordinance because it required a special use permit for group homes housing people with intellectual disabilities but not for other multi-person dwellings); *see id.* at 448 (discussing “the negative attitude of the majority of property owners” and “[unsubstantiated] fears of elderly residents of the neighborhood” regarding people with intellectual disabilities).

IV. Mr. Musgrove’s ADA Claims Overcome Eleventh Amendment Immunity Pursuant to *Georgia*’s “Actual Violation” Theory of Abrogation

Mr. Musgrove’s ADA claims easily overcome Eleventh Amendment immunity. As discussed in section I above, in order to overcome Eleventh Amendment immunity pursuant to *Georgia*’s “actual violation” test, Mr. Musgrove must “specify . . . in separate counts (1) what specific conduct he alleges violates the . . . Fourteenth Amendment[] and is actionable under 42 U.S.C. § 1983; [and] (2) to what extent the alleged conduct underlying [the plaintiff’s] constitutional claims also violates” the ADA. *Goodman*, 449 F.3d at 1153 (citing *Georgia*).

As discussed in sections II and III above, Mr. Musgrove satisfies the first part of this test: he has stated a claim for an actual violation of the Equal Protection Clause by alleging that the Defendants' exclusion of coverage of medically necessary care for gender dysphoria discriminates against him based on transgender status, sex, and disability for no rational, important, or compelling reason. *Compare Alaska*, 564 F.3d at 1068-71 (holding that employees' statutory claims were not barred by Eleventh Amendment immunity because employees adequately alleged actual violations of Fourteenth Amendment), *with Nat'l Ass'n of Bds. of Pharm.*, 633 F.3d at 1319 (holding that plaintiff's statutory claim was barred by Eleventh Amendment immunity because the plaintiff "failed to allege" a constitutional violation).

Mr. Musgrove also satisfies the second part of *Georgia's* "actual violation" test. Specifically, he has alleged that the same discriminatory conduct that violates equal protection—i.e., the Defendants' exclusion of coverage of medically necessary care for gender dysphoria—also violates Titles I and II of the ADA. *See* Compl. ¶¶ 77, 97 (alleging that Defendants discriminated in violation of Titles I and II of the ADA by (a) "adopting a healthcare policy that excludes treatment for gender dysphoria, and participating in a contractual or other arrangement or relationship with BCBS and MetLife that has the effect of subjecting Mr. Musgrove to discrimination" prohibited by the ADA; (b) "[a]dopting a healthcare policy that has

the effect of discrimination on the basis of gender dysphoria, or that screens out or tends to screen out individuals with gender dysphoria”; and (c) “[f]ailing to reasonably accommodate Mr. Musgrove by modifying the healthcare policy to include treatment for gender dysphoria”).

Whether the Defendants *actually* violated equal protection is irrelevant to the sovereign immunity analysis at this stage of the proceedings; what matters for purposes of this analysis is that Mr. Musgrove has alleged conduct that, if it occurred and if it were not justified by a valid defense, *would* have violated equal protection. He has done so. Notably, in their Partial Motion to Dismiss, the Defendants do not contest that Mr. Musgrove has stated a claim for a violation of equal protection, nor that the same conduct that gave rise to the equal protection claim also gave rise to Mr. Musgrove’s ADA claims. *See* Defs.’ Mot. Dismiss at 2 (ECF No. 37); *see also Georgia*, 546 U.S. at 157 (reversing Eleventh Circuit’s holding that plaintiff’s ADA claims were barred by sovereign immunity, and observing that the State did not contest that the plaintiff “had alleged actual violations of the Eighth Amendment,” nor did the State “dispute . . . that this same conduct that violated the Eighth Amendment also violated” the ADA).⁹

⁹ In their reply brief, Defendants erroneously attempt to distinguish *Georgia*, arguing that *Georgia*’s holding is limited to alleged violations of the Eighth Amendment and Due Process Clause of the Fourteenth Amendment, and therefore does not apply to alleged violations of the Equal Protection Clause. *See* Defs.’

CONCLUSION

For the reasons discussed herein and in the Plaintiff’s Brief in Opposition to the Board of Regents’ Partial Motion Dismiss, Mr. Musgrove’s ADA claims are not barred by Eleventh Amendment immunity pursuant to, *inter alia*, *Georgia*’s “actual violation” theory of abrogation.

Respectfully submitted this 23rd day of January, 2019.

/s/ Kevin M. Barry
Kevin M. Barry (*Pro hac vice*)
Quinnipiac University School of Law
Legal Clinic
275 Mount Carmel Ave.
Hamden, Connecticut 06518
T: (203) 582-3238
F: (203) 582-3237
legalclinic@quinnipiac.edu

Reply Br. at 5-6 (ECF No. 46). There simply is no such limitation; the Court in *Georgia* explicitly held that “insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates *the Fourteenth Amendment*”—including its Equal Protection Clause—“Title II validly abrogates state sovereign immunity.” *Georgia*, 546 U.S. at 159 (emphasis added); *see, e.g., Black*, 811 F.3d at 1270 (“Congress abrogated sovereign immunity when a plaintiff alleges a simultaneous violation of Title II and the Equal Protection Clause”) (citing *Georgia*).

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

SKYLER MUSGROVE,)	Civil Action No.
)	
Plaintiff,)	3:18-cv-00080-CDL
)	
v.)	JURY TRIAL DEMANDED
)	
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.)	
)	
<u>Defendants.</u>)	

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 23rd day of January, 2019.

/s/ Kevin M. Barry
 Kevin M. Barry (*Pro Hac Vice*)
 Connecticut Bar No. 429652