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

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| SKYLER MUSGROVE, | * | |
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| Plaintiff, | * | |
| | * | CIVIL ACTION FILE NO. |
| v. | * | 3:18-CV-00080-CDL |
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| THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al*., | * | |
| | * | |
| Defendants. | * | |

**SUPPLEMENTAL BRIEF IN SUPPORT OF 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**

COME NOW the Board of Regents of the University System of Georgia, James Hull, Jere Morehead, and Karin Elliott, each in their official capacities ("Defendants"), by and through counsel, the Attorney General of the State of Georgia, and file this Supplemental Brief in support of their Partial Motion to Dismiss, as directed by the Court's December 21, 2018 Order. (Doc. 48).

## I. INTRODUCTION

On October 12, 2018, Defendants filed a Partial Motion to Dismiss, arguing in relevant part that they are entitled to Eleventh Amendment immunity from Plaintiff's claim for monetary damages under Title I and Title II of the Americans

with Disabilities Act ("ADA"). (Doc. 37, 37-1). Plaintiff responded on November 9, 2018, asserting that "Eleventh Amendment immunity does not bar the Plaintiff's claim for monetary damages under Titles I or II of the ADA because the Plaintiff has alleged an independent violation of the Fourteenth Amendment." (Doc. 44, pp. 5-6, citing *United States v. Georgia*, 546 546 U.S. 151, 158 (2006) for the holding that Title II of the ADA validly abrogated state sovereign immunity for conduct that "actually violates" § 1 of the Fourteenth Amendment in addition to the ADA). Defendants submitted their reply on December 7, 2018. (Doc. 46).

On December 21, 2018, the Court directed the parties to file supplemental briefs on the issue of "whether Musgrove's ADA claims overcome Eleventh Amendment immunity under the 'actual violation' theory," specifically addressing: the scope of Musgrove's rights under the Equal Protection Clause; whether his 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." (Doc. 48, pp. 2-3).

## II. ARGUMENT AND CITATION OF AUTHORITY

Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v.*

*Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). Congress unequivocally expressed its intent to abrogate the States' sovereign immunity under the ADA. *Georgia*, 546 U.S. at 154; *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 957 (11th Cir. 2005) (citing 42 U.S.C. § 12202). The issue here is whether Congress acted pursuant to a valid grant of constitutional authority in doing so.

"Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting 'appropriate legislation.'" *Garrett*, 531 U.S. at 365 (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997)). § 5 grants Congress the power to enforce the provisions of the Fourteenth Amendment by creating private remedies against the States for "*actual* violations" of those provisions. *Georgia*, 546 U.S. at 158 (emphasis in original); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents*, 633 F.3d 1297, 1315-1316 (11th Cir. 2011). "Thus, insofar as Title II [of the ADA] 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," *Georgia*, 546 U.S. at 159 (emphasis in original). In other words, Title II validly abrogates sovereign immunity for conduct that is in itself unconstitutional. As shown below, the ADA does not validly abrogate sovereign immunity with respect to the claims at issue here because an exclusion in an employer-provided health

insurance policy cannot constitute an actual violation of the Fourteenth Amendment.

**A. The scope of Plaintiff's rights under the Equal Protection Clause.**

Plaintiff claims that the insurance policy exclusion violates his rights under the Equal Protection Clause because it is disability discrimination. However, the scope of Plaintiff's general constitutional right to be free from irrational disability discrimination is substantially narrowed by the low level of scrutiny applied to such claims.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985). "Where no fundamental right or suspect class is implicated, courts evaluate equal protection claims under the rational basis test." *Morrissey v. United States*, 871 F.3d 1260, 1268 (11th Cir. 2017).

Claims of disability discrimination under the Equal Protection Clause are subject to rational-basis review. *Garrett*, 531 U.S. at 366; *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1305 (N.D. Ga. 2010) (finding that rational basis scrutiny is applied to Equal Protection claims based on disability). Thus, classifications based

on disability violate the Equal Protection Clause "if they lack a rational relationship to a legitimate governmental purpose."[1] *Lane*, 541 U.S. at 522.

As to the standard for rational basis review, the Supreme Court has explained:

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

*Heller v. Doe*, 509 U.S. 312, 319-321 (1993) (internal citations and quotation marks omitted). *See also Garrett*, 531 U.S. at 366-367.

The Eleventh Circuit has accordingly found that, under rational basis review, "courts apply 'a strong presumption of validity,' and narrowly inquire if the 'enacting government body *could* have been pursuing' 'a legitimate government purpose.'" *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018) (quoting

[1] Title I and Title II of the ADA seek to enforce the Equal Protection Clause's prohibition on "irrational disability discrimination." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). *See also Association for Disabled Americans, Inc. v. Fla. Intern. University*, 405 F.3d 954, 957 (2005); *Gaylor v. Ga. Dep't of Natural Res.*, 2012 U.S. Dist. LEXIS 115019, *9 (N.D. Ga. 2012).

*Heller*, 509 U.S. at 319 and *United States v. Ferreira*, 275 F.3d 1020, 1026 (11th Cir. 2001)) (emphasis in original)). This analysis occurs "entirely in the abstract" because the actual motivations "are entirely irrelevant.'" *Id.* (internal citations and quotations omitted).

In determining whether there is any reasonably conceivable basis for a classification, the inquiry "may be based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320 (internal citations and quotation marks omitted). "Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Garrett*, 531 U.S. at 367 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Meaning, the State has no obligation to produce evidence to sustain the rationality of a classification; rather, the complaining party has the burden to negate every conceivable basis which might support a rational basis for the governmental action. *Castillo*, 899 F.3d at 1213 (quoting *Heller*, 509 U.S. at 320); *Harris v. Atlanta Indep. Sch. System*, 2009 U.S. Dist. LEXIS 139667, *31-32 (N.D. Ga. 2009).

Thus, under the rational basis level of scrutiny, Plaintiff's rights under the Equal Protection Clause in this context are limited in scope and rest on his ability to meet his burden.

**B. Plaintiff's claims for monetary damages under the ADA are barred by Eleventh Amendment immunity because his Complaint does not state an "actual violation" of the Equal Protection Clause.**

For purposes of determining whether Congress has properly abrogated immunity in this context, the issue is whether an exclusion in an employer-provided health insurance plan could also independently violate the Equal Protection Clause of the Fourteenth Amendment. Given the narrow scope of Plaintiff's rights under the Equal Protection Clause, as discussed *supra*, such an exclusion does not rise to an actual violation of his constitutional rights.

Again, under rational-basis review, the inquiry is whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Heller*, 509 U.S. at 319-321. Curtailing costs is a conceivable rational basis for an exclusion in a health insurance policy. *See Garrett*, 531 U.S. at 372 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees); *Thompson v. Roberson*, 2000 U.S. Dist. LEXIS 20605, *27-28 (S.D. Ind. December 4, 2000) (holding that

Indiana's desire to control its costs and to control the expenditure of public funds is a rational basis for its classification scheme limiting disability benefits for mental disorders).

Indeed, this rational basis is specifically contemplated by the ADA. The ADA provides that insurers and other entitles that administer benefit plans are not prohibited 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)(1). *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3rd Cir. 1998) (holding that the "ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA"). Thus, not only are cost considerations permitted by the ADA, this is also a conceivable rational basis for the health insurance plan exclusion.

Plaintiff bears the burden to negate any reasonably conceivable state of facts that could provide a rational basis for the exclusion in the health insurance plan at issue. He cannot do so, and therefore fails to adequately allege a claim under the Equal Protection Clause.

Moreover, the fact that the ADA and its regulations specifically address health insurance policies is further evidence that the alleged right in this case arises

out of the ADA itself and not from the constitution. In *Klingler v. Dep't of Revenue*, the Eighth Circuit addressed Missouri's assessment of an annual $ 2 fee for the use of a removable parking placard for disabled individuals. *Id.*, 455 F.3d 888, 894 (2006). The Court held that the placard fee violated the ADA and its related regulation prohibiting discriminatory surcharges, but found that the claim for monetary damages was barred because Title II of the ADA did not validly abrogate State sovereign immunity. *Id.*, at 891. *Klinger* examined the monetary damages issue in light of *Georgia* and concluded that it did not alter the outcome of the case for the reasons explained herein. *Klingler*, 455 F.3d at 891.

The Eighth Circuit began by identifying "the precise nature of the claims before us" and determined that the fee "implicates only the fourteenth amendment's guarantee of equal protection," which is subject to rational basis review. *Klingler*, 455 F.3d, at 893 (citing C*ity of Cleburne.*, 473 U.S. at 446). "Under this deferential standard, the state's placard program is constitutional so long as it is 'rationally related to a legitimate governmental purpose." *Id.* Although the fee was found to be discriminatory and in violation of the ADA, the Eighth Circuit held that it "does not violate the Constitution," as the State "can reasonably collect the fee to pay for the cost of the program, to discourage

frivolous applications, and to control against the fraudulent use of disabled parking spaces." *Id*.

The Eighth Circuit held: "We do not think that the rights and remedies that Title II creates are an appropriate means of enforcement of the equal protection rights of disabled people." *Id*., at 896. The Court found that the placard fee "is certainly not unconstitutional," reasoning: "The fact that the ADA's scheme forbids it [the placard fee] convinces us that, rather than seeking to enforce the constitution's guarantee against irrational discrimination based on disability, Congress was seeking to redefine the scope of protection offered by the Constitution." *Id*., at 896-897. As a result, the Court found, the Eleventh Amendment barred the plaintiffs' claim for monetary relief because Title II of the ADA is not an appropriate exercise of Congress's power under § 5 for claims involving rational discrimination based on disability. *Id*., at 897.

The same reasoning applies here. The ADA specifically applies to employer provided health insurance plans. *See* 42 U.S.C. § 12201(c). The regulations governing the ADA also provide that it is unlawful for an employer to discriminate on the basis of disability in regard to "[f]ringe benefits available by virtue of employment, whether or not administered by the covered entity" 29 C.F.R. § 1630.4(a)(vi).

As the *Klingler* court found, the fact that the ADA specifically addresses health insurance policies evidences that, "rather than seeking to enforce the constitution's guarantee against irrational discrimination based on disability, Congress was seeking to redefine the scope of protection offered by the Constitution." *Id*., at 896-897. In fact, "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational….If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 367-368.

Thus, while an exclusion in an employer provided health insurance policy may potentially be challenged under the ADA, this does not mean that it necessarily invokes constitutional protections. To find otherwise would mean that every exclusion in an employer-provided health insurance policy would be subject to constitutional challenges. For instance, obese individuals could challenge, *on constitutional grounds*, the exclusion for bariatric surgery (Doc. 1-2, p. 56, ¶ 54); and hearing impaired individuals could challenge, *on constitutional grounds*, the exclusion for hearing aids. (*Id*., p. 54, ¶ 26). The implications of such a finding are far reaching and demonstrate that this view of the protections afforded by the Equal Protection Clause is entirely too broad.

Because Plaintiff cannot negate all conceivable justifications for the exclusion (of which cost containment is but one), and because the ADA and its application to these insurance plans seeks to redefine the scope of constitutional rights rather than enforce them, health insurance policy exclusions cannot amount to constitutional violations. As a result, Plaintiff's ADA claims do not overcome the Eleventh Amendment pursuant to the "actual violation" rationale set out by the Supreme Court in *Georgia*, as there can be no finding of an "actual violation" of the Equal Protection Clause in this case. While Plaintiff may obtain declaratory and injunctive relief under the ADA, his claims for monetary damages are barred by Eleventh Amendment immunity.

## III. CONCLUSION

For all of the reasons herein and in Defendants' Partial Motion to Dismiss, Defendants are entitled to Eleventh Amendment immunity from Plaintiff's claim for monetary damages under Title I and Title II of the ADA.

Respectfully submitted this 23rd day of January, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2019, I electronically filed the foregoing SUPPLEMENTAL BRIEF IN SUPPORT OF 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 with the Clerk of Court using the CM/ECF system, which will automatically send electronic notification of such filing to the following attorneys of record:

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