IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SIDNEY ABBOTT,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 94-0273-B**
RANDON BRADGON, M.DM.D.	)	
Defendant.	)	

UNITED STATES' MOTION AND MEMORANDUM
FOR SUMMARY JUDGMENT ON CONSTITUTIONAL ISSUES AND
MEMORANDUM IN SUPPORT
OF PLAINTIFF ON STATUTORY ISSUES

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INTRODUCTION

Plaintiff Sidney Abbott alleges that Defendant Randon Bragdon, a dentist, violated the Americans with Disabilities Act ("ADA" or "the Act") when he refused to provide her with routine dental care in his Bangor office because she is HIV-positive. In defending this suit, Bragdon challenges the constitutionality of the ADA and its application to him. The United States was granted leave to intervene to defend the constitutionality of the statute and to participate as amicus curiae on issues of ADA statutory construction.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Intervenor United States hereby moves this Court to grant summary judgment in its favor on the constitutional defenses asserted by Bragdon and to issue an Order holding that the ADA is constitutional as applied to Bragdon's practice of dentistry. Such a ruling will significantly narrow the issues before the Court in the event of trial. In addition, the United States as amicus curiae urges this Court to grant Plaintiff Sidney Abbott's motion for summary judgment on liability.

ARGUMENT

I. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., is Congress' most extensive piece of civil rights legislation since the Civil Rights Act of 1964. Its purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses. This case concerns title III of the ADA, 42 U.S.C. §§ 12181-9, which prohibits

discrimination by private businesses that operate places of public accommodation if those operations "affect commerce." 42 U.S.C. § 12181(7). The "professional office of a health care provider" is specifically listed as a public accommodation in the Act and the title III implementing regulation. 42 U.S.C. § 12181(7)(F); 28 C.F.R. § 36.104.

As discussed below, every federal and state court that has considered the issue before this Court has concluded that the refusal to offer routine dental care to persons with HIV violates the ADA or equivalent state disability statutes. Moreover, every leading dental and scientific association agrees that patients with HIV infection may be safely treated in private dental offices where universal precautions are utilized, and that the refusal to treat these patients is unethical. In the past fourteen years since AIDS was first identified, with over one billion dental procedures performed, there has not been a single documented case of HIV transmission from patient to dental care worker or other patient.

II. TITLE III OF THE ADA IS CONSTITUTIONAL AS APPLIED TO BRAGDON'S PRACTICE

Defendant challenges the constitutionality of title III of the ADA on several grounds, none of which is meritorious. Specifically, Bragdon asserts that: (1) Congress lacks authority under the Commerce Clause to regulate his dental practice; (2) the remedial action requested of this Court may cause him to lose patients and, therefore, violates the Contracts Clause; and (3) the application of the ADA to his dental practice denies him of his liberty of contract to operate his practice "without interference," and of his liberty to operate his office in a "safe and prudent manner."[1]

[1] See Answer, First, Third, Seventh and Ninth Defenses; Defendant's Pretrial Memorandum at ¶¶ 3, 5, 6.

A. Prohibiting Disability-Based Discrimination By Health Care Providers Like Bragdon is Within Congress' Power to Regulate Commerce

Defendant first challenges Congress' authority under the Commerce Clause to regulate his practice of dentistry. Article I, Section 8 of the Constitution grants Congress the power to "regulate Commerce . . . among the several States" and to enact all laws necessary and proper to this end. U.S. CONST., art. I, § 8, cls. 3, 18. Katzenbach v. McClung, 379 U.S. 294, 301-02 (1964). This power is plenary, and is construed broadly by the Court. Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 276 (1981); accord United States v. Lopez, 115 S.Ct. 1624, 1626, 1634 (1995); United States v. Darby, 312 U.S. 100, 114 (1941); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).[2]

In determining whether a federal statute may be sustained as a proper exercise of Congress' power to regulate interstate commerce, a court may consider only: (1) whether regulation of the activity at issue is rationally related to a legitimate constitutional end, and (2) whether the means chosen by the statute are reasonable to reach that end. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990). See Lopez, 115 S.Ct. at 1629 (affirming the

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[2] In the purposes section of the ADA, Congress clearly stated its intention to exercise its commerce clause authority invoking "the sweep of congressional authority, including the power . . . to regulate commerce." 42 U.S.C. § 12101(b)(4). Accordingly, title III's jurisdictional requirement uses the language of the Commerce Clause, defining "commerce" as travel, trade, traffic, commerce, transportation, or communication:

> (A) among the several States;
> (B) between any foreign country or any territory or possession and any State; or
> (C) between points in the same State but through another State or foreign country.

Id. § 12181(1).

standard of rationality review); Hodel, 452 U.S. at 276 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)).

1. Redressing Discrimination in Commercial Activities is a Legitimate Legislative Goal and Title III's Proscriptions are a Reasonable Means of Achieving That Goal

The ADA's legislative history specifically acknowledges Congress' "broad authority to pass anti-discrimination laws under the commerce clause," citing Heart of Atlanta Motel, 379 U.S. 241; Katzenbach, 379 U.S. 294; EEOC v. Wyoming, 460 U.S. 226 (1983), and notes further that, "the extensive hearings on the ADA amply demonstrate how discrimination against people with disabilities has made it difficult for them to participate in commercial life in this country." 136 Cong. Rec. E1913-01 (daily ed. May 22, 1990)(statement of Rep. Hoyer)(citations omitted)(emphasis added). Thus, courts have sustained title III as a valid exercise of Congress' power under the Commerce Clause. See, e.g., Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D.Cal. 1993)(upholding title III's application to a restaurant), cert. denied, 114 S. Ct. 2726 (1994); United States v. Morvant, 1995 WL 131093, *3 (E.D. La. March 22, 1995) attached hereto as Exhibit A (upholding title III's application to a dental office).

Moreover, Congress formally found that "discrimination against individuals with disabilities persists in such critical areas as . . . health services." 42 U.S.C. § 12101(a)(3).[3] Accordingly, as a reasonable means to address such discrimination, the "professional office of a

[3] Courts must defer to congressional findings that an activity affects commerce, if there is "any rational basis" for such a finding, but formal congressional findings are not necessary. Hodel, 452 U.S. at 276; see Lopez, 115 S.Ct. at 1631; Katzenbach, 379 U.S. at 303-04; Seniors Civil Liberties Ass'n, Inc. v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992) (citing Preseault, 494 U.S. at 18).

health care provider" is specifically included in the definition of public accommodations. 42 U.S.C. § 12181(7)(F).

Congress further found that discrimination against persons with HIV or AIDS is widespread, and, as a reasonable means of curtailing such discrimination, determined that the ADA's protections should extend to those infected with the HIV virus. H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2, at 23, 58 (1990). Congress' findings are well supported. Studies demonstrate extensive discrimination by health care providers against patients with HIV or AIDS.[4] Of particular importance, "the number [of dentists willing to treat people with HIV/AIDS] remains grossly inadequate and unacceptable. The difficulty, and in many cases complete inability, of obtaining dental services is . . . an all too common problem for people living with HIV infection and AIDS." National Commission On AIDS, Annual Report to the President and the Congress, 163 (August 1990).

2. Title III of the ADA Is Constitutionally Applied to the Operations of Bragdon's Individual Dental Practice

Bragdon contends that the ADA cannot constitutionally be applied to his dental practice, because it does not affect interstate commerce and, in particular, because his so-called "infectious disease policy" does not affect interstate commerce. Answer, First Defense; Defendant's Pretrial Memorandum at ¶ 5. The first argument is refuted by undisputed facts and the second is based on a premise long rejected by the Supreme Court.

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[4] See, e.g., C. Lewis, M.D. & K. Montgomery, M.D., Primary Care Physician's Refusal To Care For Patients Infected With the Human Immunodeficiency Virus, 156 Western Journal of Medicine 36 (1992); B. Gerbert, Ph.D. et al., Primary Care Physicians and AIDS, Attitudes and Structural Barriers To Care, 266 Journal of the American Medical Association 2837 (Nov. 27, 1991); National Commission on AIDS, Annual Report to the President and the Congress, 163-65 (August 1990); Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, 126 (June 24, 1988).

The Commerce Clause power extends not only to interstate activities, but to intrastate activities that substantially affect interstate commerce. See, e.g., Lopez, 115 S.Ct. at 1628-9; McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980). See also Perez v. United States, 402 U.S. 146, 151 (1971) (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)); Wickard v. Filburn, 317 U.S. 111, 122-25 (1942); Darby, 312 U.S. at 118; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

Bragdon orders substantial supplies and equipment from out-of-state vendors. In fact, from the period of 1990-94, approximately 58% of his supplies and equipment came from out-of-state companies. U.S. Facts at ¶II.A. In addition, Bragdon's office is located 1.9 miles from Interstate 95. Id. In Morvant, these two factors alone were sufficient to sustain the constitutional application of title III to a solo practitioner dentist who was found to have discriminated against individuals with HIV/AIDS for failing to provide them routine dental care in his office.[5]

Furthermore, Bragdon's practice generates substantial income from out-of-state insurers. Defendant accepts insurance from eight companies, seven of which are out-of-state. U.S. Facts

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[5] Morvant, 1995 WL 131093, at *10 (referencing Admission 17 ("Dr. Morvant's office is within two miles of I-10") and Admission 20 ("Defendant purchased and used dental supplies manufactured and/or distributed by companies outside Louisiana")). See Katzenbach, 379 U.S. at 296-7 (restaurant on state highway, 11 blocks from interstate highway, and ordering 46% of food supplies from out of state, affected commerce); Heart of Atlanta Motel, 379 U.S. at 243, 253-61 (motel 2 blocks from downtown road and "readily accessible" to two intrastate and two interstate highways, affected commerce); Daniel v. Paul, 395 U.S. 298, 305 (1969)(where ingredients of the food most often sold probably originated out of state, entity affected commerce); EEOC v. Ratliff, 906 F.2d 1314, 1316 (9th Cir. 1990)(in civil rights context, if defendant uses items that have moved through interstate commerce at some point, "affects commerce" requirement is satisfied); Miller v. Amusement Enters., Inc., 394 F.2d 342, 345, 352-53 (5th Cir. 1968) (amusement park 150 yards from intrastate highway, affected commerce); Pinnock, 844 F. Supp. at 579 (restaurant across the street from state highway and within two miles of interstate highways, affected commerce); United States v. Vizena, 342 F. Supp. 553, 554-55 (W.D. La. 1972) (bar in which juke box, pool table, pool equipment, and records played on the juke box originated out of state, affected commerce).

at ¶II.A. See United States v. Dye Construction Co., 510 F.2d 78, 83 (10th Cir. 1975)(company holding insurance policies produced by out-of-state sources affected commerce).[6] Bragdon also accepts payment by credit card from out-of-state credit card companies. U.S. Facts at ¶II.A.

Moreover, Bragdon and at least one member of his staff participate in continuing education classes conducted out of state. Bragdon regularly attends out-of-state dental conferences and meetings, and Bragdon holds memberships in and pays dues to eight professional dental associations, six of which are headquartered out-of-state. U.S. Facts at ¶II.C. These factors amply demonstrate as a matter of law that Bragdon's practice substantially affects interstate commerce. In addition, Bragdon's individual practice is also constitutionally regulated under the Commerce Clause because it is part of the larger industry of dentistry that affects interstate commerce.[7]

Finally, contrary to Defendant's suggestion, to sustain the constitutionality of the ADA as applied to his health care practice, there is no need to inquire into the effect on commerce of his

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[6] Cf. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 327, 330 (1991) ((Sherman Act) factor in finding effect on commerce was hospital receipt of revenue from out-of-state, including from medicare); Shahawy v. Harrison, 778 F.2d 636, 642 (11th Cir. 1986) ((Sherman Act) (factor in finding effect on commerce was receipt of revenues from out-of-state private and public insurance entities).

[7] See Pinnock, 844 F. Supp at 579 (restaurant subject to commerce clause as part of restaurant industry, regardless of its individual circumstances, and thus application of title III of the ADA was constitutional). The commerce power allows Congress to regulate any entity, regardless of its individual impact on interstate commerce, so long as the entity engages in a class of activities that affects interstate commerce. Russell v. United States, 471 U.S. 858, 862 (1985); Hodel, 452 U.S. at 277 (citing Fry v. United States, 421 U.S. 542, 547 (1975)); Perez, 402 U.S. at 151-54 (1971). As the Supreme Court stated in Darby, Congress has "recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." Darby, 312 U.S. at 123; Wickard, 317 U.S. at 128-29. See also Ratliff, 906 F.2d at 1317-18 (upholding plaintiff's claim that "as a matter of law if a local business is within a class of activities which in the aggregate has an effect on commerce, there is no need for a particularized factual showing that the [business] meets the 'affecting-commerce' test").

discriminatory policy and practices. Such a requirement was specifically rejected in the seminal Katzenbach decision, 379 U.S. at 303 (no need for case-by-case determination that racial discrimination in a particular restaurant affects commerce) (citing Darby, 312 U.S. at 120-21)). Rather, the only required inquiry, which we have demonstrated is satisfied in this case, is whether Defendant's business itself meets the jurisdictional requisite of affecting commerce. Id. at 304.[8]

3. The Court's Decision in Lopez Does Not Diminish Congress' Commerce Clause Power

The Supreme Court's recent decision in United States v. Lopez, 115 S.Ct. 1624 (1995), does not change this analysis. At issue in Lopez was the Gun-Free School Zones Act, which forbade the possession of firearms in a school zone, and which the Court ruled exceeded Congress' commerce clause power. The Lopez decision, however, specifically reaffirmed the validity of the Court's previous commerce clause decisions. Id. at 1634.[9]

Of particular concern in Lopez was the fact that the School Zones Act was a criminal statute, typically a subject of state and local, not federal legislation, id. at 1631 n.3, 1632, and

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[8] Still, the Court has recognized the aggregate effects on commerce of discriminatory policies and practices, especially where the problem at issue is national in scope. Katzenbach, 379 U.S. at 300-01 (nationwide scope of problem supported conclusion of substantial effects on interstate commerce where "[act of] discrimination was but 'representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce'") quoting from Polish Nat'l Alliance v. Labor Bd., 322 U.S. 643, 648 (1944); Perez, 402 U.S. at 150. As argued supra, Congress formally found that the discrimination against individuals with disabilities is national in scope, and heard testimony regarding the aggregate effect of discrimination in health care, and of discrimination against individuals with HIV/AIDS, specifically. See discussion supra, at 4-5.

[9] See id. at 1637 (Kennedy, J. and O'Connor, J., concurring)(affirming commerce clause precedent in the area of discrimination, and the principle that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy").

"by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise however broadly one might define those terms." Id. at 1630-31; see also id. at 1640 ("neither the actors nor their conduct have a commercial character and neither the purpose nor the design of the statute have an evident commercial nexus") (Kennedy, J. and O'Connor, J., concurring).

By contrast, title III of the ADA deals with commercial actors, private businesses that offer goods and services to customers, patrons or patients. At issue in this case is a patient seeking professional dental services for a fee -- a quintessential commercial transaction. Moreover, "the design of the statute ha[s] an evident commercial nexus," id.; it ensures access to commercial services, and is designed to prevent the unavailability of those services to a significant sector of the national economy. Thus, in contrast to Lopez, where neither the prohibited conduct (possession of a gun near schools), nor its immediate effect (increase in violence in schools) was commercial, the immediate effect of the prohibited conduct here is a burden to commercial transactions. See Congress' findings, supra. Also unlike the statute at issue in Lopez, title III of the ADA contains a jurisdictional element that facilitates a case-by-case analysis of whether the particular entity at issue affects commerce: the definition of a public accommodation, itself, reaches only those entities whose operations "affect commerce." 42 U.S.C. § 12181(7); see Lopez, 115 S.Ct. at 1626.

B. Bragdon has No Constitutional Right to Continue Discriminating on the Basis of Disability

Bragdon fears he will lose some of his other patients if this Court orders him to cease discriminating against individuals with HIV or AIDS. Even if this were to prove true, it is of no constitutional significance.

1. The Contracts Clause Does Not Apply to Title III of the ADA

Defendant's attempt to rely on the Contracts Clause of the Constitution is unavailing.[10] Article I, Section X of the Constitution has no application here because it circumscribes the powers of States, not the federal government: "No State shall . . . pass any . . . law impairing the Obligation of Contracts." Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 & n.9 (1984); Fulton v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124, 1128 (1st Cir. 1984).

The Supreme Court has recognized a similar doctrine arising from the Due Process Clause of the Fifth Amendment for federal legislation, but only in circumstances where the legislation is applied retroactively. Id.[11] This due process right is not implicated here because title III is not, in fact, retroactive, as it does not penalize or otherwise attach liability for pre-Act conduct. Pinnock, 844 F. Supp. at 584 (title III is not retroactive); see McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13, 16 (1st Cir. 1993) (articulating the standard for retroactivity).

2. Imposing New Obligations on Existing Businesses Does Not Infringe the Constitution

Title III does not contravene the Due Process Clause simply because it imposes new obligations on Bragdon's existing business, regardless of any possible effects that the new obligations may have on his existing clientele. Bragdon has no due process right to continue to do business unencumbered by new obligations that may be imposed by Congress. To accept such a due process theory would absolutely paralyze Congress in any effort to regulate in the

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[10] See Answer, Third Defense; Defendant's Pretrial Memorandum at ¶ 6.

[11] Retroactive federal legislation is not, however, subject to the exacting review triggered by the Contracts Clause, but must only be reasonably related to a legitimate government purpose. See United States v. Carlton, 114 S.Ct. 2018, 2022 (1994); Pension Benefit Guaranty Corp., 467 U.S. at 733 (1984); Fulton, 762 F.2d at 1127-29.

commercial arena. "[G]overnment regulation - by definition - involves the adjustment of rights for the public good." Andrus v. Allard, 444 U.S. 51, 65 (1979). As the Court has stated:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

Federal Housing Admin. v. Darlington, Inc., 358 U.S. 84, 91 (1958)(quoting Fleming v. Rhodes, 331 U.S. 100, 107 (1947).[12]

To be sure, the enactment of a new civil rights law forbidding conduct that previously had been permitted may signal significant changes in social and economic relationships. It cannot be otherwise where Congress explicitly found serious and widespread discrimination in commercial entities, and passed the ADA precisely to alter this history of discrimination. If Bragdon loses business because of the enforcement of title III, however, such losses are based on discrimination that Congress declared illegitimate.

Bragdon's argument that he has an entitlement to keep patients who would remain with him only so long as he maintains a discriminatory policy is essentially the same discredited argument made by the owners of places of public accommodation who challenged the Civil Rights Act of 1964. Citing personal liberty interests, such owners maintained that they had a right to refuse service to black clients in order to retain their patrons. The Supreme Court unequivocally rejected this argument in Heart of Atlanta Motel:

> It is doubtful if in the long run appellant will suffer economic loss as a result of the [Civil Rights] Act [of 1964]. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a "member of the

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[12] See also United States v. Manufacturers Nat'l Bank of Detroit, 363 U.S. 194, 200 (1960); Cox v. Hart, 260 U.S. 427, 435 (1922).

> class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to such legislation.

379 U.S. at 260, citing Bowles v. Willingham, 321 U.S. 503, 518 (1944).[13]

Indeed, Defendant's "loss of patients" argument is nothing more than a "customer preference" defense. Customer preference defenses have been rejected in other civil rights contexts,[14] and, specifically, in cases involving discrimination on the basis of HIV and AIDS in a dental practice.[15]

C. Title III Does Not Abridge Bragdon's Liberty Rights as Protected By the Due Process Clause of the Fifth Amendment

Finally, Bragdon argues that the ADA infringes: (1) a fundamental liberty of contract, or the freedom to conduct his business freely and without interference; and (2) a fundamental right to operate his practice in a prudent and safe manner and in a manner that insures his personal safety. Answer, Seventh and Ninth Defenses; Defendant's Pretrial Memorandum at ¶ 3. Neither challenge is meritorious. As discussed below, there is no recognized fundamental liberty of contract. Moreover, the statute itself specifically addresses the legitimate safety concerns of health care providers like Defendant.

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[13] Bragdon also argues in his Pre-Trial Memorandum that "(t)he injunctive relief requested by Ms. Abbott is tantamount to a request that the court order involuntary servitude." Defendant's Pre-Trial Memorandum at ¶ A.8. This argument, too, was rejected by the Court in Heart of Atlanta Motel, 379 U.S. at 261, where the Supreme Court found "no merit" in the suggestion that the 1964 Civil Rights Act's prohibition of discrimination against a class of people who had traditionally been excluded from public accommodations resulted in involuntary servitude.

[14] See, e.g., Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982).

[15] See, e.g., Barton v. New York City Comm'n on Human Rights, 531 N.Y.S.2d 979, 985 (N.Y. Sup. Ct. 1988), attached hereto as Exhibit B; Lewis v. Runkle, Docket No. 92-154-PA(N), slip op. at 22 (District of Columbia Commission on Human Rights July 1, 1993), attached hereto as Exhibit C (holding that neither the fear of other patients nor the "stereotypes or preferences of workers" can justify a decision to refuse to treat a person with HIV or AIDS).

1. Title III's Proscriptions Are Neither Arbitrary Nor Irrational

Since the demise of Lochner v. New York, 198 U.S. 45 (1905), and its progeny, the Court has not recognized a fundamental economic right to do business free from government regulation. See Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 535-36 (1949).[16] The Court has carved a strict divide between "economic" and "personal" liberties, holding economic and social legislation to rationality review, and deferring to legislative policy judgments. United States v. Carolene Prods. Co., 304 U.S. 144, 147-48 (1938).

It is now well established that social or economic legislation adjusting the benefits and burdens of economic life comes to the court with a presumption of validity. See Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963); Williamson v. Lee Optical of Okla., 348 U.S. 483, 487-88 (1955); Fulton, 762 F.2d at 1129; Washington Star Co. v. Internat'l Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1509 (D.C. Cir. 1984). In challenging title III, Bragdon must show that its application to his practice is arbitrary or irrational. Id.[17] "[T]he requisite arbitrariness . . . must be stunning," Amsden v. Moran, 904 F.2d 748, 754 n.5 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991) (emphasis added).

No such showing can be made here. Indeed, as demonstrated, supra, at 4-5, title III's proscriptions are based on actual findings of widespread discrimination -- specifically in the relevant areas of health care and treatment of individuals with HIV/AIDS. Those findings are supported by empirical studies poignantly showing discriminatory treatment of individuals with

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[16] See also West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-94 (1937); Nebbia v. New York, 291 U.S. 502, 523 (1934); cf. Tenoco Oil Co., v. Dept. of Consumer Affairs, 876 F.2d 1013, 1020-24 (1st Cir. 1989) (discussing disfavored status of substantive due process claims).

[17] Cf. Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 243 (1st Cir. 1990); Tenoco Oil Company, 876 F.2d at 1021.

HIV or AIDS in the provision of dental care. See supra at 5 & n.4. Accordingly, Congress' coverage of Bragdon's dentistry practice is a proper exercise of its obligation to legislate for the common good. See West Coast Hotel Co., 300 U.S. at 392 ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.") (citations omitted).[18]

2. Title III Does Not Require Bragdon to Treat Patients who Pose a Significant Risk to His Health or Safety

Bragdon's assertion that the ADA infringes on his liberty interest in personal and professional safety fares no better, because the statute is structured so as to protect the legitimate safety concerns of health care providers. Title III specifically provides that covered entities are not required to serve individuals with disabilities who pose a "significant risk" to the health or safety of others. 42 U.S.C. § 12182(b)(3) ("direct threat" defense). See discussion infra at 24-27. This provision is a codification of the standard first articulated by the Supreme Court in School Board of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987), a case decided under section 504 of the Rehabilitation Act of 1973, the precursor to the ADA. Discussing the importance of balancing the needs of the individual with a disability as compared with the safety concerns of covered entities, the Court stated:

> Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

Id. at 287.

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[18] In his liberty of contract argument, Defendant makes some of the same claims about selecting his patients that we addressed supra, at 11-13, when discussing Bragdon's contract clause argument. See Defendant's Pre-Trial Memorandum at ¶3.

Congress' inclusion in the ADA of the direct threat defense reflects its similarly thoughtful balancing of the real need to protect against discrimination in health services (given its findings) and the legitimate safety concerns of health care entities. Congress is presumed to legislate in light of constitutional limitations and this Court should defer to the careful legislative balancing evidenced here. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction Trades Council, 485 U.S. 568, 575 (1988); see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); FTC v. American Tobacco Co., 264 U.S. 298, 305-07 (1924). Because Defendant's interest in personal safety is specifically addressed in the statute, there is no constitutional infringement in its application to his dental practice.[19]

For the above reasons, this court should uphold the constitutionality of title III as a matter of law.

III. THIS COURT SHOULD GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

The United States has significant responsibility for implementation and enforcement of title III of the ADA. As part of this responsibility, the Department of Justice has, pursuant to

[19] The cases in which the Court has recognized a significant liberty interest in bodily integrity or personal safety are inapposite, involving direct and substantial government incursions into the body, see Rochin v. California, 342 U.S. 165, 172 (1952)("the forcible extraction of [petitioner's] stomach's contents . . . is bound to offend even hardened sensibilities"), or a coercive environment, see, e.g., Washington v. Harper, 494 U.S. 210 (1990)((prison) significant liberty interest in avoiding unwanted administration of anti-psychotic drugs); Parham v. J.R., 442 U.S. 584 (1979) ((institutionalization) substantial liberty interest in avoiding unnecessary confinement for treatment). Cf. Youngberg v. Romeo, 457 U.S. 307, 322 (1982) ((institutionalization) liberty interest in reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate training, triggering review that is "lower than 'compelling or substantial necessity test'").

statutory directive (see 42 U.S.C. § 12186(b)), promulgated the regulation implementing title III, found at 28 C.F.R. pt. 36 (1994). Because the Department is the rule-making agency for title III, both its regulation and its interpretation thereof are entitled substantial deference.[20]

The remainder of this memorandum examines the statutory issues raised by this case and supports the plaintiff's motion for summary judgment on liability. It is the position of the United States based on undisputed facts that Bragdon has violated the ADA and that Abbott is entitled to summary judgment as to liability as a matter of law.

A. Bragdon Has Discriminated Against Sidney Abbott on the Basis of Disability in Violation of the ADA

To establish liability under title III, Abbott must show: (1) that she is a person with a disability, (2) that Bragdon owns and operates a place of public accommodation, and (3) that Bragdon discriminated against Abbott on the basis of her disability. 42 U.S.C. § 12182(a). As discussed below, each of these elements is established.

1. Sidney Abbott is a Person With a Disability

The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C.

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[20] Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994); Martin v. Occupational Safety & Health Review Comm'n., 499 U.S. 144, 150 (1991), citing Lyng v. Payne, 476 U.S. 926, 939 (1986); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)(where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). Indeed, "[a]s the author of the [implementing regulation for title III of the ADA], the Department of Justice is also the principal arbiter as to its meaning." Fiedler v. American Multi-Cinema, Inc., 871 F. Supp 35, 38 (D.D.C. 1994), citing Thomas Jefferson Univ., 114 S. Ct. at 2386. See also Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993)(relying extensively on Department of Justice implementing regulations and its interpretation thereof); Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 989 n.9 (S.D. Fla. 1994); Tugg v. Towey, 864 F. Supp. 1201, 1205 n.6 (S.D. Fla. 1994); Bechtel v. East Penn School Dist. of Lehigh County, PA, 1994 WL 3396, *2-*3 (E.D. Pa. 1994); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D.

§ 12102(2)(a). The title III regulation specifically lists HIV disease, whether symptomatic or asymptomatic, as an example of a physical impairment within the meaning of the statute. 28 C.F.R. § 36.104(1)(B)(ii). The courts concur in this interpretation. See D.B. v. Bloom, 1995 WL 490481, *3 (D.N.J. 1995), attached hereto as Exhibit D ("[plaintiff] is, by virtue of his HIV status, a person with a disability"); Morvant, 1995 WL 131093, *3; Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994); T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993); Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1321 (E.D.Pa. 1994).[21]

Bragdon asserts, however, that regulations and interpretations of the ADA that "define persons who test as HIV+/AIDS as having a 'physical disability' . . . exceed statutory authority and are void." Answer, Second Defense.[22] The inclusion of HIV disease within the ADA's definition of disability is solidly supported by the legislative history.[23] In particular, committee reports reference a Department of Justice interpretation that both symptomatic and asymptomatic HIV disease are physical impairments that substantially limit one or more major life activities

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Wis. 1993); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D.Ind. 1993).

[21] But see Ennis v. National Ass'n of Business and Educational Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995)(suggesting, in dicta, that HIV-positive status alone may not constitute a per se disability).

[22] To succeed on this argument, Bragdon must show that the regulatory interpretation is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844; see n.20, supra. This he cannot do.

[23] See, e.g., comments of Representative Owens, 136 Cong. Rec. H4623 (daily ed. July 12, 1990)("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection -- asymptomatic HIV infection, symptomatic HIV infection, or full blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA."); Senator Kennedy, 136 Cong. Rec. S9696 (daily ed. July 13, 1990)(same); Representative Waxman, 136 Cong. Rec. H4626 (daily ed. July 12, 1990)("As medical knowledge has increased, specialists in the field increasingly recognize that there exists a continuum of disease among those who are HIV infected. All such individuals are covered under the first prong of the definition of disability in the ADA.").

within the meaning of section 504 of the Rehabilitation Act of 1973.[24] See S. Rep. No. 116, 101st Cong., 1st Sess. 22 ("as noted by the U.S. Department of Justice, . . . , a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability.'"); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 52 (1990).

It is undisputed that Sidney Abbott has tested positive for HIV. U.S. Facts at ¶III.A. It is similarly undisputed that her HIV status has imposed major limitations on important activities and decisions in her life, including her decision to have children. Id.[25] Accordingly, Sidney Abbott is an individual with a disability within the meaning of the ADA.

2. Bragdon Owns and Operates a Place of Public Accommodation

Title III of the ADA defines a place of public accommodation to include "the professional office of a health care provider," if the operations of the office affect commerce. 42 U.S.C. § 12181(7)(F). See, e.g., Bloom, 1995 WL 490481, *3 ("dental services provider is a place of public accommodation by the terms of the ADA"); Morvant, 1995 WL 131093, *3 (same); Woolfolk v. Duncan, 872 F. Supp. 1381, 1391 (E.D. Pa. 1995)(physician's office is a place of public accommodation); Mayberry v. Von Valtier, 843 F. Supp. 1160, 1163 (E.D. Mich. 1994)(same).

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[24] Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse Jr., Counsel to the President (Sept. 27, 1988) at 5-13, attached hereto as Exhibit E, referred to hereinafter as "Kmiec Memorandum."

The ADA uses the same definition of disability as that in section 504. See 29 U.S.C. § 706(7)(B).

[25] Specifically, Abbott has testified that she "made the decision after [she] tested positive not to have children because of the risk of infecting the child and the risk of impairing [her] own immune system, and also the fact that this baby probably wouldn't have a mother after a while." Abbott Dep. at 79. See Kmiec Memorandum at 10 ("the life activity of procreation -- the fulfillment of the desire to conceive and bear healthy children -- is substantially limited for an asymptomatic HIV-infected individual").

Bragdon admits that "he is a dentist who is licensed to practice in the State of Maine and that he owns and operates the professional office of a health care provider." Answer at ¶4. As discussed above, Bragdon's argument that his practice does not "affect commerce" is without merit.

3. Bragdon Discriminated against Abbott on the Basis of her Disability

The ADA defines discrimination to include both the denial of the opportunity to benefit from the services of a place of public accommodation, 42 U.S.C. § 12182(b)(1)(A)(i), and the different treatment of individuals with disabilities as compared to those without, 42 U.S.C. § 12182(b)(1)(A)(iii). Bragdon's treatment of Abbott violates these provisions.

a. Bragdon's Treatment of Abbott Constitutes an Outright Refusal of Care

In the case of medical or dental treatment, a patient with a disability cannot be denied the opportunity to receive such care because of his or her disability. Morvant, 1995 WL 131093.[26] While a health care provider is not required to treat a person seeking treatment or services outside of the provider's area of specialization, the failure to treat must be based on the treatment the patient is seeking or requires (e.g., filling a cavity), rather than the disability (e.g., HIV/AIDS) that he or she has. 28 C.F.R. § 36.302(b)(2); Howe, 873 F. Supp. at 78-79; Morvant, 1995 WL 131093 at *4; Baby K, 832 F. Supp. at 1029.

In this case, there is no dispute that: a) Bragdon refused to treat Abbott in his office (U.S. Facts at IV.B); b) the treatment Abbott was seeking -- the filling of a small cavity -- is treatment Bragdon routinely provides in his office (id. at I.A); and c) Bragdon's refusal to treat Abbott in

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[26] See also Bloom, 1995 WL 490481 (D.N.J. 1995); Woolfolk, 872 F. Supp. 1381; Howe, 873 F. Supp. at 78; Mayberry, 843 F. Supp. at 1166; In re Baby K, 832 F. Supp. 1022, 1028-29 (E.D. Va. 1993), ("denial of medical services" would be "discrimination against a vulnerable population [and] exactly what the ADA was enacted to prohibit"), aff'd on other grounds, 16

his office was based solely on Abbott's HIV-positive status (id. at IV.A). Thus, Abbott's claim of discrimination is established.

While Bragdon maintains that he was willing to treat Abbott in a hospital setting (id. at ¶IV.B), the undisputed facts demonstrate that this argument is pretextual. Bragdon has never had privileges to practice dentistry in any hospital, at any time, since he began practicing. Id. at ¶V.A. And while Bragdon maintains that his policy of treating patients with infectious diseases only in a hospital setting has always been in effect, not one member of Bragdon's staff had any knowledge of the hospital aspect of his policy until 1991, when a complaint alleging discrimination on the basis of disability was filed against Bragdon with the Maine Dental Association. Id. at ¶VI.A. Indeed, it was not until after this very lawsuit had been filed that Bragdon first applied for hospital privileges. Id. at ¶V.A. Significantly, Bragdon applied for privileges at Down East Community Hospital ("Down East"), a facility that does not have any of the equipment that Bragdon claims is necessary for treating patients with HIV. Id. at ¶VI.E. To date, Bragdon has not received admitting privileges at Down East, nor at any other hospital in the state of Maine. Id. at ¶V.A.[27]

Bragdon's refusal to provide routine dental care to Abbott in his office, therefore, is a clear and intentional refusal to provide services on the basis of disability, which violates the ADA as a matter of law. 42 U.S.C. § 12182(b)(1)(A)(i); Bloom, 1995 WL 490481, *3 (denial of dental services on the basis of HIV-positive status violates the ADA as a matter of law);

F.3d 590 (4th Cir.), cert. denied, 115 S.Ct. 91 (1994).

[27] Bragdon's public statements and writings advocating against requiring dentists to treat HIV positive patients further support the conclusion that his offer to treat Abbott in a hospital was pretextual. See U.S. Facts at ¶VII.

Morvant, 1995 WL 131093 (same); Howe, 873 F. Supp. at 72 (denial of medical services on the basis of HIV-positive status violates the ADA as a matter of law).[28]

b. Bragdon's Offer to Treat Abbott in a Hospital Also Violates the ADA

Even accepting Bragdon's offer to treat Abbott on its face, Bragdon's conduct still violates the ADA. Unlike Bragdon's other patients, to whom Bragdon routinely provides dental fillings in his office (U.S. Facts at ¶I.A), Abbott would have had to travel over sixty miles to Down East to receive such care (id. at ¶V.B), and would have had to pay substantially more than Bragdon's customary charges for use of the hospital operatory (id.).

The consensus of every leading dental, medical, and/or scientific association is that there is no medical or scientific reason for treating HIV-positive dental patients in a hospital setting. Id. at ¶VIII.K.[29] Rather, these associations maintain that when universal precautions are utilized, persons with HIV/AIDS can and should be safely treated in private dental offices. Id. at ¶VIII.G. Where, as here, there is neither a scientific nor medical basis for a health care provider's actions,

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[28] State cases have held similarly. See, e.g., Minnesota v. Clausen, 491 N.W.2d 662 (Minn.App. 1992), attached hereto as Exhibit F (denial of dental services to person with HIV violates Minnesota Human Rights Act); G.S. v. Baksh, Charge No. 1987CPO113, slip op. at 59 (Illinois Human Rights Commission, July 8, 1994), attached hereto as Exhibit G (denial of dental services to person with HIV violates Illinois Human Rights Act); Lewis, Docket No. 92-154-PA(N), slip op. at 31 (denial of dental services to person with HIV violates District of Columbia Human Rights Act); Allen v. Brottman, AIDS Litig. Rep., March 9, 1993, p. 9657, attached hereto as Exhibit H (denial of dental services to person perceived to be HIV-positive violates New York Human Rights Law); Campanella v. Hurwitz, AIDS Litig. Rep., August 23, 1991, p. 6800, attached hereto as Exhibit I (denial of dental services to person with HIV violates New York Human Rights Law); Barton, 531 N.Y.S.2d 979 (same).

[29] While Bragdon argues that it is "safer" to treat dental patients with HIV in a hospital setting, he has introduced no evidence into the record supporting this position. To the extent that there have been cases of occupationally acquired HIV in the health care setting, the transmissions have resulted not from the failure of universal precautions, but rather, from accidental injuries (e.g., accidentally being stuck with a contaminated needle). There is no evidence that treating a dental patient with HIV in a hospital operatory in any way reduces the

different treatment of persons with disabilities constitutes a violation of the ADA. 42 U.S.C. § 12182(b)(1)(A)(iii). See, e.g., Bloom, 1995 WL 490481, at *2-*3 (referral of HIV-positive patient by dentist to another dental facility violated the ADA because there was no dental or medical justification for defendant's actions); Morvant, 1995 WL 131093, at *5-*7 (same).

B. Bragdon Fails in His Attempt to Establish an Affirmative Defense to Excuse His Discriminatory Conduct

Bragdon alleges that he is not obligated to treat persons with HIV/AIDS, because to do so would constitute a "direct threat" within the meaning of the ADA. Answer, Tenth Defense. This argument has no merit.

Title III of the ADA provides that a public accommodation is not required:

> to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others.

42 U.S.C. § 12182(b)(3). The "direct threat defense" is a limited exception to the ADA's mandate of equal treatment for persons with disabilities, one that does not apply to the facts before this Court.

> The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures . . . .

Id. (emphasis added).

In determining whether an individual poses a "direct threat," a public accommodation must make:

> an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: [1] the nature, duration, and severity of the risk; [2] the probability that the potential injury will actually occur; and [3] whether reasonable modifications of policies, practices, and procedures will mitigate the risk.

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risk of accidental injuries. U.S. Facts at ¶VIII.J.

28 C.F.R. § 36.208(c)(emphasis added); Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D.Ariz. 1993)(individualized assessment "is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear"); Morvant, 1995 WL 131093 at *8-*9.[30]

In making the required individualized assessment, deference must be paid to the reasonable medical judgments of public health officials, specifically "public health authorities such as the U.S. Public Health Service [and] the Centers for Disease Control . . ." 28 C.F.R. pt. 36, App. B at p.600 (1994); Arline, 480 U.S. at 288. This Court cannot substitute its judgment for those entrusted to protect the public health. Id.; see American Dental Ass'n v. Martin, 984 F.2d 823, 828 (7th Cir. 1993) (judgments of the CDC "are entitled to respect by the nonspecialist, biomedically unsophisticated Article III judiciary"); id. at 832 (the CDC is "a governmental agency medically and scientifically qualified to determine and evaluate if there is in fact a significant risk in the health care area")(Coffey, J., concurring).

1. The Provision of Routine Dental Care to Persons with HIV/AIDS in a Private Dental Office Does Not Constitute a "Direct Threat"

In the first case to consider whether the provision of dental treatment to persons with HIV/AIDS constitutes a "direct threat" under the ADA, the court held that it did not. Morvant, 1995 WL 131093, at *8-*9. Rather, the court found:

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[30] As noted supra, the direct threat defense codifies the standard first articulated by the Supreme Court in School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987). In Arline, the Court held that in determining whether an individual poses a direct threat, courts must consider:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

> [T]here is a plethora of expert testimony . . . that while HIV and AIDS present a severe risk of infection, the severity of which is unquestioned -- death at this time -- the universal precautions as prescribed by the CDC are universally accepted as "reasonable modifications" of practices that will significantly mitigate the risk. These "reasonable accommodations" were well known at the time Dr. Morvant refused to treat these patients and were substantially utilized by Morvant. . . Thus, the refusal to treat because of the danger was pretextual in nature.

1995 WL 131093, *4. Accord Bloom, 1995 WL 490481 (default judgment). Morvant relied on expert testimony from the CDC and the American Dental Association, which, as noted above, maintain that persons with HIV/AIDS may be safely treated in private dental offices when universal precautions are used.

State courts and agencies have reached the same conclusion in dental discrimination cases brought under human rights statutes that, like the ADA, prohibit discrimination on the basis of disability. See, e.g., Baksh, Charge No. 1987CP0113, slip op. at 62 ("there [is] no significant risk of [] HIV infection being transmitted to others in a dental office")(emphasis added); Clausen, 491 N.W.2d. at 667 (no "reasonably probable risk of serious harm" associated with treating HIV-positive patients in the dental office); Lewis, Docket No. 92-154-PA(N), slip op. at 20 (staff and patient fear of contracting AIDS in the dental office does not justify discrimination because the overwhelming medical evidence demonstrates that it is safe to treat persons with HIV/AIDS when universal precautions are utilized); Campanella, AIDS Litig. Rep., March 9, 1993 at 19, (universal precautions adequately protect dentists, their patients and their staff from infection by blood borne pathogens such as HIV); Barton, 531 N.Y.S. 2d at 985 (unjustified concerns about efficacy of universal precautions provide no basis for discriminatory refusal to provide dental care to persons with HIV/AIDS).

Although Bragdon hypothesizes that there are means by which HIV might be transmitted

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480 U.S. at 288 (quoting Brief for the American Medical Association as Amicus Curiae).

from a patient to himself, his staff, or his other patients, it is undisputed that such theoretically possible transmissions have never been documented. U.S. Facts at ¶VIII.H. Indeed, in the past fourteen years in which HIV has scientifically been studied -- with over one billion dental procedures performed by over 250,000 dental health care professionals -- there has never been a documented case of HIV transmission from infected patient to dental health care worker, nor from infected patient to non-infected patient. Id.[31] Moreover, to the extent there is any risk of HIV transmission in the dental office, it is undisputed that the risk is even further reduced by the use of universal precautions, precautions that Defendant has testified he utilizes. Id. at ¶VIII.E. See 42 U.S.C. § 12182(b)(3) (direct threat must be one that cannot be mitigated by the modification of policies, practices, or procedures); see also Morvant, 1995 WL 131093, *9. Accordingly, the provision of routine dental treatment to persons with HIV/AIDS does not constitute a significant risk, and the direct threat defense must fail. Cf. American Dental Ass'n v. Martin, 984 F.2d at 835 (Coffey, J., concurring in part, dissenting in part) (noting that one suspected case of occupational transmission of HIV falls far short of establishing a significant risk to the dental field of over 100,000 practicing dentists).

2. The Infected Health Care Worker Cases are Inapposite

Finally, the cases holding that HIV-infected health workers pose a direct threat under certain circumstances (see Doe v. University of Maryland Medical System Corp., 50 F.3d 1261 (4th Cir. 1995) (HIV-positive neurosurgical resident posed a significant risk to the health and

[31] There is a single documented case of HIV transmission from dentist to patient. It is the only documented instance world-wide, and the mode of transmission has never been identified. No studies have ever been able to determine whether these transmissions were accidental or intentional. See Marianos Declaration, Exhibit 15 to U.S. Facts, at ¶ 18.

safety of his patients),[32] do not apply here. In conducting the direct threat analysis, those cases found that the "nature, duration, and severity of risk" of HIV transmission outweighed the exceedingly small "probability" that transmission would occur. Id.; see 28 C.F.R. § 36.208(c)(listing the requisite factors); Arline, 480 U.S. at 288. In every other ADA or Rehabilitation Act case involving HIV/AIDS, the courts have found the balance to tip in the other direction, and have rejected the direct threat defense.[33] Most importantly, as discussed

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[32] See also Bradley v. University of Texas M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993)(risk of permanent duration with lethal consequences made HIV-positive surgical technician not otherwise qualified for his position); Mauro v. Borgess Medical Ctr., 886 F. Supp. 1349, 1354 (W.D. Mich. 1995) (HIV-positive surgical technician posed direct threat to others that could not be eliminated by reasonable accommodations); Scoles v. Mercy Health Corp., 887 F. Supp. 765, 772 (E.D.Pa. 1995)(hospital-employer justified in alerting orthopedic surgeon's patients of surgeon's HIV-positive status because surgeon posed a direct threat to the health and safety of his patients); Doe v. Washington University, 780 F. Supp. 628, 634-35 (E.D. Mo. 1991)(HIV-infected dental student not otherwise qualified for dental program because of the potential risk of transmission to his patients); Estate of Behringer v. Medical Center, 592 A.2d 1251 (N.J.Super. Ct. 1991)(surgeon's HIV-positive status presented a "materially enhanced risk of substantial harm in the workplace").

[33] See, e.g., Chalk v. U.S. Dist. Court Cent. Dist. of California, 840 F.2d 701, 706-09 (9th Cir. 1988)("theoretical risk" of transmission no basis for barring HIV-infected schoolteacher from classroom); Martinez v. School Bd. of Hillsborough County, Fla., 711 F. Supp. 1066, 1072 (M.D. Fla. 1989)("remote theoretical possibility" of transmission via tears, saliva and urine does not rise to the level of "significant" risk required to bar child with AIDS from school), on remand from 861 F.2d 1502 (11th Cir. 1988); Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1464 (E.D. Pa. 1995)(HIV-infected prisoners may serve in food service and personal service positions because the "extremely low risk" of transmission in those contexts does not rise to the level of direct threat); Doe v. District of Columbia, 796 F. Supp. 559, 568-69 (D.D.C. 1992)(small risk of transmission from HIV-infected firefighter who performs mouth-to-mouth resuscitation does not pose direct threat to other firefighters or members of the public); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (no significant risk of student with AIDS transmitting the disease in classroom setting); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987)(theoretical risk of transmission no basis for excluding HIV-positive grade school students despite incidents of bleeding); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 76, 380 (C.D. Cal. 1987)(remote risk of AIDS transmission cannot be the basis for excluding child from classroom even after child had been involved in biting incident); In re Westchester County Medical Center, 2 Emp. Prac. Guide (CCH) 5340 at 6999-318 (Apr. 20, 1992) (remote risk of HIV transmission no basis for terminating HIV-infected pharmacist despite the fact that pharmacists occasionally suffer

above, in every case involving dentists who refused to treat HIV-infected patients, the courts have accorded greater weight to the extremely low probability of transmission in the dental office and have found no "direct threat".[34]

In the infected health care worker cases, the following factors that do not exist in this case led the courts to place extra emphasis on the nature, duration, and severity of risk: (1) a different position taken by the CDC; (2) the fiduciary and ethical obligations owed by health care professionals to patients; and (3) the differing expectations of health care providers as opposed to patients regarding risk exposure to disease. These distinctions are dispositive and require this Court to find that the ADA prohibits the discriminatory denial of dental care to Sidney Abbott, an individual infected with HIV.

First, in determining whether or not the defendants had violated the ADA and/or the

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needlesticks); District 27 Community Sch. Bd. v. Board. of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) ("minimal theoretical risk" of transmission by fighting or biting is no basis for segregating young students).

[34] While both Arline, 480 U.S. at 288, and the Department's regulation set forth the factors to consider when determining whether a risk is "significant" enough to rise to the level of a direct threat, neither provides any guidance for how these factors are to be weighed. The Department's Technical Assistance Manual, however, specifically addresses the application of the direct threat defense to the dental context:

> **III-3.8000 Direct threat.**
> ILLUSTRATION 3: Refusal to provide dental services to an individual who is infected with HIV because of the patient's HIV-positive status would be a violation [of Title III of the ADA]. Current medical evidence indicates that the risk of HIV transmission from a patient to other patients and/or the dental staff is infinitesimal, and can be even further reduced by the use of universal precautions (infection control procedures that prevent the transmission of all infectious diseases, including HIV.)

ADA Title III Technical Assistance Manual, 1994 Supplement, at 4.

As noted in Fiedler, 871 F. Supp. at 37 n.4, the Department of Justice Technical Assistance manuals are "interpretations of regulations," and are "to be given controlling weight" as to the meaning of the regulations. Id., citing Thomas Jefferson Univ., 114 S. Ct. at 2386. See also Bechtel, 1994 WL 3396, *2-*3 (deferring to Department's regulation and Technical Assistance

Rehabilitation Act of 1973, the courts in the infected health care worker cases relied on guidance from the CDC. See Arline, 480 U.S. at 288 (courts should defer to the judgments of public health officials); see also 28 C.F.R. § 36.208(c). Thus, for example, in University of Maryland, the court acknowledged its responsibility to defer to public health officials, but noted that in this instance, the CDC had advised medical institutions to make their own determinations concerning when HIV-infected workers could safely perform certain risky procedures. 50 F.3d at 1263-64.[35] The University exercised its judgment consistently with CDC guidance, and the court deferred to the University's judgment.[36]

While the CDC suggests that it might be reasonable to preclude HIV-infected health care workers from practicing under particular circumstances, however, it unequivocally maintains that it is safe for dentists like Bragdon to treat HIV-infected patients in a private dental office. U.S. Facts at ¶VIII.G. Deference to the CDC in this case thus requires this Court to find no "significant risk."

Second, the courts in the infected health care worker cases factored the defendants' fiduciary and ethical obligations into their direct threat analysis. See, e.g., Doe v. Washington University, 780 F. Supp. at 633-34 (despite the fact that the risk was "low" and "not now capable

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Manual); n.20, supra.

[35] See CDC, Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures, 40 MMWR 1, 3-4 (July 12, 1991)(medical institutions should determine on a case-by-case basis whether HIV-positive health care providers should perform procedures that the institutions identify as 'exposure prone'). Cf. American Hospital Association, Recommendations for Health Care Practices and Public Policy, 1992 at 14 ("Determinations of fitness for duty are appropriately made on a case-by-case basis. Hospitals should establish mechanisms within their existing worker impairment programs to determine whether a health care worker known to be infected with HIV . . . can adequately and safely perform patient care duties.").

[36] See also Bradley, 3 F.3d at 924; Doe v. Washington University, 780 F. Supp. at 629 n.2 (citing 1987 CDC recommendations).

of precise measure," "failure to scrupulously guard the safety of patients would appear to be morally unacceptable and contrary to the fiduciary responsibilities of the medical profession"). In determining what constitutes a "significant risk" in this context, therefore, the courts held that "any risk" was too great.[37]

The obligations underlying these decisions dictate the opposite conclusion here. While ethical and fiduciary obligations might require HIV-infected health care providers to refrain from performing certain procedures, they also require providers like Bragdon to treat those in need, including, particularly, those with HIV/AIDS.[38] See American Dental Association, Principles of Ethics and Code of Professional Conduct, Principle 1, Advisory Opinion ("A decision not to provide treatment to an individual because the individual has AIDS or is HIV seropositive, based solely on that fact, is unethical.").[39]

Third, in the infected health care worker cases, the courts underscored that patients have a legitimate expectation that they will not unnecessarily be exposed to health risks when they seek

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[37] See also Univ. of Maryland, 50 F.3d at 1266 (deferring to UMMSC's "considered decision to err on the side of caution in protecting its patients" in spite of the low risk of transmission); Scoles, 887 F. Supp. at 772 (finding that patient's have a "right to know" of surgeon's HIV status before undergoing invasive procedure); Mauro, 886 F. Supp. at 1353 (noting that "however small" the risk of transmission may be, it is "fundamentally inconsistent" with a hospital's mission of patient care to expose a patient to a risk of acquiring a fatal disease when there is "no patient care reason" for doing so); Behringer, 592 A.2d at 1282 (noting that "the ethical relationship of doctor to patient" requires a restriction on invasive procedures).

[38] If Bragdon were to treat patients with HIV, he would not violate the ethical and fiduciary duties owed his other patients. The use of universal precautions -- including, specifically, the heat sterilization of dental instruments and handpieces -- effectively eliminates any risk of patient-to-patient HIV transmission. U.S. Facts at ¶VIII.F. Bragdon heat sterilizes his dental instruments and handpieces. Id. at ¶VIII.E.

[39] Bragdon's own expert concurs. See Kuvin Dep. at 99, 188 (stating that he believes "unequivocally" that HIV-positive patients are entitled to the receipt of routine dental care and that all dentists have "an obligation" to provide such care). See also U.S. Facts at ¶VIII.Q (detailing dental ethical policy statements).

out medical care. See Behringer, 592 A.2d at 1278. In contrast, health care providers have undertaken to work in a profession that poses inherent risks. U.S. Facts at ¶VIII.L. Well before the advent of HIV, health care providers and their staff were at risk of acquiring occupationally a number of diseases, from the common cold to potentially lethal Hepatitis B and TB. Id. Some of these diseases are more infectious than HIV; some pose a higher risk of death. Id. Moreover, patients do not always know they carry such diseases nor, even if they do, will they always disclose this fact to their health care providers. As noted in Campanella:

> [T]he risk of HIV transmission is not avoided by discriminatory treatment of those who disclose their illness. Such policies are not only discriminatory, but also irrational because they do little to protect the dentist or other patients from infection. In fact, . . . refusing to treat those with AIDS is dangerous because it may create a false sense of security, [causing dentists to not be as stringent in their use of universal precautions].

AIDS Litig. Rep., March 9, 1993, at 19-20.[40]

Because the unique circumstances at issue in the infected health care worker cases do not exist here, this Court should apply the analysis used by every other court -- and importantly, every court considering the facts presented in this case -- to reject a direct threat defense where the probable risk of HIV transmission is so low.

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[40] Cf. Bloom, 1995 WL 490481, *5 ("The court finds defendants' actions to be particularly offensive in light of their status as licensed health care providers who ought to be aware of and practice universal precautions."); Lewis, Docket No. 92-154-PA(N), slip op. at 20-21 ("What is [] shocking is that the decision not to treat a HIV-infected individual came from a member of the medical profession who is deemed to know better about the transmission of AIDS.").

CONCLUSION

This Court should grant summary judgment to the United States on the constitutional defenses asserted by Bragdon and issue an Order holding that the ADA is constitutional as applied to Bragdon's practice of dentistry. In addition, this Court should grant Plaintiff Sidney Abbott's motion for summary judgment on liability.

Respectfully submitted,

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