UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA, Plaintiff, v. DREW B. MORVANT, D.D.S., and DREW B. MORVANT, A PROFESSIONAL DENTAL CORPORATION, Defendants.	)	CIVIL ACTION No. 93-3251 Section K(1)

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The United States filed this action alleging that Defendants' refusal to provide routine dental care to individuals who are HIV-positive or who have AIDS constitutes discrimination on the basis of disability in violation of title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12121-89. On January 11, 1995, the United States and Defendants filed cross motions for summary judgment on the issue of liability. Defendants also filed a motion to dismiss for lack of subject matter jurisdiction.[1] This memorandum responds to both of

[1] Defendants' motion to dismiss should have been brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an alleged failure to state a claim upon which relief can be granted, rather than pursuant to 12(b)(1), for lack

Defendants' motions. The United States demonstrates below that, contrary to Defendants' arguments: 1) medical decisions are not immune from scrutiny under the ADA; 2) "substantial compliance with accepted professional norms" is not a defense to discrimination on the basis of disability; and 3) the ADA is constitutional as applied to discriminatory denials of routine dental care. Accordingly, Defendants' motion for summary judgment and motion to dismiss should be denied.

ARGUMENT

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

A. Medical Decisions Are Not Immune from Scrutiny Under the ADA

There is no dispute that Defendants refused to provide dental cleanings and dental examinations to Ismael Pena, xxxxxxxx, and other persons with HIV or AIDS, but rather, sent them to Dr. Kathryn Creely Sturm, another general dentist, for the provision of all routine dental care. Plaintiff's Statement of Uncontested Facts (hereinafter referred to as "Pl.'s Facts"), at ¶ 10 - ¶ 18, ¶ 37 - ¶ 42; Defendants' Statement of Uncontested Facts ¶ 5 - ¶ 6; Stipulation of Drew B. Morvant, D.D.S. and Drew

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of subject matter jurisdiction. This Court has subject matter jurisdiction to hear a claim brought pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., a federal statute. 42 U.S.C. § 12188(b)(1)(B)(ii)("the Attorney General may commence a civil action in any appropriate United States district court"). See also 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."). At issue is whether the statute is constitutional as applied, i.e., whether the government has stated a claim upon which relief can be granted. The government thus responds to Defendants' motion to dismiss as if it had been brought pursuant to Rule 12(b)(6).

B. Morvant, A.P.D.C. (September 30, 1994). Similarly, there is no dispute that Defendants' denials of care and "referrals" to Dr. Creely Sturm were based solely on the patients' HIV-positive status. Id. Defendants now attempt to justify their discriminatory actions by describing them as "medical decisions," which, they argue, are "immune from scrutiny" under the ADA. Defendants' Memorandum in Support of Motion for Summary Judgment (hereinafter referred to as "Defs.' Summ. J. Mem.") at 2. Defendants' arguments have no support in the statutory language of the ADA, the ADA regulations, or in the case law, all of which Defendants ignore.

Title III of the ADA prohibits discrimination on the basis of disability by owners and operators of places of public accommodation, including, specifically, health care professionals. 42 U.S.C. §§ 12181(7)(F); 12182(a); 28 C.F.R. §36.104(7). Accordingly, a patient with a disability cannot be denied the opportunity to receive medical or dental care because of his or her disability. Howe v. Hull, No. 3:92CV7658, slip op. at 10 (N.D. Ohio Nov. 21, 1994)(attached to the United States' Memorandum in Support of its Motion for Summary Judgment and hereinafter referred to as "Howe I"); Mayberry v. Von Valtier, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994); In re Baby K, 832 F. Supp. 1022, 1029 (E.D. Va. 1993), aff'd on other grounds, 16 F. 3d 590 (4th Cir. 1994), cert. den., __ U.S. __, 115 S. Ct. 91. While a health care provider is not required to treat a person seeking treatment or services outside the referring provider's

area of specialization, the title III regulation provides that the referral must be based on the treatment the patient is seeking or requires, rather than the disability that he or she has. 28 C.F.R. § 36.302(b)(2).[2] Indeed, a referral from one health care provider to another complies with the ADA only if, in the normal course of operations, "the referring provider would make a similar referral for an individual without a disability

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[2] The exact language of the regulation provides:

> A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

28 C.F.R. § 36.302(b)(2). Where, as here, 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." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). Thus, "'an agency's construction of its own regulations is entitled to substantial deference.'" Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991), citing Lyng v. Payne, 476 U.S. 926, 939 (1986). 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., Civ. A. 92-486 (TPJ), 1994 WL 709588, *4 (D.D.C. December 16, 1994), citing Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994). See also Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993), cert. den. sub nom., Hoskins v. Kinney, __ U.S. __, 114 S. Ct. 1545 (1994)(relying extensively on the Department of Justice implementing regulations and its interpretation thereof in determining whether appellants had violated the ADA).

who seeks or requires the same treatment or services." Id.; Howe I, slip op. at 10.

Thus, any time that a defendant asserts that an alleged discriminatory act of sending a person with a disability to another health care provider was actually a legitimate referral within the meaning of the ADA, the "medical decision" of the referring provider is subject to scrutiny by the court. Case law under the ADA fully supports this position.

In In re Baby K, 832 F. Supp. 1022, one of the first cases challenging the actions of a health care provider under the ADA, the court found that "denial of medical services" is "discrimination against a vulnerable population [and] exactly what the [ADA] was enacted to prohibit." In re Baby K, 832 F. Supp. at 1029. The court specifically overruled the hospital's alleged "medical decision" to withhold ventilator treatment from an anencephalic newborn, finding that "denial of ventilator services that would keep alive an anencephalic baby when those life-saving services would otherwise be provided to a baby without disabilities" violates the ADA as a matter of law. Id.

Similarly, in Howe v. Hull, the court found the defendant liable for discrimination because the defendant refused to treat the simple allergic drug reaction from which the HIV-positive plaintiff had been suffering, even though the defendant had the capability to do so. Howe I, at slip op. 11-12. The court found the defendant's assertion that the patient needed "specialized care" pretextual. Id. at slip op. 12. Again, the defendant's

medical decision was subject to scrutiny by the court and found to be in violation of the ADA. Id. See also Woolfolk v. Duncan, Civ. Act. No. 94-1532, 1995 WL 11976, *5 (E.D. Pa. Jan. 5, 1995) (attached hereto as Exhibit 1)(question of whether plaintiff was discriminatorily denied medical care because of his HIV-positive status subject to scrutiny under the ADA).

Defendants rely on a federal district court case, Jackson v. Fort Stanton Hosp. and Training Sch., 757 F. Supp. 1243, (D.N.M. 1990), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992), for the mistaken assertions that medical decisions are immune from scrutiny under section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794, and thus, by implication, are immune from scrutiny under the ADA.[3] See Defs.' Summ. J. Mem. at 4-5. Jackson, a case in which the court held that the state of New Mexico's institutionalization of developmentally disabled individuals violated section 504, is wholly inapposite.[4] Rather, Defendants' argument is based on

[3] Section 504 was the first federal statute prohibiting discrimination on the basis of disability and is the precursor to the ADA. Section 504 only prohibits discrimination in programs and activities receiving federal financial assistance, while the ADA prohibits discrimination by private employers employing greater than 15 persons, state and local entities, and owners and operators of places of public accommodation.

[4] In Jackson, the court held that the state had discriminated against persons with severe developmental disabilities by denying them access to community service programs. Jackson, 757 F. Supp. at 1297-99. The court relied on the recommendations of interdisciplinary teams charged with evaluating the needs of developmentally disabled individuals and held that the state's institutionalization of these individuals violated section 504 when the state could have made reasonable modifications to existing community programs so as to have

language from Jackson that quotes two other federal cases, Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) and United States v. Univ. Hosp., 729 F.2d 144 (2d Cir. 1984), and which is taken completely out of context.

Defendants' argument that "medical decisions are immune from scrutiny" is in fact based on two federal opinions that analyze a question not presented here: whether parental decisions concerning the medical treatment of their critically ill newborns should be subject to scrutiny by the government under section 504. Bowen, 476 U.S. at 646-647;[5] University Hosp., 729 F.2d at 161. The courts in these cases found that where the decision is one concerning the nature of the treatment to be provided -- for example, invasive corrective surgery versus non-invasive, non-surgical medical care -- the "medical treatment decision" rightly belongs to the parents. Bowen, 476 U.S. at 646; University Hosp., 729 F.2d at 161. Thus, the courts held, a hospital's deference to a parent's wishes is immune from scrutiny under the section 504. Id.

Bowen and University Hospital are not about access to health care for persons with disabilities; rather, they examine the role

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afforded these individuals access to a less restrictive and more integrated setting. Id.

[5] In Bowen, the Supreme Court considered the validity of regulations promulgated by the Department of Health and Human Services pursuant to section 504, which would have undermined parental choice concerning the care their children received. Bowen, 476 U.S. at 645-646.

of the government and its ability (or lack thereof) to overrule a parent's wishes. Indeed, contrary to Defendants' assertions that their policy of denying dental care to persons with HIV or AIDS is immune from scrutiny under section 504 (Defs.' Summ. J. Mem. at 6), the Supreme Court specifically stated in dicta that "[individuals with disabilities] are entitled to 'meaningful access' to medical services . . . . [An institutional rule or] policy denying or limiting such access would be subject to challenge under § 504." Bowen, at 624 (emphasis added).[6]

In fact, federal jurisprudence is quite clear that discriminatory acts such as Defendants', couched in terms of "medical decisions," are very much subject to scrutiny under section 504. See, e.g., Miller v. Spicer, 822 F. Supp. 158, 166 (D. Del. 1993) (hospital's failure to perform surgery and transfer to another facility subject to scrutiny under section 504 where plaintiff was perceived as being HIV-positive and defendants routinely performed needed surgery); Glanz v. Vernick, 756 F. Supp. 632, 637-8 (D. Mass. 1990) (physician's refusal to provide ear surgery to HIV-infected patient subject to scrutiny under section 504).[7] As the court in Glanz noted, "[a] strict

[6] Cf. id. at 632 (noting that in two instances where hospitals did not operate on critically ill newborns because the parents did not consent to the surgery, "the hospitals did not withhold medical care on the basis of handicap and therefore did not violate § 504").

[7] The courts in Howe and In re Baby K, which, as discussed above, found that the defendants' denial of medical treatment to persons with disabilities violated the ADA, also found that the defendants' actions were subject to scrutiny under, and violative of, section 504. Howe v. Hull, No. 3:92CV7658, slip op. at 15-18

rule of deference [to a physician's alleged medical decision] would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions." Id. at 638. Only by scrutinizing these decisions to deny treatment can the courts determine whether the actions of a health provider constitute legitimate refusals to provide services or illegal discriminatory acts. Id.

In enacting the ADA, Congress intended that access to medical care could no longer be denied for discriminatory reasons by owners and operators of places of public accommodation, regardless of whether or not they were recipients of federal funds.[8] Yet, as detailed in Plaintiff's Statement of Uncontested Facts, Defendants in the instant action refused to treat persons whom they had the ability to treat, and for whom they would not have made a referral to another general dentist except for the fact that the persons in question were HIV-positive. See Pl.'s Facts at ¶ 55 - ¶ 68. Health care professionals such as Defendants cannot be permitted to immunize their discriminatory conduct merely by labeling it a "medical decision."

(N.D. Ohio May 26, 1994)(attached hereto as Exhibit 2); Howe I, slip op. at 2; In re Baby K, 832 F. Supp. at 1028. See also Woolfolk, 1995 WL 11976, *3 - *5 (question of whether plaintiff denied medical care on the basis of his HIV-positive status also subject to scrutiny under section 504).

[8] See 42 U.S.C. § 12101(a)(3)("discrimination against individuals with disabilities persists in such critical areas as . . . health services").

B. "Substantial Compliance with Accepted Professional Norms" is Not a Defense to Claims of Discrimination

Defendants argue that, in the alternative, "the ADA simply requires that Dr. Morvant's referrals not have been a substantial departure from accepted professional judgment, practice, or standards." Defs.' Summ. J. Mem. at 7. "Substantial compliance with accepted professional norms," however, appears nowhere in the ADA as a defense to the discriminatory denial of dental or medical care. While such a standard may provide a defense to claims of medical malpractice, it does not provide a defense to claims of discrimination. Moreover, even assuming, arguendo, that "substantial compliance with accepted professional norms" was the standard by which liability under the ADA attached, Defendants' actions still violate the statute. As we demonstrate below, Defendants' refusal to provide routine dental care to persons with HIV or AIDS, solely on the basis of their HIV-positive status, departs widely from accepted professional judgment, practice, and standards.

1. "Substantial Compliance with Accepted Professional Judgment, Practice, or Standards" is Not a Defense under the ADA

Defendants' argument that only "substantial departures from accepted professional norms" constitute discrimination under the ADA is based, in part, on the fact that the legislative history of the ADA specifically contemplates medical referrals based on a health care provider's exercise of his or her professional medical judgment. Defs.' Summ. J. Mem. at 7-8. If Congress contemplated such referrals, Defendants posit, then the courts

must show deference to the judgment exercised by the health care professional. Id. at 8.

While the legislative history and the title III regulation certainly do contemplate referrals based on a professional's medical judgment, they caution that the referrals must be based on the exercise of bona fide medical judgments, not discriminatory acts or beliefs subsequently characterized as medical judgments.[9] Thus, the court's conclusion in Glanz v. Vernick, one of the section 504 cases cited above, is equally applicable to the ADA:

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[9] Indeed, the full quote from the legislative history upon which Defendants rely states:

> **Many physicians have developed areas of specialization. Nothing in this legislation is intended to prohibit such a physician from referring a patient with a disability to another physician if that patient is seeking treatment outside the doctor's specialization and if the doctor would make a similar referral for an individual without that disability. For example, a physician who specializes in treating burn victims could not refuse to treat the burns of a deaf individual because of that individual's deafness. However, that physician is not required to accept the deaf individual as a patient if the individual does not have burns. The physician would need only to provide other types of medical treatment to the burn victim if the physician provided such other treatments to nondisabled individuals.**
>
> **Likewise, n**othing in this legislation is intended to prohibit a physician from referring an individual with a disability to another physician **if the physician would refer other, nondisabled individuals with the same presenting conditions to another physician, or** if the disability itself creates specialized complications for the patient's health which the physician lacks the experience or knowledge to address.

H.R. Rep. 485 (II), 101st Cong., 2d Sess. 99 at 379 (1990) (highlighted text emphasizes that which was omitted by Defendants). See also 28 C.F.R. § 36.302(b)(2).

> There is some merit to the argument that the court should defer to a doctor's medical judgment. Accepting this argument at face value, however, would completely eviscerate §504's function of preventing discrimination against the disabled in the health-care context. A strict rule of deference would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions.

Glanz, 756 F. Supp. at 638 (citations omitted).

Accordingly, whether the physician claims to have based his/her referral on the exercise of his/her professional judgment is only the beginning of the inquiry. At issue is whether the health care professional actually has the ability to provide the treatment being sought or required by the person with the disability, not whether the health care professional has merely asserted an unsupported belief that he/she does not. 28 C.F.R. §36.302(b)(2). Mere compliance with or departure from "accepted professional practice" is a standard rooted in the law of torts and is relevant to resolving claims of medical malpractice, not claims of discrimination. See Howe I, slip op. at 11 ("The ADA is not a medical malpractice statute."),

Defendants cite to the Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), as support for the application of their "substantial departure" test in cases brought pursuant to the ADA. The question before the Court in Youngberg, however, was not the standard by which discrimination on the basis of disability by health care providers should be determined, but rather, the substantive due process rights owed by the state to individuals who are institutionalized or wholly dependent on the state. Id. at 309. The Youngberg Court held

that the Due Process Clause of the Fourteenth Amendment imposes on the states a duty to provide safe living conditions, freedom from bodily restraint, and minimally adequate training. Id. at 315-22. It is only with respect to determining whether a state meets the constitutional minimum of adequate training that the Court instructed the lower courts to "show deference to the judgment exercised by a qualified professional" unless the decision made by the professional "is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 322-23.

Accordingly, Youngberg is inapposite. While professional norms may shed guidance on whether the treatment being sought or required by a person with a disability is within the referring provider's area of specialization, the inquiry must go further. Even if an entire segment of the health care profession is acting in a discriminatory manner, that does not shield an individual health care provider from liability. Indeed, even if every other dentist in New Orleans acted in a discriminatory fashion and refused to treat persons with HIV or AIDS, Defendants' actions would still violate the ADA, for Defendants refused to provide dental care that they were capable of providing to persons with disabilities, solely on the basis of their disabilities. Just as restaurant owners sued under title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., could not have escaped liability by arguing that it was "accepted practice" in the South

to refuse service to African-Americans, Defendants cannot escape liability here.

2. Even, assuming, arguendo, that only "substantial departures from accepted professional judgment" impose liability under the ADA, Defendants still violated the Act

Finally, the government would prevail even if "substantial departure from accepted professional judgment, practice, or standards" was the standard by which liability under the ADA was determined, for Defendant Morvant's actions failed to meet this test. Contrary to their unsupported assertion that "Dr. Morvant's referrals to a dentist who had made a study of the dental treatment of HIV-positive/AIDS patients and who readily accepted such referrals without complaint were not a substantial departure from accepted professional judgment, practice, or standards," (Defs.' Summ. J. Mem. at 7) the undisputed facts demonstrate that Defendants' actions were and are greatly at odds with these norms.

The United States Centers for Disease Control and Prevention ("CDC"), the American Dental Association, and other leading dental organizations throughout the country take the unequivocal position that general dentists can and should treat persons with HIV or AIDS. See Pl.'s Facts at ¶ 70 - ¶ 85. Indeed, professional standards require such treatment: "[a] decision not to provide treatment to an individual because the individual has AIDS or is HIV [positive], based solely on that fact, is unethical." American Dental Association, Principles of Ethics and Code of Professional Conduct (Jan. 1993). "A dentist should

not refuse to treat a patient whose condition is within the dentist's current realm of competence solely because the patient is HIV-infected." American Dental Association, Annual Session Report 539 (Oct. 1991).[10]

At the time of the alleged "referrals," Defendant Morvant was a board-certified state-licensed general dentist. Pl.'s Facts ¶ 6, ¶ 57. His hygienists were similarly board-certified and state-licensed. Pl.'s Facts ¶ 9. Defendant Morvant routinely provided dental examinations and general dental care, and his hygienists routinely provided dental cleanings. Pl.'s Facts ¶ 57 - ¶ 58. The record clearly establishes that Defendants provided these services to patients who were immunocompromised (e.g., those undergoing chemotherapy) (Pl.'s Facts ¶ 62), who were infectious for Hepatitis B and Tuberculosis (Pl.'s Facts ¶ 64), who had medical conditions where the provision of dental treatment could have adversely affected their health (Pl.'s Facts ¶ 63), and who had acute illnesses with which Defendant Morvant was not familiar (Pl.'s Facts ¶ 61). In short,

[10] See also American Association of Dental Schools, Revised Policy Statement, III B2 (March 1993)("No dental personnel may ethically refuse to treat a patient whose condition is within the dental personnel's realm of competence, solely because the patient is at risk of contracting, or has, an infectious disease, such as human immunodeficiency virus (HIV) infection, acquired immunodeficiency syndrome (AIDS), or hepatitis B infection."); Federation Dentaire Internationale, Policy Statement on the Human Immunodeficiency Virus (HIV), the Acquired Immune Deficiency Syndrome (AIDS), and Dentistry, 4.2 (Aug. 1992)("Persons who are HIV-seropositive or who have AIDS, or who belong to groups within a community recognised [sic] as being at risk of being HIV-seropositive, should not be refused dental treatment on these grounds alone.").

Defendants provided routine dental care to all his patients with complex medical conditions, except those, like Mr. Pena and xxxxxxxx, who admitted to having HIV or AIDS. While Defendants allege that a) HIV-positivity, itself, creates specialized complications with respect to the provision of routine dental care (Defs.' Summ. J. Mem. at 8), and b) that Defendant Morvant did not have the knowledge and experience necessary to treat persons with HIV or AIDS (Id. at 8, 11), neither assertion is true. Pl's Facts at ¶¶ 49, 68, 70. See also American Dental Association, Annual Session Report 539 (Oct. 1991)(HIV-positivity, alone, not sufficient basis for refusal to provide dental care). Defendants have entered nothing into the record, except Defendant Morvant's alleged and mistaken beliefs, to support their contentions.[11]

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[11] In their Statement of Uncontested Facts, Defendants allege only that:

> HIV infection, AIDS, and their treatment have been the subject of intense scientific research only since the late 1970's. Indeed, the HIV virus was only isolated and identified in the early 1980's. While many discoveries have been made in HIV and AIDS research, many current theories about HIV infection and AIDS were and are not so firmly established as to be beyond reasonable dispute, because HIV/AIDS research is continuing.

Defendants' Statement of Uncontested Facts at ¶ 12. Moreover, Defendants point to no support in the evidentiary record for these broad and overreaching statements. Indeed, Defendants fail to cite to any evidence of record which supports any of the "facts" in their Statement of Uncontested Facts.

Similarly, Defendants extensive reliance on one issue of Science in their supporting memorandum is utterly irrelevant. Defs.' Summ. J. Mem. at 12-13. The lengthy

Similarly, there is nothing in the record that even remotely suggests that Defendant Morvant's decision to send Mr. Pena and xxxxxxxx to Dr. Creely Sturm was based on an exercise of professional medical judgment. Defendant Morvant never examined Mr. Pena or xxxxxxxx. Pl.'s Facts ¶ 17, ¶ 41. He never made any assessment of their dental or medical needs. Id. He never consulted with Dr. Creely Sturm to determine whether a referral to her was necessitated (Pl.'s Facts ¶ 27), nor did he ever consult with Mr. Pena's or xxxxxxxx's personal physicians to determine what impact, if any, the provision of dental care would have had on their patients' medical health (Pl.'s Facts ¶ 23, ¶ 41). Indeed, at the time that he "referred" Mr. Pena and xxxxxxxx to Dr. Creely Sturm, Defendant Morvant had no knowledge of what training and expertise, if any,

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passages quoted by Defendants explore issues concerning the development of a vaccine and/or cure for AIDS, issues that, albeit important, have no bearing on this action.

Finally, the case on which Defendants rely to support the proposition that "the courts already have taken judicial notice of the continuing nature of HIV/AIDS research", Stewart v. Stewart, 521 N.E. 956 (Ind. Ct. App. 1988), is an Indiana state case in which the court refused to take judicial notice of the means by which HIV is transmitted. Defs.' Summ. J. Mem. at 14. The government is not asking this Court to take judicial notice of how HIV is transmitted. Rather, we are asking this Court to rely on credible evidence entered into the record concerning HIV and the practice of dentistry. This evidence includes reports from the CDC, policy statements from leading dental organizations, and affidavits from leading experts in the field. It is appropriate for this Court to rely on such evidence. See Chalk v. Orange County Sup.'t of Sch., 840 F.2d 701, 706 (9th Cir. 1988); Doe v. District of Columbia, 796 F.Supp. 559, 563-564 (D.C. Cir. 1988).

Dr. Creely Sturm possessed concerning the dental treatment of persons with HIV or AIDS. Pl.'s Facts at ¶ 27.[12]

Thus, Defendants' emphasis on the fact that Dr. Creely Sturm "accepted referrals from other general dentists, and . . . did not complain to Dr. Morvant in any way about the referrals of HIV-positive/AIDS patients made by Dr. Morvant to her" (Defs.' Summ. J. Mem. at 11) only serves to contrast Defendant Morvant's conduct with that of Dr. Creely Sturm, who complied with accepted professional norms, and the law.[13] In the instant case, Defendants' actions constitute "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that [Defendant Morvant] actually did not base [his] decision on such a judgment." Youngberg, 457 U.S. at 323.

II. THE ADA IS CONSTITUTIONAL AS APPLIED TO DISCRIMINATORY DENIALS OF ROUTINE DENTAL CARE

Finally, Defendants argue, in the alternative once again, that if this Court finds that Defendants violated the ADA, then

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[12] At and prior to the time of the alleged "referrals," Defendant Morvant had never spoken to Dr. Creely Sturm about her knowledge concerning the dental treatment of persons with HIV or AIDS, nor about any other dentistry-related matter. Pl.'s Facts at ¶ 24 - ¶ 27. In fact, he first became aware of her qualifications during her deposition in this case. Accordingly, any efforts that Dr. Creely Sturm may have made to educate herself concerning HIV and the practice of dentistry is irrelevant to this case.

[13] Defendants' argument that their actions are legally justified because Dr. Creely Sturm accepted referrals of HIV-positive patients and never complained about them is akin to arguing that it would be legal to refuse employment to Hispanic persons, as long as the Hispanic applicants were sent to another company that was willing to hire Hispanic persons (and obey the law) without complaint.

the ADA is unconstitutional as applied to their conduct at issue in this case. Defendants' Memorandum in Support of Motion to Dismiss at 3. Specifically, Defendants argue that the ADA cannot constitutionally prohibit them from following a policy of refusing routine dental care to all persons who self-identify as having HIV or AIDS. Such a prohibition, Defendants assert, would exceed Congress' powers under the Commerce Clause and the Fourteenth Amendment. Defendants' argument has no merit.

When enacting the ADA, Congress invoked its 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).[14] In deciding whether a Federal statute operates within the constitutional authority granted under the Commerce Clause, a court may consider only: 1) whether there is a rational basis for a congressional finding that a regulated activity affects interstate commerce, and 2) whether the means selected by Congress are "'reasonably adapted to the end permitted by the Constitution.'" Presault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (quoting Heart

[14] Congress also invoked its powers under the Fourteenth Amendment, but only with respect to titles I and II of the statute, which impose obligations upon state and local government entities. See 136 Cong. Rec. E1913 (1990) (statement by Rep. Hoyer). Only the Commerce Clause provides the authority for reaching the conduct of private entities under title III, the public accommodations portion of the statute. Accordingly, only the constitutionality of the ADA under the Commerce Clause is discussed here.

of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964))). "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." Hodel, 452 U.S. at 276.

Defendants do not dispute that their actions affect interstate commerce.[15]. Rather, they argue that the means selected by Congress are not reasonably related to the goals Congress sought to accomplish in enacting the ADA. They argue that prohibiting Defendant Morvant from making an alleged "medically appropriate referral" is not rationally related to the asserted purpose of the Act, the elimination of discrimination on the basis of disability. Defendants' Memorandum in Support of Motion to Dismiss at 4-5.

Defendants' argument rests on a flawed premise. If, in fact, Defendant Morvant had made a "medically appropriate referral," no liability would attach under the ADA. Nowhere does the ADA state that health care providers are prohibited from

[15] Defendants have admitted inter alia, that they purchased and used dental equipment that was manufactured and/or distributed by companies outside of Louisiana, including those in Oregon, New York, California, Illinois, Washington, Massachusetts, Pennsylvania, and Wisconsin, as well as those outside the United States; and that their offices, located on Canal Street in downtown New Orleans, were within walking distance of several major hotels and within two miles of Interstate 10. Defendants' Response to Plaintiff's Second Request for Admission of Facts, attached hereto as Exhibit 3. See, e.g., Katzenbach, 379 U.S. at 296-97 (restaurant found to operate in interstate commerce where 46% of food originated out of state); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D. Ca. 1993) (public accommodation within walking distance of three hotels and within two miles of two interstate highways affects interstate commerce and is subject to liability under title III of the ADA).

making such referrals; indeed, as discussed above, the implementing regulation provides the exact opposite. See 28 C.F.R. § 36.302(b)(2). The government's claim here is that Defendants' "referral" of Mr. Pena, xxxxxxxx, and other persons with HIV or AIDS to Dr. Creely-Sturm was not an appropriate medical referral based on sound professional judgment. The "referrals" here were made for services Defendants routinely provided (Pl.'s Facts at ¶¶ 57-58), and were made without any examination of the patients (Pl.'s Facts at ¶¶ 17, 41), without any consultation with the patients' physicians (Pl.'s Facts at ¶¶ 24-26), without any knowledge of the expertise or credentials of the dentist to whom the patients were referred, and contrary to the dictates of the dental profession (Pl.'s Facts at ¶¶ 70-78). It is the government's position that Defendants' policy of "referring" all persons with HIV or AIDS, regardless of their dental needs or dental condition, and solely on the basis of their HIV-positive status, discriminates on the basis of disability.

Thus, Defendants' argument that the regulatory means chosen by Congress have no rational relationship to the asserted ends of the ADA must fail. The purpose of the ADA is, inter alia, to provide access to health care for persons with disabilities. 42 U.S.C. 12101(a)(3),(b). The means by which Congress has sought to achieve this end is to prohibit health care professionals from refusing to treat persons with disabilities on the basis of their disabilities when the caregivers are capable of providing the

treatment being sought or required. 28 C.F.R. § 36.302(b)(2). Certainly the relationship between the means and the ends is a rational one.

Defendants wrongly rely on Doe v. Bolton, 410 U.S. 179 (1973), for the mistaken assertion that the decisions and actions of a health care provider are immune from governmental regulation. In Bolton, the Supreme Court held that the additional levels of medical review required by a state statute prior to a physician's performance of an abortion violated the constitutional rights of the individual seeking the abortion. Id. at 199-200. Bolton is not a case dealing with Congress' very broad powers under the Commerce Clause, but rather, addresses a state's interference with a woman's constitutionally protected privacy rights. Id. at 197-198. The Court found the state statute unconstitutional not because a doctor has a constitutional right to practice unfettered by governmental regulation -- a right that, to the government's knowledge, does not exist -- but because a woman has a constitutionally protected right to decide whether or not to terminate her pregnancy. Id. at 197-198.

Indeed, Bolton and other federal cases recognize that state and federal governments can regulate the actions and decisions of a health care provider when necessary to achieve an important governmental purpose -- for example, protection of the potentially viable fetus. Webster v. Reprod. Health Servs., 492 U.S. 490, 519-21 (constitutionality of state statute regulating

actions of physicians performing abortions upheld). See Roe v. Ingraham, 480 F.2d 102, 108 ("We do not read [Doe v. Bolton] as meaning that a state is wholly without power to regulate the practice of medicine or the activities of physicians except by professional censure, deprivation of licenses, or enforcement of the criminal law.") Thus, federal courts have held that governments can, inter alia, regulate the kind of information given (or not given) by physicians to their patients (Planned Parenthood of Southeastern Penn. v. Casey, __ U.S. __, 112 S. Ct. 2791, 2822-24 (1992)) and assess and evaluate the medical treatment being provided to medicare recipients (Association of Am. Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (1975), aff'd sub nom., 423 U.S. 975 (per curiam)). In Bolton, the Court held that the additional layers of review required by the statute in question were not reasonably related to the end of ensuring that an abortion be medically necessary. Bolton, 410 U.S. at 198-99. When regulation of a health care provider's actions and/or decisions is reasonably related to the government's asserted end, the courts have deemed the statute constitutional.

Here, the important governmental purpose is the prohibition of discriminatory denials of medical care to persons with disabilities, including persons with HIV or AIDS. The regulatory means by which that purpose is achieved is reasonably related to that end and in no way impedes on the ability of a health care professional to exercise his or her professional judgment. In

the instant case, Defendants did not exercise their professional judgment, but instead refused to treat persons whom they had the ability to treat, and for whom they would not have made a referral except for the fact that the persons in question were HIV-positive. Defendants' discriminatory actions violate the ADA, which, in the instant case, is constitutional as applied.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment and Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that I have this date served upon the counsel of record listed below, by Federal Express overnight delivery, a true and correct copy of the foregoing United States' Opposition to Defendants' Motion for Summary Judgment and Motion to Dismiss for lack of Subject Matter Jurisdiction.

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SO CERTIFIED this 30th day of Janaury, 1995.

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