IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-14896-AA

SPENCER WADDELL

Appellant

-vs-

VALLEY FORGE DENTAL ASSOCIATES, INC. and
MONARCH DENTAL ASSOCIATES

Appellee

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

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ARGUMENT AND CITATIONS OF AUTHORITY

I. VALLEY FORGE'S INSISTENCE THAT MR. WADDELL POSES A SIGNIFICANT RISK OF HIV TRANSMISSION FAILS TO APPLY THE SUPREME COURT'S CONTROLLING DECISION IN *BRAGDON*, FLOUTS THE ONLY OBJECTIVE PUBLIC HEALTH AUTHORITY IN EVIDENCE, AND MISREPRESENTS THE RECORD

With no trialworthy evidence to support its position and a district court opinion that is fraught with error, Valley Forge clings to the wrong legal standard and mischaracterizes the record. Even though it adduced no response to three eminent experts who attested to the safety of Mr. Waddell's practice, Valley Forge portrays itself as the lone guarantor of patient safety while, presumably, the American Dental Association and the numerous public health *amici* supporting Mr. Waddell have abandoned patients, lining up against a licensed dentist in the name of civil rights. The truth is different: Mr. Waddell presents no threat, and there is no reasonable basis in the evidence or applicable law to find that he does.

Valley Forge notes that "[t]his Court has not yet considered a case involving an HIV positive health care worker," Brief of Appellee Valley Forge Dental Associates, Inc. (hereinafter "Appellee") at 24, but fails to apply the standards articulated in the controlling U.S. Supreme Court case decided in the dental care setting. *Bragdon v. Abbott*, 524 U.S. 624 (1998), is distinguishable only in that the transmission risk it addressed — from an HIV positive patient to her dentist —

is recognized to be *greater* than the provider-to-patient risk asserted here (R. 19: Exh. 4 (Molinari Aff.) at ¶14); *see also Abbott v. Bragdon*, 107 F.3d 934, 947 (1st Cir. 1997) (noting party's reference to risk disparity), *aff'd in part, remanded in part*, 524 U.S. 624, *on remand*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999). The courts upheld summary judgment for the ADA plaintiff even though the defendant dentist, Dr. Bragdon, offered expert testimony and clinical studies in support of his "direct threat" claim. In contrast to Bragdon and the defendants in the pre-*Bragdon* cases on which it prefers to rely, Valley Forge supports its contentions, not with its own evidence, but with inaccurate and subjective characterizations of evidence presented by Mr. Waddell.

Unlike Valley Forge, this Court cannot ignore the district court's error. That court found that Mr. Waddell poses a "significant risk" because he performs "exposure-prone procedures," despite unrebutted objective evidence that he simply does not perform such procedures. With this mischaracterization in place, it magnified the unmeasurably small risk arising from Mr. Waddell's work and, choosing inapplicable Circuit precedent over controlling Supreme Court authority, labeled Mr. Waddell a "direct threat." Valley Forge's artful characterizations and gross misreadings aside, the entire record in this case militates against a finding of significant risk. Accordingly, this Court should not only reverse the judgment for

Valley Forge but should direct entry of judgment for Mr. Waddell.

A. Valley Forge Lacks the Objective Evidence Required Under *Bragdon v. Abbott* to Raise an Issue of Fact About Mr. Waddell's Ability to Practice Safely

Although they ultimately applied a different standard, Valley Forge and the district court acknowledge the U.S. Supreme Court's standard governing "direct threat" determinations. It calls for:

> findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (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.

School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 288 (1987); *see Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (affirming applicability of *Arline*, a Rehabilitation Act case, to ADA case involving HIV transmission in dental setting) (R. 35 (District Court Judgment)) at 8-9; Appellee at 23. In this Court, as below, the case turns on whether decisionmakers must consider all four factors, or whether, as Valley Forge insists, a risk of death [(c)] can make a risk "significant" even though the likelihood of transmission [(d)] is so low as to be effectively zero.

Bragdon not only reaffirmed the *Arline* standard, but also explained what

kind of evidence is required to establish or overcome "direct threat" allegations. "The existence, or nonexistence, of a significant risk must be determined from the standpoint of the [decisionmaker], and the risk assessment must be based on *medical* or other *objective* evidence." *Bragdon*, 524 U.S. at 649 (emphases added). "As a health care professional, the [defendant dentist] had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." Id. What mattered was "whether [his] actions were reasonable in light of the available medical evidence." *Id.* And, said the Court, "[i]n assessing the reasonableness of [his] actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority." *Id*. at 650.[1]

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[1]Valley Forge fails to acknowledge the Court's statement that mere licensure as a health care professional does not entitle one's risk assessment to any deference, 524 U.S. at 649-50, but otherwise recites *Bragdon*'s evidentiary standards in its brief. Appellee at 23-24, 44. These mentions amount to lip service. Valley Forge spends the bulk of its brief trying futilely to undermine the *only* objective medical evidence in this case — the extensive expert testimony adduced by Mr. Waddell. Instead of showing that its grave allusions to patient risk are science-based and not fanciful, Valley Forge lamely, repeatedly points out that Mr. Waddell's experts are paid witnesses. Appellee at 4 n.2, 32 n.13, 34. They are indeed paid, as is typically true where a case turns on medical and scientific opinion that the parties are not competent to provide.

The requirements of substantive law, such as the *Bragdon* Court's guidance on the evidence needed to establish "direct threat," govern whether a party has raised or precluded a dispute of material fact on summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Accordingly, under *Bragdon*, introducing "medical or other objective evidence" is essential to show an entitlement to summary judgment. Despite its rhetoric, Valley Forge has defaulted entirely on its obligation to produce such evidence. It has neither provided admissible expert testimony of its own nor deposed any of Mr. Waddell's experts. Consequently, there is nothing to counter Mr. Waddell's formidable evidence from eminent public health experts who met with him and assessed his skill level, infection control knowledge, and overall health and functional capacity (R. 27: Exh. 2 (Marianos Aff.), ¶¶ 8-11; R. 19: Exh. 4 (Molinari Aff.), ¶¶ 3, 23; R. 19: Exh. 3 (Wilber Aff.), ¶¶ 3, 13).[2]

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[2]Valley Forge's criticisms of Mr. Waddell's expert testimony are unfounded. For example, it cites to a passage in *Bragdon* approving the First Circuit's refusal to rely on Dr. Marianos's affidavit in that case. Appellee at 31; *see Bragdon*, 524 U.S. at 650. That affidavit, however, addressed a different CDC document on a different point. *See id; see also Abbott v. Bragdon*, 107 F.3d 934, 948 n. 7 (1st Cir. 1997). The First Circuit had found the affidavit to be "of limited value," not because of doubts about its substantive accuracy, but because the record did not show that the conclusion Dr. Marianos expressed was available to Dr. Bragdon at the time when he refused treatment. *Id.* Here, by contrast, Valley Forge cannot rebut Dr. Marianos's multiple sworn assurances that an inquiry made at the time of Mr. Waddell's firing would have yielded advice, grounded in

Apart from the specifics of "direct threat" cases, motions for summary judgment must be supported by facts that are sworn on personal knowledge and admissible at trial. Fed.R. Civ. P. 56(e); *Macuba v. Deboer*, 193 F.3d 1316, 1322-23 (11th Cir. 1999). Deposition testimony supporting summary judgment must also be admissible at trial. *Macuba*, 193 F.3d at 1323. The moving party's evidence cannot be merely colorable, but must warrant judgment for the offering party as a matter of law. *Bragdon*, 524 U.S. at 653-54; *Anderson*, 477 U.S. at 249-50. Here, too, Valley Forge falls woefully short. Focusing on its evidence, rather than its brief's deceptively broad characterization of its evidence, one finds only that Witkin believed *someone* at Valley Forge had *some* conversation with CDC about Mr. Waddell (R. 16 (Witkin Dep.), 29-32, 38-39). Even if it were not inadmissible as rank hearsay, which it plainly is, this vague testimony would tell the court nothing; it is a far cry from the "extensive and objective analysis of both plaintiff's circumstances and the CDC guidelines" that Valley Forge touts in its

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science, to retain Mr. Waddell in light of his functional capacity and his adherence to universal precautions (R. 27: Exh. 1 (Marianos Supp. Aff.), ¶¶ 4-6; Exh. 2 (Marianos Aff.), ¶¶ 21-23, 27). That advice would have been consistent with the science-based policy expressed in guidelines that had been available from the Georgia Division of Public Health since 1993 (R. 25: Exh. A at 6; *see* R. 19 (Exh. 3 (Wilber Aff.), ¶12), and with the numerous refereed journal articles then available, showing that HIV transmission is virtually nonexistent from health care workers to patients generally, and nonexistent from dental hygienists to patients. Appellant at 7 & n. 4.

brief. Appellee at 45.[3] The *only* fact that Dr. Witkin testified he knew when he fired Mr. Waddell — supposedly from CDC — was that his HIV infection posed a risk of transmission that, while small, could not be reduced to absolute zero (R. 16 (Witkin Dep.) at 30-31, 39). But this fact is, all at once, obvious, and therefore unhelpful; inadmissible as hearsay; and insufficient as a matter of law to establish "direct threat" under *Bragdon*.[4]

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[3]Valley Forge wisely makes no reference on appeal to a sworn declaration by Dr. Witkin submitted after Mr. Waddell filed his motion for partial summary judgment. Those motion papers pointed out that Witkin admitted firing Mr. Waddell because his HIV status posed a non-zero transmission risk and for no other reason, and that this action was contrary to the principles set forth in guidelines issued by CDC and the State of Georgia (R. 19: 26-30).

The declaration avers that Witkin "primarily" considered CDC's 1991 Recommendations on health care workers with bloodborne pathogens before firing Mr. Waddell (R. 21: Exh. (Witkin Decl.), ¶¶ 2, 4). As further detailed below, however, the document recommends an approach wholly at odds with Witkin's reflexive action (R. 18: Exh. J). Moreover, the averments in the declaration are so jarringly inconsistent with Dr. Witkin's sworn deposition testimony that they fail to raise a genuine issue of material fact about whether he consulted with CDC. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 805-07 (1999) (where the same witness offers contradictory testimony, no dispute of material fact is created unless the affiant explains the inconsistency in a manner that reconciles them or allows a factfinder to find that the initial statement was made in good faith).

[4]A decisionmaker who deems objective medical information "moot" once he learns that a transmission risk cannot be totally eliminated is employing the "any risk" standard that the Supreme Court and this Court have rejected. *Bragdon*, 524 U.S. at 653; *Onishea*, 171 F.3d at 1299. *See* R. 16 (Witkin Dep.) at 40; *see also id.* at 38-39 ("Q: That's what made it your decision is the CDC says there's a risk that we can't eliminate to zero so this is my decision? A: Correct. I could not get

In that case, the defendant dentist, Dr. Bragdon, presented expert testimony in support of his "direct threat" contention. *See Bragdon*, 524 U.S. at 654. He also introduced evidence that public health authorities had identified seven dental workers with HIV for whom occupational exposure to the virus had not been ruled out as the means of infection. *Id.* Remanding the case to the First Circuit Court of Appeals, the Supreme Court directed further examination of that evidence to determine whether it had been available to Dr. Bragdon at the time he refused treatment to the plaintiff. The seven cases "might have provided some, albeit not necessarily sufficient, support for [Dr. Bragdon's] position," said the Court. "Standing alone," however, "we doubt it would meet the objective, scientific basis for finding a significant risk . . . ." *Id.* On remand, the First Circuit agreed that

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beyond that. That was the overriding factor"); *id.* at 43: ("It's irrelevant to me whether [the risk is] great or small"). No amount of wordplay on Valley Forge's part can conceal this fact.

In its brief, Valley Forge battles a straw man, arguing, "Simply because Mr. Witkin did not read every possible medical journal or article does not equate into a finding that he relied on the wrong standard." Appellee at 43. That is true as far as it goes. But Mr. Waddell has never contended that Valley Forge's liability turns on the number of articles Dr. Witkin read. It would not matter in the least whether or not anyone working with Witkin ever called CDC, if he had decided on his own to conduct an individualized assessment of Mr. Waddell in consultation with a qualified infectious disease specialist. Regardless of how Dr. Witkin might have learned to take scientifically sound action, this case is about the action that he in fact took, and it must be resolved by deciding whether that action was "based on medical or other objective evidence." *Bragdon*, 524 U.S. at 649.

seven possible infections among dental workers, about which the most one could say was that workplace exposure to HIV had not been ruled out, was an insufficient foundation for Dr. Bragdon's claim that treating the plaintiff could endanger him. *Bragdon v. Abbott*, 163 F.3d 87, 89-90 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999). The Court of Appeals also deemed insufficient reports by CDC that it had *documented* occupational HIV infections among no fewer than 42 health care workers. Because none was a dental worker, and because Dr. Bragdon did not show that transmission risks for dental workers were comparable to those faced by other health care workers, the court reaffirmed its earlier conclusion that evidence of these infections raised no issue of material fact. *Id.* at 90.[5]

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[5]Valley Forge cites to a portion of the opinion in *Onishea* where this Court rejected a rule under which no risk may be deemed "significant" unless the harm at issue has occurred "in at least several cases." *See* Appellee at 37 (citing *Onishea*, 171 F.3d at 1298-99, in turn citing first appellate opinion in *Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997)). The First Circuit's ultimate resolution of the question on remand was wholly consistent with the Supreme Court's expression of "doubt" that evidence of seven possible infections of dental workers, "standing alone," could justify a finding of significant risk. *Bragdon*, 524 U.S. at 654. Shortly after *Onishea* was decided, on May 24, 1999, the Supreme Court denied Dr. Bragdon's second petition for *certiorari*. *See* 524 U.S. 1113.

Mr. Waddell has shown that *Onishea* arose in a factual setting wholly different from the modern dental office — a place where conduct giving rise to HIV transmission risks demonstrably occur and is a "perpetual possibility." *Onishea*, 171 F.3d at 1295; *see* Brief of Appellant Spencer Waddell (hereinafter "Appellant") at 48-50. To the extent that the standards set forth in the *Bragdon* opinions diverge from those in *Onishea*, a High Court case that directly addresses HIV transmission in the dental setting plainly provides the more apposite and

Bragdon illustrates the importance of the probability prong of the "direct threat" standard, showing why the severity of the risk, eventual death from HIV, cannot be considered in isolation from the probability that transmission will occur. To adapt an analogy from *Onishea*, 171 F.3d at 1297, a fall from a tightrope and a fall from the Golden Gate Bridge may both be fatal, but the risks of fatal falls in each case are profoundly different. The appropriate analogy in this case is not the tightrope, but the bridge. It is not completely impossible that an individual crossing the bridge will fall or be pushed off, but it is exceedingly unlikely – a near-zero probability – unless one intends to jump or unless a third party intentionally harms the individual. The persistent stigma surrounding HIV should not be permitted to obscure this reality.

If Dr. Bragdon's evidence elicited skepticism from the Supreme Court and rejection by the Court of Appeals on remand, the empty vessel that is Valley Forge's direct threat case should fare no better. Quite literally, Valley Forge has produced nothing admissible, despite the requirement that a summary judgment motion rest on admissible evidence. Moreover, even if one credits Witkin's highly dubious declaration that even Valley Forge declines to cite on appeal[6], all it says is

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controlling analysis.

[6] *See supra* note 4.

that Witkin relied on CDC's recommendations; and he manifestly lacks the expertise to assess Mr. Waddell's ability to continue in practice. Far from "attacking" Dr. Witkin's ignorance about HIV, as Valley Forge suggests, Appellee at 41 n. 21, Mr. Waddell points out a highly relevant deficiency in Witkin's knowledge base when he highlights the dentist's lack of expertise in infectious diseases and his refusal to consult with anyone who has such expertise (R. 16 (Witkin Dep.) at 17; *see* Appellant at 4-5. If the belated claim, "But I read the CDC document," were enough to satisfy *Bragdon*'s demand for medical or other objective evidence, CDC and the State of Georgia would not have taken pains to specify that infectious disease experts should participate in assessments of health care workers with HIV. [cite] Nor would infected health care workers benefit from the protections of the ADA, because employers would have a ready-made, albeit subjective and unscientific, defense available in every case.

B. The District Court's Patent Mischaracterization of Georgia Dental Hygienists' Work, Ignored by Valley Forge, Led to That Court's Erroneous Judgment

Valley Forge acknowledges that the district court followed *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (*en banc*), *cert. denied sub nom. Davis v. Hopper*, 528 U.S. 1114(2000), rather than *Bragdon.* It portrays the district court as ruling, pursuant to *Onishea*, 1) that percutaneous (skin-piercing) injuries can

happen to dental hygienists; and 2) that such injuries can result in HIV transmission, with nothing more required for a finding of "significant risk." Appellee at 34-35. This summary fails to emphasize that the "bridge" between Mr. Waddell's work and the possibility of HIV transmission was the district court's finding that Mr. Waddell performs "exposure-prone procedures" — a public health term of art — despite the opinion of Mr. Waddell's expert to the contrary (R. 35: 11-12). The court's judgment, and Valley Forge's entire brief, are based on the incorrect premises that "exposure-prone procedures" are at issue in this case, and that performance of such procedures is dispositive of whether a health care worker presents a direct threat. Because neither premise is correct, the district court's legal conclusions are erroneous, and Valley Forge's defense of the judgment below is unavailing.

Valley Forge notes a "concession" that Mr. Waddell uses sharp instruments in his practice. Appellee at 29 (citing R. 27, Exh. B (Marianos Aff.) at ¶13). But it omits the expert's accompanying caution, "[i]t does not follow . . . that performance of these procedures presents a significant risk of HIV transmission, especially where hygienists use gloves and other appropriate barriers and are well trained and otherwise competent." *Id.* Its persistent failure to recognize that skin-piercing injuries are necessary but not sufficient for HIV transmission mirrors the

district court's declaration that Mr. Waddell performs exposure-prone procedures *solely because* he uses sharp instruments (R. 35:11).[7] Dr. Marianos, a former CDC official, helped formulate the definition of "exposure-prone procedure," and his testimony is that Mr. Waddell's techniques (which do not even include the giving of injections) do not satisfy the definition. Although it found that the affidavits of Dr. Marianos and Mr. Waddell's other expert witnesses "represent the views of objective health care officials" (R. 35: 10), the district court erroneously accorded Dr. Marianos's opinion no deference. *Id.* at 11-12. *See Bragdon*, 524 U.S. at 649 (mandating use of objective scientific information to decide "direct threat"

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[7]The district court's *ipse dixit* reasoning proceeded thus: Mr. Waddell concedes he uses sharp instruments; performing exposure-prone procedures gives rise to a risk of injury leading to contact between the provider's blood and the patient's blood, tissues, or mucous membranes; therefore Mr. Waddell performs exposure-prone procedures *because* there is a risk of injury leading to contact between the provider's blood and the patient's blood, tissues, or mucous membranes (R. 35: 11-12). This illogical wordplay, which equates "use of sharp instruments" with "performance of exposure-prone procedures," disregards the actual definition of the term: "Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the HCW's fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site." Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures," MORBIDITY & MORTALITY WEEKLY REPORT 1991: 40 (RR-8) (hereinafter "1991 Recommendations") (R. 18: Exh. J), at 4. Dr. Marianos helped write this definition, and he attests that Mr. Waddell's techniques do not satisfy it (R. 27: Exh. 2 (Marianos Aff.), ¶¶ 14, 19.

question); *id.* at 650 ("views of public health authorities," including CDC, "are of special weight and authority").[8] For its part, Valley Forge seeks to substitute mischaracterizations of Mr. Waddell's position, and unsupported rhetoric, for the evidence it failed to offer in support of its claim that he presents a direct threat.[9]

C. Valley Forge's Discussion of Mr. Waddell's Objective Medical Evidence is Rife With Mischaracterizations That Obscure the Consensus Among Public Health Experts That a Functionally Competent Dental Hygienist's HIV Infection Does Not Pose a Threat to Health and Safety

Mr. Waddell has shown that CDC would never have counseled Dr. Witkin to fire him on account of his HIV infection, bolstering his contention that Witkin

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[8]Valley Forge ignores the district court's finding that Mr. Waddell's experts qualify as "objective health care officials" (R. 35: 10).

[9]As one example, Valley Forge berates Mr. Waddell for saying that is is "bizarre" or "fanciful" to believe that dental workers can suffer skin-piercing injuries. Appellee at 31 n.12 (citing Appellant at 40). What Mr. Waddell said, though, is that absent "bizarre or fanciful scenarios, it is wholly within the bounds of commonplace language to say that dental hygienists *will not transmit HIV* to patients when they use universal precations and suffer no functional impairments." Appellant at 40 (emphasis added). Of course accidents happen — although adherence to protocols for disposal of sharp instruments, an element of universal precautions, tends to minimize them. *See* American Dental Association, Policy Statement on Bloodborne Pathogens, Infection Control and the Practice of Dentistry, *reprinted at* Brief of *Amicus Curiae* American Dental Association, Exh. A, p. 1. Though Valley Forge refuses to acknowledge the distinction throughout its brief, a percutaneous injury does not necessarily equate with an opportunity for HIV transmission. *See* Appellant at 35-40 (detailing ways in which accepted dental hygiene techniques diminish the already-low chance of actual HIV transmission essentially to zero).

made a knee-jerk decision rather than a science-based judgment. Valley Forge ignores this evidence, except to disparage the experts who provide it. Just as troubling, Valley Forge consistently misconstrues the content and significance of public health authorities' policies and guidelines, sometimes confusing them so thoroughly that the solid consensus of experts favoring Mr. Waddell's position is hard to discern. Like the numerous scholarly articles cited in Mr. Waddell's opening brief and available to Dr. Witkin in 1997, Appellant at 24 & n.7, the Recommendations of CDC and the Georgia Division of Public Health both support Mr. Waddell by disavowing termination of practice solely on the basis of HIV infection. To portray Dr. Witkin's reflexive reaction as consistent with sound public health practice, Valley Forge must systematically distort opinions and guidelines that, fairly read, comport with science and reject the removal of functionally capable health care workers from clinical work.[10]

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[10]In two long footnotes, Valley Forge complains that Mr. Waddell is selectively invoking portions of the guidelines promulgated by CDC and the State of Georgia, Appellee, 42 n. 22 (citing Appellant at 43), and that he is inaccurately claiming that those guidelines have the force of law. *Id.* at 43 n. 23. Although one doubts that Valley Forge was in 1997, or that its successor is today, the sort of "small, private employer" for whom it would be infeasible to convene or maintain an expert review panel, *id.*, and although the Georgia guidelines may or may not carry independent legal force as state regulations, these questions need not be resolved. Mr. Waddell does *not* predicate Valley Forge's liability on violations of the federal or state public health guidelines *per se*. Rather, he focuses on Dr. Witkin's disregard of these documents for the same reason that he criticizes

Dr. Marianos was Director of CDC's Division of Oral Health for eight years, until the very month when Dr. Witkin fired Mr. Waddell (R. 27: Exh. 2 (Marianos Aff.), ¶ 2. As such, Marianos, an experienced consultant and epidemiological investigator, *id.* at ¶3, is uniquely qualified to state CDC's position with respect to HIV positive health care workers as it existed in 1997. Reacting to Valley Forge's claim, its central argument on appeal, that Dr. Witkin acted pursuant to CDC guidance, Marianos attests:

> The assertion that CDC officials or employees would have advised a supervising dentist to limit the practice of, or to discharge, a dental hygienist solely because he or she was found to be HIV positive is wholly contradicted by CDC's actual position on the issue, as well as by accepted public health practice in 1997 and in the present day.
>
> CDC has never advocated total removal of a functionally capable health care worker, using universal precautions, from clinical duties solely on account of HIV status. There is not now, nor was there in 1997, a perceived epidemiological basis for such an action.

R. 27: Exh. 1 (Marianos. Supp. Aff.), ¶¶ 4, 5.

Had public health experts been given an opportunity to educate Dr. Witkin, they surely would have referred to CDC's 1991 "Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to

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Witkin's failure to conduct an individualized assessment of Mr. Waddell: the policies of CDC and the State of Georgia embody the wisdom and experience of public health authorities who, under *Bragdon*, deserve deference.

Patients During Exposure-Prone Invasive Procedures" (R. 18: Exh. J), and to the agency's "Recommended Infection-Control Practices for Dentistry, 1993."[11] In an effort to shoehorn Dr. Witkin's ill-informed decision into the mainstream of public health opinion, Valley Forge misreads the 1991 Recommendations with gusto. It tells this Court that the document "state[s] that there is a risk of transmission," Appellee at 30, but fails to note the qualifier that the risk is quite small, indeed "considerably lower than the risk of HBV [hepatitis B] transmission . . . ." (R. 18: Exh. J at 3).[12] It asserts that CDC "recommend[s] that a health care worker with HIV refrain from engaging in exposure-prone procedures," Appellee at 30, but fails to credit Mr. Waddell's unrebutted expert testimony that he performs no such procedures (R. 27: Exh. 2 (Marianos Aff.), ¶¶ 14, 19). Its partial quote conveys a half-truth: CDC does *not* urge avoidance of such procedures altogether, but merely recommends that infected providers seek counsel from expert review panels before continuing to perform them (R. 18: Exh. J at 5). Moreover, under the Guidelines

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[11]42 MMWR No. RR-8 (May 28, 1993) (hereinafter "1993 Dental Guidelines").

[12]The relative infectiousness of hepatitis B virus is relevant because it was the threat of HBV transmission that led to the development of universal precautions (R. 19: Exh. 4 (Molinari Aff.), ¶¶ 5, 9. HBV is about one hundred times as infectious as HIV, but in the era of adherence to universal precautions, there has not been a single outbreak of HBV in a dental office. *Id.* at ¶¶ 8, 9.

that authoritatively express Georgia's public health policy, the expert review procedure is not even triggered unless the infected health care worker performs exposure-prone procedures (R. 25: Exh. A, 6) – so under both federal and state guidelines, Mr. Waddell should not be subjected to any practice restrictions at all, much less to termination of employment. Perhaps most illustrative of Valley Forge's casual attitude toward objective science is its startling assertion that, "According to CDC, the risks of transmitting HIV during [exposure-prone] procedures *cannot* be mitigated through available precautions such as sterilization, hand-washing and the use of gloves." Appellee at 33 (emphasis in original). This is not just a false statement; it is a spectacular misreading of basic public health doctrine, which regards universal precautions as a reliable guarantor of patient and provider safety. *See* R. 19: Exh. 4 (Molinari Aff.), ¶¶ 4-19; *see also* 1993 Dental Guidelines at 1-2; *Abbott*, 163 F.3d at 89 (quoting CDC opinion that "use of the universal precautions eliminates the need for additional precautions" to avoid transmission of blood-borne pathogens).

The HIV epidemic has raged for two decades during which countless persons have received dental care. Dental hygienists with HIV do not transmit the virus to patients. As the Supreme Court has recognized, one can almost never say that the chance of an occurrence is absolutely zero. *Bragdon*, 524 U.S. at 649.

But this case, with a mountain of evidence supporting Mr. Waddell set against Valley Forge's misstatements, leaves no room for a finding of "direct threat" unless the Supreme Court and this Court adopt the "any risk" standard that both have wisely rejected.

II. VALLEY FORGE'S CONTENTION THAT MR. WADDELL IS NOT DISABLED IS BASELESS IN LIGHT OF ITS FAILURE EVEN TO CHALLENGE THE FACTS IN HIS SUMMARY JUDGMENT AFFIDAVIT

Valley Forge's backup argument that Mr. Waddell has no "disability," 42 U.S.C. § 12102(2), is foreclosed by precedent and by its own failure to rebut Mr. Waddell's showing that his HIV infection substantially limits him in a number of major life activities (R. 19: Exh. A, ¶9). If this Court were to believe that a genuine issue of fact existed on this threshold question, the district court's grant of summary judgment to Valley Forge would of course still be inappropriate. But no such fact question exists. Rather, Valley Forge continues to rely on rhetoric rather than evidence in an attempt to undercut facts it failed to contest below.

Valley Forge seems to argue that Mr. Waddell cannot be substantially limited in major life activities because he is working and otherwise functioning in society. Appellee at 47-48. Once again, *Bragdon* forecloses its claim; the Court has noted that the ADA "addresses substantial limitations on major life activities,

not utter inabilities. . . . When significant limitations result from the impairment, the definition [of disability] is met even if the difficulties are not insurmountable." *Bragdon*, 524 U.S. at 641. Whether or not Circuit precedent designates HIV infection as a *per se* disability, *see Doe v. DeKalb Co. School Dist.*, 145 F.3d 1441, 1445 n. 5 (11th Cir. 1998), Mr. Waddell has alleged more than enough to establish the limitations that his health condition imposes, and Valley Forge has failed to controvert his sworn testimony.[13]

The remaining quibbles about Mr. Waddell's disability status need not detain the Court long. The idea that reproduction does not qualify as a major life activity for a gay man is erroneous, but it would at least suggest a good faith basis for referring to Mr. Waddell's sexual orientation. Appellee at 8. Because Mr. Waddell has not alleged a substantial limitation in the activity of reproduction, however, Valley Forge's mention of his homosexuality, including on the first page of its brief, seems no less calculated to prejudice the Court than its bizarrely off-point references to his body piercings and leather pants. Appellee at 7-8. The baselessness of its contention that Mr. Waddell must produce "comparator

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[13]Valley Forge's description of *Doe* suggests that this Court was reciting a stipulation of the parties rather than stating a rule of law in that case. Appellee at 48. Fairly read, the opinion belies this characterization because the Court neither qualified its statement nor made it in the course of a discussion of the parties' factual contentions.

evidence," *id.* at 49-50, is evident not only by recourse to common sense – surely courts can take judicial notice that persons who have HIV are differently situated than persons who do not – but also by the fact that HIV infection is the sole example given by this Court, in the very case Valley Forge cites, as an impairment for which no such evidence need be offered. *See Maynard v. Pneumatic Products Corp.*, 233 F.3d 1344, 1350 & n. 11 (11th Cir. 2000). Finally, Valley Forge's contention that it has not "regarded" Mr. Waddell as disabled is insupportable in view of its insistence that he must be precluded from any and all clinical duties; this view surely excludes him from "an entire class of jobs," Appellee at 50, although Valley Forge seems improperly to import into the "regarded as" inquiry the standards for alleging substantial limitation in the major life activity of working – an allegation Mr. Waddell has not made (R. 19: Exh. A, ¶9).

CONCLUSION

For the reasons stated herein and in Mr. Waddell's opening brief, this Court should reverse the judgment of the district court and order entry of judgment for

Mr. Waddell. In the alternative, it should dismiss and remand the matter for trial.

Respectfully submitted this 29th day of November, 2000.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I certify that this brief complies with FRAP 32(a)(7) in that there are 5,800 words in the non-excludible portions of the brief, according to the word count supplied by the word processing software used in its creation.

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CERTIFICATE OF SERVICE

I certify that two copies of the within brief were served on the persons listed below, by first class United States Mail, postage prepaid, this _____ day of February, 2001:

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