

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RICHARD ROE, ET AL.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, ET AL.,

Defendants.

CIVIL ACTION NO. 1:18-cv-01565

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO
FILE UNDER SEAL EXHIBITS A & B AND SUPPORTING
ATTACHMENTS TO PLAINTIFFS' MEMORANDUM
IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs respectfully request that Exhibits A and B to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, and the documents attached to Exhibits A and B in support, be filed under seal pursuant to Local Civil Rule 5. In support of this request, Plaintiffs state as follows:

1. Plaintiffs have moved the Court to file under seal two declarations—as well as the documents attached to those declarations—in support of their Motion for a Preliminary Injunction, which seeks to preserve the status quo by enjoining the separation of Roe and Voe, as well as any other similarly situated service members subject to separation because of restrictions on deployability due to HIV status; and by enjoining Defendants from restricting Roe and Voe and others similarly situated from being promoted, changing duty station, or re-training on the same terms as other service members living with HIV who are not being separated.

2. Exhibit A is a supplemental declaration by Plaintiff Roe, an active duty service member who is being discharged from the Air Force because of his HIV status and non-

worldwide deployable designation. Plaintiff Roe also made a declaration in *Harrison, et al. v. Mattis, et al.*¹ This declaration supplements the information provided in that declaration.

3. Attachment A1 is the declaration made by Plaintiff Roe in *Harrison, et al. v. Mattis, et al.*, No. 1:18-cv-00641.

4. Attachment A2 is the Findings and Recommended Disposition of USAF Informal Physical Evaluation Board (“IPEB”) for Plaintiff Roe. Plaintiff Roe references this document in Exhibit A1.

5. Attachment A3 is a letter written by Plaintiff Roe’s doctor for Plaintiff Roe’s Formal Physical Evaluation Board (“FPEB”) appeal. Plaintiff Roe references this document in Exhibit A1.

6. Attachment A4 is the Findings and Recommended Disposition of USAF FPEB for Plaintiff Roe. Plaintiff Roe references this document in Exhibit A1.

7. Attachment A5 is the Memorandum issued by the Air Force Personnel Board (“AFPB”) on behalf of the Secretary of the Air Force denying Plaintiff Roe’s appeal of the FPEB’s Findings and Recommended Disposition, and directing his discharge. Plaintiff Roe references this document in Exhibit A.

8. Attachment A6 is another Memorandum issued by the AFPB on behalf of the Secretary of the Air Force directing that another service member living with HIV be returned to duty. Plaintiff Roe references this document in Exhibit A.

¹ See Exhibit G to Motion for a Preliminary Injunction (Dkt. 26), *Harrison, et al. v. Mattis, et al.*, No. 1:18-cv-00641 (E.D. Va. July 19, 2018).

10. Exhibit B is a declaration by Plaintiff Voe, an active duty service member who is being discharged from the Air Force because of his HIV status and his non-worldwide deployable designation.

11. Attachment B1 is the Findings and Recommended Disposition of USAF IPEB for Plaintiff Voe. Plaintiff Voe references this document in Exhibit B.

12. Attachment B2 is the Findings and Recommended Disposition of USAF FPEB for Plaintiff Voe. Plaintiff Voe references this document in Exhibit B.

13. Attachment B3 is the Memorandum issued by the AFPB on behalf of the Secretary of the Air Force denying Plaintiff Voe's appeal of the FPEB's Findings and Recommended Disposition, and directing his discharge. Plaintiff Voe references this document in Exhibit B.

14. Attachment B4 is Plaintiff Voe's separation orders, informing him of his actual date of separation from the Air Force. Plaintiff Voe references this document in Exhibit B.

15. With this Memorandum in Support of Plaintiffs' Motion to Seal, Plaintiffs have also filed a Notice of Motion to File Under Seal, Motion to Seal, and a Proposed Order to seal the materials pursuant to Local Rule 5.

16. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000).

17. Plaintiffs Roe and Voe have requested that their declarations be sealed because of the stigma and discrimination against people living with HIV. The stigma connected with HIV is

unprecedented for any medical condition in recent history. From the outset, a great number of people feared interacting with people living with HIV despite clear evidence that the condition was not communicated through casual contact.² And despite all that has been learned about HIV since that time, persistent misconceptions regarding the actual routes and risks of transmission continue to fuel stigma and discrimination against people living with HIV. As recently as 2012, in a national survey of young people aged 15 to 24, one-third said that there is “a lot” of stigma around HIV/AIDS in the U.S., and 51% said that there is at least “some” stigma.³ When pressed on their own personal feelings, 42% said they would not be comfortable having a close friend who is HIV-positive; 46% said they would not be comfortable working with someone who is HIV-positive; 62% said they would not be comfortable having a roommate who is HIV-positive; and 68% said they would not be comfortable having food prepared by someone who is HIV-positive.⁴ Those “living with HIV have been detrimentally affected in every aspect of life, including experiencing denial and termination of employment; denial of needed medical care; loss of insurance coverage; erosion of social support networks; eviction from homes; disruption of family relationships; social isolation; depression; unwarranted criminal prosecution; and excessive criminal sentences.”⁵

² Diana, Princess of Wales, famously stunned the world in 1987 when she shook the hand of a person living with HIV without wearing gloves. *See How Princess Diana Changed Attitudes to AIDS*, BBC (Apr. 5 2017), <https://www.bbc.com/news/av/magazine-39490507/how-princess-diana-changed-attitudes-to-aids>.

³ Kaiser Family Foundation, NATIONAL SURVEY OF TEENS AND YOUNG ADULTS ON HIV/AIDS 2, <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8386-f.pdf>.

⁴ *Id.*

⁵ Lambda Legal, *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report* (Nov. 2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf.

18. Both Roe and Voe feel that if their identities become public knowledge, they will be discriminated against or otherwise harmed because they are living with HIV. This fear is a legitimate reason to seal their declarations. *See, e.g., Patient v. Corbin*, 37 F. Supp. 2d 433, 434 (E.D. Va. 1998) (Brinkema, J.) (finding proceeding anonymously appropriate because “[b]eing HIV positive carries a significant stigma in many parts of today’s society.”); *Doe v. William Shapiro, Esquire, P.C.*, 852 F. Supp. 1256 (E.D. Pa. 1994) (sealing a motion for summary judgment involving an individual with AIDS to “preserve the privacy and dignity of the individual.”); Order Granting Plaintiffs’ Motion to File Under Seal Exhibits F & G to Plaintiffs’ Memorandum In Support of Plaintiffs’ Motion to Dismiss (Dkt. 32), *Harrison, et al. v. Mattis, et al.*, No. 1:18-cv-00641 (E.D. Va. July 19, 2018).

19. Less drastic measures to protect Plaintiffs’ identities are insufficient because the factual information provided in the declarations and the documents attached to them in support could be used to identify them. *William Shapiro*, 852 F. Supp. at 1257 (sealing a document because it “includes a great deal of personal information which may make it more likely that a reader would recognize the plaintiff [who was diagnosed with AIDS].”).

20. Furthermore, filing the documents under seal, as opposed to redacting them, serves the interests of Defendants in this matter by permitting Defendants to access the factual and identifying information provided in the declarations for their own use in defending against Plaintiffs’ claims.

Accordingly, Plaintiffs respectfully request that the Court enter an order sealing Exhibits A and B, and the documents attached to those exhibits in support.

Dated: January 11, 2018

Respectfully Submitted

/s/ Scott Schoettes

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