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

PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS AND
REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

If nothing changes, plaintiffs Richard Roe and Victor Voe will be illegally discharged from the Air Force in a matter of weeks. This Court can and should prevent this irreparable harm—as well as the irreparable harm to the similarly-situated Airmen[1] whose interests are represented by Plaintiff OutServe-SLDN, Inc.—by granting Plaintiffs' motion for a preliminary injunction and denying Defendants' motion to dismiss.

Defendants recycle the same jurisdictional arguments that the defendants advanced—and this Court rejected—in this matter's companion case, *Harrison v. Shanahan* (No. 18-641), asserting that the controversy is a non-justiciable matter that must be left to the discretion of the Military and that Plaintiffs lack standing. Such arguments warrant similar rejection here, for the same reasons with respect to justiciability and because Plaintiffs' imminent discharges are more than sufficient to establish standing. Defendants also attempt another jurisdictional argument in this case, contending that Roe and Voe did not exhaust their administrative remedies. Despite this argument, the result with respect to jurisdiction will not change. Roe and Voe were not required by Air Force rules to apply to the Air Force Board for the Correction of Military Records ("AFBCMR"), review by this Court will be required regardless of whether Plaintiffs first appeal to the AFBCMR, and the AFBCMR cannot adjudicate all of their claims or grant important aspects of the relief Plaintiffs seek in this case.

No matter the spin Defendants try to put on their decisions, Defendants have decided to separate Roe and Voe because they have HIV. Under DoD and Air Force Instructions, an HIV

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[1] In their papers, Plaintiffs have alternately referred to members of the Air Force using the gender-neutral term "members," and the historical term "Airmen," which the branch recently decided to retain based on the specific heritage and tradition linked to the title. Plaintiffs, while sensitive to the concerns that gendered language raises, will use "Airmen" in the interest of precision, because it is the term currently used by the Air Force.

diagnosis automatically limits an Airman's deployability. This HIV-related limitation is the basis for the separation proceedings at issue here. Limited deployability is therefore not a separate or distinct basis for separating Service members with HIV, and Defendants have violated the APA in deciding to discharge Roe and Voe based solely on their HIV status.

Plaintiffs' other claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, regarding deployability (distinct from the APA claim for retention discussed above) are likely to succeed because Defendants' policies are not based on modern HIV medical science, and the APA does not permit backward-looking and pretextual justifications for Defendants' arbitrary decisions regarding Roe and Voe. Plaintiffs also are likely to prevail on their equal protection claims because—no matter the level of scrutiny level applied—Plaintiffs' evidence demonstrates that Defendants lack even a rational basis for their adverse treatment.

The other factors favor Plaintiffs as well. Airmen living with HIV face the prospect of irreparable harm from involuntary separation, which would derail their careers and, in explaining their discharges to family, friends, and potential future employers, risk the disclosure of their HIV status and the stigma and discrimination that too often follows. Defendants, on the other hand, will not be harmed by simply maintaining the status quo. The Court should therefore enjoin Defendants' unlawful policies and deny their motion to dismiss.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

This Court has already concluded that similar claims advanced by the plaintiffs in *Harrison* are justiciable, and the same conclusion should be reached in this case. Defendants raise three jurisdictional arguments here: all without merit.

First, Defendants contend this Court lacks jurisdiction over Plaintiffs' claims on the theory that they are premature because Plaintiffs have failed to exhaust administrative remedies by appealing to the AFBCMR. (Defs.' Br., at 7). Defendants are incorrect. Plaintiffs were not required to pursue additional administrative remedies. Alternatively, in the event this Court finds that Plaintiffs would normally be required to appeal and obtain a decision from the AFBCMR, this Court should find an exception to the exhaustion requirement because the interests of exhaustion are not satisfied, an appeal to the AFBCMR would be futile, and the burden of requiring Plaintiffs Roe and Voe to litigate their case before the AFBCMR outweighs the benefits of exhaustion.

Second, Defendants theorize that Plaintiffs' claims concern a non-justiciable military controversy. (Defs. Br., at 9). Defendants are wrong: Plaintiffs' claims are not insulated from judicial review. With respect to their equal protection claims, Defendants' argument has already been considered and rejected by this Court in *Harrison*. And with respect to Plaintiffs' APA claims, the justiciability test Defendants advance—the *Mindes/Williams* test—is not the appropriate one. But even if it does apply, the factors weigh in favor of justiciability of Plaintiffs' APA claims.

Third, Defendants argue that Plaintiffs lack standing—despite their imminent discharges—to challenge those discharges because Defendants believe they lack a legally protected interest in continued service. This argument is also meritless because the harm

suffered by Roe and Voe is not, as Defendants attempt to mischaracterize it, to their "legally protected interest in continued service beyond their current terms of enlistment," *see* (Defs.' Br., at 14), but rather, to their legally protected interest in not being unlawfully discharged (i.e., wrongfully terminated). Accordingly, this Court has jurisdiction and should deny Defendants' 12(b)(1) motion to dismiss.

A. Plaintiffs' Claims Should Not Be Dismissed for Lack of Exhaustion

Defendants are wrong that this action is premature based on a failure to exhaust administrative remedies. The United States Supreme Court has held that exhaustion is required only if the agency's own rules require exhaustion. *See Darby v. Cisneros*, 509 U.S. 137 (1993). None of the relevant policies or regulations require Plaintiffs to appeal to the AFBCMR, and under the controlling precedent of *Darby*, this Court cannot create such a requirement. Since appeal to the AFBCMR is voluntary, not mandatory, Plaintiffs have not failed to exhaust.

Defendants' authority is not to the contrary. Notably, nearly every single one of Defendants' authorities was decided *before* the Supreme Court's controlling decision in *Darby*. (Defs.' Br., at 8.). The only exception is *Wilt v. Gilmore*, 62 F. App'x 484 (4th Cir. 2003), an unpublished decision, the citation of which is disfavored by rules of the court that decided it. (*See* Fourth Cir. L.R. 32.1.). But *Wilt* fails to cite *Darby* and merely follows pre-*Darby* decisions the Supreme Court has abrogated. *Darby* controls and does not require exhaustion here.

Even if this Court concludes that exhaustion is required, Plaintiffs' case should proceed nonetheless. The exhaustion requirement is not to be blindly invoked. Its "application . . . to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193 (1969). Rote application of the doctrine would allow agencies, including the Air Force, to prevent the judicial branch from

reviewing any of its actions by creating a series of administrative barriers for a plaintiff to overcome before seeking judicial review. The purposes of exhaustion in the military context, as Defendants themselves explain, is that the "AFBCMR might completely obviate the need for judicial review, or, at the very least, provide the court with a definitive interpretation of the [applicable] regulation and an explanation of the relevant facts from the highest administrative body in the [Service's] own appellate system." (Defs.' Br., at 8). Neither of these considerations applies here.

AFBCMR review could not possibly obviate judicial review here. Plaintiffs do not seek *only* determination that the policies were applied to them in an impermissible manner. Plaintiffs also challenge the very existence of policies that make distinctions on the basis of HIV status. (Compl., Request for Relief). The AFBCMR does not declare policies invalid or otherwise grant such categorical relief. As its name reveals, its purpose is to *correct military records, see* 10 U.S.C. § 1552(a)(1), not perform a comprehensive review of the validity of DoD and Air Force policies. The rationale that exhaustion would obviate review is therefore not valid here.

Appeal to the AFBCMR is also not needed here to provide the Court with a definitive interpretation of the applicable regulations. Plaintiffs already have a definitive interpretation of the regulations because they have received the final decision from the SAFPC regarding their separation. The Air Force itself characterizes the SAFPC decisions to separate Roe and Voe as a definitive statement of the agency's position. (App. to Defs.' Br., at A-00420, ¶ 13 ("One of the SAFPC's responsibilities is to serve as, effectively, the final appeal authority for Airmen evaluated by the DES prior to their separation from Active Duty.")). The memoranda the SAFPC issued to Roe and Voe explicitly state that the decisions contained in them are the *final* decisions in Roe's and Voe's cases. *See* (Exs. A5 & B3 to Pls.' Mot. for Prelim. Inj., ECF

No. 44) ("The following rationale is provided for the final decision in this case."). Additionally, Defendants' *policies* state that the SAFPC determination on behalf of the Secretary of the Air Force is the *final* disposition regarding separation determinations for individuals living with HIV. Air Force Instruction ("AFI") 36-3212 explains the process of an appeal to the SAFPC in the chapter entitled "Final Disposition." AFI 36-3212, Ch. 5. (Ex. F, at 46). Department of Defense Instruction ("DoDI") 1332.18 states that, "[a]fter adjudicating all appeals, the personnel authorities . . . will . . . [i]ssue orders and instructions to implement the determination of the respective Service's final reviewing authority." (App. to Defs. Br., at A-00023, ¶ 6). AFI 36-3212 explains that those instructions will come "in the form of retirement orders or instructions from HQ AFPC/DPPD directing disposition," through an AF Form 100. (Ex. F, Ch. 4, ¶¶ 4.5, 4.12). Plaintiffs each received AF Form 100s informing them of their official date of separation. *See* (App. to Defs.' Br., at A-00666-67; Ex. B4 to Pls.' Mot. for Prelim. Inj., ECF No. 44). They therefore each received the final decision from the Service's final reviewing authority. The assertion that Plaintiffs must appeal to the AFBCMR to obtain a definitive interpretation of the DoD's and Air Force's regulations is clearly at odds with Defendants' repeated representations in regulations and instructions—as well as in the memoranda decisions themselves and this litigation—that the SAFPC decisions are definitive. Because neither of the rationales behind the exhaustion requirement apply in this case, Plaintiffs should be excused from appealing to the AFBCMR, if such an appeal would otherwise be required.

This is especially true given that exhaustion is not required where the outcome would be "predictably futile." *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) (quoting *Dooley v. Ploger*, 491 F.2d 608, 614-15 (4th Cir. 1974)). Here, appeal to the AFBCMR would be futile because the Board cannot possibly award Plaintiffs with adequate relief. Although the

AFBCMR can retroactively alter a discharge, order back pay and allowances, and recommend reinstatement, it cannot prevent an illegal and unconstitutional separation. *See* (Defs.' Br., at 7). The AFBCMR is also not empowered to evaluate the validity of DoD or Air Force policies or regulations, and its review, conclusions, and actions are limited to the person appearing before it. *See* (App. to Defs.' Br., at A-00153, ¶ 4.14 (explaining that the Board may "identify DoD or Air Force policies, instructions, guidance or practices that are leading to" errors, but in no way authorizing the Board to invalidate or even recommend invalidation to the Secretary of the Air Force or the Secretary of the Department of Defense)). An AFBCMR appeal would further be futile because the Secretary of the Air Force is not bound by the decision: as Defendants acknowledge, any relief of reinstatement or back pay would be made "in conjunction with the Secretary"; she may disapprove or overturn such relief. *See* (App. to Defs.' Br., at A-00153, ¶ 5) (explaining what happens "[i]f the SAF or delegee does not accept the Board's *recommendation*" (emphasis added))).

Defendants assert that, under *Guerra*, exhaustion is required even when the AFBCMR cannot afford full relief. (Defs.' Br., at 8). But Defendants ignore an important distinction between that case and this one: in *Guerra*, considerations of efficiency and expertise outweighed the consequences of delay to the plaintiff, and therefore favored giving the agency the first shot. 942 F.2d at 276-77. But here, the same considerations weigh against an exhaustion requirement. The *Guerra* court required an appeal to the ABCMR not only because some relief could be awarded, but primarily because "the consequences of delay[ing review by the court] . . . [was] outweighed by the considerations of efficiency and agency expertise in requiring exhaustion." *Id.* The *Guerra* court distinguished *United States ex rel. Brooks v. Clifford*, 412 F.2d 1137, 1139-41 (4th Cir. 1969), where the consequences of delay *did* outweigh the considerations of

efficiency and agency expertise. *Guerra*, 942 F.2d at 276-77. In *Clifford*, the plaintiff "did not have to exhaust his administrative remedies" because "[his] remedy before the ABCMR . . . was inadequate because he would be required to litigate administratively, all the while being required to engage in conduct inimical to his conscience" as a conscientious objector. *Guerra*, 942 F.2d at 277. Thus, an exception to the exhaustion requirement was warranted, even though the AFBCMR would have been able to afford some relief. *Id.*

The same considerations compel the conclusion that excusing any exhaustion requirement is warranted here as well. The AFBCMR does not have any expertise—and Defendants have shown none—in evaluating Air Force regulations or actions under the U.S. Constitution or APA. This Court does, however. Further, review by the AFBCMR will take almost two years (Perkowski Decl., at ¶ 6-12 (Ex. C)), during which Roe and Voe will be separated while awaiting the outcome. *Clifford*, 412 F.2d at 1141 (petitioner would be burdened by delaying litigation for the at least four months it would have taken the ABCMR to decide appeal). Even after the AFBCMR is done, this Court will *still* have to take up the case, because the Board will not consider, much less adjudicate, facial challenges to the validity of Defendants' regulations. In the dichotomy acknowledged in *Guerra*, this case falls squarely on the side of excusing an exhaustion requirement, given that the AFBCMR cannot afford Plaintiffs their requested relief, and the burden of being separated while awaiting the AFBCMR's decision.

Appeal to the AFBCMR is not necessary under Supreme Court precedent. Further, such appeal is voluntary, not required, so there is no failure to exhaust. If there is, this Court should excuse Plaintiffs from appealing to the AFBCMR, because appeal would be futile and the burden of delay outweighs considerations of efficiency and agency expertise.

B. The Constitutionality and Legality of Defendants' Retention and Deployment Policies for People Living with HIV Are Not Military Judgments Insulated from Judicial Review

Defendants are also wrong that Plaintiffs' claims raise a non-justiciable military controversy. Plaintiffs' claims are not insulated from judicial review merely because they involve military decisions. As to the constitutional claims, this Court has already rejected Defendants' arguments. *See* (Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97). Like the constitutional claims, Plaintiffs' APA claims challenge the policies themselves, not merely the result of their application to Roe and Voe. Therefore, regardless of the test applied on the question of justiciability, Plaintiffs' claims are justiciable, and the Court should reject Defendants' motion to dismiss Plaintiffs' constitutional and APA claims on these grounds.

1. This Court Has Already Rejected Defendants' *Mindes* Arguments as to Plaintiffs' Equal Protection Claims

This Court has already rejected Defendants' non-justiciability argument as it applies to Plaintiffs' equal protection claims. *See* Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97. Defendants in *Harrison*, two of whom—the Secretary of Defense and the Department of Defense—are also Defendants here, argued that Harrison's claims against the military's deployment and accessions policies for people living with HIV involve "quintessential military judgment[s] about the qualifications necessary for appointment as a commissioned officer," and were therefore nonjusticiable. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 1, *Harrison*, ECF No. 40. Despite Defendants' objections, this Court was satisfied it had jurisdiction to continue to adjudicate the case. *See* Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97. As in *Harrison*, although the Court will "give due deference to the military when they make these types of decisions, that does not mean that the military is immune from judicial review." *Id*. Accordingly, the Court should deny Defendants' motion to dismiss on this ground, just as it did in *Harrison*.

2. Plaintiffs' APA Claims Are Also Justiciable

Plainitffs' APA claims are also justiciable. *Mindes* is questionable precedent that should not be applied here. Even if it were applied, evaluating the *Mindes* factors compels the conclusion that Plaintiffs' APA claims are justiciable.

This Court should not apply *Mindes* because, as was recognized at a hearing in *Harrison*, the analysis in *Mindes* has been widely criticized and is, at best, on uncertain ground. *See* Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97. Various circuits—including the Fourth—have questioned or rejected it. *See Aikens v. Ingram*, 811 F.3d 643, 648 (4th Cir. 2016) (noting that there is a question regarding the continued viability of *Mindes*); *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981) (rejecting the *Mindes* formulation because it "intertwines the concept of justiciability with the standards to be applied to the merits of the case"); *Knutson v. Wis. Air Nat'l Guard*, 995 F.2d 765, 768 (7th Cir. 1993) (adopting the Third Circuit's logic); *Watson v. Ark. Nat'l Guard*, 886 F.2d 1004, 1009 (8th Cir. 1989) (rejecting *Mindes* analysis as "unpredictable" and "not a viable statement of the law"); *Dibble v. Fenimore*, 339 F.3d 120, 126-128 (2d Cir. 2003) (following *Knutson*). It should not be applied here either.

But Plaintiffs' APA claims would be justiciable even if *Mindes* applied. As Defendants acknowledge, *Mindes* begins with a two-part threshold inquiry, followed by a balancing of four considerations. (Defs.' Br., at 7-9). Plaintiffs' claims and request for injunctive relief meet the requirements for justiciability in each phase of the *Mindes* analysis.

The *Mindes* threshold requirements for justiciability are: (a) that there be an allegation of the deprivation of a constitutional right or a violation of statute or military regulation; and (b) that intraservice remedies and corrective measures be exhausted. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Defendants do not deny that Plaintiffs have alleged the violation of a

statute or military regulation (Defs.' Br., at 7-9); and as already illustrated, intraservice remedies and corrective measures have been sufficiently exhausted. *See supra* Part I.A.

Having satisfied the threshold inquiries, application of the *Mindes* phase-two balancing test to Plaintiffs' APA claims demonstrates they are justiciable. In this phase, the court weighs four factors: (1) nature and strength of plaintiff's claim; (2) potential injury to the plaintiff if review is refused; (3) type and degree of anticipated interference with the military function; and (4) extent to which the exercise of military expertise or discretion is involved. *Mindes*, 453 F.2d at 201-02. Like the threshold inquiries under *Mindes*, the four-part balancing test demonstrates justiciability of Plaintiffs' claims.

First, the nature and strength of Plaintiffs' claims support review. Plaintiffs are not challenging mere "haircut regulations." *Mindes*, 453 F.2d at 201. Rather, Plaintiffs' claims affect the ability of people living with HIV to serve in the military, to deploy, and thereby to advance their military careers. *See* Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97 (noting the "very significant issues involved" in a case challenging the military's HIV-related policies). Plaintiffs' claims not only have gravitas, they are strong. Plaintiffs will be able to demonstrate that Defendants' discriminatory policies do not comport with current HIV medical science and that the decisions to separate them, based on those seriously flawed policies, were impermissibly arbitrary, capricious, and otherwise contrary to law. *See infra* Part II.B.2

Second, the potential injury to Plaintiffs also weighs in favor of justiciability. Despite Defendants' contention that "Plaintiffs will not suffer significant injury if their claims are dismissed" (Defs.' Br., at 11), Plaintiffs have shown they will suffer significant and irreparable harm as a result of the Air Force's decisions to separate them. *See infra* Part II.A (describing harm to Plaintiffs in greater detail).

The *third* and *fourth Mindes* factors also weigh in favor of the Court's jurisdiction over this case. Defendants argument that "[w]hether and how individuals may serve in this military is a central strategic calculation for which the Court has no expertise," (Defs'. Br., at 12), misconstrues the central premise of Plaintiffs' complaint. This Court undoubtedly has the requisite expertise to adjudicate allegations that Defendants' policies draw arbitrary and capricious distinctions and result in decisions that are arbitrary, capricious, and contrary to law. Individualized determinations about a particular Airman's fitness for certain service duties may involve professional military judgment, but such deference is inappropriate for categorical determinations about classes of people, particularly where the claim before the court is that the targeted trait bears no relationship to fitness to serve. Carried to its logical extent, Defendants' position would allow the military to have race-based, sex-based, and religious-based assignment, promotion, and discharge standards with no recourse for those affected by such discriminatory policies. *Mindes* itself implicitly rejects such a bright line rule. 453 F.2d at 199.

Moreover, Defendants ignore the long list of challenges to accession, commission, assignment, promotion, and discharge regulations that courts have found justiciable. *See, e.g.*, *Dillard v. Brown*, 652 F.2d 316, 323-24 (3d Cir. 1981) (holding that review of regulation forbidding the enlistment of single parents with minor dependent children was justiciable); *Serv. Women's Action Network v. Mattis ("SWAN")*, 320 F. Supp. 3d 1082, 1097 (N.D. Cal. 2018) (holding challenge to policies segregating females was justiciable under *Mindes*); *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978) (holding challenge to statute preventing females from being assigned to Navy vessels was justiciable).

Rather than adopting the interpretation and application of *Mindes* Defendants propose—under which the military could escape judicial review for any unconstitutional or illegal

regulation by asserting that it is a matter of "professional military judgment"—the "proper assessment of the degree of interference threatened by a lawsuit is informed by whether the Court will be . . . called upon to take on a comprehensive, ongoing supervisory role, displacing military management over a broad range of policy decisions (as in *Gilligan* [*v. Morgan*, 413 U.S. 1 (1973)])." *SWAN*, 320 F. Supp. 3d at 1095. Under this assessment, "[c]ourts are more likely to intrude into military matters where the military fails to follow its own regulations or where the regulations themselves are challenged on constitutional grounds, than in cases where individual personnel decisions are called into question." *Culbreth v. Ingram*, 389 F. Supp. 2d 668, 676-77 (E.D.N.C. 2005). Plaintiffs' case reflects the former, not the latter.

Further, Plaintiffs' requested relief does not require ongoing supervision of military actions. Under the APA, Plaintiffs seek a declaratory judgment that Defendants' current policies regarding the retention and separation of Service members living HIV are impermissibility arbitrary and capricious, and ask the Court to vacate the decisions to discharge Roe and Voe as arbitrary, capricious and contrary to law. (Compl., at 30-31). This does not give the court an ongoing supervisory role over a broad range of policy decisions. Plaintiffs' claims and requested relief therefore would not "vest virtual control of [the military] in federal court." *Dillard*, 652 F.2d at 321.

Nor would the requested relief require the Court to re-review the discrete, individualized personnel judgments of many people going forward, because these decisions would subsequently be made by the Air Force without application of the arbitrary and capricious policies pertaining to people living with HIV. Plaintiffs seek judicial review of the legality of the DoD's and Air Force's regulations affecting people with HIV as a class—something the "courts are uniquely

qualified to perform." *Dibble*, 339 F.3d at 127. With factors three and four in their corner, all of the *Mindes* factors weigh in favor of the justiciability of Plaintiffs' APA claims.

C. Roe, Voe, and OutServe All Have Standing

In *Harrison*, the Government argued that the plaintiff lacked standing because he had not yet been discharged—an argument this Court aptly rejected. *Compare* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 20-21, *Harrison*, ECF No. 43, *with* Mot. Hr'g Tr. at 16, *Harrison*, ECF No. 97 (upholding jurisdiction). Defendants go even further in this case, arguing that Roe and Voe lack standing even though their discharges are imminent. In fact, this is *textbook* Article III standing: Roe and Voe's impending discharges: (1) represent an "actual or imminent injury" that is "concrete, particularized, and not conjectural"; (2) are "fairly traceable" to Defendants' policies; and (3) are likely to be redressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And because Defendants concede that OutServe has standing if Roe and Voe do, their argument on that front fails as well.

1. Roe and Voe Have Standing Because Their Imminent Discharges Are Injuries in Fact That This Court Can Redress

Defendants argue that Roe and Voe have not suffered a constitutional injury because they have no "'legally protected interest' in continued service beyond their current terms of enlistment." (Defs.' Br., at 14). Re-characterizing their impending discharges this way is misleading. While Plaintiffs have both averred they would have reenlisted had they not been in the process of being separated, (Exs. A5 & B3 to Pls.' Mot. for Prelim. Inj., ECF No. 44), Roe and Voe are not asking this Court to require the military to reenlist them. Rather, they are demanding—as in any other case of wrongful termination—not to be unlawfully discharged and to be returned to the status and position each was in prior to the discriminatory and illegal conduct resulting in separation. By depriving Roe and Voe of their continued service,

Defendants have deprived them of an economic interest, which alone satisfies the injury requirement of standing. *See Roe 1 v. Prince William County*, 525 F. Supp. 2d 799, 806 (E.D. Va. 2007) ("Economic loss, whether actual or anticipated, is an injury in fact and can provide standing when there is a causal connection between the conduct complained of and that loss.").

The argument that Roe and Voe have no standing because their current terms of enlistment have already expired is a Catch-22, as their terms have expired only because Defendants' illegal policies forced them into the medical discharge process and prevented them from reenlisting.[2] Defendants cannot erect a procedural roadblock atop a challenged policy, and then claim the challenged policy prevents them from removing that roadblock.

Defendants further argue that Roe and Voe also lack standing because their injuries cannot be redressed, as even a favorable decision is no guarantee of reenlistment because their applications could be denied on "unrelated grounds." (Defs.' Br., at 14-15). However, "Plaintiffs need not show that a favorable decision will relieve their every injury." *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 189 (4th Cir. 2018). "The removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 285 (4th Cir. 2018). Plaintiffs are not challenging the procedural intricacies of the reenlistment process—they are challenging the decisions and policies regarding *their HIV status* that have prevented them from engaging in that

[2] Although Plaintiffs assert that their unlawful discharges, separate and apart from any ability to re-enlist, are sufficient injury to establish standing, Plaintiffs are confident they would have been able to re-enlist but for the Air Force's arbitrary decisions to discharge them based on their HIV status. Both Plaintiffs have been assured by their commands that they would have been and will be recommended for and selected for reenlistment. (Ex. A, ¶ 2; Ex. B, ¶ 2). Reenlistment is a command decision; if an Airman's commander approves reenlistment, nothing more is needed. *See* (App. to Defs.' Br., at A00159-293, ¶ 2.6.3.4, ¶ 2.6.11.2).

process in the first place. *See, e.g.*, (Compl., ¶¶ 4, 11-13, 15-16). Should the Air Force find an unrelated, constitutionally permissible (i.e., *non-pretextual*) reason to deny their applications for reenlistment, that would not be the concern of this Court or this litigation. Removing the challenged policies would alleviate a distinct and significant injury to Roe and Voe, and that is enough to satisfy the redressability requirement of standing. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (rejecting argument that redressability requires that there be "no other means" by which defendant can act against plaintiff).

2. OutServe's Standing Is Independent of Roe's and Voe's

This Court correctly noted in *Harrison* that OutServe had organizational standing to advance the issues raised by the case on behalf of its other members, and the same is true here. *See* Mot. Hr'g Tr. at 18, *Harrison*, ECF No. 97. An organization has standing to bring suit on behalf of its individual members if: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). OutServe's purpose as a legal organization for LGBT service members and veterans is germane to the interests it seeks to protect in this case. (Compl., ¶¶ 24-27; Ex. C to Pls.' Mot. for Prelim. Inj. ¶¶ 3-5, ECF No. 44). Furthermore, as this Court stated in *Harrison*, the claims asserted could proceed without the participation of the individual plaintiff(s). Mot. Hr'g Tr. at 18, *Harrison*, ECF No. 97. Defendants challenge only the first prong of the organizational standing test; that is, their argument that OutServe lacks standing is entirely contingent upon the success of their argument that Roe and Voe lack standing. (Defs.' Br., at 15-16). Accordingly, if Roe and Voe have standing, so does OutServe. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d

180, 186 (4th Cir. 2007) ("[organizational] standing may exist even when just one of the association's members would have standing").

Even though Roe's and Voe's standing is sufficient to give OutServe standing, it is not necessary—OutServe would have standing even if they did not. Defendants' argument that Roe and Voe are the only members who can sustain organizational standing for OutServe because they are the only OutServe members named in the complaint does not reflect the law of this circuit. *See, e.g.*, *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 283 (4th Cir. 2018) (affidavits from non-party members of plaintiff organization were sufficient to demonstrate injury in fact when determining organizational standing). As the Defendants' submissions make clear, other Airmen living with HIV—whose interests OutServe represents—are also being discriminated against and harmed by the challenged policies. *See* (Ex. C at ¶¶ 8-29 & Exs. C1, C2, C3, & C4 to Pls.' Mot. For Prelim. Inj., ECF No. 40). Furthermore, many of these Airmen have not yet reached the end of their terms of service, so Defendants' reenlistment arguments are entirely ineffective with respect to these individuals. *See* (Perkowski Decl., ¶ 18). Defendants do not challenge the fact that these Airmen would "otherwise have standing to sue in their own right." Therefore, the first prong of the test is satisfied and OutServe has organizational standing to bring these claims.

II. A PRELIMINARY INJUNCTION IS WARRANTED.

In opposing a preliminary injunction, Defendants challenge primarily whether Plaintiffs have demonstrated they are "likely to suffer irreparable harm" without an injunction, and that they are "likely to succeed on the merits" of their equal protection and APA challenges. (Defs.' Br., at 16-28). Plaintiffs have the better arguments.

A. Discharging Airmen Living with HIV Will Cause Imminent and Irreparable Harm

Plaintiffs Roe and Voe and other similarly situated Airmen will be irreparably harmed if they are discharged. Defendants' argument to the contrary rests on the faulty assumptions that the records correction process offers them any meaningful relief—a notion dispelled above, *see supra* Part I.A—and that their discharges present no negative consequences. (Defs.' Br., at 18-19). Because both of these assumptions are false, Defendants' argument regarding a lack of irreparable harm fails.

The harms to Plaintiffs Roe and Voe—and others similarly situated—are serious, broad ranging, and cannot be retroactively remedied. In an effort to narrow the true scope of the likely harms to Roe and Voe, Defendants focus entirely on the availability of health care, ignoring the other harms likely to befall them: the end of lifelong dreams of military service, abrupt halts to promising careers, loss of financial livelihoods, potential relocation, and the very real risk that explaining the untimely discharge may force them to disclose their HIV status and face the stigma, ostracism, and (additional) discrimination that too often results. (Compl., ¶¶ 6, 57, 74, 87-88, 90; Pls.' Br., at 7, 9, 11, 27-28; Ex. C. to Pls.' Mot. for Prelim. Inj., at ¶ 4, ECF No. 44). The loss of access to healthcare for a person living with HIV *is* particularly distressing, but these other harms are also very serious and cannot be remedied retroactively by a decision of this Court. *See, e.g.*, *Elzie v. Apsin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (finding irreparable injury where "the stigma of being removed from active duty . . . and labeled unfit for service solely on the basis of his sexual orientation, a criterion which has no bearing on his ability to perform his job"). Furthermore, Defendants' attempts to minimize the importance of healthcare to people living with HIV based on the Supreme Court's decision to grant a stay on the preliminary injunction against the ban on the service of transgender individuals falls flat for two reasons: the

Supreme Court did not rely upon an analysis of whether the denial of healthcare could be an irreparable harm to transgender service members, and the Court was not addressing the importance of access to healthcare for people living with HIV. *Karnoski v. Trump*, No. 18A625, 2019 WL 271944 (U.S. Jan 22, 2019). Even if the harms to Plaintiffs were subject to a heightened standard in the context of an injunction against the military, as Defendants claim they should be, *see* (Defs.Br., at 17-18), the harms asserted would be the sort of "exceptional circumstances" in which enjoining discharge proceedings is necessary. *Chilcott v. Orr*, 747 F.2d 29, 33 (1st Cir. 1984).

Furthermore, the harms to Roe and Voe, and at least four others, are imminent. Voe is scheduled to be discharged on February 25, 2019—mere weeks from now—and Roe's discharge will follow in March 2019. *See* (Defs.' Br., at 5). If the Air Force continues with what appears to be its new policy regarding Airmen living with HIV—perhaps prompted by the new "Deploy or Get Out" policy (DoDI 1332.45) or some other unknown motivation—hundreds of Airmen with HIV could be separated in the coming months based on their allegedly limited deployability. *See* (Compl., ¶ 12). The harms alleged in this case are not speculative, but are concrete and pressing for Roe, Voe, the other Airmen identified in the declaration of Peter Perkowski. *See supra* Part 1.C.2. That Defendants would attempt to claim otherwise is curious, as they themselves suggested in *Harrison* that a discharge *would* constitute irreparable harm. *See, e.g.*, Mot. Hr'g Tr. at 12, *Harrison*, ECF No. 97 ("[T]here's absolutely no threat of imminent or immediate harm that he'll be discharged at any time in the future.").

Contrary to Defendants contention, *Guerra* does not control here because the balance of equities in *Guerra* is fundamentally different. The plaintiff in *Guerra*—who was asking the Army to "exercise its discretion" and refrain from discharging him despite his admitted drug

use—focused his arguments on the procedural process that led to his discharge. *See* 942 F.2d at 275. Here, however, Plaintiffs argue that the policies under which the discharge decisions were rendered are unlawful and/or were applied unlawfully. *See* (Compl., at ¶ 16); *see also, e.g., id.*, at ¶ 48. The discharge of Airmen living with HIV by the Air Force as a result of discriminatory and inconsistently applied policies is different in kind from the discharge in *Guerra*, where the plaintiff was requesting leniency for *admitted* misconduct.

B. Plaintiffs' Claims Are Likely to Succeed on the Merits

Because every member of the Air Force living with HIV is deemed to have limited deployability, and limited deployability was the sole basis for the decisions to discharge Roe and Voe, Plaintiffs are likely to succeed on the merits of the APA claim challenging the Air Force's decision to separate them—the injunctive relief sought by this motion. While Plaintiffs are also likely to succeed on the merits of their constitutional and APA claims regarding the illegality of policies that prevent them from deploying worldwide, they need not show a likelihood of success on those claims to obtain the preliminary injunctive relief they are seeking here.

1. Plaintiffs Are Likely to Succeed on the APA Claim Against Defendants' Decisions to Separate Them

To obtain the preliminary injunction they seek, Plaintiffs need only demonstrate they are likely to succeed on the merits of a claim entitling them to retention in the Air Force. Plaintiffs can readily demonstrate the requisite likelihood of success in their APA claim asserting that the decisions to separate Roe and Voe are arbitrary, capricious, and contrary to law because they violate the Air Force regulation preventing the separation of Service members based solely on their HIV-positive status. In their opposition papers, Defendants attempt to justify the violations of the Air Force regulation by pointing to the purported limitations on Voe' and Roe's deployability as a distinct and additional basis for their discharges. (Defs. Br., at 22-23). Setting

aside (for the moment) the validity and legality of those purported limitations on their deployability, Defendants' semantic and rhetorical contortions to turn limited deployability—a characterization/attribute of *every single member* of the Air Force living with HIV—into a distinct and additional basis for Plaintiffs' discharges, quite simply fail.

Anticipating this argument, Plaintiffs explained in their opening brief that their classification as "not worldwide deployable" stems solely from their HIV diagnoses and therefore cannot be used as a justification for discharge *in addition* to their HIV diagnoses. (Pls.' Br., at 19-21). Defendants did nothing to bolster their argument in their opposition brief, and appear only to have dug the hole they are in a bit deeper. While admitting that "a service member cannot be separated solely on the basis" of an HIV diagnosis, Defendants correctly aver that a service member must nonetheless be able to "reasonably perform the duties of his or her office, grade, rank or rating" to sustain a finding that the member is fit for continued service. (Defs.' Br. at 22). Under DoDI 1332.18, among the factors considered in determining whether a service member can reasonably perform the duties of his or her office, grade, rank or rating—Defendants helpfully point out—is "whether the service member is 'deployable individually or as part of a unit, with or without prior notification, to any vessel or location' specified by the service[.]" *See* (Defs.' Br. at 23); (App. to Defs.' Br. at A-00031, 2, ¶ 4.a.3).

Defendants' argument proves Plaintiffs' point. According to the regulations on which they are purportedly relying to discharge Roe and Voe, *every single member of the Air Force living with HIV* would be discharged. And under their own policies, which classify every member living with HIV as less than worldwide deployable, there are *no* members with HIV who are "deployable . . . to *any vessel or location*" specified by the Air Force. *See* (App. to Defs.' Br. at A-00031, 2, ¶ 4.a.3) (emphasis added). However, Defendants admit that they apply

this policy inconsistently; they have retained other Airman living with HIV notwithstanding the limitations on their deployability that serve as the sole justification for the separation of Plaintiffs Roe and Voe. (Pls.' Br., at 22); (Defs.' Br., at 27). Thus, not only are Defendants' regulations themselves impermissibly arbitrary as a facial matter, but Defendants' inconsistent approach to their enforcement is also arbitrary, capricious, or contrary to law.

Decision-making based on the particular position held by an Airman at the time of an HIV diagnosis and the likelihood that particular position will require deployment is not described or authorized by any of the regulations at issue. In fact, the regulations cited by Defendants state that deployability is a consideration equally relevant to *all* Airmen when determining whether they can reasonably perform their duties. *See* (App. to Defs.' Br., at A-00031, ¶ 4.a). Thus, the Court should reject Defendants' efforts to create meaningful distinctions where none exist. Roe and Voe are being separated based solely on their HIV status, while others with HIV and the same limited deployability are being retained. That is arbitrary and capricious, in violation of the APA.

The discharge decisions for Roe and Voe that resulted from the sham process of the DES were not only arbitrary and capricious, but were also inconsistent with the DoD's and Air Force's other regulations and are therefore "not in accordance with law" under the APA. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also New York v. U.S. Dep't of Commerce*, --- F. Supp. 3d ---, 2019 WL 190285, at *112 (S.D.N.Y. Jan. 15, 2019) ("A court cannot sustain agency action founded on a pretextual or sham justification that conceals the true basis for the decision."). For this reason alone, they "must be set aside." *J.E.C.M. ex rel. Saravia v. Lloyd*, --- F. Supp. 3d ---, 2018 WL 6004672, at *13 (E.D. Va. 2018) (Brinkema, J.) (ruling that plaintiffs plausibly alleged that the Office of Refugee Resettlement had acted

arbitrarily, capriciously, and contrary to law by failing to consider an important aspect of the problem, because the agency's actions were motivated by considerations Congress had not intended it to consider, and by violating the agency's own agreement).

2. Plaintiffs Are Also Likely to Prevail on Their Constitutional and APA Claims Challenging the Policies Restricting Their Deployability

Though not necessary to sustain the preliminary injunction preventing their separation from the Air Force, Plaintiffs can also demonstrate a likelihood of success on the merits of their claims challenging the validity of regulations restricting the deployment of people living with HIV. In attempting to justify these restrictions, Defendants assert that: it is not as easy to provide healthcare to people living with HIV as Plaintiffs aver; the risks of transmission are greater than Plaintiffs recognize; and only a military commander can determine whether a particular condition renders a member ineligible for deployment. *See* (Defs.' Br., at 21-27). As presented in their brief, these arguments serve primarily to demonstrate Defendants' (and their agents') lack of understanding regarding the current medical science—as well as their entrenched resistance to acknowledging and incorporating widely accepted medical facts, understandings, and protocols regarding HIV care, treatment, transmission, and the prognosis for those receiving appropriate care.

As a preliminary matter, Plaintiffs reiterate that, for purposes of this motion, they are not staking their assertions of a likelihood of success on the equal protection claim to review of the regulations under heightened scrutiny. (Pls.' Br., at 13-18). While Plaintiffs remain firmly convinced that people living with HIV meet all of the criteria for a suspect classification entitled to heightened scrutiny, *see* (Pls.' Br., at 13 n.3)—and look forward to making those arguments at a hearing or trial—such a showing is not necessary for purposes of this motion. Because Defendants' justifications for the disparate treatment of people living with HIV are not even

rationally related to a legitimate governmental interest, they violate the equal protection guarantees of the Constitution. For these reasons, Plaintiffs are likely to succeed on the merits of their constitutional claims, as well as their APA claims regarding deployment.

Plaintiffs will be able to establish that providing healthcare to people living with HIV is no more difficult than providing care to people with other chronic conditions that the military does not consider deployment limiting. Mere assertions that Airmen living with HIV in a deployed environment "must take daily action" (i.e., swallow a pill) to remain healthy or that "[t]his need for regular treatment and monitoring *could* impair the ability of an HIV-positive member to serve worldwide," *see* (Defs.' Br., at 21), are meaningless in the context of equal protection if comparator conditions are not juxtaposed and evaluated by the same criteria for assessing deployability. Other conditions that require "daily action" similar to and sometimes more burdensome than that required for HIV, such as hypertension and dyslipidemia, do not limit deployability. *See* (Compl., at ¶¶ 2, 54-55, 59, 80, 95; Pls.' Br., at 4, 15-18, 22-23). And the loss of one's inhaler or eyeglasses could impair a service member's ability to serve, but neither asthma requiring use of an inhaler nor poor vision (correctable with prescription eyeglasses) limit a member's deployability. *See* (Ex. H to Pls. Mot. for Prelim. Inj., at 11, ¶ d; *Id.* at 12, ¶ f.2). In fact, a witness for the Defendants has now testified that two members of the Army Special Forces, some of the most "forward" deployed units, have received waivers to deploy while living with HIV, and the Army is nonetheless able to provide them with the care they need. *See* Ex. 4 to Pls.' Mot. to Compel at 193-197, *Harrison*, ECF No. 110. Plaintiffs are therefore likely to succeed on the merits by laying bare the irrationality of Defendants' policies.

Furthermore, rather than supporting their position, the medical science to which Defendants cite in their brief calls into question whether Defendants have even a basic

understanding of the healthcare provided to people living with HIV and the important differences between HIV treatment and HIV prophylaxis. The CDC study Defendants cite in their brief is discussing the relative merits of providing HIV prophylaxis—referred to as pre-exposure prophylaxis or "PrEP"—to service members at higher risk for HIV, not the treatment of service members living with HIV. *See* (Defs.' Br., at 21; App. to Defs.' Br., at A-00434). And there are important differences between these healthcare protocols.

Defendants suggest that Airmen with HIV would require medical monitoring at three month intervals. (Defs.' Br., at 22). However, people living with HIV who are stable in treatment need follow-up evaluations only every six months, whereas those taking PrEP require such follow-up evaluations—including blood tests—every three months. (Hardy Decl. at ¶ 21 (Ex. D)). Furthermore, people taking PrEP require regular "three-site" testing for sexually transmitted infections (STIs)—the presence of which increases the risk of HIV acquisition; whereas people living with HIV are offered such testing on the same basis as others in the general population who are not living with HIV and not on PrEP. *Id.* at ¶ 22. This is because the risk profile for other STIs for people taking PrEP is by definition higher. *Id.* It is therefore especially important that people not continue taking PrEP if they have acquired HIV; otherwise, resistance to the classes of medication contained in Truvada (the only medication approved for PrEP in the U.S.) may develop. *Id.*

Defendants have actually helped Plaintiffs demonstrate a likelihood of success on the merits by highlighting the provision of PrEP to service members. Despite the *greater* degree of healthcare required for those taking PrEP—as compared to those living with HIV—various branches of the military are in the process of rolling out protocols for providing PrEP to service members at higher risk, including to some deployed service members. *Id.* at ¶ 20. While

Defendants apparently believe they are able to provide the care required to support the deployment of Airmen taking PrEP, they continue to cite the less burdensome care for deployed Airmen with HIV as far too much of burden for them to shoulder.

Similarly, Defendants misunderstand and inflate the risks associated with treatment interruption. While it is true that a person who stops taking their HIV medications will eventually experience a rebound in their HIV viral load, that process generally takes weeks before the viral load reaches a clinically significant level. *Id.* at ¶ 14. And even with a clinically significant viral load, a person could go months or years without experiencing symptoms or a noticeable deterioration in their immunological health. *Id.* Furthermore, the risk of "battlefield transmission," as Defendants call it, is merely theoretical and does not turn on the viral load of the person with HIV. *See* (Ex. F to Pls.' Mot. for Prelim. Inj., at ¶¶ 21, ECF No. 40). While it is believed that an undetectable or suppressed viral load would reduce to zero whatever theoretical risk may exist in such situations, it is still only a theoretical (i.e., not documented) risk of transmission on the battlefield. *Id.* Though Plaintiffs contend that treatment interruptions that could produce an elevated viral load are unlikely to occur to a deployed member of the Armed Services, (Hardy Decl. at ¶ 3, 18 (Ex. D)) (explaining that commonly prescribed HIV medications do not require special handing, storage, or other requirements and can tolerate hard conditions like hot or cold stress and sunlight; that taking the medication once or twice a day requires very little time; and that, relatively, providing health care and treatment to deployed Airmen living with HIV is easier than providing PrEP to deployed Service members), Defendants adopt irrational hyperbole when characterizing the consequences of such treatment interruptions for deployed Airmen.

The purported risk of transmission from a person living with HIV through a transfusion is even more over-exaggerated. The safety concerns over battlefield transfusions (as distinguished from "battlefield transmissions") referenced by Defendants are the result of people who *don't know* they are living with HIV (or another blood-borne pathogen). People living with HIV know they cannot donate blood or plasma—and Airmen living with HIV certainly would not endanger their fellow Service members by doing so. Further, any risk of even an accidental donation could be avoided simply by issuing HIV-positive Service members a "Red Medical Alert" identification tag, a protocol already employed with respect to Service members with other medical conditions, including allergies, that render them ineligible to donate blood. *See* AFI 36-3802, ¶ 9.3. (Ex. G, ¶ 9.3) (stating that "Home station Medical Treatment Facilities will provide deploying personnel, with a documented medical allergic condition, a Red Medical Alert ID tag); (App. to Defs.' Br., at A-00351, ¶ 15.E.4 ("Deploying personnel requiring red medical warning tags (medication allergies, G6PD deficiency, diabetes, sickle cell disease, etc.) will deploy with red medical warning tags to be worn in conjunction with their personal identification tags.")). Defendants' alleged concerns over transmission through blood transfusions serves only to underscore the irrationality of their outdated, unwarranted, unjustifiable, and fear-based regulations.

Finally, the notion that military commanders are in the best position to determine when it is safe and appropriate for a person living with HIV to deploy to a particular zone or post is not supported by the individual and collective treatment of people living with HIV in the military. Military commanders are not immune to the misconceptions, unwarranted fears, stigma, prejudice, and discrimination that permeate society with respect to HIV and the people living with it. These misguided and unacceptable motivating factors not only inevitably affect the

individualized determinations that Defendants expect military commanders to make, but they are imbedded within the system itself. The Court need look no further than the DoD's own regulations to demonstrate the unequal treatment of Service members with HIV. CENTCOM MOD 13, *see* (App. to Defs.' Br., at A-00342-63), governs deployments to the Central Command—the area that Defendants aver to which "the majority of" Airmen will need to deploy. (Defs.' Br., at 5). The regulation states that members must bring a six-month supply of any needed medication, and refills are handled by mail order. (App. to Defs.' Br., at A-00349, ¶ 15.D.1). This requirement is no more onerous for people with HIV than for people with other conditions. Furthermore, Tab A to CENTCOM MOD 13, governing fitness standards for deployment to that AOR, sets forth a long list of conditions that are disqualifying for a CENTCOM deployment, including diabetes, migraines, sleep apnea, asthma, and sleep disorder. *See* (Ex. E). It is arbitrary and irrational that Defendants separate Service members with HIV for being unable to deploy to CENTCOM, but not Service members with these other conditions. This Court is empowered to "ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action." *Defenders of Wildlife v. North Carolina Dep't of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). So far, Defendants have offered few relevant scientific facts to justify their policies—especially when compared with Plaintiffs' well supported and medically sound contentions that those policies are irrational, arbitrary and capricious. (Compl., ¶¶ 2, 49-56, 59, 80, 95; Pls.' Br., at 2-4, 7, 9-10, 13-18, 22-23, 26.); *see Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if it lacks "a rational connection between the facts found and the choice made").

C. The Other Equitable Factors Weigh In Favor of Injunctive Relief

The remaining equitable factors also weigh in favor of granting Plaintiffs' preliminary injunction motion. Providing injunctive relief to Plaintiffs and other Airmen living with HIV will not set the courts on a "slippery slope." Defendants argue that if the Court exercises its prerogative to enter an injunction in this case, it would lead to "each and every service member with a chronic medical condition facing separation . . . seek[ing] similar relief in the federal courts." *See* (Defs.' Br., at 28). This alarmist vision is unmoored from the unique challenges faced by HIV-positive members of the Air Force, challenges that make judicial review and an injunction appropriate in this case. Unlike many of the chronic conditions that could lead to the discharge of an Airman, HIV is often subject to "stigma, ostracism, and discrimination rooted in misconceptions, fear, and ignorance." *See* (Compl., ¶ 56). The stigma and discrimination against people living with HIV, even within the category of people with chronic medical conditions, is unique in the history of this country. This deep-rooted fear and prejudice has resulted in HIV-related DoD and Air Force policies that are divorced from the recent advances of modern medicine. Both Roe and Voe were discharged against the recommendation of their medical officers and operational commanders. *See* (Compl., ¶¶ 65, 81-82; Ex. A3 to Pls.' Mot. for Prelim. Inj., ECF No. 44; App. to Defs.' Br., at A-00556, A-00763, A-00769.). Both Roe and Voe are being separated solely on the basis of their HIV status. *See* (Compl., ¶ 123). Neither Roe nor Voe presented with "progressive clinical illness or immunological deficiency," as described in DoDI 6490.07. *See* (Compl., ¶ 36; App. to Defs.' Br., at A-00573). The position of HIV-positive Airmen who are being discriminated against is substantially different from the position of Airmen with other chronic conditions.

Injunctive relief for Plaintiffs would not upset the balance of authority, oversight, and discretion between the Armed Services and the courts. Defendants argue that precluding them

from discharging Airmen living with HIV would "deprive the military of its ability to determine the appropriate makeup and distribution of its forces." *See* (Defs.' Br., at 29). Further, Defendants claim that enjoining the Air Force from discharging the Plaintiffs would be against the "public interest" and would be a "drastic change to precedent." *Id.* This argument mischaracterizes Plaintiffs' motion, which seeks only to prevent the discharge of Airmen based solely on their HIV status. It is not an undue encroachment on the military for the Court to maintain the status quo while it determines the constitutionality of the military's regulations as applied to persons living with HIV. Any minor encroachment on the military that may be precipitated by the Court's maintenance of the status quo (*i.e.*, merely preventing Defendants from doing something they are bound not to do by their own regulations and the mandates of equal protection) is outweighed by the severe harm Roe, Voe and other Airmen with HIV would suffer if Defendants started discharging them before this case is resolved.

III. CONCLUSION

For these reasons, the Court should deny the motion to dismiss and allow discovery to continue. Until the merits are resolved, the Court should issue an injunction preventing Roe, Voe, and other similarly-situated Airmen from being separated or treated differently than the Airmen living with HIV who have been retained.

Dated: February 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on the 1st day of February, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: February 1, 2019

Respectfully submitted,

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