

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RICHARD ROE; VICTOR VOE; and)
OUTSERVE-SDLN, INC.,)

Plaintiffs,)

v.)

PATRICK M. SHANAHAN, in his official)
capacity as Acting Secretary of Defense;)
HEATHER A. WILSON, in her official)
capacity as Secretary of the Air Force; and)
the UNITED STATES DEPARTMENT OF)
DEFENSE,)

No. 1:18-cv-1565-LMB-IDD

Defendants.)

**REPLY IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

I. Introduction

Plaintiffs bear the burden of demonstrating that this Court has jurisdiction to consider their constitutional and Administrative Procedure Act (“APA”) challenges to Defendants’ regulations and their decisions thereunder. Plaintiffs have not and cannot make such a showing because their claims are barred from judicial review on three independent grounds: 1) failure to exhaust administrative remedies; 2) presentation of a non-justiciable military controversy; and 3) lack of standing. Plaintiff Outserve-SDLN’s claims are derivative of the claims of Plaintiffs Roe and Voe, and must stand or fall along with those claims. For the reasons stated in Defendants’ Memorandum in Support of their Motion to Dismiss, the attachments and exhibits to that Memorandum, and this Reply Memorandum, the Court lacks subject matter jurisdiction to consider each of Plaintiffs claims on one or more of the above grounds and their complaint should be dismissed.

II. Plaintiffs Have Not Exhausted Their Administrative Remedies.

a. Exhaustion of Administrative Remedies Is Required by the Controlling Law of the Fourth Circuit.

In both *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985), and *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), the Fourth Circuit held that Plaintiffs' challenges to a military discharge were non-justiciable military controversies because Plaintiffs failed to exhaust their administrative remedies before the applicable services' Board for Correction of Military Records ("BCMR"). Plaintiffs Roe and Voe have not exhausted their remedies before the Air Force BCMR ("AFBCMR"), and therefore, their claims must be dismissed for failure to exhaust. Contrary to Plaintiffs' contentions in their opposition, *Williams* and *Guerra* remain controlling law and are directly on point in this matter.

Plaintiffs first argue that exhaustion of their BCMR remedy is not required because appeal to the AFBCMR is not mandatory under the Air Force's regulations. Plaintiffs rely on *Darby v. Cisneros*, 509 U.S. 137 (1993), for the proposition that exhaustion of administrative remedies is only required when the regulations of the relevant agency make those remedies obligatory. On this basis, Plaintiffs contend that previously decided cases requiring BCMR exhaustion, such as *Guerra* and *Williams*, have been invalidated. However, Plaintiffs plainly misread *Darby*. The *Darby* Court confined its holding to APA claims, stating that "of course, the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA." *Id.* at 153-54. As the Fourth Circuit explained in *Volvo GM Heavy Truck Corp. v. Dept. of Labor*, this means that for claims brought outside of the APA, such as Plaintiffs' Equal Protection challenges, traditional exhaustion principles related to preserving judicial economy and the administrative process continue to control. 118 F.3d 205, 208-09 (4th Cir. 1997). Cases like *Guerra* and *Williams*, which do not include APA claims, do not implicate *Darby* and remain controlling on

this Court. *See also Navas v. Gonzalez Vales*, 752 F.2d 765, 769-70 (1st Cir. 1985); *Thornton v. Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974); *Hamlet v. Brownlee*, 319 F. Supp. 2d 422, 426-27 (S.D.N.Y. 2004) (collecting cases recognizing *Darby*'s lack of effect on the exhaustion standard for non-APA claims). In the one Fourth Circuit opinion directly on point, the Court declined to address the impact of *Darby* on the court's rule requiring exhaustion of military remedies and dismissed the plaintiff's APA claim because the a favorable result from the BCMR "could render his APA claim largely moot." *Wilt v. Gilmore*, 62 F. App'x 484, 487-88 (4th Cir. 2003).¹ Moreover, this Court has recently applied the *Mindes* analysis, as adopted by *Williams* and *Guerra*, to find that dismissal was proper when a plaintiff failed to exhaust his ABCMR remedies. *Haramalis v. Lengyel*, Case No. 1:17-cv-946(LMB/MSN), 2018 WL 476156, at *3-5 (E.D. Va. Jan. 18, 2018) (Brinkema, J.).

Although the Fourth Circuit has not decided whether an exception to the *Darby* requirement should apply for APA claims against the military, it is clear that no such requirement applies to constitutional claims, that *Williams* and *Guerra* remain controlling, and that the Fourth Circuit has directed a district court to dismiss APA claims for failure to exhaust under similar

¹ Plaintiffs note that *Wilt* is an unpublished decision and that citation of such decisions issued prior to January 1, 2007 is disfavored. However, citation is permissible when no published opinion exists to decide a material issue. *See* 4th Cir. R. 32.1 (citation of unpublished opinions). *Wilt* contains the Circuit's only consideration of the effect of *Darby* on the exhaustion of administrative remedies in the military context and is therefore persuasive authority for this Court. The *Wilt* analysis was previously cited favorably in *Bowman v. Brownlee*, 333 F. Supp. 2d 554, 558-59 (W.D. Va. 2004). It is well-established as a general matter that unpublished Circuit opinions, while non-binding, are persuasive authority for courts within that Circuit. *See, e.g., DeMasters v. Carilion Clinic*, 796 F.3d 409, 419 n.4 (4th Cir. 2015) ("This Circuit ordinarily does not accord precedential value to [its] unpublished decisions, although those decisions are entitled 'to the weight they generate by the persuasiveness of their reasoning.'" (internal citations and alterations omitted)); *Martin v. Norfolk S. Ry. Co.*, Case No. 1:16-cv-1191, 2018 WL 6840128, at *7 n.12 (M.D.N.C. Dec. 31, 2018) ("While not precedential, unpublished decisions of the Fourth Circuit are valuable for their persuasive reasoning.").

circumstances.

b. The Exhaustion Balancing Test Favors Requiring Exhaustion of Administrative Remedies in this Case.

Plaintiffs argue that even if exhaustion of remedies is required, the Court should excuse them from this requirement because the AFBCMR cannot provide them the complete relief, because review at the AFBCMR would be futile, and because the burden of delay on the Plaintiffs outweighs considerations of efficiency and agency expertise. Plaintiffs' arguments on all of these counts are unavailing.

Plaintiffs' argument primarily rests on the alleged futility of AFBCMR review. However, showing that the outcome of BCMR review "would predictably be futile," is "an extremely high bar." *Haramalis*, 2018 WL 476156 at *4 (citation omitted). Plaintiffs have not made a sufficient showing. First, Plaintiffs contend that exhaustion is futile because the AFBCMR cannot grant all of the relief they seek. But "the [BCMR]'s inability to grant the plaintiff full relief [is] not dispositive on the issue of exhaustion," and "does not automatically excuse the failure to exhaust." *Guerra*, 942 F.2d at 277; *see also Aikens v. Ingram*, 513 F. Supp. 2d 586, 592 (E.D.N.C. 2007); *Haramalis*, 2018 WL 476156 at *4 ("Fourth Circuit precedent makes clear that the inability to obtain full relief is not a valid excuse for failure to exhaust."). *Guerra* establishes that the Court must undertake the exhaustion balancing analysis even if less than all of the relief sought by a plaintiff is available at the BCMR. In this case, the AFBCMR can undoubtedly provide substantial relief to Plaintiffs Roe and Voe by reversing their discharges and awarding back pay or other relief.

Plaintiffs also argue that review is futile because the Secretary of the Air Force is not obligated to follow the recommendation of the AFBCMR. Futility requires a clear showing by Plaintiff that "an adverse ruling [is] a certainty." *Thetford Props. IV Ltd. P'ship v. HUD*, 907 F.2d 445, 450 (4th Cir. 1990). Plaintiffs' speculative contention that the Secretary might not agree with

a favorable decision of the AFBCMR does not meet that standard.

If the Court concludes, as it must, that the exhaustion balancing must be undertaken, Plaintiffs argue that the Court should find that the burden on Roe and Voe of delaying federal court consideration outweighs the countervailing interests of efficiency and agency expertise. Plaintiffs do not make any substantive arguments to support their contention that the AFBCMR is less expert than this Court in matters of military operations, in particular in matter of deployment and retention. Nor do they explain how it serves the interests of judicial efficiency for this Court to decide Plaintiffs' claims when an administrative body can provide Roe and Voe with their desired relief. On the other side of the balance, Plaintiffs' reliance on *United States ex re. Brooks v. Clifford*, 412 F.2d 1137 (4th Cir. 1969), to establish the burden of delay is inapposite. In that case a conscientious objector sought review of a decision to deny him discharge from military service. The Court determined that the balance favored waiving BCMR exhaustion because as plaintiff waited for a decision, "each hour of each day [he was] required to engage in conduct inimical to [his] conscience[] or be subject to court martial." *Id.* at 1141. To the extent Plaintiffs allege any burden of exhausting AFBCMR review at all, beyond the mere fact that they would be required to undergo the process, it is objectively different in kind from the burden identified in *Clifford*. *See Haramalis*, 2018 WL 476156 at *4; *Plofchan v. Fanning*, Case No. 1:16-cv-550, 2016 WL 3640685, at *3 (E.D. Va. June 29, 2016). Indeed the potential burden in this case is indistinguishable from the burden in *Guerra*, where the Fourth Circuit held that "no such dire consequence" as that of *Clifford* attached to plaintiff's delay in securing judicial consideration of his discharge and plaintiff therefore "should have exhausted his administrative remedies...." 942 F.2d at 277.

In sum, the controlling law of the Fourth Circuit requires that Plaintiffs' constitutional

claims be dismissed for failure to exhaust available administrative remedies, and persuasive authority supports dismissal of Plaintiffs' APA claims.

III. Plaintiffs' Claims Raise a Non-Justiciable Military Controversy.

a. The Court Has Not Already Ruled on the Justiciability of Constitutional Claims in this Matter.

Plaintiffs contend that this Court has already rejected Defendants' argument that Sergeant Harrison's constitutional claims represent a non-justiciable military controversy and should reach the same conclusion in this case on that basis. First, although the cases have been consolidated for discovery purposes because of their similar subject matter, the cases do not concern exactly the same factual and legal issues and should be evaluated separately. Second, the Court denied Defendants' Motion in *Harrison* without prejudice and noted that Defendants' jurisdictional arguments would be considered again at summary judgment. Trans. of Sept. 14, 2018 Hearing at 17:12-15, *Harrison v. Mattis*, Case No. 1:18-cv-641 (E.D. Va. Sept. 14, 2018). The Court did not hold that military deference did not apply, but rather stated that deference does not inherently insulate all military decision making from judicial review. *See id.* at 15:8-16. The Court did not rule on jurisdiction with finality but rather held that the complaint alleged sufficient facts to allow jurisdiction that permitted creation of a record. *Id.* at 16:8-17. While the considerations are similar between this case and the *Harrison* case, they are not identical and the Court should apply the appropriate balancing test to determine if it may take jurisdiction here. In these circumstances, and in any event, Defendants reserve their position that the *Mindes* doctrine requires dismissal in this case.

b. The *Mindes/Williams* Analysis is the Controlling Law of this Circuit and Must be Applied.

Plaintiffs contend that the analysis described by *Mindes v. Seaman*, 453 F.2d 197 (5th Cir,

1971), should not be applied to the claims in this case because it is “questionable precedent” that has been “widely criticized.” Pls.’ Opp’n to Mot. to Dismiss and Reply in Supp. of Their Mot. For Prelim. Inj. (“Pls.’ Opp’n”) at 10, Dkt. No. 61. Plaintiffs’ characterization of *Mindes* and non-circuit authority is irrelevant, however, because the *Mindes* analysis was explicitly adopted by published Fourth Circuit precedents that have not been overruled. This Court is not free to ignore such precedent in favor of the position of another Circuit, *see, e.g., United States v. Stephens*, 764 F.3d 327, 342 (4th Cir. 2014), or indeed a conflicting statement by a later panel of the Fourth Circuit. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (“When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court.”).²

Consequently, the Court must review the Plaintiffs’ claims using the *Mindes* analysis, as adopted by *Williams* and *Guerra*, to determine whether it has jurisdiction to consider Plaintiffs’ claims. As described *supra*, Plaintiffs failed to exhaust their intra-service remedies at the AFBCMR and their constitutional claims therefore do not pass the threshold test of *Mindes* and the Court should decline jurisdiction. *See Haramalis*, 2018 WL 476156 at *3-4. The Fourth Circuit has not addressed the effect of *Darby* on exhaustion for APA claims in the military context, *see Wilt*, 62 F. App’x at 488, but assuming that Plaintiffs need not exhaust their administrative remedies for their APA claims, it is clear that neither their constitutional nor their APA claims shift the *Mindes* balance in favor of the Court taking jurisdiction in this matter.

Williams adopts the four factors of the *Mindes* balancing to determine if a district court

² Additionally, the in-circuit case cited by Plaintiffs, *Aikens v. Ingram*, 811 F.3d 643, 648 (4th Cir. 2016)(*as amended* Feb. 1, 2016), only questions the viability of *Mindes* as it applies to claims for damages as opposed to equitable relief.

may take jurisdiction over a challenge to a military decision:

- (1) the nature and strength of the plaintiff's challenge to the military determination
- (2) the potential injury to the plaintiff if review is refused
- (3) the type and degree of anticipated interference with the military function; and
- (4) the extent to which the exercise of military expertise or discretion is involved.

Williams, 762 F.2d at 359 (quoting *Mindes*, 453 F.2d at 201-02). As explained in Defendants' Memorandum, none of these factors weigh in favor of jurisdiction and none of Plaintiffs' arguments to the contrary demonstrate otherwise.

First, Plaintiffs argue that their claims are strong because the Defendants' regulations do not comport with the current state of medical science concerning HIV. However, as explained in Defendants' memorandum, and acknowledged in Plaintiffs' opposition, Pls.' Opp'n at 23-24, the proper level of scrutiny for Plaintiffs' discrimination claims is rational basis review and the standard for their APA claims is effectively the same. Mem. in Supp. of Defs.' Mot. To Dismiss and Defs.' Opp'n to Pls.' Mot. For Prelim. Inj. ("Defs.' Mem."), at 9-11, Dkt. No. 50. To the extent Defendants are even required under this standard to provide an explanation for their decisions, that explanation is provided in detail in the Memorandum and in the materials referenced by the Memorandum. *See id.* at 21-25. Plaintiffs' disagreement with some of Defendants' reasons does not render those reasons irrational, arbitrary, or capricious, nor does it create a strong claim for purposes of *Mindes*.

Second, Plaintiffs argue that the *Mindes* balance weighs in their favor because they will be harmed by discharge from the Air Force. However, the *Guerra* Court found that this factor weighed against granting review when the harm to plaintiff did not satisfy the irreparable harm standard. *See* 942 F.2d at 273-74, 279. As explained in Defendants' Memorandum, Defs.' Mem. at 11-12, Plaintiffs have no entitlement to employment or income from the Air Force and no rights issue from "a mere subjective expectancy." *Guerra*, 942 F.2d at 278 (citing *Perry v. Sinderman*,

408 U.S. 593, 603 (1972)).³ Plaintiffs will suffer no loss of medical care because they are entitled to veterans' benefits.⁴ Defs.' Mem. at 19. And, contrary to Plaintiffs' allegation, nothing about their confidential Honorable Discharges requires them in any way to disclose the reason for their separation or their HIV status. Plaintiffs face no reputational harm, Defs. Mem. at 12, and their employment-related harm, if they have any, is curable after the fact. *See Plofchan*, 2016 WL 3640685, at *4. Plaintiffs have not established that this second factor weighs in favor of the Court granting review of Defendants' military decisions.

Plaintiffs' treatment of the third and fourth *Mindes* factors ignores the principle that courts should not involve themselves unduly in military affairs. Judicial involvement in military deployment and retention decisions, based on medical considerations or otherwise, is clearly a substantial invasion of a core military function. Plaintiffs' contention that military agencies may have expertise in assessing individual circumstances but no expertise in making categorical determinations about fitness to serve is meritless. Military personnel policies have long been based upon categorical determination. Plaintiffs' recitation of cases in which courts have found military employment policies justiciable merely illustrates that justiciability is determined by a balancing test and not a brightline rule.⁵ Their assertion that the third *Mindes* factor weighs in favor of denying review only when the court would be forced into an ongoing supervisory role is contrary to *Guerra* and derived from a single out-of-circuit district court decision, which has no persuasive

³ Plaintiffs misrepresent Defendants' argument concerning their Preliminary Injunction motion in the *Harrison* case. Defendants did not suggest that discharge would constitute irreparable harm, but rather explained to the Court that discharge was not at issue so the threat of discharge should not be taken into account in a calculation of irreparable harm.

⁴ If Plaintiffs' argument on this point is correct, every individual discharged as a result of a DES process would be able to assert this harm to gain judicial reconsideration of those military personnel actions.

⁵ Each of these cases involved classes entitled to heightened scrutiny, which is not a factor here and which substantially influences the analysis.

value. Both the third and fourth *Mindes* factors weigh heavily in favor of denying review of Plaintiffs claims. Defs.' Mem. at 12-13.

In sum, controlling Circuit law requires that the *Mindes* analysis be applied to the challenges in this case to determine if the Court may take jurisdiction. Plaintiffs' constitutional claims fail the threshold requirement of *Mindes* because Plaintiffs did not exhaust their administrative remedies and they must be dismissed. For Plaintiffs' APA claims, and their constitutional claims, if the Court determines that administrative exhaustion should not be required, all four *Mindes* factors weigh in favor of deferring to military decision-making under the particular circumstances of this case. Plaintiffs' claims therefore should be dismissed as non-justiciable military controversies.

IV. Standing

The Court is also independently without subject matter jurisdiction to consider Plaintiffs' claims because they have not demonstrated that they have standing. Plaintiffs' arguments to the contrary are meritless. Although Plaintiffs allege that the expiration of their service terms is irrelevant and that they have not asked the Court to reenlist them, they have actually requested exactly that. Compl. at 30-31 (Request for Relief, E and F), Dkt. No. 1. Plaintiffs provide no support for their suggestion that they are in fact entitled to continued military service despite significant law and precedent to the contrary. Defs.' Mem. at 11-12, 14-15. Their claim of economic loss is similarly baseless as they have shown nothing but a mere subjective expectancy that they would earn further income from the Air Force.

Plaintiffs' opposition also contends that Roe and Voe's terms of enlistment have only expired because they were placed into the Disability Evaluation System ("DES"). This is factually inaccurate. All Airmen are enlisted for specific terms and must apply to reenlist and engage in the

Selective Reenlistment Process in order to continue serving. *See* A173-94.⁶ As Plaintiffs note in their complaint, both Roe and Voe's terms of enlistment have expired and have been extended only for the purpose of completing the DES process and appeals. Plaintiffs' argument that they would have already applied for reenlistment but for the DES process proves the point that Plaintiffs have completed their terms and are required to seek new terms that are not guaranteed.

Plaintiffs' arguments also ignore binding precedent concerning redressability. The Court cannot under the circumstances of this case require the Air Force to reenlist Plaintiffs, if it is ever able to do so, because they have not challenged any regulations or decisions in the reenlistment process. *Cf. Haramalis*, 2018 WL 476156 at *3-4. Because the reenlistment process is independent of the regulations challenged by Plaintiffs, their claim that a favorable ruling would provide them with the relief they seek is mere speculation. *See Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755-56 (4th Cir. 2013).

Finally, Plaintiffs' claim that Outserve-SLDN can base its organizational standing on the claims of alleged members identified only by affidavits attached to its Motion for Preliminary Injunction misunderstands both Defendants' argument and the law. First, Plaintiffs rely on *Sierra Club v. Dept. of the Interior*, 899 F.3d 260 (4th Cir. 2018), for the proposition that organizational standing can be established by affidavits of member, but there is no way to determine from that case whether allegations of those members harms were included in the complaint. Moreover, the requirement of the controlling law is that an organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Defendants bring their motion under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to Plaintiffs' complaint. A plaintiff's complaint must

⁶ Citing to the Appendix filed with the Defendants' Motion to Dismiss.

Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

KERI L. BERMAN
REBECCA CUTRI-KOHART
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for the Government

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

ANDREW R. SOMMER
Va. Bar Number 70304
WINSTON & STRAWN LLP
1700 K St., NW
Washington, DC 20006
T: (202) 282-5000
ASommer@winston.com

Counsel for Plaintiffs

/s/
R. TRENT MCCOTTER
Assistant United States Attorney
Office of the United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
Email: trent.mccotter@usdoj.gov

Counsel for the Government