

No. 19-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD ROE, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

Plaintiffs' brief, like the district court's decision, reflects a fundamental misunderstanding of the courts' role in evaluating the military's decision to discharge a service member. The Air Force discharged plaintiffs Roe and Voe because they were expected to deploy relatively frequently to Central Command's area of responsibility, given their career fields and tenure within those fields, but they would be unable to deploy in light of their medical condition. Plaintiffs do not dispute that deploying airmen with HIV presents a risk of harm to the service members, other airmen, and their mission, as well as to the United States' relations with host countries. They simply assert that the risk is sufficiently small that the Air Force should bear it. But weighing the relative benefits and risks of deploying service members with a communicable disease to areas where combat may take place is the responsibility of military experts charged with committing service members to a possible combat zone. It is not for plaintiffs or for a district court to second-guess the military's plainly rational determination.

Plaintiffs are equally wide of the mark in urging that the Air Force's discharge decision violated a regulation prohibiting discharge based on "HIV seropositivity alone." The Air Force's decision was not based on plaintiffs' HIV status alone, but on plaintiffs' inability to deploy, in light of that status, to the area where they were expected to go based on their particular career fields and duties.

Plaintiffs similarly fail to identify any irreparable harm they will suffer if the preliminary injunction is dissolved while they continue to litigate their claims. Were the Air Force to discharge plaintiffs during this litigation, and were plaintiffs to prevail, the Air Force could not deny plaintiffs reenlistment based on its prior determination that plaintiffs are not fit for duty. By contrast, plaintiffs do not dispute that the injunction impairs the Air Force's efforts to minimize harm to other airmen (and their families and units) who must be prepared to deploy in plaintiffs' stead.

Because plaintiffs are unlikely to succeed on the merits and because they will suffer no irreparable injury, the district court's preliminary injunction must be reversed. But even assuming that an injunction were appropriate, its nationwide scope would be improper. An order prohibiting the Air Force from discharging plaintiffs would fully remedy any injury they suffer. That is all that Article III permits and all that equity requires.

ARGUMENT

I. Plaintiffs' Claims Fail On The Merits.

A. The District Court Erred In Second-Guessing The Air Force's Wholly Rational Discharge Decisions.

The vast majority of airmen who are required to deploy are expected to do so to Central Command's area of responsibility, which includes the Middle East, Northeast Africa, and Central Asia. JA 474. After considering the medical evidence and the exigencies of military deployment, *see* JA 443, the military determined that

deploying HIV-positive service members to Central Command involves risks for those service members, their colleagues, and the military mission—risks that the military is unwilling to bear unless they are offset by a military need for a specific HIV-positive service member to deploy.

In challenging the reasonableness of that decision, plaintiffs rely entirely on what they describe as the district court’s “extensive findings of fact regarding the modern medical science of HIV, the effectiveness and simplicity of antiretroviral treatment, and the exceptionally low risk of transmission in a deployed setting.”

Br. 36. Plaintiffs emphasize the district court’s declaration that, based on its evaluation of “the state of science and medicine,” the risk of transmission is “vanishingly low” (Br. 37, 38); that physicians can provide appropriate care for HIV-positive airmen while they are deployed (Br. 45); and that deployed service members should be expected to adhere to their daily medication regime (Br. 47-48). Those conclusions, plaintiffs argue, demonstrate that the military could not properly decline to accept the risks involved in deploying HIV-positive service members to potential combat areas. Plaintiffs characterize statements made on the basis of the court’s review of the literature as “fact-findings” and urge that, unless they are “clearly erroneous,” the injunction should be upheld. *E.g.*, Br. 37.

Plaintiffs would thus stand the appropriate standard of review on its head. The rationality or “wisdom” of government action “is not subject to courtroom factfinding.” *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc). This

Court applied precisely that kind of “exceedingly deferential rational basis test” in an equal-protection challenge to military regulations in *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991), and plaintiffs concede that it applies here, Br. 38. Similarly, a court evaluating the reasonableness of an agency decision under the Administrative Procedure Act “is not to substitute its judgment for that of the agency,” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), and “will not disturb the agency’s judgment” if the agency “has presented a rational basis for its decision” on the administrative record. *Perez v. Cissna*, 914 F.3d 846, 852 (4th Cir. 2019).

Indeed, as this Court has recognized, “special deference” is owed where, as here, a plaintiff challenges the rationality of “military personnel policies.” *Thomasson*, 80 F.3d at 927. “Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second[-]guess judgments requiring military expertise,” as such second-guessing “might stultify the military in the performance of its vital mission.” *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971). The special deference accorded discretionary military decisions—whether expressed as the standard by which a plaintiff’s claim is to be evaluated on the merits, or as a threshold inquiry into the justiciability of that claim—reflects the same fundamental principle: “The complex, subtle, and professional decisions as to the composition ... and control of a military force are essentially professional military judgments,” and “[t]he ultimate responsibility for these decisions is appropriately

vested in branches of the government which are periodically subject to electoral accountability,” not the courts. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).¹

The district court’s task in this case was thus not to canvass the scientific literature and decide for itself the precise odds of battlefield transmission and whether the military should be required to bear that risk. “The function of the court is not to reweigh the evidence presented to the [agency].” *Randall v. United States*, 95 F.3d 339, 348 (4th Cir. 1996). The district court’s task, instead, was to determine whether it was reasonable for the Air Force to conclude that not deploying HIV-positive service members would reduce the risk of HIV transmission, help protect the battlefield blood supply, and help promote foreign relations with host countries.

There is ample basis to conclude the military’s conclusions are rational. Plaintiffs do not question the military’s interest in preventing the transmission of communicable diseases in combat zones. Nor do they dispute that the deployment of HIV-positive airmen poses some risk of transmission. Instead, they challenge the military’s decision not to accept that risk. But the military—not plaintiffs, or the

¹ In *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008), briefly referred to by plaintiffs, Br. 43-44, the Court addressed the type of pleading a plaintiff must make to survive a motion to dismiss in a case subject to rational-basis review. 521 F.3d 303-04. The Court reiterated the rule that, in such cases, the government “has no obligation to produce evidence to support the rationality” of the challenged action. *Id.* at 303. In any event, as explained below, plaintiffs do not dispute that the military evaluated the medical literature, JA 443, or that deployment involves risks of transmitting HIV.

courts—is best placed to evaluate the risk of infection in deployment settings and to weigh the costs and benefits of deployment.

Based on its own review of the “current scientific understanding of the nature of HIV infection, transmission, and management,” JA 443, the military has determined that “in the unique circumstances of military combat operations, there remain significant risks that individuals with even well-controlled HIV infection may suffer adverse health effects and create additional mission risks for the military command.” JA 461. That is, in part, because “[d]eployment and the battlefield present potential exposures to blood-borne pathogens including HIV,” as “there is potential contact with the battlefield supply of non-FDA-approved blood products, occupational combat exposures, and casualty care with infection control measures limited by austere field conditions.” JA 485 (footnotes omitted). Based on that assessment, Central Command determined that service members who are HIV-positive generally cannot deploy, absent a specific military need for a particular service member that outweighs those risks. JA 417, 481-82. How much risk to accept, in return for what benefits, is quintessentially a “professional judgment of military authorities concerning the relative importance of a particular military interest,” to which courts must “give great deference.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

Relying on their expert’s declaration, plaintiffs contend that “[o]utside of the contexts of sexual activity, sharing of injection drug equipment, blood transfusion,

needle sticks, or perinatal exposure (including breastfeeding), transmission of HIV is rare.” Br. 38 (quoting JA 599). But that assessment does not take into account such things as the challenges of caring for “battlefield trauma” in the “austere conditions” of deployment in the Middle East and North Africa. JA 480-81 (affidavit of Preventive Medicine Officer describing military-specific considerations). Even in the civilian, domestic context, the Centers for Disease Control and Prevention (CDC) recommends that healthcare workers who have contact with blood or bodily fluids from “a source patient with an undetectable serum viral load” receive post-exposure treatment. JA 456 (quoting CDC, *U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HIV* 10-11 (2013), <https://go.usa.gov/xmmJj>); see also JA 457 (“Plasma viral load ... reflects only the level of cell-free virus in the peripheral blood,” while “latently infected cells ... might transmit infection even in the absence of viremia.”) (quoting CDC, *Occupational Exposures* 11). And military deployments in theaters of combat are reasonably expected to present similar or higher risks of contact with the blood or bodily fluids of others. See JA 480, 485 (describing conditions of deployment).²

² Contrary to plaintiffs’ suggestion (Br. 39), the government need not document concrete instances of battlefield transmission of HIV before concluding that the risk would be reduced by restricting deployment of HIV-positive service members. “How *much* of a reduction” in the relevant risks might be “disputed, but no one can doubt that thoughtful people could conclude that there will be *some* reduction.” *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995).

The risks of transmission only increase if the service member's treatment were to be interrupted by the rigors of deployment. JA 456. If treatment is interrupted, a person's viral load is expected to rebound "within 2 to 3 weeks." Robert W. Eisinger et al., *HIV Viral Load and Transmissibility of HIV Infection*, 321 JAMA 451, 452 (Feb. 5, 2019), <https://jamanetwork.com/journals/jama/fullarticle/2720997>. With a higher viral load, the service member would pose even greater risks to other service personnel. See CDC, *HIV Transmission*, <https://go.usa.gov/xmmJg> ("Missing some doses can increase the viral load and the risk of transmitting HIV."). And interruptions in antiretroviral treatment also risk harm to HIV-positive service members, including possible drug resistance. JA 481.

Even if the "risks of nonadherence" to daily treatment requirements in a deployed setting are "no different for HIV" than for other conditions, Br. 48, the military is plainly entitled to implement policies that reduce the risk of treatment interruption for service members with a communicable disease. And even though the military may be "*able* to provide [daily] medications in a deployed environment" in some circumstances, Br. 46 n.8 (emphasis added), the military is not thereby *compelled* to incur the expense of doing so for all medications in all theaters for all conditions, and regardless of the consequences if treatment of a communicable disease were interrupted by the rigors of deployment.

Plaintiffs protest that the restriction on the deployment of airmen with HIV is irrational because the military allows other service members to deploy even if they

have conditions (like asthma) requiring daily treatment, Br. 45-46, or if they have a limited ability to donate blood on the battlefield (like those with an AB+ blood type, who can safely donate only to other AB+ people), Br. 41-42. That a policy is assertedly under-inclusive does not undermine its rationality if, as here, the goals underlying the policy are legitimate. *Vance v. Bradley*, 440 U.S. 93, 108 (1979). The military is not put to the choice of deploying no service member whose ability to donate blood is limited or deploying them all. The Air Force is entitled to limit the number of non-donors, and it is free to do so by focusing on those with a communicable disease who can never safely donate to any recipient under any circumstances.

Plaintiffs further argue that the Air Force's decision is irrational because there are alternative means for addressing the risk of HIV transmission during deployment. They say, for example, that the Air Force could provide post-exposure prophylaxis for those who come into contact with an infected service member's blood, Br. 40, or by precluding deployment only to certain countries, Br. 51. But whether there are alternative measures the Air Force could take is beside the point. "It may be, as plaintiffs say, that [the military] could have taken a path that would have given more leeway to those who" are living with HIV to deploy and so to occupy positions requiring frequent deployment. *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995). But it is for the military to determine which means to employ in minimizing risks for troops in potential combat areas.

Finally, plaintiffs do not dispute that the military's deployment policies also advance the government's foreign-relations interests in accommodating host countries' HIV restrictions. *See* UNAIDS, *Still Not Welcome* (June 27, 2019), <https://www.unaids.org/en/resources/infographics/hiv-related-travel-restrictions> (identifying countries with HIV restrictions, a disproportionate number of which are in Central Command's area of responsibility). Plaintiffs argue instead that this Court should not consider those interests because the government did not raise them in district court. Br. 49-50. Plaintiffs thus ask the Court to keep in place an injunction regardless of its consequences for foreign relations. No doctrine requires that outcome. Central Command's deployment policy explains, on its face and on the record, that it is "IAW"—in accordance with—"agreements with host nations," as "some nations within" Central Command's area of responsibility "have legal prohibitions against entering their country(ies) with this diagnosis." JA 417 (MOD 13, Tab A, § 7.C.2). The Court should decline plaintiffs' invitation to ignore reasons demonstrating that the challenged policy is wholly rational.

B. The Discharge Decisions Did Not Violate The Military's Own Regulations.

Plaintiffs fare no better in contending that the military's decisions to discharge Roe and Voe violated the military's own regulations. Br. 26-34.

1. Plaintiffs incorrectly contend that the Air Force discharged Roe and Voe based on their "HIV seropositivity alone," in violation of Air Force Instruction 44-

178, § 2.4.1. Br. 27 (quoting JA 351). Instead, the Air Force determined that Roe and Voe should be discharged because: (i) they were expected to deploy relatively frequently to Central Command’s area of responsibility because of their specific career fields, and tenure within those fields; *and* (ii) their HIV status precluded such deployment. JA 545, 553. That determination—which was based on the conjunction of two factors, only one of which took HIV status into account—is plainly not based on HIV status “alone.” If plaintiffs’ positions did not require deployment, their HIV status would not have been a basis for discharge. *See* JA 470-76 (describing retention of HIV-positive airmen).

Plaintiffs’ argument to the contrary (Br. 28) misunderstands the plain text of the Instruction. In prohibiting separation for HIV status “alone,” the Instruction reflects the Air Force’s determination that HIV-positive service members may be able to continue to perform their military duties. It thus prohibits the Air Force from discharging service members based solely on consideration of their HIV-positive status and without consideration of how that status would affect the service member’s ability to perform the duties required by his or her position. *See Oxford English Dictionary* (3d ed. 2012) (defining “alone” to mean “[t]aken or acting on its own; without any addition or accompaniment; with nothing more”).

By the same token, however, the Instruction permits the Air Force to consider HIV status in conjunction with other factors, such as the particular military duties required in service members’ positions. As the Instruction explains, “[m]embers with

laboratory evidence of HIV infection *who are able to perform the duties of their office, grade, rank and/or rating*, may not be separated solely on the basis of laboratory evidence of HIV infection.” JA 381 (emphasis added). Service members with laboratory evidence of HIV infection who are *unable* to perform the duties of their office may be separated on that basis. Nothing in the Instruction provides that a service member’s HIV status has no effect on that member’s ability to perform military duties or prohibits the Air Force from considering that effect as part of a discharge decision.³

2. Nor did the Air Force misapprehend Central Command’s regulations, which provide that “[c]onfirmed HIV infection is disqualifying for deployment,” and that service members living with HIV “will not deploy without an approved waiver.” JA 417 (MOD 13, Tab A, § 7.C.2).

Plaintiffs argue that the Air Force’s discharge decisions failed to recognize Central Command’s waiver process. They note that each discharge decision concluded that “the member’s condition ... renders him *ineligible* for deployment to” Central Command. Br. 31 (omission and emphasis in brief) (quoting JA 883, 1183). The statement that plaintiffs are “ineligible” for deployment, plaintiffs argue, is “legally wrong” because it is based on the incorrect premise that HIV-positive service

³ Plaintiffs thus miss the mark in presenting a hypothetical comparing Airman A, who does not have HIV and is retained, to Airman B, who has HIV and is discharged for being nondeployable. Br. 28-29. That Airman B’s discharge would not have occurred but for his HIV status does not mean that the discharge was based on HIV status “alone.”

members are “categorically” ineligible for deployment. *Id.* Plaintiffs’ quotation is selective, however. The language plaintiffs omit demonstrates that the Air Force recognized and accounted for the waiver process: “[T]he member’s condition precludes him from being able to deploy world-wide *without a waiver* and renders him ineligible for deployment” to Central Command. JA 883, 1183 (emphasis added).

Plaintiffs also assert (Br. 32) that the Air Force failed to analyze whether plaintiffs would obtain a waiver. But, as explained on the record, when the Air Force makes retention decisions based on deployability, it considers whether “waivers are unlikely to be approved.” JA 473. And “the considerations noted in [Central Command’s] policy make it extremely unlikely that such a waiver would ever be granted.” JA 474. The Air Force thus was not only aware of the waiver provision in Central Command’s policy, it made a predictive judgment regarding whether Roe and Voe would obtain a waiver. And its conclusion—that Roe and Voe would not receive a waiver—is consistent with the fact that Central Command “has never granted a waiver for an HIV positive service member.” *Id.* Indeed, the official in charge of Central Command’s waiver decisions confirmed on the record that it is “highly unlikely” that Roe or Voe “would be granted a waiver,” JA 481-82—an evaluation that plaintiffs concede is correct, *see* Br. 13.

Plaintiffs contend that Central Command’s history of denying waivers constitutes a “de facto policy” that is contrary to the formal waiver process. Br. 32-33. But, as the official in charge of waiver decisions for Central Command explained,

he “conduct[s] a thorough risk assessment for each waiver request,” making “an individual assessment of the risk each applicant poses to themselves, the deployed force, and, most importantly, the military mission.” JA 481. “For a waiver to be granted, the needs of the Service to have the specific Service member or civilian in theater must be great enough to validate taking on this additional risk.” *Id.* To date, Central Command has “determined in each case that the risks of deploying a[n] HIV-positive Service member were too great to justify waiver approval.” JA 481-82. Plaintiffs have identified no reason to doubt that Central Command makes an individualized determination for every waiver request. And Central Command’s decision to allow service members to seek a waiver does not require Central Command to grant a waiver where the risks are not justified by concomitant benefits.

3. Finally, plaintiffs contend (Br. 30-34) that the Air Force’s decision to discharge them is an arbitrary application of a Department of Defense Instruction that provides: “Determining whether a Service member can reasonably perform his or her duties includes consideration of,” among other things, “[w]hether 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 Military Department.” JA 80 (DoDI 1332.18, Encl. 3, App. 2, § 4(a)(3)) (emphasis added). If airmen with HIV cannot deploy to Central Command, plaintiffs say, they cannot deploy “to *any vessel or location*” and should thus be discharged, yet “the Air Force is retaining some Airmen with HIV while discharging Roe, Voe, and others.” Br. 34 (emphasis added).

That argument lacks merit and misunderstands Air Force discharge decisions. The Air Force retains HIV-positive airmen despite their inability to deploy to Central Command when they work in fields that do not require frequent deployment. JA 470-76. It is neither arbitrary nor capricious for the Air Force to discharge airmen whose positions would make them likely to deploy to Central Command while retaining those whose positions would not. And such individualized consideration is permitted by the Instruction, which requires consideration of a service member's deployability, not to any and every location whatsoever, but to "any vessel or location *specified by the Military Department.*" JA 80 (emphasis added); *accord* JA 122 (DoDI 1332.45, § 4.2(a)(1)) (Nondeployable service members may be retained "on a case-by-case basis, if determined to be in the best interest of the Service, based on ... [t]he Service member's ability to perform appropriate military duties commensurate with his or her office.").

II. The Balance Of The Equities Precludes The Injunction.

A. Plaintiffs Will Suffer No Irreparable Harm If The Preliminary Injunction Is Dissolved.

Plaintiffs' response brief fails to identify any irreparable injury that they would suffer from being discharged while they continue to litigate their claims. Plaintiffs' complaint seeks only injunctive and declaratory relief, *see* Compl. 30-31, No. 1:18-cv-1565 (E.D. Va.) (ECF 1), and plaintiffs' only argument for irreparable injury is that their discharge "prior to trial would be permanent and irrevocable, even if they later

win on the merits,” and would “deny them the opportunity to pursue their chosen profession.” Br. 53-54.

These assertions are incorrect. If plaintiffs are discharged during this litigation but ultimately prevail, the Air Force could not deny plaintiffs reinstatement or reenlistment based on its prior determination that plaintiffs’ HIV status precludes performance of their military duties.

As our opening brief explained (Gov’t Br. 5), the Air Force uses a multi-tiered review process to evaluate whether an airman’s medical condition prevents him from performing the duties of his office. Review by the Physical Evaluation Board is the penultimate stage in that process. JA 18-19; *see* Gov’t Br. 8-9. If the Board determines that a service member is fit for duty, both statute and military regulations prohibit the Air Force (and all other military departments) from discharging the service member “based on a determination that the member is unsuitable for deployment ... based on the same medical condition of the member considered by a Physical Evaluation Board during the evaluation of the member.” 10 U.S.C. § 1214a(a); JA 73 (DoDI 1332.18, Encl. 3, § 7(b)). If a court were to determine that an enlisted airman was unlawfully discharged, the Air Force would thus be required to take action consistent with such court order and reinstate that service member if his or her term of service has not yet expired. No enlisted airman would be denied a return to military service based on a discharge determination that a court determined to be unlawful.

Matters are slightly more complicated for airmen, like Roe and Voe, whose terms of service would have already expired absent the preliminary injunction and whose terms will expire if that injunction is lifted, *see* JA 552, 560, but the bottom line is the same. Service members whose terms of service have expired must reenlist in order to continue their military service. The same statute and regulation discussed above prohibit the Air Force from “deny[ing] reenlistment of the member, based on a determination that the member is unsuitable for deployment or worldwide assignment based on the same medical condition of the member considered by a Physical Evaluation Board during the evaluation of the member.” 10 U.S.C. § 1214a(a); JA 73 (DoDI 1332.18, Encl. 3, § 7(b)). If plaintiffs ultimately prevail on the merits, the judiciary will have held that the Board legally erred in determining that Roe and Voe were unsuitable for deployment based on their HIV status. In light of such a ruling, and the statute and regulations, the Air Force could not deny plaintiffs reenlistment based on the Board’s erroneous decision. And, because plaintiffs would not have been discharged absent that erroneous decision, the Air Force would not deny plaintiffs reenlistment based on a regulation that “prevents those living with HIV from joining the military.” Br. 54.

Plaintiffs argue that the government took the position in the district court that the courts do not have the authority to order the reenlistment of a discharged service member. Br. 53 (citing Mem. in Opp’n 15 n.4, No. 1:18-cv-1565 (E.D. Va.) (ECF 47)). That characterization is accurate but incomplete. A court lacks the authority to

directly reenlist a discharged airman because Congress committed that discretionary decision to the military. *See* 10 U.S.C. § 508(b) (“A person discharged ... may be reenlisted ... under such regulations as the Secretary [of the military department] may prescribe.”); *see* App. to Mem. in Opp’n A159, No. 1:18-cv-1565 (E.D. Va.) (ECF 47-2) (Air Force Instruction 36-2606). The Air Force could choose not to reenlist an airman for a variety of reasons having nothing to do with a previous discharge later determined to be erroneous—if, for example, the airman committed a crime, *see* App. to Mem. in Opp’n A224 (AFI 36-2606, Tbl. 5.4, ll. 10-13), or was otherwise unfit for reasons independent of the matters addressed in this case. Courts may not properly short circuit consideration of the applicant’s suitability for service. *See, e.g., Dodson v. U.S. Gov’t, Dep’t of Army*, 988 F.2d 1199, 1208 (Fed. Cir. 1993). But, if the Air Force were to discharge Roe and Voe during this litigation, and were they ultimately to prevail, Roe and Voe would be in the same position as any airman seeking to reenlist who had *not* been discharged. Roe and Voe would thus suffer no irreparable harm from their discharge.⁴

⁴ That conclusion is underscored by the “higher requirement of irreparable injury” this Court has held applies “in the military context given the federal courts’ traditional reluctance to interfere with military matters.” *Guerra*, 942 F.2d at 274. Plaintiffs contend that *Guerra* is a relic of the now-abandoned sliding-scale approach to evaluating the propriety of preliminary injunctive relief. Br. 52 (citing *Henderson ex rel. NLRB v. Bluefield Hosp. Co.*, 902 F.3d 432, 438 n.* (4th Cir. 2018)). That is mistaken. Under the sliding-scale approach, a court could issue a preliminary injunction based on a showing of “possible” irreparable injury. *Henderson*, 902 F.3d at 438 n.*. The Supreme Court rejected that approach as “‘too lenient’ for preliminary

B. The Air Force And The Public Interest Will Suffer Significant Harm If The Injunction Remains In Place.

Plaintiffs assert that the harm to the military from the injunction is “not substantial” because it “merely” requires that all HIV-positive members of the Air Force in positions requiring frequent deployment must be treated as if they were instead “in assignments with lower deployment rates,” and thus must be neither deployed nor discharged. Br. 57-58 & n.9.

Plaintiffs do not (and could not) dispute the harms this injunction causes to other service members, their families, and their units: Because of the injunction, other airmen who are deployable must compensate for non-deployable airmen by deploying more frequently. This imposes significant costs not only on those airmen, but also on their families (who must endure extended periods of separation) and their units (which must deploy soldiers more frequently, undermining mission readiness and unit cohesion).

Though they do not deny those harms, plaintiffs attempt to downplay their significance, noting that the injunction applies to only “some portion” of their estimate of about 1,200 HIV-positive service members. Br. 57 & n.9. But, as the Supreme Court has consistently held, courts must “give great deference to the

equitable relief.” *Id.* (quoting *Winter*, 555 U.S. at 22). The Supreme Court’s rejection of a *lower* injury standard does not call into question this Court’s precedent holding that a *higher* showing of injury is required, in the balance of the equities, where injunctive relief would interfere with military personnel decisions.

professional judgment of military authorities concerning the relative importance of a particular military interest,” particularly where the matters at issue involve “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” which are “essentially professional military judgments.” *Winter*, 555 U.S. at 24. Neither plaintiffs nor the district court identify any basis for discounting the military’s professional judgment that the nationwide injunction here imposes significant costs on other service members, their families, and their units.⁵

III. The Nationwide Injunction Is Improper.

A. Plaintiffs do not dispute that their injuries would be fully remedied by an injunction limited solely to Roe, Voe, and the other service members on whom plaintiff OutServe relies to establish associational standing. Accordingly, at a minimum, the injunction should be vacated insofar as it extends beyond plaintiffs. The entry of an injunction broader than necessary to remedy a plaintiff’s injury exceeds a court’s authority under both Article III and fundamental principles of equity.

As the Supreme Court has made clear, a court’s “constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). For that reason, “[a] plaintiff’s remedy must be

⁵ At the time plaintiffs filed their brief, trial was scheduled for September 2019. Br. 57. The district court has since stayed further proceedings pending this appeal. See Order, No. 1:18-cv-1565 (E.D. Va. Aug. 1, 2019) (ECF 244).

tailored to redress the plaintiff’s particular injury.” *Id.* at 1934. Thus, where no class has been certified, no justiciable controversy exists once the injury to the actual plaintiffs has been remedied. Plaintiffs have no standing to seek to remedy other people’s injuries, and courts have no authority to grant such relief under Article III.

Traditional equitable principles similarly limit the scope of injunctive relief. Injunctions may “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Accordingly, “[n]ationwide injunctions are appropriate *if necessary to afford relief to the prevailing party.*” *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (emphasis added), *abrogated on other grounds by FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *see also Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). But, where plaintiffs can obtain “complete relief” via a tailored injunction, this Court has held that a nationwide injunction is “more burdensome to the defendant than necessary.” *Virginia Soc’y*, 263 F.3d at 393. The need to carefully tailor equitable relief is all the greater with respect to *preliminary* injunctions, which are equitable tools designed merely to “preserve the relative positions of *the parties* until a trial on the merits can be held.” *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added).

The preliminary injunction here is fatally overbroad under these bedrock Article III and equitable principles. The injuries that plaintiffs seek to avoid would be

fully remedied by an injunction that prohibits the Air Force from discharging plaintiffs. Yet the preliminary injunction here goes beyond what is necessary to afford such relief and also prohibits the Air Force from discharging any *other* similarly situated service members. It is thus “more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Virginia Soc’y*, 263 F.3d at 393. This Court held that the nationwide injunction in *Virginia Society* was overbroad because “[p]reventing the FEC from enforcing” its regulations “against other parties in other circuits does not provide any additional relief to [the plaintiff].” *Id.* So, too, here.

B. Plaintiffs do not dispute that a narrower preliminary injunction would afford them complete relief. Instead, plaintiffs effectively treat nationwide injunctions as the default remedy for any government action that rests on a pure error of law and affects multiple people in multiple jurisdictions. That is not the law.

Plaintiffs note that “HIV-positive airmen are stationed throughout the United States,” and they argue that, under *Virginia Society*, “‘nationwide injunctions are appropriate’ where, for example, ‘plaintiffs are ... from throughout the country.’” Br. 60-61 (quoting 263 F.3d at 393) (omission in plaintiffs’ brief). But plaintiffs’ brief disregards the crucial passage from *Virginia Society*, which holds that “[n]ationwide injunctions are appropriate *if necessary to afford relief to the prevailing party.*” 263 F.3d at

393 (emphasis added). The *geographic* distribution of HIV-positive airmen is no basis for applying the injunction at issue here to *nonparties*.

To the extent that the nationwide injunction in *Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992), applied to nonparties, this Court in *Virginia Society* later explained that a nationwide injunction there was necessary to afford adequate relief to the plaintiffs, who, the Court noted, were “from across the country.” 263 F.3d at 393. *Virginia Society* did not hold, as plaintiffs contend, that a nationwide injunction may issue simply because plaintiffs—or, here, third parties not even before the court—are from across the country, where such a sweeping injunction is *not* necessary to afford plaintiffs complete relief. In any event, that proposition is inconsistent with subsequent Supreme Court precedent making clear that a remedy must be limited to *plaintiffs’* injury. *See Gill*, 138 S. Ct. at 1930.

Plaintiffs are similarly mistaken in their assertion that a nationwide injunction is appropriate because it would “violate the Constitution and APA” for the Air Force to discharge not only “Roe and Voe” but any “service members who are similarly situated.” Br. 61. On that theory, a nationwide injunction would be the default remedy any time a court concludes that agency action rests on an error of law. That proposition is irreconcilable with this Court’s opinion in *Virginia Society*, in which this Court held that an FEC regulation violated the First Amendment, but nevertheless held that the nationwide injunction prohibiting the FEC from enforcing the regulation

against nonparties was overbroad because it was not “necessary to provide complete relief to the plaintiffs.” 263 F.3d at 390-93.

As this Court has explained, nationwide injunctions “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue,” and “deprive the Supreme Court of the benefit of decisions from several courts of appeals.” *Virginia Soc’y*, 263 F.3d at 393. If other service members face discharge from the Air Force for the same reasons as plaintiffs, they may seek to bring their own suits to remedy their own alleged injuries. That such suits could lead to multiple courts in different jurisdictions considering the legal issues presented here is a benefit to the court system, not a burden. By contrast, permitting litigants who do not represent a class to obtain class-wide relief under the guise of a nationwide injunction improperly circumvents class-certification and preclusion rules. It would allow different groups of litigants to bring suit in multiple district courts, secure in the knowledge that all will benefit if even one suit succeeds, and none will be bound by suits that fail. That result is untenable and is squarely foreclosed by *Virginia Society*.

Plaintiffs mistakenly rely on this Court’s since-vacated opinion in *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc) (*IRAP*), arguing that it supports the proposition that where “[c]onstitutional and statutory violations ... ‘would endure in all [their] applications’” without a nationwide injunction, then “limiting relief to the named plaintiffs would improperly allow

unlawful conduct to continue.” Br. 61 (third alteration in original) (quoting *IRAP*, 857 F.3d at 605).

Plaintiffs’ reliance on *IRAP* is doubly misplaced, as it is neither precedent nor on point. After the dispute in *IRAP* became moot while the case was pending consideration by the Supreme Court, the Supreme Court vacated this Court’s judgment in order to prevent it “from spawning any legal consequences.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950); see *Trump v. International Refugee Assistance*, 138 S. Ct. 353 (2017). In any event, *IRAP* has no application here. *IRAP* concluded that allowing the government to enforce an Executive Order against others not before the court would “only serve to reinforce the ‘message’ that *Plaintiffs*” are religious outsiders, thereby compounding the Establishment Clause violations that the Court had found. See 857 F.3d at 605 (emphasis added). Here, by contrast, discharging other service members is not alleged to violate plaintiffs’ own rights or compound the harms from plaintiffs’ discharge.

Plaintiffs further argue that their injury “is produced by an unlawful categorical bar on deployment by HIV-positive service members, resulting in their discharge from the military,” and that an injunction that “bars the Government from implementing that policy” therefore “remed[ies] exactly the ‘inadequacy’ that caused the injury.” Br. 62. But plaintiffs do not contend that the nationwide injunction is *necessary* to remedy their injuries, and for good reason: Plaintiffs’ injuries stem from their individualized discharge decisions, and enjoining implementation of those

decisions fully remedies those injuries. Although plaintiffs suggest that “a violation of the APA is a paradigmatic circumstance for enjoining a regulation nationwide,” Br. 59, that argument is foreclosed by *Virginia Society*, which held that “the proper scope of injunctive relief” under APA review is not “an order setting aside the unconstitutional regulation for the entire country.” 263 F.3d at 393-94. This Court held that it “must allow” an agency, “if it chooses, to press its position in those circuits that have not yet ruled” on the legal issues decided by the district court. *Id.* at 394. There is simply no basis for the nationwide scope of the preliminary injunction.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be vacated.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,499 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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