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

NICHOLAS HARRISON, *et al.*, Plaintiffs, v. MARK ESPER, Secretary of Defense, *et al.*, Defendants.	No. 1:18-cv-641 (LMB/IDD)

RICHARD ROE, *et al.*, Plaintiffs, v. MARK ESPER, Secretary of Defense, *et al.*, Defendants.	No. 1:18-cv-1565 (LMB/IDD)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE IRRELEVANT, UNRELIABLE, OR OTHERWISE INADMISSIBLE EVIDENCE

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INTRODUCTION

As a threshold matter, Defendants respectfully renew their argument that the Court should not consider any extra-record evidence in these cases—either at summary judgment, or at any trial. But assuming that the Court intends to do so, at a minimum, the Court should exclude three categories of evidence that Plaintiffs have adduced in these matters, and that they now rely upon in their summary-judgment papers: (1) statements from two of Plaintiffs' experts, Dr. Hardy and Dr. Hendrix, about what the United States military can or cannot accomplish without impairing its mission, which is a subject on which the military is owed deference and neither witness is qualified to opine; (2) the expert report of a sociology professor, Dr. Hoppe, who uses unreliable methodology to assert—contrary to Fourth Circuit precedent—that HIV-infected individuals are a marginalized group and thus should be entitled to heightened legal protections; and (3) the opinion testimony of a former military doctor, Dr. Danaher, who apparently disagrees with certain military policies, but who was neither disclosed nor qualified as an expert, and who in any event lacks sufficient foundation for much of his testimony. In the alternative, to the extent the Court permits any of this evidence to remain in the record, it is entitled to no weight.[1]

LEGAL STANDARDS

"Expert testimony under Rule 702 is admissible if it 'rests on a reliable foundation and is relevant.'" *EEOC v. Freeman*, 778 F.3d 463, 466 (4th Cir. 2015) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). In determining the reliability and admissibility of expert testimony, "a district court exercises a special gatekeeping obligation." *Id.* (citing *Kumho Tire*, 526 U.S. at 147). "The scope of the court's gatekeeping inquiry will depend upon the particular expert testimony and facts of the case." *Id.* (citing *Kumho Tire*, 526 U.S. at 150).

These principles apply equally to summary-judgment proceedings as they do to trial, thus justifying the presentation of this motion at this stage of the proceedings. "Only evidence that would be admissible at trial may be considered for summary judgment purposes." *Hunter v. Prince*

[1] Plaintiffs oppose the relief requested in this motion.

George's Cty., Md., 36 F. App'x 103, 106 (4th Cir. 2002) (*citing Md. Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991)); *see also* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."); Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

ARGUMENT

I. The Court should not consider any extra-record evidence.

Over Defendants' objections, the Court has already authorized (and Plaintiffs have already taken) substantial discovery. Nevertheless, to preserve the issue for further review, Defendants respectfully renew their argument that discovery in these cases was inappropriate, and that, therefore, the fruits of that discovery should likewise be excluded from consideration at summary judgment or at any trial.

In brief, to the extent Plaintiffs bring any justiciable claims under the Administrative Procedure Act (APA), "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

To be sure, Plaintiffs also bring constitutional claims. But even setting aside the record-review principles imposed by the APA—which likewise apply to Plaintiffs' constitutional claims, *see, e.g.*, *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43-44 (D.D.C. 2018) (limiting review to administrative record produced by the agency for both APA claims and constitutional claims)—these particular constitutional claims are subject only to limited, deferential rational-basis review. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995); *see also infra*, Section III.1. Under that standard, Defendants "'need not actually articulate at any time the purpose or rationale supporting its classification,' and [are] not required to produce evidence showing the rationality of [their] classification." *Pulte Home Corp. v. Montgomery Cty., Md.*, 909 F.3d 685, 693 (4th Cir. 2018) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Instead,

Defendants' policies "must be sustained if 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (quoting *Heller*, 509 U.S. at 318-20). That limited, deferential inquiry requires no factual record at all. And all of these principles are even more important where, as here, the challenged polices implicate matters of core military judgment. *See infra*, Section II.

II. Dr. Hardy's and Dr. Hendrix's testimony about the capabilities of the United States military should be excluded as inconsistent with Supreme Court precedent about military deference.

Assuming the Court intends to review and rely upon material beyond the administrative record, the Court should nonetheless exclude certain testimony from Plaintiffs' experts that, at bottom, represents an effort to tell the United States military what it is or is not capable of doing without risking impairment of its mission. Plaintiffs' testimony about military capabilities—primarily, from Dr. Hendrix and Dr. Hardy—runs directly into bedrock principles of judicial restraint and military deference.

Generally, in cases challenging decisions of military policy, it is reversible error for a district court to "substitute . . . [its] own evaluation of evidence for a reasonable evaluation" by the military. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). Thus, in *Rostker*, the Supreme Court held that the district court erred in offering its own (and crediting the plaintiffs' expert witnesses') "assessments of military need and flexibility in a time of mobilization"—rather than deferring to good-faith military judgments on those issues. 453 U.S. at 68-69. Accordingly, in cases that raise questions "about how military policies operate[] or what interests they serve[]," it is "improper" for a district court "to consider plaintiff expert testimony that contradict[s] the military experts about whether the policies at issue [are] justified under the circumstances." *Doe 2 v. Shanahan*, 917 F.3d 694, 706 (D.C. Cir. 2019) (Wilkins, J., concurring); *see also Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) ("[W]hether or not expert witnesses may feel that religious exceptions to AFR 35–10 are desirable is quite beside the point. The desirability of dress regulations in the military

is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.").[2]

Plaintiffs now seek to lead this Court into that same error. The extensive expert and opinion testimony they rely upon can only be characterized as an attempt to convince this Court that the military's "considered professional judgment," *Goldman*, 475 U.S. at 509, on these matters—including about the military's own capabilities, the logistical realities of deployment overseas, what is likely or unlikely to occur on a battlefield, how consistently orders are followed, and so on—is mistaken.

For example, although Dr. Hendrix readily concedes that there *is* at least a "hypothetical" risk "of battlefield transmission of HIV," he speculates that such a battlefield event would be "exceedingly rare," and that "post-exposure prophylaxis could be provided to the person exposed." Hendrix Decl., *Harrison* ECF 26-5, ¶¶ 21, 22. This analysis ignores, among other things, the possibility that the exposed service member might be in a far-forward-deployed location, in spartan conditions, without timely access to post-exposure prophylaxis. *See* Ex. 24 to Defs.' Mot. for Summ. J., Murray Decl. ¶ 11(b). And although Dr. Hendrix describes HIV "[v]iral load testing" as "routine" and requiring "only drawing and testing a blood sample," Hendrix Decl. ¶ 24, he ignores the fact that drawing and processing (let alone testing) a blood sample in a combat theater present severe logistical challenges—for example, the lack of a trained phlebotomist, or a centrifuge to process the blood sample. *See* Ex. 53 to Defs.' Mot. for Summ. J., Peel Decl. ¶¶ 58-70. Dr. Hendrix further claims that "[w]here such testing is not immediately available in theater," Hendrix Decl. ¶ 24—and, to be clear, it virtually never will be, *see* Ex. 53 to Defs.' Mot. for Summ. J., Peel Decl. ¶ 58—"a blood sample may easily be shipped to a lab that engages in

[2] *Rostker* involved a challenge to a federal statute, not to a policy decision by the Department of Defense. But the underlying principles of military deference that *Rostker* stands for apply *a fortiori*—indeed, if anything, even more strongly—in a challenge like this one, which is brought directly against policies of the military services. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (same principles applied in a direct constitutional challenge to a military policy); *Thomasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996) (en banc) ("The deference mandated by the Constitution has extended to a variety of challenges to Congressional and Executive decisions.").

the type of testing required," Hendrix Decl. ¶ 24. But, respectfully, Dr. Hendrix severely underestimates the logistical challenges associated with shipping anything—not to mention a blood sample that needs to be frozen during transit—in and out of a combat zone, where commercial shipping companies often do not operate, and where every unnecessary military transport places service members at potential risk. Ex. 53 to Defs.' Mot. for Summ. J., Peel Decl., ¶¶ 64-66. Other similar examples abound throughout Dr. Hendrix's testimony (with some of the most egregious included in the margin[3])—all of which demonstrate the dangers of relying on the testimony of non-military experts about military capabilities, the practical realities of deployed environments, and the like—exactly the sort of thing that the Supreme Court warned against in cases like *Rostker* and *Goldman*.

Similarly, Dr. Hardy likewise concedes, for example, that neurocognitive impairment is a "possible, but not well-documented, side effect[] that some researchers are beginning to believe may occur after long-term infection with HIV"—but then states in conclusory fashion that the military should address that acknowledged risk and uncertainty "on a case-by-case basis" rather than through generally applicable accessions standards. Hardy Report, *Roe* ECF 270-20, ¶ 28, *see*

[3] *See, e.g.*, Hendrix Decl. ¶ 11 ("Being HIV positive is entirely compatible with military service."), ¶ 22 ("There is simply no support for the idea that a soldier living with HIV would present a danger to the health and safety of other military personnel, including comrades on the battlefield."), ¶ 24 ("Viral load testing is routine and requires only drawing and testing a blood sample. Where such testing is not immediately available in theater, a blood sample may easily be shipped to a lab that engages in the type of testing required."), ¶ 25 ("The physicians of the Armed Forces are more than capable of providing necessary care to a person living with HIV . . . regardless of where they are stationed. . . [A] telemedicine session could be arranged between the infectious disease specialist and the service member with HIV."), ¶ 31 ("[T]he safety of the blood supply may be ensured by continuing to screen service members for HIV and informing individuals who test HIV positive that they cannot act as emergency blood transfusion donors. . . . [B]attlefield transfusions [are] relatively rare."); Hendrix Report, *Roe* ECF 270-43, ¶¶ 20, 48, 51, 57, 60, 65, 66, 69, 76; Hendrix Rebuttal Report, *Roe* ECF 270-47 ¶ 10 ("Service members living with HIV do not require special health-related confidentiality protections in a deployed environment."), ¶ 11 ("Colonel Murray's concern than service members with HIV will disregard orders to donate blood lacks foundation. I know that a newly-diagnosed service member is repeatedly instructed that they cannot donate blood."), ¶ 12 ("[T]here continues to be no medical justification for preventing or restricting the military service and overseas deployment, including to combat zones, of people living with HIV."); Hendrix Supplemental Report, *Roe* ECF 270-51 ¶ 22 ("[T]here is not heavy dependence from blood transfusions from all service members.").

also id. ¶ 29 ("To the extent that [neurocognitive impairment] does occur in service members living with HIV, their onset could be addressed under the general retention or deployment standards and/or the specific retention and deployment standards relating to neurodegenerative disorders."). But how much risk to tolerate in developing military policy, and whether a risk should be dealt with on a case-by-case basis or by means of a generally applicable rule, are questions of military judgment, not science or medicine—and, respectfully, sweep well beyond the scope of Dr. Hardy's civilian credentials. *See* Ex. 33 to Defs.' Mot. for Summ. J., Hardy Dep. 27:14-19 (Q: "Has any of your formal education included military health care? A: No. Q: Have you had any training or professional experience in a military health care environment? A: No."). That is reason alone to exclude and disregard this testimony. "[A]n expert witness may not offer an opinion where the subject matter goes beyond the witness's area of expertise." *Young v. Swiney*, 23 F. Supp. 3d 596, 611 (D. Md. 2014); *see Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1179 (4th Cir. 1997) (same).

To be sure, unlike Dr. Hardy, Dr. Hendrix does have at least some experience with military medicine (albeit largely from the 1990s). But in analogous contexts, the Supreme Court has been unmoved by the fact that a particular national-security policy is not supported by the views of "former national-security officials," *Trump v. Hawaii*, 138 S. Ct. 2392, 2444 (2018) (Sotomayor, J., dissenting), cautioning that courts "cannot substitute [their] own assessment for the Executive's predictive judgments on such matters" and that "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security,'" *id.* at 2421–22 (majority op.). There is no reason why the views of a former military doctor should be considered by the Court (or, in the alternative, afforded any significant weight).

In sum, all of Dr. Hendrix's and Dr. Hardy's expert testimony about what the military can or cannot accomplish, or about what is likely or unlikely to occur on a battlefield, or any similar testimony that seeks to contradict the military's good-faith professional judgments, should be excluded and disregarded as an inappropriate intrusion on the military's own "assessments of military need and flexibility in a time of mobilization," *Rostker*, 453 U.S. at 68-69.

III. Dr. Hoppe's testimony should be excluded both because it is irrelevant, and because it is based upon unreliable methodology.

Under Federal Rule of Evidence 702, the Court must perform its role as a "gatekeeper" in considering the admissibility of expert testimony, to "ensur[e] that [it] both rests on a reliable foundation and is relevant to the task at hand."' *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). Rule 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "The proponent of expert testimony bears the burden of establishing the admissibility of the testimony by a preponderance of the evidence." *Disney Enters., Inc. v. Kappos*, 923 F. Supp. 2d 788, 798 (E.D. Va. 2013). In short, "[t]he touchstones for admissibility under *Daubert* are two: reliability and relevancy." *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003). Dr. Hoppe's testimony checks neither box. It should therefore be excluded in its entirety.

1. Relevance. Plaintiffs primarily rely on Dr. Hoppe's testimony to support their argument that classifications based on HIV-infected status are subject to heightened scrutiny. But the Court need not consider that issue at all, as it has already been conclusively resolved by binding precedent—as Plaintiffs all but concede. *See* Pls. Summ. J. Br., *Roe* ECF 270, at 41-42 (arguing for heightened scrutiny "to be clear and to preserve the issue for appeal").

In the Fourth Circuit, the "alleged unequal treatment of HIV-positive" individuals is subject only to rational-basis review. *Doe*, 50 F.3d at 1267. This Court has already acknowledged

as much, earlier in this litigation. *See Roe v. Shanahan*, 359 F. Supp. 3d 382, 410 n.31 (E.D. Va. 2019) ("[T]he Fourth Circuit has held, albeit in a decades-old opinion, that HIV status is not a suspect classification.") (citing *Doe*, 50 F.3d at 1267). And that precedent is both well-reasoned and consistent with decisions from other jurisdictions. *See, e.g.*, *Mofield v. Bell*, 3 F. App'x 441, 443 (6th Cir. 2001) (HIV-infected individuals are not "a suspect class that is entitled to special consideration under the Equal Protection Clause"); *see also Harrison* ECF 43 at 24-26 (collecting cases).

Because the question of the appropriate standard of review on Plaintiffs' constitutional claims is already settled, Dr. Hoppe's attempts to nonetheless portray HIV-positive individuals as a marginalized group can be excluded as irrelevant. That is because, even if the Court were to credit Dr. Hoppe's opinions that, for example, "HIV stigma remains recalcitrant in American society," Hoppe Report, *Roe* ECF 270-21, ¶ 34, it would have no bearing on this litigation. Accordingly, Dr. Hoppe's opinions are irrelevant and thus inadmissible.

2. Reliability. Even if Dr. Hoppe's testimony had any relevance, it is based on plainly unreliable methodology, and should also be excluded in its entirety for that additional and independent reason. Although the reliability inquiry under *Daubert* is a flexible one, the Supreme Court and the Fourth Circuit have "identified five factors for use in evaluating the reliability of proposed expert testimony":

> (1) whether the particular scientific theory "can be (and has been) tested";
>
> (2) whether the theory "has been subjected to peer review and publication";
>
> (3) the "known or potential rate of error";
>
> (4) the "existence and maintenance of standards controlling the technique's operation"; and
>
> (5) whether the technique has achieved "general acceptance" in the relevant scientific or expert community.

United States v. Hassan, 742 F.3d 104, 130 (4th Cir. 2014) (quoting *Daubert*, 509 U.S. at 593-94). This is not meant to be a "definitive or exhaustive list," but rather an illustration of "the types of factors that will bear on the inquiry." *Crisp*, 324 F.3d at 265-66.

Dr. Hoppe's expert report suffers from several obvious methodological failings. First, Dr. Hoppe largely labors to establish that, *historically*, there used to be stigma and public misconceptions about HIV. *See, e.g.*, Hoppe Report ¶ 15 ("A 1987 Gallup Poll found that 43 percent of Americans believed AIDS to be a form of punishment for moral decline."); *id.* ¶ 16 ("People living with HIV *faced* frequent discrimination and heightened stigma.") (emphasis added). But even accepting (without any evidence) that all of those examples of historical stigma are somehow attributable to the government or to the military, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

When Dr. Hoppe eventually turns to the more relevant matter of present-day conditions, other than conclusory assertions that "the social response to the disease" has not improved commensurate with improvements in available treatments, virtually all of the "evidence" offered is about whether "[i]gnorance remains pervasive" and whether Americans are more or "less knowledgeable today than they were in 1985." Hoppe Report ¶ 26. So, for example, he offers survey data suggesting that, in 2017, many "young adults aged 18-30" reported that they believed that "HIV could be transmitted through kissing" or "through casual contact with everyday items such as toilet bowls." *Id.*

But what Dr. Hoppe (and Plaintiffs) fail to explain is why it matters that the general public—past or present—has less-than-perfect knowledge about HIV, how it is transmitted, or how it is treated. The general public's performance on survey questions about scientific subjects will often disappoint. *See, e.g.*, Nat'l Science Foundation, *Science & Technology: Public Attitudes and Understanding*, WWW.NSF.GOV (in 2016, 27% of survey respondents reporting that the Earth

revolves around the Sun).[4] But the relevant question is not whether the American people's collective knowledge about HIV could be improved, it is whether HIV-infected individuals are a "discrete and insular minorit[y]," *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938), entitled to special legal protections. Poor performance by the general public on an HIV quiz does nothing to advance that showing.

Even accepting the premise that this sort of survey data is relevant (or reliable), one of the centerpieces of Dr. Hoppe's report is his conjecture that "Americans may be even less knowledgeable about HIV today than they were in 1985." Hoppe Report ¶ 26. But Dr. Hoppe makes a serious and demonstrable error of statistical analysis. The survey data that Dr. Hoppe relies upon from 1985 and 2001 are polls of "Americans" in general, but the survey data that he relies upon from 2017—to imply that there has been an increase in misconceptions about HIV—was limited to "young adults aged 18-30." *Id.* The report does not even acknowledge the possibility that young adults (including those who never lived through the peak of the AIDS crisis) may be less informed about HIV than the average American, which would offer a full explanation for the perceived increase in misconceptions. Dr. Hoppe essentially admitted as much at his deposition. Ex. A, Hoppe Dep. 136:22-137:2 ("Q: Can that data be extrapolated to larger society including more than just young adults? A: No.").

The remaining "evidence" mustered by Dr. Hoppe is utterly unconvincing. For example, he laments the fact that the AIDS Coalition to Unleash Power ("ACT UP") and other "explicitly political AIDS organizations have disbanded or shifted their focus away from political advocacy and towards providing medical care and clinical services," and that as a result, today, "none of the several dozen chapters of ACT UP remain active in the United States and extremely few AIDS service organizations dedicate substantial resources to political advocacy." Hoppe Report ¶ 29. But one explanation—again, unmentioned by Dr. Hoppe—is that those organizations moved away from political advocacy because it is less *necessary* today than it was in the 1980s, given substantial improvements in attitudes toward HIV-infected individuals and a greater understanding of the disease.

[4] https://www.nsf.gov/statistics/2018/nsb20181/report/sections/science-and-technology-public-attitudes-and-understanding/public-knowledge-about-s-t (last visited June 3, 2020).

Dr. Hoppe also points to a series of troubling anecdotes: "a Michigan woman was ticketed by a police officer after she disclosed her HIV status during a routine traffic stop," a "Texas man killed a woman he was having an affair with after she disclosed to him that she was living with HIV," and "another Texas man . . . pleaded guilty to charges he murdered a woman after she disclosed her HIV status." *Id.* ¶ 28. What the reader is supposed to conclude from those tragic headlines is not entirely clear, but such unsupported anecdotal evidence is no substitute for the scientific or statistical analyses that are supposed to inform reliable (and thus admissible) expert testimony under Rule 702 and the *Daubert* standard.

Next, continuing his heavy reliance on unreliable anecdata, Dr. Hoppe cherry-picks a handful of internet comments appended to "electronic news stories reporting on various stages of [this] litigation." *Id.* ¶ 31. Dr. Hoppe appears to be correct that some of these comments reflect inaccurate understandings of the modern state of HIV science, or even outright homophobia. But given the obvious reality that "this is not a representative sample of Americans," *id.*—let alone the military—scattered internet comments have no place in this constitutional litigation, nor as a basis for expert opinion.

Finally, even if the Court fully accepted Dr. Hoppe's report at face value, it says nothing whatsoever about *military* attitudes toward HIV-positive individuals. *See* Ex. A, Hoppe Dep. 49:13-15 ("Q: Has your research ever focused on the military? A: No."). And neither Dr. Hoppe nor Plaintiffs offer any reason to believe that the general public's level of knowledge, or its attitudes toward HIV-positive individuals, are at all attributable to those in the military. In fact, the only evidence in the record suggests the opposite: all three individual plaintiffs readily admitted that they have experienced no discriminatory animus from their military colleagues in connection with their HIV-infected status. *See* Ex. 28 to Defs.' Mot. for Summ. J., Harrison Dep. 142:15-21 ("Q: Do you ever feel that you've faced unfair animus based on your HIV status? A: No. In fact, everybody that I have talked to as far as superior officers, as far as peers and colleagues, who have learned about my status as I've gone through this case, they've been nothing but completely supportive."); Ex. 31 to Defs.' Mot. for Summ. J., Voe Dep. 45:1-3 ("Q: How

would you say you got along with the other Air Force service members you worked with? A: For the most part, very well."); Ex. 30 to Defs.' Mot. for Summ. J., Roe Dep. 121:20-122:6 ("Q: Have any of the people we just talked about mistreated you in any way because of your HIV status? A: No. Q: Have they generally been very supportive? A: Yes. Very supportive. Q. No impact on your career? A: No.").

"The purpose of Rule 702's gatekeeping function is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (citation omitted). Dr. Hoppe's report falls far short of that standard, and it should therefore be excluded in its entirety. "Unscientific speculation is not admissible even if the purported expert is a genuine scientist." *Lee v. City of Richmond, Va.*, No. 3:12-cv-471, 2014 WL 5092715, at *9 (E.D. Va. Sept. 30, 2014).

3. Area of Expertise. Even if the core of Dr. Hoppe's testimony were both relevant and reliable, he wanders beyond his limited area of expertise when he offers testimony about controversial matters of science and medicine. Dr. Hoppe is an assistant professor of sociology; he is not a medical doctor or an infectious-disease specialist. Accordingly, Plaintiffs' efforts to rely on Dr. Hoppe's report—for example, to support the proposition that "an individual who is diagnosed with HIV and enters into care has an average life expectancy similar to an individual of the same age who is not living with HIV," *See* Pls. Summ. J. Br., *Roe* ECF 270, Statement of Undisputed Facts ("SUF") ¶ 27 (citing Hoppe Report ¶ 25)—are improper. *See, e.g.*, *Redman*, 111 F.3d at 1179 (experts may only offer opinions within area of expertise). In any event, Plaintiffs paraphrased Dr. Hoppe's testimony imprecisely, which in fact acknowledges the existence of "lingering disparities" and a "life expectancy gap between HIV-positive and HIV-negative individuals" that may be narrower than in the past, but that still exists today. Hoppe Report ¶ 25. Regardless, Dr. Hoppe has no expertise in matters of science and medicine, and his opinions touching on such matters must be excluded.

IV. Dr. Danaher's opinion testimony should be excluded, because Dr. Danaher was neither disclosed nor qualified as an expert witness.

The Federal Rules of Evidence draw a fundamental distinction between testimony offered by a witness "qualified as an expert by knowledge, skill, experience, training, or education," Fed. R. Evid. 702, on one hand, and testimony offered by a "lay witness," Fed. R. Evid. 701, on the other. A lay witness (*i.e.*, a fact witness) may only offer opinion testimony in narrow circumstances, in which the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) *not* based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701 (emphasis added). Otherwise, opinion testimony is reserved for disclosed and qualified expert witnesses, subject to the requirements of Rule 702. *See Daubert*, 509 U.S. at 592 ("Unlike an ordinary witness, *see* [Fed. R. Evid.] 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.").

As further recognition of this distinction, the Federal Rules of Civil Procedure require advance disclosure of the identity of any testifying experts, as well as, among other things, "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; [and] (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years." Fed. R. Civ. P. 26(a)(2)(B). Failure to provide sufficient disclosures to allow advance and adversarial testing of the qualifications, methods, and opinions offered by an expert witness is grounds for exclusion of the belatedly offered testimony. *See, e.g.*, *Sharpe v. United States*, 230 F.R.D. 452, 459 (E.D. Va. 2005) ("[P]laintiff will be precluded from presenting testimony based on the failure of the expert reports to satisfy the Rule 26(a)(2)(B) requirements."); *Brock v. Cabot Oil & Gas Corp.*, No. 2:17-cv-02331, 2018 WL 850094, at *3 (S.D.W. Va. Feb. 13, 2018) ("Since the nondisclosure was not substantially justified or harmless, the plaintiffs are not allowed to use Mr. Leslie as an expert or Mr. Leslie's expert report to supply evidence on a motion, at a hearing, or at a trial."); *see also S. States Rack & Fixture, Inc. v. Sherwin-*

Williams Co., 318 F.3d 592, 595-96 (4th Cir. 2003) ("Rule 26(e)(1) requires a party to supplement its experts' reports and deposition testimony when the party learns of new information. If the party fails to do so, the court may exclude any new opinion offered by the expert.").

In this case, Plaintiffs never even *tried* to designate Dr. Danaher as an expert witness, and thus did not provide any sort of Rule 26(a)(2) disclosure at all—let alone a report that satisfies the requirements of Rule 26(a)(2)(B). In fact, it is (presumably) undisputed that Dr. Danaher's testimony in this case must be limited only to lay testimony, as a lay witness, based on his own personal knowledge.

But, despite all that, Plaintiffs' summary-judgment motion relies heavily on deposition testimony from Dr. Danaher, for what can only be described as opinion testimony that fails to meet the requirements of Federal Rule of Evidence 701: it is not "rationally based on the witness's perception" (*i.e.*, it is not based on Dr. Danaher's own personal experience or knowledge), and it *is* "based on scientific, technical, or other specialized knowledge within the scope of Rule 702" (*i.e.*, it is classic expert-opinion testimony about complex, scientific subjects like infectious diseases and military medicine).

For example, Plaintiffs cite heavily to Dr. Danaher's deposition transcript—and, in some instances, *only* to Dr. Danaher's deposition transcript—for propositions like the following:

- "A person with well-controlled HIV who has durable viral suppression could be monitored not more often than once a year." Pls. Br., SUF ¶ 67 (citing Danaher Dep. 16:10-17:3).

- "After viral achieving durable viral suppression, a service member living with HIV requires clinical visits at most every six months." Pls. Br., SUF ¶ 68 (citing, *inter alia*, Danaher Dep. 16:10-16).

- "Assuming their HIV is well controlled and otherwise asymptomatic, soldiers with HIV are medically capable of completing required training." Pls. Br., SUF ¶ 77 (citing, *inter alia*, Danaher Dep. 18:22-19:7).

- "[S]ervice members with asymptomatic HIV are fit to deploy to austere environments from a medical standpoint and the blanket prohibition on deploying service members living with asymptomatic HIV to CENTCOM cannot be medically justified." Pls. Br., SUF ¶ 79 (citing, *inter alia*, Danaher Dep. 16:4-7, 25:2-6).

All of this testimony (and Dr. Danaher's other testimony like it[5]) should be excluded for the simple reason that fact witnesses like Dr. Danaher may not offer expert opinion testimony. *See, e.g.*, *United States ex rel. Davis v. U.S. Training Ctr., Inc.*, No. 1:08-cv-1244, 2011 WL 13092087, at *1 & n.1 (E.D. Va. July 21, 2011) ("[R]elators neither designated Cotton as an expert witness nor provided the requisite expert witness disclosures mandated by Rule 26(a)(2) . . .[B]ecause relators did not designate Cotton as an expert witness, Cotton is not permitted to offer expert opinions subject to Rule 702.") (footnote omitted). That is true on *any* subject, but especially with respect to disputed, controversial, and complicated matters of military judgment (*e.g.*, who is or is not "fit to deploy to austere environments" in CENTCOM, Pls. Br., SUF ¶ 79)—subjects on which even well-qualified non-military experts are not to be credited in offering testimony in contradiction to good-faith military judgments. *See supra*, Section I; *Goldman*, 475 U.S. at 509; *Rostker*, 453 U.S. at 68-69.

The fact that Dr. Danaher (a former military doctor) happens to have at least some potentially relevant experience or qualifications cannot now cure Plaintiffs' failure to designate and qualify him as an expert before seeking to rely on his medical, scientific, and military opinions—otherwise, Defendants will have been deprived of the opportunity to put his credentials, methods, and opinions through the crucible of adversarial testing and the *Daubert* standard. *See, e.g.*, *Carr v. Deeds*, 453 F.3d 593, 604-05 (4th Cir. 2006) ("[A]s a consequence of plaintiff's failure to provide the information plainly required by the rule, defendants were not permitted to investigate Dr. Cooper's licensure, training, background, or expertise, nor were they in a position to determine whether Dr. Cooper possessed the requisite qualifications to render the rather broad range of opinions contained in his reports. . . . In sum, we cannot say that the district court abused its discretion by excluding Dr. Cooper as a witness."), *abrogated in part on other grounds by Wilkins v. Gaddy*, 559 U.S. 34 (2010).

[5] *See, e.g.*, Pls. Br., SUF ¶¶ 26, 27, 56 (citing, *inter alia*, Danaher Dep.).

Finally, Plaintiffs also purport to rely on email traffic involving Dr. Danaher from his time in the Air Force, in which he expressed some disagreement with his colleagues about certain military policies. Pls. Br. 62 (citing US00021184_12-13, *Roe* ECF 235-4), 63 (citing US00040186_6-8, *Roe* ECF 235-5). As is clear from those emails, however, Dr. Danaher lacked critical foundation that was necessary to understand the nature of the policies upon which he was purporting to opine. In fact, and as his colleagues politely but repeatedly pointed out, he misunderstood the nature of some of those policies; how, where, and why they were developed; and how they were implemented. *See* US00021184_0003 ("I need to point out you are quoting an excerpt from the outdated DoDI."); US00021184_0011 ("The situation as you have outlined below is not factually correct."). Accordingly, to the extent Plaintiffs seek to rely on any of those statements by Dr. Danaher for their truth, such reliance is improper—both for the reasons outlined above (*i.e.*, Dr. Danaher has not been disclosed or qualified as an expert), and because Dr. Danaher lacked important foundation. *See, e.g.*, *Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765, 771 (E.D. Va. 2000) (even a "valid scientific theory" that is "misapplied because of the lack of sufficient factual foundation cannot be admitted"). In any event, at a minimum, the fact that some within the Air Force might disagree with their superiors from time to time is not at all surprising, so those documents should be entitled to no weight.

CONCLUSION

For the reasons set forth above, if the Court intends to consider any extrinsic evidence in this case, at either summary judgment or trial, it should at least exclude (1) any testimony from Dr. Hardy or Dr. Hendrix about the capabilities of the United States military; (2) any testimony from Dr. Hoppe; and (3) any expert or opinion testimony from Dr. Danaher. In the alternative, to the extent the Court permits any of this evidence to remain in the record, it should be given no weight.[6]

[6] To the extent that either of these cases ultimately proceeds to a trial, Defendants reserve the right to file additional motions to exclude evidence, as appropriate.

DATE: June 3, 2020

Respectfully submitted,

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

NICHOLAS HARRISON, *et al.*, Plaintiffs, v. MARK ESPER, Secretary of Defense, *et al.*, Defendants.	No. 1:18-cv-641 (LMB/IDD)

RICHARD ROE, *et al.*, Plaintiffs, v. MARK ESPER, Secretary of Defense, *et al.*, Defendants.	No. 1:18-cv-1565 (LMB/IDD)

DEFENDANTS' MOTION TO EXCLUDE

EXHIBIT A

DR. HOPPE – EXCERPTS FROM DEPOSITION TRANSCRIPT

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Transcript of **Trevor Hoppe, Ph.D.**

Tuesday, May 14, 2019

Harrison, et al. v. Shanahan

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NICHOLAS HARRISON and OUTSERVE-SLDN, INC., Plaintiffs,	:	Case No.
v.	:	1:18-cv-641
PATRICK M. SHANAHAN, in his official capacity as Secretary of Defense, MARK ESPER,in his official capacity as Secretary of Army, and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	:	(LMB/IDD)
RICHARD ROE, VICTOR VOE and OUTSERVE-SLDN, INC., Plaintiffs,	:	
v.	:	
PATRICK M. SHANAHAN, in	:	

his official capacity as :
Secretary of Defense, HEATHER :
A. WILSON, in her official :
capacity as Secretary of the :
Air Force, and the UNITED :
STATES DEPARTMENT OF DEFENSE, :
Defendants. :
- - - - - - - - - - - - - - - - - X

Washington, DC

Tuesday, May 14, 2019

Deposition of TREVOR HOPPE, PHD, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to subpoena, the witness being duly sworn by Rebecca L. Stonerock, a Notary Public in and for the District of Columbia, taken at the offices of Winston & Strawn, 1700 K Street NW, Washington, DC, at 9:04 a.m., Tuesday, May 14, 2019, and the proceedings being taken down by Stenotype by Rebecca L. Stonerock, RPR, and transcribed under her direction.

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- - -

C O N T E N T S

E X H I B I T S

(Exhibits attached to transcript)

P R O C E E D I N G S

Whereupon,

TREVOR HOPPE PHD,

was called as a witness by counsel for Defendants, and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MR. ABBUHL:

Q. Good morning, Dr. Hoppe. We just met a moment ago, but for the record, my name is Joshua Abbuhl. I will be taking your deposition today.

So would you please state your full name again for the record?

A. Trevor Hoppe.

Q. Are you represented by any counsel?

A. No.

Q. What is the nature of your relationship with counsel to your right?

A. I have been retained by Lambda Legal as an expert witness on the case at hand.

Q. Have you ever been deposed before?

A. No.

Q. Have you ever given sworn testimony before?
A. No.
Q. So you've never provided expert testimony before?
A. No.
Q. Do you understand why you're here today?
A. Yes.
Q. And why is that?
A. To provide expert testimony related to the case.
Q. Do you understand that we asked you here by issuing you with a subpoena?
A. Yes.
Q. I'm going to hand a document to the court reporter and ask that it be marked as Exhibit 1 and passed to the witness.
(Hoppe Exhibit No. 1 was marked for identification.)
BY MR. ABBUHL:
Q. Do you recognize Exhibit 1?
A. Yes.

interests, your expert report says that your research examines the rise in application of criminal laws related to HIV and other infectious diseases in the United States, correct? It's at paragraph 6.

A. Yes.

Q. Is it fair to say that your research focuses primarily on criminal law and how it relates to HIV?

A. Yes, primarily. And the -- although it is at some times -- you know, the civil law overlaps with and is, you know, entangled with issues related to the criminal law.

Q. Has your research ever focused on the military?

A. No.

Q. Aside from any preparation related to this case or the prior case you worked on, have you ever researched the military's policies related to HIV?

A. Related to HIV specifically, there were cases involving HIV exposure in the military that came up during the course of my research for my book, and so that is related to HIV in the military.

Q. Could you talk about those a little bit?

MR. SCHOETTES: Objection, vague. You can answer.

THE WITNESS: Yes, there have been cases where the Army and -- the ones I'm aware of where the Army specifically had prosecuted people for not -- for potentially exposing others to HIV.

BY MR. ABBUHL:

Q. So is it fair to say that your research involving the military and HIV dealt with criminal prosecutions related to HIV?

A. Yes, that's right.

Q. Have you done any research related to the military's HIV policies in a non -- or noncriminal military HIV policies?

A. To the best of my knowledge, no.

Q. Jump back to something a little earlier, have you ever acted as a consultant for Lambda Legal in connection with any litigation aside from this one?

A. No.

Q. Okay. What is your current position and

was almost eradicated -- it was eradicated. So it's -- I'm trying to think of what misinformation there would be out there. It's just sort of not in people's consciousness anymore because of vaccination.

Yeah, if you ask most Americans what effects of polio were on the human body, they may not be well aware of that, and that might not mean that they were prejudicial against people with polio.

Q. Paragraph 26 cites a 2017 survey of young adults from the Kaiser Family Foundation saying that 58 percent of respondents could be transmitted -- 58 percent of respondents thought HIV could be transmitted through kissing and that 38 percent believed it could be transmitted through casual contact with everyday items such as toilet bowls, correct?

A. Yes.

Q. And that sample is of young adults, correct?

A. That's right.

Q. Can that data be extrapolated to larger

society including more than just young adults?

A. No.

Q. And similarly, paragraph 27 discusses the same poll, but different question, relating to young adults, right?

A. That's right.

Q. And we cannot extrapolate from a -- survey results regarding young adults to the larger society, correct?

A. No, I think -- the thing that's surprising to me is it's the opposite direction you would expect generationally. I think people have an expectation that younger people would be more aware, and I think what this suggests is the contrary, in fact; that they seem to be less aware than the broader population.

Q. Do you have a thesis on why that might be?

A. I'm sure there are many different reasons, but probably they did not live through the heart of the epidemic in the 1980s, and so it' I think probably just not in their consciousness in the same way -- in the heart of the epidemic, I mean, when it

was all over the news, not necessarily in terms of cases -- they're still -- there are more cases today than there were then -- but in terms of it being in the popular discourse. That would be my inference.

Q. So is it a potential inference -- or your potential inference that the reason young adults today seemingly could be less informed about the medical status of HIV compared to years past is because HIV is a less prominent news item?

A. That's one factor. The other -- I mean, talking to my students -- again, this is anecdotal -- but they describe a sex education experience with no information or very little helpful information about the disease. So it's also possible that it's a failure in education.

Q. Paragraph 28 discusses a 2012 Kaiser Family Foundation review that suggests modest improvement in the social landscape for people living with HIV, correct?

A. That's right.

Q. Do you agree that bias against HIV had declined by 2012?