

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO FILE UNDER SEAL EXHIBITS 5 & 6 TO PLAINTIFFS’
MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY’S FEES AND COSTS**

Plaintiffs respectfully request that Exhibits 5 and 6 to Plaintiffs’ Memorandum in Support of their Motion for Attorney’s Fees and Costs be filed under seal pursuant to Local Civil Rule 5. In support, Plaintiffs state:

1. Plaintiffs have moved the Court to file under seal two declarations in support of their Motion for Attorney’s Fees and Costs.

2. Exhibit 5 is a supplemental declaration by Plaintiff Richard Roe, who successfully challenged his discharge from the Air Force because of his HIV status and non-worldwide deployable designation. The declaration was necessary to establish that Roe’s “net worth did not exceed \$2,000,000 at the time the civil action was filed.” 28 U.S.C. § 2412(d)(2)(B).

3. Exhibit 6 is a supplemental declaration by Plaintiff Victor Voe, a service member who successfully challenged his discharge from the Air Force because of his HIV status and non-

worldwide deployable designation. The declaration was necessary to establish that Voe's "net worth did not exceed \$2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B).

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

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

6. Roe and Voe have been proceeding under pseudonyms throughout this litigation. ECF 23.

7. The declarations attached as Exhibits 5 and 6 to Plaintiffs' Memorandum in Support of their Motion for Attorney's Fees and Costs contain identifying information.

8. Roe and Voe have requested that their declarations be sealed because of the stigma and discrimination against people living with HIV. The stigma connected with HIV is unprecedented for any medical condition in recent history. From the outset, a great number of people feared interacting with people living with HIV despite clear evidence that the condition was not communicated through casual contact.¹ And despite all that has been learned about HIV since that time, persistent misconceptions regarding the actual routes and risks of transmission continue to fuel stigma and discrimination against people living with HIV. As recently as 2012, in

¹ Diana, Princess of Wales, famously stunned the world in 1987 when she shook the hand of a person living with HIV without wearing gloves. See *How Princess Diana Changed Attitudes to AIDS*, BBC (Apr. 5 2017), <https://www.bbc.com/news/av/magazine-39490507/how-princessdiana-changed-attitudes-to-aids>.

a national survey of young people aged 15 to 24, one-third said that there is “a lot” of stigma around HIV/AIDS in the U.S., and 51% said that there is at least “some” stigma.² When pressed on their own personal feelings, 42% said they would not be comfortable having a close friend who is HIV-positive; 46% said they would not be comfortable working with someone who is HIV-positive; 62% said they would not be comfortable having a roommate who is HIV-positive; and 68% said they would not be comfortable having food prepared by someone who is HIV-positive.³ Those “living with HIV have been detrimentally affected in every aspect of life, including experiencing denial and termination of employment; denial of needed medical care; loss of insurance coverage; erosion of social support networks; eviction from homes; disruption of family relationships; social isolation; depression; unwarranted criminal prosecution; and excessive criminal sentences.”⁴

9. Roe and Voe feel that if their identities become public knowledge, they will be discriminated against or otherwise harmed because they are living with HIV. This fear is a legitimate reason to seal their declarations. *See, e.g.*, ECF 23 (granting motion to proceed under pseudonyms); ECF 198, 221, 305 (granting Plaintiffs’ motions to seal various exhibits); *Patient v. Corbin*, 37 F. Supp. 2d 433, 434 (E.D. Va. 1998) (Brinkema, J.) (finding proceeding anonymously appropriate because “[b]eing HIV positive carries a significant stigma in many parts of today’s society”).

² Kaiser Family Foundation, *National Survey of Teens and Young Adults on HIV/AIDS 2*, <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8386-f.pdf>.

³ *Id.*

⁴ Lambda Legal, *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report* (Nov. 2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigmaand-discrimination-in-the-us_1.pdf.

10. Less drastic measures to protect Plaintiffs' identities are insufficient because the factual information provided in the declarations could be used to identify them. *Doe v. William Shapiro, Esquire, P.C.*, 852 F. Supp. 1256, 1257 (E.D. Pa. 1994) (sealing document because it "includes a great deal of personal information which may make it more likely that a reader would recognize the plaintiff," who had been diagnosed with AIDS).

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

Accordingly, Plaintiffs respectfully request that the Court enter an order sealing Exhibits 5 and 6.

Dated: August 5, 2022

Scott A. Schoettes*
sschoettes@gmail.com
SCOTT SCHOETTES, ESQ.
4728 N Malden St. #2 South
Chicago, IL 60640
T: (773) 474-9250

Kara Ingelhart*
KIngelhart@lambdalegal.org
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
65 E Wacker Pl., Suite 2000
Chicago, IL 60601
T: (312) 663-4413

Gregory R. Nevins*
GNevins@lambdalegal.org
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1 West Court Square, Ste. 105
Decatur, GA 30030
T: (404) 897-1800

Respectfully submitted,
/s/ John W. H. Harding
John W.H. Harding
Virginia State Bar No. 87602
JWHarding@winston.com
Lauren Gailey*
LGAiley@winston.com
WINSTON & STRAWN LLP
1901 L St., NW
Washington, DC 20036
T: (202) 282-5000

Julie A. Bauer*
JBauer@winston.com
WINSTON & STRAWN LLP
35 W. Wacker Dr.
Chicago, IL 60601
T: (312) 558-560

Andrew R. Sommer
Virginia State Bar No. 70304
Sommera@gtlaw.com
GREENBERG TRAUIG, LLP
1750 Tysons Boulevard
Suite 1000

Peter Perkowski*
pperkowski@perkowskilegal.com
PERKOWSKI LEGAL, PC
515 S. Flower St., Suite 1800
Los Angeles, CA 90071
T: (213) 340-5796

McLean, VA 22102
T: (703) 749-1370

**pro hac vice*

CERTIFICATE OF SERVICE

I certify that, on August 5, 2022, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: August 5, 2022

Respectfully submitted,

/s/ John W. H. Harding

John W.H. Harding

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[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion to File Under Seal Exhibits 5 and 6 to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorney's Fees and Costs, this Court GRANTS the motion, FINDING that: (1) Plaintiffs provide sufficient notice of the request; (2) there are no less drastic alternatives than sealing the declarations; and (3) declarants have a legitimate fear of stigma and discrimination based on their HIV status if their identities become public. Therefore, the Court ORDERS Exhibits 5 and 6 to Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorney's Fees and Costs to be filed under seal.

Entered this ___ day of _____, 2022

Leonie M. Brinkema
United States District Judge