UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON, et al., Plaintiffs, v. LLOYD J. AUSTIN, Secretary of Defense, et al., Defendants.	Civil Action No. 1:18-cv-641 (LMB/IDD)
RICHARD ROE, et al., Plaintiffs, v. LLOYD J. AUSTIN, Secretary of Defense, et al., Defendants.	Civil Action No. 1:18-cv-1565 (LMB/IDD)

REPLY IN SUPPORT OF PLAINTIFF RICHARD ROE AND MODERN MILITARY ASSOCIATION OF AMERICA'S MOTION TO ENFORCE THE ORDERS DATED APRIL 6, 2022 (AS AMENDED MAY 10, 2022) AND FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

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I. INTRODUCTION

Defendants do not deny—indeed, they largely confirm—that asymptomatic HIV-positive service members with an undetectable viral load ("AHPSMUVL") have experienced negative deployment and assignment decisions based on their HIV status. At least 17 service members living with HIV ("SMLWH") have been denied deployment waivers (Movants are not able to verify those purportedly denied for medical and other legitimate reasons), but that number does not include HIV-positive Marines[1] or service members, like First Lieutenant B.J., who did not submit waivers because time was too short or because they were preemptively told the assignment was unavailable due to HIV. Nor does it appear to include service members, like Sergeant First Class D.J., who applied to commissioning programs.

Defendants admit that in making those decisions, their personnel used criteria that this Court considered *and rejected* as rational bases for denying deployment to AHPSMUVL. And Defendants rely on the same arguments that the Court considered *and rejected* as "hyper-technical and circular"—namely, that deployment and assignment decisions are being made based on service members' alleged inability to perform certain job duties (which is of course, once again, just a proxy for HIV). Defendants also don't deny—indeed, they hardly address at all—the numerous instances of military personnel declaring that "nothing has changed" or that the "policy is still the same."

Instead, Defendants cling to a pedantic interpretation of the Court's orders, one that requires the bare minimum of them and ignores or downplays their history of discrimination against SMLWH, the comprehensive record before the Court, the Court's summary judgment

[1] Movants do not concede that the Marine Corps is problem-free merely because no Marine came forward with a commissioning, assignment, or deployment restriction. The new waiver requirement for SMLWH applies to all military departments, and Marines are no doubt facing the same barriers and denials as their colleagues in other branches.

opinion, and the gravamen of Movants' argument that the already proven equal protection violation persists. Under their interpretation, Defendants must give AHPSMUVL only "individualized" consideration; actual outcomes are unimportant, except to demonstrate the purported bona fides of Defendant Austin's June 6, 2022 Memo, which is of dubious effect given the experiences of Movants' declarants and the statements of Defendants' own personnel. Defendants further contend they may deny deployment or assignment to AHPSMUVL for *any* HIV-based reason previously rejected by this Court, provided it is not applied class-wide.

That is clearly not what the Court intended with its injunctions. For one thing, the Court's summary judgment opinion acknowledged that HIV waivers were possible, though rare, under the previous regulatory regime. *See Harrison v. Austin*, 597 F. Supp. 3d 884, 894-98 (E.D. Va. 2022). For another, the Court recognized that its equal protection analysis applied beyond a categorical application, noting and rejecting Defendants' argument that the deployment bar, "whether categorical or not," *id.* at 900, must be upheld under rational basis review. The Court's injunctions must be read in light of the summary judgment opinion, which does not countenance Defendants' position here.

Thus contextualized, resolution of this motion involves the following three questions:

1. May Defendants deny (or delay) deployments and assignments to AHPSMUVL by relying on purported justifications, such as "host nation restrictions," that the Court considered and rejected as a basis for its previous policies?

2. If Defendants may not rely on previously rejected justifications, including host nation restrictions, is the medical waiver requirement imposed on AHPSMUVL an ongoing equal protection violation that this Court intended to halt through its previous orders?

3. Even if Defendants may use one or more of the previously rejected justifications to deny deployment to AHPSMUVL (which Movants seriously doubt), is the medical waiver requirement nonetheless an equal protection violation that this Court intended to remedy through its orders or will remedy through a modification of those orders?

After disposing of the jurisdictional and procedural issues that Defendants argue prevent the Court from reaching these substantive issues, Movants explain below why Defendants may not rely upon previously rejected justifications and how the procedure by which they evaluate AHPSMUVL based on those now prohibited considerations is an on-going equal protection violation that has been or should be addressed by this Court.

II. ARGUMENT

A. Movants have alleged sufficient cognizable harm to establish standing and support an order to show cause why Defendants should not be held in contempt.

For the fourth time, Defendants challenge the standing of MMAA, claiming that neither MMAA nor Roe have alleged sufficient cognizable harm to support a finding of civil contempt. Because Movants have alleged cognizable harm and Defendants have presented no evidence or information to undermine the Court's conclusion that MMAA has organizational standing in this matter, this argument should be rejected out of hand as it was on summary judgment.

Neither Movant's standing as a plaintiff is at issue here, and their standing as plaintiffs establishes the necessary harm to succeed on the motion for contempt. A party that obtained an injunction automatically has standing to bring a motion to enforce it. *See* Movants' Opening Brief ("Op. Brief") at 13 (citing cases establishing this proposition). Under the Fourth Circuit's standard for a finding of civil contempt, Movants must demonstrate they have suffered harm as a result of a defendant's non-compliance, a requirement that substantially overlaps with injury-in-fact under standing doctrine. *Id.* Therefore, a judgment in a movant's favor demonstrates

standing and the harm required under the standard for civil contempt. *See Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, 887 F.3d 610, 619 (4th Cir. 2018) (holding that cognizable harm was established where previous judgment necessarily included a finding that the conduct thereafter prohibited had harmed the movant); *see also Harrison,* 597 F. Supp. 3d at 901 n.17 (adopting and incorporating all relevant portions of previous memorandum opinion establishing MMAA's standing).

Though Movants have described harms to service members MMAA is serving through its advocacy efforts on these subjects and in this matter, MMAA is not relying on those harms to establish the harm it has experienced as a result of Defendants' failure to comply with the injunctions.[2] Rather, as before, MMAA is relying upon the harm it continues to suffer in diverting resources from other organizational activities and goals to continue to advocate for SMLWH who are being denied the equitable treatment and timely opportunities that MMAA helped secure through entry of the injunctions. Furthermore, Defendants' argument that MMAA's expenditures are self-imposed because the Defendants are complying with the injunctions is a circular tautology that presumes an outcome in Defendants favor. It should play no role in determining whether MMAA has suffered the required harm here.

Likewise, Movants stand on Plaintiff Roe's declaration to establish the harm he is currently suffering as a result of Defendants' failure to comply with the injunctions. TSgt Roe's declaration is a truthful statement regarding experiences he had as a member of his unit and information he knows based on those observations and interactions. Although the declaration of

[2] In addition, some of the individual service members whose circumstances are discussed in Movant's opening brief, including Roe, are MMAA members, and harm to them could potentially support also associational standing for MMAA—an issue the Court did not reach in its previous opinion affirming MMAA's organizational standing based on direct injury. *See* Mem. Op., ECF 250, *Harrison v. Austin,* No. 1:18-cv-641 (LMB/IDD) (E.D. Va. Mar. 27, 2020).

Master Sergeant I.V. presents a contrary viewpoint (Defs.' Ex. 10), it does not directly contradict TSgt Roe's declaration. The I.V. declaration conveys the experiences of a Master Sergeant from a different unit to which TSgt Roe is temporarily billeted as an augmentee. Reply Declaration of Richard Roe, Ex. A, ¶¶ 2-4. As such, Master Sergeant I.V. likely is not aware of deployment taskings that transpired in Roe's regular unit over the past year, Roe's intentions with respect to contingency deployment, or the request Roe made to have his ALC changed. *Id.*

To the extent MSgt I.V. is presented as an authority on deployment policy or the process of deployment tasking, this case has revealed multiple times that the text of a policy or regulation does not necessarily reflect the practice and reality on the ground. *See, e.g., Harrison,* 547 F. Supp. 3d at 900 (waiver not actually available to service members with HIV despite regulations stating it is); *Harrison* ECF 350-1 (Perkowski Decl.), Ex. 6 [DoDI 6490.07], Encl. 3, ¶ e(2) (ostensibly limiting deployment only of SMLWH with "progressive clinical illness or immunological deficiency"). Human nature often leads people to pursue the path of least resistance, so it seems quite possible (if not likely) that Senior Enlisted Leaders would turn first to deployment candidates without limitations. And even MSgt I.V concedes that "[m]obility restrictions"—typically arising from medical reasons—"could prevent a Service member from deploying." Defs.' Ex. 10, MSgt. I.V. Decl. ¶ 6. Because the deployment taskings of which Roe has knowledge were conducted in a manner that removes Airmen with limitation codes from consideration at the outset, it is possible that Roe has already been bypassed for a contingency deployment. Defendants' evidence does not foreclose this possibility.

Even if Roe has not yet been bypassed, Movants detailed in their opening brief how those with limitation codes are harmed by this differential treatment—differential treatment that this Court held is an equal protection violation. *Harrison,* 547 F. Supp. 3d at 915 (holding

deployment bar "irrationally treats HIV-positive service members who are asymptomatic with undetectable viral loads differently than service members with other chronic but manageable conditions"). And if all of that is not sufficient to establish cognizable harm that has already occurred or is on-going, federal courts regularly find in discrimination cases that dignitary harm—which Roe experiences as a SMLWH with a "scarlet letter" on his file who must repeatedly establish his capabilities and eligibility to engage in a contingency deployment—is a cognizable and even compensable harm. *Griffin v. Dept. of Labor Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019) ("Dignitary harms or 'stigmatic injur[ies],' while not tangible, may be sufficiently concrete to constitute injury in fact.") Roe is not seeking compensation for the harm he continues to suffer, but he certainly should be able to obtain enforcement of the injunctions he helped secure based on that harm.

B. Any purported evidentiary issues with the Perkowski Declaration have been cured, and Defendants have suffered no prejudice.

Movants' motion is well supported with admissible evidence. Initially, taking the same approach used in the Motion for Preliminary Injunction in *Roe*,[3] Movants used an attorney declaration to provide facts and documents from the experiences of effected service members who preferred to remain pseudonymous. When Defendants objected this time, Movants resubmitted those facts and documents through new declarations from the service members themselves, curing hearsay-based objections. Defendants' claim of prejudice from this resubmission of evidence does not hold water.

As an initial matter, Defendants' motion to strike the *entire* Perkowski Declaration should be denied as overbroad and unsupported. "[A] motion to strike must be precise."

[3] Declaration of Peter Perkowski in Support of Plaintiffs' Motion for a Preliminary Injunction, ECF 40, *Roe v. Austin*, No. 1:18-cv-1565 (LMB/IDD) (E.D. Va. Jan. 11, 2019). The unobjected-to evidence in *Roe* involved the same attorney presenting the same type of information to the Court in the same way.

Disability Rights Md. v. Prince George's County Pub. Schools, No. GJH-21-3001, 2022 WL 2869043, at *3 (D. Md. July 21, 2022) (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969) (motion to strike "should state specifically the portions of the affidavit to which objection is being made")). Defendants' pronouncements that the declaration "mostly, if not entirely" (Opp'n at 8) comprises inadmissible evidence is plainly hyperbole; and assertions that the declaration's contents are improper hearsay and argumentative, while more targeted, still are not directed to statements specific enough to enable substantive individual consideration of the objections. Even when Defendants identify specific *paragraphs* of the declaration, they do not tie their objections to specific *statements* in those lengthy sections. Because Defendants fail to identify purportedly inadmissible testimony with precision, the motion to strike should be denied. *See Disability Rights Md.*, 2022 WL 2869043, at *3 (rejecting motion to strike directed to entire declaration when it was plain "on its face" that it did not appear to comprise "only" inadmissible evidence).

The procedural defect is reason enough to deny Defendants' motion to strike, but there are substantive ones as well. Movants have cured any potential evidentiary objection, and Defendants have not been prejudiced. Any purported evidentiary issues with the original Perkowski Declaration were cured by the subsequent submission of an Amended and Supplemental Perkowski Declaration ("Supp. Perkowski Decl.") and the declarations of the primary witnesses (the "Declarants"). Namely, Defendants' evidentiary objections fall into two categories: improper argument[4] and "best evidence" (Fed. R. Evid. 1002), which apply to ¶¶ 10-20 of the declaration, and hearsay and lack of personal knowledge (Fed. R. Evid. 602,

[4] Defendants do not identify which portions of ¶¶ 10-20 are improper argument independent of a "best evidence" objection. In fact, those paragraphs are not argument but merely describe the contents of regulations and how they operate.

801), which apply to ¶¶ 7-9, 23-72. The Supp. Perkowski Decl. cures the objections to ¶¶ 10-20 by attaching copies of the cited regulations as new Exhibits 21-29. The objections to ¶¶ 23-72 were cured by moving the bulk of the statements—those for which Mr. Perkowski does not have personal knowledge (as acknowledged in Movants' opening brief)—to declarations from the Declarants, who describe their own experiences.[5] The following chart summarizes the changes:

Original Evidence	Amended and Supplemental Evidence
Ex A: Perkowski Declaration ¶¶ 1-81, Exhibits 1-20	**Ex. A:** Amended & Supplemental Perkowski Decl. ¶¶ 1-22: unchanged, except that discussed regulations are now attached as Exhibits 21-29 (*Exhibits 1-7 not resubmitted*) ¶¶ 23-72: largely moved to other declarations or deleted (see below) ¶¶ 73-81 & Exs. 15-20: unchanged
Ex. B: Richard Roe Declaration	**Ex. B:** Richard Roe Declaration Unchanged (*not resubmitted*)
Perkowski Decl. ¶¶ 26-37 (portions) & Exhibits 8-10	**Ex. A:** Amended & Supplemental Perkowski Declaration & Ex. 8b **Ex. C:** Decl. of A.J. (under seal) & Exs. 8a, 9, 10
Perkowski Decl. ¶¶ 45-50	**Ex. D:** Declaration of B.J. (under seal)
Perkowski Decl. ¶¶ 38-44 (portions) & Exhibits 11-12	**Ex. A:** Amended & Supplemental Perkowski Decl. **Ex. E:** Decl. of C.J. (under seal) & Exs. 11-12
Perkowski Decl. ¶¶ 51-56, 62-68 & Exhibits 13-14	**Ex. F:** Decl. of D.J. (under seal) & Exs. 13-14
Perkowski Decl. ¶¶ 69-72	**Ex. G:** Nick Harrison Declaration

Despite their protests, Defendants have not been prejudiced by the resubmission of this evidence. Prejudice is premised on unfair surprise, which is not present here. *Cf. Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 635, 636 (D. Kan. 2005) (denying motion to strike affidavits filed with reply brief; purpose of Rule 6(d) "is to avoid unfair surprise and permit the

[5] Movants made no changes to Perkowski Declaration ¶¶ 7-9, which reflect Mr. Perkowski's conclusions based on information provided to him and his own personal observations. They are not hearsay.

court to resolve motions on the merits"). Defendants have known the identity and factual circumstances of each of the Declarants since November 2022 (*Harrison* ECF 350-1 [Perkowski Decl.], Ex. 16 (letter re injunction non-compliance); investigated those circumstances—or had the opportunity to, including the statements made to Declarants by Defendants' own personnel in 2022; communicated with Movants' counsel about those circumstances multiple times (*Harrison* ECF 350-1 [Perkowski Decl.] ¶¶ 76, 78, 81 & Exs. 17-20); and now has responded to those circumstances by providing declarations in opposition to the motion. There is no prejudice under these circumstances. Similarly, the "hundreds of pages of exhibits" recently filed (Opp'n at 11) are not prejudicial. Several of them are declarations of the Declarants. The rest—"new" exhibits 21 through 29—were all cited in the Perkowski Declaration and are publicly available government documents subject to judicial notice. *E.g.*, *Sierra Club v. U.S. Dept. of Interior*, 899 F.3d 260, 276 n.4 (4th Cir. 2018). Defendants' feigned surprise is unconvincing, and they have not been prejudiced.

As Defendants acknowledge, the purpose of the hearsay rule is to give parties the opportunity to test the veracity of evidence through cross-examination, impeachment, and credibility assessments. Opp'n 9. But here, Defendants' declarants largely confirm the facts set forth in the original Perkowski Declaration. Defs.' Exs. 2-11. Despite being asked, Defendants did not and do not identify any facts they believe are inaccurate or that couldn't be explored, examined, and verified. Their primary grievance—that they are deprived of the opportunity to discover and test the facts presented—rings hollow. It seems that Defendants' primary goal was to impose hyper-technical and unnecessary administrative hurdles for Movants to clear,[6] to cast

[6] Defendants give short shrift to the reasons behind Movant's decision to present evidence the way they did. Contrary to their flippant assertions, the privacy concerns surrounding Declarants' anonymity is real and substantial, due in large part to the stigma surrounding HIV that this Court has acknowledged, *Harrison*, 597 F. Supp. 3d at 892, and that Defendants' policies have helped foster and perpetuate.

doubt on the mountain of damning evidence against them, and to defeat the motion on a technicality. They may also have been motivated by a belief that they would benefit from delay while they consider and debate—as they purportedly have for over a year—additional guidance or regulations they think will muddy the waters enough to moot the claim,[7] though additional guidance in line with the position articulated in the opposition brief will do no such thing. Whatever their motivation, the efforts fail.

Similarly, there is no prejudice because the amended and supplemental evidentiary submissions are technical in nature, not substantive. Except for the Declaration of Nick Harrison, which contains some additional contextual details Sgt. Harrison thought were important to include (again, not prejudicial), paragraphs of the original Perkowski Declaration were moved into Declarants' declarations almost word-for-word, with mere grammatical modifications to account for the change in declarant. *Compare Harrison* ECF 350-1, Perkowski Decl. ¶¶ 23-72 *with Harrison* ECF 358-1, Supp. Perkowski Decl. ¶¶ 23-72 *and Harrison* ECF 361, Exs. C-F. Just days after learning that Defendants planned to object to the Perkowski Declaration, Movants informed Defendants' counsel that it would cure in this way (Defs.' Ex. 1 [Berman Decl.] Ex. E), further minimizing prejudice. Movants also preserved both the original Exhibit numbers and the paragraph numbers of the original Perkowski Declaration. Finally, Movants invited Defendants to file evidentiary objections to the amended and supplemental filings. Defs.' Ex. 1-E. So far, Defendants have declined to do so—likely because the bulk of the statements fall within exceptions to the hearsay rule, such as the numerous statements against interest from military

[7] Though Defendants contend that their current policies and practices comply with the Court's injunctions, during the process leading to this Motion they repeatedly represented that further policy changes were under consideration and asked for patience while that process worked its way out. *Harrison* ECF 350-1 [Perkowski Decl.] ¶¶ 76, 76 & Ex. 18, 20. Their motivation for delay runs through their actions here—including proposals that the hearing on this motion be delayed so that Movants could cure Defendants' evidentiary objections.

personnel who asserted that the rules applicable to Declarants "have not changed" and "are still the same." The only hearsay statements in the original Perkowski Declaration not covered by an exception are the statements of the Declarants to Mr. Perkowski. Again, that level of hearsay has been obviated with the submission of Declarants' declarations.[8]

In sum, Defendants' motion to strike is procedurally defective, Movants have cured the alleged evidentiary problems, and Defendants have not been prejudiced. Defendants' motion to strike should be denied.

C. Defendants may no longer deny a deployment to an individual AHPSMUVL based on any purported justifications this Court rejected as failing to provide a rational basis.

As anticipated, Defendants' explanation for their actions over the past year hinges almost entirely on their contention that inclusion of the word "categorically" means the injunctions merely require them to give each AHPSMUVL an individualized assessment. As a result, they spend the first section of their opposition brief peppering the Court with statistics regarding the number of AHPSMUVL who have been considered for deployment and categorization of the outcomes for those service members. But if Movants are correct, the only relevant information in Defendants' recitation of these facts is that *all* SMLWH, including AHPSMUVL, are required to obtain a medical waiver to deploy or commission and *some* AHPSMUVL are still being denied certain opportunities based on their HIV status. The material impact of Defendants' position is

[8] There is also no problem with this information being presented to the Court in an attorney declaration. The attorney-as-witness rule is grounded in the Rules of Professional Conduct (Opp'n 9 n.8) and speaks to when attorneys may continue a representation, not when or how they may submit evidence. In Virginia, application of the rule "hinges on whether the attorney is likely to be a 'necessary witness' and, if so, whether one of the three exceptions applies." *A1 Procurement, LLC v. Threescore, Inc.*, No. 2:15-cv-15, 2015 WL 13733927, at *15 (E.D. Va. Nov. 18, 2015) (quoting Va. Rules of Prof. Conduct r. 3.7(a)). Here, Mr. Perkowski plainly is not a necessary witness, and an exception applies. Attorney Perkowski is merely acting as a conduit of information, and testimony on an uncontested issue is excepted from the rule. *See id.* (*quoting* Va. Rules of Prof. Conduct r. 3.7(a)). As discussed above, none of the evidence to which Defendants have procedural objections is controverted.

not revealed until late in their opposition brief when they admit they believe they may rely upon *any* of the justifications that this Court rejected as a rational basis for denying deployments to AHPSMUVL, so long as they did so case-by-case. Because this interpretation essentially guts the Court's orders and gives Defendants the option of ignoring the injunctions—not only in limited circumstances but virtually across the board—it must be rejected.

Defendants' "statutory interpretation" arguments regarding the text of the orders ask a single word to carry far more weight and import than it can possibly bear and are not persuasive. By contrast, Movants provided an interpretation of the orders that gives full effect to every word. In discounting Movants' definition of the word "categorical," Defendants are merely arguing for their preferred definition; Movants are not ignoring or excising the word from the Court's orders.

In fact, Movants' interpretation more closely aligns with the Court's opinion on summary judgment. Defendants appear to mistake the Court's discussion of a necessary component of an equal protection violation—that the differential treatment apply to the entire class (or very nearly the entire class) to which a plaintiff belongs—for a (very) subtle but substantial narrowing of the scope of the remedial injunctions. Opp'n 5. But in the summary judgment opinion, most of the Court's discussion of the categorical nature of the deployment bar occurs in its rejection of Defendants' contention that the bar is not absolute because a waiver process is available. In fact, it was *Plaintiffs* who argued that the bar was very nearly absolute, because a policy that deployed significant numbers of service members living with HIV in a science-based, functional and uniformly applied process likely would not give rise to an equal protection claim. The Court decided that Plaintiffs had the better of this argument (even though a small number of medical waivers had been given to members of the Special Forces) and found that the bar was categorical "for all intents and purposes." *Harrison*, 597 F. Supp. 3d at 900. This satisfied Plaintiffs' burden

of showing that SMLWH as a class (or category) were being treated differently, but it does not provide conclusive—or even convincing—proof that the Court intended only to prohibit an *absolute* bar to deployment for service members living with HIV.

Indeed, if the Court intended to narrow the impact of the injunctions to prohibit only an absolute bar, the Court could have made that distinction clear in its summary judgment opinion. But the opinion shows quite the opposite: Examination reveals that of the 21 times that the opinion uses the word "categorical" or "categorically," 18 are to establish class-wide differential treatment, to quote or recite Plaintiffs' (or amici's) position, or as shorthand to restate the Court's conclusion that the bar was "for all intents and purposes" categorical. *Harrison,* 597 F. Supp. 3d at 889-91, 900, 906, 907, 912. The other three times "categorical" is used are to reject justifications proffered—such as the aberrant conduct of a service member with hepatitis C who supposedly donated blood—as rational bases for the policy and to describe the breadth of the bar applied to reach discharge decisions for Roe and Voe. *Id.* at 910, 911, 912-14. In addition, the word is used several times in the sense that Movants advance here. *Id.* at 907, 910, 913. By contrast, the Court discusses the deployment bar multiple times without confining its discussion to a "categorical bar." *Id.* at 893, 900-01, 910. Defendants cherry-picking an instance or two in which the Court used the word "categorical" to mean absolute—most frequently to establish that Plaintiffs had properly identified group-wide differential treatment—does not lead to the conclusion that the Court intended to narrow its injunctions in this way.

Similarly, Defendants' assertion that they may continue to use purported justifications that this Court has rejected as failing to provide a rational basis for denying deployment to AHPSMUVL is without foundation. Just as the summary judgment opinion does not mandate Defendants' interpretation of the word "categorical," the opinion does not limit the Court's

rejection of the purported justifications as applicable to only a class-wide bar. In fact, the Court makes clear that it is analyzing Defendants' purported justifications whether the bar is "categorical or not," *Harrison*, 597 F. Supp. 3d at 900, which implies that the force of the Court's conclusions are the same with respect to both individual and class-wide determinations. Defendants provide no explanation as to why a purported basis for denying deployment to AHPSMUVL as a group would be transformed into a rational basis for denying deployment to an individual AHPSMUVL, and the Court's opinion does not support any such leap.

While it appears Defendants primarily have been relying upon so-called "host nation requirements" to delay or deny deployments to AHPSMUVL (Defs.' Ex. 3 ¶ 6, Ex. 6 ¶ 10, Ex. 10 ¶ 7), they contend that they may apply any of the previously rejected justifications to an individual AHPSMUVL. Opp'n 16. But this narrowing of the Court's injunctions is without support in the summary judgment opinion (as discussed directly above) and would lead to nonsensical results. For instance, under Defendants' view of the scope and impact of the injunctions, they could reject an individual AHPSMUVL based on their purported concerns over viral rebound if an individual's HIV medications are lost or destroyed or that the service member might transmit HIV via the "walking blood bank." Not only did the Court emphatically reject both these purported bases for denying deployment to AHPSMUVL—without discussing any difference in its analysis for the entire group of AHPSMUVL versus for one individual AHPSMUVL—but the Court also *explicitly* shut down Defendants' speculation that the former might serve as an adequate justification at some point in the future. *Harrison*, 597 F. Supp. 3d at 908-909. Similarly, Defendants should not be given a greenlight to stop deploying "individual" AHPSMUVL based on concerns regarding battlefield transmission in a combat zone where the U.S. has become involved in a "hot war"—but that is a real possibility under

Defendants' interpretation of the injunctions. How Defendants could possibly read the injunctions and opinion as allowing them to deny deployment to an individual AHPSMUVL based on these rejected excuses for discrimination is very nearly unfathomable and exactly the position and type of responsive statement that justifies a finding of contempt.

With respect to "host nation requirements," Defendants' attempt at a do-over must be rejected. As discussed in Movants' opening brief, Defendants had every opportunity to present evidence to support their argument that foreign country restrictions or host nation requirements might justify denying some specific deployments to AHPSMUVL. Not only did Defendants assert this purported justification from nearly the outset of these cases, share documents responsive to Plaintiffs' discovery requests, and provide a 30(b)(6) witness for deposition on this topic *twice* (once at Plaintiffs' request and once at Defendants'), but they were on explicit notice no later than the Fourth Circuit's January 2020 decision that the support they proffered for this purported justification at the preliminary injunction stage was inadequate to establish a rational basis for denying deployments to HIV-positive service members. Nothing has changed since.

Nonetheless, despite the Court's rejection of this argument as inadequately supported by the record—both before the Fourth Circuit and at summary judgment—Defendants assert that they may reject individual AHPSMUVL based on host nation restrictions. This position is flawed for at least two reasons: First, it ignores the findings of this Court and the Fourth Circuit that Defendants had failed to show that *civilian* travel advisories also apply to military personnel or that any SMLWH had ever been deported from a foreign country due to their HIV status. Nonetheless, despite continued failure to make this showing, Defendants still cite State Department travel guidance for civilians as a basis for denying deployment to service members.

Second, the application of State Department guidance to waiver requests by SMLWH has been entrusted to the same personnel who previously routinely denied those requests. Defs' Ex. 8 [Declaration of Dr. Andre B. Hall], ECF 363-8, ¶¶ 3-5. Defendants provided no additional guidance to these decisionmakers other than the statement that an AHPSMUVL should not be denied a deployment unless the service member could not perform the duties to which they would be assigned, thereby leaving it up to lower-level personnel to interpret and apply the unsubstantiated civilian travel guidelines to SMLWH. *Id.* ¶ 5(c). As Movants demonstrated in their opening brief, this has resulted in confusion, unwarranted consternation, contradictory decisions for countries with nearly identical "restrictions," and the denial of deployments to some AHPSMUVL. Op. Brief 7-12, 22-29.

The sad but simple fact is Defendants cannot currently be trusted to provide fair and impartial individualized determinations for SMLWH. Military decisions are not entitled to deference when they are founded on irrational, evidence-free "concerns" sprouting from still-extant prejudices against people who are members of a disfavored community. It will take a concerted effort to change hearts and minds regarding the deployability of SMLWH after two decades of an explicitly discriminatory policy based on common misconceptions regarding HIV, its transmissibility, and the level of care required, and military leadership is simply not (yet) committed to changing hearts and minds on this. Defendants hotly contested every aspect of this litigation and fervently believed they would prevail on summary judgment. Despite numerous signs and signals that these cases were not going their way, Defendants persisted in their irrational justifications and did not once propose a path to settlement.

They also did not have a sudden epiphany on April 6, 2022, or even by June 6, 2022. The election of a new Presidential administration that ostensibly supports the service of people living

with HIV prompted Defendants to cut their losses and retreat, but it has turned out to be a tactical retreat and plan to regroup and continue their discriminatory practices in a more circumscribed way. From the way in which Defendants changed their policies, to the Communications Plan for the roll-out of those changes, to the statements from lower-level decisionmakers that "nothing has changed," evidence abounds that Defendants and those to whom they have delegated decision-making authority do not want to give SMLWH the same opportunities as service members who are not living with HIV, even if the SMLWH is asymptomatic and has an undetectable viral load. Op. Brief, *passim.* For these reasons, it is necessary to ensure that Defendants not be allowed to circumvent the clear mandate of the Court's orders to allow AHPSMUVL to deploy and to commission.

D. The medical waiver to deploy or commission currently required for all service members living with HIV, regardless of viral load, is unnecessary and a violation of equal protection.

Because Defendants should not be allowed to resurrect previously rejected justifications for their discriminatory policies, the assignment limitation codes ("ALCs") and medical readiness classifications ("MRCs"), and consequent deployment medical waiver required for every SMLWH before deployment, are unnecessary and make AHPSMUVL targets for discrimination.

If the Court had intended merely to require Defendants to give each SMLWH an individualized determination, there would have been no need for the Court to carve out the group of AHPSMUVL in its orders. The Court's orders could have simply required Defendants to give every SMLWH the individualized determination that Defendants were supposed to be providing all along. But the Court instead specifically stated that worldwide deployment could not be categorically denied to any AHPSMUVL. Amended Order, ECF 328, *Roe v. Austin*, No. 1:18-cv-1565 (LMB/IDD) (E.D. Va. Apr. 6, 2022); Amended Order, ECF 314, *Harrison v. Austin*,

No. 1:18-cv-641 (LMB/IDD) (E.D. Va. Apr. 6, 2022). In attempting to apply Defendants' preferred definition of "categorically," Movants ask what it would even mean to "absolutely" bar that person from worldwide deployment. In the context of an individual, an absolute versus partial bar to worldwide deployment does not even make sense. Therefore, Movants once again submit that the injunctions mean each individual AHPSMUVL cannot be barred from worldwide deployment based on their placement as an individual within this category. Op. Brief 23. And the word should be given the same definition in the context of the injunctions regarding commissioning.

If a decisionmaker does not want HIV-positive service members on a deployment—and evidence has been presented that this is sometimes the case—it is not hard for them to come up with purported reasons that the service member cannot perform the job duties assigned. And the decisionmaker need not be a mastermind to realize that is the game here. Even if Defendants did not intend to send the signal that it is okay to reject SMLWH from deployments that they deem too difficult or that are in particularly austere environments, without any meaningful way to monitor or police those decisions, some rejections—as have already taken place—will be the inevitable result.

Movants respect the need for appropriately wielded discretion, as well as this Court's desire to allow Defendants to retain as much discretion as possible while still operating within the confines of the Constitution. With strong guidance from this Court, Defendants were given the opportunity to exercise their discretion to set up a system that eliminates discrimination against AHPSMUVL. They failed to do so. It is therefore necessary to send Defendants an even stronger message that constitutional violations will not be tolerated by imposing consequences for their violations of the Court's injunctions. A finding of contempt will send that message.

E. Alternatively, the Court should clarify its orders to address the ongoing violations of the Constitution and the APA.

If the Court disagrees that Defendants' actions plainly fall outside the scope and meaning of its injunctions—read in conjunction with the Court's summary judgment opinion—then Movants submit that the already proven equal protection violation against SMLWH has not been adequately remedied by the Court's orders. In the alternative, Movants respectfully request that the Court clarify its orders to address these ongoing violations. Movants' arguments for clarification are laid out in their opening brief, and Defendants have not bothered to address them. But Defendants' evidence and arguments largely confirm the need for clarification.

First, ALCs and MRCs put AHPSMUVL at a substantial disadvantage for a host of opportunities, including deployments. *E.g.*, Ex. 10, MSgt I.V. Decl. ¶ 6 ("Mobility restrictions could prevent a Service member from deploying."); Ex. 3, Staples Decl. ¶¶ 5, 7 (waiver requests must "include a justification providing an analysis of the expected benefits" and the "process takes approximately 90 days"); Ex. 6, Stangle Decl. ¶ 4 ("ALCs are designed to limit … deployment and/or overseas assignments."). The restrictions wrought by ALCs and MRCs are also "categorical" in nature: at best, they are a presumption of non-deployability and inability to commission that a SMLWH must overcome; at worst, they are an invitation to maintain the status quo that existed before the Court's orders.

Second, the waiver requirement imposed on SMLWH, based on the ALC or MRC, treats them differently from service members with other well-managed chronic conditions who are presumptively deployable under DoDI 6490.07. Those service members with other conditions are not presumptively non-deployable (or unable to commission) and therefore do not need to overcome the presumption that attaches to SMLWH. This is a continuing equal protection violation that the Court must address and eliminate by requiring the removal of deployment and

assignment restrictions, thus making AHPSMUVL presumptively deployable like other well-managed chronic conditions. Under this rubric, Defendants still retain the discretion to deny deployments, commissions, and assignments, but only for reasons that are not discriminatory and that do not constitute continuing equal protection violations.

The scales need to be reset when it comes to Defendants' treatment of SLWHV. clarifying the Court's orders in this way accomplishes this goal.

III. CONCLUSION

For the reasons set forth above and in their opening brief, Movants respectfully request the relief delineated in the papers in support of this motion to enforce and for an order to show cause.

Dated: June 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 16, 2023, 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: June 16, 2023

Respectfully submitted,

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