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

NICHOLAS HARRISON, *et al.*, Plaintiffs, *v.* JAMES N. MATTIS, *et al.*, Defendants.	)	No. 1:18-CV-00641-LMB-IDD

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Defendants' consolidated Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss ("Defendants' Opposition and Motion to Dismiss") established that Plaintiffs' equal protection challenge to a Department of Defense ("DoD") policy of precluding HIV-positive individuals from commissioning as officers (the "Commissioning Policy") was non-justiciable and not sustainable as a matter of law. Specifically, the Commissioning Policy represents an exercise of military authority Congress specifically vested in the Executive Branch, and that exercise of authority is non-justiciable under the doctrine set forth in *Mindes v. Seaman*. Even if the case were reviewable, dismissal of Plaintiffs' equal protection challenge would still be necessary because Plaintiffs have failed to assert a claim as a matter of law. This Court's review of Plaintiffs' claim is governed by the deferential rational basis standard, and the Commissioning Policy is reasonably related to ensuring that Service members are medically fit and capable of performing their duties.

Plaintiffs' arguments in opposition to Defendants' motion do nothing to alter either conclusion. As a preliminary matter, Plaintiffs contend that this case concerns all of Defendants' HIV-related policies, but Plaintiffs have established standing to challenge the Commissioning Policy only. Plaintiffs also erroneously argue that the *Mindes* doctrine of non-justiciability categorically does not apply in this case, an argument that finds no support in case law, including in *Mindes* itself. Applying the four factor *Mindes* test, the Court should conclude that this case is non-justiciable.

With respect to the merits of their claim, Plaintiffs encourage this Court to disregard binding Fourth Circuit precedent and be the first court to apply a heightened standard of review to claims alleging HIV-based discrimination, but they offer no valid reason for the Court to do so. Under that deferential standard of review, the Commissioning Policy passes constitutional muster

because it is a reasonable exercise of Defendants' judgment about how best to ensure that Service members are medically sound and ready to serve. Dismissal of this action is therefore warranted.

ARGUMENT

A. Plaintiffs are limited to challenging Defendants' Commissioning Policy, which is the sole alleged cause of harm to Plaintiffs

In their Opposition to the Motion to Dismiss and Reply in Support of Their Motion for Preliminary Injunction ("Opposition"), Plaintiffs continue to erroneously suggest that the Court should read their Complaint expansively in this case. In Plaintiffs' telling, because the Complaint mentions various HIV-related policies, asserts claims on behalf of both an individual Service Member and organization, and purports to bring both as-applied and facial claims, "all HIV-related personnel policies cover[ing] all . . . facets of serving as a person living with HIV" in the military are being challenged. Pls.' Opp'n to the Mot. to Dismiss and Reply in Supp. of Their Mot. for a Prelim. Inj. ("Pls.' Opp'n") at 2, ECF No. 51.

Plaintiffs are incorrect. As Defendants noted in their opening brief, in order to invoke the Court's Article III jurisdiction to hear this case, Plaintiffs must establish standing by demonstrating that (1) they have "suffered an injury in fact that is concrete and particularized, and is actual or imminent"; (2) "the injury is fairly traceable to the challenged action"; and (3) "the injury will likely be redressed by a favorable decision." *See Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 609 (E.D. Va. 2015) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The only injury identified in the Complaint is that suffered by Plaintiff Harrison, who contends that Defendants' Commissioning Policy discriminates against him by preventing him from being able to commission as an officer due to his HIV status. *See* Compl. ¶ 4, ECF No. 1 ("Sgt. Harrison discovered that outdated military policies regarding people living with HIV would prevent him from being commissioned as an officer and from filling this position based in Arlington,

Virginia."); ¶ 74 ("Defendants have refused to grant Plaintiff Nick Harrison a commission as an officer serving as an attorney in the Judge Advocate General Corps for the D.C. National Guard based solely on his HIV status."). Having identified one injury in the Complaint, Plaintiffs are limited to challenging Defendants' policy—the Commissioning Policy—that is the cause of that alleged harm. *See Lewis v. Casey*, 518 U.S. 344, 358 n.6 (1996) ("[S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.").

Plaintiffs' reliance on the inclusion of OutServe/SLDN as a Plaintiff does not change the standing analysis. OutServe/SLDN asserts no injury to itself as an organization and instead relies on its representation of the interests of its members, including Plaintiff Harrison. Compl. ¶ 69. But "[t]he possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy," and OutServe/SLDN must still establish that "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Yet the Complaint identifies only Plaintiff Harrison as an OutServe/SLDN member who allegedly has been injured by Defendants' policies. The claims of OutServe/SLDN are therefore limited to challenging only the Commissioning Policy, the same policy that allegedly harmed Harrison.[1]

[1] Plaintiffs' submission of two declarations under seal in support of their Motion for Preliminary Injunction, *see* Mem. in Supp. of Pls.' Mot. for Prelim. Inj., Ex. F, ECF No. 26-6; Ex. G, ECF No. 26-7, does not expand the scope of claims in this case. Neither individual is a named Plaintiff, nor does either claim to be a member of OutServe/SLDN, which makes them both third parties to this action. In any event, neither individual's assertion of harm would be sufficient to establish standing even if they were Plaintiffs or OutServe/SLDN members, for reasons explained in the Declaration of Lisa Lute, ECF No. 43-1, and the Declaration of Martha Soper, ECF No. 48.

The fact that the Complaint makes passing references to facial challenges to other policies does not establish Plaintiffs' standing to challenge anything other than the Commissioning Policy, *see* Pls.' Opp'n at 2 ("This case is about more than just commissioning, because the facial challenges to Defendants' HIV-related personnel policies cover all of these facets of serving as a person living with HIV."). Standing is an "irreducible constitutional minimum" requirement, *see Lujan*, 504 U.S. at 560, one from which Plaintiffs are not excused simply because they purport to be bringing a facial challenge. *See, e.g.*, *MacDonald v. Moose*, 710 F.3d 154, 162 (4th Cir. 2013) (applying three-part *Lujan* test to facial due process challenge to anti-sodomy law); *Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 429-30 (4th Cir. 2007) ("Although there is broad latitude given facial challenges in the First Amendment context, a plaintiff must establish that he has standing to challenge each provision of an ordinance by showing that he was injured by application of those provisions." (internal citation and quotation marks omitted)); *Greenville Cty. Repub. Party Exec. Comm. v. Greenville Cty. Election Comm.*, 604 F. App'x 244, 253-54 (4th Cir. 2015) (dismissing for lack of standing facial First Amendment and equal protection challenges to state law requiring supermajority for nominating candidates by party convention or petition). "A party has standing to challenge the constitutionality of a [law] only insofar as it has an adverse impact on his own rights," *Cty. Court of Ulster Cty, v. Allen*, 442 U.S. 140, 154-55 (1979), and Plaintiffs must therefore demonstrate that *they* are being harmed by a policy they claim is facially unconstitutional, just as they must for an as-applied challenge. Because the only adverse impact identified by Plaintiffs in this case is Plaintiff Harrison's inability to become a commissioned officer, the Complaint is limited to challenging that policy only.

Notably, the one policy that Plaintiffs concede is *not* covered by their Complaint is the policy announced in the February 14, 2018 Memorandum, as superseded and modified by DoD

Instruction ("DoDI") 1332.45.[2] *See* Pls.' Opp'n at 3 ("Plaintiffs are not directly challenging the new [DoDI 1332.45] as a violation of equal protection."). Yet Plaintiffs' challenge to this policy is at the heart of their request for a preliminary injunction. *See* Pls.' Mot. for Prelim. Inj. at 1-2, ECF No. 26 ("Plaintiffs seek a preliminary injunction to preserve the status quo by suspending implementation of the new [February 14, 2018] Policy as applied to any service member classified as non-deployable based solely on their HIV status."); Pls.' [Proposed] Order Gr. Pls.' Mot. for Prelim. Inj. at 1, ECF No. 25-1 (requesting that the Court enjoin Defendants "from implementing [the February 14, 2018 Memorandum] to separate any service member classified as non-deployable based solely on their HIV status"). Plaintiffs cannot base their request for a preliminary relief on a challenge to a policy (DoDI 1332.45) where that claim is not part of the Complaint in this case. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823 (4th Cir. 2004) ("A preliminary injunction is, of course, appropriate to grant intermediate relief of *the same character* as that which may be granted finally." (citation and internal quotation marks omitted)); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003), *abrogated on other grounds* ("[P]reliminary relief may never be granted that addresses matters which in no circumstances can be dealt with in any final injunction that may be entered."). Because Plaintiffs' equal protection challenge in this case is limited to the Commissioning Policy, and because Plaintiffs have expressly stated that their Complaint does not challenge DoDI 1332.45, Plaintiffs' request for the Court to enjoin preliminarily that policy must be denied.

[2] Both parties refer extensively to DoDI 1332.45 in their briefing on Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion to Dismiss. For the Court's convenience, Defendants have attached a copy of the DoDI as Exhibit 1 to the instant filing.

B. Plaintiffs' challenge to the Commissioning Policy is non-justiciable

Defendants' Opposition and Motion to Dismiss set forth the reasons why the judicial review of Commissioning Policy (as well as DoDI 1332.45, as challenged in Plaintiffs' preliminary injunction motion) is foreclosed by the doctrine set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and adopted by the Fourth Circuit in *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985). *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss ("Defs.' Opp'n and Mot. to Dismiss") at 10-14, 20-23, ECF No 43. Specifically, the determination about whether to commission an officer is one involving an inherently military judgment about whether a Service member is fit and qualified to serve in such a position. *Id*. at 20-23. Plaintiffs contend that *Mindes* does not apply to their constitutional claims and that, in any event, application of the four-factor *Mindes* test weighs in favor of justiciability. Plaintiffs are wrong on both counts.

First, Plaintiffs' reliance on *Aikens v. Ingram*, 811 F.3d 643 (4th Cir. 2016), for the proposition that *Mindes* does not apply to constitutional challenges, *see* Pls.' Opp'n at 4, is significantly misplaced. The court's analysis in *Aikens* concerned not whether *Mindes* applies to constitutional challenges (as opposed to non-constitutional challenges) but rather whether *Mindes* applies only to challenges seeking equitable relief versus those seeking monetary damages. *See Aikens*, 811 F.3d at 647-48 (concluding that *Mindes* applies only where equitable relief is sought). *Aikens* thus has no bearing on whether *Mindes* applies to preclude Plaintiffs' claims in the instant case. Furthermore, Plaintiffs' contention that facial constitutional claims are somehow excluded from the purview of *Mindes* is illogical given that the first of two threshold requirements under *Mindes* involves an assessment of whether a plaintiff has alleged a violation of a constitutional right, federal statute, or military regulation. *See Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) (citing *Mindes*, 453 F.2d at 201).

The remaining cases cited by Plaintiff similarly provide no support for their broad assertion that *Mindes* cannot apply here because they have asserted a facial challenge. In two of those cases, the courts merely concluded that challenges to the military action was justiciable but made no sweeping findings about the applicability of *Mindes* vis-à-vis facial challenges, *see Watson v. Ark. Nat'l Guard*, 886 F.2d 1004, 1010 (8th Cir. 1989); *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.D.C. 1987), while the third case cited by Plaintiff involved no justiciability analysis at all, *see Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017).[3] Plaintiffs' contention that *Mindes* categorically does not apply in this case finds no support in Plaintiffs' cited cases and should be rejected.

Second, the four-factor test from *Mindes* supports a finding of non-justiciability in this case.[4] Plaintiffs' equal protection challenge to the Commissioning Policy, which is subject to rational basis review under Fourth Circuit precedent, is premised on the contention that DoD lacked any conceivable rational basis for the challenged policy. *See* Defs.' Opp'n and Mot. to Dismiss at 23-29; *see also infra*, Part D. Given the deferential standard of review, Plaintiffs' claim is inherently weak. *Cf. Woodard v. Marsh*, 658 F.2d 989, 994 (5th Cir. 1981) (concluding claim

[3] Plaintiffs' citation to *Doe 1* is also inapposite because the D.C. Circuit has not adopted *Mindes*. *See Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989).

[4] Defendants do not challenge Plaintiff Harrison's ability to meet the threshold requirements under *Mindes* with respect to the Commissioning Policy. *See* Defs.' Opp'n and Mot. to Dismiss at 21. But Defendants do challenge Plaintiffs' ability to meet these threshold requirements with respect to their challenge to DoDI 1332.45, to the extent the Court permits Plaintiffs to raise this separate claim in their Motion for Preliminary Injunction. Plaintiffs provide no support for their contention that a court is permitted to discard the threshold inquiries under *Mindes* in the context of examining a party's request for a preliminary injunction. *See* Pls. Opp'n at 7. To the contrary, *Mindes* should apply with equal force in the context of a motion for a preliminary injunction given a court's obligation to determine whether the moving party is likely to succeed on the merits of its claims. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Just as a court would assess a party's standing to bring a claim as part of the preliminary injunction analysis, so too should it consider whether the claims brought are justiciable.

was weak for purposes of the *Mindes* analysis where it "would have the court determine whether there was any rational basis for the distinctions made, on the basis of such factors, between himself and the two students who were retained. We think that this is precisely the role that *Mindes* cautions the courts from taking."). In addition, the potential injury to Plaintiff Harrison if review of the Commissioning Policy is refused would be minimal. Plaintiffs effectively concede in their Opposition that the Court lacks the authority to order DoD to commission Harrison and instead request a retroactive evaluation of Harrison without application of the Commissioning Policy, *see* Pls.' Opp'n at 5-6, n.2, meaning that DoD still retains the ultimate discretion about whether to grant Harrison a commission and could deny him a commission for reasons unrelated to his HIV status. Nor is Harrison at risk of being discharged from the military due to his HIV status; rather, he is merely unable to have a position in the military he wishes—but is not entitled—to have. The harm to Harrison in the absence of review is thus minimal in this case.

As Defendants made clear in their Opposition and Motion to Dismiss, the third and fourth *Mindes* factors also weigh heavily in favor of a non-justiciability finding. Plaintiffs' challenge to the Commissioning Policy effectively seeks judicial oversight of the inherently military decision about which individuals are qualified to be commissioned. But Congress has expressly vested this power in the Executive Branch and has further afforded the Executive broad discretion in its exercise. *See* 10 U.S.C. § 532(a) (permitting DoD to consider, among other things, a Service member's "good moral character" and other "special qualifications" when making a commissioning determination). As the Supreme Court has observed, "[i]t is obvious that the commissioning of officers . . . is a matter of discretion within the province of the President as Commander in Chief" and courts accordingly "have never assumed by any process to control the appointing power either in civilian or military positions." *Orloff v. Willoughby*, 345 U.S. 83, 90

(1953). Decisions about whether to commission a Service member as an officer is precisely the type of judgment for which courts lack expertise and for which deference to the military is warranted.

Furthermore, the fact that both Congress and DoD have played a role in shaping military HIV policy should make the Court particularly reticent to conclude that the Commissioning Policy is subject to judicial review. Both "legislative and executive judgments in the area of military affairs" are entitled to "a healthy deference," based on the recognition that the Constitution assigns control over the military to these two coordinate branches but not to the judiciary. *See Rostker v. Goldberg*, 453 U.S. 57, 66-67 (1981); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability."); *Orloff*, 345 U.S. at 92 (declining to review challenge to commissioning decision because "Congress has authorized the President alone to appoint Army officers . . . .").

In this case, Congress has been engaged in the development of military HIV policy through oversight requests. For example, the National Defense Authorization Act ("NDAA") for Fiscal Year 2014 required DoD to provide a report to Congress concerning "personnel policies regarding members of the Armed Forces infected with [HIV] or Hepatitis B," including a description of deployment policies. *See* NDAA for Fiscal Year 2014, Pub. L. No. 113-66 § 572, 127 Stat. 672, 772. DoD provided this report in September 2014, explaining the bases for the policies set forth in DoDI 6490.07. *See* Report to Congressional Defense Committees on Department of Defense Personnel Policies Regarding Members of the Armed Forces with HIV or Hepatitis B (Sept. 2014)

(attached as Exhibit 2). More recently, the House Armed Services Committee, in connection with its consideration of the NDAA for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283, asked DoD to provide an update regarding "how current policies reflect the evidence base and medical advances in the field[] of HIV," with a specific request for DoD to address "[t]he feasibility of allowing an individual who is currently serving as an enlisted member of the Armed Forces to become a commissioned officer." *See* H.R. Rep. No. 115-200, at 148-49 (2017). DoD responded to this Congressional inquiry on August 2018 with a fulsome report on its HIV policies, including the Commissioning Policy. *See* Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human Immunodeficiency Virus: Report to the Committees on the Armed Services of the Senate and House of Representatives (Aug. 2018) (attached as Exhibit 3).[5] Given this ongoing dialogue, DoD is not acting alone in developing its HIV policies but is instead receiving tacit Congressional approval for those policies. The active involvement of both the Legislative and Executive Branches—the two branches of government in which control of military affairs is vested—thus provides additional justification for the conclusion that judicial scrutiny would not be appropriate.[6]

C. Rational basis review applies to Plaintiffs' equal protection challenge to the Commissioning Policy

[5] The 2014 and 2018 Congressional Reports are both in the public record. The Court is therefore permitted to take them into consideration when ruling on Defendants' Motion to Dismiss. *See Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006).

[6] Plaintiffs identify a "long list of challenges to accession, commission, assignment, promotion, and discharge regulations that courts have found to be justiciable." *See* Pls.' Opp'n at 10. Two of those cases involved claims that were subject to a higher level of scrutiny and thus presented claims that were stronger in nature than that presented by Plaintiffs here, *see Dillard v. Brown*, 652 F.2d 316, 318 (3d Cir. 1981) (claim for sex discrimination); *Serv. Women's Action Network v. Mattis*, --- F. Supp. 3d. ---, 2018 WL 2021220, at *1 (N.D. Cal. May 1, 2018) (same), while the remaining two cases also involved claims of sex discrimination and were brought in a jurisdiction that has not adopted the *Mindes* test, *see Doe I*, 275, F. Supp. 23d at 192; *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978).

Plaintiffs' Opposition further errs by encouraging the Court to ignore binding precedent and review the Commissioning Policy under strict scrutiny. *See* Pls.' Opp'n at 14 ("Plaintiffs ask this Court to probe beyond the surface of *Doe* [v. *University of Maryland Medical System Corporation*] in assessing the appropriate level of scrutiny in this case, and invite the Court to [apply a higher standard of review]."). The Fourth Circuit has spoken clearly as to the level of scrutiny that applies to Plaintiffs' claims, so the Court should reject Plaintiffs' invitation to depart from binding precedent.

As Defendants noted in their opening brief, the Fourth Circuit held in *Doe* that "alleged unequal treatment of HIV-positive" individuals is subject to rational basis review. 50 F.3d 1261, 1267 (4th Cir. 1995). Although Plaintiffs may quibble with the reasoning employed by the *Doe* court to reach that conclusion, this Court is bound by that precedent and must apply it unless and until it is overruled by the Fourth Circuit sitting *en banc* or by the Supreme Court. *See United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other [courts] unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." (internal quotation marks omitted)); *United States v. Brown*, 74 F. Supp. 2d 648, 652 (N.D. W. Va. 1998) ("[A] district court is bound by the precedent set by its Circuit Court of Appeals, until such precedent is overruled by the appellate court or the United States Supreme Court."). This is true even where the "logical underpinnings" for the Fourth Circuit's decision may have been eroded by time or by other higher court rulings. *See United States v. Danielczyk*, 791 F. Supp. 2d 513, 515-16 (E.D. Va. 2011), *rev'd on other grounds*, 683 F.3d 611 (4th Cir. 2012). Because the Fourth Circuit has held that rational basis review applies to equal protection challenges based on HIV status, this Court has no option but to likewise apply rational basis review.

Even if the Court had the discretion to revisit the Fourth Circuit's holding in *Doe*, the fact that the case was decided in 1995 and is thus, in Plaintiffs' view, outdated provides no reason to apply a heightened standard of review. Indeed, multiple courts since the *Doe* decision have similarly applied rational basis review to claims of HIV-based discrimination. *See Mofield v. Bell*, 3 F. App'x 441, 443 (6th Cir. 2001); *Johnson v. Robinson*, Case No. 15-CV-298-JPG-RJD, 2017 WL 5288190, at *4 (S.D. Ill. Nov. 13, 2017), *appeal filed*, No. 17-3426 (7th Cir. 2017); *Washington v. Albright*, No. 2:11-CV-618-TMH, 2011 WL 4345687, at *2 (M.D. Ala. Aug. 22, 2011), *report & recommendation adopted*, No. 2:11-CV-618-TMH, 2011 WL 4345681 (M.D. Ala. Sept. 16, 2011); *Werts v. Greenwood Cty. Det. Ctr.*, No. CIV. A. 4:08-1852-TLW-TER, 2008 WL 5378251, at *4 (D.S.C. Dec. 23, 2008); *Fox v. Poole*, No. 06-CV-148, 2008 WL 3540619, at *6 (W.D. N.Y. Aug. 12, 2008); *Pitre v. David Wade Corr. Ctr.*, No. Civ. A. 06-1802, 2008 WL 466160, at *5 (W.D. La. Feb. 14, 2008); *Perkins v. Kan. Dep't of Corr.*, No. CIV. A. 97-3460-GTV, 2004 WL 825299, at *9 (D. Kan. Mar. 29, 2004).

All of these decisions were issued well after 1996, the year in which Plaintiffs assert "everything changed" and medical advances "transformed the landscape of HIV treatment and prevention and radically shifted health outcomes for people living with HIV," *see* Compl. ¶ 19, and they thus demonstrate a continuing judicial consensus about the appropriate standard of review even as medical progress is made. Most notably, Plaintiffs—in the face of this overwhelming precedent—fail to identify a single case in which a court has applied a level of scrutiny other than rational basis, including cases that have been decided in recent years. Given the uniformity of precedent on this point over the course of the past few decades, the fact that the Fourth Circuit has not had occasion to revisit its ruling in *Doe* since it was issued in 1995 provides no justification to

disregard its holding with respect to the applicable standard of review for HIV-based discrimination claims.

Plaintiffs' remaining disagreements with *Doe* are equally unpersuasive. In particular, Plaintiffs reject the view expressed by the parties and the court in *Doe* that HIV is a disability. *See* Pls.' Opp'n at 12-14. But even if Plaintiffs' view were accepted as true, it would still not provide a basis for applying a heightened standard of review. As Defendants noted in their opening brief, any notion of disability aside, HIV is still an infectious disease, and courts have consistently held that alleged discrimination based on disease and other medical conditions are subject to rational basis review. *See, e.g.*, *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (obesity); *Adell v. Hepp*, No. 17-CV-448-JPS, 2017 WL 1393728, at *3 (E.D. Wis. Apr. 18, 2017) (bowel disease); *Brandon v. Carmichael*, No. 15CV2814 WQH (PCL), 2016 WL 8731115, at *4 (S.D. Cal. Oct. 28, 2016), *report & recommendation adopted*, No. 15-CV-2814-WQH-PCL, 2016 WL 7030365 (S.D. Cal. Dec. 2, 2016) (hepatitis); *Mlaska v. Schicker*, No. 15-CV-00918-MJR, 2015 WL 6098733, at *11 (S.D. Ill. Oct. 16, 2015) ("medical conditions" generally). Thus, assuming HIV is not a disability, discrimination claims based on HIV status should still be subject to rational basis review, just like claims alleging discrimination based on other types of diseases and medical conditions.

Even if there were not binding precedent governing the applicable standard of review in this case, the Court would nevertheless want to proceed with caution in considering Plaintiffs' request to find HIV-positive individuals to constitute a suspect class. As the Supreme Court has counseled, "respect for the separation of powers" should make courts "reluctant" to establish new suspect classes, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), and this admonition "has even more force when the intense judicial scrutiny would be applied to the

'specialized society' of the military," *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Where the Fourth Circuit in *Doe* has spoken directly to the appropriate standard of review for allegations of HIV-based discrimination, which is binding on this Court, there is no reason for the Court to deviate from this precedent. Rational basis review accordingly applies to Plaintiffs' claim.

D. The Commissioning Policy satisfies rational basis review

The Commissioning Policy easily passes constitutional muster under rational basis review. As an initial matter, Plaintiffs have failed in their Complaint and in both of their briefs to explain how the Commissioning Policy was the result of "intentional or purposeful discrimination" against those who are HIV positive. *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) ("To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of *intentional or purposeful discrimination*." (emphasis added)). Their failure to identify any purposeful discrimination by DoD alone means that their equal protection challenge should be dismissed at this threshold stage of the analysis.

Even if Plaintiffs could satisfy this threshold requirement, the Commissioning Policy satisfies rational basis review. Plaintiffs do not—and cannot—contest that DoD has a legitimate interest in ensuring that Service members are medically fit and ready to serve. *See* Defs.' Opp'n and Mot. to Dismiss at 27. To meet this goal, DoD has established criteria that it applies to all persons under consideration for appointment, enlistment, or induction into the Military Services. *See* DoD Instruction ("DoDI") 6130.03 § 1.2(c). These criteria include being free of contagious diseases, being free of medical conditions that may require excessive time lost from duty due to treatment or hospitalization, being medically capable of adapting to the military environment

without geographical limitations, and being medically capable of performing duties without aggravation of existing physical conditions. *Id*. DoD has classified HIV as a "systemic condition" that makes an individual incapable of meeting these criteria. *Id*. § 5.23(b).

Although Plaintiffs accuse DoD of failing to take into account medical advancement in the treatment of HIV when making this analysis, *see* Pls.' Opp'n at 16-17, that is plainly not the case. Indeed, in its August 2018 Congressional Report, DoD acknowledged the "medical consensus that modern medication management of HIV infection produces very positive results." DoD Congressional Report at 9. Nevertheless, DoD has determined that "in the context of the extraordinary challenges of many aspects of military service, including potential mission needs under highly stressful combat conditions or in extremely austere and dangerous places worldwide, even well-managed HIV infection carries risks of complications and comorbidities." *Id*. Such risks include "immune system dysregulation, neurocognitive impairments . . ., disrupted medication maintenance and necessary monitoring for potential side-effects, possible military vaccination adverse effects, and potential communicability, including in circumstances of buddy-aid to a seriously injured member in combat and emergency whole blood battlefield transfusions." *Id*. Thus, even with the significant advances in HIV treatment, the unique demands and challenges of military service have led DoD to determine that it is necessary to generally prohibit HIV-positive persons from being appointed, enlisted, or inducted into the Service. *See Gilligan*, 413 U.S. at 10 (observing that the military makes "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments").

It is DoD's application of this bar on accessing HIV-positive individuals in the context of Service Members who wish to become commissioned officers—the Commissioning Policy—that

precludes Plaintiff Harrison from being commissioned as a JAG officer and thus is the challenged policy in this case. As Defendants have previously explained, commissioning as an officer involves a change in a Service member's status, for which the member must satisfy a new set of criteria. *See* Defs.' Opp'n and Mot. to Dismiss at 29. Because commissioning as an officer involves taking on a new set of duties and leadership responsibilities, DoD has reasonably determined that the HIV accession standards should apply to this process just as they do to individuals who are seeking to enlist for the first time.[7] *Id*. As DoD explained in its Congressional Report, "in the case of an enlisted member seeking appointment as a commissioned officer, the accession standards are the appropriate ones to apply because it is a new position, involving a whole new set of duties and responsibilities and new training and mentorship." DoD Congressional Report at 23.

Although DoD recognizes that, as a general matter, there are benefits in retaining Service members once they have been fully trained and gain a certain amount of experience, these considerations do not apply in the context of an enlisted Service member seeking to commission as an officer because the commissioned position will involve a new skill set and defined responsibilities. *Id*. DoD accordingly has articulated a reasonable basis for the Commissioning Policy, and it survives rational basis review. *See Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir.

[7] In their Opposition, Plaintiffs badly misconstrue Defendants' point in this regard, claiming that Defendants have argued that HIV-positive individuals cannot be of good moral character, exercise leadership responsibilities and privileges, administer oaths to enlisted service members, or swear a required oath. *See* Pls.' Opp'n at 17-18. This is not the case. Defendants simply pointed out the statutorily proscribed differences between commissioned officers and other enlisted Service members to illustrate the meaningful difference between the two types of positions generally, which is why DoD applies the same accessions criteria to already-enlisted individuals who are commissioning as they would to individuals who are enlisting for the first time. *See* Defs.' Opp'n and Mot. to Dismiss at 28-29. Defendants' argument in this regard cannot fairly be read in the manner suggested by Plaintiffs.

2013) ("[T]he fit between the enactment and the public purposes behind it need not be mathematically precise. As long as [DoD] has a reasonable basis for adopting the classification, which can include rational speculation unsupported by evidence or empirical data, the [challenged policy] will pass constitutional muster.").

In their Opposition, Plaintiffs contend that they can overcome rational basis review through factual allegations about current medical treatment for HIV-positive individuals, which they contend that Defendants cannot disprove. *See* Pls.' Opp'n at 16-17 (asserting that even "when Defendants are legitimately permitted to argue the facts [about medical treatment for HIV-positive individuals], they ultimately will lose those arguments"). But this misapprehends rational basis review; policy choices, such as the Commissioning Policy, are "not subject to courtroom fact-finding and may be based on rational speculation supported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) ("[T]he State has no obligation to produce evidence to support the rationality of [a classification], which may be based on rational speculation unsupported by any evidence or empirical data." (internal quotation marks omitted)). Defendants thus need not demonstrate that their policy is the only medically acceptable outcome possible; indeed, Defendants have expressed their general agreement with Plaintiffs' assertion that modern medicine has made great strides in HIV treatment. *See* DoD Congressional Report at 9. Rather, the Commissioning Policy is simply a reflection of what DoD has determined is the best way to square that medical reality with the reality of military life, with its attendant unique demands and challenges. *See Rostker*, 453 U.S. at 64-65 (noting that there is "perhaps . . . no other area" where the Supreme Court has shown the political branches "greater deference" than when reviewing military personnel matters). DoD's determination in this regard need only be rationally related to

the legitimate interest of ensuring that all Service members are medically fit and capable of serving. Because the Commissioning Policy meets this standard, Plaintiffs' equal protection challenge should be dismissed.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support of Motion to Dismiss, the Court should deny Plaintiffs' Motion for a Preliminary Injunction and grant Defendants' Motion to Dismiss.

DATE: September 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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