IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KEVIN DEESE, *et al.*,

Plaintiffs,

v.

MARK T. ESPER,
Secretary of Defense, *et al.*,

Defendants.

Case No. 1:18-cv-02669-RDB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Constitution vests "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" exclusively in the Legislative and Executive Branches. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Adhering to its constitutional responsibility to compose a lethal and ready military force of individuals who are medically fit and capable of serving, the Secretaries of Defense, the Navy, and the Air Force have established evidence-based policies governing the accession and retention of individuals who have tested positive for the human immunodeficiency virus ("HIV"). As most-recently reported to Congress in August 2018, and recognizing the medical consensus about the positive results from modern medication management of HIV infection, these policies currently prohibit individuals who are HIV-positive (among numerous other systemic medical conditions) from commissioning as officers, absent a waiver. Exhibit 1 (Aug. 2018 Department of Defense Report to the Committees on the Armed Services of the Senate and House of Representatives).

Plaintiffs are graduates of military service academies who tested positive for HIV prior to graduation. In this lawsuit, they claim that the policies and decisions concerning HIV that precluded their commissioning as officers and led to their separation violate their rights to due process and equal protection. Plaintiffs also advance five separate counts under the Administrative Procedure Act, 5 U.S.C. §§ 500-706 ("APA"), blending a procedural challenge with substantive challenges to the policies precluding commissioning HIV-positive officers. Finally, Plaintiff Doe purports to challenge these military policy judgments via an independent

cause of action for "equitable estoppel," and seeks a declaratory judgment that he actually commissioned as an officer in the Air Force upon graduation, which cannot be revoked.[1]

To be sure, although they cannot dispute that HIV remains an incurable chronic illness demanding medical management and strict adherence to treatment, *see* ECF 33, ¶¶ 3, 31, Plaintiffs offer many valid points about advancements in health care and the potential fitness of those living with HIV today for some military duties. Those points – and Plaintiffs' unquestioned patriotism and desire to serve notwithstanding – their legal challenges to the military's accession policies in this case should be dismissed or summary judgment should issue in favor of Defendants.

At the threshold, Plaintiffs' essential claim that the restrictions on HIV-positive service members becoming commissioned officers are unlawful involves a quintessential military judgment about qualifications for appointment and is thus non-justiciable. It is well-settled that the balancing of the rights of individual service members with the needs of the Armed Forces are policy decisions subject to the civilian control and electoral accountability of the Legislative and Executive Branches. And in this case – despite the ongoing dialogue between the Department of Defense and Congress on this very issue reflected in part by Exhibit 1 – Plaintiffs ask this Court

[1]Two similar cases are pending in the Eastern District of Virginia. In *Harrison, et al. v. Spencer, et al.*, Case No. 1:18-cv-00641-LMB, an active duty sergeant in the U.S. Army who was previously diagnosed as HIV-positive is challenging under the Equal Protection Clause the Department of Defense's policy (and an Army regulation) precluding HIV-positive service members from commissioning. The case proceeded through discovery and dispositive motions and a bench trial have been stayed in light of *Roe v. U.S. Dep't of Defense*, Case No. 1:18-cv-01565-LMB-IDD. *Roe* involves two HIV-positive active duty members of the Air Force (along with an organizational plaintiff) challenging Air Force and Department of Defense policies and decisions concerning their fitness for duty and their ability to deploy worldwide. In March 2019, the *Roe* plaintiffs' motion for a preliminary injunction was granted in part. *See Roe v. Shanahan*, 359 F. Supp. 3d 382 (E.D. Va. 2019). The government appealed to the Fourth Circuit and a panel recently affirmed the decision. *See Roe v. U.S. Dep't of Defense*, ___ F. 3d. ___, 2020 WL 110826 (Jan. 10, 2020).

to step in now, substitute its judgment for that of the political branches, and decide who should be medically qualified to receive an officer's commission. For numerous reasons, such a change in policy should emanate from the political branches and not this Court. *See generally Thomasson v. Perry*, 80 F.3d 915, 925-26 (4th Cir. 1996); *accord, e.g., Mayor and City Council of Baltimore v. Azar*, 392 F. Supp. 3d 602, 606 (D. Md. 2019) ("It is not the role of this Court to become involved in these policy questions. Quite simply, the executive branch of government is entitled to deference with respect to its administrative orders.").

In addition, the record also demonstrates that, apart from HIV, Plaintiff Deese also has been diagnosed with a different disqualifying medical condition. Therefore, he cannot demonstrate that a favorable ruling against Defendants as to his claims about HIV policy is likely to redress his alleged injury, as is required for him to establish constitutional standing.

But even if the Court concludes that some of Plaintiffs' claims may be justiciable, and with one exception[2]: (1) their equal protection and due process claims should still be dismissed as a matter of law because the challenged policy[3] survives rational basis review and because they

[2]As discussed below, apart from the primary claim that HIV should not be one of the 29 systemic medical conditions that generally preclude commissioning, Plaintiff Doe alleges that his particular separation from active duty as a student at the Air Force Academy, without being processed through the Disability Evaluation System ("DES"), violated the military's own regulations. *See, e.g.*, ECF 33, ¶¶ 127, 139, 155; Request for Relief, ¶ 12. Defendants agree that Plaintiff Doe (and Plaintiff Deese) should have been processed through the DES and – after the Complaint was filed – jointly moved the Court to stay the proceedings for this purpose. *See* ECF 22, ¶ 3; ECF 24, ¶ 2; ECF 26, ¶ 2; ECF 31. That process had not been completed when the stay was lifted. Nevertheless, Defendants have no objection to the Court ordering a limited remand (either before or after adjudicating the other claims) or appropriate injunctive relief to see this process through to completion.

[3]Plaintiffs cite in their Amended Complaint a veritable laundry list of military instructions, directives, and policies they say are "relevant to" HIV-positive service members. *E.g.*, ECF 33, at ¶ 26. They only have Article III standing, however, to challenge the particular policies or decisions that caused the harm of which they complain, i.e., their failure to receive commissions as officers in the Navy and Air Force and their ensuing separations. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lewis v. Casey*, 518 U.S. 344, 358 n.6 (1996).

have no protected liberty or property interest; (2) their procedural APA claims fail because the challenged rule was exempt from notice-and-comment rulemaking as a "general statement of policy" or an "interpretive rule" under 5 U.S.C. § 552(b)(3)(A), or because it "involve[s] a military or a foreign affairs function," *id.* § 553(a)(1); (3) Defendants' policies and decisions challenged in this case should not be disturbed under the deferential scope of substantive APA review, since they were the product of reasoned decision making and were not arbitrary or capricious; (4) there is no independent cause of action for "equitable estoppel," but even if such a remedy ever could be applied against the federal government (*contra OPM v. Richmond*, 496 U.S. 414, 419, 423 (1990)), it does not apply to the policy decisions challenged here, nor can Plaintiff Doe establish the elements of such a claim, *e.g., Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003); and (5) Plaintiff's Doe's claim for declaratory relief is factually unfounded and legally flawed since all of the ministerial steps necessary to commission were not completed and he was well-aware that he could not commission without an exception to policy being approved.

Accordingly, Plaintiffs' claims should be dismissed as non-justiciable, for failing to state actionable claims upon which relief may be granted by this Court, or summary judgment should issue in favor of Defendants as to all claims not dismissed.

II. FACTS AND PROCEDURAL HISTORY

A. DEFENDANTS' POLICIES GOVERNING THE APPOINTMENT OF SERVICE MEMBERS WITH MEDICAL CONDITIONS, INCLUDING HIV

The purpose of the Armed Forces is to fight and win the Nation's wars. All service members must be physically and mentally able to execute their duties and responsibilities, even while exposed to extreme danger, emotional stress, and harsh environments. Congress has provided broad authority to the Department of Defense ("DoD") to establish the standards for the accession and retention of service members and DoD has traditionally imposed demanding

standards of physical and mental health and readiness for military service. Congress has restricted the appointment of commissioned officers – under regulations prescribed by DoD – to persons who, inter alia, are "physically qualified for active service." 10 U.S.C. § 532(a)(3).

DoD's regulations – promulgated pursuant to notice and comment rulemaking[4] – expressly incorporate DoD Instruction ("DoDI") 6130.03 as the basic medical criteria for eligibility. 32 C.F.R. § 66.6(b)(5)(i). DoDI 6130.03 provides the medical standards that must be satisfied by individuals for appointment, enlistment, or induction into the military services. ECF 1-1.[5] Those standards include ensuring that each individual be: (1) Free of contagious diseases that may endanger the health of other personnel; (2) Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness; (3) Medically capable of satisfactorily completing required training and initial period of contracted service; (4) Medically adaptable to the military environment without geographical area limitations; and (5) Medically capable of performing duties without aggravating existing physical defects or medical conditions. DoDI 6130.03 ¶ 4(c) (ECF 1-1, at 3).[6]

Individuals who do not meet these physical and medical standards may request a medical waiver, and the "Secretaries of the Military Departments" are authorized to waive "the standards in individual cases." *Id.* Encl. 2 ¶ 3(b) (ECF 1-1, at 8); *accord* 32 C.F.R. § 66.7(a) (waiver determinations are made "by the Secretary of the Military Department"). DoDI 6130.03

[4] *See, e.g.,* 80 Fed. Reg. 16269-01, 2015 WL 1349361 (March 27, 2015) (issuance of interim rule and inviting comment on, inter alia, medical qualification standards that were in existence at the time of Plaintiffs' separations).

[5] DoDI 6130.03 was updated on May 6, 2018. *See* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883. Plaintiffs attached to their complaint the version in effect at the relevant time. ECF 1-1.

[6] "ECF" page references refer to the page numbers imprinted by the Court's CM/ECF system.

identifies medical conditions across different body systems considered to be disqualifying for military service. *Id.* Encl. 4 (ECF 1-1, at 11-51). Among the 19 "Systemic Conditions" that are disqualifying is laboratory evidence of HIV infection. *Id.* ¶ 24(b) (ECF 1-1, at 39).[7]

Beyond these general standards, DoD and the military services have specific policies governing service members with HIV. DoDI 6485.01 (ECF 1-3) sets forth DoD's current policy for the identification, surveillance, and management of service members infected with HIV, as well as for the prevention of further transmission of the disease.[8] Reiterating the relevant portion of DoDI 6130.03, individuals with laboratory evidence of HIV infection are ineligible for "appointment, enlistment, pre-appointment, or initial entry training" in the military. *Id.* ¶ 3(a) (ECF 1-3, at 2). Thus, individuals who are HIV-positive are precluded from enlisting in the military and from being appointed to positions within the military, including appointment as a commissioned officer. *Id.*; *Roe*, ___ F.3d ___, 2020 WL 110826, at *2 (4th Cir. Jan. 10, 2020) ("The United States military does not permit HIV-positive individuals to enlist, nor does the military allow a servicemember who acquired HIV after joining to be appointed as an officer.").

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[7]Far from "singling out service members living with HIV," as Plaintiffs contend (ECF 33, ¶ 13), DoD policies also disqualify from military service individuals with such conditions as "inflammatory bowel disease," "seasonal allergic conjunctivitis," and allergies to food and stinging insects. *See generally* DoDI 6130.03, Encl. 4, ¶¶ 3-31 (ECF 1-1, at 12-51).

[8]DoD first issued a uniform policy on HIV for the military services on October 24, 1985. *See generally* D. BURELLI, CONG. RESEARCH SERVICE, ACQUIRED IMMUNE DEFICIENCY SYNDROME AND MILITARY MANPOWER POLICY, IB87202 (Feb. 12, 1988) (Exh. 3). For over 30 years, the policy has consistently provided for HIV testing of all recruits and service members and directed that HIV-positive individuals are not eligible for appointment or enlistment. As supplemented by additional memoranda and later by DoDI 6485.1 (also codified for a time as 32 C.F.R. Part 58), and then DoDI 6485.01 in 2006, the policy also has provided guidelines on the assignment of active duty personnel who are infected, disease surveillance and health education, retention, separation, safety of the blood supply, and limitations on the use of information. *See also* DEFENSE HEALTH AGENCY, *MEDICAL SURVEILLANCE MONTHLY REPORT*, "REVIEW OF THE U.S. MILITARY'S HUMAN IMMUNODEFICIENCY VIRUS PROGRAM: A LEGACY OF PROGRESS AND A FUTURE OF PROMISE," Vol. 24, No. 9, at 2-6 (Sept. 2017) (Exh. 5).

As with all other disqualifying medical conditions, applicants may be considered for a waiver pursuant to DoDI 6130.03.

All applicants for appointment, enlistment, and induction are screened for HIV infection, and all personnel are routinely screened every two years. *Id.* Encl. 3 ¶ 1(a), (c) (ECF 1-3, at 7). Active-duty and reserve component service members who test positive are not involuntarily separated from the military, but are instead referred for "appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses. . . ." *Id.* Encl. 3 ¶ 2(c)-(d) (ECF 1-3, at 8).

The military services have established HIV-related policies consistent with DoD instructions. As relevant here, the Secretary of the Navy issued SECNAV Instruction 5300.30E (ECF 1-4), and the Air Force issued Instruction 44-178 (ECF 1-11).

The Navy's instruction (which also covers Hepatitis B and Hepatitis C) precludes the appointment or enlistment of applicants for service who are HIV-positive. SECNAV 5300.30E, ¶ 3(a) (ECF 1-4, at 3). The instruction explains:

> Individuals confirmed HIV antibody positive, or who have evidence of chronic HBV or HCV infection are not eligible for military service because:
>
> (1) The condition existed prior to appointment or enlistment.
>
> (2) Individuals with HIV may suffer potentially life threatening reactions to some live-virus immunizations administered at basic training.
>
> (3) HIV antibody positive individuals and individuals with chronic HBV or HCV infection are not able to participate in battlefield blood donor activities or military blood donation programs.
>
> (4) The [Department of the Navy] will avoid current and future medical costs associated with these infections, and reduce the possibility that the individual will be unable to complete the initial service obligation.

Id. ¶ 4(a) (ECF 1-4, at 5).

Like the DoDI, it also requires routine testing and, if evidence of infection is detected, personnel "shall be referred for medical evaluation regarding continued service and appropriate treatment in the same manner as personnel with other progressive illnesses." *Id.* ¶ 3(b)-(c) (ECF 1-4, at 3-4). Specific to Plaintiff Deese's situation, the instruction provides:

> (3) USNA midshipmen shall be processed for separation from the Naval Academy and discharged when confirmed HIV positive, or when diagnosed with chronic HBV or HCV infection. SECNAV may elect to delay separation to the end of the current academic year. A midshipman who is otherwise qualified and granted such a delay in the final academic year may be graduated without commission and thereafter discharged. An honorable discharge shall be issued if the sole basis for discharge is HIV seropositivity or chronic HBV or HCV infection. Recoupment of educational expenses shall be in accordance with existing statutory requirements and Navy personnel policies.

Id. ¶ 4(c)(3) (ECF 1-4, at 7).

For service members infected after induction, the Navy's instruction also provides for appropriate medical evaluation and treatment. *Id.* ¶ 8 (ECF 1-4, at 10). Expressly recognizing that the Navy already invested training these members and that "normal daily activities" do not pose a "demonstrated risk of transmission," the Navy permits personnel with "controlled HIV disease" to be considered for assignments overseas or on "large ship platform tours," but not for "overseas individual augmentee (IA) tours given the austere environments where they potentially could be placed." *Id.* ¶ 9 (ECF 1-4, at 11-12); *see also* Exh. 5, at 5 (discussing the Navy's progress toward "less absolute" deployment limitations, in view of the evolution and management of HIV infection).

The Navy's instruction places the overall responsibility for its HIV policy and execution on the Assistant Secretary of the Navy for Manpower and Reserve Affairs. *Id.* ¶ 17 (ECF 1-4, at 23).

The Air Force's HIV instruction "outlines the Air Force [HIV] Program including responsibilities and procedures for identification, surveillance, and administration of Active Duty Air Force personnel." AFI 44-178, at 1 (ECF 1-11). The Air Force program screens "[a]ll applicants for enlistment or appointment . . . for evidence of HIV infection," and those infected "are ineligible for enlistment or appointment to the [Active Duty Air Force] and the [Air Reserve Component]. *Waiver for HIV infection is not authorized*." *Id.* at ¶ 2.2.1 (ECF 1-11, at 6) (emphasis supplied).

Active duty personnel are screened every two years (or for clinically indicated reasons) and, upon a positive test result, receive counseling by a physician, and a clinical evaluation for continued military service. *Id.* at ¶¶ 2.3, 2.4 (ECF 1-11, at 6-7). Members who are able to perform their duties may not be separated from service solely on the basis of laboratory evidence of HIV. *Id.* at Att. 9 (ECF 1-11, at 37); *Roe*, 2020 WL 110826, at *2. Those who are not so able are covered by AFI 36-3212. *Id.* at ¶ A.9.2.1 (ECF 1-11, at 37).

Specific to Air Force Academy cadets like Plaintiff Doe, the instruction requires HIV screening as part of the processing for entry into the Academy "and again as part of their medical screening prior to appointment as officers." *Id.* at Att. 2, ¶ A.2.3 (ECF 1-11, at 16). If officer applicants become ineligible for appointment because of evidence of HIV infection, the instruction provides for the following procedure:

> A2.5.3. Separate Air Force Academy cadets . . . from the Academy . . . . The superintendent of the Academy may delay separation to the end of the current academic year. A cadet granted such a delay in the final academic year, who is otherwise qualified, may graduate without commission and then is discharged. If the sole basis for discharge is serologic evidence of HIV infection, issue an honorable discharge.

Id. at ¶ A2.5.3 (ECF 1-11, at 16).

From the time they were first promulgated in the mid-1980s until the most recent report to Congress in August 2018 (the most-recent report prior to Plaintiffs' discharges was submitted in September 2014, Exh. 2), several critical rationales have motivated DoD's HIV policies. The policies are based on the current medical evidence about how HIV is contracted and transmitted to uninfected service members, the ability of an HIV-positive service member to continue service without exacerbating his or her condition or risking the military mission, the impact of having HIV infected personnel on commands, and the safety of the military blood supply. Exh. 1, at 4, 19-20; Exh. 2, at 2, 9-11; Exh. 5, at 2 (despite the dramatic change of the impact of HIV over the past 30 years, HIV infection "remains a threat to the Department of Defense" because "there is an appreciable impact on military mission and troop readiness because of the incurable nature of the infection, the need for lifelong therapy, the high cost of treatment and the limitations to duty assignments . . . .").

The 2018 report recognized that with modern antiretroviral therapy, people living with HIV with an undetectable viral load have a "negligible risk" of sexually transmitting the disease, but it may take as long as six months for someone's viral load to reach this level. Moreover, in the context of protecting the blood supply (which, in this context, may involve "battlefield blood transfusions"), "an 'undetectable' viral load that confers a 'negligible risk' of HIV transmission has no application in the setting of blood transfusion or needlestick (occupational) exposures." Exh. 1, at 20; *see also id.* at 21-22; Exh. 2, at 6 (the 2014 report noting the then most-recent recommendations of the U.S. Preventive Services Task Force). From a foreign policy perspective, the policies also must respect the laws of host nations where U.S. forces are deployed. Exh. 1, at 24.

On the question of why – despite modern medical management of HIV – the needs of the Armed Services in 2018 continue to result in the disallowance of HIV-infected individuals from enlisting or commissioning, DoD explains:

> Supported by the work of the medical and personnel experts of the [Accession Medical Standards Working Group], the DoDI 6130.03 disqualification for accession for HIV infection does not reflect disagreement with the medical consensus that modem medication management of HIV infection produces very positive results. However, 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, possibly with latent effects, immune system dysregulation, neurocognitive impairments (NCI) (discussed further below), 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. In view of these risks, the needs of the Service incline toward maintaining the longstanding medical standard disallowing accession of HIV infected individuals.

Id. at 9.

The costs of medical treatment has been another reason cited by the Accession Medical Standards Working Group for maintaining the disqualification standard. In a September 2015 paper produced in discovery in the *Harrison* case, *see* n.1, a lifetime cost for HIV treatment for an individual was cited as $379,668 in 2010 dollars. *See* Exh. 4.

Finally, it bears mention that, in addition to the frequent reports requested by Congress, the military's policies themselves are required to be reviewed and updated frequently. The Heads of the DoD Components are required to insure that each issuance for which they are responsible is reviewed annually.

B. PLAINTIFFS ARE DIAGNOSED WITH HIV PRIOR TO GRADUATION AND ARE INELIGIBLE TO RECEIVE OFFICERS' COMMISSIONS

1. PLAINTIFF DEESE IS DIAGNOSED WITH BOTH THROMBOCYTOPENIA AND HIV WHILE A MIDSHIPMAN

Plaintiff Deese was admitted to the Naval Academy in July 2010 as an Additional Appointee. *See* ECF 33, ¶¶ 35-36. He performed well academically and his medical qualifications were uncomplicated until December 2013. At that time, the Chief of the Navy's Bureau of Medicine and Surgery (BUMED), noted that Plaintiff Deese did not meet established physical standards for commissioning due to laser eye surgery, but that a waiver of the standards was recommended. N.A.R. 015.[9]

In his final semester before graduation, Plaintiff learned that he had been diagnosed as HIV positive and consequently, would not be commissioned as an officer. ECF 33, ¶ 42. Plaintiff also was diagnosed with thrombocytopenia (a low platelet count), another disqualifying medical condition. N.A.R. 016; DoDI 6130.03, Encl. 4, ¶ 23(b) (ECF 1-1, at 39). BUMED did *not* recommend a waiver of the physical standards. N.A.R. 016. Plaintiff was permitted to graduate from the Naval Academy in May 2014. N.A.R. 013-014; ECF 33, ¶ 45.

In October 2014, the Academy's Superintendent forwarded to the Assistant Secretary of the Navy for Manpower and Reserve Affairs BUMED's letter regarding Plaintiff Deese's inability to meet commissioning standards. N.A.R. 020. The Superintendent recommended at that time that Plaintiff receive an honorable discharge, "due to [his] history of thrombocytopenia and V08 [asymptomatic HIV,] medical conditions which would impair his performance of duty as a commissioned Naval officer." *Id.*

[9]Citations to "N.A.R." refer to the Navy's administrative record filed under seal with the Court at ECF 38.

Plaintiff Deese avers in his Amended Complaint that, while a decision on his separation remained pending with the Navy for several years, he learned more about how to advocate for himself as a person living with HIV. ECF 33, ¶ 48. He obtained several recommendations to waive the medical standards for his commissioning, *id.* ¶ 50-52, and on October 27, 2016, he sent a formal request to the Secretary of the Navy (through the Academy Superintendent) for waivers allowing him to commission. *Id.* ¶ 53; N.A.R. 007-012.

Revisiting his prior recommendation, in November 2016, the Academy Superintendent endorsed Plaintiff Deese's request and recommended an exception to policy to allow him to commission, despite being HIV-positive. N.A.R. 005. The endorsement cited the policies reviewed in the 2014 Report to Congress (Exh. 2), emphasizing the objective of retaining members who acquire HIV but are still capable of performing their duties. *Id.*; ECF 33, ¶ 55. Plaintiff Deese also sought the assistance of his home state Senators in connection with his request. N.A.R. 025-039.

On March 15, 2017, the Assistant Secretary of the Navy for Manpower and Reserve Affairs disapproved the Superintendent's request to allow Plaintiff Deese to commission. N.A.R. 004. The disapproval noted the two disqualifying conditions (thrombocytopenia and HIV), explaining that "[o]ne of the two conditions is non-waiverable pursuant to [DoDI 6485.01] and the other condition could place him in extraordinary risk should he be injured." *Id.* The Assistant Secretary of the Navy for Manpower and Reserve Affairs also indicated that the decision was based upon "the advice of [BUMED] and [his] own review of the case." *Id.* Plaintiff Deese was notified of his honorable discharge in May 2017. N.A.R. 001; ECF 33, ¶ 56.

2. PLAINTIFF DOE IS DIAGNOSED WITH HIV DURING HIS SECOND YEAR AT THE AIR FORCE ACADEMY

Plaintiff Doe enlisted in the Air Force as a Space Systems Operations Apprentice in January 2009. ECF 33, ¶ 65. By July 2011, he had been promoted to the grade of Senior Airman (E-4). *Id.* ¶ 66. Doe's term of enlistment ran until January 2015; however, he became a U.S. Air Force Academy cadet on June 28, 2012. *See id.* ¶ 67.

According to his Amended Complaint, Doe was diagnosed with HIV on February 28, 2014, after a routine physical. *Id.* ¶ 68. A medical evaluation board was convened to assess his qualifications for continued service and, upon completion thereof in June 2014, he was returned to duty with a limitation code of C-2. *Id.* ¶ 68-69; A.R. 012.[10] Plaintiff Doe highlights the divergent accession and retention standards, cited above, noting that Air Force Academy "officers were confused about the applicable standard because . . . 'there was no verbiage specific to prior-enlisted cadets'" (who were still in their term of enlistment as Academy cadets when diagnosed) like himself. ECF 33, ¶¶ 70-71. Doe continued his studies at the Academy for the balance of the 2014-15 academic year as any other cadet.

After his term of enlistment ended some nine months prior, in September 2015, Doe received a memorandum from the Academy notifying him that his disenrollment was being proposed because of his HIV status. A.R. 015, 018. Through counsel, and relying upon AFI 44-178 (ECF 1-11) and DoDI 6485.01 (ECF 1-3), Doe requested a waiver to allow him to complete his studies at the Academy and to request an "exception-to-policy" from the Undersecretary of Defense for Personnel and Readiness to allow for his appointment as a commissioned officer. A.R. 022. Doe's request received the support of the Director of the Air Force's HIV Medical

[10]Citations to "A.R." refer to the Air Force's administrative record filed under seal at ECF 39.

Evaluation Unit (A.R. 016; ECF 33, ¶ 78), the Commandant and Vice Commandant of Cadets at the Academy, as well as his entire chain-of-command (A.R. 024), and the Academy's Chief of Aerospace Medicine and its Command Surgeon/Surgeon General. A.R. 014.

Notably, despite their support for his request, officials demonstrated their awareness of the applicable policies and waiver authorities. For example, the Chief of Aerospace Medicine explained that "policy directs discharge of this cadet and that commissioning is disallowed." A.R. 017. He also cited the applicable portion of AFI 44-178 for cadets, permitting a waiver of dismissal by the Academy Superintendent "through degree completion," and permitting the cadet to "graduate without commission" before being discharged. *Id.* Finally, the Chief of Aerospace Medicine indicated that the Undersecretary of Defense was the appropriate authority for an exception-to-policy, but noted that there was no precedent therefor. *Id.*

Sometime between September and December 2015, the Superintendent of the Air Force Academy waived the accession standards in AFI-44-178, ¶ A.2.5.3, to permit Doe to graduate in June 2016. A.R. 012, ¶ 2; A.R. 013, ¶ 2; A.R. 014, ¶ 1.

In December 2015, following the recommendation of the Commandant of Cadets, the Superintendent of the Air Force Academy transmitted the recommendation for Doe to receive an exception-to-policy to permit his commissioning. ECF 33, ¶ 83; A.R. 012-14.

Plaintiff graduated from the Air Force Academy on June 2, 2016, with a Bachelor's of Science degree, ECF 33, ¶ 85, but did not go on to commission into officer status. Plaintiff instead remained in a cadet status pending approval or disapproval of his request for an exception-to-policy. *Id.* ¶ 90.

The record reflects that, once at Pentagon-level review, the Air Force considered two courses of action to propose to the Secretary of the Air Force in response to Doe's request. A.R.

003, 005. As drafted by the Deputy Assistant Secretary for Force Management Integration, the first option was for the Secretary to waive the standards set forth in AFI 44-178, ¶ 2.2.1 to allow Doe to commission and pursue a request to the Undersecretary of Defense for Personnel and Readiness to grant an exception to the accession policy in DoDI 6485.01. *Id.* The second option originally was not to seek an exception to the policy and separate him with an honorable discharge. *Id.* After further discussion with the Undersecretary of the Air Force, the second option was augmented to include waiving the financial liability for tuition at the Academy for the extra academic year Doe was provided due to administrative error, and also to facilitate Doe's hiring as a civilian under a non-competitive hiring authority. *Id.*, ¶¶ 1, 3.

While Plaintiff Doe alleges he had advance notice of the Secretary's decision as early as September 21, 2016, ECF 33, ¶¶ 96, 99, on October 26, 2016, the Air Force Secretary's Office formally notified the Commander of the Air Force Academy that the request for an exception-to-policy was disapproved by the Secretary on September 28, 2016. *Id.* at ¶ 100; A.R. 001. The record also indicates that, by this time, Doe accepted civil service employment. A.R. 002.

III. STANDARDS OF REVIEW

A. MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

A federal court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102 (1998)). The requirement that the plaintiff establish subject-matter jurisdiction "as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 95 (internal quotations omitted). For that reason, "[t]he objection that a federal court

lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citing Rule 12(h)(3)). Questions of justiciability are typically reviewed under Rule 12(b)(1). *Martin v. Obama*, RDB-11-3444, 2012 WL 1380366, at *1 (D. Md. Apr. 18, 2012) (quoting *Taylor v. Kellogg Brown & Root Set-us., Inc.*, 658 F.3d 402, 412 (4th Cir. 2011)), *aff'd*, 474 F. App'x 396 (4th Cir. 2012).

A defendant may challenge subject-matter jurisdiction under Rule 12(b)(1) by contending "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Once a defendant makes this facial challenge to subject-matter jurisdiction, "the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991); *accord Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (and cases there cited). A plaintiff receives the same procedural protection as would be afforded under Rule 12(b)(6): "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).[11] In this case, Defendants assert that, even assuming the truth of Plaintiffs' factual allegations, their claims are not justiciable and they have not established subject-matter jurisdiction.

[11]Alternatively, a defendant may challenge subject-matter jurisdiction by claiming that the jurisdictional allegations of the complaint are not true. *Adams*, 697 F.2d at 1219. The plaintiff "is afforded less procedural protection" because the trial court may then go beyond the allegations of the complaint and resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits, depositions, or live testimony, without converting the motion to a summary judgment proceeding. *Kerns*, 585 F.3d at 192 (quoting *Adams*, 697 F.2d at 1219).

B. MOTION TO DISMISS FOR FAILURE TO STATE AN ACTIONABLE CLAIM

A motion to dismiss for failure to state a claim under Rule 12(b)(6) serves to test the legal sufficiency of the complaint. *E.g., Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," thereby "nudg[ing] their claims across the line from conceivable to plausible." *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Although courts must generally accept as true the allegations of a complaint, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "At bottom, determining whether a complaint states on its face a plausible claim for relief and therefore can survive a Rule 12(b)(6) motion will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief . . . ." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679) (internal quotation marks omitted).

C. MOTION FOR SUMMARY JUDGMENT IN ACTIONS BROUGHT UNDER THE ADMINISTRATIVE PROCEDURE ACT

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As to the counts in this case involving review of final agency action under the APA, however, the standard set forth in Rule 56(a) does not apply because of the limited role of a court in reviewing the administrative record. *See, e.g.,*

Roberts v. United States, 883 F. Supp. 2d 56, 62-63 (D.D.C. 2012). In this context, summary judgment effectively serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *See Richard v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C. Cir. 1977); *Johnson v. Sessions*, RDB-15-3317, 2018 WL 2762562, at *5 (June 8, 2018).

IV. ARGUMENT

A. THE ENTIRETY OF PLAINTIFFS' CHALLENGE TO DEFENDANTS' DECISIONS ABOUT WHICH INDIVIDUALS ARE QUALIFIED TO RECEIVE AN OFFICER'S COMMISSION IS NON-JUSTICIABLE

Courts extend great deference to the military when called to review the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which consist of "essentially professional military judgments." *Gilligan*, 413 U.S. at 10 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)); *accord Roe*, 2020 WL 110826, at *7 (quoting *Gilligan*). As the Supreme Court has repeatedly emphasized, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10; *see also North Dakota v. United States*, 495 U.S. 423, 443, (1990) (noting that when confronted with questions relating to military operations, courts "properly defer to the judgment of those who must lead our Armed Forces in battle"). "The laws and traditions governing th[e] [military] discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). Under certain circumstances, such as when a service member challenges his or her deployment or military duty assignment, this deference requires that courts treat such challenges as non-justiciable, even where a constitutional claim is raised. *See Orloff v. Willoughby*, 345 U.S. 83,

93-94 (1953) ("[I]t is not within the power of this Court . . . to determine whether specific assignments to duty fall within the basic classification of petitioner.").

Orloff – the Supreme Court's seminal case about the reviewability of military personnel decisions – has particular relevance here because the petitioner in *Orloff* contended that *the Army's decision not to grant him a commission* was "punish[ment] for [his] having claimed a privilege which the Constitution guarantees." *Id.* at 91. Yet the Court declined to compel the Army to issue a commission, concluding that "*[w]hether Orloff deserves appointment is not for judges to say*." *Id.* at 92 (emphasis added). Likewise, Plaintiffs' challenge here to Defendants' policy judgments about the medical qualifications for commissioning implicate the same concerns as in *Orloff* and preclude judicial review.

The Fifth Circuit provided a four-factor test as to the justiciability of challenges to military decision-making in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), a test which has been adopted and applied by the Fourth Circuit in *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985), and *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991), and which was just reaffirmed in *Roe*. *See* 2020 WL 110826, at *5. Pursuant to *Mindes*, assuming a challenger can satisfy the threshold elements of alleging a violation of a recognized constitutional right, a federal statute,[12] or a military regulation; and has exhausted available intraservice remedies, the Court weighs four factors: the nature and strength of the plaintiff's challenge; the potential injury to the plaintiff of withholding review; the degree of anticipated interference with the military function; and the extent to which military expertise or discretion is involved. *Mindes*, 453 F.2d at 201-02; *Roe*,

[12]The *Mindes* test also applies to APA claims against the military. *See Roe*, 2020 WL 110826, at *6; *Khalsa v. Weinberger*, 779 F.2d 1393, 1401 (9th Cir.), *aff'd*, 787 F.2d 1288 (9th Cir. 1985). The Ninth Circuit has held that equitable estoppel claims are not subject to the *Mindes* analysis. *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc).

2020 WL 110826, at *5-6 (also noting the parallels between the *Mindes* framework and application of the traditional factors for awarding preliminary injunctive relief).

With respect to the first factor, in the face of the detailed, longstanding, and evidenced-based explanations provided for the rules, policies, and decisions at issue, Plaintiffs' novel constitutional, APA, and equitable challenges to DoD's HIV policies do not enjoy a likelihood of success. This case does not involve a facially suspect policy akin to barring members of a certain racial or ethnic heritage from military service. A challenge – fundamentally based upon advances in medical treatment – to treating HIV-positive individuals *the same as* those with other systemic medical conditions hardly suggests unconstitutional conduct.

Nor would Plaintiffs – who graduated from their respective service academies in 2014 and 2016 – be "potentially injured" for purposes of the second factor should the Court decline review at this point in time. Beyond the fact that the passage of time reveals no grave injury from the lack of judicial review (and raises significant practical impediments to awarding the injunctive relief sought), the main injury identified in the Amended Complaint is Plaintiffs' inability to commission as officers. But only the President has the power to issue an original appointment of a commissioned officer. *See* 10 U.S.C. § 531(a)(1) ("Original appointments in the grades of second lieutenant, first lieutenant, and captain . . . shall be made by the President alone."). In 2005, President Bush assigned this responsibility to the Secretary of Defense, without the ability to redelegate. E.O. 13384, 709 Fed. Reg. 43739 (July 27, 2005). The Court thus has no power to direct the commissioning that Plaintiffs have requested. *See Orloff*, 345 U.S. at 90 ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief."). Plaintiffs therefore cannot be said to be harmed when the relief they seek for their asserted injury is essentially one that the

Court cannot grant. Relatedly, insofar as Plaintiffs complain about the stigma associated with graduating from the service academies but not commissioning (or not being able to serve in their chosen careers), the courts have not recognized these as potential injuries that judicial review could obviate. *Khalsa v. Weinberger*, 779 F.2d 1393, 1399-1400 (9th Cir. 1985) (recognizing precedents "that give little weight to the injury flowing from denial of enlistment" and concluding that "[t]he district court did not err in holding that appellant will suffer little legally cognizable injury from having to choose another career"); *Sandidge v. Washington*, 813 F.2d 1025, 1027 (9th Cir. 1987) (concluding that the second *Mindes* factor weighs against reviewability where a plaintiff "has left military service, and his claims of adverse impact on other job opportunities are speculative").

The third and fourth *Mindes* factors are generally considered together, *see Culbreth v. Ingram*, 389 F. Supp. 2d 668, 676 (E.D.N.C. 2005), and they too weigh against justiciability. These factors concern the type and degree of anticipated interference with the military function and the extent to which the exercise of military expertise or discretion is involved.

The Supreme Court already made clear in *Orloff* that judicial interference in the commissioning process is not permitted. In that case, the plaintiff had been drafted under a special statute authorizing the commission of medical specialists beyond the normal age limit. *See* 345 U.S. at 93-94. He was denied a commission – which otherwise would have been granted him – because of his refusal to execute a loyalty certificate and his lawful exercise of his Fifth Amendment right not to answer certain questions and, as a result, the Army reassigned him to another specialty. *Id*. On appeal, the Supreme Court refused to order that he be commissioned or discharged. In so holding, the Court reasoned that "[i]t is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander

in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions." *Id*. at 90. Deferring to the military on commissioning decisions, the Court concluded that "the judiciary [must] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous to not intervene in judicial matters." *Id*. at 94.

These same considerations weigh against review here. Decisions concerning which individuals are medically suitable to meet the needs of the military and serve as officers embody precisely the type of professional military judgments that are not reviewable by courts. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Gilligan*, 413 U.S. at 10) (explaining that the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" are "essentially professional military judgments."); *Kuang v. U.S. Dep't of Def.*, 778 F. App'x 418, 421 (9th Cir. 2019) (citations omitted) (finding non-justiciable DoD's policy that lawful permanent residents not be accessed into the military prior to completion of a favorable background screening, observing "that military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches."); *Maier v. Orr*, 754 F.2d 973, 984 (Fed. Cir. 1985) ("Judicial deference to administrative decisions of fitness for duty of service members is and of right should be the norm."); *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) ("It is equally settled that responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province [ ]") (collecting cases in footnote); *Lindenau v. Alexander*, 663 F.2d 68, 74 (10th Cir. 1981) (no review available where the potential injury is a lost "opportunity to enlist" and "any benefits that go along with enlistment") *Pilchman v. Dep't of Def.*, 154 F. Supp. 2d 415, 422 (E.D.N.Y. 2001) (citing then-extant version of DoDI

6130.3 and explaining that such "qualifications are reasonably related to the requirements of physical fitness of military officers in general," and that "[t]hese standards are entitled to a high degree of deference, since 'courts are ill-suited to second-guess military judgments that bear upon military capability or readiness.'") (citation omitted), *aff'd*, 40 F. App'x 614 (2d Cir. 2002).

The Fourth Circuit panel's contrary finding in *Roe* is distinguishable. As noted above, that case involved (at the preliminary injunction stage) challenges brought by HIV positive members of the Air Force *who were already on active duty*. They were facing imminent separation from the service because of Air Force policies limiting their ability to deploy, which in turn would result in their imminent separations—without the individualized determination of fitness for duty allegedly required by Air Force policy. *Roe*, 2020 WL 110826, at *7. Applying the *Mindes* factors, the Court determined plaintiffs presented a strong APA challenge, since the Air Force's deployment policies permitted a waiver, but the Air Force intended to discharge them without conducting an individualized assessment, simply predicting instead they could not deploy as a result of their HIV status. *Id.* at *15, 18. Alternatively, the panel also determined that, even if the Air Force considered plaintiffs "categorically ineligible to deploy," plaintiffs were "likely to succeed on their claim that the deployment policies at issue violate the APA because the Government has not—and cannot—reconcile these policies with current medical evidence." *Id.* at *18. As to the "potential injury" factor, the *Roe* plaintiffs were facing imminent discharge "for reasons unrelated to their ability to serve." *Id.* at *16. Finally, for purposes of the final two factors, the panel emphasized that the "core of Plaintiffs' claims is an allegation that the Air Force failed to follow its own stated policies," and merely requiring the Air Force to follow its own policies "creates minimal interference with the military's function" and does not involve military expertise or discretion. *Id.* at *15-16.

In contrast, Plaintiffs' claims here challenge *adherence to* a longstanding military policy precluding the *accession* of HIV-positive members. Retention and opportunities for deployment are not at issue. If justiciable, DoD's policy will be reviewed only for a rational basis under the deferential APA standards. Unlike *Roe*, there are no allegations that the accessions policy has been inconsistently applied among HIV-positive members or applied differently, as compared to similarly disqualifying infectious diseases. Distinct from the imminent injury facing the *Roe* plaintiffs, the status quo here has been maintained since Plaintiffs' respective graduations in 2014 and 2016. They are not facing any prospective adverse consequences, let alone imminent ones. Finally, this case cannot be resolved without interference with the core military function of selecting commissioned officers. Whereas *Roe* surmised that a court simply ordering the military to follow its own policies would suffice to remedy the plaintiffs' complaints, such an order here would not provide meaningful relief. Quite the contrary, only following Plaintiffs' invitation to strike down portions of DoDI 6130.03 and DoDI 6485.01, reflecting the military's expertise in balancing the medical evidence concerning HIV against the needs of its mission, would allow them to commission.

This Court should be reluctant to second-guess the military judgment as to which medical conditions are disqualifying for accession as an officer and which ones are not. Without such reluctance, the presumptive consequence would be that every candidate rejected for an officer's commission based upon the failure to meet a given medical standard under DoDI 6130.03 would enjoy a right to challenge, in a civilian court, the inclusion of a given condition on the list of

prohibited conditions, resulting in substantial interference with the military's personnel selection processes.[13]

As the Supreme Court indicated in *Orloff*:

> We know that from top to bottom of the Army *the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army*. The responsibility for setting up channels through which such grievances can be considered and fairly settled *rests upon the Congress and upon the President of the United States and his subordinates* . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

Orloff, 345 U.S. at 93-94 (emphasis supplied); *accord Winter*, 555 U.S. at 24 (quotations omitted) (explaining that courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," and that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."); *Thomasson v. Perry*, 80 F.3d at 924 ("[t]he judiciary has no authority to make rules for the regulations of military forces").

In the end, application of the precedent compels the conclusion that Plaintiffs' challenge to the core of the military's judgment as to which individuals may become a commissioned officer of the Armed Forces is non-justiciable.

[13]This is not an insignificant number. Between 2012 and 2017, more than 1,600,000 active, reserve, and National Guard applicants were examined for medical fitness by DoD components. *See* DoD Accessions Medical Standards Analysis & Research Activity, Annual Report 2018, at 7 (2018), available at https://www.amsara.amedd.army.mil/Documents/AMSARA_2018_Report/AMSARA_AR_2018.pdf. Approximately 15 percent of those applicants received a permanent medical disqualification, and six percent were temporarily disqualified.

B. IN LIGHT OF HIS THROMBOCYTOPENIA DIAGNOSIS, PLAINTIFF DEESE CANNOT SATISFY THE REDRESSABILITY REQUIREMENT TO CONFER ARTICLE III STANDING

As set forth in part II.(B)(1) above and confirmed in the administrative record, prior to his graduation, Plaintiff Deese was diagnosed both with HIV and thrombocytopenia, another disqualifying medical condition. Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." This requirement is built on separation-of-powers principles and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

"This restriction requires a party invoking a federal court's jurisdiction to demonstrate standing." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (citation omitted). To establish standing, (1) the plaintiff must have suffered an "injury in fact;" (2) "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "*it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision*." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis added; internal citations and punctuation omitted). A plaintiff need "not show that a favorable decision will relieve his every injury," *Larson v. Valente*, 456 U.S. 228, 242-43 & n.15 (1982), but redressability still requires a plaintiff to show that he or she "personally would benefit in a tangible way from the court's intervention." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (en banc) (quotation and internal quotation marks omitted).

Here, a judgment in Plaintiff Deese's favor merely as to the validity of the challenged HIV policies will not redress the injury of not receiving an officer's commission upon graduation. Indeed, only an order invalidating portions of the medical qualification standards (or the waiver-ability thereof) which are not being challenged in this action would accomplish that. *See Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); *S.C. Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475, 483 (4th Cir. 2015). Inasmuch as Plaintiff Deese is unable to satisfy the redressability requirements to confer Article III standing, the Court should dismiss his claims for lack of subject-matter jurisdiction.

C. EVEN IF THE COURT CONCLUDES PLAINTIFFS' CONSTITUTIONAL CHALLENGE IS JUSTICIABLE, THE MILITARY'S HIV POLICIES SATISFY RATIONAL BASIS REVIEW FOR PURPOSES OF THE EQUAL PROTECTION CLAUSE

Although Plaintiffs frame their constitutional challenges as independent claims, the APA provides the proper vehicle to raise constitutional challenges to agency action, including agency policies. *See* 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . *contrary to constitutional right*, power, privilege, or immunity.") (emphasis added). Accordingly, their claims should be analyzed, as discussed below, under the deferential APA standards of review.

Even if considered independently, however, their constitutional claims should be dismissed at the pleadings stage. In Counts IX and X, Plaintiffs advance equal protection challenges to Defendants' accession standards which effectively preclude HIV-positive individuals from becoming commissioned officers. To satisfy their burden, Plaintiffs must

plausibly allege that the decision at issue has an adverse effect on a protected group and was motivated by discriminatory animus. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

Despite Plaintiff's plea for more intense scrutiny, ECF 33, ¶¶ 181-83, 190, the Fourth Circuit already has clearly established that rational basis review applies. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that the "alleged unequal treatment of HIV-positive [individuals]" is subject to rational basis review). The Fourth Circuit's holding in this regard comports with decisions from other jurisdictions, which have explained that people with HIV do not constitute "a suspect class that is entitled to special consideration under the Equal Protection Clause." *Mofield v. Bell*, 3 F. App'x 441, 443 (6th Cir. 2001). Given that courts should be "reluctant to establish new suspect classes" – a presumption that "has even more force when the intense judicial scrutiny would be applied to the 'specialized society' of the military" – there is no basis for departing from rational basis review here. *Thomasson*, 80 F.3d at 928.

Under rational basis review, a classification fails only when it rests on grounds "wholly irrelevant" to the achievement of the government's legitimate objective. *Heller v. Doe*, 509 U.S 312, 324 (1993). The challenged rule "is entitled to 'a strong presumption of validity,' and must be sustained if 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Thomasson*, 80 F.3d at 928 (quotation omitted); *Verderamo v. Mayor and City Council of Balt.*, 4 F. Supp. 3d 722, 733-34 (D. Md. 2014) (citation omitted). "The burden is on the one attacking the [government's policy] to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320 (citation omitted). Where there are "plausible reasons" for the classification, the "inquiry is at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Judge Hollander went on to explain in *Verderamo* that "the government need not prove what the decisionmakers' *actual* motivations were; it need only

identify a reasonable basis on which the decisionmakers rationally *could have* relied." 4 F. Supp. 3d at 734 (emphasis in original).

To evaluate an equal protection claim under rational-basis review, the reviewing court first must determine "whether the purpose that animates [the challenged] laws and regulations is legitimate." *Adkins v. Rumsfeld*, 464 F.3d 456, 469 (4th Cir. 2006) (quotation and internal quotation marks omitted). Second, the court examines "whether it was 'reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose." *Id.* (quotation and internal quotation omitted). The Fourth Circuit described the burden a plaintiff bears when claiming that a governmental classification has no rational relation to its legitimate goals:

> Under this deferential standard, the plaintiff bears the burden to negate every conceivable basis which might support the legislation. Further, the State has no obligation to produce evidence to support the rationality of the statute, which may be based on rational speculation unsupported by any evidence or empirical data. Rather, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Indeed, a legislative choice is not subject to courtroom fact-finding, and equal protection analysis is not a license for the courts to judge the wisdom, fairness, or logic of the legislative choices.

Giarratano v. Johnson, 521 F.3d at 303 (internal citations and quotation marks omitted).

The policies challenged by Plaintiffs pass muster under this standard of review. It is transpicuous that the Armed Forces have a legitimate interest in ensuring that all service members are medically fit and ready to serve. Congress has prescribed that commissioned officers must be "of good moral character," "physically qualified for active service," and have "such other special qualifications" determined by DoD. 10 U.S.C. § 532(a).

And the military's policies restricting HIV-positive individuals from commissioning are relevant to that legitimate interest. Like the other infectious diseases listed in DoDI 6130.03, HIV has the potential to undermine a service member's medical fitness, and DoD has reasonably decided to preclude individuals who are HIV-positive from commissioning. Plaintiffs summarily dismiss the HIV policy as founded upon "predetermined biases or stigma-based categorical bans." ECF 33, ¶ 107. But they cannot dispute that HIV is an infectious disease with no known cure and no effective vaccine. They also acknowledge that individuals who are HIV positive must take daily action to ensure that their viral loads stay suppressed in order to remain healthy and minimize the risk that they will infect others, and they concede that blood transfusions and needle sticks permit transmission. *Id.* at ¶¶ 29-33. These undisputed facts concerning the need for regular treatment and monitoring (and the potential for transmission in the military environment) is contrary to the military's stated policy goals of accessing candidates who are "[f]ree of contagious diseases that may endanger the health of other personnel," and "[m]edically adaptable to the military environment without geographical area limitations." DoDI 6130.03 ¶ 4(c) (ECF 1-1, at 3). *See also* Exh. 5, at 2-6 (detailing the ongoing challenges to the military regarding HIV infected personnel, despite the remarkable advancements in treatment, including the significant contributions made by military medical researchers).

Tellingly, much of Plaintiffs' complaint about the purported inequality of the commissioning policies involves comparing the applicable accession standards with retention standards and applying the accession standards to service academy graduates, as opposed to comparing the treatment of HIV-positive individuals with those who have other incurable systemic infections or those who are disease-free. DoD's determination to employ the accession medical standards in this context more than satisfies the "some reasonable basis" analysis.

Becoming a commissioned officer involves a change in a service member's status and duties, and there are specific qualifications and privileges attendant to that new role. For instance, Congress has set out different qualifications for commissioned officers than those for regular enlistments, *compare* 10 U.S.C. § 532(a) (qualifications for commissioned officers, including to be "of good moral character," "physically qualified for active service," and "has such other special qualifications" determined by DoD) *with* 10 U.S.C. § 505(a) (qualifications for enlistment in the military), and also created different oaths, *compare* 5 U.S.C. § 3331 (text of the oath of office for those "appointed to an office of honor . . . in the civil service or uniformed services") *with* 10 U.S.C. § 502(a) (text of the enlistment oath). Moreover, commissioned officers are granted certain authorities and powers that exceed what are given to enlisted service members; under the Uniform Code of Military Justice, for instance, only commissioned officers can be commanding officers, *see* 10 U.S.C. § 801(3), and commissioned officers are given the power to convene general courts martial, *see* 10 U.S.C. § 822(a).

Because commissioning to an officer involves satisfying a new set of criteria and being given new leadership responsibilities and privileges, Defendants reasonably decided that the HIV accession standards should apply to the commissioning process. Much like a civilian seeking to enlist in the military for the first time, individual members seeking to commission as officers are looking to advance to a new, higher-level position, with a significant new set of duties and leadership responsibilities. And just as Defendants evaluate a civilian at the enlistment stage to assess whether that individual is able to fulfill the desired role in a manner that advances the needs and strategies of the military, the evaluation of an individual at the officer commissioning stage reasonably involves a similar assessment at that time.

That academy midshipmen and cadets are considered to be "active duty" service members and that, despite their years of service and training, they may be denied the ability to commission does not undermine the reasoned basis for Defendants' policy. Although DoD and the taxpayers have invested considerable time and resources in training and developing the skills of such individuals to serve as officers, commissioned officers are expected, without limitation or reservation, *to serve and deploy worldwide in any capacity* and, thus, it is reasonable for DoD to again take into account their medical condition before an individual is assigned to serve as a commissioned officer. Defendants' policy of not permitting HIV-positive individuals to become commissioned officers – even those who have successfully completed the requirements to graduate from the service academies – is rationally related to the mission of ensuring that military units are as capable and deployable as possible. Accordingly, Plaintiffs' equal protection challenge to the policy fails as a matter of law.

D. EVEN IF THE COURT CONCLUDES PLAINTIFFS' CONSTITUTIONAL CHALLENGE IS JUSTICIABLE, PLAINTIFF DOE'S DUE PROCESS CLAIM FAILS

In Count VI, Plaintiff Doe claims that Defendants' actions violated the Due Process Clause. Both Plaintiffs contended in their original complaint their rights were violated by their respective discharges from service without being processed through the disability evaluation system ("DES"). And, as noted in footnote 2 above, regardless of whether constitutionally required, Defendants *agree* that the military's policies provided for this process and agreed to a stay under the auspices of this Court to permit Plaintiffs to avail themselves of the process. Though the processing of Plaintiffs' claims continue as of the time of filing this motion, Defendants do not oppose the Court's granting of such relief – either before or after adjudicating Plaintiffs' other claims. *E.g., Fla. Power & Light Co. v. Lorion* , 470 U.S. 729, 744 (1985) ("If

the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation.").

Beyond the notice and opportunity to be heard in the context of the DES process (which Defendants remain willing to provide), Plaintiff Doe has no protected liberty or property interest in receiving an officer's commission – a conclusion which defeats the remainder of his due process claims. *E.g., Guerra v. Scruggs*, 942 F.2d at 277 ("Thus, in order for Guerra to have a Due Process claim, he must first establish that he has a property or liberty interest."). Explaining that property interests are created and defined by existing rules (such as state or federal statutes), as opposed to "a mere subjective expectancy," the Fourth Circuit in *Scruggs* examined the federal statute governing the pre-term discharge of enlisted service members to determine whether the plaintiff had a property right in continued military service. *Id.* at 278 (citations omitted). Based on its conclusion that "[t]he language of the statute . . . shows that the Army has discretion to discharge enlisted personnel," the Court determined that the plaintiff could have "no property interest" in his term of enlistment. *Id.* (citing *Rich v. Secretary of Army*, 735 F.2d 1220, 1226 (10th Cir.1984)); *see also, e.g., Spadone v. McHugh*, 842 F. Supp. 2d 295, 304 (D.D.C. 2012) (quoting *Wilhelm v. Caldera*, 90 F. Supp. 2d 3, 8 (D.D.C. 2000)); *accord Downey v. United States Dep't of the Army*, 685 F. App'x 184, 193 (4th Cir. 2017) (finding no basis for establishing a property interest in plaintiff's "command position or attendance at the National War College"), *cert. denied sub nom.*, *Downey v. Dep't of Army*, 138 S. Ct. 645 (2018); *Knehans v. Alexander*, 566 F.2d 312, 314 (D.C. Cir. 1977) (there is "no constitutionally protected entitlement to continued active duty as a commissioned officer in the Army").

Plaintiffs have not identified any statute, contract, or other independent source of law that entitles them to the liberty or property interests they claim in pursuing their chosen careers as

military officers. As such, they fail to allege – and cannot prove – a constitutionally-protected interest to support their due process claims based upon their failure to commission.

Plaintiff Doe also claims, however, that the reason for his discharge is based on a "defamatory rationale" which affects his reputation and "place[s] upon [him] a false stigma that . . . deprives [him] of a liberty interest." ECF 33, ¶¶ 159-60. The Supreme Court has recognized that, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The purpose of such process is to provide the person an opportunity to clear his name. *Codd v. Velger*, 429 U.S. 624, 627 (1977).

As the Fourth Circuit has recognized, however, a "critical element" of a plaintiff's claim based on the deprivation of a reputational liberty interest is falsity:

> In the abstract, Guerra might have a liberty interest in his good name. The stigma attached to a general discharge related to a drug offense is well documented. [citation omitted] However, merely having a liberty interest in one's good name does not make out a claim of a Due Process violation. "A critical element of a claimed invasion of a reputational liberty interest . . . is the *falsity* of the government's asserted basis for the employment decision at issue." [collecting cases] Here, Guerra never denied that he had used cocaine. In fact, he voluntarily underwent disciplinary procedures under Article 15 without demanding a court-martial to contest the drug test results. Therefore, Guerra has failed to make out an essential element of his Due Process claim: he cannot show that the stated reason for his discharge—cocaine use—was untrue. Thus, we find that Guerra had no liberty interest.

Guerra v. Scruggs, 942 F.2d at 278-79 (underscoring added; italics in original); *accord, e.g.*, *Downey*, 685 F. App'x at 193 (citing *Scruggs*) ("assuming without deciding that Downey has a liberty interest in his good name and reputation, he cannot make out a due process claim because he cannot show that any statements made by the Army in connection with his Article 15 proceeding were untrue.").

The Air Force has not lied about the reasons for its treatment of Plaintiff Doe. He admits his HIV status and there is no secret about the longstanding policies that preclude his commissioning as an officer. Under these circumstances, the Fourth Circuit would not recognize a protected liberty interest to support the claims advanced in Count VI.[14]

E. IF DETERMINED TO BE JUSTICIABLE, PLAINTIFFS' PROCEDURAL APA CLAIMS IN COUNT V FAIL BECAUSE DODI 6485.01 IS EXEMPT FROM "NOTICE-AND-COMMENT RULEMAKING"

DoDI 6485.01 is a general statement of policy or an "interpretive rule," not a substantive or legislative rule; it thus was not required to go through notice-and-comment rulemaking, as Plaintiffs contend. ECF 33, ¶¶ 150-51. The APA establishes the procedures federal agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy." *Id.* § 551(4). A three-step procedure for so-called "notice-and-comment rulemaking" is set forth in 5 U.S.C. § 553, which ordinarily involves the issuance of notice of proposed rulemaking in the Federal Register, the opportunity for interested persons to participate "through submission of written data, views, or arguments," the agency's consideration and response to the comments, and when the agency promulgates the final rule, it must include "a concise general statement of [its] basis and purpose." Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and

[14]Even if Plaintiff Doe somehow could demonstrate that he was deprived of a protected property or liberty interest (and he cannot), he still must show that the procedures giving rise to the deprivation were constitutionally inadequate, i.e., that he was denied notice and an opportunity to be heard. *E.g., Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 145-46 (4th Cir. 2014). The administrative records demonstrate that both Plaintiffs received sufficient notice in advance of their non-commissioning to understand the reasons for the actions taken as well as the opportunity to be heard on their requests for an exception to policy.

effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979) (internal quotation marks omitted).

But not all "rules" must be issued through the notice-and-comment process. The notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015).

A "substantive rule establishes a standard of conduct which has the force of law." *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Thus, an "agency action that purports to impose legally binding obligations or prohibitions on regulated parties – and that would be the basis for an enforcement action for violations of those obligations or requirements – is a legislative rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). "[A] substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and *creates new law or imposes new rights or duties*." *Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d at 205, 207 (4th Cir. 1989) (citations omitted; emphasis supplied).

A statement of policy, by contrast, "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp.*, 441 U.S. at 302 n.31 (1979) (quotation omitted). It "explains how the agency will enforce a statute or regulation – i.e., how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule." *McCarthy*, 758 F.3d at 252. Similarly, interpretive rules "are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*, 575 U.S. at 97 (quotation omitted). "Put differently, 'an interpretive rule is merely a clarification or explanation of an *existing statute or rule*.'" *Children's Hospital of*

the King's Daughters, Inc. v. Azar, 896 F.3d 615, 620 (4th Cir. 2018) (quoting *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995)) (internal quotations omitted; emphasis in original).

Accordingly, the 2013 version of DoDI 6485.01 at issue is a classic statement of policy or an interpretive rule for which the APA's notice and comment procedures are not triggered. DoDI 6485.01 establishes policy, assigns responsibility, and prescribes procedures for oversight, all of which is directly related to a military function of the United States. Its text makes clear that its purpose is "*to establish policy*, assign responsibilities, and prescribe procedures for the identification, surveillance, and management of members of the Military Services infected with HIV and for prevention activities to control transmission of HIV." ECF 1-3, at 2 (emphasis added). It provides DoD's interpretation of the requirement (in effect for over 30 years) that HIV positive individuals may not access and explains *how* DoD intends to exercise its authority with respect to HIV-positive service members on a prospective basis.

But even if DoDI 6485.01 possibly could be construed as a "legislative rule" articulating some new rule precluding the commissioning of HIV positive officers, as opposed to maintaining a policy in effect since the 1980s, the APA also recognizes a category of "rules" that are exempt from notice-and-comment procedures, including "rules involving a military or a foreign affairs function." *See* 5 U.S.C. §§ 553(a)(1).

As such, both because DoDI 6485.01 is a general statement of policy or an interpretive rule restating DoD's longstanding interpretation of the qualification standards, and is directly related to a military function of the United States, the notice and comment requirement is inapplicable and Plaintiffs' procedural APA challenge in Count V should be rejected.

F. ASSUMING JUSTICIABILITY, PLAINTIFFS CANNOT SATISFY THEIR HEAVY BURDEN TO SUCCEED ON THEIR SUBSTANTIVE APA CLAIMS

1. THE APA PRECLUDES REVIEW OF PLAINTIFFS' CONTENTION THAT THE ACCESSION MEDICAL STANDARDS SHOULD HAVE BEEN WAIVED TO ALLOW THEM TO COMMISSION

Even assuming Plaintiffs' APA claims are not barred by *Mindes*, their challenge to the failure of the Secretary of the Navy or the Secretary of the Air Force to waive the relevant medical standards (or somehow utilize the inapplicable retention standards) is "committed agency discretion by law" and not subject to challenge under the APA. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Agency action is committed to agency discretion where, among other reasons, the relevant statute provides "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830; *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (agency action is unreviewable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply'") (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); *Lincoln v. Vigil*, 508 U. S. 182, 191 (1993) (exception to APA review is restricted to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

The Court's inquiry must begin with the statutory language. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (court's evaluation "requires careful examination of the statute on which the claim of agency illegality is based"). As cited above, in this context, Congress offered no further guidance to the Executive beyond limiting commissioned officer appointments to those individuals who are "physically qualified for active service." 10 U.S.C. § 532(a)(3) ("Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer . . . *may* be given only to a person who—[ ] (3) is physically qualified for active service . .

. .") (emphasis added). The statute's use of the permissive word "may" indicates Congress's recognition of DoD's broad discretion to make decisions regarding the commissioning of officers. *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-61 (1979) (statute providing that commission "may" order a hearing was not reviewable pursuant to § 701(a)(2), in light of provision's text, statutory structure, and legislative history).

The statute's permissive language and complete silence as to any factors or criteria further supports the conclusion that Congress broadly delegated to DoD the underlying determination of who is "physically qualified." *See id.* at 455 ("The statute is silent on what factors should guide the Commission's decision; not only is "[t]he extent of this inquiry . . . not . . . marked . . . with certainty, . . . but also on the face of the statute there is simply 'no law to apply' in determining if the decision is correct." (internal citations omitted)); *see also Roberts v. Napolitano*, 792 F. Supp. 2d 67, 73-74 (D.D.C. 2011) (statute authorizing Global Entry program included general mandates but was "silent as to the criteria the Secretary of Homeland Security should apply in approving applications for entry into the . . . program," and such statutory silence "indicates that Congress committed to the [agency] the sole discretion to determine eligibility guidelines and evaluate applicants").

Here, neither Congress nor DoD and the military departments have provided any meaningful standards to guide the Court's review of the exercise of discretion by the Secretaries of the Navy and Air Force in this case.

2. IN ANY EVENT, THE FINAL AGENCY ACTIONS WITH RESPECT TO PLAINTIFFS PLAINLY SATISFIES THE APA'S DEFERENTIAL STANDARD OF REVIEW

Even if Plaintiffs' substantive APA claims are reviewable, the promulgation of the military's HIV policies and their application – without exception – to Plaintiffs were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and

should be upheld. 5 U.S.C. § 706(2)(A). The APA confines review of Executive Branch action to the administrative record of proceedings before the pertinent agency. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973).[15] Judicial review under the APA is highly deferential, with a presumption in favor of finding the agency action valid. *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (citing *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993)).

The APA scope of review is "narrow," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983): "[A] court is not to substitute its judgment" for the agency's reasonable judgment, *id.*, and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The court is to perform "only the limited, albeit important task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." *Holly Hill Farm Corp. v. United States*, 447 F.3d 258, 263 (4th Cir. 2006).

In this case, Plaintiffs' substantive APA claims may be grouped into a few categories for analysis. Both Plaintiffs claim that the Navy and Air Force violated the APA and failed to abide

[15]Supported by the administrative records filed herewith, the Navy and the Air Force's administrative processes resulted in final agency action regarding both plaintiffs. To assess those determinations, the Court "shall review the whole record." *Id*. § 706. The Supreme Court has been clear for nearly 50 years, however, that the Court's review is typically limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Only if the "bare record" does not reveal the agency's reasoning or if it appears that the agency acted in bad faith may the record be supplemented; otherwise, "inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Save Our Sound OBX, Inc. v. N. Carolina Dep't of Transportation*, 914 F.3d 213, 226-27 (4th Cir. 2019) (citing *Volpe*, 401 U.S. at 420); *see also, e.g., Outdoor Amusement Bus. Ass'n, Inc. v. DHS*, ELH-16-1015, 2017 WL 3189446, at *8 (D. Md. July 27, 2017) (record on review excludes the agency's "privileged materials").

by their own regulations and governing statutes by: (1) not recognizing the Superintendent of Naval Academy and the chief medical officer of the Air Force Academy as the authorities to decide medical waivers (and allowing Doe's request to be decided by the Secretary of the Air Force, as opposed to the Undersecretary of Defense for Personnel and Readiness) (Counts I and II); (2) not utilizing the retention medical standards for active duty members (Counts I and II); and by (3) not processing Plaintiff Doe through the DES (Count II). Both Plaintiffs also claim that the Navy and the Air Force's HIV instructions – insofar as they preclude midshipmen, cadets, and other officer candidates with HIV from being commissioned (and discharged with a DES process) conflict with parts of statutes and regulations and are proscribed by the APA (Counts III and IV). And in Count V, in addition to the claim of a procedural APA violation addressed above, Plaintiffs claim that DoDI 6485.01 is arbitrary and capricious and an abuse of discretion insofar as it precludes "people with HIV from joining the services in any capacity, and prohibiting service members with HIV from becoming officers." ECF 33, ¶ 149; *id.* at ¶¶ 147-48 (also contrary to APA "to bar service academy cadets or other officer candidates with HIV from participating in a commissioning program or from being commissioned as officers," and "to prevent the secretary of each armed service or their designees to determine waiverability of the medical standards").

Other than Plaintiffs' claims concerning the failure to provide them the DES process (which, as discussed above, Defendants already have sought to redress), Plaintiffs cannot show an APA violation.

As to Counts I and II, Plaintiffs suggestion that the final authority for medical waivers does not rest with the service secretaries has no support. DoDI 6130.03 plainly states that the "Secretaries of the Military Departments and Commandant of the Coast Guard shall . . .

[a]uthorize the waiver of the [medical] standards in individual cases for applicable reasons and ensure uniform waiver determinations." *Id.* Encl. 2, ¶ 3(b) (ECF 1-1, at 8); *see also, e.g.,* 32 C.F.R. § 66.7(a) (waivers are made "by the Secretary of the Military Department concerned for the applicant"). Plaintiffs assert, however, "on information and belief," that the Secretary of the Navy delegated his final authority in this regard to the Superintendent of the USNA, ECF 33, ¶ 115, and that the Secretary of the Air Force delegated her authority "to the chief medical officer of the USAFA." *Id.* at ¶ 123. The authority cited by Plaintiffs for their "belief" (ECF 1-6 and ECF 1-9) simply does not delegate the service secretaries' authority in this regard and Plaintiffs have not identified the specific language that they contend supports their belief.

Plaintiffs' claims in this regard also are belied by the record. While the Superintendent of the USAFA exercised her authority to *delay Doe's separation* under AFI 44-178, ¶ A2.5.3 (ECF 1-11, at 16) to allow him to graduate, the Superintendent also demonstrated her knowledge that DoDI 6485.01 required an "exception to policy" from DoD to allow him to commission. A.R**.** 014, 017 (noting that a waiver is required and that there is no precedent for such a waiver). Similarly, the Superintendent of the Naval Academy recognized the Secretary's authority in both his 2014 memorandum to the Assistant Secretary of the Navy for Manpower and Reserve Affairs requesting Plaintiff Deese's separation and in his 2016 memorandum requesting an exception to policy. N.A.R. 005, 020-021.

Additionally, as explained above, DoD amply has set forth a reasoned basis for utilizing the accession medical standards when determining one's eligibility for an officer's commission – even when the candidate was once on "active duty" as an Academy midshipmen or cadet. It is possible, of course, that this Court could disagree with the military's decision-making about which standards to apply in the unique situation of Academy graduates seeking to commission.

But as this Court has recognized, so long as "the quantity and quality of the evidence is sufficient so that a reasonable mind might find it adequate to support the [agency's] decision, it should not be overturned under the APA. *Almy v. Sebelius*, 749 F. Supp. 2d 315, 323 (D. Md. 2010), *on reconsideration* (Oct. 29, 2010), *aff'd*, 679 F.3d 297 (4th Cir. 2012); *see also id.* at 309 (noting that courts presume that government officials "have properly discharged their official duties").

With respect to Counts III and IV, the policies at issue do not conflict with any Act of Congress or regulation having the force of law.[16] Plaintiffs do not explain in their Amended Complaint why such conflicts purportedly exist. At best, they make the fair point that DoD's accession policies with respect to HIV positive applicants are inharmonious with the retention policies applied to those diagnosed after induction, and that this dissonance is amplified considering that service academy midshipmen and cadets are considered to be on "active duty" and the considerable investment all taxpayers made in their education and training.

But this point is not indicative of conflict with a controlling statute or regulation, nor does it mean that the policy cannot be sustained under the APA. The differences between accession and retention were expressly considered by DoD in shaping its HIV policies, and the rationale for utilizing the accession standards for commissioning were plainly expressed. *E.g.*, *Maryland State Dep't of Educ., Div. of Rehab. Servs. v. U.S. Dep't of Veterans Affairs*, 896 F. Supp. 513, 518 (D. Md. 1995) ("[w]hen applying the arbitrary and capricious standard, this Court must consider whether the Secretary has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice

[16]The challenge to SECNAV Instruction 5300.30E (ECF 1-4) in Count III is also precluded by the statute of limitations, as the policy was issued more than 6 years prior to the commencement of this suit. 28 U.S.C. § 2401(a); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) ("[A] complaint under the APA for review of an agency action is a 'civil action' within the meaning of section 2401(a).").

made") (quotation and internal quotations and alterations omitted), *aff'd sub nom.*, *Maryland State Dep't of Educ. v. U.S. Dep't of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996).

With respect to Count V, and as the 2018 Report to Congress explains, military authorities "are aware of and have access to all available contemporary medical literature, practice guidelines, medications, and treatment modalities based on emerging and published evidence-based studies or expert opinion." Exh. 1, at 5, 22. The military's policies "reflect current medical literature and expert opinion . . . regarding transmission and treatment of HIV." *Id.* The military recognized that in light of medical advances, "people living with HIV on [antiretroviral treatment] with an undetectable viral load in their blood have a 'negligible risk' of sexually transmitting HIV." *Id.* at 19. It also recognized, however, that "in the unique circumstances of military combat operations, there remain significant risks" to deploying service members with HIV. *Id.* at 24; *see also id.* at 9 (explaining that in "highly stressful combat conditions" in "extremely austere and dangerous places," "even well-managed HIV infection carries risks of complications," including "disrupted medication maintenance" and "potential communicability" in situations where soldiers must render "aid to a seriously injured member in combat"). The military's judgment in this context is plainly "the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52. There is no basis for setting it aside as arbitrary or capricious.

Moreover, DoDI 6485.01 and related policies plainly flow from and interpret – rather than conflict with – Title 10 of the United States Code and the implementing regulations codified at Title 32, C.F.R., Part 66. Indeed, for the same reasons discussed above that the policy satisfies rational basis review for Plaintiffs' constitutional challenges, it satisfies the APA. *E.g.*, *Motor*

Vehicle Mfrs. Ass'n., 463 U.S. 29 (equating the arbitrary and capricious standard with a rationality standard).

Finally, Plaintiffs' claim of an APA violation via the promulgation and continuing application of DoDI 6485.01 is decidedly undermined by DoD's reporting to Congress on its policies in 2014 and 2018 (Exhs. 1 and 2), followed by Congressional inaction. When Congress disapproves of DoD's interpretation or construction of a military personnel statute, it has taken remedial action. *See, e.g.*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (Dec. 22, 2010). Despite being well-informed of DoD's policy regarding HIV in 2014, Congress chose only to request additional reporting in 2018. As such, there is no "evidence of any intent to repudiate" DoD's longstanding exercise of administrative discretion under its broad Congressional mandate. *Haig v. Agee*, 453 U.S. 280, 297 (1981).

G. PLAINTIFF DOE'S "EQUITABLE ESTOPPEL" AND DECLARATORY JUDGMENT CLAIMS ARE BARRED

In Count VII, Plaintiff Doe purports to state a claim for "equitable estoppel," contending that Defendants should be precluded from discharging him based upon his medical status. Similarly, in Count VIII he seeks a declaration that he actually *was* commissioned as an officer upon graduation, and that neither DoD nor the Air Force could revoke said commission.

Doe's equitable estoppel claim cannot succeed for several reasons. There is no recognized cause of action for estoppel. The Supreme Court has explained that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Congress has created no such cause of action for estoppel. This is further confirmed by the Federal Rules, which expressly recognize estoppel as an affirmative defense – not a cause of action such as the one Doe seeks to advance here. Fed. R. Civ. P. 8(c)(1).

Even if such an independent cause of action exists, it is unclear that the remedy could be applied to a policy decision of the federal government. As the Supreme Court has noted, "[f]rom our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants." *OPM v. Richmond*, 496 U.S. at 419; *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984) (the government "may not be estopped on the same terms as any other litigant."). While the Court has not reached the question whether estoppel may ever be appropriate against the Government, even in an extreme case, *Richmond*, 496 U.S. at 423, it has in fact "reversed every finding of estoppel that [it] ha[s] reviewed." *Id.* at 422.

In situations where an estoppel claim against the government could ever be appropriate (*e.g.*, individualized challenges to non-policy actions), courts "invoke the doctrine of estoppel against the government with great reluctance." *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980); *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989) (en banc) (quotation omitted). A party must show "affirmative misconduct going beyond mere negligence" and, "even then, estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Id.* at 707 (quotation omitted). In short:

> The law of estoppel against the government is very narrow and can lead to harsh results. An estoppel claim against the government must make out the traditional elements of estoppel, must show affirmative misconduct going beyond mere negligence or mistake by an individual government employee, and must not threaten the public fisc or public policy.

Angeles v. District Director, 729 F. Supp. 479, 485 (D. Md. 1990) (citations omitted).

The "traditional elements of estoppel" require the party seeking to assert equitable estoppel against a private litigant to show the following:

> (1) the party to be estopped knew the true facts; (2) the party to be estopped intended for his conduct to be acted upon or acted in such a way that the party

> asserting estoppel had a right to believe that it was intended; (3) the party claiming estoppel was ignorant of the true facts; and (4) the misconduct was relied upon to the detriment of the parties seeking estoppel.

Dawkins v. Witt, 318 F.3d at 611 n.6 (quotation omitted).

Doe has failed plausibly to allege the traditional elements of estoppel or that the government engaged in any "affirmative misconduct going beyond mere negligence." He claims – despite the decades-long existence and application of the policies challenged in this case – that he somehow was not informed that his HIV status would jeopardize his ability to commission "until well after he took a commitment oath and began his third year at the USAFA." ECF 33, ¶ 173. He also bases his claim to estoppel on the fact that "military doctors . . . decided to give him a medical waiver to allow him to commission," but he was "ultimately discharged [because] he was not medically fit." *Id.* at ¶ 174.

Such allegations cannot overcome the high bar to estop the government. That doctors he does not identify in his pleading – who lack any authority to commission officers – supported Doe's own request for a waiver or exception to policy that ultimately proved unsuccessful when reviewed at the Pentagon hardly constitutes "affirmative misconduct" by the Air Force, which must be either "a *deliberate lie* or a pattern of false promises" made to a particular individual. *Muherjee v. INS*, 793 F.2d 1006, 1008 (9th Cir. 1986) (emphasis added); *Keener v. E. Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992) (even misleading statements fall short of "affirmative misconduct" in the absence of evidence that the statements in question constituted a deliberate and malicious lie).

Contrasting Doe's claims here with those in *Watkins* proves the point. In *Watkins*, the Army had refused to reenlist a career soldier with an outstanding record solely on the basis of his admitted homosexuality, despite the fact that the Army had repeatedly reenlisted him over the

previous 15 years, in violation of its own regulations at the time and with full knowledge of his homosexual orientation. *Watkins*, 875 F.2d at 701-03. The Ninth Circuit determined that the Army had induced Watkins's reliance on its previous course of conduct and was therefore equitably estopped from refusing to reenlist him. *See id.* at 709-11. Here, on the other hand, the Air Force in this case has never affirmatively misrepresented Doe's qualifications or violated its own regulations or policies with respect to Doe's service – let alone repeatedly over the course of 15 years. To the contrary, the Air Force adhered to AFI 44-178 when it allowed him to remain at the Academy through degree completion. And the same Air Force doctors and Academy commanders who supported his request to commission recognized that an exception to policy was required, *but that there was no precedent therefor*. *See, e.g.*, A.R. 017. Nor has Doe ever relied to his detriment on any violation by an Air Force employee of its own regulations or policies, as partially evidenced by his securing of civilian employment with the Air Force in the months following his graduation. *See, e.g., Volvo Trucks of N. Am., Inc. v. United States*, 367 F.3d 204, 212 (4th Cir. 2004) ("Equitable estoppel requires reasonable reliance.").

Almost the direct opposite of the situation in *Watkins*, the Air Force *followed* its applicable policies and procedures from the time Doe was diagnosed with HIV. Ultimately, application of the accession standards without Pentagon approval of Doe's request for an exception precluded his commissioning. But unlike the situation in *Watkins*, there are no well-pled or plausible allegations that some extraordinary misconduct by Air Force personnel reasonably led Doe to believe he would commission, despite the policies excluding HIV-positive individuals from receiving a commission. Doe offers only legal conclusions couched as facts that Defendants made representations to him that he would be able to commission, despite his

HIV status. ECF 33, ¶ 164. As a consequence, Doe's claim that the Air Force should be estopped fail. *See, e.g., Doe v. Garrett*, 903 F.2d 1455, 1463-64 (11th Cir. 1990).

Related to his estoppel argument, in Count VIII, Plaintiff Doe also insists that he actually was commissioned upon graduation because he received a certificate signed by the Secretary of the Air Force. *See* ECF 33, ¶¶ 86-89, 172. He also argues that his discharge paperwork once indicated he was commissioned as a Second Lieutenant but "[a]n administrative correction" amended his rank to a "Cadet." *Id.* at ¶ 104. Based upon this interim administrative paperwork, he argues that – despite his own request (through counsel) for an exception to policy to allow him to commission, and despite the Air Force's 2016 decision formally denying his request for an exception to policy (A.R. 001) – he is entitled to a declaration from this Court that he *is* a commissioned officer. Doe's argument elevates form over function and to whatever extent the Air Force erroneously may have issued paperwork suggesting that he received a commission (while his request for an exception to policy was pending), he was never definitively recognized by anyone with the power to bind DoD or the Air Force as a commissioned officer. Doe is not entitled to declaratory relief on this basis.

V. CONCLUSION

For the reasons set forth herein, Defendants respectfully request that the entirety of Plaintiffs' Amended Complaint be dismissed under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and that summary judgment be entered in their favor as to any claim not dismissed.

Respectfully submitted,

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