No. 19-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD ROE, et al.,

Plaintiffs-Appellees,

v.

DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 1:18-cv-01565
Hon. Leonie M. Brinkema

BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1410 Caption: Richard Roe et al. v. U.S. Dep't of Defense et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Richard Roe
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Lauren Gailey Date: 07/18/2019

Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Victor Voe
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Lauren Gailey Date: 07/18/2019

Counsel for: Appellees

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No. 19-1410 Caption: Richard Roe et al. v. U.S. Dep't of Defense et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

OutServe-SLDN, Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Lauren Gailey Date: 07/18/2019

Counsel for: Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Regulations

Other Authorities

STATEMENT OF THE ISSUES

Whether the district court properly exercised its discretion to grant a preliminary injunction preventing Plaintiffs from being illegally discharged from the Air Force where the record shows they are likely to succeed on their equal protection and Administrative Procedure Act claims on a number of independent grounds, and they would suffer irreparable harm without injunctive relief.

INTRODUCTION

Richard Roe and Victor Voe are dedicated Air Force personnel who wish to continue their highly successful military careers. They also happen to have HIV. Both are undergoing successful retroviral treatments, have undetectable viral loads, and are asymptomatic. Both are physically able to perform all their military duties and were strongly recommended for retention by their commanding officers. But the Government determined they were categorically prohibited from deploying to an important military area of responsibility, solely because they have HIV. And the Air Force then ordered them—and others like them—discharged from the military, solely because of the HIV-based deployment ban.

As the district court found, Plaintiffs are likely to succeed in showing the HIV-based deployment ban and related discharge policy are unlawful, for at least two reasons: first, because they are contrary to the Government's own regulations; and second, because they are arbitrary, capricious, and irrationally discriminatory, in violation of both the Administrative Procedure Act and the constitutional guarantee of equal protection.

Like claims of discrimination challenging policies restricting military service based on race or sex, Plaintiffs' claims are rooted in the principle that the defining characteristic of the group at issue is not relevant to their ability to serve. Outdated and discredited notions about the capabilities of people living with HIV and the risk of transmission are currently animating the Government's policies and decisions regarding their service. As the district court found, "when diagnosed promptly and treated appropriately," HIV is "a chronic, manageable condition" with a risk of transmission that is "essentially reduced to zero." JA832. Its treatment regimen generally consists of a single daily pill that requires "no special handling [or] storage" and causes "no significant side effects." JA857 (internal quotes omitted). Indeed, one of the military's own

medical journals describes HIV as "compatible with active service throughout a full career in the military." JA859.

The Government insists the district court overstepped its bounds by identifying and addressing the discrimination at issue in this case. It is wrong. The district court did not determine the level of risk the Air Force should accept in deploying service members with HIV; rather, the district court pointed out that the risk is essentially zero and that the U.S. military accepts similar burdens and tolerates similar or greater risks with respect to other medical conditions. It is the military's acceptance of similar or greater risks—while insisting on *zero* risk when it comes to HIV—that lays bare the discrimination at play and justifies the district court's carefully tailored injunction at this preliminary stage.

But Plaintiffs need not prove the Government's deployment policy is irrational to justify the injunction entered by the district court. Regardless of whether Roe and Voe are permitted to deploy, their discharges violate the Air Force's own regulation stating that HIV-seropositivity alone is not grounds for separation. JA351, JA381.

For years and years, the Air Force has placed service members newly diagnosed with HIV on treatment and returned them to duty (with

restrictions on their deployment) in accordance with this instruction. JA471. Recently, for reasons not entirely clear, the Air Force started discharging some Airmen with HIV; the Air Force did not, however, change the instruction prohibiting discharges based on HIV status alone. JA346 (noting that the instruction was published March 4, 2014 and certified current June 28, 2016). Instead, leaders in the Air Force tried to justify the discharge of some service members living with HIV by claiming that the discharges were warranted by limitations on the deployment of HIV-positive service members—limitations that are themselves wholly based on HIV status. JA747, JA460.

The district court, however, rejected these arguments, concluding that the Air Force's explanation was a mere artifice by which it attempted to circumvent its own instruction and discharge Airmen based on HIV status alone. JA867. The district court therefore entered a preliminary injunction to prevent the Government from permanently terminating the military careers of high-performing HIV-positive Airmen before their administrative and constitutional challenge to the military's HIV policies can be heard on the merits. That challenge is scheduled for trial in less than two months. Entry of that injunction, supported by 55 pages of fact-

findings and careful analysis, was well within the district court's discretion, and should be affirmed.

STATEMENT OF THE CASE

Richard Roe and Victor Voe are members of the United States Air Force facing imminent separation solely because of their HIV diagnoses. Along with advocacy organization OutServe, they filed a complaint in the Eastern District of Virginia seeking declaratory and injunctive relief against the Secretary of Defense, the Secretary of the Air Force, and the U.S. Department of Defense ("DoD") (collectively, the "Government"). JA16. The complaint alleges the Government violated both the constitutional guarantee of equal protection and the Administrative Procedure Act by separating them as a result of their HIV diagnoses. JA36–146.

I. HIV Is Now a Highly Treatable Medical Condition.

For those with consistent access to care, HIV is a non-infectious, chronic, manageable condition with little to no effect on their daily lives. JA597–99. Untreated, HIV attacks the body's immune system by taking over CD4 cells—a species of white blood cells responsible for helping the immune system fight off infections. JA596. When the HIV virus takes

over a CD4 cell, the virus multiplies and attacks and kills more CD4 cells. *Id.* This reduces the number of CD4 cells a person has, weakening the immune system. *Id.* Over time, an untreated person's CD4 count will drop below 200, causing the body to become vulnerable to "opportunistic infections." JA597. The presence of an opportunistic infection is a defining feature of an AIDS diagnosis. *Id.*

Effective treatments to reverse the progression of HIV first became available in 1996. *Id.* Antiretroviral therapy—which now generally involves taking just one pill a day with minimal to no side effects—prevents the virus from replicating. JA597–98. Once on effective treatment, an individual's viral load drops, and their CD4 count rebounds. JA597. Within several months, the viral load drops below 200 copies of the virus per milliliter of blood, and that individual is deemed "virally suppressed." *Id.* When the viral load drops below a level that modern tests are capable of measuring, the person is said to have an "undetectable" viral load. *Id.* Those who begin treatment in a timely manner and adhere to that treatment do not experience any meaningful effects on their physical health and have a life expectancy that is nearly the same as those without HIV. JA596.

Contrary to common fears and misconceptions about HIV that continue to linger decades after the height of the epidemic, HIV is not easily transmitted. JA600. Even for those who are untreated, the per-act risk of transmission for the highest risk sexual activity (receptive anal intercourse) is about 1.38 percent. *Id.* And for those who are virally suppressed or have an undetectable viral load, the risk of transmission for any sexual activity is *effectively zero*. JA600–01. With treatment, activities with a lower baseline risk than receptive anal intercourse would have an even lower risk of transmission than "effectively zero." JA601 ("risk of transmission via blood splash and other non-injection activities" is so low as to be "possibly only theoretical").

Despite the transformation of HIV into a chronic, manageable condition and the non-infectiousness of those in effective treatment, stigma against individuals living with HIV persists. Deep-rooted misconceptions about the routes and risks of HIV transmission, coupled with lingering prejudice against the groups most affected by HIV, continue to fuel the stigma and discrimination people living with HIV face in various contexts, including in employment, housing, and public accommodations. JA657–58.

II. Plaintiffs Richard Roe, Victor Voe, and OutServe

This challenge to the Air Force's deployment and discharge policies for HIV-positive Airmen was brought by two individual plaintiffs—known here as Richard Roe and Victor Voe—and the advocacy group OutServe. Both individual plaintiffs are active-duty members of the Air Force and have undetectable viral loads as a result of successful treatment.

A. Richard Roe and Victor Voe

Like many other service members with HIV, Roe and Voe have served their country admirably for years and aspire to make a career of the military. Their HIV diagnoses in 2018 hit them hard; however, like most people diagnosed with HIV in the past 20 years—particularly those in the military, who have access to high-quality medical care—they responded well to treatment and were soon restored to full immunological health and had achieved an undetectable viral load. JA1170, JA1463. Nevertheless, they were referred into the Air Force's Disability Evaluation System (DES) and informed they were going to be discharged from service and denied the opportunity to serve their country—solely because they have HIV. JA903–04, JA972–73, JA1191–94.

Unwilling to give up, Roe and Voe appealed the initial decisions regarding their discharges. JA894–95, JA1186–87. And they were not the only ones who did not want their service to end: their military doctors—those most familiar with their health and success on their respective treatment regimens—supported their retention. JA907 (opining that "no physical limitation … would prevent [Roe] from conducting his duties," and he should be "returned to duty like hundreds of other USAF members diagnosed with [HIV] before him"). Furthermore, their commanders—those who were most familiar with the requirements of their positions and the quality of their work—supported their retention, with both noting that the inevitable restrictions on deployment did not alter their opinions. JA979–80; JA1199–1200. Given the support of their doctors, the support of their commanders, and the retention of most other Airmen with HIV over the past 20+ years, Roe and Voe remained hopeful the preliminary decision to discharge them would be reversed in the appeal process.

Instead, they received identical memoranda from the Secretary of the Air Force Personnel Council (SAFPC), the final authority on appeal, issued on almost the same date, affirming their respective discharges

from the Air Force. *See* JA883–84, JA1183–84. The SAFPC stated that although each "has been compliant with all treatment, is currently asymptomatic … has an undetectable human immunodeficiency virus (HIV) viral load … is able to perform all in garrison duties, has passed his most recent physical fitness assessment without any component exemptions, and his commander strongly supports his retention," they would nevertheless be "discharged with severance pay" because they were unable to deploy. *Id.* The SAFPC further stated that "[d]eployability is a key factor in determining fitness for duty," and each "belongs to a career field with a comparatively high deployment rate/tempo." *Id.* Accordingly, Roe was set to be discharged on March 28, 2019, and Voe was set to be discharged on February 25, 2019. JA1170, JA1466.

B. OutServe

OutServe is a non-partisan, non-profit, legal services and policy organization that represents the U.S. LGBTQ+ military community, including service members, veterans, civilian employees of the Department of Defense, and their spouses and families. JA784. OutServe is a membership organization with over 7,000 members—veterans, active-duty

and reserve-component service members, and civilian defense workers who identify as LGBTQ+ or are living with HIV. JA784–85. In the district court briefing, the organization submitted an affidavit identifying four additional active duty Air Force OutServe members "who face imminent discharge because of HIV-related deployment restrictions" and who the district court found "identically situated to Roe and Voe." JA563–69, JA786–91, JA843.

III. The DoD's and Air Force's Policies

The relevant regulations are extensively described in the district court's opinion. JA 832–37. A brief discussion of the key provisions governing deployment and separation/discharge is warranted here.

A. Deployment policies

Three separate military policies bearing on the deployment of personnel living with HIV are pertinent here: Department of Defense Instruction (DoDI) 6490.07, which applies generally to members within the Department of Defense; Air Force Instruction (AFI) 44-178, which applies specifically to Air Force personnel; and Modification 13 to USCENTCOM Individual Protection and Individual Unit Deployment Policy ("MOD-13"), which applies to personnel from all services who

deploy to Central Command ("CENTCOM"), an area spanning 20 countries and located largely in the Middle East.

DoDI 6490.07 is intended to ensure that service members in all military services "are medically able to accomplish their duties in deployed environments." JA136. It sets out a broad four-part test for determining whether a particular service member may deploy, and also identifies an extensive list of individual medical conditions "that categorically prevent individuals from deploying unless a waiver is granted." JA142–43, 145–47, JA833. Included in that list are "infectious diseases," which in turn include HIV, but only "with the presence of progressive clinical illness or immunological deficiency." JA146. The DoD policy contains no restrictions on the deployment of service members with HIV who do *not* exhibit progressive clinical illness or immunological deficiency, and the Government did not rely on DoDI 6490.07 to discharge Roe and Voe.

AFI 44-178 is the Air Force regulation that governs the "identification, surveillance, and administration" of airmen living with HIV, including their deployment. JA346. Unlike DoDI 6490.07, AFI 44-178 provides that airmen living with HIV—even without evidence of

progressive illness or immunological deficiency—"must be assigned within the continental United States … Alaska, Hawaii, [or] Puerto Rico," and can be deployed outside those areas only with a waiver. JA351. Deployment waivers "are considered using normal procedures for chronic diseases." *Id.*

Finally, MOD-13 sets forth CENTCOM's "individual/unit deployment policy." JA392. It provides that personnel who are "found to be medically non-deployable" may not enter the CENTCOM area until "the non-deployable condition is completely resolved or an approved waiver" is obtained. JA393. Tab A to MOD-13 establishes fitness standards for deployment to the CENTCOM area of responsibility and provides a list of medical conditions that preclude deployment to CENTCOM "without an approved waiver." JA414. Those conditions include "confirmed HIV infection." JA417. The process for obtaining a CENTCOM waiver requires that disapprovals be made in writing, and allows the applicant's unit to appeal the decision. JA396–97. It is undisputed, however, that CENTCOM has never granted a waiver to a service member living with HIV and is "highly unlikely" ever to do so. JA481–82.

B. Separation policies

Both the DoD and the Air Force have policies governing the management of HIV-positive personnel. None of those policies permit the military to separate service members solely because they are living with HIV.

According to DoDI 6485.01, a service member with HIV "will be referred for appropriate treatment and a medical evaluation for fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses in accordance with DoDI [1332.18]."[1] JA134. DoDI 1332.18 establishes that in determining whether a service member is medically fit and able to reasonably perform their duties, a Service is to consider "[w]hether the Service member can perform the common military tasks required" for the Service member's position, whether the Service member has passed their physical fitness tests, and "[w]hether the Service member is deployable." JA80. In separating Roe and Voe, the SAFPC relied solely on the deployability consideration in finding that they were unfit for continued service. JA883, JA1183.

[1] DoDI 1332.18, most recently updated on May 17, 2018, cancelled and replaced 1332.38. JA50.

The Air Force instruction addressing Airmen with HIV, AFI 44-178, provides that "HIV seropositivity alone is not grounds for medical separation or retirement for [active-duty Air Force] members." JA351. An attachment to the Instruction provides that Airmen living with HIV must be retained as long as they "are able to perform the duties of their office, grade, rank and/or rating" and reiterates that they "may not be separated solely on the basis of laboratory evidence of HIV infection." JA381.

IV. District Court Proceedings

Plaintiffs filed this lawsuit in December 2018, alleging that the Air Force's decision to terminate Roe and Voe violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the equal protection component of the Fifth Amendment's Due Process Clause. JA36–47. The complaint sought declaratory and injunctive relief to prohibit the Government from continuing its ban on the deployment of service members with HIV into combat zones and from discharging Roe and Voe and other similarly-situated Airmen from the Air Force. JA45–46. Plaintiffs moved for a preliminary injunction, and the Government moved to dismiss the Complaint on non-justiciability grounds. JA5, JA7.

In February 2019, the district court denied the Government's motion to dismiss and granted Plaintiffs' motion for a preliminary injunction. JA875–77.

In its opinion, the court first found that Plaintiffs' claims were justiciable under the four-part analysis set out by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and adopted by this Court in *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985).[2] JA846–47. The court concluded that Plaintiffs had "made a strong showing that defendants' policies are irrational, based on a flawed understanding of HIV epidemiology, and inconsistently applied." JA846. It then found that the Air Force's discharge decisions based on the challenged policies would cause Roe, Voe and others similarly situated "imminent, serious cognizable injuries," that Plaintiffs were alleging that HIV-positive service members were "being irrationally and arbitrarily swept from the ranks," and that the "far-reaching nature of these claims surely counsels in favor of judicial review." JA846–47. The court further found that

[2] The court questioned the continued viability of *Mindes* in light of developments in this and other circuit courts of appeals, but ultimately decided to use its analytical framework in assessing justiciability. JA845–46.

injunctive relief would impose only a minimal burden on the military, because the Plaintiffs "request[ed] only that military decisionmakers evaluate whether they are fit for service with more careful attention to their individual characteristics," thus leaving "significant breathing space" for the exercise of military discretion. JA847.

On the merits, the district court determined Plaintiffs are likely to succeed on both their equal protection and APA claims, noting that "at this stage, plaintiffs have made a strong and clear showing that defendants' policies are irrational, outdated, and unnecessary and their decisions arbitrary, unreasoned, and inconsistent." JA852–53.

The district court also determined the Plaintiffs were likely to succeed on their APA claims because the Government's conduct violated its own regulations and was contrary to law. JA867. The court reiterated that "the evidence in this record clearly establishes that HIV seropositivity alone is not inconsistent with ongoing military service, does not seriously jeopardize the health or safety of the servicemember or his companions in service, and does not impose unreasonable burdens on the military when compared to similar chronic conditions." JA865. The court reasoned that, although the Air Force "purported to engage in

an individualized determination as to Roe's and Voe's fitness for duty, in fact its decisions were completely dependent on the across-the-board deployability policy." JA867. Because their discharges were based entirely on the irrational deployment policy, and their inability to deploy under this policy was based entirely on their HIV-positive status, the court found their discharges violated regulations providing that Air Force personnel "may not be separated solely on the basis of laboratory evidence of HIV infection." JA 867.

Having determined Plaintiffs are likely to succeed on the merits, the court next concluded an injunction is necessary to prevent Roe, Voe and others similarly situated Airmen from suffering irreparable harm, and that the balance of the equities weigh in Plaintiffs' favor. JA868–72. The court noted similarly-situated Airmen would not only be permanently discharged from the Air Force absent an injunction, but would face "a particularly heinous brand of discharge, one based on an irrational application of outmoded policies related to a disease surrounding which there is widespread fear, hostility, and misinformation." JA869. In contrast, the Government "can scarcely be said to face any serious consequences stemming from the issuance of

appropriately tailored injunctive relief, given that HIV-positive individuals make up such a miniscule percentage of active-duty service members." JA871. Finally, the court determined an injunction would be in the public interest, because "[t]he public undoubtedly has an interest in seeing its governmental institutions follow the law and treat their employees in reasonable, nonarbitrary ways." JA872.

Accordingly, the district court entered an injunction prohibiting the Air Force from making or enforcing discharge determinations based on CENTCOM's effectively categorical policy prohibiting deployment by personnel with HIV. JA872–75.

STANDARD OF REVIEW

This Court "review[s] the decision to grant or deny a preliminary injunction for an abuse of discretion." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 213 (4th Cir. 2019) (citation omitted). Abuse of discretion review "is a deferential standard, and so long as the district court's account of the evidence is plausible in light of the record viewed in its entirety, [the Court] may not reverse," even if it is "convinced that" it "would have weighed the evidence differently." *Id.* Legal conclusions supporting the ultimate determination to grant the

injunction are reviewed *de novo*, while findings of fact are reversible only if clearly erroneous. *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013).

SUMMARY OF ARGUMENT

The district court correctly determined that the Plaintiffs' claims are justiciable. As the court explained, the "gravamen" of their complaint is that in deeming HIV-positive airmen categorically non-deployable and then discharging them solely on the basis of that non-deployability, the Government violated its own regulations. JA847. A claim that the military has acted in violation of its own regulations is justiciable.

On the merits, the district court correctly determined the Plaintiffs are likely to succeed on their APA claims. JA864–67. It is undisputed HIV-positive service members were "categorically" banned from deploying to CENTCOM solely because of their HIV status, and were discharged solely because of that categorical ban. *See*, *e.g.*, JA883, JA1183 (SAFPC letters separating Roe and Voe). These actions violated governing regulations in at least two ways: first, by contravening the Air Force instruction providing that service members cannot be discharged based on "HIV seropositivity alone," and second, by ignoring the

regulatory requirement that HIV-positive service members be given the same opportunity for individualized waiver consideration afforded to other service members with chronic illnesses.

In addition, the district court correctly concluded the Plaintiffs are likely to succeed on their equal protection claim and their arbitrary and capricious APA claim because the policies are not based on modern medical science, and are therefore irrational. JA859–64.

The district court also did not err in determining the Plaintiffs would suffer irreparable harm and the balance of equities favored injunctive relief. JA868–72. Without the injunctions, Roe and Voe will be permanently separated from the Air Force before their claims can be heard on the merits, and—because current accession regulations prohibit the military from accepting HIV-positive recruits—will be unable to rejoin the military in any capacity. JA869–70. They will also be placed in the untenable position of explaining to family, friends and potential employers that they were discharged because they are HIV-positive (or lying), and so subject themselves to the bias and animus against people with HIV that even today exist. *Id.* The injunction's harm to the military, by contrast, is minimal: it must temporarily retain a small

number of airmen who are concededly fit to perform their jobs and whose commanders favor their retention. JA871.

Finally, the district court did not abuse its discretion in crafting a preliminary injunction that protects all similarly-situated service members equally. JA872–75. This Court's precedents establish that where, as here, the Government's unlawful policies affect a geographically dispersed group of identically situated plaintiffs, an injunction protecting all the members of that group is the appropriate remedy.

ARGUMENT

I. The District Court Correctly Determined that Plaintiffs' Claims Are Justiciable.

The Government argued below, and briefly reiterates here, that its "policies with respect to servicemembers living with HIV … are altogether immune from judicial scrutiny" under the justiciability test established in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and adopted by this Court in *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985). JA844; Gov. Br. 19. The district court performed the *Mindes* analysis, which "weighs the plaintiff's case and injuries against military independence and expertise," and determined the Plaintiffs' claims

"present[ ] a justiciable controversy properly subject to judicial review." JA846–47. The Government does not separately challenge the district court's justiciability analysis on appeal, acknowledging the *Mindes* test "parallels the application of the preliminary injunction factors" and choosing to address justiciability and the merits together. Gov. Br. 19. Nevertheless, the importance of the justiciability question warrants discussion here.

First, Plaintiffs have alleged—and the district court has found a strong likelihood of success on—a claim that Government was discharging them in violation of its own regulations. JA864–67. In light of the finding that the Air Force violated its own rules, the Government's repeated invocation of military discretion is beside the point. The military is rightly afforded discretion to manage military affairs; it is not afforded discretion to violate federal regulations. *See, e.g.*, *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) (holding that claims that the military violated its own regulations are justiciable, because "the military no less than any other organ of the government is bound by statute, and … must abide by its own procedural regulations should it choose to promulgate them").

Second, Plaintiffs have alleged a constitutional claim of discrimination based on HIV status. JA36–38. The allegation of a constitutional violation strongly supports judicial review in this case. *See, e.g.*, *Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals."). It is precisely the role of the courts to determine whether those rights have been violated.

Furthermore, the Government's reliance on *Goldman v. Weinberger*, 475 U.S. 503 (1986), to shield its decisions and policy-making process from scrutiny is misplaced. *See* Gov. Br. 28–29. That case involved a First Amendment challenge by an Orthodox Jewish military doctor who argued that the Air Force's prohibition on wearing headgear indoors infringed on his right to exercise his faith. *Goldman*, 475 U.S. at 504–05. The Supreme Court's decision was rooted in the limited application of First Amendment principles to the military, which "need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment." *Id.* at 507. Equal protection rights, unlike free speech rights, are not systematically reduced in the military context. *See, e.g.*, *Frontiero v. Richardson*, 411

U.S. 677 (1973) (applying standard equal protection analysis to strike down gender-based military policy). Moreover, unlike in *Goldman,* the district court here was not weighing the relative importance of a military interest—an issue on which courts "must give great deference," *Goldman*, 475 U.S. at 507—but was instead evaluating the primarily *factual* question of whether any discernible risk of transmission actually exists. *Goldman* does not stand for the proposition that the military's judgment is isolated from judicial review in all instances. The district court was correct that Plaintiffs' claims were not exempt from judicial review.

II. The Preliminary Injunction Is an Appropriate Exercise of the District Court's Discretion.

A. The district court correctly determined that Plaintiffs are likely to succeed on the merits of their APA and Equal Protection claims.

To obtain preliminary injunctive relief, Plaintiffs need only have shown the likelihood of success on *a* claim entitling them to retention in the Air Force. *See Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). Furthermore, Plaintiffs need not demonstrate they are *certain* to prevail on that claim—only that, in light of the record before the district court at this stage of the proceedings, success at trial is more

likely than not. *See, e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017).

The lower court appropriately found that Plaintiffs are likely to succeed in demonstrating the decisions to discharge Roe and Voe were contrary to the DoD's and Air Force's own regulations, as well as irrational, arbitrary, and capricious. The district court's decision was amply supported by findings of fact, most of which the Government has not challenged—and none of which have been shown to be clearly erroneous. The district court's decision should be affirmed.

1. The discharges of Roe and Voe violated Air Force regulations, contrary to the APA.

The APA permits courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action is not in accordance with law where "it is inconsistent with [the agency's] regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Here, the district court correctly determined that the Air Force's decision to separate Roe and Voe under DoDI 1332.18, based solely on

their purported "nondeployable" status, was contrary to the governing regulations, in at least two ways. JA865–67.

a. Plaintiffs' discharges violated the Air Force regulation prohibiting discharge for "HIV-seropositivity alone."

The governing Air Force regulation on HIV-positive Airmen is Air Force Instruction 44-178, which provides that "HIV seropositivity alone is not grounds for medical separation or retirement for [Active Duty Air Force] members." JA351, 381 (AFI 44-178 §§ 2.4.1, A9.1.1). The district court correctly determined Roe and Voe were discharged based on their "HIV status alone," (JA867), and the Government has not met its burden to show that the court's determination was clearly erroneous.

It is undisputed the Air Force could not lawfully discharge Roe and Voe solely because of their HIV-positive status. The Government argues Roe and Voe were discharged not because of their HIV-positive status, but because they were "not able to perform the duties of their office, grade, rank and/or rating" as required for retention by DoDI 1332.18. Gov. Br. 35. That purported inability to perform their duties was based entirely on a determination they could not deploy to CENTCOM, a major theater of operations for the Air Force. *See* JA417 (MOD-13, Tab A,

§ 7(c)(2)). But that determination of nondeployability was itself based entirely on "HIV seropositivity alone," without regard to any actual disability associated with the illness. *See id.* (listing HIV as a "disqualifying" medical condition for deployment).

The district court correctly recognized that because Plaintiffs were discharged solely for nondeployability, and their nondeployability was solely a function of their HIV-positive status, they were effectively discharged because of their HIV-positive status. JA867. That result is contrary to law: the Air Force cannot lawfully use two steps to accomplish exactly what its own rules forbid it from accomplishing in one.

To demonstrate that Plaintiffs were discharged based on HIV status alone, consider two hypothetical service members, Airman A and Airman B. The two Airmen are identical in every way—same office, same grade, same rank, same rating, same service record, same position—except that Airman B is diagnosed with asymptomatic HIV and Airman A is not. Under Air Force policies as applied in this case, Airman A is deployable to CENTCOM and is retained. Airman B, although identical to Airman A in every way but HIV status, is not deployable and is

discharged from service. There is no serious question that Airman B has been discharged on the basis of "HIV seropositivity alone."

It is of no moment that, as the Government argues, "the Air Force routinely retains service members with HIV if they work in career fields that do not require them to deploy frequently." Gov. Br. 35. Separation based entirely on HIV status is precisely what AFI 44-178 forbids, and it is what took place here. As the district court put it, "[b]y attempting to discharge" the Plaintiffs because of the CENTCOM deployability "limitation, the SAFPC violated agency policy mandating that HIV status alone is not a permissible ground for separation." JA867.

b. Roe and Voe's discharges violated the governing deployability and medical separation regulations.

Even if the Court were to accept the Government's assertion that a separation for partial nondeployability under DODI 1332.18 *by reason of* "HIV seropositivity alone" is not equivalent to a separation *for* "HIV seropositivity alone," the separations were still unlawful because they did not comply with the requirements of the governing medical separation regulation (DODI 1332.18) or the governing deployability regulations.

Plaintiffs were referred into the DES under DoDI 6485.01, enclosure 3, § 2(c), which states that active duty service members diagnosed with HIV must be "referred for … a medical evaluation for fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses." JA134. Once in the DES system, a service member is subject to separation only if he (1) is unable "to reasonably perform[] the duties of [his] office, grade, rank, or rating;" (2) "represents an obvious medical risk to the health of the member or the health or safety of other members;" or (3) "imposes unreasonable requirements on the military to maintain or protect the Service member." JA75 (DoDI 1332.18, encl. 3, app. 1, § 2(a)).

The Government relies entirely on the first requirement—the ability of the member to perform his duties. Gov. Br. 33–34. DoDI 1332.18 establishes a four-factor framework for assessing a service member's ability to perform his duties. One of those factors asks whether the service member "is deployable individually or as part of a unit, with or without prior notification, to any vessel or location specified by the Military Department." *See* JA80 (DoDI 1332.18, encl. 3, app. 2, § 4). It is undisputed that this is the only consideration the Air Force relied on

in making its separation decision. JA883; JA1183. But the Air Force's deployability determinations were contrary to the applicable regulations.

The official discharge notices for both Roe and Voe state that "the member's condition … renders him *ineligible* for deployment to the Central Command." JA883, JA1183 (emphasis added). That statement, which is the central justification for Plaintiffs' discharges, is legally wrong: HIV-positive members are *not* categorically "ineligible" for deployment to CENTCOM. Rather, under the Air Force's interpretation of the relevant CENTCOM regulations, HIV-positive Airmen—like Airmen with any one of hundreds of other medical conditions—are unable to deploy to CENTCOM *without a waiver*. JA414, 417 (MOD-13, Tab A, § 7 pmbl., § 7(C)(2)); *see* Gov. Br. 6. The CENTCOM deployability regulations list a lengthy array of "disqualifying" medical conditions of varying degrees of severity, including asthma, migraine headaches, attention deficit disorder, and high body mass index—all of which can be waived. JA414–21 (MOD-13, Tab A, § 7(A)).

In ordering the separation of the Plaintiffs solely because of purported deployability concerns, the Air Force gave no consideration to the possibility that their deployability restrictions could be waived, even

though applicable regulations specifically provided that waivers were available for HIV-positive members as for members with any other "chronic illness." JA142–43 (DoDI 6490.07, encl. 2, §§ 2–3). That refusal to consider the possibility of waiver likely resulted from the fact that despite its regulation permitting waivers, CENTCOM has *never* granted a deployment waiver to an HIV-positive service member, and it is "highly unlikely" that it ever will. JA482. In light of that evidence, the district court correctly found that "the rule that prohibits HIV positive servicemembers from deploying to CENTCOM is a categorical one." JA858.

But the waiver process is intended to be an individualized determination based on a number of factors, including the specific position, geographic location, and access to necessary care for the condition at issue. JA143 (DoDI 6490.07, encl. 2, § 3.a). As the district court explained, "although the SAFPC purported to engage in an individualized determination as to [Plaintiffs'] fitness for duty, in fact its decisions were completely dependent on the across-the-board deployability policy." JA867. The failure to "analyze whether [the Plaintiffs] could in fact be deployable to CENTCOM … despite their

condition" was a violation of DoD regulations, and a "decision in direct conflict with the agency's own standards … [that] cannot stand under the APA." *Id.* In short, the applicable regulations place HIV-positive service members in the same regulatory regime that applies to service members with a host of other medical issues, who are eligible to obtain waivers that allow them to deploy. *See* JA142–43. By systematically denying such waivers to HIV-positive Airmen—and then discharging those same Airmen for their inability to deploy—the Air Force acted in contravention of its own regulatory requirements and so violated the APA.

Furthermore, even if one accepts as legitimate the *de facto* policy of systematically denying deployment waivers (for CENTCOM) to HIV-positive service members, the Air Force acted arbitrarily and capriciously—and contrary to DoD regulations—by retaining some Airmen with HIV and discharging others, such as Roe and Voe. As the regulation outlining the criteria for "Reasonable Performance of Duties" makes clear, an Airmen must be deployable "with or without prior notification, *to any vessel or location specified by the Military Department*." JA80 (DoDI 1332.18, encl. 3, app. 2) (emphasis added). But if MOD-13 operates as a categorical bar against the deployment of service

members with HIV to CENTCOM (and Defendants contend that it does), then *no* Airman with HIV is deployable "to any vessel or location specified by the Military Department [i.e., the Air Force]." Because the Air Force is retaining some Airmen with HIV while discharging Roe, Voe, and others, its decisions on this front are arbitrary, capricious, and contrary to law.[3]

2. The Government's HIV-based deployment policies are irrational, arbitrary and capricious.

The determination that Plaintiffs are likely to succeed in demonstrating the Government violated the APA by acting contrary to its own regulations is sufficient to sustain that prong of the preliminary injunction standard. The district court *also* correctly found, however, that Plaintiffs are likely to succeed on their claim that the Government's categorical prohibition on the deployment of service members with HIV—which is contrary to the science of HIV treatment and prevention—is

[3] Furthermore, no Airman with HIV is deployable to any location overseas "without prior notice," because deployment overseas requires a waiver under Air Force and DoD policies. This further establishes that Defendants are not in fact applying this criteria regarding deployability to Roe and Voe, are acting in violation of their own regulations, and/or are applying them in an arbitrary and capricious manner.

irrational, arbitrary and capricious, and therefore violates both the APA and the constitutional guarantee of equal protection. JA856–64.

Although arbitrary-and-capricious review is necessarily deferential, the standard "does not reduce judicial review to a rubber stamp." *Ergon-W. Va., Inc. v. U.S. Envtl. Prot. Agency*, 896 F.3d 600, 609 (4th Cir. 2018) (citation omitted). To the contrary, courts "must conduct a searching and careful review to determine whether the agency's decision was based on a consideration of the relevant factors," whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," and whether the agency committed "a clear error of judgment." *Perez v. Cissna*, No. 18-1330, 2019 WL 350328, at *3 (4th Cir. Jan. 29, 2019) (alterations in original) (internal quotation marks and citations omitted). In other words, "the agency must … articulate a … rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Finally, consistent with this standard and to avoid being arbitrary and capricious, an agency "must treat similar cases in a similar manner unless it can provide a legitimate

reason for failing to do so." *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) (citation omitted).

In concluding Plaintiffs have shown a likelihood of success on their APA and equal protection claims, the district court relied on extensive findings of fact regarding the modern medical science of HIV, the effectiveness and simplicity of antiretroviral treatment, and the exceptionally low risk of transmission in a deployed setting. Specifically, the district court found that "[b]ecause of advances in medicine and science, HIV is no longer a progressive, terminal illness." JA859. It is readily treatable with a simple pill regimen that does "not require highly specialized medical personnel," and its treatment imposes no greater burden on the military than treatment of other "conditions treated with daily medication that do not subject servicemembers to the same categorical denial of deployability." JA859–61. The court further found as fact that "antiretroviral treatment is highly effective in preventing HIV transmission"; that "uncontroverted evidence" established that "when an individual's viral load is suppressed, he cannot transmit the virus to another"; and that even in the case of "sustained disruption in

treatment," the risk of "transmitting HIV during military service remains *vanishingly low*." JA861–62 (emphasis added).

In light of these fact-findings, which are entitled to deference on appeal, the court found that the Government's categorical ban on deployment by HIV-positive service members is "inconsistent with the state of science and medicine." JA863. For that reason, it is not "based on a consideration of the relevant factors," and so it is irrational, arbitrary, and capricious in violation of the APA and the guarantee of equal protection. *Perez v. Cissna*, No. 18-1330, 2019 WL 350328, at *3 (4th Cir. Jan. 29, 2019).

On appeal, the Government makes no attempt to demonstrate that any of the district court's key fact-findings are clearly erroneous. It instead argues its categorical ban on deployment by service members living with HIV is rational because: (1) there exists a non-zero risk of transmission to other service members in a deployed environment, (2) providing HIV-related care to a deployed service member presents more of a burden than the military customarily assumes, (3) the health of a service member with HIV will be placed in jeopardy by deployment to austere environments, and (4) deployment by HIV-positive service

members may implicate "foreign policy considerations" in countries that "have legal prohibitions against entering … with an HIV diagnosis." Gov. Br. 22–26. Because none of these arguments hold up under even rational basis review, Plaintiffs are likely to succeed on their claims under the equal protection components of the Constitution, as well as under the APA.

a. The risk of HIV transmission is essentially zero and therefore does not justify the deployment ban.

The district court correctly determined the risk of HIV transmission in a deployed setting is "vanishingly low" or "essentially … zero". JA832, JA862–64. In light of the extensive evidence presented regarding the near-zero risk of HIV transmission in a deployed setting, the district court was more than justified in finding the DoD's and Air Force's policies are not rationally rooted in a concern for preventing HIV transmission. For example, Plaintiffs' experts explained that, "[c]ontrary to popular belief, HIV is not an easily transmitted virus," even when untreated. JA600. "Outside of the contexts of sexual activity, sharing of injection drug equipment, blood transfusion, needle sticks, or perinatal exposure (including breastfeeding), transmission of HIV is rare." JA599. "For all

other activities … the CDC characterizes the risk as 'negligible,' and further states that 'HIV transmission through these exposure routes is *technically possible but unlikely* and not well documented.'" *Id.* (emphasis added).

Moreover, as the district court noted, "Defendants have not identified a single recorded case of accidental transmission of HIV on the battlefield, which is unsurprising given the uncontroverted evidence that even without effective treatment, the risk of transmission through non-intimate contact such as blood splash is negligible."[4] JA862. Once an individual is on treatment and virally suppressed, they "are incapable of transmitting HIV" through sexual activity. JA600. Based on the lower (and possibly only theoretical) baseline risk for blood splash and other non-injection activities—prior to factoring in the effects of treatment—the experts expressed reasonable certainty that it is "*not possible* for a

[4] Though Defendants contend there has never been an accidental battlefield transmission of HIV because service members diagnosed with HIV are not allowed to deploy, in fact service members are regularly diagnosed with HIV while deployed. Because those in the acute stages of the disease are more infectious than even those who are chronically infected and untreated, people like Plaintiffs—who have been diagnosed and treated and are virally suppressed—they present less of a risk than service members with HIV who have not been diagnosed yet.

person with a suppressed or undetectable viral load to transmit HIV through such activities." JA601 (emphasis added). As the district court noted, Plaintiffs' experts' explanations regarding the near-zero to zero risk of HIV transmission were not rebutted by the Government. JA861–62. There is thus no basis for overturning the district court's findings based on those explanations.

The Government also make an unsupported argument about the risks of transmission while providing "casualty care." Gov. Br. 23. But the risks of HIV transmission to healthcare workers through percutaneous exposures (not mere blood splash or wound-to-wound contact) is well-documented and relatively low. JA599–600, JA680–81. And, as with other types of exposures, the risk of transmission is reduced dramatically by effective treatment. JA600–01.

Finally, the Government contends that "allowing personnel with HIV to deploy would endanger the military's battlefield blood supply." Gov. Br. 24–25. But this is a "red herring," playing upon fears rooted in the early days of the epidemic, when hemophilia patients became infected with HIV through the blood supply. Plaintiffs have never suggested that service members with HIV—even those on effective treatment—should

be allowed to donate blood. JA685. Service members "who have been diagnosed with HIV are informed that they cannot donate blood—and there is no evidence that they attempt to do so." JA685; *see also*, *e.g.*, JA378 (AFI 44-178, att. 7 (service members living with HIV are counseled and repeatedly reminded not to donate blood)), JA388 (AFI 44-178, att. 13 (Order given to service members that they not donate blood). As the court pointed out, the real risk of HIV transmission through the military's blood supply "is that a servicemember *unaware* he is HIV positive might donate blood." JA862. Blood donation by a service member living with HIV would be a violation of a direct order and is not at all likely or truly a significant concern. *Id.*

The Government also asserts that "the military has a strong interest in ensuring that all members of [a] team [of soldiers]"—which "are often composed of just a few soldiers"—"can donate blood if necessary." Gov. Br. 25. But as the district court noted, service members who cannot donate blood per FDA regulations are allowed to deploy: those who have recently been tattooed, people who have traveled to certain locations, people who have paid for sex, and men who have sex with men are all prevented from donating under current FDA

regulations. JA863; *see* Food and Drug Administration, *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products – Questions and Answers* (Feb. 2, 2018).[5] To use the district court's example of blood type, people with AB+ blood—who can only donate to others with AB+ blood—are allowed to deploy. JA863.[6] Yet those individuals would be just as useless to a Service member in a small unit with A, B, or O type blood—and a mismatched blood type transfusion can be and often is fatal.[7]

Unable to credibly challenge the district court's finding that the risk of HIV transmission in deployed settings is negligible, the Government argues instead that even a negligible risk—any risk greater than zero—is sufficient to justify the deployment ban. Gov. Br. 27. The Government even goes so far as to claim the court is not allowed to ask whether the

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[5] *Available at* https://www.fda.gov/vaccines-blood-biologics/blood-blood-products/revised-recommendations-reducing-risk-human-immunodeficiency-virus-transmission-blood-and-blood.

[6] *See also* The Blood Center, *Blood Fact*, http://www.theblood-center.org/Donor/BloodFacts.aspx.

[7] *See* Jennifer Whitlock, *What Is the Universal Recipient Blood Type? Understanding Universal Donors and Recipients*, Verywell Health (Apr. 19, 2019), https://www.verywellhealth.com/what-is-a-universal-recipient-3157299.

Defendant's assessment of the risk is rooted in objective fact or how that risk compares to similar health risks the Government tolerates in the deployed environment. Gov. Br. 27–28. But this is an argument about justiciability, not a challenge to the district court's fact-finding—and in any event, it is wrong. The U.S. Supreme Court, addressing the risk of transmission in *Bragdon v. Abbott*, the seminal case on HIV discrimination, has explained that, "[b]ecause few, if any, activities in life are risk free, [the relevant statute and Supreme Court case] do not ask whether a risk exists, but whether it is *significant*." 524 U.S. 624, 649 (1998) (emphasis added). "The existence, or nonexistence, of a significant risk … must be based on medical or other objective evidence." *Id.* Here, the Government has identified no such evidence.

The Government now attempts to escape its own failure to produce evidence to support its policies by claiming that "under rational basis review, [it] ha[d] no obligation to produce evidence to sustain the rationality of a … classification." Gov. Br. 28. (citing *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993)). That, too, is incorrect. The Government had no *initial* obligation to produce evidence, because a "presumption of rationality … applies to government classifications." *Giarratano v.*

Johnson, 521 F.3d 298, 304 (4th Cir. 2008). But once Plaintiffs presented "facts sufficient to overcome the presumption of rationality," the Government *was* required to provide some evidence to supports its purportedly rational reasons. *Id.* Unlike in *Heller*, the Government did have an obligation to provide evidence of its rational basis.

Similarly, under the APA, arbitrary and capricious review is deferential, but "does not reduce judicial review to a rubber stamp." *Ergon-W.Va.*, 896 F.3d at 609. It requires "a searching and careful review" to determine whether the agency has "articulated a *satisfactory* explanation for its action." *Perez,* 2019 WL 350328, at *3 (emphasis added). The Government's assertion that it can impose a categorical ban on HIV-positive service members, no matter how minuscule the purported risk, while accepting risks with other medical conditions and service members, is scarcely an explanation at all, never mind a "satisfactory" one. Accordingly, the district court did not err in concluding that the DoD's and Air Force's policies are irrational, arbitrary and capricious.

b. The purported difficulty of caring for HIV-positive service members does not justify the deployment ban.

Nor did the district court err in finding that the Government's professed inability to provide care to deployed HIV-positive service members is not rational or based in fact. Plaintiffs' experts informed the district court that "[g]eneral practitioner physicians are capable of engaging in the type of medical monitoring and care required for people living with HIV." JA682. Thus, "[t]he physicians of the Armed Forces are more than capable of providing necessary care [during deployment] to a person living with HIV, alongside other types of health care provided to all members of the military, regardless of where they are stationed." *Id.*

Furthermore, the military's purported inability to deploy service members with well-controlled HIV is belied by the fact that it deploys service members with conditions requiring similar levels of care. As the district court noted, there are a number of serious medical conditions treated with daily medication that do not result in the categorical non-deployability of service members diagnosed with those conditions.

JA860–61.[8] These conditions include dyslipidemia, hypertension, and asthma. JA 145–47 (DoDI 6490.07, encl. 3, §§ d, g(1)). As long as they are "controlled with medication" that does not cause serious side effects and does not require "frequent monitoring," service members diagnosed with these conditions are allowed to deploy. *Id.* The Government provided no reason why HIV is handled differently from these other conditions requiring daily medication.

c. The mere possibility that deployment will compromise the health of a service member with HIV does not justify the deployment ban.

Like their contentions with respect to HIV transmission risks and the purported difficulty of providing care to deployed service members with HIV, the Government's claim that the health of a service member with HIV would be jeopardized by deployment is simply not supported by the facts. Plaintiffs' experts make clear that "[p]eople living with HIV who are virally suppressed should not experience any HIV-related

[8] The Government contends the district court's comparison to other conditions fails because the other conditions are not infectious diseases. Gov. Br. 30. However, the district court referenced those other conditions to demonstrate that the military is able to provide medications in a deployed environment; the communicability of the conditions is irrelevant in this context. *See* JA859–60.

symptoms or complications of any kind related to their HIV." JA683. And the Government does not rebut that: "Provided they are able to continue taking their medications, inhospitable environmental conditions and/or challenging work conditions should have no effect on the person living with HIV's health or their ability to serve." JA683–84.

The Government instead claims that a service member with HIV is likely to have more difficulty adhering to their medication regimen while deployed, which would in turn put their health at risk. Gov. Br. 24. This contention is not supported by facts. First, the Government overstates the level of adherence required for HIV medications to be effective, claiming that Plaintiffs' experts admitted adherence must be "excellent." *Id*. In fact, only approximately 85 percent adherence is needed to achieve and maintain a suppressed viral load. *See*, *e.g.*, S. Scott Sutton et al., *Odds of Viral Suppression by Single-Tablet Regimens, Multiple-Tablet Regimens, and Adherence Level in HIV/AIDS Patients Receiving Antiretroviral Therapy*, 37:2 Pharmacotherapy 204, 209 (2017) ("Newer ARTs demonstrate that the minimal level of adherence required to achieve viral suppression is less than 95% and ranges from 80–90%."). Second, any service member who is allowed to deploy will have already

demonstrated the ability to adhere to their medication regimen, because no one is suggesting that a newly-diagnosed individual should be deployed until they have stabilized. Indeed, the Government's own military medical journal indicates that active duty service members experience extremely high viral suppression rates. *See* Sarah E. Woodson et al., *Virologic Suppression in U.S. Navy Personnel Living with HIV Infection and Serving in Operational Assignments*, Military Medicine (Jul. 11, 2019) (all service members monitored maintained viral suppression even after six months of shipboard deployment). And in any event, the risks of nonadherence are no different for HIV than for many other conditions requiring daily medications.

As new and unfamiliar as the facts surrounding HIV treatment, prevention and transmission may be to some, they are the facts. Plaintiffs understand they are contending with deeply rooted beliefs, misconceptions and fears about HIV transmission that are triggered by talk of sharp objects, open wounds, close contact, and blood transfusion. In fact, the Government is counting on those amorphous but deep-seated beliefs to carry them past this litigation without any real scrutiny of the policies

being challenged. *See* Gov. Br. 27. But eradicating those fears and misconceptions by shining the light of science upon them is one of the main aims of Plaintiffs in this litigation. *See* JA28–30. The district court properly examined scientific evidence countering those misconceptions and reached the conclusion the Government's policies are not rational and should be enjoined until this case can be tried. *See* JA28–30. The Government has identified no abuse of discretion to warrant reversal here.

d. The Government's newfound reliance on "foreign policy considerations" cannot justify the deployment ban.

The Government attempts to bolster its position by arguing for the first time on appeal that "[s]everal countries within Central Command's area of responsibility prohibit people with HIV from entering," and that it has a legitimate interest in "complying with their requirements." Gov. Br. 16, 25–26. Although the Government alluded to this purported justification in the companion case also pending before the district court, this is the first time it has been raised in *Roe*. *Compare* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Memo. in Supp. of Mot. to Dismiss at 9, *Harrison v. Esper*, No. 18-641 (E.D. Va. Aug. 16, 2018), ECF No. 43

(mentioning "prohibitions imposed by host countries"), *with* Mem. in Supp. of Defs.' Mot. To Dismiss and Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 24, *Roe*, No. 18-1565 (E.D. Va. Jan. 25, 2019), ECF No. 47 (failing to include countries' restrictions among a "broader range of issues associated with deployment"). "Issues raised for the first time on appeal are generally not considered absent exceptional circumstances," none of which are present here. *Williams v. Prof'l Transp., Inc.*, 294 F.3d 607, 614 (4th Cir. 2002).

In any event, no evidence supports the Government's reliance on foreign policy considerations. In *Harrison*, the Government asserted that such prohibitions were found in "Status of Forces" agreements. *See*, *e.g.*, Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Memo. in Supp. of Mot. to Dismiss at 9, *Harrison*, ECF No. 43 ("the Air Force is limited in its ability to deploy HIV-positive airmen to certain regions due to the policies of other DoD components as well as prohibitions imposed by host countries"). The Government submitted no evidence addressing which countries have such prohibitions, whether the prohibitions even apply to service members, whether Plaintiffs would ever have been required to deploy to those countries, or whether a purported inability to deploy to

one of those unidentified countries would have precluded deployment to CENTCOM as a whole. This Court need not take its word for it—or even entertain the argument at all.

B. The district court correctly determined that injunctive relief is necessary to prevent irreparable harm to the Airmen.

Roe and Voe, and other Airmen like them, face irreparable harm in the absence of an injunction. As this Court has explained, "irreparable harm occurs when the threatened injury impairs the court's ability to grant an effective remedy." *Int'l Refugee Assistance Project. v. Trump*, 883 F.3d 233, 270 (4th Cir. 2018), *vacated on other grounds*, 138 S. Ct. 2710 (2018). Here, absent the injunction, Roe and Voe would be discharged from the military before their claims can be heard on the merits. JA869–70, JA1170, JA1466. Once effected, it is the Government's position that those discharges will be permanent and irrevocable. Despite the Government's assertion that Roe and Voe are simply being generally discharged under honorable conditions (*see* Gov. Br. 37–38), they are being discharged because they have a condition that is highly stigmatized, and they are being labeled as unfit for service

because of that condition (even though they are, in fact, fit for service). JA869–870.

1. The standard for showing irreparable harm is not heightened in military cases.

Contrary to the Government's claim, there is no higher standard of irreparable harm in the military context. As the district court explained, the suggestion in *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), that a "higher requirement of irreparable injury should be applied in the military context" was made at a time when this Court used a sliding scale to measure irreparable harm. Op. 47–48; JA868–69; *see also Guerra*, 942 F.2d at 273–74. But this Court has since abandoned this approach in favor of the "likely" irreparable harm standard. *Henderson ex rel. NLRB v. Bluefield Hosp. Co.*, 902 F.3d 432, 438 n.* (4th Cir. 2018). This standard is binary: harm is either likely, in which case an injunction may issue, or it is not—regardless of any of the other factors or who the parties happen to be. *Id.* at 439. *See also Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019). The Government has made no attempt to rebut the district court's conclusion that "there is but one standard for issuing injunctive relief, in military cases 'no less'—and

no more—'than in other cases.'" JA869 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006)).

2. Roe and Voe's discharges from the Air Force prior to trial would be permanent and irrevocable, even if they later win on the merits.

Without the injunction, Roe and Voe would be discharged before their claims could even be heard on the merits. From that point, they would have no available remedy: the Government maintains that neither the district court nor this Court has the authority to reinstate a discharged service member. *See, e.g.*, Mem. In Supp. Of Defs.' Mot. to Dismiss and Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 15 n.4, *Roe*, ECF No. 47. Thus, if the preliminary injunction were lifted and Roe and Voe discharged prior to a decision by the district court on Plaintiffs' claims, the Government would take the position that neither the trial court nor this Court would have the power to grant the only remedy they seek—even if Plaintiffs ultimately prevail on the merits. Because the injury Roe and Voe would suffer without the injunction would be permanent and irrevocable, and would "impair[] the court's ability to grant an effective remedy," they have demonstrated irreparable harm. *Int'l Refugee Assistance Project*, 883 F.3d at 270.

3. Roe and Voe's discharges from the Air Force would deny them the opportunity to pursue their chosen profession.

The district court was correct in finding injunctive relief is necessary to prevent Roe and Voe from being denied the opportunity to "pursue their chosen profession"—an injury that constitutes irreparable harm. JA870 (quoting *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011)). They have chosen to pursue careers in the Air Force. *See* JA 1175, JA1461. If the Government is correct that they cannot be reinstated via judicial decree, once separated, they would be precluded from reenlisting into the Air Force (or any of the military branches) by DoDI 6130.03, which prevents those living with HIV from joining the military. For the individual plaintiffs, discharge would close the book on their chosen profession forever. The district court joined many others in finding that this outcome constitutes irreparable harm. JA868–70; *see also, e.g.*, *Enyart*, 630 F.3d at 1166; *Tiwari v. Mattis*, No. 17-242, 2018 WL 1737783, at *7 (W.D. Wash. Apr. 11, 2018); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 186–87 (D.D.C. 2011).

On appeal, the Government reads *Guerra* as standing for the sweeping proposition that "a general discharge under honorable

conditions' is insufficient to justify the extraordinary remedy of a preliminary injunction." Gov. Br. 36 (quoting *Guerra*, 942 F.2d at 274–75). But *Guerra* is readily distinguishable here on several grounds.

First, the "only harm" considered by this Court in *Guerra* was "the damage to [Guerra's] reputation" caused by a general discharge (as opposed to an honorable discharge) "during the interim between his discharge and the decision of the board reviewing his discharge." *Guerra*, 942 F.2d at 274–75; *see also id.* at 273 (noting that at the time of the appeal, Guerra's original term of service expired and he was discharged despite the injunction, such that the only issue remaining on appeal was "the classification of his discharge"). The *Guerra* court did not address the harm caused by *the discharge itself*, as opposed to its reputational effects. Here, by contrast, Plaintiffs have alleged—and the district court found—that Roe and Voe will suffer irreparable harm from the fact of being discharged, because the discharge will prevent them from pursuing their chosen careers. JA869–70. The Government has failed to address this basis for the district court's ruling.

Second, as noted above, the *Guerra* court's finding of no irreparable harm was made under a regime with a "higher requirement" for

demonstrating irreparable harm—a standard that does not apply here. JA868–69.

Finally, this case is factually distinguishable from *Guerra* because of the unique stigma associated with a discharge resulting from HIV. A general discharge under honorable conditions via improper procedures was not sufficiently harmful in *Guerra*, where the plaintiff's discharge was based on drunkenness and cocaine use—instances of personal conduct for which Guerra concededly bore responsibility. *Guerra*, 942 F.2d at 273. But as the district court noted here, a general discharge under honorable conditions because the Air Force believes that well-controlled HIV—an already stigmatized condition—renders a person who is in all meaningful respects perfectly healthy *unfit* to serve their country, affirms the stigma associated with HIV.

C. The district court correctly determined that the balance of equities favors Plaintiffs.

The district court was correct to determine the balance of the equities favors Plaintiffs here. JA871–72. While the harms to Plaintiffs without the injunction are imminent and irreparable, the injunction's impact on the Government is minimal and temporary.

First, to the extent the Government will suffer any harm, that harm will be fleeting. Trial on the merits of Plaintiffs' claims is scheduled for September 9, 2019—just two months from the date of this brief. If the Government prevails at trial, the preliminary injunction will be dissolved shortly after this appeal is argued.

Second, the harms the Government will endure during that brief period are not substantial. As the district court found, "HIV-positive individuals make up … a miniscule percentage of active-duty servicemembers—0.027%, by one calculation." JA871.[9] And because the Air Force only discharges HIV-positive airmen in "high-tempo" deployment positions (an ad hoc category that appears to include any airman whose position has a deployment rate exceeding 20 percent, *see* JA476), only some portion of that 0.027 percent will be affected by the

[9] As of June 2017, there were only 1,194 HIV-positive service members in the entire military. *See* U.S. Dep't of Defense, *Update: Routine Screening for Antibodies to Human Immunodeficiency Virus, Civilian Applicants for U.S. Military Service and U.S. Armed Forces, Active and Reserve Components*, (Jan. 2012–Jun. 2017), 24 Med. Surveillance Monthly Rpt. 8, 8–14 (Sept. 2017). This makes up just 0.027 percent of all active duty service members. *See* L. Ferdinando, *Pentagon Releases New Policy on Nondeployable Members*, U.S. Dep't of Defense (Feb. 16, 2018).

injunction. Moreover, the effect of the injunction is merely to put Roe and Voe in the same position as HIV-positive Airmen in assignments with lower deployment rates, who the Air Force has chosen to retain. *Id.* If this is a burden, it is a minor one.

Unable to muster a convincing argument for harm, the Government seeks to use "military discretion" as a shield against equity, seemingly asserting that the harm to the military of in any way restricting its ability to make a "discretionary decision" regarding its "discretionary staffing decisions" is so great that it inherently outweighs the interests in maintaining the status quo while the legality and constitutionality of those decisions is decided. Gov. Br. 36–38. To the extent the Government is suggesting a lawful injunction against the military is *of itself* a cognizable harm, the Government has cited no authority for that sweeping proposition—and Plaintiffs are aware of none.

III. The Scope of the Injunction Is Not an Abuse of Discretion.

An injunction broad enough to encompass other similarly-situated service members was entirely within the district court's discretion. "[D]istrict courts have broad discretion when fashioning injunctive re-

lief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). The district courts' authority to issue nationwide injunctions in appropriate circumstances is well established. *See, e.g.*, *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992) (explaining in affirming nationwide scope of permanent injunction that "[i]t is well established … that a federal district court has wide discretion to fashion appropriate injunctive relief in a particular case" (citations omitted)); *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) ("It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction."). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Moreover, a violation of the APA is a paradigmatic circumstance for enjoining a regulation nationwide. *Regents of Univ. of Cal. V. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018) (nationwide injunctive "relief is commonplace in APA cases"). "In this context, '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that

the rules are vacated—not that their application to the individual petitioners is proscribed." *Id.* at 511 (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)); *see also Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554, 604–05 (4th Cir. 2017) (en banc), *vacated on other grounds*, 138 S. Ct. 353 (2017) (hereinafter *IRAP I*) (as long as the scope of the injunction is "carefully addressed to the circumstances of the case" and is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," district "[c]ourts may issue nationwide injunctions").

Applying these principles here reveals that the scope of the injunction is appropriate. First, the harm necessitating the injunction has a diffuse geographical footprint: HIV-positive airmen are stationed throughout the United States. JA785–91. *See Richmond Tenants,* 956 F.2d at 1308–09 (upholding nationwide injunction where challenged conduct caused irreparable harm in myriad jurisdictions across the country); *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001), *abrogated on other grounds by Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (noting

that "nationwide injunctions are appropriate" where, for example, "plaintiffs are … from throughout the country").

Second, the broad relief afforded here is appropriate in light of the broad, "categorical" nature of the unlawful conduct. As the district court pointed out, "plaintiffs' entitlement to injunctive relief … is not so much dependent on characteristics peculiar to Roe and Voe; rather, it flows from defendants' reliance on an arbitrary, across-the-board determination that HIV-positive servicemembers must be deemed ineligible to deploy to CENTCOM, regardless of each servicemembers' actual physical condition." JA874. That is, the Constitutional and statutory violations marring the discriminatory policies "would endure in all [their] applications," such that limiting relief to the named plaintiffs would improperly allow unlawful conduct to continue. *IRAP I*, 857 F.3d at 605. Because the policies violate the Constitution and APA as they apply to Roe and Voe, it follows they are also illegal as applied to service members who are similarly situated to Roe and Voe in the relevant respects. It would be a bizarre result if, after its conduct has been found in violation of both its own regulations and the Constitution, the

Government were permitted to engage in the same conduct against others who are situated exactly the same as Roe and Voe.

The authorities the Government relies on do not undermine the conclusion of the district court regarding the scope of the injunction. For example, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), does not deal with injunctive relief at all; it addresses whether an intervenor as of right must possess Article III standing to pursue a remedy different from the remedy sought by the plaintiff—an issue that is not presented here. *See id.* at 1651. In any event, *Town of Chester* actually *supports* the injunction under these circumstances. The Government cites *Town of Chester* for the proposition that an injunctive "remedy … must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Gov't Br. 39 (alteration in original) (quoting *Town of Chester,* 137 S. Ct. at 1650). The injunction here is entirely consistent with that principle. The "injury in fact" at issue is produced by an unlawful categorical bar on deployment by HIV-positive service members, resulting in their discharge from the military. The injunction bars the Government from implementing that policy, remedying exactly the "inadequacy" that caused the injury.

The Government's reliance on *Gill v. Whitford*, 138 S. Ct. 1916 (2018), is similarly misplaced. Like *Town of Chester*, *Gill* deals primarily with Article III standing. The plaintiffs were Democratic voters who challenged a statewide redistricting law they alleged diluted their votes. *Id.* at 1923. The Supreme Court found that, because voting rights are "individual and personal," and the alleged injury of vote dilution was "district specific," the only "remedy that is proper and sufficient lies in the revision of the boundaries of the individual [plaintiff's] own district." *Id.* at 1930. With respect to the effects of the redistricting act on representation in the state as whole, the plaintiffs had only an "undifferentiated, generalized grievance" insufficient to support Article III standing. *Id.* at 1931. The contrast with this case is evident: the categorical discrimination against Roe and Voe directly injures every similarly situated HIV-positive Airman (i.e., those in positions with a "high deployment tempo"), regardless of where they are stationed. Such Airmen do not have an "undifferentiated, generalized grievance" against the Government but will (absent the injunction) suffer a specific and concrete injury.

Nor does *U.S. Department of Defense v. Meinhold*, 510 U.S. 939 (1993), support the Government's position here. Although the Government claims "this case is materially indistinguishable from *Meinhold*" (Gov. Br. 40), the two cases are in fact distinguishable on multiple grounds. *Meinhold*, unlike this case, involved a single plaintiff—not a geographically diffuse group of similarly situated plaintiffs like Roe, Voe, and OutServe's members. *See Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1472–73 (9th Cir. 1994). Moreover, unlike Plaintiffs here, Meinhold did not ask the court to categorically enjoin the Government from enforcing its anti-gay policies against others; his motion for injunctive relief merely "request[ed] [his] immediate reinstatement in the Navy." *See id.* at 1480. The district court not only ordered Meinhold's reinstatement, but *sua sponte* entered a sweeping injunction barring the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation." *Meinhold v. U.S. Dep't of Def.*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), *vacated by Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469 (9th Cir. 1994).

It is unsurprising the Supreme Court and the Ninth Circuit found the district court's *sua sponte* nationwide injunction overbroad, given

that the single plaintiff never even sought such relief. *See* 34 F.3d at 1480 ("DoD should not be constrained from applying its regulations to Meinhold and all other military personnel" because "Meinhold sought only to have his discharge voided and to be reinstated."). Here, by contrast, Plaintiffs' complaint specifically requested an injunction barring the DoD and Air Force from "applying or enforcing the HIV-specific" provisions of four enumerated regulations. JA46.

Finally, the Government's policy arguments against the injunction offer no basis for reversal. While there are sound legal and prudential reasons to employ broad injunctions carefully, every court to consider the question (including this one) has concluded that "nationwide" injunctions are appropriate, and indeed desirable, in some circumstances—such as here, where the plaintiffs are geographically dispersed and the harm is caused by a categorical, undifferentiated policy that applies systematically to an entire class of persons. *See, e.g.*, *Richmond Tenants Org.*, 956 F.2d at 1308–09; *Virginia Soc'y for Human Life, Inc.*, 263 F.3d 379 at 393; *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) ("[T]here is no bar against … nationwide relief in federal district or circuit court when it is appropriate."). And although one Justice of the Supreme Court

has expressed his view that such injunctions are beyond the power of the courts, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring)), that view has never captured a majority of the Court—or even a second vote.

CONCLUSION

For all the reasons given, Plaintiffs respectfully ask that the judgment of the district court be AFFIRMED.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached brief contains 12,682 words and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Century Schoolbook font.

Dated: July 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2019, I caused the foregoing document to be electronically filed with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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