No. 19-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD ROE, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR APPELLANTS

JOSEPH H. HUNT
Assistant Attorney General

G. ZACHARY TERWILLIGER
United States Attorney

MARK B. STERN
MARLEIGH D. DOVER
LEWIS S. YELIN
JAMES Y. XI
Attorneys, Appellate Staff
Civil Division, Room 7515
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-8877

Of Counsel:

RYAN D. NEWMAN
Deputy General Counsel

MICHAEL J. FUCCI
Associate General Counsel

Department of Defense

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Other Authorities:

INTRODUCTION

The military allows enlisted service members who contract HIV to continue to serve if they can perform the duties of their office, grade, and rank. That policy reflects the military's understanding that, with treatment, many individuals may accomplish their military duties while living with HIV.

At the same time, however, HIV remains an incurable and communicable disease. While treatment may decrease the risk of transmitting HIV, it has not eliminated it. That risk is amplified on the battlefield where soldiers often come into contact with blood and where the rigors of war may make it more difficult for a service member to adhere to his treatment regime. In the professional judgment of the military, allowing HIV-positive soldiers to deploy to the Middle East, North Africa, and Central Asia (areas that include Syria, Afghanistan, and Iraq) presents risks that it is unwilling to bear. Accordingly, the United States Central Command, which governs military operations in those areas, prohibits personnel with HIV from deploying without a waiver.

The two individual plaintiffs in this case are airmen who contracted HIV. The Air Force determined that they could no longer perform their military duties because their career fields required them to deploy frequently and because their condition prevented them from deploying to Central Command's area of responsibility, where most airmen are expected to go. The Air Force planned to discharge them in early 2019.

The district court entered a nationwide preliminary injunction prohibiting the Air Force from making or enforcing discharge decisions based on the deployment policy, concluding that it is irrational. The court did not dispute that HIV is a communicable disease or that a risk of transmission exists. Nor did it dispute that modern medicine has not eliminated that risk. Instead, the court disagreed with the military's judgment about whether to tolerate that risk, concluding—based on its own evaluation of the medical science and battlefield exigencies—that it is irrational for the military not to do so because (in the court's view) the risk is "low."

The district court's disregard for the military's judgment is remarkable. The Supreme Court has stressed time and again that courts owe special deference to the professional judgments of our Nation's military leaders on such matters. Yet the court substituted its own judgment for that of the military about the amount of risk to tolerate and who to send to the battlefield. The court's decision is all the more perplexing because it purported to apply rational basis review. Classifications fail that standard only when they rest on grounds "wholly irrelevant" to the achievement of a legitimate objective. Preventing the transmission of communicable diseases on the battlefield is a legitimate objective. Restricting those with communicable diseases from deploying to the battlefield is relevant to that objective. It is mystifying how the district court could determine otherwise.

The district court was on no firmer ground in concluding that the discharge decisions violated Air Force regulations that prohibit the discharge of airmen "solely"

because they have HIV. The Air Force concluded that Roe and Voe could no longer perform the duties of their office, grade, or rank because their jobs required them to deploy frequently and because their condition prevented them from deploying to the area where most airmen are expected to go. The discharge decisions therefore turn not just on Roe and Voe's HIV status, but also on how often their jobs require them to deploy. Indeed, the Air Force regularly retains airmen with HIV who work in jobs that do not require frequent deployment.

The injunction is all the more inexplicable because of the lopsided equities here. The injunction forces the Air Force to retain airmen who cannot deploy, even though their units are often asked to do so. The injunction therefore requires those who *can* deploy to compensate for their unavailable team members by deploying more often, burdening those service members, their families, and their units. On the other hand, the discharge decisions will not cause the plaintiffs to suffer any injuries that are irreparable. In all events, Article III standing requirements and bedrock equitable principles require that any injunction should at least be limited to redressing the injuries of the plaintiffs here.

STATEMENT OF JURISDICTION

The plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202, raising claims under the U.S. Constitution and the Administrative Procedure Act (APA), 5 U.S.C. § 702. JA 21. The district court entered a preliminary injunction on February 15, 2019. JA 875-76. The government

filed a timely notice of appeal on April 16, 2019. JA 878-79. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in issuing a nationwide preliminary injunction prohibiting the Air Force from discharging any active duty service member on the ground that he is ineligible for deployment to U.S. Central Command because he is HIV-positive.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Legal Background

1. The military has long imposed restrictions on the ability of people to serve if they have medical conditions that may limit their ability to deploy, pose an increased risk of injury to themselves or others, or otherwise threaten to impair the effectiveness of their unit. Since 1988, those conditions have included HIV. The current policy prohibits individuals with HIV from enlisting and requires each department (i.e., the Army, Navy, Air Force, etc.) to screen enlisted service members for the virus. Department of Defense Instruction (DoDI) 6485.01, § 3(a) (June 7, 2013) (JA 128).

Air Force regulations provide that enlisted airmen "with [a positive HIV test] who are able to perform the duties of their office, grade, rank and/or rating, may not

be separated solely on the basis of laboratory evidence of HIV infection." Air Force Instruction (AFI) 44-178, A9.1 (Mar. 4, 2014) (JA 381). But if doctors determine that the infection may "prevent the Service member from reasonably performing the duties of [his] office, grade, rank, or rating," Department of Defense regulations require the referral of the service member to the relevant department's Disability Evaluation System. DoDI 6485.01, Encl. 3, § 2(c) (JA 134); DoDI 1332.18, Encl. 3, App. 1, § 2(a) (Aug. 5, 2014) (JA 75).

The Disability Evaluation System is a multi-tiered review process that evaluates whether a service member is fit to continue serving. DoDI 1332.18 (JA 50). A service member will be considered unfit if evidence adduced during the process establishes that his condition prevents him from performing the duties of his office, grade, rank, or rating. DoDI 1332.18, Encl. 3, App. 2, § 2(a)-(b) (JA 79). When deciding whether a service member can perform his duties, authorities must consider, among other things, "[w]hether the Service member is deployable." *Id.* § 4(a)(3) (JA 80). The weight placed on a service member's deployability, however, may vary depending on the member's "career field" or "career point"—factors that bear on how frequently the military would be likely to ask the service member to deploy. JA 474-76.

2. Various military regulations restrict service members with medical conditions from deploying. Department of Defense regulations set minimum standards. DoDI 6490.07 § 2(c) (Feb. 5, 2010) (JA 137). Each individual military

department and each Combatant Command (i.e., the U.S. Africa Command, the U.S. Central Command, the U.S. European Command, etc.) may establish additional restrictions depending on the specific needs of the department or Command. *Id.* § 2(c)(3) (JA 137).

Three regulations are relevant. The Department of Defense requires service members with certain enumerated medical conditions, including HIV with "the presence of progressive clinical illness or immunological deficiency," to obtain a waiver from the relevant Combatant Commander before deploying. DoDI 6490.07, Encl. 2, § 3 (JA 143); *id.* at Encl. 3, § e(2) (JA 146). The Air Force requires HIV-positive airmen to obtain a waiver to deploy outside the United States and Puerto Rico. AFI 44-178, § 2.4.2 (JA 351). And the U.S. Central Command (CENTCOM), the "theater-level Unified Combatant Command with responsibility for military operations across North Africa, Central Asia, and the Middle East, including Iraq and Afghanistan," JA 478, requires HIV-positive airmen to obtain a waiver to deploy to its area of responsibility. MOD 13 to USCENTCOM Individual Protection and Individual-Unit Deployment Policy (MOD-13), Tab A § 7(c)(2) (JA 417). Because of ongoing military operations in the region, 80% of Air Force deployments in the last two decades have been to Central Command's area of responsibility. JA 474.

3. The Air Force frequently retains HIV-positive airmen despite their inability to deploy to Central Command. That practice reflects the Air Force's understanding that HIV-positive airmen who work in fields that do not require frequent deployment

may still be able to perform the duties of their office, grade, or rank. JA 473-74. Accordingly, if an HIV-positive airman "is in a career field that does not require deployment," the Medical Retention Standards Office within the Air Force will return the airman to duty rather than refer him to the Disability Evaluation System. JA 470. Thirty-one airmen were diagnosed with HIV in 2018. JA 470. The Medical Retention Standards Office returned ten to duty and referred the remaining twenty-one to the Disability Evaluation System. *Id.*

Even when airmen are referred to the Disability Evaluation System, however, they may be returned to duty if the System determines that their condition does not prevent them from fulfilling their duties. The Disability Evaluation System processed ten airmen with asymptomatic HIV in October 2018 and returned four to duty. JA 476. Those found unfit worked in career fields with at least a 20% chance of deployment; those found fit worked in career fields with less than a 12.8% chance of deployment. *Id.*

B. Factual Background

Plaintiffs Richard Roe and Victor Voe enlisted in the Air Force in 2012 and 2011. JA 30, 33. Each was diagnosed with HIV in 2017. JA 30, 34. Thereafter, each began antiretroviral treatment, which requires taking one or two pills per day. JA 30, 34. The treatment has rendered their viral loads (the amount of HIV per millimeter of blood) "undetectable." JA 28, 30, 34.

Following their diagnoses, the Air Force's Medical Retention Standards Office referred them to the Air Force's Disability Evaluation System to determine whether they were fit to continue serving. The Air Force determined that neither was.

In Roe's case, the Medical Evaluation Board (the first level of review in the Disability Evaluation System) determined that Roe's condition may "contribute to make [his] qualifications . . . for worldwide duty questionable" and referred him to the Informal Physical Evaluation Board (the second level of review). JA 552. The Informal Board acknowledged that Roe's commander wanted him retained. JA 551. And it acknowledged that Roe was able to perform his daily in-garrison duties. *Id.* It nevertheless concluded that Roe was unfit for service because he could not "reasonably perform[] the duties of his office, grade, rank or rating." *Id.* The Board noted that military regulations prohibited Roe from deploying without a waiver. *Id.* And it explained that "some nations have legal prohibitions against entering their country with [an HIV] diagnosis." *Id.*

Roe appealed that determination to the Formal Physical Evaluation Board (the third level of review). The Formal Board acknowledged both the recommendations supporting Roe's retention and Roe's record of performance. JA 549. Nevertheless, it also determined that Roe was no longer fit to serve. *Id.* Roe's inability to deploy worldwide, the Formal Board explained, "would have [a] significant effect on his career progression and place increased burden on others within his career field." *Id.* Roe appealed that determination to the Secretary of the Air Force Personnel Council

(the fourth level of review). The Council upheld the Board's decision, noting that Roe's disease "renders him ineligible for deployment to the Central Command Area of Responsibility, where the majority of Air Force members are expected to deploy." JA 545. "Deployability," the Council continued, "is a key factor in determining fitness for duty," and "the member belongs to a career field with a comparatively high deployment rate/tempo." *Id.* The Air Force planned to honorably discharge Roe on March 28, 2019. JA 828, 1089.

The Medical Evaluation Board also referred Voe to the Informal Physical Evaluation Board, JA 560, which found him unfit for service because his condition "prevents him from reasonably performing the duties of his office, grade, rank or rating; represents a medical risk to [himself and others]; is subject to progression; requires frequent follow-up with a medical specialist; and limits [his] ability to meet mobility requirements." JA 559. The Formal Physical Evaluation Board agreed, explaining that Voe "require[d] frequent follow-up with a specialist" and was "a non-deployable asset in a high ops-tempo career field." JA 557. The Secretary of the Air Force Personnel Council upheld the decision to discharge Voe, reasoning that Voe was "ineligible for deployment to the Central Command Area of Responsibility, where the majority of Air Force members are expected to deploy," and that Voe "belongs to a career field with a comparatively high deployment rate/tempo." JA 553. The Air Force planned to honorably discharge Voe on February 25, 2019. JA 831, 1378.

C. Prior Proceedings

Roe, Voe, and OutServe-SLDN, Inc. (an advocacy organization for LGBT and HIV-positive service members), filed this lawsuit in December 2018. JA 16. They contend that the Air Force's decision to terminate Roe and Voe violated the equal protection component of the Fifth Amendment's Due Process Clause and the APA. JA 36-45. In February 2019, the district court denied defendants' motion to dismiss and granted plaintiffs' motion for a preliminary injunction. JA 875-76.

The court first rejected the government's argument that the case involved a "non-justiciable military controversy" under the 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). Under those cases, military personnel decisions are not justiciable if a balance of four factors weighs in the military's favor: the nature and strength of the plaintiff's challenge, the potential injury to the plaintiff if review is refused, the type or degree of anticipated interference with the military function, and the extent to which the exercise of military expertise or discretion is involved. *Williams*, 762 F.2d at 359.

The district court concluded that the balance of the four factors weighs in favor of the plaintiffs. JA 846-47. Concerning the strength of plaintiffs' claims, the court concluded that the claims "are not weak." JA 846. It noted that plaintiffs "have made a strong showing that defendants' policies are irrational, based on a flawed understanding of HIV epidemiology, and inconsistently applied." *Id.* Even though

plaintiffs did not bring their lawsuit on behalf of a class, the court stated that they sought relief "on behalf of a broader class of HIV-positive servicemembers," and that the "far-reaching nature of these claims surely counsels in favor of judicial review." JA 846-47. The court believed that the military's policies would cause plaintiffs "imminent, serious cognizable injuries." JA 847. The court recognized that "whether a servicemember is fit for continued military service is a question that implicates military discretion, and one in which courts have little expertise." JA 846. Nevertheless, it surmised that the intrusion on the military function and military discretion would be small, because plaintiffs "request[ed] only that military decisionmakers evaluate whether they are fit for service with more careful attention to their individual characteristics." JA 847.

On the merits, the district court determined that the plaintiffs are likely to succeed on their claims. JA 852-53. The court reasoned that "the question is the same for both the equal protection and APA claims: 'whether the defendants' treatment of Roe and Voe was rational (i.e., not arbitrary and capricious).'" JA 855 (brackets and citation omitted).

The district court first determined that "the policy declaring all HIV-positive servicemembers categorically ineligible for deployment to CENTCOM is irrational and arbitrary." JA 866. The court found that policy to be "inconsistent with the state of science and medicine and with the way the military treats other chronic but manageable conditions." JA 863. The court acknowledged that "Roe and Voe must

take daily medication to ensure that their viral loads remain suppressed," but it found that "it 'often takes weeks' for an individual's viral load to return to clinically significant levels" even after an individual stops antiretroviral treatment. JA 859. The court also pointed to "several serious medical conditions treated with daily medication"—namely, dyslipidemia (elevated cholesterol or triglycerides), high blood pressure, and asthma—"that do not subject servicemembers to the same categorical denial of deployability to CENTCOM." JA 859-60. The court therefore found "no reason why asymptomatic HIV is singled out for treatment so different from that given to other chronic conditions." JA 860. The court also dismissed the potential risk of "transmitting HIV through a 'battlefield blood transfusion,'" reasoning that "[t]hat concern fades from view after a servicemember has been diagnosed with HIV and thus knows that he cannot give blood." JA 862. The court likewise dismissed the potential risk of "accidental transmission of HIV on the battlefield," citing "uncontroverted evidence" from plaintiffs' experts "that even without effective treatment, the risk of transmission through nonintimate contact such as blood splash is negligible." *Id.* The court turned aside the military's judgment that the risk of transmission is sufficiently high to justify the deployment restriction, faulting it for failing to point to "evidence" to rebut the expert witnesses and relying instead on "little more than *ipse dixit*." JA 863.

Having found Central Command's deployment policy to be irrational, the district court likewise found the Air Force's decisions to discharge Roe and Voe to be

arbitrary and capricious. JA 864-67. 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." JA 867.

The court also held that the decisions to discharge Roe and Voe were arbitrary and capricious because referring Roe and Voe to the Disability Evaluation System in the first place was "arguably inconsistent" with Department of Defense regulations that classify individuals with HIV as "deployable with limitations" rather than "non-deployable." JA 864. It pointed to a 2018 report to Congress from the Department of Defense that stated that "the retention determination process" applies to the latter but not to the former. *Id.*

The court also determined that the discharge decisions contravened Air Force regulations that prohibit the Air Force from separating service members "solely" because of their HIV status. JA 865. And it faulted the Air Force for "fail[ing] to consider key aspects of the problem," such as whether Roe and Voe were deployable to locations other than the Middle East, North Africa, and Central Asia and whether they could be retained in a different capacity. JA 867.

The court concluded that the equities weighed in the plaintiffs' favor. In the absence of a preliminary injunction, the court concluded, plaintiffs would suffer irreparable injury. The court declared that plaintiffs 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." JA 869. That injury is "compounded," the court believed, because if plaintiffs are discharged, they "will likely be forced to reveal their condition." JA 870. In contrast, the court concluded, 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." JA 871. Finally, the court determined that 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." JA 872.

The court entered a nationwide injunction prohibiting the Air Force from "making or enforcing discharge determinations based on" Central Command's policy prohibiting personnel with HIV from deploying in the Middle East, North Africa, and Central Asia without a waiver. JA 873-75. The court later amended that injunction to allow the Air Force to discharge airmen who wished to be separated. JA 877.

SUMMARY OF ARGUMENT

The district court's ruling is remarkable in every way. The court concluded—based on its own assessment of medical science and battlefield exigencies—that a longstanding military policy governing who to send to the battlefield fails to satisfy rational basis review. But courts almost never strike down a policy as illegitimate under rational basis review. And they are especially hesitant to do so when the policy

at issue is the military's. That hesitance reflects the recognition that courts have no competence over decisions regarding military affairs. Indeed, it is difficult to conceive of *any* decision over which the courts have less competence than the one here, which involves the military's judgment, based on its understanding of medical science and battlefield risks, about who to send to fight our nation's wars.

Indeed, this Court has held that military discharge decisions are not even reviewable if a balance of four factors weighs in favor of the military. Those factors are: the nature and strength of the plaintiffs' challenge, the potential injury to the plaintiff if review is refused, the type or degree of anticipated interference with the military function, and the extent to which the exercise of military expertise or discretion is involved. Each of the four factors weighs in favor of the military here.

Even if the plaintiffs' claims were reviewable, they fail on the merits. There is no world in which Central Command's deployment policy is irrational. HIV is a communicable disease. Modern medicine has not eliminated the risk of transmitting it. And that risk is heightened on the battlefield, where soldiers often come into contact with blood and may fail to adhere to their treatment because of the rigors of war. While plaintiffs and the district court disagree with the military about the extent of the risk and whether the military should tolerate it, decisions about the amount of risk to tolerate and who to send to the battlefield are for the military, not the courts, to make.

The deployment policy also reflects the military's determination that allowing personnel with HIV to deploy would endanger the military's battlefield blood supply. Personnel with HIV may not donate blood, as the risk of transmission from blood transfusions is extremely high even in cases where the donating service member has adhered to treatment. Teams are sometimes composed of just a few soldiers. The inability of just one or two soldiers to give blood may force a wounded soldier to choose between receiving a blood transfusion from an HIV-positive service member and not receiving one at all.

The deployment policy also reflects the military's foreign policy considerations. Several countries within Central Command's area of responsibility prohibit people with HIV from entering. The military has a legitimate interest in maintaining relations with those countries. Its determination to comply with their restrictions is plainly rational, and the court had no basis to interfere with that judgment, which implicates foreign affairs as well as military matters.

The court's analysis of plaintiffs' APA claims is equally flawed. The court erred in concluding that the Air Force contravened Department of Defense regulations by referring plaintiffs to the Disability Evaluation System. Those regulations require the Air Force to refer a service member to the System if his condition might impair his ability to do his job. And in considering whether a service member can do his job, the regulations require the Air Force to consider whether the service member is deployable. Here, Roe and Voe's condition prohibits them from deploying to an area

where most airmen are required to go. The Air Force therefore did not violate its regulations by referring them to the Disability Evaluation System.

The court likewise erred in concluding that the Air Force violated its own regulations prohibiting the discharge of airmen "solely" because they have HIV. The Air Force discharged plaintiffs because their condition prohibits them from deploying *and* because their jobs require them to deploy frequently. Indeed, the Air Force routinely retains HIV-positive airmen if they work in fields that do not require frequent deployment.

The district court further erred by faulting the Air Force for failing to consider whether plaintiffs could deploy to other locations. It was not arbitrary for the Air Force to focus on whether plaintiffs could deploy to Central Command's area of responsibility, which includes Syria, Afghanistan, and Iraq. That is where most airmen are expected to go. Nor did military regulations require the Air Force to consider whether plaintiffs could be retained in another capacity. The regulation the district court relied on applies only to service members who have a condition that disqualifies them for specialized duties (such as flying airplanes), not for general military responsibilities like deployment.

The balance of equities likewise preclude an injunction. Courts have repeatedly concluded that mere discharge from the military is not sufficient to warrant the extraordinary remedy of preliminary injunctive relief. And the Air Force and the

public interest are injured by an order that requires the Air Force to retain airmen who cannot deploy.

The court's order is particularly egregious because it extends not only to the individual plaintiffs in this case but to all discharge decisions. The scope of the injunction magnifies the injury to the Air Force and contravenes Article III standing requirements and bedrock equitable principles.

STANDARD OF REVIEW

To obtain the "extraordinary remedy" of a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). "The first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When the government is the opposing party, the last two factors merge. *Id.* at 435.

This Court reviews an order regarding preliminary injunctive relief for abuse of discretion, but reviews the district court's legal conclusions de novo. *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013).

ARGUMENT

I. Plaintiffs' Claims Are Not Justiciable

This Court has made clear that claims challenging military discharge decisions are not justiciable if a balance of four factors (called the "*Mindes* factors" after *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)) weighs in the military's favor. *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991); *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985).[1] Those factors are: (1) the nature and strength of the plaintiffs' challenge, (2) the potential injury to the plaintiff if review is refused, (3) the type or degree of anticipated interference with the military function, and (4) the extent to which the exercise of military expertise or discretion is involved. *Williams*, 762 F.2d at 359.

Application of those factors in this case parallels the application of the preliminary injunction factors. The first and fourth factors involve an assessment of the strength of plaintiffs' claims. The second and third factors address the relative injuries to plaintiffs, the military, and the public. To avoid unnecessary repetition, the

[1] The district court criticized the *Mindes* test and, citing *Aikens v. Ingram*, 811 F.3d 643 (4th Cir. 2016), questioned whether it remains good law. JA 845-46. *Aikens*, however, did not overrule *Guerra* and *Williams*. 811 F.3d at 648 (deciding case "[w]ithout passing on the continued viability of the *Mindes* test in this circuit"). The *Mindes* approach remains the law in the Fourth Circuit, as it does in most other courts of appeals. *See, e.g.*, *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984); *Harkness v. Secretary of Navy*, 858 F.3d 437 (6th Cir. 2017); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982); *Wenger v. Monroe*, 282 F.3d 1068 (9th Cir. 2002); *Clark v. Widnall*, 51 F.3d 917 (10th Cir. 1995); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987). *But see Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765 (7th Cir. 1993) (declining to adopt *Mindes*); *Kreis v. Secretary of Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (same); *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981) (same).

government addresses those issues in the context of the preliminary injunction factors. Because the *Mindes* justiciability doctrine does not implicate the Court's jurisdiction, *Mindes*, 453 F.2d at 198-99, the Court may resolve the case on the basis of a *Mindes* analysis or on the merits. *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (considering the merits of plaintiffs' claims after assuming without deciding that they were justiciable); *see also Powell v. McCormack*, 395 U.S. 486, 512-13 (1969) (distinguishing "justiciability" from "jurisdiction").

II. Plaintiffs' Claims Fail On The Merits

A. Central Command's Deployment Policy Survives Rational Basis Review

1. The military requires personnel to meet strict physical and medical standards before deploying to certain environments. The reasons for imposing such standards are obvious: those environments often involve hazards that may exacerbate a service member's medical condition, risking harm to the service member and to the service member's unit and potentially impairing the unit's ability to accomplish its mission. The military accordingly requires service members with a variety of conditions to obtain waivers before deploying. U.S. Central Command MOD-13, Tab A (JA 414-21). Those conditions include, among other things, sleep apnea, migraines, heat stroke, heart disease, bulimia, anorexia, and infectious diseases such as HIV, hepatitis, and tuberculosis. *Id.* The military also requires service members who take various medications to obtain waivers before deploying. *Id.* (JA 420-21). Each restriction

involves a judgment call by the military that the risk of deploying someone with a particular medical condition is too high to justify.

Because Central Command's deployment policy turns on a medical condition, not any suspect or quasi-suspect classification, the policy is subject to rational-basis review. *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that rational basis review applies to classifications based on HIV status). Under that standard, 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 v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993)). "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). "Given the standard of review, it should come as no surprise that [courts] hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." *Hawaii*, 138 S. Ct. at 2420.

A more searching form of review would be particularly inappropriate in this case, which implicates the military's judgment about which service members to deploy to potential combat environments. *See Thomasson*, 80 F.3d at 928 (noting that "respect

for the separation of powers should make courts reluctant to establish new suspect classes" and that that reluctance has "even more force" in the military context). The Supreme Court has long accorded "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981). That deference reflects the recognition that courts have no competence over the "complex, subtle, and professional decisions as to the composition . . . and control of a military force." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *see also Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the [military]."). "Judicial deference . . . is at its apogee" in this area because "military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quotation marks and brackets omitted).

The district court did not question the military's interest in preventing the transmission of communicable diseases in combat zones. As the Department of Defense explained in an August 2018 report to Congress, "preventing disease through limiting risk of exposure to infectious disease is a key component to enhanc[ing] military readiness and effectiveness," because "loss of personnel to infectious diseases reduces operational readiness and effectiveness by requiring replacement troops." JA 458.

Restricting personnel with HIV from deploying is relevant to that interest. HIV may be transmitted through sex, blood transfusions, contact with sharp objects contaminated with the virus, and contact between broken skin and HIV-infected blood. JA 456-57.[2] Those risks are heightened in deployed environments. As one 2012 military study explains, "[d]eployment and the battlefield present potential exposures to blood-borne pathogens including HIV," as "there is potential contact with the battlefield supply of non-FDA-approved blood products, occupational combat exposures, and casualty care." JA 485.

Medical advances have not eliminated those risks. While individuals who obtain an "undetectable viral load" by taking antiretroviral medications have a "negligible risk" of sexually transmitting HIV, "exposure to a source patient with an undetectable serum viral load does not *eliminate* the possibility of HIV transmission." JA 456 (emphasis added) (quoting CDC, *U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HIV*, at 10-11 (2013)[3]). And while antiretroviral medication may help prevent transmission through sexual activity, it "has no application" to the transmission of the disease through other means, such as contact with sharp HIV-infected objects and blood transfusions. JA 457.

[2] *See also* Centers for Disease Control and Prevention (CDC), *HIV Transmission*, *available at*: https://go.usa.gov/xmmJg (CDC, *HIV Transmission*).

[3] Available at: https://go.usa.gov/xmmJj.

Moreover, as plaintiffs' experts recognize, achieving and maintaining an undetectable viral load requires excellent adherence to treatment, which requires taking medicine every day. JA 598 (recognizing HIV-infected individuals must "adhere[] to their prescribed medications" to achieve and maintain an undetectable viral load); JA 680 (same); *see also* JA 456; CDC, *HIV Transmission* ("Missing some doses can increase the viral load and the risk of transmitting [the disease]."). Strict adherence to treatment is not always easy. According to the CDC, up to one-third of people who take antiretroviral medicine fail to maintain an undetectable viral load. CDC, *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV* (Dec. 2018).[4] The risk of missing doses is exacerbated when service members are deployed to "extremely austere and dangerous places," where service members face "highly stressful combat conditions" and where operational challenges may make it difficult for the military to provide medical care. JA 446, 462; *see also* JA 480-81.[5]

The deployment policy also reflects other rational concerns. For example, a soldier wounded on the battlefield may need an emergency blood transfusion, which

---

[4] Available at: https://go.usa.gov/xmmJw (citing Gary Marks, et al., *Single viral load measurements overestimate stable viral suppression among HIV patients in care: Clinical and public health implications*, 73 J. of Acquired Immune Deficiency Syndromes 205 (Oct. 2016), *available at*: https://go.usa.gov/xmA2e).

[5] Moreover, recent studies suggest that patients treated with antiretrovirals may suffer from "memory difficulties, mental slowing, attention deficits, and other neurological impairment symptoms." JA 457. The impact of these potential impairments on a service member's "readiness, resilience, and/or retention is currently unknown." JA 458.

would require a team member to donate blood in the field. Because teams are often composed of just a few soldiers, the military has a strong interest in ensuring that all members of the team can donate blood if necessary. Personnel with HIV, however, may not donate blood, as blood transfusion presents an extremely high risk of transmission (up to 92.5% transmission rate). JA 459.[6] Allowing HIV-positive personnel to deploy might require a wounded soldier to choose between accepting a transfusion from an HIV-infected service member and not receiving one at all. It is rational for the military to decide not to put its soldiers to that choice.

The deployment policy also reflects the military's foreign policy considerations. As the deployment policy notes, "some nations within [Central Command's area of responsibility] have legal prohibitions against entering their country(ies) with [an HIV] diagnosis." U.S. Central Command MOD-13, Tab A § 7(c)(2) (JA 417). Central Command thus requires its civilian personnel to comply with all immunization and medical screening requirements of their host nation before deploying, U.S. Central Command MOD-13 § 15.A.3 (JA 393), and has explained that for service members with infectious diseases such as hepatitis, HIV, and tuberculosis, its decision to grant a waiver "cannot override host or transit nation infectious disease or immunization

[6] The CDC's data includes cases involving transmission of very high viral loads as well as lower levels of viremia. JA 459. Other studies indicate that blood transfusions may pose a "very high risk of transmission" even if from an-HIV infected service member with an undetectable viral load. *Id.* (citing Pragna Patel, et al., *Estimating per-act HIV transmission risk: a systematic review*, 28 AIDS 1509 (June 2014), *available at*: https://go.usa.gov/xmA2S).

restrictions," U.S. Central Command MOD-13, Tab A § 7(c)(5) (JA 417). The Department has a legitimate interest in maintaining good relations with those countries. In its judgment, that interest is best served by complying with their requirements regarding HIV and other infectious diseases. JA 461 ("Current DoD- and Service-level personnel policies pertaining to HIV-infected members of the Armed Forces . . . [a]re instituted to . . . respect host Nation laws where our forces are deployed."). That judgment "implicate[s] our relations with foreign powers." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Courts lack the competence to second guess it. *Id.* (noting that "decisions" that "may implicate our relations with foreign powers . . . are frequently of a character more appropriate to the Legislature or the Executive than to the Judiciary").

2. The district court recognized that HIV may be transmitted on the battlefield. And it acknowledged that modern medicine has not eliminated that risk, as HIV-positive service members who fail to adhere to treatment "are vulnerable to 'viral rebound.'" JA 859. But it downplayed the risk of transmission because, according to an affidavit supplied by one of plaintiffs' experts, "it 'often takes weeks' for an individual's viral load to return to clinically significant levels." *Id.* And "even in the case of a sustained disruption in treatment long enough for the viral load to rebound to clinically significant levels, an individual's risk of transmitting HIV during military service remains vanishingly low." JA 862.

But whether a risk is high, low, or vanishingly low is beside the point. The court acknowledged that a risk exists. Decisions about the amount of risk to tolerate are for the military, not the courts, to make. *Winter*, 555 U.S. at 24. The military acknowledged the effect of antiretroviral medication, but determined that even a small risk is still too much to bear. JA 456, 461. By concluding that the military should tolerate that risk, the district court inappropriately "substitute[d its] judgment" for that of the military. *Rostker*, 453 U.S. at 68.

The court also erred by "substitut[ing] . . . [its] own evaluation of evidence for a reasonable evaluation" by the military. *Rostker*, 453 U.S. at 68. After considering "current medical literature . . . regarding transmission and treatment of HIV," JA 459-60, the military concluded that transmission is possible even when an individual has an undetectable viral load. JA 456 (citing CDC, *U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HIV*, at 10-11 (2013)). It also concluded that medication does not help minimize transmission through blood transfusion or contact with sharp objects—hazards that soldiers commonly face. JA 457.

Not willing to accept the military's answers, the district court examined the evidence and gave its own answers, concluding—based on a single affidavit from a plaintiffs' expert—that transmission is impossible when an individual's viral load is "suppressed." JA 861. But the military's decision "is not subject to courtroom factfinding." *Thomasson*, 80 F.3d at 928 (quoting *Beach Commc'ns*, 508 U.S. at 315). So long as "the question is at least debatable," plaintiffs cannot "procure invalidation of

the [decision] merely by tendering evidence in court that the [decisionmaker] was mistaken." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). The district court "was quite wrong in undertaking an independent evaluation of [the] evidence, rather than adopting an appropriately deferential examination of [the military's] evaluation of that evidence." *Rostker*, 453 U.S. at 83.[7]

The district court underscored its error by faulting the military for not "respond[ing] to plaintiffs' experts" with "scientific data, evidence, or real-life accounts." JA 863. As the military's 2018 Report to Congress explains, the military's policies regarding HIV are informed by "all available contemporary medical literature, practice guidelines, medications, and treatment modalities based on emerging and published evidence-based studies or expert opinion." JA 459-60.

In any event, under rational basis review the government "has no obligation to produce evidence to sustain the rationality of a . . . classification." *Heller*, 509 U.S. at 320. The district court's criticisms cannot be squared with the Supreme Court's rejection of the same objections in *Goldman*. There, the plaintiff argued that the "Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline." 475 U.S. at 509. The plaintiff (like the district court here) faulted the Air Force for relying on "mere *ipse dixit*" rather

[7] The district court also faulted the military for failing to point to actual cases of battlefield transmission. JA 862. But the military prohibits service members with HIV from deploying to combat environments in the first place, so it is unsurprising that there would be no documented examples of transmission.

than "actual experience or a scientific study in the record." *Id.* The plaintiff also asserted (like the district court here) that the Air Force's concerns were "contradicted by expert testimony." *Id.* The Court emphatically declared that the opinions of expert witnesses were "quite beside the point." *Id.* What mattered was the "considered professional judgment" of "military officials." *Id.*

The district court also erred in discounting the government's justifications on the ground that "plaintiffs have identified several serious medical conditions treated with daily medication that do not subject servicemembers to the same categorical denial of deployability to [Central Command's area of responsibility]." JA 859-60. Under rational basis review, a classification does not fail because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citation omitted); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (upholding classification under rational basis review "[e]ven [though] the classification" was "both underinclusive and overinclusive"). That is particularly so in the military context. In *Goldman*, for instance, the Court rejected a free-exercise challenge to the Air Force's judgment that allowing a Jewish officer's to "wear[] an unobtrusive yarmulke" while working as a psychologist in an Air Force base hospital would "threaten discipline," even though the Air Force allowed service members to wear "visible religious headgear . . . in designated living quarters" and "certain pieces of jewelry." 475 U.S. at 508-09. Decisions about where to "draw[] the line," the Court explained, are for the military, not the courts, to make. *Id.* at 510.

The district court's analysis fails even on its own terms. Three of the examples it identified—dyslipidemia (elevated cholesterol or triglycerides), hypertension (high blood pressure), and asthma—are not infectious diseases and therefore do not present the same concerns as HIV. It is plainly rational for the military to treat them differently. The fourth example, service members who require daily antimalarial medicine, is likewise inapt. Service members take antimalarial medicine not because they *have* malaria. They take it to avoid contracting the disease when they are deployed to malaria-prone areas. Rather than treating similar conditions differently, the deployment policy treats similar conditions similarly. It prohibits service members with other infectious diseases such as hepatitis and tuberculosis from deploying without a waiver. U.S. Central Command MOD-13, Tab A, § 7(C) (JA 417).

The district court also erred by discounting the military's concerns about blood transfusions. The court concluded that there is no risk of transmitting HIV through blood transfusions because personnel with HIV know they cannot donate blood. JA 862. That misses the point. As explained above, wounded soldiers often require emergency blood transfusions in the field. When teams are small, the inability of even one or two soldiers to give blood may create unnecessary risks.

The court also noted that "[m]any service members cannot give blood for various reasons, including blood type and allergies, but are not barred from deploying." JA 863. As explained above, the military's policy does not fail rational basis review simply because it is underinclusive. And in any event, here too the

court's comparisons fail on their own terms. The blood-type problem is far more difficult to address than the problem posed by the limited number of persons who cannot donate blood because of an infectious disease. The military could rationally conclude that the costs and benefits of dealing with that hypothetical problem are different than those presented by service members with HIV. *See Thomasson*, 80 F.3d at 930 (decision to treat a problem differently because of a different "allocation of military resources and a balance of competing interests" is not irrational). And even if it is true that personnel with "allergies" are unable to donate blood, the military may rationally treat them differently because they do not present the same transmission risks as personnel with HIV.

B. The Discharge Decisions Do Not Violate The APA

1. Plaintiffs' APA claims fail for substantially the same reasons as their equal protection claim. The "scope of review under the 'arbitrary and capricious' standard is narrow." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Under "this 'narrow' standard of review," an agency need only "'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). And review of that explanation is "deferential." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

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." JA 459-60.[8] 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." JA 456. It also recognized, however, that "in the unique circumstances of military combat operations, there remain significant risks" to deploying service members with HIV. JA 461; *see also* JA 446 (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"). That judgment call is plainly "the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52. There is no basis for setting it aside.

2. The district court likewise erred in concluding that the Air Force departed from its regulations. The court suggested, for example, that the decision to refer Roe

[8] They regularly consult, among other things, information from the Department of Health and Human Services, the Centers for Disease Control and Prevention, and the HIV Medicine Association of the Infectious Diseases Society of America. JA 459-60.

and Voe to the Disability Evaluation System in the first place was "arguably inconsistent" with military regulations. JA 864. That is incorrect. Both Department of Defense and Air Force regulations state that service members with HIV will be "referred for . . . a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses." DoDI 6485.01, Encl. 3, § 2(c) (JA 134); AFI 44-178, § 2.4 (JA 350). Service members with chronic or progressive illnesses will be referred to the Disability Evaluation System if medical authorities determine that the member has a condition that "may . . . prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating." DoDI 1332.18, Encl. 3, App. 1, § 2(a) (JA 75). To assess whether the service member can reasonably perform his duties, medical authorities must consider "[w]hether the Service member is deployable." *Id.* Encl. 3, App. 2, § 4(a)(3) (JA 80). And U.S. Central Command prohibits service members with HIV from deploying without a waiver. U.S. Central Command MOD-13, Tab A § 7(C)(2) (JA 417). The Air Force therefore correctly referred Roe and Voe to the Disability Evaluation System.

In concluding otherwise, the district court pointed to a Department of Defense regulation that classifies service members with HIV "with the presence of progressive clinical illness or immunological deficiencies" as "deployable with limitations." JA 864 (quoting DoDI 1332.45 § 3.3 (July 30, 2018) (JA 115)). The court noted that in the 2018 Report to Congress, the military explained that "non-deployable" and

"deployable with limitations" are two separate categories, with "the retention determination process applying to the former but not the latter." JA 864 (quoting JA 441). In the court's view, that quote suggests that service members with HIV "would not be subject to review for separation." *Id.* But that statement has no relevance to this case. The language the district court quoted concerns a new 2018 policy that requires retention determinations for service members classified as "non-deployable" for more than 12 months. DoDI 1332.45 § 1.2(b) (JA 111). That new policy indeed applies only to service members classified as "non-deployable." *Id.*; JA 386. But plaintiffs were not discharged under that policy. They were discharged under the general standards that govern service members with chronic or progressive illnesses. *See* DoDI 1332.18, Encl. 3, App. 1, § 2(a) (JA 75).

The district court likewise erred in concluding that discharging Roe and Voe violated various Air Force Instructions prohibiting the Air Force from separating members solely because of a positive HIV test. JA 44-46. Section 2.4 of Air Force Instruction 44-178 states: "HIV seropositivity alone is not grounds for medical separation or retirement for [service] members. Members shall be retained or separated as outlined in Attachment 9." JA 351. Attachment 9 in turn provides: "Members with laboratory evidence of HIV infection who are able to perform the duties of their office, grade, rank and/or rating, may not be separated solely on the basis of laboratory evidence of HIV infection." JA 381.

The Air Force's decisions to discharge Roe and Voe fully complied with those requirements. The Air Force concluded that Roe and Voe were not "able to perform the duties of their office, grade, rank and/or rating" because they belonged to career fields that were expected to deploy frequently and because their HIV prevented them from deploying to the area where 80% of airmen are expected to go. The discharge decisions therefore turn not just on their HIV diagnoses, but also on how frequently their jobs require them to deploy. Indeed, the Air Force routinely retains service members with HIV if they work in career fields that do not require them to deploy frequently. JA 470, 474-76.

3. The district court likewise erred in concluding that the military failed to "consider key aspects of the problem" by not addressing whether Roe and Voe could deploy to locations outside of Central Command's area of responsibility. JA 867. It is plainly not irrational for the military to conclude that Roe and Voe were not "able to perform the duties of their office, grade, rank and/or rating" because they could not deploy to the area where the military needs most of its airmen to go. The district court also criticized the military for failing to follow a Department of Defense regulation that, in its view, required the military to consider whether Roe and Voe "could be retained in a different capacity." JA 867 n.41 (citing DoDI 1332.18, Encl. 3, App. 2, § 4(a)(4) (JA 80)). Plaintiffs never argued that the military violated that regulation by discharging them. In any event, the district court misunderstood that regulation, which applies only to service members who have a condition that

disqualifies them for specialized duties (such as flying airplanes), not for general military duties like deployment. *See* DoDI 1332.18, Encl. 3, App. 2, § 4(a)(4) (JA 80).

III. The Balance Of The Equities Also Precludes The Injunction

1. The district court also erred in assessing the equities. *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), illustrates the point. In that case, the district court enjoined the Army from discharging the service member for using drugs. *Id.* at 273. This Court reversed. In evaluating the equities, the Court explained that a "higher requirement of irreparable injury should be applied in the military context given the federal courts' traditional reluctance to interfere with military matters." *Id.* at 274 (citing *Sampson v. Murray*, 415 U.S. 61 (1974)). It concluded that the service member failed to establish irreparable harm under that standard because "a general discharge under honorable conditions is not an injury of sufficient magnitude to warrant an injunction." *Id.* at 274. By contrast, the harm to the Army in that case was "substantial." *Id.* at 275. Enjoining the Army from making a discretionary decision to discharge the service member would amount to "judicial second-guessing of a kind that courts have been reluctant to engage in." *Id.* In light of the deference courts owe to the military's discretionary staffing decisions, and the plaintiff's failure to establish irreparable harm, the Court concluded that equities weighed in the Army's favor. *Id.*

2. The equities are even more lopsided here than they were in *Guerra*. The district court's injunction not only subjects the Air Force to the institutional harm of "judicial second-guessing" of "affairs peculiarly within the jurisdiction of the military

authorities." *Guerra*, 942 F.2d at 275. It also requires the Air Force to retain airmen who cannot deploy even though their units are frequently required to do so. Other airmen who are able deploy must therefore compensate for their unavailable team members by deploying more frequently. That imposes significant costs not only on those airmen, but also on their families (who must endure extended periods of separation) and their units (which must deploy soldiers more frequently than they wish, undermining mission readiness).

The district court dismissed the Air Force's concerns as "overstated" because HIV-positive individuals make up a "miniscule percentage of active-duty servicemembers." JA 871. But the Supreme Court has cautioned that courts must "give great deference to the professional judgment of military authorities" regarding the harm that would result to military interests if an injunction were granted. *Winter*, 555 U.S. at 24; *see also In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012). The Air Force has determined that requiring it to retain airmen who cannot deploy despite working in high-deployment fields imposes significant costs on individual service members, their families, and their units. The district court was wrong to disregard those concerns so cavalierly.

3. On the other hand, the absence of an injunction will not irreparably harm plaintiffs. As this Court has explained, "a general discharge under honorable conditions" is insufficient to justify the extraordinary remedy of a preliminary injunction. *Guerra*, 942 F.2d at 274-75. The district court nevertheless concluded that

plaintiffs faced irreparable injury because they "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," and because of "the commonsense observation that HIV-positive servicemembers, if discharged under these circumstances, will likely be forced to reveal their condition." JA 869-70. But the district court did not find (and plaintiffs have never asserted) that the deployment policy was motivated by any special animus toward HIV-positive service members. JA 867 n.42. There is no basis to infer animus, as the military restricts the ability of service members with other infectious diseases from deploying too. As explained above, the military's policies toward service members with HIV are based on a judgment that HIV is a communicable disease and that medical advances have not eliminated the risk of transmitting it on the battlefield. There is also no foundation for the district court's speculation that plaintiffs will be forced to "reveal their condition." The Air Force does not publicize its discharge decisions, which, in any case, would simply reveal that the plaintiffs were honorably discharged. JA 1089, 1378.

IV. The Nationwide Injunction Is Improper

Even if the Court were to conclude that the district court could properly enter an injunction, the district court plainly erred insofar as it extended relief to parties not before the court.

Both Article III and equitable principles require that injunctive relief be limited to redressing the plaintiff's own injuries stemming from a violation of his own rights. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The remedy sought thus "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Whitford*, 138 S. Ct. at 1931 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see id.* at 1934 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). Principles of equity independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (explaining that universal injunctions "do not seem to comply" with "longstanding principles of equity"). That is especially so in the context of military affairs and national security. *See Winter*, 555 U.S. at 24; *Gilligan*, 413 U.S. at 10.

Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). This Court has articulated similar concerns, explaining that nationwide injunctions have

"the effect of precluding other circuits from ruling" on the same issue, "substantially thwart[ing] the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (quoting *United States v. Mendoza*, 464 U.S. 154, 160 (1984)), *abrogated on other grounds by FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

The Supreme Court has previously stayed a nationwide injunction against a military policy to the extent it swept beyond the parties to the case. *U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993). Indeed, this case is materially indistinguishable from *Meinhold*, which involved a constitutional challenge by a discharged Navy service member to the Department's "then-existing policy regarding homosexuals." *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1473 (9th Cir. 1994). After the district court enjoined the Department from "taking any actions against gay or lesbian service members based on their sexual orientation" nationwide, the Supreme Court stayed that order "to the extent it conferred relief on persons other than Meinhold." *Id.*; *see Meinhold*, 510 U.S. at 939. The Court's grant of a stay in *Meinhold* reflects the principle that injunctive relief should not extend beyond the parties to the case. Because a preliminary injunction prohibiting the military from discharging Roe, Voe, and the four purported members of OutServe would have provided complete relief pending final judgment, the district court had no authority to enter a nationwide injunction

barring the Air Force from discharging service members based on the deployment policy.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be vacated.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

G. ZACHARY TERWILLIGER
United States Attorney

MARK B. STERN
MARLEIGH D. DOVER
LEWIS S. YELIN

s/ James Y. Xi
JAMES Y. XI
Attorneys, Appellate Staff
Civil Division, Room 7515
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-8877
james.y.xi@usdoj.gov

Of Counsel:

RYAN D. NEWMAN
Deputy General Counsel

MICHAEL J. FUCCI
Associate General Counsel

Department of Defense

May 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,129 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in Garamond 14-point font, a proportionally spaced typeface.

s/ James Y. Xi
James Y. Xi

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served (as agreed upon) by email:

Laura Cooley
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
lcooley@winston.com

Andrew Sommer
Greenberg Traurig LLP
1750 Tysons Boulevard
Suite 1000
McLean, VA 22102
sommera@gtlaw.com

s/ James Y. Xi
James Y. Xi

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Air Force Instruction 44-178 § 2.4

2.4. Clinical Evaluation, to Include Evaluation for Continued Military Service. All ADAF members, as well as ARC members on extended active duty, who test positive for HIV are referred to SAMMC for medical evaluation. Per AFI 48-123 and AFI 41-210, HIV-positive personnel must undergo medical evaluation for the purpose of determining status for continued military service. ARC members who are not on extended active duty or who are not on full-time National Guard duty, and who show serologic evidence of HIV infection, will be referred for a medical evaluation of fitness for continued service in the same manner as service members with other chronic or progressive illnesses in accordance with DoDI 1332.38. In the case of an ANG member, it is only required if the state identifies a nonmobility, nondeployable position in which the member can be retained. All ADAF members will have an initial evaluation at SAMMC, followed by a visit at 6 months, then yearly thereafter while remaining on AD status. ARC and ANG members whose condition is determined to meet Line of Duty requirements may have initial and/or annual HIV evaluations performed at regional military facilities. ARC and ANG members not meeting Line of Duty requirements will have an initial evaluation by a civilian HIV specialist. The medical evaluation follows the standard clinical protocol outlined in Attachment 8 and utilizes procedures for evaluating T-helper cell counts described in Attachment 12. ARC members not on extended active duty must obtain a medical evaluation that meets the requirements of Attachment 8 from their civilian healthcare provider (in the case of the ANG, only if the state identifies a nonmobility, nondeployable position in which the member can be retained). An epidemiological assessment (including sexual contacts and history of blood transfusions or donations) is conducted to determine potential risk of HIV transmission (see Attachment 11). (T-1)

2.4.1. Outcome of Evaluation for Continued Military Service. HIV seropositivity alone is not grounds for medical separation or retirement for ADAF members. Members shall be retained or separated as outlined in Attachment 9. (T-1)

2.4.2. Periodic Re-evaluation. HIV infected ADAF members retained on active duty and ARC members retained in the Selected Reserve must be medically evaluated annually at SAMMC. Such personnel must be assigned within the continental United States (CONUS). Alaska, Hawaii, and Puerto Rico are also acceptable. ARC HIV infected members may not be deployed outside of CONUS (except for Alaska, Hawaii, and Puerto Rico). HIV-infected members shall not be assigned to OCONUS mobility positions, and those on flying status must be placed on Duty Not Including Flying (DNIF) status pending medical evaluation/waiver determination. Waivers are considered using normal

procedures established for chronic diseases. Aeromedical waivers are considered according to the Aerospace Medicine Waiver Guide. Members on the Personnel Reliability Program (PRP) or other security sensitive positions shall evaluated for suspension or temporary decertification during medical evaluation, as determined by their Certifying Official/Unit Commander on the advice of a Competent Medical Authority. The Secretary of the Air Force may, on a case-by-case basis, further limit duties and assignment of members to protect the health and safety of the HIV-infected member or other members. Submit such requests to Office of the Secretary of the Air Force, Air Force Pentagon, Washington, DC 20330-1670. (T-1)

Air Force Instruction 44-178, Attachment 9

RETENTION AND SEPARATION

A9.1. Retention:

A9.1.1. Members with laboratory evidence of HIV infection who are able to perform the duties of their office, grade, rank and/or rating, may not be separated solely on the basis of laboratory evidence of HIV infection. (T-0)

A9.1.2. HIV-infected members who have been evaluated for continued military service and are retained will receive an Assignment Limitation Code (ALC-C). Please refer to AFI 41210 for ALC-C stratifications and for a list of waiver authorities for OCONUS TDY and/or assignment. (T-1)

A9.2. Separation:

A9.2.1. AFI 36-3212, Physical Evaluation for Retention, Retirement, and Separation, provides guidance for separation or retirement of AD members who are determined to be unfit for further duty.

A9.2.2. AD and Reserve members with laboratory evidence of HIV infection found not to have complied with lawfully ordered preventive medicine procedures are subject to administrative and disciplinary action, which may include separation.

A9.2.3. Separation of AD members with laboratory evidence of HIV infection under the plenary authority of the Secretary of the Air Force, if requested by the member, is permitted.

A9.2.4. The immediate commander of ARC members not on extended active duty who show serologic evidence of HIV infection will determine if the member can be utilized in the Selected Reserve. If the member cannot be utilized, he/she may be transferred involuntarily to the Standby Reserve or separated. If separated, the characterization of service shall never be less than that warranted by the member's service record. (T-1)

A9.2.5. Air Force members determined to have been infected with HIV at the time of enlistment or appointment are subject to discharge for erroneous enlistment or appointment. (T-1)

Department of Defense Instruction 1332.18, Enclosure 3, Appendix 1, § 2

2. CRITERIA FOR REFERRAL

a. When the course of further recovery is relatively predictable or within 1 year of diagnosis, whichever is sooner, medical authorities will refer eligible Service members into the DES who:

(1) Have one or more medical conditions that may, individually or collectively, prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating including those duties remaining on a Reserve obligation for more than 1 year after diagnosis;

(2) Have a medical condition that represents an obvious medical risk to the health of the member or to the health or safety of other members; or

(3) Have a medical condition that imposes unreasonable requirements on the military to maintain or protect the Service member.

b. In all cases, competent medical authorities will refer into the DES eligible Service members who meet the criteria in paragraph 2a within 1 year of diagnosis.

Department of Defense Instruction 1332.18, Enclosure 3, Appendix 2, § 2

2. GENERAL CRITERIA FOR MAKING UNFITNESS DETERMINATIONS

a. A Service member will be considered unfit when the evidence establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating, including those during a remaining period of Reserve obligation.

b. A Service member may also be considered unfit when the evidence establishes that:

(1) The Service member's disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; or

(2) The Service member's disability imposes unreasonable requirements on the military to maintain or protect the Service member.

Department of Defense Instruction 1332.18, Enclosure 3, Appendix 2, § 4

4. REASONABLE PERFORMANCE OF DUTIES

a. Considerations. Determining whether a Service member can reasonably perform his or her duties includes consideration of:

(1) Common Military Tasks. Whether the Service member can perform the common military tasks required for the Service member's office, grade, rank, or rating including those during a remaining period of Reserve obligation. Examples include routinely firing a weapon, performing field duty, or wearing load-bearing equipment or protective gear.

(2) Physical Fitness Test. Whether the Service member is medically prohibited from taking the respective Service's required physical fitness test. When an individual has been found fit by a PEB for a condition that prevents the member from taking the Service physical fitness test, the inability to take the physical fitness test will not form the basis for an adverse personnel action against the member.

(3) Deployability. 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. When deployability is used by a Service as a consideration in determining fitness, the standard must be applied uniformly to both the AC and RC of that Service.

(4) Special Qualifications. For Service members whose medical condition disqualifies them for specialized duties, whether the specialized duties constitute the member's current duty assignment; the member has an alternate branch or specialty; or reclassification or reassignment is feasible.

b. General, Flag, and Medical Officers. An officer in pay grade O-7 or higher, or a medical officer in any grade, being processed for retirement by reason of age or length of service, will not be determined unfit unless the determination of the Secretary of the Military Department concerned with respect to unfitness is approved by the USD(P&R) on the recommendation of the ASD(HA).

c. Service Members on Permanent Limited Duty. A Service member previously determined unfit and continued in a permanent limited duty status or otherwise continued on active duty will normally be found unfit at the expiration of his or her period of continuation. However, the Service member may be determined fit when the condition has healed or improved such that the Service member would be capable of performing his or her duties in other than a limited-duty status.

d. Combined Effect. A Service member may be determined unfit as a result of the combined effect of two or more impairments even though each of them, standing

alone, would not cause the Service member to be referred into the DES or be found unfit because of disability.

Department of Defense Instruction 1332.45, § 1.2

1.2. POLICY. It is DoD policy that:

a. To maximize the lethality and readiness of the joint force, all Service members are expected to be deployable.

b. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for:

(1) A retention determination by their respective Military Departments.

(2) As appropriate, referral into the Disability Evaluation System (DES) in accordance with DoD Instruction (DoDI) 1332.18 or initiation of processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. This policy on retention determinations for non-deployable Service members does not supersede the policies and processes concerning referral to the DES or the initiation of administrative separation proceedings found in these issuances.

c. Implementation for this policy is October 1, 2018

Department of Defense Instruction 6485.01, § 3

3. POLICY. It is DoD policy to:

a. Deny eligibility for military service to persons with laboratory evidence of HIV infection for appointment, enlistment, pre-appointment, or initial entry training for military service pursuant to DoDI 6130.03 (Reference (c)).

b. Periodically screen Service members for HIV infection.

Department of Defense Instruction 6485.01, Enclosure 3, § 2(c)

c. An AD Service member with laboratory evidence of HIV infection will be 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 in accordance with DoDI 1332.38 (Reference (k)). An AD Service member with laboratory evidence of HIV infection determined to be fit for duty will be allowed to serve in a manner that ensures access to appropriate medical care.

Department of Defense Instruction 6490.07, Enclosure 2, § 3

3. WAIVERS. If a commander or supervisor of DoD personnel (except for SOF personnel) wishes to deploy an individual with a medical condition that could be disqualifying (see Enclosure 3, the commander or supervisor must request a waiver. The waiver request shall be submitted to the applicable Combatant Commander through the individual's servicing military medical unit in the case of a Service member, or through the individual's personnel office in the case of a civilian employee, with medical input provided by the individual's medical provider.

Department of Defense Instruction 6490.07, Enclosure 3, § e(2)

MEDICAL CONDITIONS USUALLY PRECLUDING CONTINGENCY DEPLOYMENT

This list of conditions is not intended to be all-inclusive. A list of all possible diagnoses and their severity that may cause an individual to be potentially non-deployable, pending further evaluation, would be too extensive. Medical evaluators must consider climate, altitude, rations, housing, duty assignment, and medical services available in theater when deciding whether an individual with a specific medical condition is deployable. In general, individuals with the conditions in paragraphs a. through h. of this enclosure, based upon a medical assessment as described in Enclosure 2 and Reference (l), shall not deploy unless a waiver is granted.

. . .

e. Infectious Disease

(1) Active tuberculosis or known blood-borne diseases that may be transmitted to others in a deployed environment.

(2) A diagnosis of human immunodeficiency (HIV) antibody positive with the presence of progressive clinical illness or immunological deficiency. The cognizant Combatant Command surgeon shall be consulted in all instances of HIV seropositivity before medical clearance for deployment.

U.S. Central Command MOD-13, Tab A, § 7(c)

7. Individuals with the following conditions will not deploy without an approved waiver:

. . .

C. Infectious Disease:

1. Blood-borne diseases (Hepatitis B, Hepatitis C, HTLV) that may be transmitted to others in a deployed environment. Waiver requests for persons testing positive for a blood borne disease should include a full test panel for the disease, including all antigens, antibodies, viral load, and appropriate tests for affected organ systems.

2. Confirmed HIV infection is disqualifying for deployment, IAW References I and T, service specific policies, and agreements with host nations. Note that some nations within the CENTCOM AOR have legal prohibitions against entering their country(ies) with this diagnosis.

3. Latent tuberculosis (LTBI). Individuals who are newly diagnosed with LTBI by either TST or IGRA testing will be evaluated for TB disease with at least a symptom screen and chest x-ray, and will have documented LTBI evaluation and counseling for consideration of treatment. Those with untreated or incompletely treated LTBI, including those with newly diagnosed LTBI, previously diagnosed LTBI, and those currently under treatment for LTBI will be provided information regarding the risks and benefits of LTBI treatment during deployment (see paragraph 15.G.6.C). Individuals meeting the above criteria do not require a waiver for deployment. Active duty TST convertors who have documented completion of public health nursing evaluation for TB disease and counseling for LTBI treatment described above may deploy without a waiver as long as all Service specific requirements are met.

4. History of active tuberculosis (TB). Must have documented completion of full treatment course prior to deployment. Those currently on treatment for TB disease may not deploy.

5. A CENTCOM waiver cannot override host or transit nation infectious disease or immunization restrictions. Active duty must comply with status of forces agreements; civilian deployers should contact the nation's embassy for up-to-date information