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

NICHOLAS HARRISON, ET AL., Plaintiffs, v. JAMES N. MATTIS, ET AL., Defendants.	CIVIL ACTION NO. 1:18-CV-00641

PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS AND REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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I. INTRODUCTION

A. Summary of Argument

Plaintiffs should prevail on both the motion to dismiss and their motion for a preliminary injunction. While Defendants contend that the Court cannot adjudicate this matter, Defendants misconstrue the applicability of *Mindes* to facial constitutional challenges to military policies, such as the equal protection challenge in this case. Even if *Mindes* were applicable, Plaintiffs' claims pass the two-phase test articulated in that case and are justiciable. This Court is not powerless to address the merits of the dispute before it.

Defendants also mistake the appropriate level of scrutiny for measures classifying persons based on their HIV status. This leads Defendants to incorrectly conclude this suit is weak and should be dismissed. Nevertheless, Plaintiffs have provided compelling evidence, including expert testimony, demonstrating that such classifications should be reviewed as presumptively unconstitutional. And Defendants have offered no relevant facts or other evidentiary support to the contrary. However, even if the Court were to apply rational basis review—as Defendants urge—Plaintiffs nonetheless prevail. Defendants are unable to articulate a single justification for their discriminatory deployment, enlistment, and appointment policies that does not directly contradict the adjudicatory facts alleged in the Complaint or is not wholly unrelated—much less rationally related—to the disparate treatment reflected in the policies at issue. Plaintiffs, therefore, are likely to succeed on the merits of their equal protection challenges; certainly and at the very least, their suit should not be dismissed.

As to Plaintiffs' motion for preliminary injunction, service members living with HIV face a very real risk of the irreparable harm of discharge. Indeed, Defendants' arguments regarding their newly revised policies reveal that these service members still face potential separation just because they have HIV. Furthermore, Defendants cannot argue any harm resulting from

maintaining the status quo—which they admit has been in place for years—and the public interest is certainly served by eradicating this form of discrimination from the military. For all of these reasons, the Court should grant the preliminary injunction Plaintiffs have requested.

B. Points of Clarification Regarding Plaintiffs' Claims

Before diving into the substantive legal questions presented by the motion to dismiss and the motion for a preliminary injunction, Plaintiffs need to clarify a few things that have been muddied or misapprehended by Defendants in their brief:

First, Defendants attempt to narrow the scope of Plaintiffs' equal protection claim by calling this broadly applicable policy the "Commissioning Policy" and arguing that Sgt. Harrison is the only plaintiff that claims injury. (Defs.' Br. at 20-21.) Defendants read the Complaint too narrowly. Plaintiffs assert both a facial and as applied challenge to both Defendants' deployment and accessions policies. (Compl., ¶¶ 71-78.) The accessions policy for people living with HIV includes enlistment, induction for training, and appointment/commissioning as an officer. (Compl., ¶ 28.) OutServe/SLDN represents the interests of many service members living with HIV in this lawsuit, including those who wish to enlist, those who wish to continue serving, those (like Sgt. Harrison) who wish to be worldwide deployable, and those who also wish to one day commission as officers (like Sgt. Harrison). (Compl., ¶¶ 7, 69-70.) This case is about more than just commissioning, because the facial challenges to Defendants' HIV-related personnel policies cover all of these facets of serving as a person living with HIV.

Second, all of these policies are important in varying degrees to service members living with HIV, but the deployability policy is the lynchpin policy through which the decisions and determinations reflected in the other HIV-related personnel policies were made. (Compl., ¶¶ 27-35.) If people living with HIV were classified as worldwide deployable, there are no valid reasons not to commission them as officers. Similarly, if they were classified as worldwide

deployable, there would be no valid reason not to allow them to enlist. If the current policy regarding unduly restricting the deployment of people living with HIV is found unconstitutional, the other policies in question also fall.

Third, Plaintiffs are not directly challenging the new "Deploy or Get Out" (DOGO) policies as a violation of equal protection. Rather, Plaintiffs seek a preliminary injunction against the DOGO policies for service members living with HIV, so they are not drummed out of the military before the constitutionality of the deployment and accessions policy are determined in this litigation. (Pls.' Br. at 27-29.) It is the latter policies that classify Soldiers as non-deployable and thus subject to the DOGO policies announced by a memorandum regarding the "DoD Retention Policy for Non-Deployable Service Members" ("DOGO Policy") and implemented by Department of Defense (DoD) Instruction 1332.45 ("DOGO Instruction"). Therefore, in assessing the preliminary injunction, the Court is not being asked to adjudicate or opine in any way on the constitutionality of the DOGO policy itself. Rather, it need only assess the likelihood of success for Plaintiffs' equal protection challenge to the deployment regulations that result in the classification of people living with HIV as non-worldwide-deployable, as well as the harms that suspending implementation of the DOGO policy to people living with HIV will prevent and any impact preventing implementation may have on the Defendants.

II. ARGUMENT

A. This Case is Justiciable

Defendants contend that this Court is powerless to evaluate Plaintiffs' constitutional challenge, characterizing the deployment and accessions policies for people living with HIV as involving "quintessential military judgment[s] about the qualifications necessary for appointment as a commissioned officer" and arguing they are therefore nonjusticiable." (Defs.' Br. at 1.) Defendants are wrong.

This case is not like those involving particular military fact-findings and discretion to which the Fourth Circuit has previously applied *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). Instead, this case presents the question of whether Defendants' regulations singling out *all* people living with HIV for differential treatment with respect to "accession" (*i.e.*, deployment, enlistment, and appointment as officers) are unconstitutional. (Compl., ¶¶ 32, 72, 77; Prayer for Relief, ¶¶ 1-2.) Even if *Mindes* is applied, however, it favors proceeding to the merits of Plaintiffs' constitutional claims.

1. *Mindes* Is Inapplicable to Plaintiffs' Claims and to Their Motion for Preliminary Injunction.

The Fifth Circuit's *Mindes* test—adopted by the Fourth Circuit in *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985) for certain types of claims against the military—does not apply to Plaintiffs' challenges to the discriminatory regulations at issue in this case.

Even if *Mindes* is sound law—an unsettled question[1]—*Mindes* is applicable only to *individualized claims* by service persons against the military. *Aikens v. Ingram*, 811 F.3d 643, 648 (4th Cir. 2016). *Mindes* does not bar facial challenges to the constitutionality of regulations that discriminate against a group of people as a class. The distinction between individual claims to which *Mindes* may apply and claims that are not governed by *Mindes* was recognized by the Fourth Circuit in *Aikens*. *Id.* at 647-48. There, the Court explained that in the Fourth Circuit,

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[1] The Third Circuit rejected the *Mindes* formulation because it "intertwines the concept of justiciability with the standards to be applied to the merits of the case." *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). The Seventh Circuit adopted the Third Circuit's logic. *See Knutson v. Wisc. Air Nat'l Guard*, 995 F.2d 765, 768 (7th Cir. 1993). The Second Circuit has followed *Knuston* and *Watson*, *infra*. *See Dibble v. Fenimore*, 339 F.3d 120, 126-128 (2d Cir. 2003). The Eighth Circuit has criticized *Mindes* as proscribing an "unpredictable analysis" and rejected it as "not a viable statement of the law" since it is at odds with the Supreme Court's decision in *United States v. Stanley*, 483 U.S. 669 (1987). *See Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1009 (8th Cir. 1989). Even the Fourth Circuit has alluded to—but not yet decided—*Mindes*' questionable viability. *See Aikens*, 811 F.3d at 648.

Mindes has been applied only to cases involving "internal personnel matters such as challenges to convening retention boards and military discharge," and not to ultra vires actions of military officers taken against service members. *Id.* at 648. In the latter context, the Court explained, *Mindes* "has no place." *Id.* Similarly, *Mindes* has no place when military action is challenged as being facially unconstitutional, and *Mindes* itself suggests as much. *Mindes*, 453 F.2d at 199 ("The Court could not stay its hand if, for example, that only blacks were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons.").

Given this distinction, *Mindes* does not govern the justiciability analysis. Plaintiffs are facially challenging DoDI 6485.01 (accessions policy), DoDI 6490.07 (deployment policy) and AR 600-110 (Army's policies regarding identification, surveillance, and administration of service members living with HIV). (Compl., ¶¶ 27-35, 71-78.) They seek a declaration that these restrictions are unconstitutional and that Defendants be enjoined from continuing to discriminate against people living with HIV under the color of these regulations. (*Id.*, Prayer for Relief, ¶¶ 1-2.) The resolution of this dispute requires "a legal analysis"—"one which courts are uniquely qualified to perform." *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1010 (8th Cir. 1989); *see also Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (finding jurisdiction to adjudicate the accession and retention of transgender individuals for military service and granting a preliminary injunction as to the ban against transgender service members). This remains true even though Plaintiff Nick Harrison seeks Army reconsideration of a retroactive commission without the unwarranted influence of his status as a person living with HIV.[2] *Cf.*

[2] Defendants argue that Sgt. Harrison and OutServe-SLDN can allege harm based only on Defendants' commissioning policy. (Defs.' Br. at 20-21.) Defendants read the Complaint too narrowly, as explained above. *See* § I.B., *supra*. While no doubt Sgt. Harrison has been harmed by Defendants' commissioning policies (a matter Defendants all but concede), he and other service members living with HIV, whose interests are represented by OutServe-SLDN, are also

Emory v. Sec'y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987) ("We note that Emory's current inactive status is not a bar to the district court fashioning some relief if it determined that his claims are indeed meritorious.").

Because *Mindes* is inapplicable, Defendants' challenges to the Complaint and Plaintiffs' motion for preliminary injunction on the basis of non-justiciability should be rejected.

2. Plaintiffs' Claims Are Justiciable Under *Mindes* In Any Event.

Plaintiffs' claims that the Defendants' policies are facially discriminatory and unconstitutional would be justiciable even if *Mindes* applied. As Defendants acknowledge, *Mindes* requires a two-part threshold inquiry and then a balancing of four considerations. (Defs.' Br. at 11-12.) Plaintiffs' claims and request for injunctive relief fulfill the requirements for justiciability in each phase of the *Mindes* analysis.

a. <u>The allegations underlying the Complaint and motion for preliminary injunction meet the *Mindes* threshold requirements.</u>

The *Mindes* threshold requirements for justiciability are: (a) that there be an allegation of the deprivation of a constitutional right or a violation of statute or military regulation and (b) that intraservice remedies and corrective measures be exhausted. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Defendants concede that Plaintiffs' claims meets the justiciability

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being discriminated against by these policies that prevent them from deploying, enlisting, and being promoted as officers. (Compl., ¶¶ 27-39, 69-70.) Because Defendants' policies unconstitutionally discriminate against all service members living with HIV, they are all harmed. Defendants also contend that only the President of the United States can commission an officer in the military and thus the claim is not justiciable or redressable. (Defs.' Br. at 21-22.) Even if the Court concludes that it cannot order the Executive to commission Sgt. Harrison, the Court may fashion appropriate relief from Defendants' constitutional violations, including requiring retroactive evaluation of Sgt. Harrison's requested commission without consideration of his status as a person living with HIV. *See Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). Should the Court deem it necessary, Plaintiffs will amend their request for relief to specifically pray for such relief.

thresholds. (Defs.' Br. at 21.) Defendants, however, incorrectly contend that Plaintiffs' requested preliminary injunction must also meet the *Mindes* threshold determinations. *Id*. There are several reasons Defendants are wrong about this.

First, Plaintiffs ask this Court to invoke its equitable powers to maintain the status quo while Plaintiffs challenge to the constitutionality of Defendants' policies, including its policy of classifying persons living with HIV as non-deployable, is adjudicated. (Pls.' Br. at 1-2.) Plaintiffs are not challenging the DOGO policies; they instead challenge the policies that would cause them to be separated under the DOGO policies simply because they are living with HIV. (Compl., ¶¶ 27-35, 71-78.) *Second*, there is no dispute that Sgt. Harrison exhausted his remedies to make the claims he has made in the Complaint. (Compl., ¶¶ 54-64; Defs.' Br. at 21.) This is sufficient to allow the Court to grant the requested injunction to permit him from being separated solely because he is living with HIV. And Plaintiff OutServe-SLDN is "an organization not a service member and so it has no intraservice remedies available to it to exhaust." *Service Women's Action Network (SWAN) v. Mattis*, 2018 WL 2021220, at *7 (N.D. Cal. 2018) (citing *Christofferson v. Wash. State Air Nat'l Guard*, 855 F.2d 1437, 1441-42 (9th Cir. 1988) (acknowledging that the absence of an intraservice remedy does not preclude application of the *Mindes* test)). Thus, there is no exhaustion requirement for it to meet. *Id.*

Therefore, even if *Mindes* applies to the claims alleged in the Complaint, which in turn serve as the basis for Plaintiffs' motion for injunctive relief, the *Mindes* thresholds have been met.

b. Application of the *Mindes* balancing test to the allegations underlying the Complaint and motion for preliminary injunction show that this case is justiciable.

Like the threshold inquiries of phase one under *Mindes*, the four-part balancing test of phase two weighs heavily in favor of the justicability of Plaintiffs' claims. Under *Mindes*, if the

threshold requirements are met, the court weighs four factors to determine whether judicial review is appropriate:

> (1) nature and strength of plaintiff's claim;
> (2) potential injury to the plaintiff if review is refused;
> (3) type and degree of anticipated interference with the military function; and
> (4) extent to which the exercise of military expertise or discretion is involved.

453 F.2d at 201-02.

First, the nature and strength of Plaintiffs' claims support review. Defendants fail to address the nature of Plaintiffs' claims in their brief in support of their motion and instead focus entirely on strength. (Defs.' Br. at 13, 21-22.) This is inconsistent with *Mindes*, which noted that "[c]onstitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty." *Mindes*, 453 F.2d at 201. Here, Plaintiffs are not challenging a haircut regulation, but a policy that prohibits in some instances and impedes in others the ability of people living with HIV to serve in the military. The nature of Plaintiffs' equal protection claims strongly supports review.

Plaintiffs' arguments as to the unconstitutionality of Defendants' discriminatory policies also are strong. *See* Section II.B. *infra*. Most of Defendants' purported justifications for its policies are not even related—let alone rationally related—to an individual's HIV status. (*See* Section II.B.2, *infra*; Defs.' Br. at 29 (arguing that people living with HIV should not be commissioned because "only commissioned officers can be commanding officers" and "only commissioned officers are given the power to convene general courts-martial").) In sum, the first *Mindes* factor regarding the nature and strength of Plaintiffs' claims tips heavily in

Plaintiffs' favor. *See SWAN*, 2018 WL 2021220, at *7-8 (finding that an equal protection claim challenging the "Leaders First" policy and the Marines training policy that segregated trainees by gender met the first *Mindes* factor).

Second, the potential injury to Plaintiffs also weighs in favor of review. Defendants argue that the injury to Plaintiffs is "minimal" if the court declines review. (Defs.' Br. at 22.) But this conclusory assertion is clearly not supported by the facts of this case. Plaintiff Nick Harrison has explained that the military's discriminatory policies have prevented him from commissioning as an officer and from advancing his military career. (Harrison Decl., ¶¶ 17-27.) Sgt. Harrison also described how his deployment into combat zones was a "major asset" to his progress in the military. (*Id.*, ¶ 16.) Denying people living with HIV these opportunities has caused and will continue to cause injury to the hundreds of soldiers living with HIV. Even more troubling is Defendants' complete disregard of the injury that has already occurred or is in the process of occurring to the careers of the two service members who provided declarations in Support of Plaintiffs' Motion as a result of their classification as non-deployable and implementation of the DOGO policies. (Defs.' Br. at 17.) One military career has been waylaid and the other is about to end entirely based on a policy that Defendants claim is "non-existent." (Defs.' Br. at 10.) These are just three examples, but there soon will be hundreds and hundreds more unless the Court prevents implementation of the DOGO Instruction. This type of injury is more than sufficient to place the second *Mindes* factor squarely on Plaintiffs' side of the scales. *See SWAN*, 2018 WL 2021220, at *8 (finding that female soldiers "being denied assignment to any brigades outside of Fort Bragg and Fort Hood (for the Army) and being subject to segregation on the basis of sex (both Army and Marines)" was a "significant" injury under *Mindes* and weighed in plaintiffs' favor).

While Defendants are correct that the *third* and *fourth Mindes* factors—(3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved—are considered together, they misconstrue the required analysis, arguing that "courts have consistently held that the military's decisions about duty assignments, promotions, and discharges are non-justiciable." (Defs.' Br. at 13.) Carried to its logical extent, Defendants' position would allow the military to have race-based, sex-based, and religious-based assignment, promotion, and discharge standards with no recourse for those affected by such discriminatory policies. *Mindes* itself implicitly rejects such a bright line rule. *Mindes*, 453 F.2d at 199. Moreover, Defendants ignore the long list of challenges to accession, commission, assignment, promotion, and discharge regulations that courts have found to be justiciable. *See e.g.*, *Dillard v. Brown*, 652 F.2d 316, 323-24 (3d Cir. 1981) (holding that review of regulation forbidding the enlistment of single parents with minor dependent children was justiciable); *SWAN*, 2018 WL 2021220 at *12 (holding that a challenge to policies segregating females was justiciable under *Mindes*); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 192 (D.D.C. 2017) (finding jurisdiction to adjudicate the accession and retention of transgender individuals); *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978) (finding a challenge to a statute that prevented females from being assigned duties aboard Navy vessels was justiciable).

The "proper assessment of the degree of interference threatened by a lawsuit is informed by whether the Court will be required to scrutinize particular personnel decisions (such as an assignment) by many decisionmakers [] or called upon to take on a comprehensive, ongoing supervisory role, displacing military management over a broad range of policy decisions (as in *Gilligan* [*v. Morgan*, 413 U.S. 1 (1973)]." *SWAN*, 2018 WL 2021220 at *9. Because the facial

challenge brought by Plaintiffs here falls within neither category, unlike the claims and requested relief in *Gilligan,* Plaintiffs' claims and requested relief would not "vest virtual control of [the military] in federal court[.]" *Dillard*, 652 F. 2d at 321. Nor would the requested relief require the Court to re-review the discrete, individualized personnel judgments of many people going forward, because these decisions would simply subsequently be made by the military for other service members without application of the discriminatory policies pertaining to people living with HIV. And as for Sgt. Harrison, the decision had already been made. He was selected for the JAG position, told he would commission as an officer due to his combat experience, and *only later* denied the appointment solely because of his HIV status and the antiquated policies at issue in this case. (Compl., ¶¶ 52-54; Harrison Decl., ¶¶ 16-27.) Plaintiffs seek judicial review of the constitutionality of the military's regulations affecting people with HIV as a class—something the "courts are uniquely qualified to perform." *Dibble,* 339 F.3d at 127. With factors three and four in their corner, all of the *Mindes* factors weigh in favor of the justiciability of Plaintiff's claims.

B. Plaintiffs' Case Should Not Be Dismissed Because Defendants' Deployment and Accessions Policies Regarding People Living with HIV Fail Any Level of Review

A motion to dismiss should be granted only "in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F. 2d 324, 325 (4th Cir. 1989). A motion to dismiss "tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts [or] the merits of a claim." *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (emphasis added). Therefore, such a motion should be denied if Plaintiffs have "alleged sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Woods v. City of Greensboro*, 855 F. 3d 639, 647 (4th Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). In conducting its review of the pleadings, the Court must "accept[] as

true all of the factual allegations contained in the complaint and draw[] all reasonable inferences in favor of the plaintiff." *Wright v. N. Carolina*, 787 F. 3d 256, 263 (4th Cir. 2015). As a result, the purpose of a motion to dismiss "is to test the sufficiency of a complaint and not to resolve contests surrounding the facts [or] the merits of a claim." *Presley v. City of Charlottesville*, 464 F. 3d 480, 483 (4th Cir. 2006). "[D]ismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Wright*, 787 F.3d at 263 (citations omitted).

1. Strict Scrutiny Should Be Applied to Defendants' Deployment and Accessions Policies Regarding People Living with HIV.

HIV status is a quasi-suspect or suspect classification and governmental policies singling people out on this basis should be subject to heightened scrutiny. Plaintiffs alleged this legal conclusion in their complaint, made factual allegations regarding the constitutional facts underlying the legal conclusion alleged, and supported those facts and that legal conclusion through compelling evidence and argument in their brief in support of the motion for preliminary injunction. (Compl. ¶¶ 14-25, 71-78; Pls.' Br. at 9-22.) In response, Defendants presented no constitutional facts or any other information to dispute the facts presented by Plaintiffs, and instead rely entirely upon legal argument on this topic. (Defs.' Br. at 24-29.) As Plaintiffs acknowledge, however, their arguments in support of heightened scrutiny require a re-examination of certain older precedents in light of developments with respect to HIV over the past 10 to 20 years. (Pls.' Br. at 18-20.) For that reason, Defendants' reliance upon case law from more than a decade ago is completely unavailing.

The case upon which Defendants rely almost entirely, *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), is not determinative of the level of scrutiny to be applied to people living with HIV. *Doe* was decided 23 years ago based on the limited

understanding of HIV from years before even that, and the prevailing view from that time of HIV as a disability has been continuously undermined by scientific advances since then. (Pls.' Br. at 18-22.) *Doe* involved a surgeon who had been dismissed by the defendant employer after he was diagnosed with HIV, because the defendant believed Doe presented a significant risk to the health or safety of others. *Doe*, 50 F.3d at 1262. The parties in *Doe agreed* that Doe was a person with a disability as a result of his HIV diagnosis—something that Plaintiffs specifically disavow in their complaint as not true (with "disability" commonly defined) for Plaintiff Harrison and for most people living with HIV today. *Id.* at 1265 (Compl., ¶ 75.) In fact, Plaintiffs assert that all service members living with HIV, who by definition have access to healthcare and are expected to exhibit the discipline necessary to adhere to their medication regimes, are medically fit and capable of engaging in all of the rigorous demands of being a soldier. (Compl. ¶¶ 73-78; Pls.' Br. at 23-25.)

Furthermore, because the key factual bases for the conclusions reached in *Doe* no longer exist, a different result very likely would be reached if *Doe* were revisited today. (Compl., ¶¶ 19-25.) The *Doe* opinion relies upon 1991 CDC guidance regarding HIV-positive healthcare workers—which has since been withdrawn—to agree with the defendant's assertions that: "(1) HIV may be transmitted via blood-to-blood contact in a surgical setting; (2) Dr. Doe will always be infectious; (3) infection with HIV is invariably fatal; and (4) there is an ascertainable risk that Dr. Doe will transmit the disease during the course of his neurosurgical residency." *Doe*, 50 F.3d at 1265. The first of these assertions is the only one that is still true today. (Pls.' Br. at 17-20.) As alleged in the complaint, a person living with HIV who is on effective treatment is no longer infectious, and HIV is a chronic, manageable condition rather than an invariably fatal disease. (Compl. ¶¶ 19-25.) The fourth assertion that there existed an ascertainable risk of HIV

transmission during the course of a neurological residency—which was the determinative issue in the case—is also no longer true. (Compl. ¶ 25; Pls.' Br. at 18.) In fact, the current applicable standards for HIV-positive healthcare workers state that a surgeon may perform the type of procedures Doe would have performed in his neurological residency as long as the surgeon is maintaining adherence to his antiretroviral medications—medications that were, as Plaintiff's complaint makes clear, not yet even available in 1995. *See* Henderson et al., *SHEA Guideline for Management of Healthcare Workers Who Are Infected with Hepatitis B Virus, Hepatitis C Virus, and/or Human Immunodeficiency Virus*, 31(3) Infection Control and Hospital Epidemiology (2010), https://www.shea-online.org/images/guidelines/BBPathogen_GL.pdf; (Compl., ¶¶ 19-22.)

Rather than supporting Defendants' argument regarding the appropriate level of scrutiny to apply today to equal protection claims involving people living with HIV, *Doe* reveals precisely why the continuing validity of the holdings from certain earlier cases must be re-examined in light of the changed circumstances for people living with HIV. (*See* Defs.' Br. at 25 (citing cases from 1990, 2001, 2004, and 2008).) Plaintiffs ask this Court to probe beyond the surface of *Doe* in assessing the appropriate level of scrutiny in this case, and invite the Court to evaluate their claims using the facts about HIV as understood *today* to determine whether people living with HIV constitute a suspect or quasi-suspect class entitled to heightened scrutiny. (Compl. ¶¶ 14-26, 75-76; Pls.' Br. at 9-22.) Plaintiffs are confident the result of such an inquiry will be heightened scrutiny for policies singling out people living with HIV for differential treatment by state actors.[3]

[3] Defendants' reliance upon cases addressing other medical conditions is also misplaced. (*See* Defs.' Brief at 25 n.5.) Plaintiffs are asking the Court to re-examine the appropriate level of scrutiny for policies targeting people living with HIV based on the current understanding of HIV.

2. Defendants' Deployment and Accessions Policies Do Not Survive Rational Basis Review, Particularly When Assessed in Light of the Factual Allegations in the Complaint.

Regardless of the level of scrutiny applied, Defendants' deployment and accessions policies for people living with HIV are not rationally related to any legitimate governmental interest the Defendants have been able to articulate. The rational basis standard of review is "not a toothless one." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation"). And Defendants have failed to articulate a single justification that is not directly contradicted by the factual allegations in the Complaint or wholly unrelated—much less rationally related—to the distinction drawn by the policies in question. (Defs.' Br. at 24-29.)

As set forth in Plaintiffs' complaint (and further argued in their brief in support of the motion for a preliminary injunction), a soldier's HIV diagnosis bears no relationship to their fitness, military readiness, effectiveness, or lethality. (Compl., ¶¶ 22-25, 76; Pls.' Br. at 23-24.) As further alleged, the health care they need is as easily provided as the care for other conditions that do not preclude deployment or accession, and there is no discernible risk of HIV transmission to other personnel. (Compl., ¶¶ 24-25, 36; Pls.' Br. at 24-25.) Defendants' attempts to dispute these factual allegations, in an effort to find a rational basis for their discriminatory policies, are inappropriate on a motion to dismiss and unpersuasive in any event.

It would not at all be appropriate to base a decision about the level of scrutiny for classifications based on HIV status on what a few other courts have held regarding *other* non-disabling medical conditions. As experts have noted, "[t]he scope and intensity of stigma and discrimination against people living with HIV is unprecedented for any medical condition in the history of the United States." (Hoppe Decl. ¶ 12.) Defendants' attempts to analogize HIV to various other medical conditions is rendered moot by this assertion alone.

See Lucero v. Early, 873 F.3d 466, 471 (4th Cir. 2017) (vacating a dismissal because the district court failed to "take account of the factual dispute" and determine the appropriate level of scrutiny to apply). Furthermore, the generalities and platitudes they offer about that which is required of deployable service members do not withstand the specific facts Plaintiffs provide about people living with HIV, particularly when those facts are compared with the applicable medical standards for service.

The medical standards for enlistment and commissioning set forth at the outset of Defendants' brief "include ensuring that each individual be:

- Free of contagious diseases that may endanger the health of other personnel;
- Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness;
- Medically capable of satisfactorily completing required training and initial period of contracted service;
- Medically adaptable to the military environment without geographical area limitations; and
- Medically capable of performing duties without aggravating existing physical defects or medical conditions.

(Defs.' Brief at 2.) In anticipation of these requirements, Plaintiffs' complaint alleges and their opening brief further explains that a person's HIV-positive status: will not endanger the health of other personnel (Compl., ¶ 25; Pls.' Br. at 25-27); will not require excessive time lost from duty for necessary treatment or hospitalization (Compl., ¶ 76(c); Pls.' Br. at 24-25);[4] will have no

[4] Defendants' purported reliance on the article entitled "HIV Preexposure Prophylaxis in the U.S. Military Services" serves only to further reveal their misunderstanding regarding HIV treatment and prevention. *See* Defs.' Brief at 28 (citing the article in the CDC's "Morbidity and Mortality Weekly Report" (May 25, 2018) authored by Blaylock, *et al*.) This article is about providing prevention and care to HIV-negative people, *not* about providing care and treatment to HIV-positive people. *See* Blaylock et al., HIV Preexposure Prohylaxis in the U.S. Military Services. Any restrictions on medication availability noted in the article are clearly limited to pre-exposure prophylaxis for HIV-negative individuals. *Id.* The blood work and STI testing that is required every three months for HIV-negative people taking pre-exposure prophylaxis (PrEP) is required

effect on a person's ability to complete the required training and period of contracted services (Compl., ¶ 76(c); Pls.' Br. at 23-24); will not impact medical adaptability to the military environment without geographical limitations (Compl., ¶¶ 25, 36, 76(c); Pls.' Br. at 26-27);[5] and will not be medically aggravated by performing the duties of a service member (Compl., ¶ 76; Pls.' Br. at 23-24). Even at a later stage of the litigation, when Defendants are legitimately permitted to argue the facts, they ultimately will lose those arguments.

The other purported justifications Defendants offer for refusing to allow people living with HIV specifically to commission as officers are so wholly unrelated to a person's HIV status as to cross into the realm of the nonsensical. Defendants appear to argue that a person's HIV-positive status prevents them from being "of good moral character" and has some effect on their

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because the presence of an STI makes acquisition of HIV more likely and taking PrEP after acquiring HIV could facilitate resistance to an entire class of HIV medications. *Id*. As alleged in the Complaint, people living with HIV who have stabilized require medical visits to monitor the efficacy of treatment only twice a year (Compl., ¶ 29; Pls.' Br. at 24) and require no more frequent STI testing than their counterparts in the general population. *See* Centers for Disease Control and Prevention, *2015 Sexually Transmitted Diseases Treatment Guidelines*, https://www.cdc.gov/std/tg2015/screening-recommendations.htm.

[5] Another purported justification related to geographic limitations to which Defendants make oblique reference a few times in their papers is the existence of agreements with certain countries, particularly in the Middle East, that do not permit entry of people with HIV. These "status of forces" agreements ("SOFAs") are insufficient to justify the classification of service members with HIV as non-deployable. First, as executive agreements, SOFAs are subject to constitutional principles. *Id.* (distinguishing between treaties and executive agreements). Neither executive actions cloaked as international agreements, nor the laws of foreign countries to which the U.S. voluntarily submits, override the Constitution. *See Wilson v. Girard*, 354 U.S. 524 (1957) (subjecting administrative agreement to constitutional review). Second, SOFAs last only a few years and are then subject to renegotiation. Because they are short-lived, they cannot justify a permanent policy that subjects service members with HIV to eternal second-class status. Even if the SOFAs cannot be modified to remove restrictions prohibiting the transit of service members living with HIV, their existence does not justify classifying those service members *worldwide* non-deployable. The United States does not allow foreign countries to unconstitutionally discriminate against other groups of people serving in the military, and it should not do so with respect to people living with HIV.

ability to exercise leadership responsibilities and privileges, to be a commanding officer, to convene general courts-martial, or to administer the oath to enlisted service members. (Defs.' Br. at 28-29.) There is even an argument implying that people living with HIV are not able to swear the required oath to be "appointed to an office of honor." (Defs.' Br. at 29.) Plaintiffs are at a loss to explain why Defendants think that a person's HIV-positive status has any impact on one's ability to do any of these things. *See Plyler*, 457 U.S. at 222 (stating that even under rational basis review, the Equal Protection Clause must still operate to affect "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit").

C. This Court Should Issue the Requested Preliminary Injunction to Maintain the Status Quo in Order to Prevent Imminent and Irreparable Harm to Service Members Living with HIV

1. The Preliminary Injunction Is Necessary Because the Recently Issued "Deploy or Get Out" Instruction Presents the Same Problems as the "Deploy or Get Out" Policy That Was the Basis for Plaintiffs' Motion.

The preliminary injunction Plaintiffs are seeking to prevent the separation of service members living with HIV who are classified as non-deployable remains necessary despite the issuance of an additional "Deploy or Get Out" policy—namely, Department of Defense Instruction 1332.45 (the "DOGO Instruction"). Defendants argue that the original DOGO Policy has been rescinded, that there is a "new" and different policy regarding retention reviews established by the DOGO Instruction, and that Plaintiffs' request for a preliminary injunction regarding the DOGO Policy is mooted by its rescission. (Defs.' Br. at 7-10.) But this Court need not participate in the "shell game" Defendants have set up here. The DOGO Instruction *incorporates* (and cancels) the DOGO Policy, and this rulemaking process was contemplated by the DOGO Policy itself. *See* DoDI 1332.45; DOGO Policy (stating "the *interim* policy guidance . . . will remain in effect until the Department issues a DoD Instruction on reporting and retention

of non-deployable service members") (emphasis added).

More important, the DOGO Instruction is very similar to the DOGO Policy. Despite Defendants' attempts to make them seem wildly different, the Instruction is a natural outgrowth of the Policy. *Compare* DOGO Policy (calling for dismissal of most non-deployable service members while contemplating criteria for retaining some of them) *with* DOGO Instruction (same). And contrary to Defendants' mischaracterizations, Plaintiffs did not assert that the DOGO Policy was going to result in the "automatic" and immediate discharge of every single service member living with HIV. Rather, Plaintiffs specifically asserted that the "[i]mplementation of the new DOGO Policy is *likely* to result in the discharge of *almost* all service members living with HIV." (*See* Pls.' Br. at 27 (emphasis added).) Because the DOGO Instruction is likely to result in the exact same outcome and the harm to individual service members is just as imminent as when the DOGO Policy—which allowed for immediate implementation—was announced, Plaintiffs' motion for a preliminary injunction should be granted. The only real difference is that now Plaintiffs must seek to enjoin enforcement of the DOGO Instruction implementing the DOGO Policy, instead of the DOGO Policy. *See Aggarao v. MOL Ship Mgmt. Co., Ltd*., 675 F.3d 355, 378 (4th Cir. 2012) ("[T]he status quo to be preserved by a preliminary injunction . . . is not the circumstances existing at the moment the lawsuit or injunction was actually filed, but the last uncontested status between the parties which preceded the controversy") (internal citations omitted).

The biggest distinction between the two iterations of the policy is that the Instruction appears to require that people living with HIV be classified as "deployable with limitations," which would exempt them from the retention reviews required of by the DOGO Instruction. *See* DoDI 1332.45, § 3.3 (stating that those with conditions listed in DoDI 6490.07—which HIV is—

"will be categorized as Deployable with Limitations"); DoDI 1332.45, § 3.2 (stating those who are "deployable with limitations" are not to be counted as non-deployable). Defendants proffer this as one possible interpretation to avoid the irreparable harm that will otherwise befall service members living with HIV, but they concede that they also interpret the DoDI as permitting them to classify people living with HIV as non-deployable and to subject them to the retention reviews that are likely to result in their separation. (Defs.' Br. at 15-17.) The purported discretion to retain service members living with HIV classified as non-deployable is no different from the discretion that has been exercised time and time again to deny people living with HIV, like Plaintiff Harrison, the ability to deploy or to commission. (*See* Pls.' Br., Exhibits F-G.) Based on the history of discrimination that people living with HIV have faced under current military policies—the very same policies challenged in this lawsuit—this Court should reject Defendants' efforts to hide behind a façade of "discretion" in the DOGO Instruction to claim it does not present a real, imminent and irreparable harm to Plaintiff and those similarly situated. *See* Section C.2, *infra*. Because Defendants have chosen to preserve their ability to discriminate against people under the DOGO Instruction in the same manner in which they have discriminated in the past against people living with HIV under their deployment and accessions policies, Plaintiffs' motion for a preliminary injunction should be granted.

2. The "Deploy or Get Out" Instruction in Conjunction with the Classification of People Living with HIV as "Non-Deployable" Presents Imminent and Irreparable Harm.

The second potential interpretation of the DOGO Instruction advanced by Defendants would classify people living with HIV as "non-deployable" and then require them to prove that despite their non-deployable status, their retention would be "in the best interest of the Military Service." (Defs.' Br. at 15-19.) Neither the DOGO Instruction nor the declarations in support of Defendants' opposition to Plaintiff's motion for a preliminary injunction articulate the standard a

service member would have to meet to prove that their retention would be "in the best interest" of the branch of the service in which they are serving. Based on the declarations in support of Defendants' opposition, it appears that the determination may be based, in part, on how valuable the service member's particular skill set is to the branch in which they serve and the availability of positions utilizing that skill set that do not require deployment. (*See* Soper Decl., ¶ 4.)

But the applicable standard is never made clear in these declarations or in Defendants' brief, because apparently it has not yet been articulated—and may never be. (Defs.' Br. at 16.) Each branch of the Armed Services may choose to guide the retention review process through additional regulations or they may choose to let individual commanders—with no medical training or understanding of living with HIV in 2018—make those decisions on a case-by-case basis. (Defs.' Brief at 16.) Based on the very limited number of medical waivers and exceptions to policy that have been granted to people living with HIV in the past, few service members living with HIV will actually be retained through the appeal process described in the DOGO Instruction. (Compl. ¶¶ 28-35, 52-64.) Defendants' current uncertainty regarding the precise contours of the policy, rules, and regulations that will be implemented in each branch of the Armed Services should not prevent this Court from taking action to ensure that people living with HIV are not irreparably harmed before this litigation is resolved. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents"). Allowing application of the DOGO Instruction to people living with HIV will result in arbitrary decision-making at best and outright discrimination at worst.

Separation from military service is an irreparable harm, especially for service members living with HIV, who are currently not able to re-enlist because of their HIV status. (Compl., ¶ 28; Pls.' Br. at 27-29.) For any service member who is involuntarily separated from service for reasons that are not justified, the harm is irreparable. (Pls.' Br. at 28.) The loss of income, of potential retirement benefits, and of access to health care can be particularly harmful to people who have spent multiple years in military service. *Id.* The loss of access to critically important health care is particularly troubling for people living with HIV. (Compl., ¶ 16.) Those with plans for a career in the military—like Plaintiff Harrison—lose not only a job, but also a part of their identity. (*See* Declarant 1 Decl. *passim*.) And the emotional distress and stigma of being involuntarily separated from the military, especially when one may be reluctant to reveal the real reason for the discharge for fear of the stigma attached to an HIV diagnosis, can be particularly devastating. (Pls.' Br. at 28-29.) There is little doubt that involuntary separation from service is an irreparable harm.

Finally, the experiences of the individuals placed before this Court in Plaintiffs' Complaint and in the brief in support of their motion for a preliminary injunction demonstrate irreparable harm. (Compl., ¶¶ 53-54; Declarant 1 Decl. *passim*; Declarant 2 Decl. *passim*.) Plaintiff Harrison is currently classified as non-deployable, which is the very reason he is being denied a commission. (Compl., ¶¶ 53-54.) By its refusal to grant him a medical waiver or an exception to policy, the Army has already demonstrated that it does not value his skills as a Soldier and as a lawyer more than it values its discriminatory policy. It is hard to imagine how he would demonstrate that his retention would be in the "best interests of the Military Service" when the Army would not grant him a waiver to accept a position that would use his proven

skills as a lawyer and leader, into which the relevant commanders wanted to place him, and that was very unlikely to require deployment. (Compl., ¶¶ 51-64.)

Declarant One has similarly already been denied a waiver or exception to policy for his HIV status and is in the final step of appealing the order separating him from service. (Declarant 1 Decl., ¶¶ 10-19.) This individual is being separated from service because, according to the Air Force, a diagnosis of pharyngitis—nothing more than a sore throat—"complicated" his HIV diagnosis and rendered him unfit for duty. (Soper Decl. ¶ 10.) No wonder Plaintiffs and those similarly situated have little faith in the ability of the Military Services to properly assess their ability to serve while living with HIV. While the Air Force avers that it is holding final determination of Declarant One's retention status—and presumably that of others living with HIV—in abeyance pending its internal policy review (Soper Decl. ¶ 11), there is currently nothing that prevents the Air Force from finishing that review the day after this Court renders its decision and formalizing Declarant One's separation from the Air Force the day after that.

Finally, the harm to another service member in the Army is not only imminent, but has already occurred. After many years of service, Declarant Two was given an important promotion into a position of leadership. (Declarant 2 Decl., ¶ 9.) On the eve of assuming his new post, however, Declarant Two was informed that the decision had been reversed based on the "Deploy or Get Out" Policy, now reflected in the "Deploy or Get Out" Instruction. (Declarant 2 Decl., ¶¶ 12-14.) The prestigious post was taken away from this dedicated and deserving Soldier, and it has now been given to another person. The preliminary injunction will not in fact be able to prevent or rectify the harm that Declarant Two has suffered, but he allowed us to use his story because he does not want to see the same or a similar fate befall any other service member living with HIV. (Declarant 2 Decl., ¶ 18.) Declarant Two's story demonstrates

that the harm is not merely imminent, but is already occurring. These harms are real, they are imminent, and they are truly irreparable. This Court has the power to prevent any more such harms from occurring to service members living with HIV.

3. The Other Equitable Factors Also Weigh In Favor of Preserving the Status Quo Through Preliminary Injunction.

The remaining equitable factors also weigh in favor of granting Plaintiffs' preliminary injunction motion. Defendants' arguments to the contrary are two-fold. Defendants first contend that maintaining the status quo and *precluding* Defendants from discharging any service members solely because they have HIV "would likely create confusion and miscommunication throughout the service . . . ." (Defs.' Br. at 19.) Defendants' argument here cannot be squared with their earlier argument that "there is no policy requiring the automatic discharge of HIV-positive Service members." (Defs.' Br. at 7.) If the latter is true, an injunction precluding the discharge of service members because they have HIV presents no risk of confusion or miscommunication. Instead, the military would merely be precluded from doing something Defendants say it is not currently doing. Indeed, such an injunction would do nothing more than what Plaintiffs have asked: preserve the status quo by prohibiting Defendants from discharging people living with HIV under the DOGO policies. (Pls.' Br. at 1-2.) Retention of service members diagnosed with HIV while on active duty has been the military's default policy for many years leading up to its announcement of the DOGO policies. (Compl., ¶ 34.) There is simply no support for Defendants' claim that continuing to previous policy until this litigation is resolved will cause miscommunication or create confusion.

Defendants also argue that precluding them from discharging service members living with HIV would improperly intrude upon "inherently military decisions." (Defs.' Br. at 19-20.) As part of this argument, Defendants claim that an injunction would "establish[] a new policy

concerning the deployability or retention of HIV-positive Service members . . . ." (Defs.' Br. at 19.) This mischaracterizes Plaintiffs' motion, which seeks only to prevent the discharge of service members based solely on their HIV status. And the declarations submitted by Defendants belie their arguments about the military nature and purported necessity for their policy. For example, LTC Lute avers that "Soldiers infected with HIV who do not demonstrate progressive clinical illness or immunological deficiency during periodic evaluations will not be involuntarily separated solely due to their infection status." (Lute Decl., ¶ 3.) Defendants' own declarants assert "[t]he Army's policies described in paragraph (3) preventing the separation of asymptomatic Soldiers based on their infection status remain in effect." *Id.*, ¶ 8. Ms. Soper also explains that while there are several cases where service members are currently slated for separation because they are living with HIV, these separations "are currently on hold . . . pending internal Air Force Policy review." (Soper Decl., ¶ 11.) Thus, according to both of Defendants' declarants, an injunction would not alter the military decisions currently in effect. Instead, it would ensure that the Army does not deviate, under the auspices of the DOGO Instruction, from what it contends is its "current policy."

Nor is it an undue encroachment on the military for the Court to maintain the status quo while it fully weighs the constitutionality of the military's regulations as applied to persons living with HIV. Defendants' argument smacks of their justiciability arguments, which are addressed above. *See supra* § III.A.1-2. A full evaluation of this case can be done quickly, and in this Court it almost surely will be. Any minor encroachment on the military that may be precipitated by the Court's maintenance of the status quo (*i.e.*, merely preventing Defendants from doing something they say they are not doing today but apparently want the ability to do

tomorrow is outweighed by the severe harm service members with HIV would suffer if Defendants started discharging them before this case is resolved.

III. CONCLUSION

For the reasons set forth above, Plaintiffs are entitled to an injunction maintaining the status quo and suspending implementation of the DOGO Instruction against people living with HIV who are classified as non-deployable.

Dated: August 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: August 30, 2018

Respectfully submitted,

/s/ *Andrew R. Sommer*
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