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' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs submit this sur-reply to respond to arguments first presented in Defendants' reply in support of their motion to dismiss, primarily through a Department of Defense report to Congress regarding their HIV-related personnel policies. (Defs.' Reply at 14-18; Defs.' Reply, Ex. 3 *Dep't of Def. Personnel Policies Regarding Members of the Armed Forces Infected with Human Immunodeficiency Virus: Rep. to the Comms. on the Armed Services of the S. and H.R.* (Aug. 2018) (hereinafter "2018 Report")). Defendants' reliance on the 2018 Report, as well as a similar one submitted to Congress in 2014 (Defs.' Reply, Ex. 2 (hereinafter "2014 Report"), is improper and unavailing. *First*, the Court should not take judicial notice of these reports because they are disputed. *Second*, if the reports are considered, the opinions the DoD articulates in them are objectively unreasonable in light of the facts presented by Plaintiffs. *Third*, they contain admissions by Defendants that support *Plaintiffs'* position with respect to the motion to dismiss.

The Court may take judicial notice of the fact the Department of Defense submitted reports to Congress regarding its HIV-related personnel policies, but it may not take judicial notice of the assertions made in those reports. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 566 F.3d 177, 217 (4th Cir. 2009) (holding a court may take notice of the existence of

documents in the public record, but it is proper to decline notice if "the parties clearly and reasonably disagree about the meaning to be ascribed to [those] documents."). Any facts in the public record of which the Court takes judicial notice still must be "construed in the light most favorable to the plaintiff along with the well-pleaded allegations of the complaint." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013).Because the purported justifications for Defendants' disparate treatment of people living with HIV in these reports are opinions rather than facts—and are incompatible with the well-pleaded allegations of Plaintiff's Complaint—the Court should not take judicial notice of the contents of these reports.[1] *See Clatterbruck*, 708 F.3d at 558 ("On a motion [to dismiss], the court's task is to test the legal feasibility of the complaint without weighing the evidence that might be offered to support or contradict it.").

Furthermore, the mere assertion of a justification—even in a report to Congress—does not make it rationally related to the policies in question. Defendants argue that if the government can articulate a justification, that justification must be reasonable.[2] (Defs.' Repl. at 16.) That is not the law. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (the standard applied through rational basis review "is not a toothless one"). If government justifications are objectively unreasonable, they do not pass muster. *See Plyler v. Doe*, 457 U.S. 202, 222 (1982) (noting a primary goal of

[1] Defendants' reliance upon *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006), is misplaced. In that case, the court took judicial notice of an article upon which both parties were relying and over which there was no dispute. *See Blankenship*, 471 F.3d at 526 n.1.

[2] However, Defendants' presentation of their justifications to this Court do not even accurately mirror the statements made to Congress. To Congress, Defendants accurately describe the first criteria for accession (enlistment and commissioning): an individual must be "[f]ree of contagious diseases *that may endanger the health of other personnel*." (Rpt. at 1 (emphasis added).) Before this Court, however, Defendants omit the qualifier, instead asserting that an individual must be "free of contagious diseases[.]" (Defs.' Reply at 14.) This inaccurate statement of the policy is critical, because—as Plaintiffs have made clear in the Complaint and affidavits in support of their motion—HIV does not endanger the health of other personnel. (Compl. ¶¶ 24-25; Hendrix Decl. ¶¶ 19-22; Del Rio Decl. ¶¶ 25-27.) And Defendants have presented no evidence that it does.

the Equal Protection Clause is "abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit").

This axiom is particularly applicable when a defendant's justifications are based on flawed assumptions that contradict unrefuted record evidence. For instance, Defendants argue that service members living with HIV present a risk of transmission and assert in the 2018 Report that "an 'undetectable' viral load that confers a 'negligible risk' of HIV transmission has no application in the setting of . . . needlestick (occupational) exposures." (Defs.' Repl., Ex. 3 at 24.) This statement is unsupported and contradicts the consensus of most respected HIV experts—including the only experts whose testimony is before the Court—and the allegations made in the Complaint. (Hendrix Decl. ¶ 21; Del Rio Decl. ¶ 27; Compl. ¶¶ 24-25; Pls.' Opp. at 13-14; CDC, *HIV Risk Behaviors*, https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html ("Factors that may decrease the risk include . . . antiretroviral treatment")). Defendants' purported justifications in the 2018 Report could only be found rationally related to the policies at issue if the Court *ignores* all of the Plaintiffs' well-supported factual assertions on this subject. This the Court cannot do with respect to adjudicatory facts at this stage of the litigation. *See Clatterbruck*, 708 F.3d at 558 (holding that only after the motion to dismiss stage can the court weigh and evaluate the contrasting evidence brought before it).[3]

[3] Defendants' argument that these reports show "tacit Congressional approval for those policies" is a real stretch. (*See* Defs.' Repl. at 10). The very reason for the second report was that Congress found the first "fell short in describing the criteria for which these policies are implemented throughout different branches and among commanding officers." (2018 Rpt. at 7). If anything, this shows Congressional *dissatisfaction* with the policies at issue and the relative political powerlessness of people living with HIV, who seem unable to secure anything more than requests for information rather than actual action from Congress to force the DoD to fix these policies. The 2018 Report appears to suffer from the same deficiencies as the first did.

Defendants' purported concern over HIV transmission through contact with the blood of an HIV-positive person in battlefield situations is also unfounded and directly contradicted by Plaintiffs' presentation of the facts. (*Compare* 2018 Rpt. at 9, 22 (referring to the "potential" for transmission during "buddy aid" and through battlefield transmissions) *with* Compl. ¶ 24; Pls.' Br. at 25-26; Del Rio Decl. ¶ 27; Hendrix Decl. ¶ 21 (stating that the risk of battlefield transmission from a virally suppressed person is "essentially zero")). There is no discernible risk of HIV transmission in the battlefield and Plaintiffs' experts make that clear in their affidavits. (Compl. ¶ 24; Hendrix Decl. ¶ 21, Del Rio Decl. ¶ 27). On the other hand, the Report cites no evidence—scientific or otherwise—to back-up what amounts to a position statement that battlefield transmission is a legitimate concern. Furthermore, this alleged concern over transmissions from HIV-positive people through blood transfusions is a complete "red herring." (Pls.' Br. at 26; Pls.' Reply at 16-17). Service members with HIV would not donate blood on the battlefield—just as they do not donate blood anywhere else. Any risks associated with blood transfusions will not be increased by deploying service members with HIV.

Similarly, the purported potential complications and co-morbidities for people living with HIV—neurocognitive impairments (NCI), immune system dysregulation, etc.— are not valid threats to any legitimate military interest. The 2018 Report states that the DoD Infectious Disease Clinical Research Program found *no evidence* of a higher prevalence of NCI among HIV-positive people in treatment as compared to HIV-negative people. (2018 Rpt. at 20). Any risk NCI poses is thwarted by the health care provided by the Armed Services; this non-existent risk cannot justify the discriminatory policies here. Furthermore, to the extent that a person aging with HIV develops any of the co-morbid conditions mentioned in the 2018 Report (cardiovascular disease, osteoporosis, cerebrovascular disease, etc.), the same policies and

procedures that exist for dealing with those conditions among general population service members can be applied to those with HIV.

Finally, the 2018 Report contains a number of admissions that support Plaintiffs' case. First, the 2018 Report shows that service members with HIV, without more, are not "disabled." The Report states: "*If they develop a disability*, HIV-positive Service members undergo evaluation for fitness for continued service by the same process as those who are HIV-negative." (2018 Rpt. at 2 (emphasis added).) Second, the Report acknowledges that HIV-related disability is a mere possibility; it is the result of *long-term* failure to adhere to treatment; and military policy actively seeks to avoid this result:

- "[T]he goal [of Department policies is] to maintain a Service member's fitness for duty … and help *avoid a disease progression* of HIV-positive Service members *into potential disability*." (Report at 4 (emphasis added)).
- "AIDS is usually the result of long-term non-adherence with medications and *can be* associated with impairment and disability… ." (Report at 19 (emphasis added).
- "The goal [of providing evidence-based care to those with HIV is] to retain and maintain a Service member's fitness for duty … as well as to *avoid any disability that might arise* as a result of HIV infectivity." (Report at 20 (emphasis added)).

In sum, the Reports show HIV status should be assessed as a suspect classification separately from "disability" and that policies contingent on HIV status are subject to heightened scrutiny.

Most important, the Report admits that deployment of service members with HIV can be accomplished with no detrimental effects on preparedness, military readiness, or lethality and that Defendants' current HIV-related personnel policies indeed harm service members with HIV. Since 2012, the Navy has been deploying Sailors with HIV on to certain large ship platforms. (2018 Rpt. at 17). Such deployments still require a medical waiver, which should not be necessary, but the Navy has at least begun granting such waivers with greater regularity. (2018 Rpt. at 3). The 2018 Report describes this relatively new, less discriminatory policy as a success,

and identifies none of the purported concerns raised by Defendants in this litigation as a problem in the Navy's moderately more expansive deployment policies.

Furthermore, the 2018 Report shows that deployment limitations are detrimental to the careers of people with HIV: "The previous [Navy] policy of denying deployments was making this subset of personnel [*i.e.*, Sailors with HIV] less competitive in achieving career milestones or warrior qualifications." (2018 Rpt. at 17; 2014 Rpt. at 7 (same).) As long as Defendants' HIV-related personnel policies are permitted to stand, they will make Plaintiff Nick Harrison and other service members with HIV less competitive and successful compared to their HIV-negative colleagues. The Constitution does not permit this denial of equal protection and, therefore, Plaintiffs must be proceed to the merits to eradicate this invidious form of discrimination.

Dated: September 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 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: September 12, 2018

Respectfully submitted,

/s/ *Andrew R. Sommer*
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