IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KEVIN DEESE, *et al.*, Plaintiffs, v. MARK T. ESPER, Secretary of Defense, *et al.*, Defendants.	Case No. 1:18-cv-02669-RDB

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

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I. ARGUMENTS IN REPLY

A. APPLICATION OF THE *MINDES* FACTORS DEMONSTRATES PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

Constitutional separation-of-powers principles require courts to exercise caution before intervening in internal military matters. *E.g., Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). The reluctance to intrude upon the authority of the Executive in military affairs gave rise to a four-factor test "[t]o determine whether a case involving a military decision is justiciable." *Roe v. Dep't of Defense*, 947 F.3d 207, 217-18 (4th Cir. 2020) (citing *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)). The "*Mindes* test" requires balancing of four factors: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (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. *Id.* at 218 (quotation omitted).[1] *Roe* acknowledged that the *Mindes* factors "parallel" the preliminary injunction factors. 947 F.3d at 218.

Defendants showed that application of *Mindes* renders Plaintiffs' claims non-justiciable. (ECF 42-1, at 22-29).[2] The first factor favors non-justiciability. Plaintiff Deese lacks standing to challenge the HIV-based policies because of another disqualifying medical condition. *See* § B, below. Plaintiffs' equal protection claims will be reviewed "[u]nder the exceedingly deferential rational basis test," *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991), they cite no case in which an HIV-based classification in the military has been held to violate the

[1]Not all circuits apply *Mindes* and a certiorari petition on this issue is pending. *Kuang v. Dep't of Defense*, No. 19-1184. While this Court is bound to apply *Mindes*, this case would be non-justiciable, even absent use of the *Mindes* structure. *See Orloff v. Willoughby,* 345 U.S. 83, 93-95 (1953); *Gilligan,* 413 U.S. at 10; *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975); *United States v. Shearer*, 473 U.S. 52, 58 (1985); *United States v. Stanley*, 483 U.S. 669, 682 (1987); *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

[2]All "ECF" pin cites herein are to those generated by the Court's CM/ECF system.

constitution, and the classification is rational. *See* § C, below. Plaintiff Doe cannot show that he was deprived of a constitutionally-protected liberty interest, barring his due process claims. *See* § D, below. Plaintiffs' APA claims carry less weight than constitutional ones, *Khalsa v. Weinberger*, 779 F.2d 1393, 1401 (9th Cir. 1985), many of which are precluded by the APA itself (5 U.S.C. § 701(a)(2)) or time-barred, and their remaining APA claims will be reviewed under a highly-deferential standard. *See* § F, below. Finally, Plaintiff Doe's estoppel claim is legally precluded and factually implausible. *See* § G, below.

Plaintiffs' response relies heavily on *Roe*, which does not dictate the outcome here. ECF 48, at 23-26. The *Roe* plaintiffs are HIV-positive members of the Air Force. 947 F.3d at 215-17. The Secretary of the Air Force Personnel Council determined that, due to their medical disability, they were unable to perform the duties of their "office, grade, rank, or rating" because they were in highly-deployable career fields and ineligible to deploy to U.S. Central Command's ("CENTCOM") area of responsibility due to their HIV-infection. *Id.* at 216-17. With their medical discharges looming, they sued in the Eastern District of Virginia ("EDVA"), and the court entered a preliminary injunction prohibiting their discharges. *Id.* at 217.

The government appealed and the Fourth Circuit affirmed. In light of the "parallels" between *Mindes* and the preliminary injunction standard, the Court only "briefly addressed" *Mindes*. *Id.* at 218. The panel found the plaintiffs were likely to prevail on at least one of their APA challenges to their discharges or the CENTCOM deployment policy (the panel did not address their equal protection claims, *id.* at 225 n.3), that they would be irreparably harmed absent the injunction, and that the balance of equities favored plaintiffs. The panel noted more than once that its decision was based on a "limited record" at a "preliminary stage." *Id.* at 222, 224. Specifically, it found the government's position inconsistent as to whether the CENTCOM

policy was a categorical ban on deployment, since the policy allows for waiver, while acknowledging that the record concerning application of CENTCOM's waiver policies in the DES process was unclear. *See id.* at 219-20, 221-22. Making assumptions about how the waiver process interacts with DES determinations, the panel found that in any event the Plaintiffs were likely to succeed on the merits of their claim that the DES process was unreasoned. *Id.* at 225-28.[3] Beyond likelihood of success, *Roe* found the remaining factors supported the injunction. *Id.* at 229-31. Irreparable injury was found via plaintiffs' impending discharges. *Id.* at 229-30. The Court agreed that the harm to the government would be slight because HIV-positive members make up a "miniscule percentage of active-duty servicemembers." *Id.* at 233. And it found the public interest satisfied. *Id.* at 230-31. For the final two factors, the panel emphasized that requiring the Air Force to follow its own policies "creates minimal interference with the military's function" and does not involve military expertise or discretion. *Id.* at 218.

Roe's justiciability holding on a preliminary injunction record does not translate here. ECF 42-1, at 27-28. As to the first *Mindes* factor, *Roe* only considered the APA challenge to the CENTCOM policy and resulting discharge decisions, recognizing that the policies governing *accessing and commissioning of officers* (at issue here) are not the same as the *retention and deployment* policies, at issue in *Roe*. 947 F.3d at 214. *Roe* did not even consider the *accession* policy for APA or equal protection purposes. And *Roe* cannot even arguably bear on Plaintiffs' "non-categorical bar" APA claims, or Doe's liberty-based due process or equitable claims.

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[3]Though Plaintiffs argue *Roe* held (on a preliminary record) that all of the justifications for the deployment policy in the 2018 DoD Report to Congress were arbitrary and capricious, ECF 48, at 24, the panel actually reviewed the text of the CENTCOM policy and a declaration. 947 F.3d at 225 (noting the 2018 report "cannot substitute for the judicial review provided for by the APA"). As noted below, summary judgment briefing is now pending in EDVA.

Plaintiffs also argue the "nature" of their constitutional claims favors justiciability. ECF 48, at 25. But the authority they cite undercuts the reviewability of *all* their claims. *Mindes* valued constitutional claims over those "having a statutory or regulatory base," 453 F.2d at 201, which diminishes their APA and equitable claims. And the cited constitutional cases involved challenges to suspect classes not reviewed for rational basis.[4] In sum, Plaintiffs' constitutional challenges were not reviewed in *Roe* and do not have the strength contemplated by *Mindes* when reviewed for rational basis and giving appropriate deference to professional military judgments. If their APA claims are viable in light of 5 U.S.C. § 701(a)(2) and limitations, they are not the same claims at issue in *Roe*, they fall at the other end of the *Mindes* value-based spectrum, and most allege internal conflicts among military directives in which the remedy would be a remand.

Even if Plaintiffs' claims could satisfy the first *Mindes* factor, they fail the others. The second factor examines the "*potential* injury" if review is refused. Plaintiffs graduated many years ago, the Court is unable to commission them, and circuit-level precedent holds that injuries from the denial of enlistment or being discharged do not suffice. ECF 42-1, at 24-25. Plaintiffs concede that only the Executive may commission them, yet argue Defendants should not have relied upon the seminal commissioning case, *Orloff v. Willoughby*, since it may have lost its "viability" because of a 1954 Fourth Circuit decision. ECF 48, at 27.[5] Plaintiffs again seek refuge in *Roe*, *id.* at 28-29, even though the panel found that the *Roe* plaintiffs were facing

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[4]*See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (rejecting challenge to regulation restricting religious headgear as "military officials . . . are under no constitutional mandate to abandon their considered professional judgment"); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (equal protection challenge to draft registration based on gender); *United States v. Virginia*, 518 U.S. 515 (1996) (challenge to Virginia's failure to provide an "exceedingly persuasive justification" for maintaining a male-only citizen solider program at VMI).

[5]Defendants do not agree that the Fourth Circuit's discussion of the 1953 amendment to the "Doctor's Draft Law" in *Nelson v. Peckham*, 210 F.2d 574, 575 (4th Cir. 1954), lessens the importance of *Orloff* here.

imminent harm – as opposed to the purported harm here that occurred as long as *six years ago* – and also stress the stigmatic injuries they have alleged from their non-commissioning. *Id.* at 30.

Distinct from the *Roe* plaintiffs' impending discharges, Defendants maintained the status quo for Deese and Doe since their graduations in 2014 and 2016. The potential injury to Plaintiffs here is minimal, in light of the limitations on this Court granting an officer's commission, the absence of any present risk of discharge, and the availability of alternative remedies, such as an APA challenge to a decision by a board for the correction of military records. *Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999); *Randall v. U.S.*, 95 F.3d 339, 344 (4th Cir. 1996) (citing *Chappell v. Wallace*, 462 U.S. 296 (1983)).

As to the third and fourth *Mindes* factors, Plaintiffs' seek judicial intervention in the military's decision-making regarding commissioning qualifications. As Defendants' showed (ECF 42-1, at 25-29), how to exercise the power to appoint officers is a professional military judgment over which courts lack expertise and for which deference is at its peak. Citing *Roe*, Plaintiffs argue that overruling DoD on whether HIV status is disqualifying poses no interference with military function or discretion. ECF 48, at 30-33. Whereas the *Roe* panel's view was that ordering the military *to follow its own policies* creates minimal interference with military expertise and would remedy the plaintiffs' complaints, 947 F.3d at 218, ordering Defendants in this case to follow their own policies would not provide the relief Plaintiffs seek, because DoDI 6485.01 (and portions of DoDI 6130.03, SECNAV 5300.30E, and AFI 44-178) preclude it.

Plaintiffs also claim that *Roe*'s alternative construction of the deployment policy as a "categorical bar," and finding such a bar at odds with modern science, broadened its holding on the third and fourth factors. While *Roe* determined the plaintiffs were likely to prevail for purposes of the *first Mindes* factor, the panel's findings on the *interference* factors were limited

to requiring adherence to the military's written policies. 947 F.3d at 218; *see also id.* at 230 ("the Government has not shown what institutional harm arises from relief that merely requires it to comply with its own policies"). Further distinguishing *Roe*'s interference finding, the panel emphasized the "miniscule percentage" of service members with HIV. *Id.* at 233. The intrusion the Air Force continues to assert in *Roe* regarding deployment of a tiny percentage of its ranks is intensified considerably when telling all of DoD who to access as officers, at issue here.[6]

In response to the concern that, if Plaintiffs' claims were found to be justiciable, officer candidates rejected based upon *any* medical standard could seek judicial review, Plaintiffs say their "claims attack a much graver injustice that satisfies the *Mindes* framework where other cases may not." ECF 48, at 33. Plaintiffs do not explain why their claims should be more justiciable than those of unsuccessful candidates with, for example, Hepatitis (also covered in SECNAV 5300.30E) or any of the hundreds of other barring conditions. Such challenges are at the core of military deference because they compel judges to review not only the medical science of each condition, but also the unique military considerations regarding the risks and logistical support required to accommodate such conditions during contingency operations, and the associated, but likely unknown, impact on the military if courts reach a different conclusion.

Finally, deference is warranted in this case because Congress tacitly approved the policy. *See* ECF 42-1, at 49; ECF 42-4; ECF 42-3; § F(3), below. Both "legislative and executive judgments in the area of military affairs" are entitled to "a healthy deference," because the

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[6]The cases Plaintiffs cite (ECF 48, at 30) in favor of review involve challenges reviewed at a higher level of scrutiny than at issue here; *see Dillard v. Brown*, 652 F.2d 316, 318 (3d Cir. 1981) (sex discrimination); *Serv. Women's Act. Network v. Mattis*, 320 F. Supp. 3d 1082 (N.D. Cal. 2018) (same), and cases reviewed at higher levels of scrutiny *and* from jurisdictions that do not follow *Mindes*. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 192 (D.D.C. 2017), *vacated sub nom., Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019); *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978); *Witt v. Dep't of the Air Force*, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010).

Constitution assigns control over the military to these two coordinate branches but not to the judiciary. *See Rostker*, 453 U.S. at 66-67; *Gilligan*, 413 U.S. at 10 (1973).

B. In Light of His Thrombocytopenia Diagnosis, Plaintiff Deese Cannot Satisfy the Redressability Requirement to Confer Article III Standing

In response to Defendants' standing argument (ECF 42-1, at 30-31), Deese does not dispute his diagnosis, that the condition is "separately disqualifying," or that, under the standards, having "[c]urrent *or [a] history of* coagulation defects [including] idiopathic thrombocytopenia" is disqualifying. ECF 1-1, at 39, ¶ 23 (emphasis added). He asserts that, because his platelet count is *now* within a normal range, he has standing. ECF 48, at 34. Citing a journal article relying on data collected by a military's HIV study (ECF 48-6), Deese asserts that thrombocytopenia is associated with an initial HIV diagnosis, which "typically" resolves with successful HIV treatment, which also was his personal experience. ECF 48, at 34.

Deese's arguments fail to show redressability. While the evidence might indicate that Deese currently does not have thrombocytopenia, his history of the condition is disqualifying. Moreover, the cited article fails to show that thrombocytopenia is merely a corollary of HIV infection, such that controlling HIV similarly manages thrombocytopenia. ECF 48-6, at 2 ("[thrombocytopenia] typically improves with highly active antiretroviral therapy [ ] However, cases continue to be observed."), at 4 ("viremic individuals, including those with healthy CD4 cell counts, may be at risk"). Thus, even if Plaintiffs' challenge enjoys success, this will not redress Deese's injury of not receiving an officer's commission upon graduation.

C. The Military's HIV Policies Satisfy the Applicable Rational Basis Review for Purposes of the Equal Protection Clause

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation

omitted). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity [and] cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe,* 509 U.S. 312, 319–20 (1993) (citations omitted). "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (citations omitted).

Plaintiffs allege in Counts IX and X that "Defendants' accession and commissioning policies treat service members living with HIV differently—and worse—than similarly situated people who do not have HIV." ECF 48, at 38 (citing ECF 33, ¶¶ 177–78, 186–87). Defendants established that Plaintiffs have not plausibly alleged they are "similarly situated" to HIV-negative individuals or that intentional or purposeful discrimination occurred, and that DoD has articulated at least a "rational basis" for the accession policies at issue. ECF 42-1, at 31-36.

The accession policy is at least rationally-related to the statutory mandate (10 U.S.C. § 532(a)) to commission only those "physically qualified for active service" with "such other special qualifications" as determined by DoD, because: (1) HIV has at least the potential to undermine a service member's medical fitness; (2) it is undisputed that HIV has no cure and no effective vaccine; (3) it is undisputed that individuals who are HIV positive must receive costly daily treatment and regular monitoring to ensure their viral loads stay suppressed to remain healthy and minimize the risk of infection; (4) regardless of viral load suppression, transmission may still occur in the military environment via unscreened blood transfusions, needle sticks, or

during combat medical care; (5) respect for the laws of host nations where U.S. forces are deployed; and (6) applying the accession standards to service academy graduates is reasonable in light of the change in status, responsibilities, expectations, and privileges attendant to becoming a commissioned officer.

Recognizing that, when applying rational basis, the judiciary "hardly ever strikes down a policy as illegitimate," *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), Plaintiffs urge the Court to apply "heightened scrutiny." ECF 48, at 37-40. They also assert that "Defendants fail to articulate a single justification for their policies that is not directly contradicted by [their] Amended Complaint, wholly unrelated to the distinction between service members living with HIV and those who are not, or rejected outright in *Roe*." *Id.* at 35. Plaintiffs insist that the "plausibility" of their claims may be found, provided the Court ignores DoD's rationale, looks no further than their own allegations and *Roe*, and follows EDVA's lead in *Harrison v. Esper* to permit discovery. Plaintiffs' arguments do not create plausible claims in Counts IX and X.

It is well-established that the Court may consider "documents attached or incorporated into the complaint," *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606–07 (4th Cir. 2015), and "any document that the defendant attaches to its motion to dismiss if the document was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity." *See Tucker v. Specialized Loan Servicing, LLC*, 83 F. Supp. 3d 635, 648 (D. Md. 2015) (quotation omitted). The Court may also take judicial notice of matters of public record, such as documents accessible on government websites. *E.g., Pruitt v. Wells Fargo Bk., N.A.*, DKC-15-1308, 2015 WL 9490234, at *4 n.4 (D. Md. Dec. 30, 2015). Here, Plaintiffs attached the qualification standards and the accession policies to their complaint. ECF 33, ¶ 26 & n.3-4. Defendants' attached to their motion the 2014 and 2018 reports to Congress, as well as DoD's

Medical Surveillance Monthly Report (ECF 42-3, 42-4, and 42-7), all of which are available on government websites and Plaintiffs have not challenged their authenticity.

Threshold Requirements: Given the proper scope of consideration under Rule 12(b)(6), Plaintiffs claims fail at the threshold. HIV-positive individuals are not similarly situated to non-infected people. *Moore v. Ozmint*, No. CIV.A. 3:10-3041-RBH, 2012 WL 762460, at *11 (D.S.C. Feb. 16, 2012), *report and rec. adopted*, 2012 WL 762439 (D.S.C. Mar. 6, 2012) (collecting cases). Plaintiffs do not offer an analogue (and there is not one) for a person who has asymptomatic HIV with such a suppressed viral load because of daily medication management and medical monitoring that he or she poses a minimal risk of transmitting the virus.

Further, Plaintiffs fail to allege the purposeful or intentional discrimination required to state a claim. *DHS v. Regents of Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at *16 (U.S. June 18, 2020) (quotation omitted) ("To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision," citing as "[p]ossible evidence" a disparate impact on a particular group, "departures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body"); *see also Pers. Admin. of Mass. v. Feeney,* 442 U.S. 256, 279 (1979). Given policies since the beginning of the epidemic *precluding* separation based upon HIV status alone (ECF 33, ¶ 4), the administrative records showing that no tuition recoupment was sought from either Plaintiff, and that the Air Force facilitated Plaintiff Doe's civilian Air Force employment, ECF 39 (A.R.), at 002, no reasonable inference of discriminatory animus exists.

Rational Basis Review Applies: Even if the Court finds Plaintiffs' claims cross the threshold, the challenged policies satisfy rational basis review. The Fourth Circuit squarely held

that the "alleged unequal treatment of HIV-positive [individuals]" is subject to rational basis review. *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995).

Plaintiffs' invitation (ECF 48, at 38) for this Court to be the first to hold that a classification based on one's HIV status should be reviewed with greater scrutiny than rational basis should be rejected. This Court (and panels of the Fourth Circuit) must follow *Doe* unless and until it has been overruled by the Supreme Court or by an en banc decision of the Fourth Circuit. *See Roe*, 947 F.3d at 217-18 (citation omitted). Even if this Court had discretion to reconsider *Doe*, closer scrutiny is not warranted. Despite Plaintiffs' claim that *Doe* is "outdated" and has been "undermined by scientific advances," ECF 48, at 39-40, courts continue to apply rational basis review to HIV-based equal protection claims.[7] Plaintiffs fail to cite a single case in which rational basis has *not* been applied to claims of HIV discrimination. Regardless of whether HIV is considered a "disability" or simply a medical condition, classifications based thereon are subject to rational basis review. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-68 (2001); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 486 (4th Cir. 2005) (citing *Cleburne*, 473 U.S. at 446).

Finally, courts should be "reluctant to establish new suspect classes" – a presumption that "has even more force when the intense judicial scrutiny would be applied to the 'specialized society' of the military." *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (quotation

[7]*See Moore v. Ozmint, supra*; *Mofield v. Bell*, 3 F. App'x 441, 443 (6th Cir. 2001); *Johnson v. Robinson*, No. 15-CV-298-JPG-RJD, 2017 WL 5288190, at *4 (S.D. Ill. Nov. 13, 2017), *appeal filed*, No. 17-3426 (7th Cir. 2017); *Washington v. Albright*, No. 2:11-CV-618-TMH, 2011 WL 4345687, at *2 (M.D. Ala. Aug. 22, 2011), *report & rec. adopted*, No. 2:11-CV-618-TMH, 2011 WL 4345681 (M.D. Ala. Sept. 16, 2011); *Werts v. Greenwood Cty. Det. Ctr.*, No. 4:08-1852-TLW-TER, 2008 WL 5378251, at *4 (D.S.C. Dec. 23, 2008); *Fox v. Poole*, No. 06-CV-148, 2008 WL 3540619, at *6 (W.D.N.Y. Aug. 12, 2008); *Pitre v. David Wade Corr. Ctr.*, No. 06-1802, 2008 WL 466160, at *5 (W.D. La. Feb. 14, 2008); *Perkins v. Kan. Dep't of Corr.*, No. CIV. A. 97-3460-GTV, 2004 WL 825299, at *9 (D. Kan. Mar. 29, 2004).

omitted); *see also Roe*, 359 F. Supp. 3d at 410 n.31. Unlike the categories previously recognized by the Supreme Court (*e.g.,* race, color, gender, alienage, national origin, or illegitimacy),[8] a classification based on HIV status is not inherently suspect, nor does it burden fundamental rights. *United Bldg. and Constr. Trades Council v. Mayor of Camden,* 465 U.S. 208, 219 (1984) (citation omitted) ("there is no fundamental right to government employment for purposes of the Equal Protection Clause"); *Dodson v. Army*, 988 F.2d 1199, 1203-04 (Fed. Cir. 1993).

Plaintiffs' Allegations Fail to Defeat Rational Basis: A classification fails under rational basis only when it rests on grounds "wholly irrelevant" to the achievement of the government's objective. *Heller v. Doe*, 509 U.S 312, 324 (1993). "The burden is on the one attacking the [government's policy] to negative every conceivable basis which might support it." *Id.* at 320 (citation omitted). For purposes of the pending pre-discovery motion, the Court may credit the well-pled allegations of Plaintiffs' Amended Complaint regarding the incurable nature of HIV (ECF 33, ¶ 31), the likelihood of transmission (*id.*, ¶¶ 32-33), and their asymptomatic status. And, while "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," *e.g., State Farm Mut. Auto. Ins. Co. v. Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 573 (D. Md. 2019) (cleaned up), the Court may discern for itself the limited relevance to this case of *Roe*'s assessment – on a preliminary record – of the *deployment* policies.[9]

[8]*See, e.g.,* GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5:1 (Dec. 2019 Update).

[9]Similarly, that Judge Brinkema permitted discovery in *Harrison* does not suggest the plausibility of the claims here. As the court explained: "Let's get the evidence out there. I'm not going to rule with any prejudice if the government after the discovery has been done will take another look at it probably in the summary judgment context, but I'm going to let this case go forward. * * * [H]owever, I am not granting the motion for preliminary injunction. I don't find at this point yet that there's sufficient evidence in this record to satisfy me that the plaintiff necessarily is going to win this case. ECF 48-7, at 18. Consolidated with *Roe*, post-discovery motions are now pending. *Harrison, et al. v. Esper, et al.*, Case No. 1:18-cv-00641-LMB (E.D. Va.) (ECF Nos. 257, 276).

Even so, Plaintiffs' allegations do not plausibly defeat rational basis for the accession policy. HIV is undisputedly a chronic and contagious disease, even when well-managed. They offer no well-pled allegations concerning several of the military's stated rationales, including the potential for lost duty time or inability to continue service, the foreign policy concerns raised by countries hosting U.S. personnel that bar HIV-infected members, nor do they address the lifetime costs and increased burdens of monitoring and treatment. An officer candidate's incurable virus for which there is no effective vaccine, that requires lifetime monitoring and expensive daily medication management, and that creates foreign policy issues with host nations to which the service member may deploy, is not "wholly irrelevant" to that candidate's qualifications.

Assuming Plaintiffs' well-pled allegations are true, they may show a disagreement with the DOD on the magnitude of HIV-transmission risk in the military environment. But that amounts to nothing more than an improper attempt to have this Court displace DOD's risk analysis with its own. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993); *Scruggs*, 942 F.2d at 279 ("The deference afforded to the government under the rational basis test is so deferential that even if the government's actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification.") (cleaned up; emphasis in original); *see also Hawaii*, 138 S. Ct. at 2421-22 ("[W]e cannot substitute our own assessment for the Executive's predictive judgments on such matters.").

Thus, even if the Court were to find the rationale for the accession policy to be *un*wise, *un*fair, and *il*logical, so long as it also could find the policy rationally related to accessing the

most qualified and capable commissioned officers to lead military units with the appropriations authorized by Congress, Plaintiffs' equal protection challenge fails as a matter of law.

D. PLAINTIFF DOE'S DUE PROCESS CLAIM IN COUNT VI IS NOT VIABLE

Citing *Guerra* and *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir. 1977), Defendants showed that Doe's due process claims are barred because he failed to state a constitutionally protected interest in an officer's commission, nor could he state plausible claims based on the deprivation of a reputational liberty interest since the Air Force's records do not contain *false* information. ECF 42-1, at 36-39. And even if Doe could plausibly allege the deprivation of a protected interest, he did not plead that the procedures provided were inadequate. *Id.* at 39 n.14.

In response, Doe pins his claim to a constitutionally-protected interest entirely in the form of a "liberty interest premised on the DoD's false statement that he is medically unfit for duty, causing him to face social stigma and/or forced disclosure of his HIV status." ECF 48, at 51-52. Instead of the military cases of *Scruggs* (Army discharge) and *Knehans* (Army discharge after being passed over for promotion), Doe relies on cases involving state or local governments, which require a plaintiff to plead that the charges against him: (1) placed a stigma on his reputation; (2) *were made public by the employer*; (3) were made in conjunction with his termination or demotion; *and (4) were false*. *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 646-47 (4th Cir. 2007) (citation omitted; emphasis added); *see* ECF 48, at 52.

Though Defendants did not cite this four-factor test, Doe claims Defendants "do not dispute" that he "sufficiently alleged the first three elements." ECF 48, at 52. To be clear, *in addition to* Doe's inability to show falsity, he likewise has not pled and cannot prove that any "charges" against him contained in the Air Force's records have been "made public," or that there has been a "public disclosure." *Sciolino*, 480 F.3d at 647 (citation omitted). Thus, Doe

cannot show that he was deprived of a constitutionally-protected liberty interest, but even if he could, no additional notice and opportunity to be heard were required, nor could such process suffice to "clear his name" under these circumstances.

No Falsity: Doe's uncontested HIV status and DoD and Air Force policy *specific to HIV* (DoDI 6485.01 and AFI 48-123) are the reasons recorded by the Air Force for why he did not commission upon graduation. Doe insists, however, that "the alleged falsity is not that [he] has HIV; it is that he is *medically unfit for duty*." ECF 48, at 52 (citing his complaint; emphasis in original). There is nothing "false" about the Air Force applying to Doe its extant policies concerning the accession of HIV-positive individuals. Doe's argument necessarily depends on this Court striking down the HIV-specific policies. Doe cites no precedent for such a theory, which would contravene the Fourth Circuit's formulation: "[a] critical element of a claimed invasion of a reputational liberty interest . . . is the *falsity* of the government's asserted basis for the employment decision at issue." *Scruggs*, 942 F.2d at 278-79 (collecting cases; emphasis in original). The government's asserted basis for not commissioning and discharging Doe, i.e., he is HIV-positive and the applicable policies do not permit accession, is entirely true.

In addition to *Scruggs*, in which the critical fact was whether or not the service member used cocaine and was discharged for that reason, two other circuit decisions show that the "falsity" determination is based on the *underlying facts* leading to the discharge, not (as Doe claims here) whether the service member *should have been discharged* under the policy. Most closely aligned with the allegations Doe makes here is a Ninth Circuit decision prior to the Don't Ask Don't Tell Repeal Act of 2010, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), when homosexuality was grounds for discharge. Regardless of the concerns that such discharges were

stigmatizing, in part because they were irrelevant to fitness for duty, the Ninth Circuit rejected the procedural due process claims because the charges of homosexuality were true:

> *If the Navy's charges of homosexuality were false*, made public, and followed by discharge, we can assume a deprivation of liberty would occur. []
>
> In the cases before us, however, the plaintiffs either admitted or were found in a predischarge hearing to have engaged in the acts which allegedly imposed a stigma on them. []
>
> *Plaintiffs contend also they received the stigma of "unfitness" for retention*, and that they never received a hearing on the issue. In the context of these cases, *we reject this argument. The mere fact of discharge from a government position does not deprive a person of a liberty interest*. []. *The real stigma imposed by the Navy's action, moreover, is the charge of homosexuality, not the fact of discharge or some implied statement that the individual is not sufficiently needed to be retained*. [] *This is especially true since the regulations do not make fitness of the particular individual a factor in the decision to discharge*.
>
> *The plaintiffs' admission of homosexual acts, and the fact that hearings on the subject were allowed, serve to dispose of the procedural due process claims*.

* * * *

Id. at 806 (citations omitted; emphasis added).

Likewise, the D.C. Circuit rejected a due process claim arising from the discharge of an Army officer pursuant to a statute (10 U.S.C. § 3303) requiring discharge after being twice passed over for promotion because the factual basis for discharge under the statute was true:

> [W]hatever "liberty" interest Knehans may have had in his reputation, *see Paul v. Davis*, 424 U.S. 693 (1976), *has not been impinged by the mere fact of his honorable discharge and nonretention in the Army*, *see Board of Regents v. Roth*, 408 U.S. 564, 572-75 (1972), especially since the reasons for his nonpromotion were never publicly disseminated, [ ] and, secondly, that he had no constitutionally protected entitlement to continued active duty as a commissioned officer in the Army since, absent more, any objectifiable expectancy supporting such an entitlement was *sufficiently negated by the express provisions of 10 U.S.C. § 3303* (1970). * * *

Knehans v. Alexander, 566 F.2d at 314 (footnotes omitted; emphasis added).

Accordingly, regardless of the implications of "falsity" Doe assigns to his non-commissioning, it is not the sort recognized to support a liberty-based due process claim.

<u>*No Public Disclosure*</u>: As quoted above, Doe's allegations lack the requisite public dissemination of false information. He alleges that the circumstances of his discharge "are more likely to result in the forced disclosure *of [his] HIV status* in order to explain the discharge on his record," and that, *[i]f* a prospective external employer were to ask why Doe was abruptly discharged [ ], *Doe would be compelled to answer truthfully*." ECF 33, ¶¶ 156, 159 (emphasis added). The mere possibility – now some four years on from his graduation – that *Doe* (not the Air Force) will have to disclose *truthful* information about his HIV status fails to show the requisite disclosure *by the government* of false information. *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1227 (10th Cir. 1984) (cited in *Scruggs*, 942 F.2d at 278) ("To impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity.") (citations omitted); *Beller*, 632 F.2d at 806 ("the deprivation of liberty claims based on the fact that the reasons for discharge will become public seems to us without merit"); *Knehans*, 566 F.2d at 314 ("the reasons for his nonpromotion were never publicly disseminated").[10]

<u>*Additional Process Would Not "Clear His Name"*</u>: The administrative record confirms that Doe's counseled request for an exception-to-policy was considered before his separation. And, as acknowledged multiple times during this litigation in the context of Plaintiffs' APA claims, the applicable policies should have afforded Doe DES processing in connection with his separation, which may have resulted in a disability rating and associated benefits. The Air Force agreed to provide this procedure (or its equivalent through the BCMR) shortly after this litigation was filed. Relying on two cases involving property (not liberty) interests, Doe argues that the

[10]DoD's HIV policy expressly protects the privacy of such information. *See* DoDI 6485.01, Encl. 3, ¶ 5 (ECF 1-3, at 7).

DES process would have been the "requisite process," but it needed to have been provided before the constitutional deprivation. ECF 48, at 53.

If Doe's claim were that he was deprived of a *property* interest by not having a chance at obtaining disability benefits, and as Defendants already have admitted, his arguments about having the DES process occur before separation would have merit and the case should be remanded, as Defendants have agreed. But Doe has confirmed his claim is that he was deprived of a *liberty* interest and, in the context of an alleged deprivation of a liberty interest based on false and stigmatizing information, the only purpose of such process is to provide an opportunity for the person to clear his name. *Codd v. Velger*, 429 U.S. 624, 627 (1977). Nothing about the DES process, regardless of *when* it occurs, could alleviate the stigmatic harm claimed here. Rather, Doe's opportunity to persuade the Air Force that his HIV status posed no impediment to service as a commissioned officer was provided – before a decision – in the context of his request for an exception-to-policy.

E. PLAINTIFFS' CONCEDE THAT DODI 6485.01 IS EXEMPT FROM "NOTICE-AND-COMMENT RULEMAKING," BARRING THEIR PROCEDURAL APA CHALLENGE

Plaintiffs claimed that DoDI 6485.01 is defective since it was not issued through notice-and-comment rulemaking. ECF 33, ¶¶ 150-51. In response to Defendants' motion (ECF 42-1, at 39-41), Plaintiffs have "withdrawn" their procedural challenge. ECF 48, at 45 n.14.

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

Both sides agree that Plaintiffs' substantive APA claims have three parts: (1) the Superintendent of Naval Academy and the chief medical officer of the Air Force Academy (its "surgeon general" or "USAFA/SG") should be the authorities for medical waivers and both Plaintiffs' requests for exceptions to the accession policy should have been decided by the

Undersecretary of Defense for Personnel and Readiness ("USD P & R") (Counts I and II); (2) Defendants' application of their policies "to categorically bar USNA midshipmen and USAFA cadets living with HIV from commissioning" violates the APA (Counts III, IV, and V) because "such policies conflict with parts of statutes and other regulations (Counts III and IV), and because DoDI 6485.01 is arbitrary and capricious and an abuse of discretion" (Count V, ECF 33, ¶¶ 147-49); and (3) Doe should have been processed through the DES (Count II) (the Air Force previously agreed to take corrective action and such proceedings remain pending). *See* ECF 48, at 44-45 (citing ECF 33, at ¶¶ 111–153); ECF 42-1, at 44-45.

Plaintiffs incorrectly state their burden in response to Defendants' motion is to show that they "sufficiently alleged" these APA violations. ECF 48, at 44, 46, 48; *contra, e.g., Mayor and City Council of Baltimore v. Azar*, 2020 WL 758145, at *6 (D. Md. Feb. 14, 2020) ("[c]laims seeking review of an agency action under the APA 'are adjudicated without a trial or discovery, on the basis of an existing administrative record and accordingly are properly decided on summary judgment'") (cleaned up). To defeat Defendants' motion, Plaintiffs must establish, not merely allege, that Defendants' actions were not supported by the administrative record and were otherwise inconsistent with the deferential APA standard of review. *E.g., Nat'l Fed. of the Blind v. U.S. Abilityone Comm'n*, 421 F. Supp. 3d 102, 114 (D. Md. 2019).

1. THE APA PRECLUDES REVIEW OF PLAINTIFFS' CORE CHALLENGE TO THE APPLICATION OF THE ACCESSION MEDICAL STANDARDS

The crux of Plaintiffs' APA challenge, i.e., that the Service Secretaries should have waived the relevant medical standards, utilized the inapplicable retention standards, or granted their requests for an exception-to-policy, is "committed to agency discretion by law" and excluded from APA review. ECF 42-1, at 42-43. Under 5 U.S.C. § 701(a)(2), agency action is committed to agency discretion where the relevant statute provides "no meaningful standard

against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Analysis of the statute underlying the claim of unlawful agency action is required, *Webster v. Doe*, 486 U.S. 592, 600 (1988), and here, Congress conferred broad discretion to DoD regarding commissioning. 10 U.S.C. § 532(a)(3) (commissioned officer appointments limited to those who are "physically qualified for active service."); *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

Plaintiffs' first assert that Defendants' argument should be cabined solely to Counts I and II. ECF 48, at 42 n.11. Defendants' argument under 5 U.S.C. § 701(a)(2) applies to *all* aspects of Plaintiffs' APA claims as to which *Congress* has not supplied limits on the military's discretion to select commissioned officers through judicially-manageable standards. Plaintiffs also argue that, since the military's policies *themselves* contain specific standards to apply, those standards permit judicial review, regardless of whether *legislative* standards exist. *Id.* at 43, 44 ("[g]iven the multitude of military regulations, policies, procedures, and instructions cited by Plaintiffs here and throughout their Amended Complaint, meaningful standards undoubtedly exist to guide the Court's review of Defendants' actions."). The argument that the military's promulgation of its own HIV instructions should be considered the guideposts *placed by Congress* to evaluate the legality of agency action is illogical and incorrect, as it is only the relevant statute (10 U.S.C. § 532(a)(3)) that should be examined for the requisite standards.

Finally, Plaintiffs rely on a DACA-rescission case, *Casa de Maryland v. DHS*, 924 F.3d 684 (4th Cir. 2019), *pet'n for cert. filed*, No. 18-1469 (May 24, 2019), to claim incorrectly that reviewability only involves distinguishing "enforcement" cases from "non-enforcement" cases. ECF 48, at 42-43. In *Casa*, the Fourth Circuit contrasted DHS' decision from the traditional discretion afforded to the decision of a prosecutor in the Executive Branch not to indict. *Id.* at

698-99. That a "*Chaney*-type enforcement action" is *one* type of discretionary action shielded from APA review under § 701(a)(2) does not make it the *only* type,[11] and Plaintiffs reliance on *Casa* cannot make their claims reviewable here.

2. COUNT III IS BARRED BY LIMITATIONS

The Navy's instruction challenged by Deese in Count III was issued more than 6 years before this suit was filed; as a consequence, the claim is time barred. *See* ECF 42-1, at 47 n.16; *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012); *Outdoor Amusement Bus. Assoc., Inc. v. DHS*, 334 F. Supp. 3d 697, 712-13 (D. Md. 2018). Deese responds that he personally was not aggrieved by the instruction until 2017, so his "as applied" challenge did not accrue until then. ECF 48, at 46 n.15. But Count III proclaims that the instruction violates the APA because it "categorically bar[s] USNA midshipmen and officer candidates with HIV from being commissioned." *Id.* ¶¶ 131-34. And Deese seeks to "[e]njoin the Navy from using SECNAV Instruction 5300.30E to bar or to disenroll from a commissioning program . . . *any person diagnosed with HIV while on active duty* . . . ." *Id.*, Request for Relief, ¶ 8. This is plainly a facial challenge. *Outdoor Amusement*, 334 F. Supp. 3d at 712-13.

Conceding as much, Deese also seeks refuge in *non-limitations* case law discussing when, in "exceptional cases," judicial review of agency action may be available when not provided by Congress in the APA. Such precedent has no application where Congress provided review through the APA and the challenge is simply untimely.

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[11]Indeed, "there is much more to the case law interpreting § 701(a)(2) than the no-law-to apply theme." 33 WRIGHT, ET AL., FED. PRAC. & PROC. § 8325 (2D ED. 2018). It also covers certain "categories of administrative decisions" that have been "traditionally . . . regarded" as unsuitable for judicial review. *Lincoln*, 508 U.S. at 191. This includes decisions made by the Executive Branch in areas in which "courts have long been hesitant to intrude." *Id.* at 192.

Finally, Deese argues his otherwise time-barred claim may proceed because the Navy reissued the instruction in 2018—*after he was allegedly injured by it*. As Judge Hollander explained, the D.C. Circuit's "reopening doctrine" only applies where there is evidence that "demonstrates that the agency has undertaken a serious, substantive reconsideration of the existing rule." *Outdoor Amusement*, 334 F. Supp. 3d at 713 (cleaned up). Even if the doctrine *could* apply in this Circuit, it does not apply here because: (1) Instruction 5300.30E is a policy statement, not a "rule"; (2) no evidence has been provided of a "serious, substantive reconsideration," as opposed to a restatement of the prior policy; and (3) the instruction was reissued after the events at issue in this case.

3. THE FINAL ACTIONS OF THE NAVY AND AIR FORCE WITHSTAND PLAINTIFFS' SUBSTANTIVE APA CHALLENGE, AND SUMMARY JUDGMENT SHOULD ISSUE

Defendants sought summary judgment on Counts I and II because 32 C.F.R. § 66.7(a) and DoDI 6130.03 provide that the "Secretaries of the Military Departments" are authorized to waive the medical standards in individual cases. ECF 42-1, at 45-46. Based on the administrative records, Defendants also showed that the appropriate officials *knew* that the academy-level instructions Plaintiffs cite (6130.1B and AFI 48-123, ECF 33, ¶¶ 115, 123) did *not apply in HIV cases*. ECF 42-1, at 46 (citing A.R. 014, 017; N.A.R. 005, 020-021). In response, Plaintiffs concede the Service Secretaries' authority but maintain that waiver authority has been delegated to the USNA Superintendent and the USAFA/SG. ECF 48, at 49.[12] They contend Defendants' failed to follow their own regulations because the Service Secretaries prevented their delegates from acting on their requests. *Id.* at 50-51.

[12]The language of USNA 6130.B cited by Plaintiffs, in which the USNA Superintendent provided himself with the authority to "commission any midshipman," ECF 48-5, at 5 (¶ 6(c)(1)), has been removed. *See* https://www.usna.edu/AdminSupport/_files/documents/instructions/60006999/USNAINST_6130.1C_Processing_Midshipmen_Medical_Evaluation_Boards_and_Commissioning_Decisions.pdf (last accessed Mar. 23, 2020).

Two fundamental principles defeat Plaintiffs' claims in this regard. First, *specific instructions govern accession and retention where HIV infected service members are concerned*. It is a firmly established principle of construction that the specific controls the general. *E.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Thus, *as officials at both Academies recognized*, Defendants had to comply with DoDI 6485.01, SECNAV Instruction 5300.30E, and AFI 44-178 (not the general instructions Plaintiffs cite). And the Navy's instruction places the overall responsibility for its HIV policy and execution on the Assistant Secretary of the Navy for Manpower and Reserve Affairs. (ECF 1-4, at 23), and the Air Force Instruction offers no opportunity for a waiver. ECF 1-11, at 6.

Second, the Navy's and Air Force's interpretation of 32 C.F.R. § 66.7(a), DoDI 6485.01 and 6130.03, SECNAV Instruction 5300.30E, and AFI 44-178, permitting the Assistant Secretary of the Navy for Manpower and Reserve Affairs and the Secretary of the Air Force to make the final decisions was reasonable and consistent with the relevant statute (10 U.S.C. § 532). As such, this interpretation should control. *E.g., Stinson v. U.S.*, 508 U.S. 36, 45 (1993) ("provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation") (cleaned up).

Plaintiffs also allege that their requests for exceptions-to-policy were "stymied by Defendants" as they were not considered by USD P & R. ECF 48, at 50-51. While DoDI 6485.01 is a DoD policy, exceptions to which must be approved by DoD, the military services must endorse any exception-to-policy. DOD will not consider the request if it is not so endorsed. In the same vein, even if the DOD were to grant an exception-to-policy, then the involved service also would have to grant its own service-level exception or waiver. DoDI 6485.01 places

upon "the Secretaries of the Military Departments" the responsibility for "[i]mplement[ing] this instruction and any guidance issued under the authority of this instruction," ECF 1-3, at 6 (Encl. 2, ¶ 4(a)), so the actions challenged here comport with the plain language. Moreover, the policy is to "[d]eny eligibility for military service to persons with laboratory evidence of HIV infection for appointment . . . ." *Id.* at 2, ¶ 3(a). Since both Navy and Air Force policies similarly preclude appointment, it is hardly unreasonable or inconsistent that the process requires the military department to endorse a request for an exception to policy for the military departments to support a request for an exception *before* elevating the request to USD P & R.

Practically, Plaintiffs have named both the Secretary of Defense and DoD as defendants. If the claim is that USD P & R would have – *contrary* to the position taken by the Service Secretaries reflected in the administrative records – *granted* Plaintiffs' requests for an exception-to-policy, DoD would have voluntarily sought remand for corrective action. Likewise, if Plaintiffs are correct in their claim of improper procedure (and they are not), and *assuming further* they can show that such *procedural* error harmed them substantively, the recognized remedy would be a remand to allow DoD to decide their requests with an outcome that is not in meaningful doubt. 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); *Downey v. U.S. Dept. of the Army*, 110 F. Supp. 3d 676, 686 (E.D. Va. 2015) (quotations omitted) (the APA includes the same kind of "harmless-error" rule that courts ordinarily apply in civil cases), *aff'd*, 685 F. App'x 184, 191 n.6 (4th Cir. 2017) (quotation omitted) ("The harmless error rule applies to agency action because if the agency's mistake did not affect the outcome, it would be senseless to vacate and remand for reconsideration."); *NLRB v. Wyman–Gordon Co.,* 394 U.S. 759, 766 n. 6 (1969) (courts need not "convert judicial review of agency action into a ping-pong game" where "remand would be an idle and useless

formality"); *Rabbers v. Commissioner Social Sec. Admin.*, 582 F.3d 647, 654-55 (6th Cir. 2009) (quotation omitted).

Plaintiffs' remaining claims in Counts III, IV, and V are their "categorical bar" claims, which they support in their opposition by relying on *Roe*'s criticisms of the *deployment* policy rationales, asserting that there is no "rational connection" between "the facts concerning HIV treatment and prevention" and the policy choice made not to access HIV-positive members, and reiterating their arguments, debunked above, that there are "inconsistencies" between the *general* instructions for medical waivers and the *specific* instructions for HIV. ECF 48, at 45-48.

As noted above, *Roe's* criticisms, based on a limited preliminary injunction record, of a "ban" that is "outmoded and at odds with current science" was addressed to the CENTCOM *deployment* policy (as explained in a declaration) and emphasized "transmission risk." 947 F.3d at 228. *Roe*'s determination that the military incorrectly utilized the transmission factor in its rationale for banning the deployment of HIV-positive members to CENTCOM, when considering the broader question of whether a given individual is medically-qualified to be an officer, would be but one of several relevant factors. But the science of viral transmission is not the only reason for the accession policy, and frankly, there is little dispute about the risks of HIV transmission. *See, e.g.,* ECF 42-3, at 22 (recognizing that "people living with HIV on [antiretroviral treatment] with an undetectable viral load in their blood have a 'negligible risk' of sexually transmitting HIV."). Where the parties diverge is how the risk of transmission should be balanced with the other rationales expressed for the policies. Expectedly, Plaintiffs approach the problem from the perspective of the HIV-positive service member, whereas Defendants factor in the impact on, inter alia, non-infected personnel, the costs and logistics of providing

uninterrupted monitoring and treatment on aircraft carriers, in submarines, and in austere environments around the globe for current and future conflicts, as well as foreign relations.

While Plaintiffs (and possibly this Court) may disagree with the military's balancing of these concerns, so long as the Court can assess the agency's path, that certain factors tip in Plaintiffs favor does not render the overall balancing arbitrary and capricious. *DHS v. Regents*, 2020 WL 3271746, at *17 ("[t]he wisdom" of agency decisions or the "sound[ness]" of policies is not the Court's concern); *BGE v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105-06 (1983) ("It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made.") (citations omitted). This is especially so when scientific data is at issue. *Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 398-99 (4th Cir. 2006) ("we do not sit as a scientific body, meticulously reviewing all data under a laboratory microscope [n]or is it for the judicial branch to undertake comparative evaluations of conflicting scientific evidence.") (quotations and internal quotation marks omitted).

Plaintiffs dismiss Defendants' explanation (ECF 42-3, at 26, p.23 of report) for why the accession standards are used as not specific enough to HIV and insist that any policy is arbitrary and capricious if not supported by science. ECF 48, at 47. Plaintiffs' conclusory challenge invites the Court to substitute its judgment for DoD's and in no way precludes a finding that military officials considered the relevant factors and stated a rational connection between the facts and the policy choice. *E.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 753 (4th Cir. 2019) (quotation omitted).

Finally, Plaintiffs do not address Defendants' arguments that the HIV policies at issue are wholly consistent with the governing statutes and that their APA claims are undermined by

DoD's reporting to Congress on these policies in 2014 and 2018, without "evidence of any intent to repudiate" DoD's policy choices. *See* ECF 42-1, at 48-49. Plaintiffs' real complaint is with the broad discretion conferred by Congress and its acceptance of the military policies at issue here. But Congress' choices are not subject to "arbitrary and capricious" review under the APA.

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

Defendants showed that Doe's equitable estoppel (Count VII) and declaratory relief (Count VIII) claims should be dismissed. ECF 42-1, at 49-53. Doe does not provide responsive argument to support his claim for a declaratory judgment, *see* ECF 48, at 11, 54-57, so Defendants will focus their reply on Count VII.

There is no recognized independent cause of action for estoppel against the federal government. ECF 42-1, at 50. And in the lower court decisions in which estoppel has been considered or invoked against the government, in addition to the traditional elements, a plaintiff must show "affirmative misconduct going beyond mere negligence or mistake," a "serious injustice," and no threat to the public fisc or public policy. *Id.* (and cases there cited). Against this backdrop, Defendants showed the implausibility of Doe's estoppel claim, based upon allegations that he was somehow led to believe by unnamed Air Force doctors years before his graduation that he would be able to commission in spite of his HIV status. *Id.* at 51.

Doe ignores the Supreme Court's jurisprudence on estopping the federal government, instead supporting his claim with out-of-circuit cases. ECF 48, at 54-55. Likewise, he disregards the September 2015 memorandum notifying him that his disenrollment was being proposed because of his HIV status. A.R. (ECF 39) 015, 018. He does not mention that, through counsel and expressly relying upon AFI 44-178 (ECF 1-11) and DoDI 6485.01 (ECF 1-3), he requested a waiver to allow him to complete his studies at the Academy and an "exception-to-

policy" to allow him to commission. A.R. 022. Doe also omits that the Air Force disapproved his exception-to-policy request in September 2016, ECF 33, ¶¶ 96, 99, and that, by the following month at the latest, he had accepted civil service employment with the Air Force. A.R. 002.

Despite the unchallenged administrative record on these points, Doe relies on his own allegations that he was told (by someone) six months after his diagnosis that he could continue his studies at the Academy and would be eligible to commission, that duty orders were issued in April 2016 (while his request for an exception-to-policy was pending), and that, in June 2016 (while still awaiting a decision on his request), he received a commissioning certificate, took an oath, and (except for administrative steps that he avers "are not prerequisites to holding office") completed the commissioning process. *Id.* at 54 (citing ECF 33, ¶¶ 68, 73-74, 84-89). Doe insists that such facts, if proven, suffice to estop the United States. ECF 48, at 54.

Neither Doe's well-pled allegations nor anything contained in the administrative record gives rise to plausible estoppel claims. *At best*, he has pled that Academy officials were "confused" about which standards applied to him (ECF 33, at ¶¶ 70-71), that he applied for and received medical waivers through graduation, and that the Air Force inadvertently processed his commission as a graduating cadet, despite the pendency of his exception-to-policy request. *Id.* at ¶¶ 84-89. Such allegations fail to show affirmative misconduct beyond mere negligence or mistake. *Muherjee v. INS*, 793 F.2d 1006, 1008 (9th Cir. 1986) ("affirmative misconduct" requires either "a *deliberate lie* or a pattern of false promises" made to a particular individual) (emphasis added); *Keener v. E. Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992) (even misleading statements fall short of "affirmative misconduct," unless the statements in question constituted a deliberate and malicious lie).

Moreover, Doe's allegations (and the record facts he omits) undercut the traditional elements of estoppel. He failed to allege that any statements made to him (before his request for an exception-to-policy) were made by someone who knew "the true facts"; i.e., that this person *knew* he would not commission but misled him anyway. Doe's pleadings aver that Academy officials were "confused" about the correct standards to apply, not that they knew something that he did not. Frankly, he alleges and the record confirms that he enjoyed the support of officials and physicians at the Academy to pursue the exception. There was no "knowledge imbalance" between Doe and everyone else – they all knew that an exception was required. *E.g.,* A.R. 017 (recognizing that an exception to policy was required, but that there was no precedent therefor).

Doe also cannot show that *he* was "ignorant of the true facts." His pleadings show his express knowledge of AFI 44-178 and its application to him shortly after his diagnosis. Finally, as to the "reliance" factor, Doe provides no well-pled facts that he would have adopted a different course of action had he known for certain he would not commission. His allegation that he would have re-enlisted (ECF 33, at ¶ 78), as opposed to completing his studies and earning a degree with no tuition recoupment and then beginning civilian employment with the Air Force is not only implausible, but fails to show *detrimental* reliance.

Both sides cite *Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1989) (en banc). ECF 42-1, at 51-52; ECF 48, at 55-56. In that case, the Army refused to reenlist a soldier with an outstanding record solely based on his admitted homosexuality, even though the Army had repeatedly reenlisted him over the previous 15 years, in violation of its own regulations and with full knowledge of his sexual orientation. 875 F.2d at 701-03. The court found the Army had induced Watkins's reliance on its previous course of conduct and was therefore equitably estopped from refusing to reenlist him. *See id.* at 709-11. Doe tries to equate his situation with

that in *Watkins*. But here, the Air Force never affirmatively misrepresented Doe's qualifications for commissioning or turned a blind eye to its own regulations or policies – certainly not over 15 years. The Air Force *adhered* to AFI 44-178 at every stage. Following the provisions for cadets, Academy officials duly required medical waivers for Doe, which he pursued through graduation. And he requested an exception to the "no commissioning" policy (with the support of the same officials he accuses of "affirmative misconduct") before graduation. Unlike *Watkins*, there are no well-pled or plausible allegations that some extraordinary misconduct by Air Force personnel reasonably led Doe to believe he would commission.

Given the Air Force's consistent adherence to AFI 44-178, *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990), is the more appropriate precedent. There, an HIV-positive member of the Naval reserves challenged his scheduled release from active duty in the Naval Reserve Canvasser Recruiter Program ("NRCR"), and the court rejected the *Watkins* analogy. *Id.* at 1464 ("the Navy has refused to reenlist Doe in the NRCR program, in accordance with its 1987 regulation. Unlike the situation in *Watkins,* the Navy has never led Doe to believe that he has any expectation of serving in the NRCR program in violation of the regulations excluding HIV-positive individuals. Doe's estoppel claim thus lacks merit.").

This Court should follow suit and dismiss Counts VII and VIII.

II. <u>CONCLUSION</u>

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

Respectfully submitted,

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