No. 19-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD ROE, et. al.
Plaintiffs-Appellees,
v.
UNITED STATES DEPARTMENT OF DEFENSE, et al.,
Defendants-Appellants.

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

AMICI CURIAE BRIEF OF FORMER MILITARY OFFICIALS IN SUPPORT OF APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT BELOW

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INTEREST OF AMICI CURIAE

Amici are former military officials who have decades of first-hand experience in military affairs, all of which is highly relevant to the questions now before this Court. *Amici* include:

- **Secretary Eric K. Fanning** served as the 22nd United States Secretary of the Army. As Secretary, he had statutory responsibility for all matters relating to the United States Army including manpower, personnel, and reserve affairs. He previously served as Chief of Staff to the Secretary of Defense, Acting Secretary of the Air Force and Under Secretary of the Air Force, and Deputy Under Secretary of the Navy/Deputy Chief Management Officer. He is the only person to have held senior appointments in all three military departments and the Office of the Secretary of Defense.
- **Secretary Deborah Lee James** previously served as the 25th United States Secretary of the Air Force from 2013 throughout 2017. Secretary James served in the Pentagon as the Assistant Secretary of Defense for Reserve Affairs from 1993 throughout 1998, where she was the Secretary of Defense's Senior Advisor on National Guard and Reserve personnel. As a professional staff member on the House Armed Services Committee, she served as Senior Advisor to the Military Personnel and

Compensation Subcomittee, the NATO Burden Sharing Panel, and the Chairman's Member Services team.

- **Secretary Ray Mabus** served as the 75th United States Secretary of the Navy from 2009 through 2017, the longest to serve as leader of the Navy and Marine Corps since World War I. Throughout his tenure, Secretary Mabus focused on four key priorities—People, Platforms, Power and Partnerships—that enabled the Navy and Marine Corps' unique ability to maintain the global presence that reassures our allies and deters our adversaries. Among his achievements, Mabus spearheaded the "21st Century Sailor and Marine" initiative which was designed to build and maintain the most resilient and ready force possible and to prepare service members and their families for the high-tempo operations of today's Navy and Marine Corps.

- **Dr. Lawrence J. Korb** previously served as Assistant Secretary of Defense (Manpower, Reserve Affairs, Installations and Logistics). He also served on active duty for four years as Naval Flight Officer and retired with the rank of Captain from the Naval Reserve. Dr. Korb served as director of the Center for Public Policy Education and senior fellow in the Foreign Policy Studies Program at the Brookings Institution; dean of the Graduate School of Public and International Affairs at the University of Pittsburgh;

vice president of corporate operations at the Raytheon Company; and director of defense studies at the American Enterprise Institute. He has authored, co-authored, or contributed to more than 20 books, including *The Fall and Rise of the Pentagon; American National Security: Policy and Proces*s. He is currently a Senior Fellow at the Center for American Progress with an expertise in military policy and budget.

- **Rear Admiral Alan M. Steinman (Ret.)** previously served as the Director of Health and Safety for the U.S. Coast Guard. As a Board Certified doctor in occupational medicine, Rear Admiral Steinman dedicated decades of his career, in various roles, to the rescue and treatment of ill and injured personnel at sea. He has conducted extensive research in areas including rescue operations and preventative medicine in the military. He is credited with improving the quality of care in Coast Guard clinics and establishing the Coast Guard's system of emergency medical services.

- **Captain Thomas T. Carpenter (Ret.)** served in the U.S. Marine Corps from 1970 through 1982 in various capacities including A-4 Skyhawk pilot. He is currently the co-chair of the Forum on the Military Chaplaincy which seeks to provide resources and advocacy to military chaplains who value

personal integrity, selfless compassion, respect for others and excellence in leadership.

RULE 29 CERTIFICATIONS

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for Amicus represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than Amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

All parties have consented to the submission of this brief.

SUMMARY OF ARGUMENT

The United States' all-volunteer military depends on allowing every citizen who is fit to serve to do so. In our professional military judgment, any policy that discharges willing and able service members based on chronic, but well-managed, medical conditions should be based on the most up-to-date science and be justified by credible—not theoretical—risks. Unfortunately, the Department of Defense's ("DoD") categorical restriction on deployment of service members with HIV lacks such scientific support and justification. HIV no longer qualifies as a chronic medical condition requiring a waiver under the DoD's general policies, yet the DoD's outdated policy persists.

Treatment of HIV has progressed dramatically. So long as they adhere to the treatment protocol—which, unsurprisingly, 99% of service members do—persons with HIV do not experience any noticeable effects on their physical health and enjoy nearly the same life expectancy as persons without HIV. More still, those with suppressed viral loads—which includes nearly everyone who adheres to the treatment protocol—cannot pass HIV to others through sexual contact.

Despite these tremendous advances in the treatment of HIV, the DoD defends its categorical exclusion based on supposed risks such as the risk of transmission on the battlefield. The latest medical expertise and our own collective military experience show

that these risks are more theoretical than actual.[1] Even if such risks exist to some small extent, they do not justify categorically discharging service members who in all other respects are fit to serve. It is more damaging to military readiness to deny those service members the opportunity to deploy where they are needed.

It is our professional military judgment that there is no legitimate reason to deny HIV positive service members the opportunity to deploy. We base this judgment on decades of military experience and the current understanding of HIV—its treatment, its transmission, and the capability of and prognosis for those in care. We urge the Court to affirm the district court's decision.

[1] Our professional military judgment is informed by the consensus of medical experts regarding the current transmission and treatment of HIV. None of the statements made herein regarding the transmission or treatment of HIV appear to be disputed by the DoD in its brief to this Court. *See generally* Br. of Dep't of Defense, 19-1410 (May 28, 2019).

ARGUMENT

I. Retention of Service Members Is Essential.

It is fundamental that the military must recruit and retain the best possible service members. Doing so is essential to maintain the United States' all-volunteer military. Yet the military continues to face significant challenges on both fronts that call into question any policy that negatively affects retention by affirmatively *discharging* able service members.

Military leaders, including *amici*, recognize that they "are clearly in a war for talent" with the private sector that makes military recruitment efforts more difficult.[2] As of October 2017, for example, the Air Force faced a total pilot shortage of "approximately 2,000 with the largest shortage—1,300—in [its] fighter pilot inventory."[3] Worse still, the pool of eligible recruits is shrinking. According to 2017 Pentagon data, 71% of the 34 million Americans between the ages of 17 and 24 are *ineligible* to serve in the military.[4] In other words, the military faces increasing competition to recruit from a shrinking pool.

Retention would be important even if recruitment were robust, but these challenges make it is especially important that the military retain its current service

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[2] *See, e.g.*, Mark D. Faram, *Navy sees recruiting challenges on the horizon*, Navy Times, Nov. 2, 2018, available at https://www.navytimes.com/news/your-navy/2018/11/02/navy-sees-recruiting-challenges-on-the-horizon/.

[3] Lisa Ferdinando, *Military Leaders Highlight Efforts, Challenges in Recruiting, Retention*, U.S. Dep't of Defense, Apr. 13, 2018, https://www.ausa.org/news/retention-becomes-key-army-growth.

[4] Nolan Feeney, "*Pentagon: 7 in 10 Youths Would Fail to Qualify for Military Service*," Time, June 29, 2014, http://time.com/2938158/youth-fail-to-qualify-military-service/.

members. The military expends significant resources on each recruited service member that are wasted if the military then unnecessarily discharges them. The Center for Strategic and Budgetary Assessments, for example, reported that the DoD's average cost in its fiscal year 2018 budget request, per service member, was $107,106.[5] The military incurs even more costs for service members who qualify for specialty positions. For example, it costs between $5.6 million and $10.9 million to train a single fighter pilot.[6] The military also incurs additional costs for military education, including language training, that can cost as much as $200,000 per person.[7] Discharging service members who are willing and able to serve results in an unnecessary monetary loss and is a significant drain on service members' collective experience and training. This loss happens when the military needlessly discharges HIV-positive service members.

Amici agree that the military must balance retention efforts against other military needs, such as readiness, resilience, deployability, and mission accomplishment. In our professional military judgment, however, advances in medical science have made it so that deployment of service members with HIV does not negatively impact those other needs. Put simply, there is nothing left to "balance" against deployment of HIV-positive

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[5] Katherine Blakeley, *Military Personnel: 2018 Request*, Center for Strategic and Budgetary Assessments (Aug, 15, 2017).

[6] Michael G. Mattock, et al., *The Relative Cost-Effectiveness of Retaining Versus Accessing Air Force Pilots*, Rand Corporation at 35 (2019).

[7] Beth J. Asch, et al., *Ensuring Language Capability in the Intelligence Community*, Rand Corporation at 70 (2013).

service members—particularly those whose viral loads are suppressed and who have demonstrated adherence to treatment protocols.

II. Categorical Denial of Contingency Deployment to Service Members with HIV is Outdated and Unnecessarily Restrictive.

The United States rightfully seeks strong, healthy, and capable service members. In furtherance of that pursuit, the military creates and enforces policies on the deployment of service members with chronic medical conditions. These policies ensure the safety of service members and the appropriate allocation of military medical and personnel resources. To be effective, these policies must be based on the most up-to-date medical science. It serves no one if they are not.

Under the general guidelines, HIV should not result in any restriction on deployment. Consistent with the need to retain service members, the DoD explicitly recognizes the importance of retaining service members with HIV: "Once a service member completes training, the goal is to retain members who acquire HIV and who are still capable of performing their duties in the rigorous military environment."[8] But despite these words, the DoD continues to apply outdated policies on the deployment of HIV-positive service members.

[8] Mem. from Stephanie Barna, Acting Under Secretary of Defense for Personnel and Readiness to Committee on Armed Services, U.S. House of Representatives at 6 (Aug. 27, 2018).

Two specific policies control the military's decision-making as to deployability, both of which provide guidelines for chronic medical conditions generally and HIV specifically:[9]

- The Department of Defense Instruction ("DoDI") 6490.07[10] requires satisfaction of four factors to ensure that service members are "medically able to accomplish their duties in deployed environments" and establishes standards for when personnel with an existing medical condition may deploy without a waiver;
- The CENTCOM Policy[11] provides five additional requirements, establishing that service members must be "medically, dentally and psychologically fit," and cannot have medical conditions that would prohibit their ability to tolerate environmental and operational conditions of the deployed location.

Despite the general guidance, both these policies make HIV specifically subject to deployment restrictions that, together, amount to a categorical ban on HIV-positive service members. This ban is no longer necessary, however, given the progression and breakthroughs of HIV treatment. Roe and Voe, and other similarly-situated HIV-positive service members should be deemed fit for deployment and certainly not discharged from the military altogether, but that would require removal of the categorical ban and proper application of these policies. Based on medical science, and in our professional military judgment, the categorical ban is no longer justified.

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[9] Because both policies are adequately described in the parties' briefs, *see* Brief of Appellees at 11-13; Brief of Appellants at 5-6., we do not repeat them here.

[10] Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees.

[11] U.S. Central Command MOD-13, Tab A (PPG-Tab A: Amplification of the Minimal Standards for Fitness for Deployment to the CENTCOM AOR; To Accompany MOD Thirteen to USCENTCOM Individual Protection and Individual/Unit Deployment Policy) ("Mod-13").

HIV-positive service members who are asymptomatic, have suppressed viral loads, and have a demonstrated history of adherence to medication meet the required factors set by DoD for both general deployability and deployability to CENTCOM. Service members Roe and Voe also meet the requirements under both the general standards for deployment without restriction in 64907.04 and Mod 13. Their conditions are stable, any medical treatment they need is available in theater, and the deployment of HIV-positive service members has been proven not to be a detriment to their health and care, nor that of their colleagues.

Nevertheless, in defense of its outdated policy, the DoD asserted below that "forward-deployed military medical assets are not intended to care for service members' chronic medical needs." This is no longer a legitimate concern, as even forward-deployed military medical assets are fully capable of administering a biannual blood test and a once-a-day pill that requires no special handling or storage.

Given their stable conditions and minimal treatment requirements, these service members are capable of performing all functions and duties associated with their roles. To be sure, in 2004, the DoD's Armed Forces Epidemiology Board determined that "[t]here is no evidence that HIV infection, per se, affects physical fitness."[12] When properly treated, HIV is no longer a debilitating disease that shortens one's life. Medical

[12] Office of the Assistant Secretary of Defense, Health Affairs Policy Memorandum—Human Immunodeficiency Virus Interval Testing (Mar. 29, 2004), available at https://www.health.mil/Reference-Center/Policies/2004/03/29/Policy-Memorandum--Human-Immunodeficiency-Virus-Interval-Testing.

research and current treatment strategies have made it so that HIV is "compatible with active service throughout a full career in the U.S. military."[13] With four years of additional medical advancements, that statement is only more correct today as it was then.

Simply put, HIV-positive service members can perform all necessary functions in the deployed environment, without limitations. They are as adaptable to any military environment as non-HIV service members, and their ability to serve will not be impacted. This is no longer hypothetical, as the Navy's experience allowing HIV-positive service members to deploy overseas demonstrates that these men and women should be allowed to serve in the armed forces.

Indeed, a retrospective review was recently performed on twenty active duty Navy service members with HIV. The service members were approved for operational or OCONUS (outside the continental United States) assignments while on antiretroviral therapy medication. The review determined that after *six months* (double the length of the reasonable time frame for determining eligibility to deploy to CENTCOM) on an operational assignment outside of the Continental United States, the service members

[13] J. Brundage, D. Hunt & L. Clark, *Durations of Military Service after Diagnoses of HIV-1 Infections Among Active Component Members of the U.S. Armed forces 1990-2013,* Armed Forces Health Surveillance Center, *Medical Surveillance Monthly Report*, Vol. 22, No. 8 (Aug. 2015), available at https://health.mil/Reference-Center/Reports/2015/01/01/Medical-Surveillance-Monthly-Report-Volume-22-Number-8.

maintained their viral suppression and the care necessary was accessible.[14] The study concluded that the deployment "was successful without detriment to the continuum of HIV care or military missions." "Viral suppression and immune response were maintained despite the expansion of operational and OCONUS assignments for HIV infected service members serving on active duty in the U.S. Navy."[15] Researchers concluded that the study "suggest[s] that the risk of HIV transmission from HIV infected service members to others including non-infected service members would be low to negligible."[16] In sum, despite DoD's arguments before this Court to the contrary, deployment of HIV-positive service members will not be a detriment to their care or to military missions.

III. The Department of Defense's Stated Reasons For Restricting Deployment of Service Members with HIV Do Not Justify the Policy and Practice.

The DoD has offered several other reasons that it claims justify the categorical exclusion of service members with HIV. Specifically, the DoD contends that service members with HIV—particularly those that must frequently deploy—present a unique deployment risk justifying exclusion. They contend that it is possible that HIV may be transmitted on the battlefield or through a battlefield transfusion. In addition, the DoD contends that there is a risk that service members will lose or not have access to their

[14] S.E. Woodson, *Virologic Suppression in U.S. Navy Personnel Living with HIV Infection and Serving in Operational Assignments*, Military Medicine, usz169, available at https://doi.org/10.1093/milmed/usz169.
[15] *Id.*
[16] *Id.*

medications, which may result in an increase of that service member's viral load. In our professional military judgment, and in light of the medical science, none of these reasons justify the DoD's continued categorical exclusion of service members with HIV. We address each in turn.

A. The Frequency With Which A Service Member Needs to Deploy Does Not Justify Discharging Them.

The DoD alleged in its brief that the discharge decisions involving Roe and Voe turned "not just on their HIV diagnoses, but also on how frequently their jobs require them to deploy." DoD Br. at 35. Yet, under even a basic analysis of the deployment standard, the frequency with which Roe's and Voe's jobs require them to deploy should be of no consequence. Nothing indicates that HIV-positive service members, who are asymptomatic and with undetectable viral loads, cannot deploy to a combat theater and perform all that service to this nation requires. As service members who can perform all the services required of them, whether they deploy often or rarely has no impact on whether they are fit to serve.

B. The Risk of HIV Transmission on the Battlefield Does Not Present a Significant Risk.

DoD also argues that in addition to blood transfusions, which are discussed below, its policy is reasonable because service members may come into "contact with sharp HIV-infected objections" or contact between broken skin and HIV-infected blood. DoD Br. at 23, 27.

Based on current medical science, the risk of transmission in a deployed setting, even in combat, is so low, particularly for those with an undetectable viral load, that in *our* professional military judgment, it does not present a risk of any significance. It certainly does not justify categorically barring the deployment of service members with HIV.

C. That Service Members with HIV Cannot Provide Blood No Longer Justifies the DOD's Categorical Exclusion.

The DoD also argues its categorical exclusion is reasonable because service members may serve in small teams and that the inability of one team member to give blood presents a risk. *See* DoD Br. at 16, 24, 27. While there remains a risk of transmission of HIV via a blood transfusion, that risk is relatively minor, given the military's blood supply policies and procedures and the fact that transmission through a blood transfusion is rare in and of itself. Once again, in our professional military judgment, this hypothetical concern does not justify DoD current categorical ban.

Based on our collective experience, substantiated by data, it is rare for any service member to require an emergency blood transfusion from non-prescreened sources.[17] It is rarer still for members of the Air Force, such as Roe and Voe.[18] Thus, the likelihood

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[17] *See* T. Ballard, P. Rohrbeck, M. Kania & L. Johnson, Transfusion-Transmissible Infections Among U.S. Military Recipients of Emergently Transfused Blood Products, June 2006-December 2012, Medical Surveillance Monthly Reports, Vol. 21, No. 11 (Nov. 2014) (only 2% of the total blood products transfused from 2006-2012 came from non-FDA compliant blood products).

[18] *See id.* (members of the Air Force received only 2% of all non-FDA compliant blood or 2% of 2% of all blood transfusions).

that Roe or Voe would be in a position where their inability to donate blood would have any impact on another service member is negligible, if non-existent.

Further, the armed services has a military-wide blood program that is responsible for collecting, testing, and transporting blood to forward-deployed surgical units and theater hospitals.[19] These surgical units and theater hospitals then provide blood and blood products to first responders at the unit level.[20] Thus, the military uses pre-screened blood whenever possible, even in combat settings. If pre-screened blood is not available, the next source is a "walking blood bank," a volunteer service member who has been pre-screened to donate fresh blood when called upon. If that is insufficient, the next source is those who have donated recently. If this is not enough, then medics call for volunteers. Service members with HIV are ordered not to give blood and are well aware that they cannot. Also, they can be tagged to prevent them from giving blood.

If deploying a service member who cannot give blood justified a categorical exclusion, we would expect to see it for all service members who cannot give blood for whatever reason. For example, men who have sexual contact with other men cannot give blood, yet are not deemed categorically non-deployable. Nor are service members who have AB+ blood type, who can only donate blood to other AB+ donors. Indeed,

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[19] *See* Military Blood Program Fact Sheet *available at* https://www.militaryblood.dod.mil/press/Documents/Print_Factssheet.pdf at 4.

[20] *See id.*

all these service members are routinely allowed to deploy into a combat theater as part of small teams without waiver or restriction. In our professional military judgment, so should service members with HIV.

D. The Rare Instances Where a Service Member Loses or is Unable to Obtain More Medication Do Not Justify the DoD's Categorical Exclusion.

The DoD also argues that the policy is justified because service members with HIV may lose their medication through unforeseen circumstances and it may become difficult to resupply it. DoD Br. at 24. This also is a relatively rare circumstance and is a risk present for any service member who takes important medications. It also does not justify DoD's categorical ban.

Based on current medical science, the consequences of a treatment interruption—even one with viral rebound—are not significant and it would take several months, if not years, before the person with HIV would be immunologically compromised. Frankly, if the military cannot resupply medication within a few months, it is experiencing much bigger problems with much bigger consequences.

Many others who are allowed to deploy would have similar health issues if they were denied their medications, inhaler, or glasses for an extended period of time. That a service member could see an increase in the viral load (without necessarily impacted his health) months or years later if he fails to take his pills every day, does not justify DoD current policy.

* * *

The justifications DoD puts forth in support of its policy are outdated and, in our judgment, do not outweigh the burdens placed on other service members and the military writ large by discharging fit and able service members. Of course some risk remains, but because of advances in medicine, the risk is negligible. Roe and Voe should not be discharged based on theoretical risks that, for all intents and purposes, will never come to pass.

CONCLUSION

Amici respectfully request that this Court affirm the decision of the district court below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,161 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.

/s/ Richard D. Salgado
Richard D. Salgado

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on July 25, 2019.

/s/ Richard D. Salgado

Richard D. Salgado