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

Alexandria Division

ISAIAH WILKINS, ET AL., PLAINTIFFS, v. LLOYD J. AUSTIN, ET AL., DEFENDANTS.	CIVIL ACTION NO. 1:22-cv-01272

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

This Court has already found that Defendants' policies prohibiting the commissioning and deployment of service members living with HIV ("SMLWH") were irrational, arbitrary, and capricious, in violation of the equal protection components of the Due Process Clause of the Constitution's Fifth Amendment and the Administrative Procedure Act. Defendants did not appeal that decision. Their policies barring all people living with HIV ("PLWH") from joining any branch of the U.S. military (i.e., accession), however, remain in violation of those same laws. This lawsuit seeks to eliminate Defendants' last major barrier to the full service of PLWH by removing the accessions bar for those seeking to join the military in service of their country.

After controlling Fourth Circuit guidance and this Court's comprehensive analysis and prior rulings, Defendants can present no basis to relitigate the purported justifications for barring SMLWH from deploying or commissioning. As the Fourth Circuit has held, "[a] ban on deployment may have been justified at a time when HIV treatment was less effective at managing the virus and reducing transmission risks," but "any understanding of HIV that could justify this ban is outmoded and at odds with current science." *Roe v. Dep't of Def.*, 947 F.3d 207, 228 (4th Cir. 2020). "Such obsolete understandings cannot justify a ban, even under a deferential standard of review and even according to appropriate deference to the military's professional judgments." *Id.*

Further, in light of this Court's opinion and orders in *Harrison* and *Roe*, the only justification of any significance Defendants have left to offer here is the cost of providing health care to PLWH. But this purported justification does not provide a rational basis for the accessions bar as it pertains to new recruits, making the policies creating the bar unconstitutional and arbitrary and capricious.

First, courts around the country have confirmed that a concern for the preservation of monetary resources standing alone cannot justify a discriminatory classification used in allocating those resources. Second, the cost of health care has never been reflected or factored into Defendants' general medical criteria for accession decisions, including with respect to other chronic manageable conditions. Third, the cost of providing health care to new SMLWH would not present a significant financial burden to Defendants in view of their $842 billion proposed budget for Fiscal Year 2024, in which $58.7 billion is allocated to fund health care, including to current SMLWH, service members' dependents living with HIV, and retirees living with HIV. Fourth, Defendants can present no supporting evidence for any speculative concern that PLWH would be disproportionately "incentivized" to join the military to cover their HIV health care costs given that most PLWH already have their health care funded or subsidized by an employer or the federal government through various medical programs.

The prognoses and lives of PLWH have been completely transformed by the development and improvement of antiretroviral therapies over the last three decades. And this Court has already held that SMLWH in effective treatment are capable of performing all of their job duties, including potential contingency deployment. It is time for this undisputable fact to be applied to those seeking to join the military and for Defendants' accession bar for PLWH to be eliminated altogether.

Plaintiffs respectfully request this Court grant this motion for summary judgment.

II. LISTING OF UNDISPUTED FACTS

A. History of HIV Infection and Treatment

1. "In the early 1980s, many young and otherwise healthy people became ill with a wide array of rare and often deadly infections. Researchers identified acquired immunodeficiency syndrome (AIDS) as the reason so many otherwise healthy people died from these infections, but

they did not understand the cause of AIDS. The people most frequently diagnosed with AIDS belonged to marginalized and stigmatized groups—gay men, intravenous drug users, Haitians, and hemophiliacs—and the disease acquired the colloquial moniker 'gay cancer.'" *Roe*, 947 F.3d at 212 (citations omitted).

2. In 1984, researchers discovered that AIDS was caused by HIV, a virus that could take root in any person sufficiently exposed; however, "'by that time, many Americans already believed the cause of the disease to be a deviant lifestyle, a stigmatizing belief that . . . AIDS was a punishment from God.' Stigma, fear, and misinformation about HIV persist today." *Id.* (citation omitted). PLWH have suffered for decades through a unique history of misinformation, stigma, ostracism, and discrimination, and continue to do so to this day. *Id.* at 212, 229, 233-34 (recognizing stigma); *see also Harrison v. Austin*, 597 F. Supp. 3d 884, 892, 907 (E.D. Va. 2022) (same).

3. In 1996, antiretroviral therapy for HIV became widely available, and today, there is "an effective treatment regimen for virtually every person living with HIV." *Roe*, 947 F.3d at 213. Some 75% to 80% of PLWH are on a one-tablet antiretroviral regimen, which combines the required medications into a single pill taken once a day. These "pills have no special handling or storage requirements"; they "tolerate extreme temperatures well"; "have minimal side effects"; and "impose no dietary restrictions." *Id.*

4. With adherence to treatment, PLWH's viral load becomes "suppressed" within several months and "undetectable" shortly thereafter, meaning there are fewer than 50 virus copies per millimeter of blood. *Id.*

5. Testing is also done at regular intervals to confirm viral loads, usually quarterly, until the patient reaches an undetectable viral load, at which point it is reduced to three times a

year. *Id*. Once the viral load is undetectable for two years, testing is reduced to a semiannual basis. *Id*. Testing can be performed by a general practitioner; blood samples can be shipped to labs when on-site testing is unavailable. *Id*.

6. Antiretroviral therapy is effective for virtually every PLWH, and the virus develops resistance to therapy only when individuals fluctuate in their adherence to treatment. *Id*. Furthermore, completely stopping treatment does not result in immediate adverse health consequences; it "often takes weeks for an individual's viral load to reach a level that would not be considered 'suppressed.'" *Id.* Sustained lack of treatment leads to a clinical latency period, which may last for years, during which the person may not have any symptoms or negative health outcomes. *Id.* But any negative health outcomes can be reversed by restarting treatment. *Id.*

7. People who adhere to their effective treatment regimen "have effectively no risk of sexually transmitting the virus to an HIV negative partner," and with the possible exception of blood transfusions, "risk of transmission from a person with an undetectable viral load through non-sexual means such as percutaneous needlestick injuries is very low, if such a risk exists at all." *Id.* at 213-14.

8. The effectiveness and availability of modern antiretroviral treatment means that an HIV infection, once considered invariably fatal, is now a "chronic, treatable condition," and individuals who are timely diagnosed and treated "enjoy a life expectancy approaching that of those who do not have HIV." *Id.* at 214.

9. A person's HIV status bears no relation to their ability to contribute to society, particularly in view of dramatic medical advances over the last three decades. *See Harrison*, 597 F. Supp. 3d at 910 (holding irrational the U.S. military's categorical bar of worldwide deployment for asymptomatic SMLWH with an undetectable viral load).

10. HIV-positive status is an immutable characteristic: it is not yet curable, and a person cannot change their HIV status. *Roe*, 947 F.3d at 214; *Harrison*, 597 F. Supp. 3d at 893.

11. Even today, many PLWH do not have access to care, and criminal laws continue to unfairly single out and discriminate against PLWH. *See, e.g.*, Pls.' RJN ¶ 1, Ex. A; Pls.' RJN ¶ 7, Ex. G; Pls.' RJN ¶ 8, Ex. H; Pls.' RJN ¶ 14, Ex. N at 1–5.[1] And in the face of intransigence and hostility to criminalization policy reform, many criminal defendants are forced to seek judicial relief—often from decades-long sentences based on discriminatory assumptions, and not always successfully. *See, e.g.*, *Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (holding that where courts could previously take judicial notice of the fact of HIV transmission risk solely on the basis of a person's HIV diagnosis—relying upon outdated assumptions that are now scientifically unsupportable in light of "the advancements in medicine regarding HIV"—courts could no longer do so and must require proof in criminal cases that HIV transmission could occur in a particular circumstance).

B. HIV Policy in the Military

12. In 1991, five years before the advent of effective antiretroviral combination therapy, the Department of Defense ("DoD") issued its first version of Department of Defense Instruction ("DoDI") 6485.01, *see* Ex. A DoDD 6485.1, *Human Immunodeficiency Virus-1 (HIV-1)* (Mar. 1991), which set DoD policy with respect to PLWH.

13. DoDI 6485.01 officially makes PLWH ineligible for appointment, enlistment, pre-appointment, or initial entry training for military service. Ex. B, DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members*, ¶ 3(a) (June 7, 2013) ("DoDI 6485.01"). Though this Instruction regarding "HIV in Military Service Members" has been

[1] Plaintiffs' Requests for Judicial Notice ("Pls.' RJN") are filed contemporaneously herewith.

tweaked over the years, including as a result of this Court's rulings, the core policies barring enlistment and appointment of PLWH have remained the same since 1991. *Compare* Ex. A ¶ 4.1 *and* Encl. 5 (denying "eligibility for appointment or enlistment" to PLWH), *with* Ex. B ¶ 3.a (denying "eligibility for military service" to PLWH, except certain "covered personnel").

14. As part of its implementation of DoDI 6485.01, DoD listed an HIV diagnosis as a medical condition that did not meet the medical standards for accession in DoDI 6130.03, Volume 1. *See* Ex. C, DoDI 6130.03, Vol. 1, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, ¶ 6.23b (Nov. 16, 2022) ("Presence of human immunodeficiency virus (HIV) or laboratory evidence of infection for false-positive screening test(s) with ambiguous results by supplemental confirmation test(s).").

15. The general medical criteria for enlistment or appointment as set forth in DoDI 6130.03 state that a recruit must be:

> (1) Free of contagious diseases that may endanger the health of other personnel.
>
> (2) Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization or may result in separation from the Military Service for medical unfitness.
>
> (3) Medically capable of satisfactorily completing required training and initial period of contracted service.
>
> (4) Medically adaptable to the military environment without geographical area limitations.
>
> (5) Medically capable of performing duties without aggravating existing physical defects or medical conditions.

Ex. C, DoDI 6130.03 ¶ 1.2(d).

16. As a necessary predicate to its rulings in *Harrison* and *Roe*, the Court found that well-managed HIV falls within the general medical criteria for enlistment and appointment set forth in DoDI 6130.03, Volume 1. *See Roe*, 947 F.3d at 214-15; *Harrison*, 597 F. Supp. 3d at 912-

14 (acknowledging stricter medical standards for accession versus deployment but finding service members with well-managed HIV meet those stricter standards).

17. While defendants argued even those with well-managed HIV failed to meet each of the five policy criteria for accession, the Court previously held that none of Defendants' justifications provided a rational basis for barring enlisted service members from commissioning. *Harrison*, 597 F. Supp. 3d at 894, 913-14.

18. After basic training, Defendants expect new members of the military to be able to deploy worldwide. DoDI 6490.07, titled "Deployment-Limiting Conditions for Service Members and Civilian Employees," provides guidance on medical conditions that limit deployment. Ex. D, DoDI 6490.07, *Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees*, 3 § 4(b) (Feb. 5, 2010). DoDI 6490.07 provides that service members with existing medical conditions may deploy on a contingency deployment when the following conditions are met:

> (1) The condition is not of such a nature or duration that an unexpected worsening or physical trauma is likely to have a grave medical outcome or negative impact on mission execution.
>
> (2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment in light of physical, physiological, psychological, and nutritional effects of the duties and location.
>
> (3) Any required, ongoing health care or medications anticipated to be needed for the duration of the deployment are available in theater within the Military Health System. Medication must have no special handling, storage, or other requirements (e.g., refrigeration, cold chain, or electrical power requirements). Medication must be well tolerated within harsh environmental conditions (e.g. heat or cold stress, sunlight) and should not cause significant side effects in the setting of moderate dehydration.
>
> (4) There is no need for routine evacuation out of theater for continuing diagnostics or other evaluations. (All such evaluations should be accomplished before deployment.)

Id. at 3 § 4(b).

19. As a necessary predicate to its rulings in *Harrison* and *Roe*, the Court found that those with well-managed HIV meet the general medical criteria for worldwide deployment without a waiver under DoDI 6490.07. *Harrison,* 597 F. Supp. 3d at 908-11 (holding that Defendants' attempts to justify the deployment bar were unsupported in or contradicted by the record (citing *Roe,* 947 F.3d at 228)).

20. As a necessary predicate to its rulings in *Harrison* and *Roe*, the Court held that none of the justifications offered by the defendants provided a rational basis for preventing service members from deploying worldwide or, specifically, to the United States Central Command ("CENTCOM"). *Id.*

21. Army Regulation 600-110 is the Army's implementation of DoDI 6485.01. It includes rules for both active-duty Army and Army Reserve/National Guard servicemembers. Ex. E, Army Regulation 600-110, *Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus*, i (Apr. 22, 2014) ("AR 600-110").

22. AR 600-110 implemented a blanket prohibition on the accession of individuals living with HIV. *See id.* ¶ 1-16.a; *see also generally id.*, ch. 5. The Regulation defines "accession" as enlistment in either the Army or Reserves, appointment as a West Point cadet, or one's first appointment as a commissioned officer in either the Army or Reserves. *See id.* at 20 ¶ 5.2.a.

23. Before this Court's rulings in the *Harrison* and *Roe* cases, the United States military did not permit PLWH who acquired HIV after joining the military to be appointed as an officer. *Roe*, 947 F.3d at 214.

24. After this Court issued a permanent injunction requiring DoD to allow service members living with HIV to commission, Defendant Austin amended DoD Instructions and ordered the secretaries of all military departments (which includes the Army) to amend their

respective regulations to allow for the appointment of people currently serving and living with well-managed HIV. *See* Pls.' RJN ¶ 17, Ex. Q at 2.

25. Defendant Austin, however, did not modify the regulations that prohibit the enlistment or appointment of individuals with HIV who are not currently serving. *See* Pls.' RJN ¶ 17. Ex. Q at 2.

26. Through the regulations discussed above, the DoD maintains a policy that prohibits the enlistment and appointment of civilians living with HIV.

27. "[N]o HIV-positive service member can obtain a medical waiver for accession." *Harrison*, 597 F. Supp. 3d at 906.

28. The DoD's and Army's enlistment and appointment policies regarding PLWH were not before this Court in *Harrison* or *Roe*. *Id.* at 914.

C. HIV Health Care Costs

29. Through Medicare and Medicaid, the Ryan White HIV/AIDS Program, the Department of Veterans Affairs, and other sources, the U.S. government spends more than $28 billion per year on the domestic response to HIV. Pls.' RJN ¶ 2, Ex. B at 3–4. Additional indirect costs, like health insurance subsidies under the Affordable Care Act ("ACA"), are not identified as being included in this figure. *Id.*

30. The DoD's most recent (FY 2024) budget request totaled $842.0 billion, including $58.7 billion to fund the Military Health System ("MHS"). Pls.' RJN ¶ 5, Ex. E at 2. The MHS delivers health care to military personnel, retirees, and their families. *Id.*

31. Defendants estimate that antiretroviral therapy costs between $10,000 and $25,000 per person annually. *Harrison*, 597 F. Supp. 3d at 913-914.

32. Defendants previously argued that there are an estimated 1,800 service members living with HIV. *Harrison v. Austin*, No. 1:18-cv-641 (E.D. Va. June 3, 2020) ("*Harrison* ECF"), ECF 264 at 26, Mem. in Supp. of Defs' Cross-Mot. for Summ. J.

33. The DoD health care budget already includes HIV-related health care needs of current SMLWH, service members' dependents living with HIV, and retirees living with HIV. Pls.' RJN ¶ 6, Ex. F at 3; *see also Harrison*, 597 F. Supp. 3d at 913. Civilians are not denied enlistment or appointment opportunities if their dependents are living with HIV.

34. The DoD is one of many departments of the federal government tasked with carrying out the federal government's National HIV/AIDS Strategy, which includes the objectives of reducing HIV-related stigma and discrimination, improving HIV-related health outcomes of PLWH, and engaging, employing, and providing public leadership opportunities for PLWH. Pls.' RJN ¶ 4, Ex. D at 6, 8, 26, 37, 44, 68.

35. The Department of Veterans Affairs ("VA") provides comprehensive health care services and health care for service-connected medical conditions and injuries to eligible veterans. Pls.' RJN ¶ 9, Ex. I; Pls.' RJN ¶ 10, Ex. J. This includes providing health care benefits to eligible spouses, dependents, and family caregivers. Pls.' RJN ¶ 18, Ex. R. The VA is also the single largest provider of HIV care in the United States. Pls.' RJN ¶ 11, Ex. K.

36. U.S. employers are generally subject to the Americans with Disabilities Act ("ADA"), which prohibits discrimination against PLWH, including in hiring based on the potential increase in health care insurance premiums or the costs of providing benefits to their employees, and they face successful claims of discrimination when they practice such policies. Pls.' RJN ¶ 12, Ex. L; Pls.' RJN ¶ 13, Ex. M; Pls.' RJN ¶ 15, Ex. O Sec. II. The U.S. Department of Justice's Civil Rights Division, Disability Rights Section actively litigates cases concerning discrimination

against PLWH to ensure compliance with the ADA, Pls.' RJN ¶ 12, Ex. L; Pls.' RJN ¶ 13, Ex. M, and the U.S. Equal Employment Opportunity Commission's FY 2022 budget requested $445,933,000 to assist with "preventing and addressing employment discrimination," including discrimination against PLWH. Pls.' RJN ¶ 16, Ex. P at Sec. I.A. Thus, in general, PLWH in nonmilitary careers can purchase health insurance subsidized by their employer, purchase health insurance through the marketplaces established under the ACA, qualify for government programs that pay for HIV care, such as through the VA, Medicaid, Medicare, or the Ryan White HIV/AIDS Program, or pursue one of several other available avenues for obtaining HIV-related care and treatment. Pls.' RJN ¶ 3, Ex. C.

D. The Parties

1. Plaintiffs

Isaiah Wilkins

37. Isaiah Wilkins is a 24-year-old, Black cisgender gay man who wants to serve in the Army. Ex. F, Declaration of Isaiah Wilkins ("Wilkins Decl.") ¶¶ 1-2.

38. At age 16, Wilkins obtained his GED. *Id.* ¶ 3. The following year, he joined the Georgia National Guard and enrolled at Georgia Military College, a public military junior college established in 1879, where he earned an associate degree. *Id.*

39. Wilkins applied for and earned a spot as part of a carefully selected class at the United States Military Academy Preparatory School ("USMAPS"), a preliminary step to matriculating at the prestigious U.S Military Academy at West Point. *Id.* ¶ 4. To facilitate his matriculation in USMAPS, Wilkins voluntarily separated from the National Guard. *Id.* ¶ 5. In so doing, he signed a new contract with the Army Reserves, took the oath of enlistment, and mobilized on to active duty to attend USMAPS. *Id.*

40. During routine entry processing at USMAPS, Wilkins received a medical examination that revealed for the first time that he was living with HIV. *Id.* ¶ 6. Because he was subject to accessions medical standards and testing, an Entrance Physical Standards Board ("EPSBD") convened and recommended discharge based on the HIV diagnosis. *Id.* ¶ 7.

41. Given his particular situation of previous service in the National Guard, Wilkins successfully advocated for his retention for almost a year. *Id.* During that time, he was not allowed to attend classes and instead was given menial assignments at the school. *Id.*

42. The Commandant of USMAPS concurred with the EPSBD's discharge recommendation. *Id.* ¶ 8. The Superintendent of the U.S. Military Academy affirmed the decision of the Commandant, and Wilkins was separated due to his HIV status. *Id.*

43. Wilkins was told that because the National Guard is a different component, his enlistment into the Army Reserves was considered a new entry and therefore subject to medical standards regulations applicable to new entrants—including those related to HIV. *Id.*

44. In consultation with his medical provider, Wilkins is on a daily single-tablet regimen, which has suppressed his viral load to an undetectable level, and he is willing to continue taking the medication during Army service. *Id.* ¶ 10. Wilkins currently receives HIV-related health care from the VA Medical Center in Atlanta, Georgia, which covers his HIV-related care. *Id.*

45. As an individual with a suppressed viral load, Wilkins's medical needs related to his HIV are minimal, and there is nothing about his condition that disqualifies him for deployment under the policies for those currently serving. Therefore, the risk of Wilkins transmitting HIV in nearly any context is extremely low or zero. See *Roe*, 947 F.3d at 213-14; *Harrison*, 597 F. Supp. 3d at 892-93.

46. Wilkins is a member of Minority Veterans of America ("MVA"). Ex. G, Declaration of Lindsay Church ("Church Decl.") ¶ 19; Wilkins Decl. ¶ 1.

47. Wilkins wishes to enlist in the Army and to resume his education at USMAPS. Ex. F, Wilkins Dec ¶ 2. He would seek to do so if the regulations barring accessions by people living with HIV were eliminated. *Id.* Because of statutory age restrictions, Wilkins would need this Court to order that reconsideration of his reappointment to USMAPS without regard to his age is necessary to remedy the constitutional violation from his disenrollment. *See* 10. U.S.C. § 7446.

Carol Coe

48. Plaintiff Carol Coe is a 33-year-old, Latina, transgender lesbian woman living in Washington, D.C with her wife. Ex. H, Declaration of Carol Coe ("Coe Decl.") ¶¶ 1-2. She is living with HIV. *Id.* ¶ 3. She previously served in the Army. *Id.* ¶¶ 4-8.

49. In 2008, Coe, who was still identifying with the male gender she was assigned at birth, signed up to join the Army in military intelligence. *Id.* ¶¶ 4–5. She obtained a security clearance and served in the military for approximately five years. *Id.* ¶ 5.

50. Coe contracted HIV while serving in the Army but was not discharged because prior policy permitted servicemembers to be retained after an HIV diagnosis; those policies, however, also limited career growth due to the restrictions placed on servicemembers living with HIV. *Id.* ¶ 7.

51. Coe started on antiretroviral therapy and soon reached an undetectable viral load. *Id.* Coe follows a daily single-tablet regimen with no side effects. *Id.* ¶ 3. Coe receives this care and treatment through the VA health care system, which covers her HIV care. *Id.*

52. As an individual with an undetectable viral load, Coe's medical needs related to her HIV are minimal and there is nothing about her condition that disqualifies her for deployment

under the policies for those currently serving. Therefore, the risk of Coe transmitting HIV in nearly any context is extremely low or zero. *Roe*, 947 F.3d at 213-14; *Harrison*, 597 F. Supp. 3d at 892-93.

53. After realizing she was transgender, Coe chose to leave the military in 2013, separating under the regulations that permitted honorable discharge based on HIV status. Ex. H, Coe Decl. ¶ 8. Coe's decision to leave service was based on several factors: (1) she was (at the time) not deployable due to her HIV status, and that limited her military career and the opportunities for promotion and advancement; (2) she wanted to obtain health care to affirm her gender, which was not available through the military at that time; and (3) she wanted to live as the transgender woman she is, which was not permitted by military policy at the time. *Id.*

54. In the spring of 2022, Coe visited an Army recruiter. *Id.* ¶ 9. After reviewing Coe's military records, the recruiter told her that she could not reenlist based on her HIV-positive status, thereby effectively rejecting her for reenlistment. *Id.*

55. Coe is a member of MVA. Ex. G, Church Decl. ¶ 19; Ex. H, Coe Decl. ¶1.

56. Coe wants to reenlist and would seek to do so if the regulations barring accessions by people living with HIV were eliminated. Ex. H, Coe Decl. ¶ 10.

Natalie Noe

57. Plaintiff Natalie Noe is a 33-year-old straight woman of Indigenous Australian descent living in California. Ex. I, Declaration of Natalie Noe ("Noe Decl.") ¶ 1 Noe is a lawful permanent resident and sought to join the miliary to further her education and to give back to the nation she now calls home. *Id.* ¶¶ 1,4.

58. Noe was given a medical exam in February 2020 on the same day that she signed an enlistment contract and was sworn into the Army. *Id.* ¶ 6. She was told to report for basic training on July 13, 2020. *Id.*

59. Noe was subsequently brought in for a meeting with Army personnel who informed her that her HIV test had come back positive, which was shocking news to Noe. *Id.* ¶ 7. Army personnel informed Noe that she would no longer be able to join the Army Reserves given her new HIV diagnosis. *Id.*

60. Following her HIV diagnosis, Noe joined a research study investigating the efficacy of a long-acting injectable antiretroviral therapy, which includes an injection given every three to six months and a daily tablet regimen. *Id.* ¶ 8. Noe quickly achieved an undetectable viral load. *Id.*

61. Noe is willing to leave the research study and take a daily pill regimen if necessary to join or to deploy as a member of the Armed Forces. *Id.* ¶ 10.

62. Noe wishes to enlist in the Army Reserves and would seek to do so if the regulations barring accessions by people living with HIV were eliminated. *Id.* ¶ 2.

Minority Veterans of America

63. Plaintiff Minority Veterans of America ("MVA") is a private, 501(c)(3) advocacy organization, the largest minority-focused military- and veteran-serving organization in the country. Ex. G, Church Decl. ¶¶ 6-8, 14. MVA is a nonprofit organized under the laws of the State of Washington with a principal place of business in Richmond, Virginia. *Id.* ¶ 6.

64. MVA's membership—nearly 3,000 members throughout the United States and several countries—includes veterans who have separated from U.S. military service, veterans who are currently serving in the Armed Forces, family members and caregivers of veterans and servicemembers, and nonmilitary individuals—called allies—who support MVA's work. *Id.*

¶¶ 15-17. Civilians living with HIV who want to join or rejoin the Armed Forces are among MVA's members. *Id.* ¶ 15.

65. MVA's mission is to advocate for equity and justice for the minority veteran community—namely, the 10 million veterans that include women, people of color, LGBTQ+ people, people living with HIV, and (non)religious minorities. *Id.* ¶¶ 8-13. MVA's work includes direct advocacy before Congress, the Department of Veterans Affairs, and DoD on issues of concern to its members, including those who are still serving. *Id.* ¶ 23. MVA seeks to create an intersectional movement of minority voices capable of influencing critical change for the good of minority servicemembers and veterans. *Id.* ¶¶ 9-10.

66. In this case, MVA represents the interests of its members currently living with HIV, including Mr. Wilkins and Ms. Coe, as well as those members who may want to join or rejoin the military after an HIV diagnosis in the future. *Id.* ¶¶ 19-20. Accordingly, MVA represents those who are, or will be, adversely affected by the challenged regulations and policies. *Id*.

2. Defendants

67. Defendant Lloyd Austin III is the Secretary of the U.S. Department of Defense. Answer ¶ 10. He is ultimately responsible for the administration and enforcement of the Department's regulations, policies, and practices applicable to people living with HIV, including those that bar their enlistment or appointment. *Id.*

68. The DoD is an executive branch department of the U.S. federal government and consists of the Office of the Secretary of Defense, the Joint Chiefs of Staff, the Joint Staff, the Departments of the Army, Navy, and Air Force, the Combatant Commands, and other defense components. 32 C.F.R. § 275.2. Under the direction of the Secretary of Defense, the DoD is responsible for the administration and enforcement of the DoD's accessions restrictions on PLWH. Answer ¶ 10.

69. Defendant Christine Wormuth is the Secretary of the Army. *Id.* ¶ 11. She is ultimately responsible for the Army's administration and enforcement of the regulations, policies, and practices applicable to people living with HIV, including those that bar their appointment into the Army and Army Reserves. *Id.*

III. Procedural History

On May 30, 2018, a lawsuit challenging the then-existing DoD policy preventing SMLWH from commissioning—which, in turn, was based on the policy barring their deployment—was filed. *Harrison. v. Austin* challenged the denial of Sergeant Nicholas Harrison's application to receive a commission based on his HIV status. *See Harrison* ECF 1, Compl. Later in 2018, a similar lawsuit was filed involving members of the Air Force who had been threatened with discharge due to their HIV status and the same policy barring deployment. *Roe v. Austin*, No. 1:18-cv-01565 (E.D. Va. Dec. 19, 2018) ("*Roe* ECF"), ECF 1, Compl. Both cases proceeded in this Court.

Motions to dismiss were denied in both cases. *Harrison* ECF 60; *Roe* ECF 73. The Court granted a motion for preliminary injunction in *Roe* to prevent the impending discharges of the individual plaintiffs. *Roe*, 947 F.3d at 217. On appeal, the Fourth Circuit unanimously upheld the preliminary injunction. *Id.* at 234.

Following discovery, the parties filed cross-motions for summary judgment. *Harrison*, 597 F. Supp. 3d at 889 n.1. On April 6, 2022, this Court granted plaintiffs' motions for summary judgment and denied the government's cross-motion. *Id.* at 916. In *Harrison*, this Court ordered that defendants be enjoined from categorically barring the worldwide deployment, or deployment to CENTCOM, of Harrison or any other asymptomatic SMLWH with an undetectable viral load; that defendants be enjoined from denying the application of Harrison or any other asymptomatic

SMLWH with an undetectable viral load from applying to commission as an officer based on their ineligibility for worldwide deployment; and that the Secretary of the Army rescind the decision denying Harrison's application to commission as a Judge Advocate General in the District of Columbia National Guard and to reevaluate his application in light of the Court's other orders. *See Harrison* ECF 308.

Similarly, in *Roe*, this Court enjoined defendants from categorically barring the worldwide deployment or deployment to CENTCOM of plaintiffs Richard Roe, Victor Voe, and any other asymptomatic SMLWH with an undetectable viral load due to their HIV-positive status; enjoined defendants from discharging plaintiffs or any other asymptomatic SMLWH with an undetectable viral load because they were classified as ineligible for worldwide deployment; and ordered the Secretary of the Air Force to rescind the decisions discharging Roe and Voe (and others) and to reevaluate those decisions in light of the other injunctive relief discussed above. *See Roe* ECF 320. While defendants initially appealed those orders, the appeal was ultimately voluntarily dismissed. *Roe v. U.S. Dep't of Def.*, No. 22-1626, 2022 WL 17423458 (4th Cir. July 11, 2022).

Because there were no civilian plaintiffs in *Harrison* challenging the accessions bar, the validity of the bar to entry of PLWH was not presented in those cases. *Harrison*, 597 F. Supp. 3d at 914. On November 10, 2022, Plaintiffs filed the present case to address that issue. ECF 1. Defendants answered the Complaint on February 17, 2023. ECF 36. Proceedings were stayed from February 17 to April 14 after Defendants informed the Court that a working group had been tasked with providing by April 1 a recommendation to the Under Secretary of Defense for Personnel and Readiness regarding the enlistment of people living with HIV. ECF 38. After the stay was lifted and the Court conducted a status conference to discuss the discovery plan in view of Plaintiffs'

intention to file this motion for summary judgment, the Court issued a briefing schedule for the motion and any cross-motion Defendants may file. ECF 48.

IV. Legal Standards

Under the Rule 56 standard, "[s]ummary judgment is appropriate only if the record 'shows there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156 (4th Cir. 2010). "A 'genuine' issue concerning a 'material' fact only arises when the evidence, viewed in the light most favorable to the nonmoving party, is sufficient to allow a reasonable [trier of fact] to return a verdict in that party's favor." *Adamson v. Columbia Gas Transmission, LLC*, 987 F. Supp. 2d 700, 703-04 (E.D. Va. 2013).

"Mere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law." *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). "Where no genuine issue of material fact exists," it is the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotations omitted).

The military is afforded discretion to manage military affairs, but it is not afforded discretion to violate federal law or the U.S. Constitution. *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals.") (citing reference omitted). "It is precisely the role of the courts to determine whether those rights have been violated." *Id.* (citing *Dillard v. Brown*, 652 F.2d 316, 320 (3d Cir.1981)). This is especially true in equal protection cases because "constitutional questions that arise out of military decisions regarding the composition of the armed forces are not

committed to the other coordinate branches of government." *Id.* In fact, courts routinely apply heightened scrutiny to military decisions. *Karnoski v. Trump*, 926 F.3d 1180, 1201-02 (9th Cir. 2019) (holding intermediate scrutiny should apply in challenge to military policy banning service based on transgender identity, and rejecting Defendants' argument that where a "case involves judicial review of military decisionmaking, mere rational basis review applies" because "deference [to the military] does not mean abdication"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (applying heightened scrutiny to a military policy that allegedly discriminated based on gender); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (en banc) ("Classifications based on race or religion, of course, would trigger strict scrutiny."). While courts give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," courts must be mindful that "military interests do not always trump other considerations." *Roe*, 947 F. 3d at 219 (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 26 (2008)).

Under even the lowest level of review, a law must bear a rational relationship to a legitimate government interest to withstand an equal protection challenge. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 540 (1973). Plaintiffs do not contest that military readiness and effectiveness are legitimate goals, but the relationship between these goals and the classification Defendants purport to use to achieve it—HIV status—may not be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "[A]rbitrary and irrational discrimination violates the Equal Protection Clause" even under a rational-basis standard. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

The question is the same for Plaintiffs' APA claims: "whether the defendants' treatment of [Plaintiffs] was rational (i.e., not arbitrary and capricious)." *Harrison*, 597 F. Supp. 3d at 904

(citing *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 955 (9th Cir. 2011)). Additionally, under the APA, an agency "must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) (citations omitted). Because both ultimately require a rational reason for the government action in question, the legal standards for Plaintiffs' equal protection and APA claims are "fundamentally indistinguishable." *Harrison*, 597 F. Supp. 3d at 904.

To defeat these claims, Defendants must, at least, provide "a rational connection between the facts" concerning HIV and "the choice made" to bar enlistment and appointment of people with HIV. *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). And under a heightened scrutiny standard, Defendants must show that the enlistment and accessions bar for PWLH is "substantially related to a sufficiently important governmental interest." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020).

V. ARGUMENT

Defendants cannot meet their burden even under the rational basis standard, let alone heightened scrutiny. The "obsolete understandings" of HIV medicine that Defendants have relied upon are "outmoded and at odds with current science" and "cannot justify a ban, even under a deferential standard of review." *Roe*, 947 F.3d at 228. And the cost of health care does not provide a sufficient legal justification for Defendants' discrimination against PLWH in their accessions policies.

A. All of Defendants' Purported Justifications for Barring the Enlistment, Accession, and Deployment of PLWH Have Been Rejected by This Court as Failing to Provide a Rational Basis for a Ban.

Defendants can present no basis to relitigate—or for this Court to revisit—the comprehensive analysis and rulings in *Harrison* and *Roe* rejecting the purported justifications for barring the commissioning or deployment of SMLWH based on their HIV status. *See* ECF 56,

May 9, 2023 Hr'g Tr. at 11:15-21 (The Court: "[C]ertainly the medical evidence that was established in the *Harrison* case is going to be, to some degree, the law of the case in this respect. I'm not going to revisit any of the arguments about HIV.") Indeed, "both this Court and the Fourth Circuit have put that to rest." *Id.* at 11:21-22.

For example, among other things, this Court found there is no support for any speculation by Defendants that, after enlistment or appointment, a deployed SMLWH could experience viral rebound due to either lost or destroyed medication or insufficient adherence to medication and then transmit HIV to other servicemembers. *Harrison*, 597 F. Supp. 3d at 908 (citing *Roe*, 947 F.3d at 226-27). Nor is there any evidence that HIV could be transmitted by deployed service members through battlefield blood transfusions. *Id.* at 909 (citing *Roe*, 947 F.3d at 227-28). And this Court has already found that there is an "incredibly low exposure risk" of battlefield bodily fluid transmission and that it is a "flawed belief that any non-zero risk of HIV transmission to other service members is sufficient to justify a categorical bar of HIV-positive individuals from deployment." *Harrison*, 597 F. Supp. 3d at 911 (citing *Roe*, 947 F.3d at 227-28). Defendants' argument that HIV poses any greater risk of medication side effects and comorbidities compared to other chronic medical conditions that do not bar accession has also been rejected. *Id.* at 912-13 (citing *Roe*, 947 F.3d at 213-14). And this Court disposed of each of the other purported justifications raised by the defendants in the *Harrison* and *Roe* cases. *Id.* at 901-14.

The purported justifications advanced by Defendants in the *Harrison* and *Roe* cases should be similarly rejected here as applied to PLWH who are seeking enlistment or appointment to the military. The exposure risks and medical care of PLWH seeking enlistment or appointment are identical to those for SMLWH. And the Fourth Circuit's guidance could not be clearer: "A ban on deployment may have been justified at a time when HIV treatment was less effective at managing

the virus and reducing transmission risks," but "any understanding of HIV that could justify this ban is outmoded and at odds with current science." *Roe*, 947 F.3d at 228. According to the Fourth Circuit, "[s]uch obsolete understandings cannot justify a ban, even under a deferential standard of review and even according appropriate deference to the military's professional judgments." *Id.* Defendants can offer nothing to undermine the same conclusion here.

B. The Cost of Health Care for PLWH Does Not Provide a Rational Basis for Barring Them from Joining the Military.

The only possible remaining justification Defendants could advance for barring the enlistment or appointment of PLWH is the cost of providing health care after they join the military. This "additional cost burdens" argument was raised in *Harrison* but found "largely irrelevant for service members like Harrison who contracted HIV during their military service because the military is already paying for their medical treatment, and it is unclear whether commissioning would increase the cost of that treatment." *Harrison*, 597 F. Supp. 3d at 913. Thus, the "additional costs" justification that "may apply to HIV-positive individuals who wish to enlist" and "the enlistment policies" were not before the Court in *Harrison*. *Id.* at 914. But the issue is squarely presented here, and the cost of providing health care to PLWH seeking to join the military is not a sufficient legal justification for discriminating against them.

First, the Supreme Court has stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). Courts across the country have found this principle especially applicable when considering challenges to policies that are part of "historic patterns of disadvantage" impacting "disadvantaged or unpopular" groups and where the justifications seemed "thin, unsupported or impermissible." *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1, 10-11 (1st Cir. 2012).

For example, in *Massachusetts*, the Court found that the provision of a federal law denying federal benefits to lawfully married same-sex couples was not adequately supported by any permissible federal interest, and therefore violated equal protection principles, observing that "[j]udges and commentators have noted that the usually deferential 'rational basis' test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination." *Id.* at 11; *see also Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (finding that where "the state's interests [in a law terminating eligibility for health care benefits of state employees' same-sex partners] in cost savings and reducing administrative burdens . . . depend upon distinguishing between . . . similarly situated [people] . . . such a distinction cannot survive rational basis review"); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849, 857 (E.D. Mich. 2014) (holding that law restricting public employment benefits to same-sex partners of employees purportedly to "promote[] the State's fiscal goals of reducing the costs to government and promoting financially sound local government units" violated the Equal Protection Clause under rational basis review). For the same reason here, higher-than-average health care costs cannot provide a rational basis for denying PLWH employment opportunity in the military based on their HIV status.

Second, Defendants undisputedly do not base accession decisions on the cost of health care for any other recruits with any other health condition, including chronic ones requiring ongoing management. Indeed, cost of care is not reflected or factored into DoD's general medical criteria for accession and never has been. Ex. C, DoDI 6130.03 ¶ 1.2(d). While Defendants once invoked the cost of health care as a basis for denying accession to transgender people seeking to enlist in the military, *see Doe v. Trump*, 275 F. Supp. 3d 167, 211 (D.D.C. 2017), following tweets by President Trump alleging the "tremendous medical costs" would "burden[]" the military if they

were allowed to serve,[2] that argument was subsequently dropped from official policy justifying Defendants' decision.[3] And of course, Defendants have since withdrawn those restrictions, allowing transgender people to serve openly in their true gender and to receive medically necessary health care.[4] Having recognized that the cost of health care is an indefensible excuse for discrimination against one marginalized group, Defendants should not be permitted to advance it against another here, especially when it has never justified excluding any group of people under DoD's general medical criteria for accession.

Third, the cost of providing health care to PLWH who join the military would not present a significant financial burden to Defendants in terms of the Department of Defense's overall spending. The DoD's most recent (FY 2024) proposed budget totaled $842 billion, with $58.7 billion to fund the Military Health System. SUF ¶ 30. Specifically, Defendants have estimated that the annual cost of HIV treatment is between $10,000 and $25,000 per SMLWH. SUF ¶ 31; *see also Harrison*, 597 F. Supp. 3d at 913-14. With the number of current SMLWH at 1,800, SUF ¶ 32, the annual cost of treating them—at the very highest end using Defendants' own estimates—is $45 million, which is under 0.077% of the Military Health System's budget, SUF ¶ 30. Notably, Defendants' health care budget also specifically includes health care for service members' dependents, who, if living with HIV, would receive HIV-related care, and whose medical status would not preclude the service member's ability to access. SUF ¶ 30.

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[2] Adam Edelman, *Trump Bans Transgender People Serving in the Military*, NBC News (July 26, 2017), https://www.nbcnews.com/politics/donald-trump/trump-announces-ban-transgender-people-serving-military-n786621.

[3] Dep't of Def., *Military Service by Transgender Persons* (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF.

[4] Dan De Luce and Shannon Pettypiece, *Biden Admin Scraps Trump's Restrictions on Transgender Troops*, NBC News (March 31, 2021), https://www.nbcnews.com/news/military/biden-admin-scraps-trump-s-restrictions-transgender-troops-n1262646.

Of course, Defendants can present no evidence, only conjecture, that a constitutionally significant nonspeculative number of PLWH would join the military (and clear all other requirements for accession). Put into proper context, any argument by Defendants regarding the burden of additional costs for treating PLWH must fail.

Moreover, any health care costs must be weighed against the benefits of gaining the service and commitment of people, such as Plaintiffs, eager to dedicate themselves to the protection of the United States. As one concurring opinion pointed out in an analogous context investigating the impact of the military's provision of medically necessary gender-affirming care to transgender service members, "the benefits to be derived (by the military and the individuals in question) from increased" enrollment of PLWH are "a [more] relevant comparator" than "overall military costs." *Doe v. Shanahan*, 917 F.3d 694, 712 (D.C. Cir. 2019). In a time when Defendants fail to meet recruitment goals, losing the service of capable individuals is the more onerous cost than covering their health care.

Fourth, Defendants have no evidence to support their speculative concern, raised for the first time in *Harrison* (*see* 597 F. Supp. 3d at 914), that PLWH would be disproportionately "incentivized" to join the military to cover their health care costs. Such conjecture ignores the basic economics of how health care is financed in the United States. PLWH will not receive any special benefit for joining the military that they could not obtain through full-time employment elsewhere. SUF ¶¶ 29, 36. In other careers, they could purchase health insurance subsidized by their employer, purchase health insurance through the marketplaces established under the ACA, qualify for government programs that pay for HIV care, such as through the VA,[5] Medicaid,

[5] The government already pays for the HIV care for Wilkins and Coe through the Department of Veterans Affairs. SUF ¶¶ 29, 35, 43, 50. Were they and others like them allowed to rejoin the military, the net effect on government spending would effectively be zero.

Medicare, or the Ryan White HIV/AIDS Program, or pursue one of several other available avenues for obtaining HIV-related care and treatment. *Id.*

Every person in the country who purchases health insurance is essentially subsidizing the care of people with more substantial and costly health issues, including PLWH. That is simply how insurance works. As a self-insured entity that employs a fighting force of relatively young and healthy people, the DoD is already achieving significant savings compared to insured entities with employees more evenly distributed across the age spectrum and therefore more substantial claims experience.

Moreover, the federal government already spends *billions* of dollars every year on HIV prevention and care for its citizens. Between Medicare and Medicaid, the Ryan White HIV/AIDS Program, the VA, and other sources, the U.S. government spends more than $28 billion per year on the domestic response to HIV, much of it provided in low or no cost treatment. SUF ¶ 29. Defendants' estimated cost of caring for SMLWH is a tiny fraction of that amount—and would likely be covered by other government-funded sources if PLWH were barred from the military, making the net savings to the government even more minimal.

Importantly, the DoD is a department of the federal government *directly tasked* with carrying out the National HIV/AIDS Strategy, which includes the objectives of reducing HIV-related stigma and discrimination, improving HIV-related health outcomes of people living with HIV, and engaging, employing, and providing public leadership opportunities for people with HIV. SUF ¶ 34. Allowing PLWH to join the military accomplishes all of these goals; barring them entry does the opposite. It is not rational for the DoD—a part of the federal government—to cite cost as reason not to enlist or appoint people living with HIV—especially since those people are taking on a job that may place them in harm's way or even risk their very lives.

Finally, it is worth noting that the broader federal government is opposed to the very type of discrimination in which Defendants are currently engaged.[6] The U.S. Department of Justice's Civil Rights Division, Disability Rights Section and the U.S. Equal Employment Opportunity Commission undisputedly expend significant resources fighting discrimination, including discrimination against PLWH. SUF ¶ 36. Any other employer attempting to defend a policy of discrimination against hiring PLWH based on the potential increase in health care insurance premiums or the costs of providing benefits to its employees would undoubtedly face successful claims of discrimination. SUF ¶ 36. Though the laws enforced in those cases do not apply in the military context, Defendants should not be permitted to name the arguments rejected in those cases as constitutionally sufficient justification here. *See Emory*, 819 F.2d at 294 ("The military has not been exempted from constitutional provisions that protect the rights of individuals.").

C. Heightened Scrutiny Should Apply to People Living With HIV

Defendants cannot prevail under a rational basis standard, for the reasons discussed above. But to be clear and to preserve the issue, Plaintiffs maintain that heightened scrutiny is warranted in this case, because PLWH meet the requisite traditional standards: they (1) have been "historically subjected to discrimination," (2) have a defining characteristic that bears no "relation to ability to perform or contribute to society," (3) have "obvious, immutable, or distinguishing characteristics," and (4) lack relative political power. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (cleaned up).

First, people living with HIV have suffered for decades through a unique history of misinformation, stigma, ostracism, and discrimination, and continue to do so to this day. SUF ¶ 2.

[6] The current President also supports the enlistment of people living with HIV. *See 2020 Presidential Candidate Questionnaire* (Joe Biden), https://aidsunited.org/wp-content/uploads/2021/11/Biden_HIVSurvey_2020.pdf ("Undetectable seropositive individuals should be able to enlist and serve their country."), *last visited* May 30, 2023.

Second, a person's HIV status bears no relation to their ability to contribute to society, particularly in view of dramatic medical advances over the last three decades. SUF ¶¶ 3-9. Third, despite these medical advances, HIV status remains an immutable characteristic: it is not yet curable, and one cannot change their HIV status to obtain equal treatment. SUF ¶ 10. Fourth, people living with HIV are a discrete and insular group lacking sufficient political power to protect their rights through the legislative process. SUF ¶ 11; *see United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (finding ostracism gives rise to "insular[ity]," which "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

Neither the *Harrison* and *Roe* decisions before this Court, nor *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), forecloses application of a heightened scrutiny standard. *Doe* turned on whether HIV was a disability (as defined under since-amended applicable statutory law) and whether the plaintiff physician's HIV presented a significant risk to the health and safety of his co-workers; prevailing views at the time have since been undermined by scientific advances. *Id.* at 1262. As the Fourth Circuit recently recognized, "[a]n HIV diagnosis was '[o]nce considered invariably fatal' but now . . . is a 'chronic, treatable condition'" and "[a]ntiretroviral therapy is effective for virtually every person living with HIV." *Roe*, 947 F.3d at 213-14.

VI. CONCLUSION

While Plaintiffs maintain that PLWH are a stigmatized group warranting heightened scrutiny, there is not even a rational basis for Defendants' bar on PLWH joining the military. All of the purported justifications Defendants proffered in *Harrison* and *Roe* were carefully considered and rejected. The same result is warranted here. The sole remaining issue—whether "additional costs" "may apply" to PLWH who wish to enlist—is not a rational or legitimate justification for

discrimination, particularly where the DoD's annual health care budget is nearly $60 billion and already covers HIV-related health care for current service members, dependents of service members, and retirees.

Defendants' blanket exclusion also contributes to the ongoing stigma surrounding PLWH while actively hurting the DoD's own recruitment goals. As with the prior prohibition on the military service of transgender individuals, barring PLWH from enlisting "exclude[s] qualified individuals on a basis that has no relevance to one's fitness to serve." *Doe*, 917 F.3d at 697.

Modern science has changed the treatment of PLWH, and this Court has already held that SMLWH who maintain treatment are capable of performing all of their job duties, including worldwide deployment. It is time for the military to apply this undisputable fact to PLWH and permit them to join the military.

Dated: May 31, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 31, 2023, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

DATED: May 31, 2023

Respectfully submitted,

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