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

RICHARD ROE; VICTOR VOE; and OUTSERVE-SLDN, INC., Plaintiffs, v. PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	)	No. 1:18-cv-1565-LMB-IDD

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Richard Roe and Victor Voe challenge their discharges from the United States Air Force. The Plaintiffs were discharged on the ground that their infection with the Human Immunodeficiency Virus (HIV) likely precludes their deployment to the United States Central Command ("CENTCOM") area of operation. After review of their cases by four boards comprising the Air Force's disability evaluation system, the Secretary of the Air determined that Roe and Voe would be unable to reasonably perform the duties of their office, grade, rank, or rating. Plaintiffs Roe and Voe, together with Plaintiff OutServe-SLDN, Inc., challenge the Secretary's discharge decisions, as well as the Department of Defense ("DOD") and Air Force regulations that were applied in those decisions, under the Equal Protection Clause and the Administrative Procedure Act.

The Court lacks subject matter jurisdiction to consider Plaintiffs' claims for several reasons. First, Plaintiffs have not yet exhausted all avenues of administrative relief, including an appeal to the Air Force Board of the Correction of Military Records. *See infra* part I.A. Moreover, even if Plaintiffs had exhausted their administrative remedies, the Court also lacks jurisdiction because Plaintiffs' claims raise a non-justiciable military controversy, *see infra* part I.B, and because Plaintiffs do not possess standing to bring those claims, *see infra* part I.C.

Even if this Court had jurisdiction over Plaintiffs' claims, Plaintiffs cannot clearly establish even one of the four elements required to permit this Court to grant preliminary relief. *See infra* part II. It is well-established that federal employees have no entitlement to their positions and must make an extraordinary showing to justify injunctive relief preventing their termination from federal employment. The burden is even heavier in cases of military discharge in light of the significant deference courts must give to military decision making. Plaintiffs come nowhere close

to making this elevated showing, and otherwise have not met the necessary prerequisite of demonstrating a irreparable harm. Therefore, if this Court does exercise jurisdiction here, it should nonetheless deny Plaintiffs' motion for preliminary injunction.

BACKGROUND

I. Regulatory Background

Department of Defense Instruction ("DoDI") 1332.18 governs the discharge of service members with medical conditions. Air Force Instruction ("AFI") 10-203, *Duty Limiting Conditions*, implements DoDI 1332.18 and establishes procedures for the administrative management of airmen with injuries or illnesses that affect their ability to perform military duties. A104.[1] These procedures ensure maximum utilization and readiness of personnel, while preserving airmen's health and minimizing risk of further injury or illness. *Id.*

DoD has also promulgated detailed instructions to the Military Services governing the management of service members with laboratory evidence of HIV infection. DoDI 6485.01 directs the Services to (1) periodically screen all service members, A84, (2) provide medical care for all service members with laboratory evidence of HIV, (3) establish "aggressive disease surveillance and health education programs" for service members, and if necessary, (4) refer a service member with laboratory evidence of HIV for "a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses. . . ." A85.

Consistent with this guidance, the Air Force directed its personnel center to conduct medical evaluations of "fitness for continued service for asymptomatic HIV Airmen . . . in the same manner as any Airman with a chronic and/or progressive disease." A338. The Air Force further directed that "[a]symptomatic HIV alone is not unfitting for continued service." A338-

[1] Citations to the appendix filed with this brief are abbreviated A___.

339. Airmen with asymptomatic HIV would not be referred to the disability evaluation system ("DES") unless they satisfied the requirements of DoDI 1332.18. *Id.* The Air Force also explained that the decision to retain or separate airmen with asymptomatic HIV would be made on a case by case basis. A339.

The Air Force uses a tiered disability review process. An airman's case is first evaluated by the Air Force Personnel Center's Medical Retention Standards Office. A415. If this office determines that an airman has (1) one or more medical conditions that may prevent the airman from reasonably performing the duties of his office, grade, rank, or rating, (2) a medical condition that represents an obvious medical risk to the health of the member or to the health and safety of others, or (3) a medical condition that imposes unreasonable requirements on the military to maintain or protect the airman, then the airman is referred to the DES. *Id.* If none of these conditions are present, the airman is returned to duty (called IRILO). A105, A127. An airman referred to DES first undergoes a Medical Evaluation Board ("MEB"). A129. A MEB is composed of two or more licensed physicians, and it prepares a narrative summary of the airman's duty limiting condition. A416. After evaluating an airman's case, the MEB can return the airman to duty or forward the case to a Physical Evaluation Board ("PEB"). A416-417. If the case is forwarded to a PEB, the airman is given an opportunity to make a written rebuttal and is provided an impartial medical review, if requested. A417.

Every case at this level is reviewed by an informal PEB ("IPEB"). A417. The IPEB prepares a narrative summary after considering the airman's medical records, the airman's written rebuttal, and the recommendation of the airman's commander. *Id.* Applying the standards in DoDI 1332.18, the IPEB prepares a written recommendation whether to discharge or return the airman to duty. A418. An airman may appeal an IPEB decision to a formal PEB ("FPEB"). A419. On

appeal, airmen receive representation and an opportunity for an in-person hearing before the FPEB. *Id.* The FPEB also applies the standards in DoDI 1332.18 and prepares a written recommendation whether to discharge or return the airman to duty. A419-420. An airman who receives a discharge recommendation from the FPEB may then appeal to the Secretary of the Air Force Personnel Council ("SAFPC"). *Id.* The SAFPC reviews the case, applies the standards in DoDI 1332.18, and makes a recommendation whether to discharge or return an airman to duty. A420.

Even if the SAFPC decides to separate an airman, the airman still has significant intra-service administrative remedies available to alter or overturn the separation. *See Guerra v. Scruggs*, 942 F.2d 270, 272-73 (4th Cir. 1991). The airman may seek review of the separation decision by the Air Force Board for Correction of Military Records ("AFBCMR"), which has broad authority to correct any error or injustice in an airman's military record. *See* 10 U.S.C. § 1552; 32 C.F.R. § 581.3; AFI 36-2603. The AFBCMR has authority to consider claims of constitutional, statutory, and regulatory violations in the rendering of personnel decisions. *See Guerra*, 942 F.2d at 273. It serves as the "highest administrative body in the [Air Force's] own appellate system" and may offer the Air Force's definitive interpretation of its own regulations. *Navas v. Gonzalez Vales*, 752 F.2d 765, 770-71 (1st Cir. 1985). The AFBCMR is not limited to just correcting military records; the Secretary of the Air Force, acting through or upon recommendation of the AFBCMR, possesses plenary authority to afford relief to airmen injured by adverse personnel actions including, but not limited to, reversing involuntary separations, removing adverse information from personnel files, and awarding back pay and allowances. *See* 10 U.S.C. §§ 1552(a), (c), (d).

An airman aggrieved by a decision of the AFBCMR may generally seek judicial review of that final decision. *See Randall v. United States*, 95 F.3d 339, 348 (4th Cir. 1996). If an airman

seeks back pay in connection with a military record change, he may bring a Tucker Act claim before the Court of Federal Claims. *Id.* Where the airman does not seek monetary relief, then the AFBCMR's decision may generally be reviewed by the district courts under the Administrative Procedure Act. *Id.*

II. Roe And Voe's Separation Decisions

Roe and Voe's separation decisions were processed in the same manner as cases involving other chronic medical conditions. In accordance with DoDi 6485.01, the MEB determined that Plaintiffs' diagnoses made their qualifications for worldwide duty questionable and referred their cases to the IPEB. A554 (Roe), A761 (Voe). The IPEB determined that Plaintiffs would be unable to reasonably perform the duties of their office, grade, rank, or rating because of their inability to deploy and potential medical complications. A550 (Roe), A758 (Voe). The IPEB determinations acknowledge that Plaintiffs are asymptomatic, otherwise physically fit, and able to perform in-garrison duties. *Id.*

On appeal, the FPEB in both cases determined that, although Roe and Voe were asymptomatic, plaintiffs should be separated because they were subject to significant deployment restrictions in career fields with high likelihoods of deployment. A468 (Roe), A756 (Voe). Both plaintiffs sought SAFPC review, and in both cases, the SAFPC concluded that Plaintiffs belonged to career fields with high deployment tempos but were subject to deployment restrictions, including ineligibility to deploy to the CENTCOM area, where the majority of the Air Force is expected to deploy, and were therefore unfit for continued service. A460 (Roe), A747 (Voe).

Following the SAFPC's decisions, both Roe and Voe received separation papers. A666 (Roe), A942 (Voe). Roe is scheduled to be honorably discharged in March 2019, and Voe is scheduled to be honorably discharged in February 2019. *Id.* Neither Roe nor Voe have sought

review of their discharges before the AFBCMR. A420.

STANDARD OF REVIEW

Defendants bring a factual challenge to the Court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In a factual challenge, "the defendant argues 'that the jurisdictional allegations of the complaint [are] not true,' providing the trial court the discretion to 'go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Kerns v. United States* 585 F.3d 187, 192 (4th Cir. 2009)). Because the Court may consider facts outside of the pleadings to determine if it in fact possesses jurisdiction to consider the case, "the presumption of truthfulness normally accorded a complaint's allegations does not apply." *Id.* "When, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proving the truth of such facts by a preponderance of the evidence." *Unites States ex re. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009).

A party seeking a preliminary injunction bears the burden of establishing that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Each of these four factors must be satisfied to obtain preliminary injunctive relief. *Henderson v. Bluefield Hosp. Co.*, 902 F.3d 432, 439 (4th Cir. 2018). Consequently, if the party seeking the injunction fails to make a clear showing of any one of the four factors, the Court need not consider the remaining factors and must deny the preliminary injunction. *See id.* at 438-39.

ARGUMENT

The Court must dismiss Plaintiffs' complaint for lack of subject matter jurisdiction because

the claims are premature, *see infra* part I.A, the claims raise a non-justiciable military controversy, *see infra* part I.B, and because Plaintiffs do not possess standing to bring these claims, *see infra* part II. Each of these grounds is independently sufficient to require jurisdictional dismissal. Even if this Court did possess jurisdiction over Plaintiffs' claims, Plaintiffs cannot clearly establish any of the four elements required to permit the Court to grant preliminary relief and their motion for preliminary injunction must be denied. *See infra* part III. Finally, even if this Court were to grant preliminary relief, such relief should be limited to the individual Plaintiffs. *See infra* part IV.

I. This Court Lacks Subject Matter Jurisdiction To Consider Plaintiffs' Claims.

A. Plaintiffs Roe And Voe's Claims Must Be Dismissed As Premature.

"[A] court should not review internal military affairs 'in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.'" *Williams v. Wilson*, 762 F.2d 327, 359 (4th Cir. 1985) (quoting *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971)); *see also Downey v. U.S. Dep't of the Army*, 685 F. App'x 184, 192-83 (4th Cir. 2017). Failure to exhaust all available intra-service remedies renders any federal court claim (and any request for immediate injunctive relief sought along with that claim) "a nonjusticiable military controversy," requiring a district court to dismiss the claim "without prejudice as premature." *Williams*, 762 F.2d at 359-60; *see also Guerra*, 942 F.2d at 276-77. Despite its application here, Plaintiffs do not even acknowledge this binding precedent.

Plaintiffs seek to bypass the well-established intra-service remedies available to them, including review at the AFBCMR, to obtain premature review in federal court. The AFBCMR has authority to consider the very arguments that Plaintiffs present here, and thereafter alter any discharge, order back pay and allowances, and recommend reinstatement into the Air Force. *See*

10 U.S.C. § 1552.

The Fourth Circuit (and other circuits) has held that service members must exhaust their intra-service remedies before seeking relief in federal court. *See, e.g.*, *Williams*, 762 F.2d at 360; *Guerra*, 942 F.2d at 273; *Wilt v. Gilmore*, 62 F. App'x 484, 487-88 (4th Cir. 2003); *see also, e.g.*, *Navas*, 752 F.2d at 769-70; *Thornton v. Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974). This is so even when, unlike here, the AFBCMR cannot afford full relief to the service member. *See Guerra*, 942 F.2d at 272; *Wilt*, 62 F. App'x at 488. A decision of the AFBCMR "might completely obviate the need for judicial review" or, at the very least, provide the Court with "a definitive interpretation of the [applicable] regulation and an explication of the relevant facts from the highest administrative body in the [service's] own appellate system." *Navas,* 752 F.2d at 770-71 (quoting *Hodges*, 499 F.2d at 422). Further, under a "consistent and unambiguous line of cases," the Fourth Circuit has "reject[ed] the contention that constitutional claims should be exempt from exhaustion requirements." *Nationsbank Corp. v. Herman*, 174 F.3d 424, 429 (4th Cir. 1999).

Plaintiffs are entitled to present all of their arguments to the AFBCMR. There is no reason for this Court to weigh in on the meaning of the challenged regulations (or the proper application of those regulations to Plaintiffs) before the Air Force itself has had an opportunity to offer a definitive interpretation. Indeed, Plaintiffs could ultimately prevail in the administrative proceedings. In any event, this action is premature.

Plaintiffs' claims are materially indistinguishable from *Williams*, where the plaintiff alleged that the military failed to follow its own regulations during his separation proceeding and sought immediate injunctive relief from a federal district court before any actual discharge could take place. *See Williams*, 762 F.2d at 360. The Fourth Circuit held unequivocally that because

the plaintiff had not exhausted all of his intra-service remedies, including review at the applicable BCMR, the lawsuit was a "nonjusticiable military controversy," and dismissed the case without prejudice as premature. *Id.* Under this binding Fourth Circuit precedent, Plaintiffs' action, including their claims that the Air Force failed to follow its own regulations, is premature and must be dismissed without prejudice so that Plaintiffs may exhaust all intra-service remedies.

B. Even If Plaintiffs Roe and Voe Had Properly Exhausted Their Available Intra-service Remedies, Their Claims Raise A Non-Justiciable Military Controversy.

Even if Plaintiffs' claims satisfied the threshold requirements of the *Williams/Mindes* analysis, the Court would be required to balance four factors to determine if it could properly consider the case:

(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.

Williams, 762 F.2d at 359 (quoting *Mindes*, 453 F.2d at 201-02). In this case, none of these factors weigh in favor of this Court taking jurisdiction over Plaintiffs' claims.

First, Plaintiffs' Equal Protection and APA challenges are weak. In addition to being premature, plaintiff's only constitutional claim, an Equal Protection challenge, is subject to a highly deferential standard of review. The conduct challenged by Plaintiffs does not "impinge[] upon a fundamental right or involve[] a suspect classification, [therefore] a minimal level of scrutiny is applied under the rational basis test." *Guerra*, 942 F.2d at 279. Under the rational basis standard, "a regulation need only bear some rational relationship to legitimate governmental purposes," and the "deference afforded to government . . . 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." *Id.* Plaintiffs'

arguments to the contrary are without merit. The Fourth Circuit has squarely held that claims of discrimination on the basis of HIV status are subject to rational basis review only. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 486 (4th Cir. 2005) ("classifications based on disability are subject to minimal scrutiny.").

"[R]ational-basis review of an equal protection claim in the context of agency action is similar to that under the APA . . . . In such a case, the equal-protection argument is folded into the APA argument, since no suspect class is involved and the only question is whether the defendants' treatment of [Plaintiff] was rational (i.e., not arbitrary and capricious)." *Cooper Hosp./Univ. Med. Ctr. v. Burwell*, 179 F. Supp. 3d 31, 47 (D.D.C. 2016) (internal citations omitted), *aff'd sub nom. Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App'x 11 (D.C. Cir. 2017); *see also Nazareth Hosp. v. Sec'y of HHS*, 747 F.3d 172, 180 (3d Cir. 2014); *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 955 (9th Cir. 2011). In other words, because Plaintiffs' challenges are to an agency action, the equal-protection challenge is subsumed within the APA challenge. *See* 179 F. Supp. 3d at 47. Defendants have set forth the justifications for their HIV policies in two reports to Congress. A364 (2014 Report), A380 (2018 Report). As discussed in more detail *infra*, these justifications are sufficient to survive rational basis review.

Plaintiffs' challenges to the Air Force's implementation of regulations are also weak.[2] In

[2] If the Court concludes that Plaintiffs' challenges to the Air Force's application of the challenged regulations are justiciable because they are procedural in nature, *see Allphin v. United States*, 758 F.3d 1336, 1342 (Fed. Cir. 2014), it must nevertheless refuse to consider Plaintiffs' challenges to the substance of the Air Force's decisions. In military discharge cases "merit-based challenges are nonjusticiable . . . [t]he merits of a military staffing decision are committed wholly to the discretion of the military." *Id.* at 1341 (internal citation omitted). The Air Force "has wide discretion to manage its workforce, and its decisions to institute [review boards] and honorably discharge its [airmen] are unquestionably beyond the competence of the judiciary to review." *Id.* (internal citation omitted). For procedural challenges to agency action, the appropriate relief is remand.

reviewing agency actions, the Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1335 (4th Cir. 1995) (quotation omitted); *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "The APA confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." *Downey v. U.S. Dep't of the Army*, 110 F. Supp. 3d 676, 685–86 (E.D. Va. 2015), *aff'd* 685 F. App'x 184 (4th Cir. 2017) (internal quotation marks, citations, and alterations omitted).

The Air Force applied the provisions in DoDI 6485.01 and AFI 44-178, and referred Roe and Voe's cases to the DES in the same manner as any service member with a chronic or progressive illnesses. A85, A299. Plaintiffs were provided the full opportunity in the DES process to present their case to multiple boards and appeal, before final separation decisions were made by the Air Force. The administrative record demonstrates that each board recommended separation because both Plaintiffs faced deployment restrictions, and the SAFPC concluded that Plaintiffs were in career fields likely to deploy to the CENTCOM area of operations (the area to which a majority of Air Force deployments are currently sent), and Plaintiffs would likely be unable to deploy to CENTCOM. A460 (Roe). A747 (Voe); A419 (Decl.).

Second, Plaintiffs will not suffer significant injury if their claims are dismissed. Roe and Voe have both completed their terms of enlistment. Compl. ¶¶ 75, 88 (Dkt. 1). It is beyond question that there is no right to reenlist in the military, and therefore no injury if reenlistment is denied, at the conclusion of a service member's term of enlistment. *Williams v. United States*, 541 F. Supp. 1187, 1191-92 (E.D.N.C. 1982); *see also, e.g.*, *Guerra*, 942 F.2d at 278 ([E]ven if we found that Guerra had a property interest at one time, we note that he would no longer have a

property interest because his term of enlistment has now expired."); *Dodson v. U.S. Army,* 988 F.2d 1199, 1203-04 (Fed. Cir. 1993) ("[N]o one has a right to enlist or reenlist in the armed forces, unless specially given one by statute or regulation."); *Montiel v. United States*, 40 Fed. Cl. 67, 72 (Fed. Cl. 1998) ("servicemembers have no right to reenlist at the expiration of their terms."); *West v. Brown*, 558 F.2d 757, 760 (5th Cir. 1977); *Simmons v. Brown*, 497 F. Supp. 173, 178 (D. Md. 1980) ("[A] serviceman has no property interest or entitlement in continued military service"). Moreover, both Roe and Voe will receive honorable discharges, A666 (Roe), A942 (Voe), and it is well-settled that such discharges do not give rise to reputational injury. *See Guerra*, 942 F.2d at 274; *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *McBride v. West*, 940 F. Supp. 893, 896 (E.D.N.C. 1996) (holding that an honorable discharge did not constitute irreparable harm); *Simmons*, 497 F. Supp. at 179 ("[A] liberty interest is not impinged by the mere fact of discharge from military service unless stigmatizing information is likely to be disseminated to the public at large or to prospective employers.").[3]

The third and fourth prongs of the *Mindes* balancing are substantially intertwined, and both weigh in favor of the Court declining jurisdiction in this case. Plaintiffs' claims strike at the core of military discretion and expertise, and the Court's second-guessing of those decisions would result in a substantial interference with military functions. Whether and how individuals may serve in the military is a central strategic calculation for which the Court has no expertise. Defendants' policies regarding deployability and retention of military members deemed to be non-deployable

[3] Furthermore, Plaintiffs' discharges cannot create stigma because the circumstances of the discharges are confidential unless Plaintiffs themselves choose to release them. *See Sims v. Fox*, 505 F.2d 857, 862-63 (5th Cir. 1974) ("The mere presence of derogatory information in *confidential* files is not an infringement of 'liberty'." (emphasis added)).

stem from the military's goal of "maximiz[ing] the lethality and readiness of the joint force" and the military's judgment that "all Service members [should be] expected to be deployable." *See* A62. Decisions about which Service members are fit—including medically fit— to meet the needs of the military and whether those members should be deployed are precisely the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" that the Supreme Court has said are "essentially professional military judgments." *Winter*, 555 U.S. at 24 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *see also Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983). Courts consistently refuse to interfere with such professional military judgments. Indeed, earlier this month the Court of Appeals for the District of Columbia Circuit vacated a preliminary injunction entered against another military personnel policy, noting that "it is 'difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process.'" *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *2 (D.C. Cir. Jan. 4, 2019) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *see also, e.g.*, *Thomassen v. Perry*, 80 F.3d 915, 925-26 (4th Cir. 1996).

Accordingly, none of the four *Williams/Mindes* factors weigh in favor of considering Plaintiffs' claims, which the Court should dismiss as non-justiciable.

C. Plaintiffs Lack Standing To Bring Their Claims.

This case should also be dismissed because Plaintiffs lack standing. For an individual to demonstrate Article III standing, he must show that "(1) []he suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 753 (4th Cir. 2013).

Plaintiffs Roe and Voe allege that they have been injured because they have been prevented from continuing to serve in the Air Force. Plaintiffs cannot show, however, that they have a "legally protected interest" in continued service beyond their current terms of enlistment. *See Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 621 (4th Cir. 2018) (noting that, to satisfy the first prong of the standing analysis, a plaintiff must show that he "suffered an invasion of a legally protected interest" (internal quotation omitted)). Both Plaintiffs concede that their terms of enlistment have expired. Compl. ¶¶ 74, 88. Thus, Plaintiffs must reenlist to continue serving in the Air Force. It is well-established that "a citizen enjoys no constitutionally protected right to join the military," and consequently that there is "no substantive protection for reenlistment." *Williams*, 541 F. Supp. at 1191-92. There is also no statutory or regulatory right to reenlist in the Air Force. *See* 10 U.S.C. §§ 505, 508(b); A173, A211. Because Plaintiffs have alleged no legally protected interest they have not met their burden to demonstrate standing.

Even if Plaintiffs could demonstrate that a legally protected interest was injured, they still would not possess standing because their alleged injury is not likely to be redressed by a favorable decision on their claims. "An injury is redressable if it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision." *Doe*, 713 F.3d at 755 (internal citations omitted). And Fourth Circuit "precedent declin[es] to find redressability where an additional, unchallenged rule could prevent a plaintiff from having [his] injury cured." *Id. at* 757. Although deployability and discharge determinations may inform the Secretary's reenlistment decisions, reenlistment is a separate process independent of both the medical evaluation and the underlying regulations challenged by the Plaintiffs. *See generally* A159. Enlistment and reenlistment decisions are in the sole discretion of the Secretary of the Air Force. *See* 10 U.S.C. §§ 505, 508(b). No statute or regulation creates an entitlement to reenlistment for enlisted members of the Air

Force. *See* A211 ("Reenlistment in the Regular Air Force . . . is a command prerogative and is not an inherent right of any individual."). Even if Roe and Voe were to prevail on their claims, they would be required to engage in the reenlistment process, and could be denied reenlistment on unrelated grounds. *See* A173 ("Airmen *may be considered* for reenlistment . . . if they . . . 1. Meet eligibility requirements . . . 2. Have qualities essential for continued service . . . 3. Can perform duty in a career field in which the Air Force has a specific need.") (emphasis added). Plaintiffs do not challenge the reenlistment regulations and those regulations plainly could prevent them from obtaining their desired relief.[4] Thus, the individual Plaintiffs have not met their burden to demonstrate standing.

The sole organizational plaintiff, OutServe-SLDN, has likewise failed to demonstrate standing to bring its claims. An organization "can assert standing either in its own right or as a representative of its members." *S. Walk at Broadlands Homeowner's Ass'n v. Openband at Broadlands*, LLC, 713 F.3d 175, 182 (4th Cir. 2013). Here, Outserve has not alleged any injury to itself and therefore "'can establish standing only as [a] representative[] of [its] members who have been injured in fact, and thus could have brought suit in their own right.'" *Id.* at 183-83 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)). An organizational plaintiff must satisfy three prongs to establish representational standing:

> (1) Its own members would have standing to sue in their own right;
> (2) the interests the organization seeks to protect are germane to the organization's purpose; and
> (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit.

Id. at 184 (quoting *Md. Highway Contractor's Ass'n*, 933 F.2d 1246, 1251 (4th Cir. 1991)).

[4] Although Plaintiffs request that the Court order Defendants to reenlist them directly, that power is not within the Court's inherent authority and infringes on the separation of powers.

At the first prong of this test, "to show that its members would have standing, an organization must 'make specific allegations establishing that at least one *identified member* had suffered or would suffer harm.'" *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis in original)). The only individual members of Outserve identified by the complaint are Plaintiffs Roe and Voe.[5] As discussed above, neither Roe nor Voe have standing to bring the claims in the present case. Therefore, Outserve has failed to establish that it has standing to bring claims in this case.

II. Plaintiffs Cannot Demonstrate Entitlement To Preliminary Injunctive Relief.

A preliminary injunction is an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Plaintiffs have not met their burden to make a clear showing that they are entitled to preliminary relief. To succeed on their motion, Plaintiffs must clearly demonstrate each of four elements: (1) they are "likely to suffer irreparable harm in the absence of preliminary relief;" (2) they are "likely to succeed on the merits;" (3) "that the balance of equities tips in [their] favor;" and (4) "that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "*Winter* ma[kes] clear that *each* of these four factors must be satisfied to obtain preliminary injunctive relief." *Henderson*, 902 F.3d 439. Consequently, if Plaintiffs fail to make a clear showing of any one of the four factors the Court need not consider the remaining factors and must deny the preliminary injunction. *See id.* at 438-39. Plaintiffs have not established any of these elements, let alone all four of them. Accordingly, their motion must be denied.

[5] Plaintiffs reference four additional members in an attachment to their Motion for Preliminary Injunction. However, even if those individuals could be shown to have standing, they are not, identified in the complaint, and "[i]t is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk*, 713 F.3d at 184.

A. Fourth Circuit Authority Precludes Plaintiffs From Establishing Irreparable Harm.

Plaintiffs' motion for a preliminary injunction must be denied because they cannot make a "clear showing" of likely irreparable harm. *See Winter*, 555 U.S. at 22. In cases involving military personnel decisions, courts require the moving party to make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief. *See Guerra*, 942 F.2d at 274; *see also Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985).

The Supreme Court has recognized that where federal civilian employees seek immediate injunctive relief from termination, the employee must make an extraordinary showing of irreparable harm beyond the traditional evidence necessary to sustain preliminary injunctive relief. *Sampson v. Murray*, 415 U.S. 61, 91-92 (1974). The *Sampson* Court specifically rejected the same allegations of harm on which Plaintiffs premise their motion, Pls.' Mem. (Dkt. 34) at 27-28, as insufficient:

> Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case.

Sampson, 415 U.S. at 91-92; *see also id.* at 84. Moreover, Plaintiffs claims arise in the military personnel context, where courts have provided extraordinary deference. *See, e.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Hartikka*, 754 F.2d at 1518; *Chilcott*, 747 F.2d at 33 ("[M]ilitary discharge proceedings should be enjoined only in exceptional circumstances."). The Fourth Circuit has held "that *Sampson*'s higher requirement of irreparable injury should be applied in the military context given the federal courts' traditional reluctance to interfere with military matters." *Guerra*, 942 F.2d at 274.

In *Guerra*, the Fourth Circuit applied this heightened standard to a nearly identical set of circumstances—an enlisted National Guard soldier seeking immediate injunctive relief to preclude his forthcoming separation based on conclusory allegations of reputational loss and pay—and held that the soldier simply could not demonstrate the necessary irreparable harm. *Id.* at 274-75. Courts have not hesitated to reject claims of stigma or reputational injury from service members who received discharges less favorable than Plaintiffs' honorable discharges. *See id.* at 274 (holding that even a "general discharge under honorable conditions is not an injury of sufficient magnitude to warrant an injunction."); *Chilcott*, 747 F.2d at 34; *McBride*, 940 F. Supp. at 896.[6]

Even in the absence of this precedent, Plaintiffs' injuries are simply not irreparable. Plaintiffs can obtain review from the AFBCMR, which is empowered to "correct any military record . . . when the Secretary considers it necessary to correct an error or remove an injustice," 10 U.S.C. § 1552(a), and may (in conjunction with the Secretary of the Air Force) order Plaintiffs' reinstatement and backpay.[7] In the event that the AFBCMR denies their requests for relief, Plaintiffs have an alternate course of recovery in either the Court of Federal Claims (which can

[6] Plaintiffs rely on an out-of-circuit district court decision to the contrary, Pls.' Mem. at 28 (citing *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993); however, the Fourth Circuit was clear in *Guerra* that the damage to a plaintiff's reputation from the time of discharge to the decision of the AFBCMR does not rise to the level of irreparable injury, and that decision is binding. 942 F.2d at 274-75.

[7] In this respect, Plaintiffs are entitled to greater remedies from the AFBCMR than were the Plaintiffs in *Williams* and *Guerra*. As the Fourth Circuit noted in both of those cases, because of the unique federalism issues applicable to National Guardsmen, the applicable BCMR could not order the reinstatement of either of those Plaintiffs; nevertheless, the Fourth Circuit held that those Plaintiffs were still required to complete BCMR review before seeking federal court relief. *See Guerra*, 942 F.2d at 276-77; *Williams*, 762 F.2d at 359-60. As members of the regular Air Force, the AFBCMR, in conjunction with the Secretary of the Air Force, can order Plaintiffs' reinstatement.

"provide an entire remedy" under the Tucker Act, *Mitchell v. United States*, 930 F.2d 893, 896-97 (Fed. Cir. 1991)) or this Court (under the APA).

Further, Plaintiffs point to no "dire consequences" that would excuse requiring Roe and Voe from exhausting their administrative remedies. *Guerra*, 942 F.2d at 277. To be sure, Plaintiffs' rely on *Karnoski* to allege that "denial of timely health care" is an irreparable injury. Pls.' Mem. At 27-28 (citing *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *9 (W.D. Wash. Dec. 11, 2017). But the Supreme Court has stayed the injunction in *Karnoski*. *See Trump v. Karnoski*, No. 18A625, 2019 WL 271944, at *1 (U.S. Jan. 22, 2019). And Plaintiffs here were not denied medical care here. The Secretary determined that they should be discharged. In any event, both Roe and Voe are entitled to receive medical benefits from the Department of Veterans Affairs, 38 C.F.R. § 17.37(b), that are not subject to any copayment or income eligibility requirement, 38 C.F.R. §§ 17.108(d)(1), (e)(1), 17.110(c)(2), 17.111(f)(1).

Plaintiffs' reliance on the fact that they assert a constitutional violation to establish irreparable injury is also misplaced. Pls.' Mem. at 28 Although courts have recognized that there is a strong presumption of harm where a plaintiff alleges a loss of First Amendment rights, *see Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011), this authority does not apply with the same force in cases not involving First or Fourth Amendment claims. *See Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484-85 (1st Cir. 2009) (noting that an automatic finding of irreparable harm for a constitutional violation has been generally reserved for "infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief" and that "it cannot be said that violations of Plaintiffs' rights to due process and equal protection automatically result in irreparable harm" (citation and emphasis omitted)); *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th

Cir. 2000); *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). Thus, the fact that Plaintiffs have alleged an equal protection violation cannot by itself establish that they will be irreparably harmed absent an injunction.

In sum, because Plaintiffs cannot establish the necessary irreparable harm to justify preliminary injunctive relief, this Court should deny Plaintiffs' motion without addressing the other *Winter* factors. *See Henderson*, 902 F.3d at 438-39.

B. Plaintiffs Have Not Clearly Demonstrated That They Are Likely To Succeed On The Merits.

Even if, despite Fourth Circuit authority to the contrary, Plaintiffs could somehow establish the necessary irreparable harm in the absence of preliminary injunctive relief, they cannot demonstrate that they will likely succeed on the merits. Plaintiffs' challenges to Defendants' policies are unlikely to succeed because those policies need only be rationally related to military needs. Plaintiffs' challenges to the Air Force's decisions to separate Roe and Voe are also unlikely to succeed because the Air Force properly and consistently applied its regulations.

1. Plaintiffs Have No Likelihood of Success on the Merits Because Their Claims are Non-Justiciable.

Fourth Circuit precedent is clear that, when a case that cannot be heard because the Court lacks subject matter jurisdiction, Plaintiffs have "no likelihood of success on the merits." *Guerra*, 942 F.2d at 277. As explained above, *see supra* Part I, review is unavailable here for several reasons, including Plaintiffs failure to exhaust their intra-service remedies. *Id.* at 276-77; *see also Williams*, 762 F.2d at 359. Plaintiffs therefore must obtain review of their separation decisions through the AFBCMR before coming to this Court. *See Williams*, 762 F.2d at 360 ("The ABCMR is better equipped than the courts. . . . The ABCMR has far greater experience that this court in deciphering the content and effect of military regulations and should be permitted to exercise its

expertise." (citing *Navas*, 752 F.2d at 769-70)). For this reason alone, Plaintiffs cannot demonstrate that they are likely to succeed on the merits.

2. Even If Plaintiffs Claims Are Justiciable, They Are Unlikely to Succeed on the Merits of Their Challenges to Defendants' Policies Because Those Policies Are Rational.

As explained *supra* in part I.B, Plaintiffs' constitutional claims are subject to rational basis review only and analysis of those claims is subsumed within the APA analysis. *See Cooper Hosp.*, 179 F. Supp. 3d at 47. Plaintiffs concede that military readiness, "building and maintaining an effective military," and protecting the health and safety of services members are legitimate government interests. Pls.' Mem. at 13. As such, the Court must "uphold the polic[ies] so long as [they] can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump*, 138 S. Ct. at 2420.

DoD and the Air Force have provided sufficient justifications for their policies. A369-379 (2014 Report), A380-413 (2018 Report). As explained in DoD's 2014 Report to Congress, HIV infection has the potential to undermine a Service member's medical fitness and the readiness of the force. A376. As Plaintiffs concede, in the best case scenario, individuals who are HIV positive must take daily action to ensure that their viral loads stay suppressed in order to remain healthy and minimize the risk that they will infect others. *See* Compl. ¶¶ 51-55, 59, 80. This need for regular treatment and monitoring could impair the ability of an HIV-positive Service member to serve worldwide. A384. As a May 2018 report from the Centers for Disease Control and Prevention ("CDC") noted, "[c]linical, pharmacy, and laboratory services are limited in some deployment settings" and "access to expedited laboratory testing for HIV infection" as well as the three-site [sexually transmitted infections] testing recommended by the CDC "is either unavailable or not easily accessible at many smaller medical facilities in the United States." A437.

Additionally, "because some pharmacies have insufficient stock of medication for use for [HIV treatment,] not every service member" who needs the medication can obtain it, and the recommended follow-up evaluations every three months "can be difficult in light of the often unpredictable training and mission schedules." *Id.* Moreover, despite the development of successful treatment strategies, current treatments do not cure HIV and, if treatment is interrupted, it is thought that "the vast majority of, if not all, infected individuals receiving [antiretroviral therapy (ART)] will experience plasma viral rebound regardless of the level of HIV . . . at the time of discontinuation of ART." A444. In these circumstances, DoD and the Air Force's regulations governing the discharge of service members are rational.

Plaintiffs contend that Defendants' regulations governing military service for service members with laboratory evidence of HIV are not rationally related to military effectiveness because service members who receive successful treatment are physically fit. Pls.' Mem. at 13-15. This argument misconstrues the regulations applicable to their Air Force separation decisions. The Air Force did not apply DoDI 1332.45, but rather heeded the direction of DoDI 6485.01 to refer service members with laboratory evidence of HIV to the DES in the same manner as a Service member with other chronic or progressive illnesses. A414-416; *see also* A229, A329. And while a service member cannot be separated solely on the basis of being infected, a service member whose condition otherwise interferes with their ability to perform their military occupation successfully may be referred to the DES. A392, A294-337. The DES process is regulated by DoDI 1332.18, which provides reasonable procedures for the assessment of service members with deployment limiting conditions. In short, the regulations require a service member to be declared unfit if the evidence "establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating . . . ." A27.

To determine whether a service member can reasonably perform his duties, DoDI 1332.18 directs the services to consider: (1) whether the service member can perform the common military tasks required for the Service member's office, grade, rank, or rating; (2) whether the service member is capable of taking the required physical fitness test; (3) whether the service member is "deployable individually or as part of a unit, with or without prior notification, to any vessel or location specified by" the service; and (4) for service members whose conditions disqualify them for specialized duties, whether the specialized duties constitute the member's current assignment, if the member has an alternative specialty, or if reclassification of the member is feasible. A31. Thus, a fitness determination does not turn solely on a service member's physical fitness. Rather, it is a more inclusive review of a service member's ability to reasonably perform duties of his or her office, grade, rank, or rating.

Plaintiffs further contend that the military should be able to provide necessary medical care to deployed service members. Pls.' Mem. at 15-17. But this argument is nothing more than the substitution of conclusory assertions and Plaintiffs' opinions for the military's professional judgment, which this Court cannot allow. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (explaining that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *see also, e.g., Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 at *2 (D.D.C. Jan. 4, 2019); *Thomassen*, 80 F.3d at 925-26. Besides ignoring the risks of interruption of medical care, Plaintiffs' arguments also misconstrue the purpose of forward-deployed military medical assets. Those assets are not intended to care for service members' chronic medical needs, but rather the exigent and emerging needs of the deployed force. A397, A425-426. And contrary to Plaintiffs' argument, the military may consider the added burden of providing medical care to deployed service members,

particularly where, as noted above, the law of this Circuit is that HIV diagnosis is not a suspect classification and that claims of discrimination on the basis of HIV status are subject to rational basis review. *Doe*, 50 F.3d at 1267; *see also Rostker v. Goldberg*, 453 U.S. 57, 81-82 (1981) (noting that the courts should not dismiss "added burdens" and "administrative burdens" in challenges to military policies).

Plaintiffs also attempt to minimize the risk of a transmission of HIV on the battlefield, because there are no documented cases of such transmission. But this argument presumes the best outcome for a deployed service member—continued access to treatment and complete viral suppression—when the military must weigh the risks of the worst outcome—the interruption of treatment, subsequent rebound of HIV, and potential to transmitted the virus to others. As the waiver authority for CENTCOM explains, when deciding whether to deploy a service member the military considers how a service member would be impacted by reasonably anticipated contingencies, such as loss, theft, or destruction of medication. A427-428.

DoD's deployment regulations are also rational. DoD policy places the responsibility to decide whether to grant a waiver to a service member with laboratory evidence of HIV to deploy to a certain country to the combatant commander responsible for that geographic region. A88-89. (DoDI 6490.07). Though Plaintiffs singularly focus on the success and relative ease of modern antiretroviral treatments, the DoD considers a broader range of issues associated with deployment, including risks to the service members health and the risk to his or her unit. As the waiver authority for CENTCOM explains in his declaration, when deciding whether to deploy a service member the military conducts an individual assessment of each condition, occupation, as well as the timing and location of the deployment. A427. The military also considers how a service member would be impacted by reasonably anticipated contingencies, how their condition will impact the

evaluation of routine medical issues, what secondary effects their treatment may have, and how their condition will influence, and be influenced by, operational activities within active combat zones. *Id.* Not only is such a risk calculation rational, but it is also fundamentally a professional military judgment that is not subject to judicial review. *See Winter*, 555 U.S. at 24; *see also Harkness v. Sec'y of Navy*, 858 F.3d 437, 444 (6th Cir. 2017) (explaining that duty assignments "lie at the heart of military expertise and discretion" and such decisions are therefore non-justiciable).

Plaintiffs also discount the likelihood that a battlefield blood transfusion, and transmission of HIV because of a blood transfusion, would occur. But battlefield transfusions do occur, and the safety of such transfusions has long been a concern. A429 (explaining that screening for HIV began in 1986, in part, for this reason). The military's clinical guidelines for battlefield transfusions warn military physicians that there is a known and documented risk of a transfusion-transmitted infection. A1025-1026. And while the probability of transmission of HIV by battlefield blood transfusion may be "relatively low . . . the potential impact is high." A431. In fact, there are documented cases of the transmission of infectious agents as the result of battlefield transfusions. *See* A450 (HTLV, a retrovirus like HIV), A1025-1026 (reporting the transmission of Hepatitis C Virus and HTLV to service members who received battlefield transfusions).

3. Even If Plaintiffs' Claims Are Justiciable, Plaintiffs Cannot Demonstrate That The Air Force Violated Its Regulations.

Plaintiffs APA claims also fail because they cannot demonstrate that the Air Force violated either the DoD's or its own regulations. Judicial review of an agency action under the APA is confined "to the administrative record of proceedings before the pertinent agency."[8] *Downey*, 110

[8] For this reason, the Court should not permit discovery to proceed in this case.

F. 3d at 685-86. The administrative record here demonstrates that the Air Force properly considered Roe and Voe's treatment by acknowledging that Plaintiffs were asymptomatic, that they were on a one or two pill per day regimen, that they could pass their physical assessments, and that they were physically able to perform their in garrison duties. A460, A468, A550 (Roe), A474, A756, A758 (Voe).

At each level of review, the board applied 1332.18, and the administrative record explains the reasoning that, despite Plaintiffs' asymptomatic condition, Roe and Voe should be separated because they would likely not be able to perform the duties of their military specialties, both of which were subject to high deployment tempos to the CENTCOM area of responsibility. A460 (Roe); A747 (Voe).

The boards' recommendations were not arbitrary and capricious, and the record demonstrates a connection between the facts and the conclusion that Air Force reached. The conclusion that Plaintiffs likely would not be permitted to deploy is supported by the declaration of CENTCOM's designated waiver authority, who notes that, although a deployment waiver for a service member is possible, it is not likely. A427-428. The boards' recommendations are also supported by the fact that the overwhelming majority of deployments of Air Force personnel have been to the CENTCOM area of responsibility. A419. And the Air Force's choice to emphasize a particular area of operations is consistent with DoDI 1332.18's instruction that a Service may consider whether a service member is deployable "to any vessel or location specified by the Military Department." A31. Far from Plaintiffs' arguments that Roe and Voe were being discharged for HIV "alone," they were in fact discharged for a combination of having HIV and being in a career field where they would have a high deployment tempo to CENTCOM, rendering

it impossible for them to fully perform their duties. The Air Force therefore reasonably applied the applicable regulations to the separation decisions here.

Plaintiffs rely on *Wilson v. Office of Civilian Health & Med. Program of Uniformed Servs. (CHAMPUS),* 866 F. Supp. 931, 936 (E.D. Va. 1994), to support their argument that failure to use updated medical information makes a decision arbitrary and capricious. Pls.' Mem. at 23-24. In *Wilson*, the court held that the DoD was arbitrary and capricious when it relied on an outdated and non-authoritative news article for medical information rather than that of a board-certified oncologist, both of which were in the record. 866 F. Supp. at 936. No such circumstances exist here. The concerns reflected in the challenged policies are not outdated. A380-413, A423-28. And Plaintiffs here ask the court to substitute the opinion of their expert for DoD's professional military and medical judgment, an approach rejected by the Supreme Court in *Winter*. 555 U.S. at 28.

4. Even If Plaintiffs' Claims Are Justiciable, Plaintiffs Cannot Demonstrate that The Air Force Failed to Apply Its Regulations Uniformly.

Plaintiffs' allegation that the Air Force is not applying DoD's or its regulations consistently is also without merit. Pls. Mtn at 22. Plaintiffs base this argument on the incorrect assumption that all service members with asymptomatic HIV are similarly situated. They are not. DoD and Air Force regulations require weighing considerations other than a service member's medical condition, such as deployability. A31.

Of the ten appeals by airmen with laboratory evidence of HIV decided in October of 2018, the SAFPC returned four airmen to duty and recommended the discharge of six airmen. A420. The SAFPC recommended discharge for one airman because his medical condition was unstable. *Id.* It recommended discharge for two airmen because their medical conditions disqualified them

for specialized duties. *Id.* The SAFPC recommended discharge for three airmen, including Roe and Doe, because those airmen were employed in career fields with a high rate of deployment from 2015 to 2017. *Id.* By contrast, the four airmen who were returned to duty were each employed in career fields with low rates of deployment. *Id.* Thus, rather than demonstrating inconsistent treatment, an overall review of the SAFPC's recommendations show that the Air Force is applying the standards set forth in DoDI 1332.18.

C. The Remaining Equitable Factors Do Not Favor Preliminary Injunctive Relief.

The remaining equitable factors—which merge when the government is a party, *Nken v. Holder*, 556 U.S. 418, 435 (2009)—do not favor preliminary injunctive relief. Plaintiffs contend that the loss of their positions (which is potentially temporary, pending review by the AFBCMR) outweighs the loss the Air Force would suffer. Pls.' Mem. at 28-29. But the Fourth Circuit rejected this casual view towards the presumed harm to the military from the entry of preliminary injunctive relief in *Guerra*, noting that the harm "is greater than it first appears." 942 F.2d at 275. This is so because "injunctions would be routinely sought in . . . discharge cases" and "[t]he result would be judicial second-guessing of a kind that courts have been reluctant to engage in." *Id*.

The same is true here. If this Court were to grant preliminary relief, each and every service member with a chronic medical condition facing separation would be able to seek similar relief in the federal courts before the services could evaluate the service member's arguments for retention, issue a decision on separation, and provide review from the services' BCMRs. A preliminary injunction would also entangle the Court in "professional military judgments,"—"complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Winter*, 555 U.S. at 24 (citations omitted)—in a way that would interfere "with the subordinate decisions of military authorities" and "frustrate[] the national security goals that the

democratic branches have sought to achieve," *Thomassen*, 80 F.3d at 926. The Court "cannot predict the effect" on the Air Force of retaining airmen who have been determined to be not fit for duty. *Guerra*, 942 F.2d at 275. The Air Force's discretionary decision, if second-guessed, that "would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Orloff*, 345 U.S. at 95. Additionally, an injunction establishing a new policy concerning the deployability or retention of HIV-positive Service members would deprive the military of its ability to determine the appropriate makeup and distribution of its forces, a judgment call for which the military is uniquely situated. *See Winter*, 555 U.S. at 24

The public interest would also not be served by ordering the Air Force to stop processing Plaintiffs' separations. *See Guerra*, 942 F.2d at 280 (holding that the public interest did not weigh in favor of immediate injunctive relief to preclude military member's discharge based on same analysis as the balancing of harms). Indeed, in the context of personnel actions, it is in the public interest to "allow[] the military, in an orderly fashion, to fully adjudicate claims on the part of its own personnel, free of unnecessary interference by the federal courts." *McBride*, 940 F. Supp. at 897. Permitting court involvement prior to the exhaustion of administrative remedies is a drastic change to precedent that simultaneously undermines the trust placed in the military to regulate its own actions and results in judicial second guessing of military actions prior to their completion.

Thus, the final two factors weigh in Defendants' favor, not Plaintiffs'. For these reasons, Plaintiffs cannot clearly establish any of the preliminary injunction factors on this record, let alone all four of them. Their motion must therefore be denied. *See Henderson*, 902 F.3d at 439.

III. Even If Plaintiffs' Prevail, The Appropriate Remedy Is Remand Or An Injunction Limited To Plaintiffs Roe And Voe.

If the Court rules in Plaintiffs' favor, any injunction should be no broader than necessary to provide Plaintiffs complete relief, and should therefore be limited to the individual Plaintiffs

before this Court. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). If the Court finds merit in Plaintiffs' APA claims, then the appropriate remedy is a remand to the Air Force for a better explanation of its decisions. *See Fla. Power & Light*, 470 U.S. 729, 744 ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

As for Plaintiffs' constitutional claims, Plaintiffs fail to show that a nationwide injunction is necessary to redress any injury to them. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (noting that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Plaintiffs' facial challenges do not provide this basis. The Supreme Court has stayed a nationwide injunction against a military policy to the extent it swept beyond the parties to the case. *See United States Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993). *Meinhold* involved a facial constitutional challenge by a discharged Navy service member to DoD's "then-existing policy regarding homosexuals." *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1473 (9th Cir. 1994). After the district court enjoined DoD from "taking any actions against gay or lesbian servicemembers based on their sexual orientation" nationwide, the Supreme Court stayed that order "to the extent it conferred relief on persons other than Meinhold." *Meinhold*, 510 U.S. at 939. The Supreme Court's grant of a stay in *Meinhold* reflects the principle that injunctive relief should not extend beyond the parties to the case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' claims and deny their motion for a preliminary injunction.

DATE: January 25, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/
R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

KERI L. BERMAN
REBECCA CUTRI-KOHART
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for the Government

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

ANDREW R. SOMMER
Va. Bar Number 70304
WINSTON & STRAWN LLP
1700 K St., NW
Washington, DC 20006
T: (202) 282-5000
ASommer@winston.com

Counsel for Plaintiffs

/s/

R. TRENT MCCOTTER
Assistant United States Attorney
Office of the United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
Email: trent.mccotter@usdoj.gov

Counsel for the Government