UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JOHN DOE, Plaintiff, v. LLOYD AUSTIN, in his official capacity as Secretary of Defense; CHRISTINE WORMUTH, in her official capacity as the Secretary of the Army; DANIEL R. HOKANSON, in his official capacity as Chief of the National Guard Bureau; JON A. JENSEN, in his official capacity as Director of the United States Army National Guard; GARY M. BRITO, in his official capacity as Deputy Chief of Staff, G-1, of the United States Army; GREGORY KNIGHT, in his official capacity as Adjutant General of the Vermont National Guard; the UNITED STATES NATIONAL GUARD BUREAU; the UNITED STATES ARMY NATIONAL GUARD; the UNITED STATES DEPARTMENT OF DEFENSE; and the VERMONT NATIONAL GUARD, Defendants.	)	Civil Action No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff John Doe ("Plaintiff") brings this action for declaratory and injunctive relief against Defendants Lloyd Austin, in his official capacity as Secretary of Defense; Christine Wormuth, in her official capacity as the Secretary of the Army; Daniel R. Hokanson, in his official capacity as Chief of the National Guard Bureau; Jon A. Jenson, in his official capacity as Director of the United States Army National Guard; Gary M. Brito, in his official capacity as Deputy Chief of Staff, G-1, of the United States Army; the United States National Guard Bureau; the United States Army National Guard; and the United States Department of Defense (the "Federal

Defendants"); as well as Gregory Knight, in his official capacity as Adjutant General of the Vermont National Guard; and the Vermont National Guard (with Gregory Knight, the "Vermont National Guard Defendants," and, collectively, with the Federal Defendants, the "Defendants"), challenging current military policies that impermissibly discriminate against people living with the human immunodeficiency virus (HIV).

STATEMENT OF THE CASE

1. Plaintiff is deeply devoted and committed to military service and has been since the age of seven, when he first visited a military base with his mother and recalls being awed. From then, Plaintiff decided to carry on the family history of military service. He was raised by a single, low-income mother and born into a Latinx family with extensive armed forces experience—several uncles and his grandfather served in the military.

2. Throughout high school, Plaintiff was active in the Junior Reserve Officers' Training Corps program ("JROTC"), a federal program sponsored by the United States Armed Forces in high schools across the United States. After graduating from high school, he was accepted to Norwich University ("Norwich"), a private military academy in Northfield, Vermont. At Norwich, Plaintiff immediately began participating in the Reserve Officers' Training Corps ("ROTC") program, in pursuit of becoming a commissioned officer after graduation. During his first semester at Norwich, Plaintiff also enlisted in the Vermont Army National Guard ("Vermont ARNG").

3. Plaintiff subsequently tested positive for HIV. In response, and without any individualized assessment of his fitness for duty, Defendants separated him from the military components of ROTC and from the Vermont ARNG—even though he was and is healthy and asymptomatic and adheres to a treatment regimen that has been scientifically established to render

his viral load undetectable. Defendants have never asked Plaintiff how he is managing his HIV, nor have they spoken with his treating physician. Since he reported his HIV status, no military doctor has ever evaluated him for fitness for duty. Instead, based solely on his HIV status, Defendants have deemed him unfit for service.

4. The U.S. military's policies relating to HIV are outdated, illogical and unnecessary, and Defendants' decision to bar Plaintiff from achieving his lifelong goals of service in the military on the basis of such policies is arbitrary, unreasoned, and discriminatory. The military's HIV policies were developed in the 1980s, when little was known about HIV and no medical treatment existed. Testing positive for HIV was made an absolute bar to joining the military—a restriction that remains to this day despite groundbreaking-medical advances over the ensuing years.

5. A generation after they were first developed, the military's policies are highly anachronistic and fail to reflect current medical reality. Advances in medical treatment and prevention have transformed HIV from a progressive, terminal disease to a manageable condition. In particular, current antiretroviral therapy requires only one pill a day and works by reducing the number of copies of the virus in the blood, keeping people healthy. *HIV Treatment as Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2020), https://www.cdc.gov/hiv/risk/art/index.html. As a result, those in successful treatment are effectively incapable of transmitting HIV—a tremendous advancement and protection for individuals living with HIV and overall public health. *Id.*

6. While 35 years of medical advancements should have resulted in a substantial change in the military's policies for people living with HIV, no such change has occurred. The military still maintains an absolute bar against individuals living with HIV from joining the military. And those members who test positive for HIV *after* they enlist are prohibited from

commissioning as officers or otherwise advancing through the ranks, and are subject to invasive oversight of their sex lives and various strict limitations in their assignments. Although military regulations suggest there are waivers or exemptions to these policies, on information and belief, these are rarely granted, or granted on an arbitrary basis.

7. Through their policies and practices, Defendants are unjustifiably preventing Plaintiff and other similarly-situated individuals who are HIV-positive from serving their country. Because Defendants' policies and practices are arbitrary, based on outdated science, and premised on unfounded stereotypes about HIV, they violate Equal Protection, the Administrative Procedure Act ("APA"), as well as Due Process requirements of the Fifth and Fourteenth Amendments. Defendants should be enjoined from implementing these policies, and Plaintiff and other individuals living with HIV should be allowed to serve their country in the same manner as any other individuals living with manageable medical conditions.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1343, and 2201-02. This case poses federal questions that arise under the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

9. Venue is proper in the District of Vermont under 28 U.S.C. § 1391(b) and (e)(1). A substantial part of the events and omissions giving rise to these claims occurred in this district.

10. This Court has personal jurisdiction over Defendants because their enforcement of the service restrictions for people living with HIV occurs within the District of Vermont.

PARTIES

A. Plaintiff

11. Plaintiff John Doe is a 21-year-old Latinx male with a permanent residence in Revere, Massachusetts. He is a student at Norwich University in Vermont and lives on campus during the school year. He is living with HIV.

B. Federal Defendants

12. Defendant Lloyd Austin is the Secretary of the U.S. Department of Defense. He is responsible for the administration and enforcement of the Department's service restrictions of people living with HIV.

13. Defendant Christine Wormuth is the Secretary of the Army. As Secretary of the Army, she has command authority over the Vermont National Guard. She is responsible for the administration and enforcement of both Department of Defense Instructions and Army Regulations, within the Army and National Guard, including the Army's regulations regarding service members and recruits living with HIV.

14. Defendant Daniel R. Hokanson is the Chief of the United States National Guard Bureau. In this capacity, he is responsible for the administration and enforcement of both Department of Defense Instructions and Army Regulations within the Army and National Guard, including those pertaining to service members and recruits living with HIV.

15. Defendant Jon A. Jenson is the Director of the United States Army National Guard. He guides the formulation, development and implementation of all programs and policies affecting the Army National Guard and is therefore responsible for the administration and enforcement of the Army National Guard's regulations regarding service members and recruits living with HIV.

16. Defendant Gary M. Brito is the Deputy Chief of Staff, G-1 of the United States Army. He serves as lead agent for all HIV policies, provides Army staff supervision for the HIV program, coordinates with U.S. Military Entrance Processing Command policies pertaining to pre-accession HIV testing conducted at military entrance processing stations, and is charged with ensuring that HIV policies and programs are effectively implemented consistent with Department of Defense guidance and current medical knowledge.

17. Defendant United States National Guard Bureau is the federal instrument responsible for the administration of the National Guard, established by the United States Congress as a joint bureau of the Department of the Army and the Department of the Air Force. It is a component of the Department of Defense. It is responsible for administering programs for the development and maintenance of Army and Air National Guard units in the 50 states, the Commonwealth of Puerto Rico, the District of Columbia, the Virgin Islands, and Guam, and therefore has oversight over the Vermont National Guard's regulations regarding service members and recruits living with HIV.

18. Defendant United States Army National Guard is an organized militia force and a federal military reserve force of the United States Army. The Army National Guard, in conjunction with the Air National Guard, are simultaneously part of two different organizations: the Army National Guard of each state, most territories, and the District of Columbia (also referred to as the Militia of the United States), and the Army National Guard of the United States (as part of the federalized National Guard). The Army National Guard is divided into subordinate units stationed in each U.S. state and territory, as well as the District of Columbia, operating under their respective governors and governor-equivalents. Plaintiff was suspended due to his HIV status from the Vermont ARNG, a reserve component of the Army National Guard.

19. Defendant United States Department of Defense is an executive branch department of the U.S. federal government comprising, as relevant here, the office of the Secretary of Defense, the Joint Chiefs of Staff, the Joint Staff, the Army Department, and the National Guard Bureau. Under the direction of Secretary Lloyd, the Department of Defense is responsible for administration and enforcement of the Department's service restrictions on service members and recruits living with HIV.

C. Vermont National Guard Defendants

20. Defendant Gregory Knight is the Adjutant General of the Vermont National Guard. The Army and Air National Guard in each state are headed by the State Adjutant General. The Adjutant General is the de facto commander of a state's military forces, and reports to the state governor. As commander of the Vermont National Guard, Major General Gregory Knight is responsible for the administration and enforcement of the Vermont National Guard's policies regarding restrictions on service members and recruits living with HIV.

21. Defendant Vermont National Guard is comprised of the Vermont Army National Guard and the Vermont Air National Guard. The Vermont National Guard is a reserve component of the United States Army and the United States Air Force.

FACTUAL ALLEGATIONS

A. Enlisting in the National Guard and Becoming an Officer

22. The United States Army National Guard (the "National Guard") is the country's primary military reserve. Most National Guard members serve part-time while holding civilian jobs or attending college. They are trained to respond both to overseas conflicts and domestic emergencies, such as weather disasters, civil unrest, and terrorist attacks. Members generally serve in the National Guard organization operating in the jurisdiction in which they live or attend college.

23. The National Guard is distinct from other components of the United States military in that it is controlled by both state and federal leaders. There are fifty-four separate National Guard organizations across the fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. The Vermont National Guard is one such organization.

24. At the federal level, the National Guard is overseen by the United States National Guard Bureau, the head of which is a member of the Joint Chief of Staff, the United States military's top advisory body. At the state level, National Guards are generally activated and commanded by the governors of their respective jurisdictions. For example, the Governor of Vermont, through the State Adjutant General, commands the Vermont National Guard in connection with State missions.

25. Under Vermont law, 20 V.S.A. § 362, matters relating to the "organization, discipline, training, and government of the National Guard," not otherwise provided under Vermont law, "shall be decided by the federal laws and regulations prescribed for the National Guard and the U.S. Army or Air Force as applicable."

26. To be eligible for original enlistment in the National Guard, a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps. 32 U.S.C. § 313. A person must also be a U.S. citizen or a permanent resident alien, have a high school diploma or GED, pass a military entrance test, meet certain physical and medical standards, and take the oath of enlistment.

27. After enlistment, National Guard members attend training, such as initial entry training (*i.e.*, basic training) or technical training.

28. Students who enlist in the National Guard can obtain 100% federal tuition funding, payment for certain other fees and expenses, and other educational benefits. Many state organizations, including the Vermont National Guard, offer similar tuition benefits. These educational scholarships, funds, and other programs are key selling points to individuals considering serving in the National Guard while attending college.

29. National Guard members may advance through the enlisted ranks and then complete officer training. Alternatively, National Guard members attending a four-year college or university may commission as an officer by obtaining a degree and completing ROTC.

30. ROTC is a four-year leadership program offered at a number of colleges and universities across the country. ROTC allows students to, in exchange for paid tuition and certain personal expenses, attend post-secondary education and train to be a military officer in the Army, Army Reserves, or the National Guard. Students are not required to enlist in the military to participate in the ROTC program, although midway through the program students must commit to doing so. Upon obtaining a degree and completing the ROTC program, graduates are eligible to become a second lieutenant in the army.

31. The "Basic Course" generally refers to the first two years of the ROTC program (*i.e.*, a student's freshman and sophomore years). It is intended to create a working knowledge of the ROTC and the Army, and normally involves one elective class and a lab, along with required physical training and field training. U.S. Army (2021), https://www.goarmy.com/careers-and-jobs/find-your-path/army-officers/rotc.html.

32. The "Advanced Course" refers to the last two years of the ROTC program (*i.e.*, a student's junior and senior years). A student is qualified for the Advanced Course after completing

the Basic Course. At this point in the program, the student must commit to enlisting (if the student has not enlisted already) and serving as an officer after graduation. *Id.*

33. Advanced Course entrants must also attend the "Advanced Camp," a roughly four-week leadership training event typically held in the summer between a student's junior and senior years. It is the most significant training and evaluation event of the ROTC program, and individuals must pass the evaluation to be commissioned as an officer.

B. Military Medical Standards Applicable to HIV

34. Title 32 of the United States Code §§101-908 are the federal statutes dealing with the organization, training, and federal recognition of National Guard members.

35. The regulations implementing these statutes are DOD Instructions ("DoDI") and Army Regulations ("AR"), which detail medical fitness standards that apply to individuals seeking to enter, or be retained in, the United States Army and National Guard.

36. There are separate regulations for *accession* standards (applicable to those seeking to enlist in the military, or those already enlisted seeking to be commissioned as officers) and *retention* standards (applicable to those seeking to remain in the military).

37. Under the accession standards, living with HIV is an absolute bar to joining the military as an enlisted person or officer, without regard for a person's individual circumstances, including, but not limited, one's overall health, viral suppression, or the nature of the treatment the person is receiving.

38. Under the retention standards, individuals living with HIV are allowed to continue service but with restrictions that are far different – and far more limiting – than similarly-situated individuals with other manageable medical conditions.

i. **Accession Standards**

39. The Army defines "accession" to include enlisting in the Army (including the National Guard), being appointed as a commissioned officer (including in the National Guard), and enrollment as an ROTC scholarship cadet. AR 600-110, § 5.2.

40. The DoDI addressing accession standards is DoDI 6130.03, Volume 1, entitled "Medical Standards for Military Service, Appointment, Enlistment, or Induction" (The "DoDI Accession Regulations"). The stated purpose of these accession medical standards is to ensure that individuals are:

> (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.

41. Section 5 of DoDI Accession Regulations lists approximately 434 medical conditions that disqualify individuals from enlisting. Section 5.23 ("Systemic Conditions") includes the presence of HIV as a disqualifying condition.

42. The DoDI Accession Regulations provide that applicants with one of these disqualifying conditions may be considered for a medical waiver. DoDI 6130.03, Vol. 1, §§ 1.2(d), 2.3(b). The medical waiver involves a "thorough review," the approval of which depends on "sufficient mitigating circumstances/provided medical documentation" justifying the waiver. *Id.*, § G.2.

43. A separate DoDI, however, uniquely singles out HIV as a non-waivable disqualifying condition when diagnosed in accordance with that DoDI's procedures. DoDI 6485.01 ("[HIV] in Military Service Members" (hereafter, the "DoDI HIV Policy")). Under this policy, testing and screening is performed for three separate groups: first, for "[a]pplicants for appointment, enlistment, or individuals being inducted" into the military, who must be tested in accordance with the DoDI Accession Regulations; second, for "applicants to...officer candidate programs", who must be tested within 72 hours of arrival into the program, and for "[ROTC] program cadets...[who] must be tested...not later than during their commissioning physical examination, and denied a commission if they test positive"; and third, for "[a]ll Service members" who "will be screened periodically for laboratory evidence of HIV infection" and such testing must be done in strict accordance with military regulations. DoDI 6485.01, Encl. 3, § 1.

44. The DoDI HIV Policy provides that, when testing and screening is performed in accordance with these procedures, "[i]t is DoD policy to ...[d]eny eligibility for military service to persons with laboratory evidence of HIV infection for appointment, enlistment, pre-appointment, or initial entry training for military service...." DoDI 6485.01, § 3. Thus, those who test HIV-positive in accordance with DoDI HIV Policy cannot enlist in the National Guard, be commissioned as an officer in the National Guard (through the ROTC program or otherwise), or attend basic training for the National Guard. *See* AR 135-178.

45. Similarly, the AR addressing medical fitness, AR 40-501 ("Standards of Medical Fitness") provides that, with respect to the medical conditions that are causes for rejection of appointment, enlistment, or induction into the Army, "the standards regarding the immune mechanism including immunodeficiencies will not be waived." AR 40-501, § 2-2(b). The AR specific to HIV, AR 600-110, entitled "Identification, Surveillance, and Administration of

Personnel Infected with [HIV]," similarly implements a blanket prohibition on the accession of individuals living with HIV when testing is done in accordance with the AR. AR 600-110, §§ 1-16(a),5-3(b). Specifically, HIV testing must "be accomplished during the initial physical examination at the [military entrance processing station ("MEPS")]" and "[t]esting from any other source except MEPS, other DOD military treatment facilities, or DOD contract facilities is not acceptable for accession testing requirements[.]" *Id.* 5-3(b). MEPS is where career advisors and military recruiters bring recruits, including applicants for the National Guard, to conduct physicals and health screening, including urinalysis and bloodwork.

46. When individuals are tested for HIV according to these protocols, AR 600-110 provides that "[a]pplicants for accession who have no military status of any kind at the time of testing and who are confirmed HIV infected will not be enlisted or appointed in any component in the Army." *Id.*, § 5-3(c).

47. AR 600-110 provides that non-enlisted cadets who are confirmed to be living with HIV "will be disenrolled from the program at the end of the current academic term[.]" AR 600-110, § 5-3(h)(2); *see also* USACC Pamphlet 145-4 (concerning ROTC "enrollment, retention, and disenrollment criteria, policy, and procedures").

ii. <u>Retention Standards</u>

48. The DoDI addressing retention standards is DoDI 6130.03, Volume 2, entitled "Medical Standard for Military Service: Retention" (the "DoDI Retention Standards"). Section 3 of the DoDI Retention Standards, which describes the procedures for applying medical standards, notes that the standards for "disqualifying conditions" will be applied on a case-by-case basis.

49. "Disqualifying conditions" include certain systemic conditions. DoDI 6130.03, § 5.23 classifies HIV as a "Systemic Condition," and provides that when considering any systemic

condition, "the condition must persist despite appropriate treatment and impair function so as to preclude satisfactory performance of required military duties of the member's office, grade, rank or rating."

50. Systemic Conditions, such as HIV, are grounds for separation from the military only "if they require medication for control with frequent monitoring by a medical provider due to potential debilitating or serious side effects." DoDI 6130.03, § 5.23(a).

51. Service members who test positive for HIV in accordance with military testing procedures "will be referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses." DoDI 6130.03, § 5.23(b)(1). Thus, for example, while a National Guard member with a confirmed HIV diagnosis will not be able to ascend in rank, he may nevertheless continue to serve in his current capacity so long as he is adjudged to be fit for such continued service.

52. Similarly, under Army regulations, unless there is also "progressive clinical illness or immunological deficiency," the Army cannot separate enlistees who learn they are living with HIV under retention standards. AR 600-110 § 1-16(e).

53. Only those enlistees with "rapidly progressive" clinical illness or immunological deficiency do not meet medical retention standards, and medical providers must refer them for physical disability processing. AR 600-110 § 1-16(k).

54. AR 600-110 § 1-16(e) explicitly distinguishes between individuals who learn that they are living with HIV "during the accession testing program" and those who later learn they are living with HIV (after the initial testing regimen is completed); the latter "will not be involuntarily separated solely because they are HIV infected" unless they demonstrate progressive clinical illness or immunological deficiency. AR 600-110, § 1-16(e); *see also* DoDI 6485.01, Encl., §

3(2)(c); AR 600-110, § 7-12(a) ("[s]oldiers confirmed to be HIV infected, but who manifest no evidence of progressive clinical illness or immunological deficiency, will not be separated solely on the basis of their HIV infection.")

55. Still, while individuals who test positive for HIV after enlistment may continue to serve, they are limited in their opportunities for assignments and advancement, and they are subjected to invasive scrutiny of their sex lives. For example:

a. enlistees who are officer candidates through Office Candidate School (OCS) when they are confirmed HIV-positive "will be immediately disenrolled from the program," AR 600-110, § 5-3(h);

b. enlistees "will not be deployed or assigned overseas," *id.*, § 6-3(a);

c. enlistees assigned to military-sponsored educational programs such as "advanced civilian schooling, professional residency, fellowships, training with industry, and equivalent educational programs, regardless of whether the training is conducted in civilian or military organizations" will be "disenrolled at the end of the academic term in which HIV infection is confirmed," *id.*, § 6-3(b)(2); and

d. the military ensures that a "Soldier is informed that continuing to have sex without CDC recommended condoms or barriers may place sexual partners at risk of infection," a "Soldier will be advised to immediately notify his or her spouse and/or sexual partner(s) of his or her infection, and a "Soldier will be advised that the HIV program director or coordinator (PHN) will verify that the spouse was informed and offer counseling and testing services," AR 600-110, § 4-6(b)(3)-(4).

56. Another significant distinction between accession and retention standards is that the retention regulations state that exceptions or waivers are available for enlistees who test positive for HIV. *See* AR 600-110 (Deputy Chief of Staff, G-1 "has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations.").

57. AR 600-110 also notes that the waiver request must include "a full analysis of the expected benefits and must include formal review by the activity's senior legal officer."

58. Although waivers are said to be available under military regulations for enlistees living with HIV, on information and belief, they are rarely applied, and when they are applied, they are done so in an arbitrary, inconsistent, and unlawful manner.

59. Upon information and belief, a Marine reservist living with HIV was recently granted an exception to policy (ETP) allowing him to continue serving on active-duty orders over 30 days.

60. Upon information and belief, another Soldier living with HIV was granted an ETP allowing him to move from active duty to the reserve—a movement that technically is "non-waivable."

61. A separate Army Regulation for enlisted separations from the Army National Guard and Reserve provides that "[d]ischarge will be accomplished on determination that a Soldier was not medically qualified under procurement medical standards when accepted for enlistment, or who became medically disqualified under these standards prior to entry on IADT [basic training]." AR 135-178, Sec 6-6(a).

C. Plaintiff's Efforts to Serve His Country

i. <u>Completion of JROTC Program and Enrollment in ROTC</u>

62. Throughout high school at Revere High School in Revere, Massachusetts, Plaintiff was active in the Junior Reserve Officers' Training Corps ("JROTC") program, a federal program sponsored by the United States Armed Forces in high schools across the United States.

63. Many of his JROTC superiors were mentors and father figures to him, reinforcing his belief that the military would provide him a sense of support and honor.

64. After graduating from high school, Plaintiff was overjoyed to gain admission at Norwich University, where he enrolled on August 18, 2019. Norwich is a private military academy in Northfield, Vermont. Founded in 1819, Norwich is the oldest of the six senior military colleges and is referred to as the "Birthplace of ROTC." *See* "About Norwich University," Norwich University (2021), https://www.norwich.edu/about/1209-norwich-university-200-year-history.

65. At Norwich, Plaintiff began participating in the ROTC program, in pursuit of becoming a commissioned officer after graduation. He is currently a junior at Norwich with an expected graduation date of May 2023.

66. Plaintiff's time at Norwich has included some of the most rewarding years of his life. In addition to participating in numerous clubs and committees, Plaintiff has taken every opportunity to develop his skills in military leadership, including interning as an assistant instructor in the JROTC Program in Revere and mentoring junior students as a squad leader.

67. Plaintiff completed the ROTC program's Basic Course during his first two years at Norwich. Overall, Plaintiff has performed substantial work towards gaining commissioned officer status, including rigorous physical activity.

ii. <u>Enlistment in the National Guard and Participation in ROTC as an Enlisted Cadet</u>

68. During his first semester at Norwich, Plaintiff enlisted into the Vermont ARNG. The National Guard and Norwich have a partnership dating back seventy-five years.

69. On or about September 9, 2019, Plaintiff underwent a physical and medical examination at the MEPS in Springfield, Massachusetts in connection with his application to the National Guard. With the exception of a waiver for his vision, Plaintiff cleared the health screening at MEPS and was deemed of sound physical fitness. A blood screening for HIV was negative. On or about October 29, 2019 Plaintiff signed an enlistment agreement with the Vermont National Guard for a period of six years and took the National Guard oath, thereby "effect[ing] a change in status from civilian to military member of the Armed Forces." *See* 32 U.S.C. § 304 ("Each person enlisting in the National Guard shall sign an enlistment contract and subscribe to the [National Guard] oath.").

70. Plaintiff's file from the ROTC Department at Norwich also notes an earlier May 13, 2019 physical exam, and states that "no medical condition or physical impairment was found that preclude[d] participation in the basic course, Army ROTC…"

71. Plaintiff received a start date for basic training of April 2020. However, due to the COVID-19 pandemic, on April 6, 2020, the Army announced it would halt the movement of new recruits to basic training. On April 20, 2020, the Army announced it would resume shipping to basic training, but that individuals in high-risk/transmission areas—such as Plaintiff, whose permanent residence is Revere, Massachusetts—would be rescheduled for later dates.

72. Plaintiff's contract terms were renegotiated as a "COVID holdover," and he received a start date for basic training for spring 2021—approximately 18 months after he enlisted.

73. Plaintiff's leadership and dedication to the military has not gone without notice by his instructors and other leaders. Captain Wesley Trumbauer, Plaintiff's Norwich ROTC Advisor, noted Plaintiff's genuinely inspiring eagerness to serve in the military. After observing Plaintiff's

performance at Norwich, Captain Trumbauer was confident that Plaintiff would have commissioned as an officer into the Army.

74. Similarly, Major Deborah Bowker, who oversaw Plaintiff's JROTC program at Revere High School and who has known Plaintiff for six years, has only positive remarks to make about him and his future military prospects. Major Bowker identifies Plaintiff as a "role model" and "phenomenal leader," noting that even while enrolled at Norwich he found time to return to their high school and serve as a mentor where he went "above [and] beyond in his internship responsibilities."

D. Plaintiff's Separation

75. On or about October 27, 2020, Plaintiff discovered that he is HIV-positive. While at Massachusetts General Hospital because of flu-like symptoms, routine bloodwork determined that he had antibodies for HIV. On October 30, 2020, Plaintiff received a retest confirming he is HIV-positive.

76. By that time, Plaintiff had been enlisted in the National Guard for over a year, and was waiting to attend basic training. He had also completed one and a half years of the ROTC program and was on track to attend Advanced Camp for the summer following his junior year.

77. Between October 28 and November 10, 2020, Plaintiff informed the National Guard, through SFC David Girr of the Vermont ARNG, and Norwich's ROTC Department, through CPT Wesley Trumbauer, of the results of his bloodwork. Notwithstanding the aforementioned distinction between accession and retention standards with respect to HIV-positivity, and despite the fact that Plaintiff's bloodwork was taken in his capacity as a civilian (*i.e.*, outside of the Army regulations that provide the procedure for obtaining bloodwork), SFC Girr informed Plaintiff that the test results would make Plaintiff ineligible to serve in the National

Guard. CPT Trumbauer informed Plaintiff that he would not be able to get a scholarship or contract through the ROTC program due to his HIV status.

78. As a result of Plaintiff's diagnosis, he was no longer allowed to continue his monthly training periods with the Vermont ARNG, and the Vermont ARNG initiated formal separation proceedings under AR 135-178, the regulation that establishes policies, standards, and procedures governing the administrative separation of enlisted members of the Army National Guard. Specifically, the Vermont ARNG sent Plaintiff a Notification of Separation Proceedings (the "Notification of Separation"), purportedly pursuant to Chapter 6, Paragraph 6 of AR 135-178 ("Not medically qualified under procurement medical fitness standards"), that the Vermont ARNG deemed Plaintiff unfit for military service due to testing positive for HIV.

79. The ROTC Department also separated Plaintiff from the military components of the program, such that although he could continue as an undergraduate at Norwich, he would be unable to participate in Advanced Course or receive a contract after graduation to commission as an officer.

80. On or about April 14, 2021, Plaintiff contacted Sofia Philbrick of Norwich's ROTC Department to inquire as to whether living with HIV disqualified him from continuing to junior year ROTC classes.

81. On or about April 16, 2021, Ms. Philbrick stated that Plaintiff's diagnosis "would not allow [him] to contract with Army," but he could continue taking Army ROTC classes for academic credit only. She stated that "[d]ue to HIV being a non-waiverable [sic] condition," Plaintiff could not contract with the ROTC Department.

82. Prior to that time, Plaintiff was scheduled to begin Advanced Course in Fall 2022 (his junior year) and was on track to commission as an army officer following training and graduation.

83. Because—and only because—of these test results, Plaintiff was informed that:

a. he would be discharged and would no longer be allowed to continue his military service;

b. he was required to return all issued military clothing and gear;

c. he would no longer be entitled to any education benefits, including but not limited to a state tuition waiver for college;

d. he would no longer be able to use the Montgomery GI Bill while enrolled as a student;

e. he would no longer be entitled to tri-care medical and dental benefits once separated; and

f. he would be prohibited from all future military affiliations.

84. On May 21, 2021, Plaintiff received the Notification of Separation.

85. On June 18, 2021, within thirty calendar days of Plaintiff's receipt of the Notification of Separation, counsel for Plaintiff contacted SFC David M. Pacheco of the Vermont National Guard urging the retention of Plaintiff in the National Guard. In particular, counsel for Plaintiff highlighted the support Plaintiff enjoys among his instructors and ROTC advisors and his medical prognosis, as well as the fact that separation was not mandatory under AR 135-178 and that litigation is pending that could eliminate the HIV restrictions altogether. Plaintiff's counsel also noted that several waivers and exceptions to policy (ETP) had been granted for other service members living with HIV.

86. Plaintiff also submitted documentation showing that he is healthy and has no physical limitations on service. Dr. Anne Neilan, a board-certified internist, pediatrician and infectious disease clinician at MGH, and an instructor at Harvard Medical School, is Plaintiff's treating physician. As Dr. Neilan noted in her medical support letter, Plaintiff can engage in strenuous physical activity without limitation. As to his HIV positivity, Dr. Neilan noted that Plaintiff's diagnosis is not life-limiting and poses no physical limitations. In addition, given his status as virologically suppressed, Plaintiff confers effectively no risk of HIV transmission to others.

87. As of the date of filing, neither the Vermont ARNG nor any of its members, employees, or agents has responded to Plaintiff's June 18, 2021 retention request, and Plaintiff was never referred to a military doctor for any type of individualized assessment.

88. Instead, in March 2022, in response to a request for his records, Plaintiff received a document, entitled "National Guard Report of Separation And Record of Service." The form lists his date of enlistment/appointment in the National Guard as October 29, 2019 and the effective date of his separation as January 27, 2022. His "record of service" is noted as 2 years, 2 months, and 29 days. His rank at separation is listed as Specialist (SPC), the rank above Private First Class. The reason noted for his separation is "Medical, Physical, or Mental Condition Retention." No further explanation is given, and no individualized assessment of his fitness for duty is included.

89. Defendants have never asked Plaintiff how he is managing his HIV, nor have they spoken with his treating physician. Since he reported his HIV status, no military doctor has ever evaluated him for fitness for duty.

90. Despite the fact that Plaintiff was enlisted in the Vermont ARNG at the time he learned he was living with HIV, the military did not apply retention standards to him. He was not

referred to appropriate medical personnel for an evaluation of his health, and, despite his requests, he was not afforded any waiver review. Furthermore, according to the Notification of Separation, the military also applied accession standards to Plaintiff, and treated him as though he had never enlisted in, or had any relationship with, the United States military. In either case, the standards applied to individuals living with HIV are unlawful and unconstitutional.

91. Plaintiff's separation from the National Guard and the military components of ROTC are final agency actions not subject to further review.

92. Plaintiff's separation from the National Guard has severely impacted his career and stigmatized him at Norwich. Because he is no longer in the National Guard, he cannot attend basic training, and he cannot participate with other students in required ROTC program elements. Specifically, his inability to participate in field training is currently prohibiting him from participating in Advanced Camp, which is required to qualify for the ability to be a commissioned officer after graduation.

93. Plaintiff's separation also places him in the untenable position of having to reveal private medical information to those who question why his long-planned military career trajectory appears to have stopped, or to remain silent and have people assume there is some dishonorable reason for his separation.

94. If Plaintiff is reinstated, he would be able to attend Advanced Camp his senior year and then commission as an officer upon graduation.

E. The Military's HIV Policies Are Medically Outdated And Based on Bias

95. The military's accession and retention policies and practices, as well as Army Regulation AR 135-178, Sec 6-6(a) which was subsequently applied to Plaintiff, regarding people living with HIV are based on outdated medical assumptions, as well as invidious bias.

96. Medical advances in treatment of HIV have changed dramatically over the past decades. Yet the military's policies are still premised on the assumption that HIV is both highly disruptive and easy to transmit, neither of which is true based on recent data and scientific advancements.

97. Until the late 1980s, there was no treatment for HIV. And even when the first medicines became available, they were often difficult to take, ineffective, and accompanied by severe side effects. As a result, HIV could not be managed and typically progressed quickly to AIDS, which suppresses the immune system and leaves the body highly vulnerable to severe illness. In the early years of the AIDS crisis, an AIDS diagnosis was effectively a death sentence, with patients typically dying within months, if not weeks, of diagnosis.

98. In 1996, with the advent of new antiretroviral medications, the prognosis of people living with HIV changed from a terminal illness to a manageable condition. Antiretroviral therapy works by preventing the virus from multiplying, reducing the body's "viral load," which is the amount of HIV in the body. According to the CDC, "all evidence to date suggests that it is not realistically possible to sexually transmit HIV while the person with HIV remains undetectable or virally suppressed." Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV, CTRS. FOR DISEASE CONTROL & PREVENTION 3 (Dec. 2020), https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf.[1]

---

[1] Furthermore, the development of readily available pre-exposure prophylaxis (PrEP) and post-exposure prophylaxis (PEP) medications greatly reduce the odds of infection after an exposure. PrEP reduces the risk of getting HIV from sex by about 99%, and from injection drug use by at least 74%. PEP has demonstrated an 81% reduction in the odds of HIV transmission.

99. Although antiretroviral therapy once required taking dozens of pills a day, often with severe side effects, patients can now take a single pill once a day with virtually no side effects at all.

100. Antiretroviral therapy not only effectively eliminates the risk of transmission; it also enables people living with HIV to live normal, healthy lives. For example, in 1996, when antiretroviral therapy was first introduced, life expectancy for a 20-year-old HIV-positive man was roughly 39 years. Now, a 20-year-old HIV-positive man who initiates treatment early, such as Plaintiff, approaches the same lifespan as someone who is HIV-negative.

101. For other conditions that were previously outright disqualifying, the military has changed its policies over time due to the availability of new information and scientific data. For example, before 2004, a history of asthma at any age disqualified someone from military service. After 2004, however, the military only disqualified recruits who had asthmatic symptoms after the age of 13. This change was based, in large part, on a study of recruits showing that a history of mild asthma was not associated with excessive medical care or early attrition from military service. Those with well-controlled asthma may remain on active duty. *See* Army Regulation 40-501.

102. The military has substantial experience successfully retaining service members living with HIV without compromising military readiness. Multiple branches of the military allow service members who are already enlisted when they learn that they are HIV-positive to remain in service. In fact, between 2012 and 2018, ninety-nine percent of HIV-positive service members achieved viral suppression within one year of starting antiretroviral therapy, meaning that they had fewer than 200 copies of HIV per milliliter of blood. This rate of viral suppression is significantly higher than the national one. In 2016-17, for example, a little more than eighty percent of patients receiving HIV clinical care nationally were virally suppressed at their last test.

103. Yet the military has not updated its HIV policies to reflect the data and scientific advancements in the treatment of HIV. Nor do its policies bear an actual relationship to the goals it aims to promote under DoDI 6130.03: protecting troops from contagious diseases, avoiding excessive time lost from duty for necessary treatment or hospitalization, and ensuring a fit force.

104. The military's outdated policies on HIV are also rooted in invidious bias based on sexual orientation. Although individuals from all backgrounds live with HIV, since the 1980s, gay men have accounted for a substantial percentage of those living with HIV. As other courts have observed in analyzing the "relentless stigma" that accompanies HIV, "[p]rejudice against homosexuals intensifies prejudice against HIV, and prejudice against HIV becomes a proxy for prejudice against members of the gay community." *Henderson v. Thomas*, 913 F.Supp.2d 1267, 1278 (M.D. Ala. 2012).

105. Defendants' animus towards service members and recruits living with HIV is extensive and well-documented, and includes:

a. Beginning in October 1985, when the Department of Defense began a mandatory HIV-screening program, military personnel who tested positive were "often removed from their units and demoted to lesser jobs," while being required to sign pledges to "avoid risky sexual practices" and subject to prosecution for "sodomy, disobedience, and other offenses related to sexual activity." Nikita Lalwani, *Unsafe and Unsound: HIV Policy in the U.S. Military*, 130 YALE L. J. 1618, 1625 (2021);

b. For decades, Department of Defense regulations declared homosexuality "incompatible with military service," DoD Directive 1332.14 (Jan. 28, 1982), based on a variety of invidious stereotypes and assumptions that have since been thoroughly repudiated. The fact that many HIV-positive individuals were gay men was used as a

defense to this bar, even long after medical advances had rendered HIV positivity a manageable condition;

c. Proponents of bars on military service based on sexual orientation and HIV positivity frequently voiced sentiments laced with invidious bias. For example, Representative Robert Dornan stated that HIV was spread by "human God-given free will" through one of three causes, all of which violated the Uniform Code of Military Justice, including "having unprotected sex with strangers in some hideaway or men's room somewhere, high risk sex that is homosexual." 141 Cong. Rec. H11,760 (daily ed. Nov. 2, 1995); *see also* 142 Cong. Rec. H1213-14 (daily ed. Feb. 1, 1996);

d. The military issues safe-sex rules exclusively to HIV-positive service members. Once diagnosed, they must routinely sign a document known as a "safe sex order," which requires them, among other things, to verbally inform all sexual partners — military or civilian — of their HIV status before engaging in sexual activity, and to use condoms or other "proper methods" to prevent the transfer of bodily fluids during sex. Failure to follow these rules can result in criminal penalties under the Uniform Code of Military Justice.

PLAINTIFF'S CLAIMS ARE JUSTICIABLE

106. Plaintiff's claims are justiciable because they facially challenge the constitutionality of the military's policies and practices and allege that the military failed to follow its own regulations.

107. Plaintiff has exhausted any and all available administrative remedies prior to seeking judicial review, such that he has no alternative to remain in the National Guard or rejoin the military components of ROTC beyond litigation.

108. In the alternative, requiring Plaintiff to exhaust his administrative remedies would be futile given the blanket bar on accession for enlistees who are HIV-positive.

109. In the alternative, requiring exhaustion would result in irreparable harm, as Plaintiff is due to graduate from Norwich in May 2023 and will be unable to obtain a commission as an army officer through the ROTC program if not reinstated.

CLAIMS FOR RELIEF

COUNT I
Violation of Equal Protection Under the Fifth Amendment's Due Process Clause (Based on HIV Status)
Against All Defendants

110. All prior paragraphs are incorporated as if fully set forth herein.

111. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Due Process Clause includes within it a prohibition against the denial of equal protection by the federal government, its agencies, its officials, or its employees.

112. Defendants' policies and practices, as described above, discriminate impermissibly against people living with HIV both on their face and as-applied by barring people living with HIV from enlistment in the military and appointment as officers in the military based solely on their HIV status.

113. Defendants routinely permit similarly-situated individuals who are not living with HIV, including but not limited to people with comparable chronic, manageable conditions, to enlist in the military, to commission as officers, and to deploy worldwide.

114. Government discrimination against individuals living with HIV bears all the indicia of a suspect classification requiring heightened scrutiny by the courts:

a. People living with HIV have suffered through a unique history of misinformation, stigma, and discrimination for decades, and continue to suffer such discrimination to this day;

b. People living with HIV are a discrete and insular group and lack the political power to protect their rights through the legislative process. A small minority of the overall population is currently living with HIV. People living with HIV often fear disclosing their status and continue to lack representation at any level of the federal government. For the first decade after the discovery of HIV, the needs of people living with and at higher risk for HIV were ignored and/or not adequately resourced by federal, state, and local governments. Even today, many people living with HIV do not have access to care, and there are aspects of the criminal law that unfairly single out and discriminate against people living with HIV;

c. Particularly in light of dramatic medical advances—the benefits of which have been fully understood and documented—a person's HIV status bears no relation to that person's ability to contribute to society; and

d. Even with medical treatment rendering their viral load undetectable, a person cannot change their HIV status. While HIV is treatable and manageable, it is not curable. There is no available course of treatment that a person could undergo to change their status as a condition of equal treatment.

115. Defendants' disparate treatment of Plaintiff and other individuals living with HIV deprives them of their right to equal dignity and stigmatizes them as second-class citizens in violation of equal protection guarantees.

116. There is no valid purpose for this disparate treatment, and neither is the classification at issue—HIV status—adequately tailored in service of any governmental interest.

117. This disparate treatment is not even rationally related to a legitimate governmental interest, let alone serving an important or compelling governmental interest, or being substantially related or narrowly tailored to such an interest. Thus, the enlistment ban and service restrictions cannot withstand any form of scrutiny and are invalid.

118. Through the actions and omissions above, Defendants have violated the Due Process Clause of the Fifth Amendment.

COUNT II
Violation of Equal Protection Under the Fourteenth Amendment (42 U.S.C. § 1983)
(Based on HIV Status)
Against the Vermont National Guard Defendants

119. All prior paragraphs are incorporated as if fully set forth herein.

120. The Fourteenth Amendment to the United States Constitution provides that no person shall be denied "equal protection of the laws."

121. To the extent the Vermont National Guard Defendants have not violated Plaintiff's equal protection rights under the Fifth Amendment, they have violated Plaintiff's equal protection rights under the Fourteenth Amendment.

COUNT III
Violation of the Administrative Procedure Act
(Failure to Follow Mandatory Policies and Procedures)
Against All Defendants

122. All prior paragraphs are incorporated as if fully set forth herein.

123. Because Plaintiff was already a member of the military when he was determined to be HIV-positive in November 2020, including having been sworn into the Vermont ARNG in or

around September 29, 2019, Defendants should have applied their retention policies, rather than their accession policies, to him.

124. Defendants have failed to abide by their own regulations and governing statutes in the process of summarily separating Plaintiff.

125. First, under Defendants' own retention policies, Plaintiff should have been "medically evaluated to determine the status of his or her infection and [fitness for duty]." *see* AR 600-110, ch. 7-9(e)(8). Instead, Defendants—without any additional testing, evaluations, hearing, or medical referrals—separated Plaintiff from service in the National Guard and denied him the military benefits of ROTC.

126. If the procedures set forth in the applicable regulations described above had been followed, Plaintiff would have been retained in the National Guard given his overall physical health.

127. Similarly, under retention standards as noted in DoDI 6130.03, § 5.23(b)(1), the Defendants failed to refer Plaintiff for "appropriate treatment and a medical evaluation of fitness."

128. Defendants failed to follow the appropriate referral and testing procedure and also failed to apply retention standards to Plaintiff, whereby he should have been treated in the same manner as a Service member with any other chronic or progressive illnesses. DoDI 6130.03, § 5.23(b)(1).

129. Second, Plaintiff was also not tested for HIV in accordance with military regulations. *See, e.g.*, DoDI 6485.01, Encl. 3, § 1.

130. In accordance with Defendants' policies, Plaintiff took a blood test when he enlisted, which revealed that he was not living with HIV.

131. Another blood test that revealed Plaintiff is living with HIV was taken a year later at MGH—outside of military testing procedures.

132. Plaintiff should not have been separated based on such blood test results.

133. Defendants did not use a military-approved testing procedure after Plaintiff's self-disclosure of his HIV-positive status.

134. Accordingly, the Defendants' actions in separating Plaintiff from service violate the Administrative Procedure Act, 5 U.S.C. §551 *et seq*, because they are arbitrary and capricious, unsupported by substantial evidence, and contrary to law.

COUNT IV
Violation of the Administrative Procedure Act
(Facial and As-Applied Challenge to HIV Retention Policies and Practices)
Against All Defendants

135. All prior paragraphs are incorporated as if fully set forth herein.

136. Defendants' bar on individuals living with HIV from becoming officers, deployment, or assignment overseas, and participation in military-sponsored educational programs, as enforced through such regulations as DoDI 6485.01, AR 600-110, 5-3(h), and AR 135-178, Sec 6-6(a) are arbitrary, capricious, not in accordance with law, an abuse of discretion, and contrary to the APA.

137. The original publication of DoDI 6485.01, prohibiting service members with HIV from becoming officers, did not establish that the Department of Defense had examined the relevant data and did not articulate a rational connection between the facts and the policy choices made. As such, that DoDI and any subsequent continuation of those prohibitions in the Code of Federal Regulations, in DoD directives, instructions, or other regulations, or in service-specific directives, instructions, or regulations, is arbitrary, capricious, not in accordance of law, an abuse of discretion, and violative of the APA.

138. These regulations are based on outdated information that does not comport with the current state of HIV medical science.

139. The APA requires agency decision-making to evince a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). If an agency fails to address the current state of medical science, it does not "consider an important aspect of the problem"; relatedly, an agency cannot offer an explanation for its decision that "runs counter to the evidence before" it. *Id.*

140. "Any understanding of HIV that could justify [a categorical bar on deploying HIV-positive service members] is outmoded and at odds with current science. Such obsolete understandings cannot justify a ban, even under a deferential standard of review." *Roe v. Dep't. of Defense*, 947 F.3d 207, 228 (4th Cir. 2020).

141. HIV-specific policies that do not account for medical advancements demonstrate a lack of reasoned decision-making, rendering such policies arbitrary and capricious. *See Deese v. Esper*, 483 F.Supp.3d 290, 310-11 (D. Md. 2020) ("If [the military's] assumptions or conditions are not in fact based on reality, or do not hold in a given case, then this Court may conclude that the agency's actions against an HIV-positive service member were arbitrary and capricious.").

142. In addition, Defendants' policies that limit opportunities for members of the military also violate the APA because they are contrary to:

a. 10 U.S.C. § 532(a)(3), which states as follows: "Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to

a person who . . . (3) is physically qualified for active service." There is no basis to support the military's assumption that well-managed HIV renders an individual physically unqualified for service;

b. The Equal Protection Clause, in that they are premised on bias and stereotypes based on HIV-positive status; and

c. The Due Process Clause, in that they deprive individuals of liberty and property interests without sufficient procedural safeguards.

143. Accordingly, Defendants' actions violate the Administrative Procedure Act, 5 USC §551 *et seq.* facially and as applied to Plaintiff.

COUNT V
Violation of the Administrative Procedure Act
(Facial and As-Applied Challenge to HIV Accession Policies and Practices)
Against All Defendants

144. All prior paragraphs are incorporated as if fully set forth herein.

145. Because Plaintiff was already a member of the military when he was determined to be HIV-positive in November 2020, including having been sworn into the Vermont ARNG in or around September 29, 2019, he should have been subject to Defendants' retention policies and practices. Even if Defendants' accession policies and practices were deemed appropriate to apply to Plaintiff, however, those policies and practices violate the APA because they are arbitrary, capricious, not in accordance of law, and an abuse of discretion.

146. Treating HIV as a disqualifying condition for accession is contrary to the APA, both facially and as-applied to Plaintiff, because it is:

a. based on outdated thinking that does not comport with the current state of HIV medical science;

b. arbitrary and capricious, as there is no basis in law or medical science for treating recruits, enlistees, or cadets differently from similarly-situated National Guard members;

c. contrary to 10 U.S.C. § 532(a)(3);

d. contrary to Equal Protection Clause, in that it is premised on bias and stereotypes based on HIV-status; and

e. contrary to Due Process, in that it deprives individuals of property and liberty interests without sufficient procedural safeguards.

147. Defendants' accession policies and practices of refusing to consider a waiver for an individual who is HIV-positive is contrary to the APA for all of the same reasons, both facially and as-applied to Plaintiff.

COUNT VI
Violation of Procedural Due Process Under the Fifth Amendment
Against All Defendants

148. All prior paragraphs are incorporated as if fully set forth herein.

149. Plaintiff was separated from service in the National Guard and denied the military benefits of ROTC because he was purportedly medically unfit for duty due to his HIV-positive status. While Plaintiff does not agree that he was medically unfit—and Dr. Anne Neilan, a board-certified internist, pediatrician, and infectious disease clinician at Massachusetts General Hospital and an instructor at Harvard Medical School, indeed found him medically fit—the Defendants' own retention standards required that Plaintiff be "medically evaluated to determine the status of his…infection and [fitness for duty]." *see* AR 600-110, ch. 7-9(e)(8).

150. The Fifth Amendment states that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

151. A person has a protected liberty interest in his good name, reputation, honor, and integrity, of which he cannot be deprived without due process.

152. A person has a protected property interest in pursuing his education, as well as in future educational and employment opportunities and occupational liberty, of which he cannot be deprived without due process.

153. Plaintiff's constitutionally protected property and liberty interest in his continued enlistment in the National Guard and in freedom from arbitrary suspension, loss of current and potential income, loss of title and rank, and loss of medical benefits arises from the policies, courses of conduct, practices, and understandings established by the National Guard and the Department of Defense.

154. The Vermont National Guard and the Department of Defense have a duty to provide to their enlistees, cadets, and soldiers due process of law by and through any and all policies and procedures set forth by the National Guard and the Department of Defense.

155. Plaintiff was entitled to fundamentally fair procedures to determine whether he was medically fit under the military's retention standards.

156. Defendants failed to follow the procedures set forth for individuals living with HIV under AR 135-178, AR 40-501, and AR 140-10, among other laws and regulations.

157. Additionally, as required under DoDI 6130.03, § 5.23(b)(1), the Defendants failed to refer Plaintiff for "appropriate treatment and a medical evaluation of fitness."

158. There was no evaluation of Plaintiff's medical fitness for retention, no consideration of whether Plaintiff was eligible for a waiver, and no determination of whether Plaintiff was eligible for reassignment or referral to disability evaluation services.

159. Plaintiff was also not screened and tested for HIV in strict accordance with military regulations. See, e.g., DoDI 6485.01, Encl. 3, § 1. Defendants did not follow a military-approved testing procedure after Plaintiff's self-disclosure that he was living with HIV.

160. As a result, through their actions and omissions, Defendants violated the Due Process Clause of the Fifth Amendment in separating Plaintiff and failing to provide him with the basic due process protections, which they are required to provide to enlisted service members living with HIV or with any other chronic but manageable health condition.

161. As a direct and proximate result of the above conduct, Plaintiff was deprived of liberty and property interests, including, without limitation, educational, medical and dental benefits, and career opportunities with the military; subjected to stigma for being separated solely due to his HIV status; and put in a position where he will be forced to disclose his HIV status to future employers and academic institutions to explain the reason for his separation.

162. Plaintiff has a property right in the benefits to which he is entitled as a service member who acquired a condition the military deemed disqualifying. Defendants' policies and practices, which automatically and arbitrarily categorize individuals living with HIV as medically unfit, exclude Plaintiff and other similarly-situated individuals from a range of employment opportunities in the military, despite hundreds of others with the same condition being allowed to continue to serve as officers in a multitude of positions. Defendants' policies and practices also place a stigma of purported disability on Plaintiff and other similarly-situated individuals, limiting their freedom to take advantage of employment opportunities, and precluding them from continuing in their chosen careers. Moreover, Defendants' actions are more likely to result in the forced disclosure of Plaintiff's HIV status in order to explain the separation on his record.

163. As a result, Defendants have deprived Plaintiff of a liberty interest.

164. Plaintiff was not afforded the due process due since Defendants failed to medically evaluate Plaintiff to determine his fitness for duty.

165. Instead, Defendants—without any additional testing, evaluations, hearing, or medical referrals—separated Plaintiff from service in the Guard and denied him the military benefits of ROTC.

166. Plaintiff was also not tested for HIV in accordance with military regulations. *See, e.g.*, DoDI 6485.01, Encl. 3, § 1.

167. Through the actions and omissions above, Defendants have violated the Due Process Clause of the Fifth Amendment.

COUNT VII
Violation of Procedural Due Process Under the Fourteenth Amendment (42 U.S.C. § 1983)
Against the Vermont National Guard Defendants

168. All prior paragraphs are incorporated as if fully set forth herein.

169. To the extent the Vermont National Guard Defendants have not violated Plaintiff's due process rights under the Fifth Amendment, they have violated Plaintiff's due process rights under the Fourteenth Amendment.

DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial on all issues so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Issue a judgment, pursuant to 28 U.S.C. §§ 2201-02, declaring that:

    a. Defendants' actions to separate Plaintiff from military service violate the APA, as well as the Equal Protection and Due Process protections of the U.S. Constitution;

    b. Defendants' retention standards that bar HIV-positive individuals from becoming officers and place other restrictions on service and military

assignments, including but not limited to the enforcement of DoDI 6485.01, AR 600-110, 5-3(h), and AR 135-178, Section 6-6, violate the APA, as well as the Equal Protection and Due Process protections of the U.S. Constitution, both on their face and as applied to Plaintiff; and

c. Defendants' accession standards that deem HIV-positive status to be a disqualifying condition, including but not limited to DoDI 6130.03, 5.23, and that allow for no waivers, DoDI 6485.01, 3(a), violate the APA, as well as the Equal Protection and Due Process protections of the U.S. Constitution, both on their face and as applied to Plaintiff.

2. Preliminarily and permanently enjoin Defendants, their agents, employees, representatives, successors, and any other person or entity subject to their control or acting directly or indirectly in concert with them:

   a. from enforcing the challenged retention standards, including by enjoining any separation, discharge, adverse action, or denial of promotion, reenlistment, or continuation of service, accession, solely because an individual is living with HIV; and

   b. from enforcing the challenged accession standards, including by enjoining any denial of appointment or accession solely because an individual is living with HIV.

3. Hold unlawful and set aside the challenged accession and retention standards;

4. Require the Vermont National Guard to retroactively reinstate Plaintiff;

5. Require Defendants to retroactively reinstate Plaintiff into the military components of the ROTC program, including but not limited to accepting him into Advanced Course and assigning him for training in preparation for an officer commission upon graduation in 2023;

6. Award Plaintiffs costs, expenses, and reasonable attorneys' fees pursuant to 28 U.S.C. § 2412, 42 U.S.C. § 1988, and any other applicable laws; and

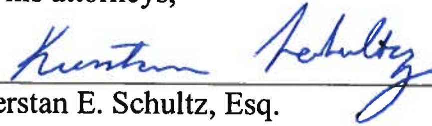
7. Grant any injunctive or other relief that this Court deems just, equitable, and proper.

Dated: May 4, 2022

Respectfully submitted,

JOHN DOE,

By his attorneys,



Kierstan E. Schultz, Esq.
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
Tel.: 603-628-4031
kschultz@nixonpeabody.com

Christopher E. Queenin, Esq. (*pro hac vice application forthcoming*)
Krithika Rajkumar, Esq. (*pro hac vice application forthcoming*)
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: 617-345-1000
cqueenin@nixonpeabody.com
krajkumar@nixonpeabody.com

Sophia L. Hall, Esq. (*pro hac vice application forthcoming*)
Oren Sellstrom, Esq. (*pro hac vice application forthcoming*)
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street, 5th Floor
Boston, MA 02110
Tel: 617-984-0274
shall@lawyersforcivilrights.org
osellstrom@lawyersforcivilrights.org