Wilkins v. Austin: How the Department of Defense's Policies Perpetuate the Stigmatization of HIV

I. OVERVIEW

In the early 1980s, young and otherwise healthy people belonging to marginalized and stigmatized groups, *i.e.*, gay men, intravenous drug users, Haitians, and hemophiliacs, were diagnosed with AIDS and the disease quickly acquired the colloquial moniker "gay cancer."[1] That was the beginning of the stigmatization and misinformation surrounding AIDS and HIV. Most people were, and still are, under the misguided impression that HIV is easily spread from person to person, a dangerous assumption that is reflected in the United States military's policy regarding HIV-positive individuals.

While the Department of Defense (DoD) sets out policies and regulations regarding HIV-positive individuals, the individual branches may also issue their own policies stricter than those of the DoD.[2] The DoD has taken the position that HIV-positive individuals have a "disqualifying condition in light of . . . criteria set forth in DoDI 6130.03, § 1.2(d)."[3] The DoD has also conceded that "the military will 'deny waivers' for those who are HIV positive, even if they are asymptomatic with an undetectable

1. Wilkins v. Austin, 745 F. Supp. 3d 375 (E.D. Va. 2024).
2. *Id.* at 378.
3. *Id.* at 380.

viral load."[4] Along with that, the Army "designates an HIV diagnosis as a disqualifying medical condition that precludes accession."[5]

The plaintiffs of *Wilkins v. Austin* are Isaiah Wilkins, Carol Coe, Natalie Noe, and the Minority Veterans of America. Isaiah Wilkins was a twenty-four-year-old Black cisgender gay man who joined the National Guard at seventeen, but later separated from the Guard when he was selected to be a student at the United States Military Academy Preparatory School (USMAPS).[6] During his routine entry processing for USMAPS, he was diagnosed with HIV for the first time and the accessions board subsequently discharged him.[7] Wilkins was on antiretroviral therapy that had suppressed his viral load to an undetectable level and would continue to take the medication during his Army service.[8] Carol Coe was a thirty-three-year-old Latina transgender lesbian woman who joined the Army when she identified as male, where she was later diagnosed with HIV and began antiretroviral therapy, reaching an undetectable load.[9] She left the Army in 2013 and tried to re-enlist in 2022, but was told she could not due to her HIV-status.[10] Besides her HIV status, there was nothing else that would disqualify Coe from serving in the military.[11] Natalie Noe was a thirty-three-year-old cisgender woman.[12] Noe began antiretroviral therapy after her diagnosis and reached undetectable viral load and was asymptomatic.[13] Minority Veterans of America was a private organization that advocates for "equity and justice for the minority veteran community, namely, for the 10 million veterans that include women, people of color, LGBTQ+ people, people living with HIV and (non-)religious minorities."[14] Plaintiffs Wilkins and Coe were members of the Minority Veterans of America organization.[15]

The plaintiffs challenged the DoD's accession policy under both the equal protection section of the Fifth Amendment's Due Process Clause and the Administrative Procedure Act (APA).[16] They argued that the

4. *Id.* at 381.
5. *Id.*
6. *Id.* at 382.
7. *Id.* at 382-83.
8. *Id.* at 383.
9. *Id.*
10. *Id.*
11. *Id.* at 383-84.
12. *Id.* at 384.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

military's accession policy barring HIV-positive individuals from joining any military service branch was "irrational, arbitrary, and capricious—and thus unlawful—because it is irreconcilable with current scientific evidence concerning HIV treatment and transmission."[17] This was not the first time that a DoD policy regarding HIV-positive individuals has been challenged.[18]

In the cases of *Harrison v. Austin* and *Roe v. Austin*, the plaintiffs challenged a military policy that "barred asymptomatic HIV-positive service members with undetectable viral loads from deploying worldwide . . . ."[19] After the rulings in *Harrison* and *Roe*, "the Secretary of Defense amended the DoD instructions and ordered the secretaries of all military branches to amend their respective regulations" so that currently enlisted HIV-positive service members could commission into other positions and be able to deploy worldwide.[20] However, those court decisions did not address the DoD policy that bars HIV-positive individuals from joining the military through the accession board.[21] The Eastern District of Virginia addressed that exact question in *Wilkins v. Austin*, *holding* that the DoD must allow people seeking accession into any of the military branches who are asymptomatic HIV-positive with undetectable viral loads and maintain treatment to enlistment, gain an appointment, and be inducted. *Wilkins v. Austin*, No. 1:22-CV-1272 (LMB/IDD), 2024 WL 3874873, at *16 (E.D. Va. Aug. 20, 2024).

II. BACKGROUND

The United States Military has historically been unaccommodating to members of the LGBTQ+ community. In the 1940s, being gay or lesbian was considered a "mental illness" by the military and was a cause for discharge from service.[22] In 1982, the military made a policy that explicitly banned gay and lesbian men and women from joining the military.[23] In 1993, the military instituted the "Don't Ask, Don't Tell" policy, which meant that closeted LGBTQ people could join the military

17. *Id.* at 385.

18. *See generally*, Harrison v. Austin, 597 F. Supp. 3d 884, 904 (E.D. Va. 2022); Roe v. U.S. Dep't of Def., 947 F.3d 207, 220 (4th Cir. 2020).

19. *Wilkins*, 745 F. Supp. 3d at 380.

20. *Id.*

21. *Id.*

22. *Diversity, Equity, and Inclusion: DOD LGBTQ+ Timeline*, *NHHC Nav. Serv. of Lesbian, Gay, Bisexual, and Transgender Pers*. 1 (Oct. 13, 2016), https://www.history.navy.mil/content/dam/nhhc/news-and-events/events/DoD%20LGBTQ%20Timeline.pdf.

23. *Id.*

and no one would ask about their sexual orientation, but if they openly disclosed their sexual orientation, they would be discharged.[24] However, in 2011 Congress repealed the "Don't Ask, Don't Tell" policy and ten years later the ban on transgender individuals joining the service was rescinded.[25]

It is likely that one of the factors motivating the DoD's history and policies against HIV-positive individuals is the stigma surrounding HIV.[26] Some examples of the stigma surrounding HIV are "believing only certain groups of people get HIV, judging people who take steps to prevent HIV, and feeling people deserve to get HIV because of their choices."[27] However, HIV does not only affect certain groups of people and it is not easily spread as the CDC "estimate[s] the per-exposure risk of transmitting untreated HIV during the riskiest sexual activity . . . to be 1.38%."[28] HIV also cannot be spread "by saliva, tears, or sweat, and it is not transmitted through hugging, handshaking, sharing toilets, exercising together, or closed-mouth kissing."[29] HIV is only spread when infected bodily fluids of one person encounter the damaged tissue, a mucous membrane, or bloodstream of another person.[30] However, even then, transmission is unlikely.[31]

HIV was once considered to be fatal, but now it is considered a chronic treatable condition.[32] This is largely due to antiretroviral therapy becoming available to HIV patients in the mid-1990s.[33] Antiretroviral therapy consists of a once-daily pill that, with strict adherence, suppresses an HIV-positive person's viral load, which means that the virus will become "undetectable."[34] Because of this therapy, HIV-positive people "who are timely diagnosed and treated 'experience few, if any, noticeable effects on their physical health and enjoy a life expectancy approaching that of those who do not have HIV.'"[35]

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24. *Id.* at 2.
25. *Id.*
26. *Wilkins*, 745 F. Supp. 3d at 379.
27. *Stigma and HIV*, Ctrs. for Disease Control and Prevention (Apr. 16, 2024), https://www.cdc.gov/hiv/health-equity/index.html#:~:text=People%20with%20HIV%20often%20internalize,and%20apply%20them%20to%20themselves.
28. *Wilkins*, 745 F. Supp. 3d at 379.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 380.
33. *Id.* at 379.
34. *Id.*
35. *Id.* at 380. (quoting Roe v. U.S. Dep't of Def., 947 F.3d 207, 212-14 (4th Cir. 2020)).

HIV is now a manageable condition, yet the United States military still treats it as a reason to deny accession into their ranks.[36] Central to the issue of HIV-positive individuals' accession into the military presented in *Wilkins v. Austin* are the two cases of *Harrison v. Austin* and *Roe v. Austin*, which both dealt with the military's policy of "prohibiting the commissioning and retention of asymptomatic HIV-positive service members with undetectable viral loads," as well as issues with deployment for HIV-positive individuals.[37]

A. Harrison v. Austin

In 2018, a plaintiff, Nicholas Harrison, filed a complaint challenging a DoD policy that categorically banned HIV-positive individuals from deploying worldwide, which he argued prevented him from commissioning as a Judge Advocate General Corps (JAGC) officer in the D.C. National Guard.[38] Harrison argued that this categorical bar violated the equal protection section of the Fifth Amendment's Due Process Clause because the policy had no rational basis.[39] Specifically, there was no rational basis for the policy because it was "at odds with current medical evidence concerning HIV treatment and transmission."[40]

An equal protection claim under the Due Process Clause of the Fifth Amendment requires plaintiffs to "demonstrate that [they have] been treated differently from others with whom [they are] similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination."[41] If the plaintiff has achieved this first step, then the court must then decide if the unequal treatment can be justified under the correct level of scrutiny.[42] In *Harrison*, the plaintiffs argued that heightened scrutiny was the correct level of scrutiny because the "defendants' classification of HIV-positive service members is suspect," but the court did not address that argument because the Equal Protection claims had merit under rational basis review.[43]

Rational basis review requires courts to determine if a rule or law has a reasonable relation to a legislative purpose, and is not arbitrary or

36. *Id.* at 382.
37. *Id.* at 378.
38. *Id.* at 384.
39. *Id.* at 385.
40. *Id.*
41. Harrison v. Austin, 597 F. Supp. 3d 884, 904 (E.D. Va. 2022) (quoting Martin v. Duffy, 858 F.3d 239, 252 (4th Cir. 2017).
42. *Id.*
43. *Id.*

discriminatory.[44] The court in *Harrison* "focused on the qualifications of HIV positive service members compared to those of their similarly situated peers, not the number of people in the isolated class."[45] Hence, why they did not address the HIV-positive service members as a suspect class and implemented rational basis review.[46]

The defendants in Harrison tried to persuade the court that they did not need to address the plaintiffs' arguments under rational basis review because the plaintiffs "failed to meet either of their two initial burdens to succeed on an [E]qual [P]rotection claim."[47] The defendants argued that the plaintiffs had not met the burden of proving that there was a similarly situated class in the military to fulfill one of the first requirements of the equal protection claim.[48] However, the plaintiffs argued that there were similarly situated service members who were not barred from worldwide deployment even though, while not HIV-positive, they had comparable chronic manageable conditions to HIV-positive service members.[49]

The defendants also argued that the plaintiffs failed to prove the second part of the equal protection claim because they could not prove that the DoD acted with malicious intent to discriminate against HIV-positive individuals.[50] However, plaintiffs argued that "a showing of animus is not necessary," because all that is required is that the plaintiffs show that they "[were] irrationally or arbitrarily treated differently from similarly situated parties."[51] Therefore, under rational basis review the court found that the DoD's policy to categorically bar HIV-positive individuals from deploying worldwide was irrational and arbitrary because it was at odds with current scientific evidence regarding HIV treatment and transmission.[52] The court in *Harrison* enjoined the defendants from categorically barring the worldwide deployment of the plaintiff or any other HIV-positive service member with an undetectable viral load and ordered the Secretary of the Army to rescind the denial of Harrison's application into the National Guard JAGC.[53]

44. Nebbia v. New York, 291 U.S. 502, 537 (1934).
45. *Wilkins*, 745 F. Supp. 3d at 392.
46. *Harrison*, 597 F. Supp. 3d at 904.
47. *Id.*
48. *Id.* at 904-05.
49. *Id.* at 905.
50. *Id.* at 907.
51. *Id.*
52. *Id.* at 916.
53. *Id.* at 915-16

B. Roe v. Austin

This lawsuit was also filed in 2018.[54] The plaintiffs, service members in the Air Force, challenged the same DoD policy because they were being threatened with discharge due to their HIV status.[55] They also argued that it violated the equal protection section of the Fifth Amendment's Due Process Clause *and* the APA.[56]

An equal protection claim under the Due Process Clause of the Fifth Amendment, as previously stated, requires plaintiffs to demonstrate that they were treated differently from others that are in a similar situation and that the unequal treatment was intentional or purposeful discrimination.[57] The APA governs agency actions and, under its section 5 U.S.C. § 706(2)(A), it "commands courts to 'hold unlawful and set aside agency action, findings, and conclusions' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[58] It has been held in at least three other circuit courts that the rational basis review set out in the Equal Protection Clause and the arbitrary and capricious review set out under the APA are "fundamentally indistinguishable."[59]

There are three policies that discuss deployment of HIV-positive Air Force servicemembers, but the one in contention in *Roe* is Modification 13, "which governs deployment of HIV-positive servicemembers to [United States Central Command's] CENTCOM's area of responsibility."[60] This modification requires service members to obtain a waiver before deploying to a CENTCOM area.[61] The defendants took the position that suggested that CENTCOM "require[d] HIV-positive airmen to obtain a waiver to deploy to its area of responsibility."[62] They further argued that that position was "supported by CENTCOM's Modification 13 which itself provides, '[m]edical clearance to deploy with any of the following documented medical conditions may be

54. *Wilkins*, 745 F. Supp. 3d at 384-85.

55. *Id.*

56. *Id.* at 385.

57. *Harrison*, 597 F. Supp. 3d at 904 (quoting Martin v. Duffy, 858 F.3d 239, 252 (4th Cir. 2017)).

58. Roe v. U.S. Dep't of Def., 947 F.3d 207, 220 (4th Cir. 2020); Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1966).

59. *Harrison*, 597 F. Supp. 3d at 904; *see also* Grant Med. Ctr. v. Hargan, 875 F.3d 701, 708 (D.C. Cir. 2017); Real Alternatives, Inc. v. Dep't of Health & Human Servs., 867 F.3d 338, 353 (3d Cir. 2017); Ursack Inc. v. Sierra Interagency Black Bear Grp., 639 F.3d 949, 955 (9th Cir. 2011).

60. *Roe*, 947 F.3d at 221.

61. *Id.*

62. *Id.*

granted, except where otherwise noted,' and then lists HIV as a non-deployable condition."[63]

The court found that the record that they had did not show whether "CENTCOM's deployment policies act as a categorical ban on deploying HIV-positive servicemembers to CENTCOM's area of responsibility" or whether "CENTCOM provides an individual assessment to each HIV-positive servicemember who seeks a waiver."[64] However, the court found that the plaintiffs had shown success on their claims in either instance.[65] This is because even if Modification 13 was not a categorical ban, the Air Force treating HIV-positive service members as ineligible to deploy to CENTCOM and denying them assessment for continued service was arbitrary.[66] And "[i]f Modification 13 is a categorical ban, the Government failed to satisfy the APA's requirements in promulgating the policy."[67]

Along with finding that the defendant's use of Modification 13 was arbitrary, "the Fourth Circuit [further] explained that plaintiffs were likely to succeed on the merits of their claim because the defendants 'cannot[] reconcile [their] policies with current medical evidence.'"[68] Thus, the court in *Roe* enjoined the defendants from categorically barring the worldwide deployment of the plaintiffs or any other HIV-positive service members with an undetectable viral load and ordered the Secretary of the Air Force to rescind the discharge of the plaintiffs.[69]

III. COURT'S DECISION

In the noted case, the Eastern District of Virginia reached its decision by analyzing two main issues within the case: "1) whether defendants have asserted any rational bases to withstand the constitutional and statutory challenges to the accession bar; and 2) whether the Court may order the Secretary of the Army to reconsider allowing [the plaintiff] Wilkins to matriculate at [USMAPS] and, if successful, enroll at [West Point]."[70] The court analyzed the first issue by focusing on the three different rationales offered by the defendants, which were medical and

63. *Id.*
64. *Id.* at 222.
65. *Id.*
66. *Id.*
67. *Id.*
68. Wilkins v. Austin, 745 F. Supp. 3d 375, 392 (E. D. Va. 2024) (quoting *Roe*, 947 F.3d at 220).
69. *Id.* at 386.
70. *Id.* at 388-89.

scientific rationales, a financial rationale, and a foreign relations rationale.[71]

For medical and scientific rationales, the defendants tried to restate the previous argument, made in *Harrison* and *Roe*, that HIV-positive individuals could be non-compliant with medications causing a viral load rise, that HIV is "an infectious, incurable, bloodborne disease" that could be easily transmitted to other service members, and that the side effects of an HIV diagnosis could further harm the service member's health.[72] The court rejected this argument mainly because they, and the Fourth Circuit, already rejected the same argument in *Harrison* and *Roe* as "the underlying science of HIV treatment and transmission does not provide a rational basis to bar the accession of HIV-positive individuals."[73] However, they still found that the antiretroviral medications had no special requirements for storage and would be just as easy to access as any other types of medication already have been for service members abroad.[74] And even if an HIV-positive individual was non-compliant with their medications, they would not suffer any immediate negative health effects and the virus would enter into a "clinical latency that can last years," so nothing in the record for this case undercut those findings as the defendants offered no new evidence that would alter the previous conclusion made in *Harrison* and *Roe*.[75] Thus, the defendants did not present a rational basis in this case for the categorical bar of accession for HIV-positive individuals based on medical rationales.[76]

For the financial rationale, the defendants argued that "it is rational to exclude asymptomatic HIV-positive individuals with undetectable viral loads from accession because they 'would impose disproportionately higher financial costs on the military compared to individuals without HIV,' based on previous estimates that antiretroviral therapy costs between $10,000 and $25,000 per person annually."[77] However, the defendants offered no testimony, data, or facts to support this claim.[78] Plaintiffs argued that the financial rationale did not offer a rational basis for the categorical bar because the defendants "do not base accession decisions on the cost of health care for any other recruits with any other

71. *Id.* at 387, 389, 393, 394.
72. *Id.* at 389.
73. *Id.*
74. *Id.*
75. *Id.* at 390 (quoting Roe v. U.S. Dep't of Def., 947 F.3d 207, 227 (4th Cir. 2020)).
76. *Id.* at 392.
77. *Id.* at 393 (citation omitted) (quoting Harrison v. Austin, 597 F. Supp. 3d 884, 913-14 (E.D. Va. 2022)).
78. *Id.*

health condition, including chronic ones requiring ongoing management."[79] Thus, the court found that because the defendants offered no evidence to support this rationale and the fact that "the DoD health care budget already includes HIV-related health care needs of current service members' dependents living with HIV," that their financial rationale does not offer a rational basis for the categorical bar.[80]

For the foreign relations rationale, the defendants argued that "because of the DoD's interests in respecting host nation laws and in maintaining a ready force of warfighters with unrestricted deployability, it [was] rational to deny the accession of an individual for whom the military knows will not be worldwide deployable."[81] Plaintiffs argued that this rationale did not provide a rational basis for the categorical bar because the defendants had not given evidence that distinguishes between host nation restrictions for new enlistees from newly-commissioned officers.[82] The court rejected the foreign relations rationale by stating that the "DoD does not employ 'long-standing' 'diplomatic deference' for any other minority group, [which] makes it simply irrational for defendants to maintain that they must defer to host-nation laws only with regard to asymptomatic HIV-positive individuals with undetectable viral loads," and they further rejected the rationale because of what they had previously concluded in *Harrison* and *Roe*.[83] In *Harrison*, there was no evidence in that record that "an active-duty service member has ever been deported from a foreign country due to their HIV-positive status."[84] And, in *Roe*, the Fourth Circuit denied this rationale because the record did not show "whether the laws of host nations 'appl[y] to both military servicemembers and civilians' or whether 'the inability to enter one nation would preclude deployment to the entire area.'"[85] Thus, the court found that the foreign relations rationale had no rational basis for the categorical ban.[86]

The Court analyzed the second issue by focusing on plaintiff Isaiah Wilkins' matriculation into USMAPS and the remedies available to him.[87] Defendants argued that under 10 U.S.C. § 7446(a), Wilkins was no

79. *Id.*
80. *Id.* at 394.
81. *Id.*
82. *Id.*
83. *Id.* at 396; Harrison v. Austin, 597 F. Supp. 3d 884,916 (E.D. Va. 2022); Roe v. U.S. Dep't of Def., 947 F.3d 207, 234 (4th Cir. 2020).
84. *Wilkins*, 745 F. Supp. 3d at 395.
85. *Id.* (quoting *Roe*, 947 F.3d at 225-26).
86. *Id.* at 397.
87. *Id.*

longer eligible to attend USMAPS because he was twenty-three years old when the complaint in this case was filed.[88] Plaintiffs argued, and the court agreed, that Wilkins was separated from USMAPS solely due to his HIV status before he turned twenty-three years old, and that Wilkins had met all the other criteria to attend USMAPS, thus the statute should not be used against him.[89] As for a remedy to Wilkins, the court ordered the Secretary of the Army to reevaluate the removal of Wilkins from USMAPS.[90]

The court decided in favor of the plaintiffs as they found that there were no rational bases for the categorical ban that could withstand constitutional challenge and that the court did have the authority to order the Secretary of the Army to reevaluate their decision regarding Wilkin's matriculation into USMAPS.[91]

IV. ANALYSIS

The Eastern District of Virginia held that "[m]ode[r]n science has transformed the treatment of HIV, and . . . asymptomatic HIV-positive service members with undetectable viral loads who maintain treatment are capable of performing all of their military duties . . . ."[92] The holding in this case was a win in the battle to protect HIV-positive individuals from being arbitrarily discriminated against. Discrimination of HIV-positive individuals is closely related to the stigma that surrounds the condition.

A. HIV Stigma and Its Plague of the LGBTQ+ Community

HIV stigma has many negative effects with some of the most problematic being that the stigma can sometimes cause people to forgo getting tested for the condition, cause them to not share their HIV status with others, or even discourage them from accessing HIV medical treatments.[93] As stated before, examples of the stigma surrounding HIV are thinking that only certain types of people can get HIV, judging people for taking measures to prevent HIV, and believing people deserve to

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 398.
92. *Id.* at 399.
93. *Stigma and HIV*, Ctrs. for Disease Control and Prevention (Apr. 16, 2024), https://www.cdc.gov/hiv/health-equity/index.html#:~:text=People%20with%20HIV%20often%20internalize,and%20apply%20them%20to%20themselves.

contract HIV because of who they chose to sleep with.[94] Another issue is that people often refer to HIV as a "disease", and while medically speaking, HIV is technically classified as an infection in the body. However, "infection" is often synonymous with the term disease in most people's vocabulary. "Disease" can be a negative and scarily charged word that may cause some people to be paranoid if they ever encounter someone who has HIV, which also only furthers the stigma. The term "condition" is a more appropriate term for HIV as it is manageable and treatable. Treating the condition of HIV as something to be feared is a vicious cycle that will only cause people, HIV-positive and HIV-negative alike, to suffer because the fear of discrimination within professional and personal lives creates a situation where more people will refuse to get tested, keep it a secret from susceptible partners, and reject medical treatment.

HIV stigma also plagues the LGBTQ+ community. The stigma surrounding HIV perpetuates the stigma surrounding LGBTQ+ individuals as gay and bisexual men are the most affected by the condition.[95] The discrimination against LGBTQ+ individuals can also cause an increase in the spread of HIV. According to the Human Rights Campaign:

> Dealing with the potential consequences of bias and discrimination—job loss, homelessness, lack of healthcare insurance—often results in LGBTQ+ people engaging in behaviors that facilitate the spread of HIV. For example, in the face of persistent employment discrimination, many transgender women are left with few other options but to engage in survival sex work in order to meet their most basic needs.[96]

For anyone who wants to explore their sexuality, it can be daunting to face the societal barriers of anti-LGBTQ+ bias, discrimination, and stigma of HIV in their personal lives and professional lives. It is unfair for LGBTQ+ individuals to endure such hateful rhetoric to the point that it can force them to put themselves at a higher risk of having HIV and then being further punished for having the condition. The holding in *Wilkins v.*

94. *Id.*

95. *HIV and Gay and Bisexual Men*, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/vitalsigns/hivgaybimen/index.html (Nov. 30, 2021).

96. *How HIV Impacts LGBTQ+ People*, Hum. Rts. Campaign, https://www.hrc.org/resources/hrc-issue-brief-hiv-aids-and-the-lgbt-community#:~:text=Anti%2DLGBTQ+%20bias%20further%20enables,partner%20is%20not%20yet%20undetectable (last visited on Nov. 9, 2024).

Austin is a major advance toward destigmatizing HIV and the experiences of LGBTQ+ individuals.

B. DoD's Lack of Accommodation for the LGBTQ+ Community and the Perpetuation of Stigma

While the military has tried to correct its history of discrimination against the LGBTQ+ and no longer has explicit policies or bans that target the LGBTQ+ community, they still tried to find loopholes, as was seen in *Wilkins v. Austin*, to deny members of the community the ability to join their ranks.[97] The Eastern District of Virginia and the Fourth Circuit appropriately did not allow the DoD to utilize outdated science to justify reducing retention and banning worldwide deployment of HIV-positive individuals in *Harrison* and *Roe*,[98] and they also appropriately did not allow the DoD to utilize that same worn out, outdated science to justify banning HIV-positive individuals from joining the service altogether in *Wilkins v. Austin*.[99]

The United States military has also been suffering from low recruitment numbers in recent years. The DoD reported that in 2023, the military services missed their recruiting goal by 41,000, with the beginning of 2024 starting as the year with the smallest active duty force since 1940.[100] The DoD also reported that "only 23% of young people between 17 and 24 qualify to join the military, but even fewer have interest in joining."[101] The DoD further lists what they believe is contributing to their recruitment challenges, some of which are "[a] smaller eligible population . . . Generation Z, the generation born from 1997 to 2012, generally has a low trust in institutions . . . [and] Generation Z has decreasingly followed traditional life and career paths."[102] A smaller eligible population is likely due to the DoD requiring the medical disqualification of individuals for treatable conditions such as HIV, anxiety, depression, ADHD, and asthma. The military's eligibility pool could increase if the DoD would allow the accession of younger generations who, even if they have a treatable condition such as HIV or a

97. *Wilkins*, 745 F. Supp. 3d at 380.

98. *Id.* at 386.

99. *Id.* at 399.

100. KaMaria Braye, *U.S. Military Sees Record Breaking Low Recruitment Numbers*, WAVY (Dec. 27, 2023, 6:32 AM), https://www.wavy.com/news/military/u-s-military-sees-record-breaking-low-recruitment-numbers/#:~:text=by:%20KaMaria%20Braye,decreases%20the%20propensity%20to%20serve.

101. *Id.*

102. *Id.*

mental condition such as depression or anxiety, are otherwise able-bodied and willing to serve their country. According to Walton Family Foundation's research "42% of Gen Z battles with depression . . . which is almost twice as high as Americans who are over 25 (23%)."[103] Thus, whether the DoD is ready to accept it or not, they will likely have to become more accommodating to candidates' medical conditions if they want to have any success in recruiting the next generation of soldiers. As for having low trust in institutions, having discriminatory bans that perpetuate medical stigmas has likely caused Generation Z to have such low trust in institutions such as the DoD. Clearly, the DoD has promulgated their own failure of recruitment numbers through their archaic ideals of service members following "traditional" life and career paths in an era where tradition is no longer the currency of the world.

The military's policy to disqualify HIV-positive individuals from accession to service perpetuates the stigma of HIV because it categorizes people with HIV as "other" and "dangerous" to those who don't have HIV. However, there have been many scientific and social advances in understanding HIV that show that the military's own understanding of HIV is severely lacking. It is now known that HIV is not easily spread, and even less spreadable if they are taking medication, so there is little to no risk to someone without HIV to get it just from contact with someone who is HIV-positive. HIV is also a treatable and manageable condition, with the lifespan of someone with HIV being similar to someone who doesn't have HIV. The people applying for accession into the military who are HIV-positive are still able-bodied and have the same desire to serve their country as someone who is HIV-negative. It is unfair to categorize their medical history as deeming them lesser than just because they have to take medication every day when "[m]ore than 131 million people—66 percent of all adults in the United States—use prescription drugs," and "[a]bout two-thirds (65%) of [service members, from a sample size of 26,680] had ≥1 [filled prescription medication] in [a] 6 months surveillance period."[104] Thus, the military's policy against HIV-positive individuals, whether it was done knowingly or not, perpetuates

103. *Gen Z's Progressive Stance on Therapy and Mental Health*, *Pac. Oaks Coll.: Voices Digit. Mag.*, (Mar. 4, 2024), https://www.pacificoaks.edu/voices/blog/gen-z-view-on-mental-health/#:~:text=Gen%20Z%20Mental%20Health%20Statistics,are%20over%2025%20(23%25).

104. *Prescription Drugs*, GEO. UNIV., HEALTH POL'Y INST., https://hpi.georgetown.edu/rx drugs/#:~:text=More%20than%20131%20million%20people,Prescription%20drugs%20are%20 costly(last visited Mar. 10, 2025); Joseph Knapik, et al., *Prescription Medication Use of United States Military Service Members by Therapeutic Classification*, 13 Frontiers in Pharmacology 1, 1 (2022).

the negative stigma surrounding HIV when there is no reasonable medical or social basis to do so.

V. CONCLUSION

The Eastern District of Virginia and the Fourth Circuit in their holdings pushed the United States military to rescind their bans on worldwide deployment and the accession bar against HIV-positive individuals in a step that can be seen, and should be seen, as substantial change to promote unity among a traditional government institution and a progressive society. *Wilkins v. Austin* was hopefully the beginning of an institutional change in the DoD that will allow for the dismantling of HIV stigma and anti-LGBTQ+ bias in the military.

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