U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 6, 2022

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *Harrison* v. *Austin*, No. 18-cv-641 (E.D. Va.)
Roe v. *Austin*, No. 18-cv-1565 (E.D. Va.)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek further review of the decision of the United States District Court for the Eastern District of Virginia in the above-captioned cases. A copy of the decision is enclosed.

These cases involve challenges to policies adopted by the Department of Defense (DoD) and some of its components relating to the commissioning and retention of servicemembers who have tested positive for the human immunodeficiency virus (HIV) but are being treated, are asymptomatic, and have an undetectable viral load. In *Roe*, two Air Force servicemembers and an advocacy organization challenged policies that presumptively precluded such servicemembers from being deployed to the Central Command area of responsibility because of their HIV-positive status. The plaintiffs contended that those policies, and DoD's decisions to discharge them based on those policies, violated the Administrative Procedure Act, 5 U.S.C. 706(2)(A), and the equal protection component of the Due Process Clause of the Fifth Amendment. The plaintiffs argued that the policies were at odds with current medical evidence concerning HIV treatment and transmission and therefore lacked a rational basis. In *Harrison*, an HIV-positive enlisted member of the D.C. National Guard, joined by the same organization, brought suit under the Due Process Clause contending that policies that prevented him from being commissioned as an officer lacked a rational basis for the same reasons.

In February 2019, the district court entered a preliminary injunction in *Roe*, concluding that the plaintiffs were likely to prevail on their argument that the challenged policies were irrational. See *Roe* v. *Shanahan*, 359 F. Supp. 3d 382 (E.D. Va. 2019). The Department of Justice appealed. The Fourth Circuit affirmed the preliminary injunction, agreeing with the district court's conclusion that the plaintiffs were likely to prevail on their Administrative Procedure Act claims. See *Roe* v. *Department of Defense*, 947 F.3d 207 (4th Cir. 2020). On April 6, 2022, the district court entered summary judgment in both cases, ruling for the plaintiffs on both their equal protection and Administrative Procedure Act claims. The court entered permanent injunctions addressing DoD's treatment of asymptomatic HIV-positive

servicemembers with an undetectable viral load. The injunctions prohibit DoD from categorically barring the worldwide deployment or deployment to the Central Command area of responsibility of such servicemembers due to their HIV-positive status. The injunctions also prohibit DoD from separating or discharging such servicemembers, or from denying their applications to commission as officers, because they are classified as ineligible for worldwide deployment or deployment to the Central Command area of responsibility due to their HIV-positive status.

The Department of Justice defended the constitutionality and legality of the challenged DoD policies while those policies were in place, including by appealing to the Fourth Circuit in *Roe*. But DoD has now modified the enjoined policies and adopted new policies that are consistent with the district court's injunctions and that do not implicate the plaintiffs' constitutional and Administrative Procedure Act claims. Given those circumstances, we have determined that an appeal is not warranted.

The Department of Justice filed a protective notice of appeal on June 6, 2022, but we intend to dismiss the appeal on July 6, 2022. Please let me know if we can be of further assistance in this matter.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

Enclosures