

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.
Plaintiffs,

v.

JAMES N. MATTIS, in his official capacity as
Secretary of Defense; MARK ESPER, in his
official capacity as the Secretary of the Army;
and the UNITED STATES DEPARTMENT OF
DEFENSE,
Defendants.

NO. 1:18-CV-00641-LMB-IDD

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

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I. INTRODUCTION

This case presents a constitutional challenge regarding certain Military policies that discriminate against people living with HIV. The relevant policies include but are not limited to the accession (*i.e.*, appointment, enlistment, or induction) and deployment of individuals living with HIV. Plaintiffs contend that the Military's policies discriminate against people living with HIV and lack a rational basis in light of modern advances in science and medicine that make HIV very manageable with treatment that is provided with relative ease.

As detailed below, Plaintiffs issued discovery requests seeking documents the Military relied upon in devising, maintaining, implementing, and revising its HIV-related policies, as well as documents regarding instances where the Military has granted a medical waiver or an "exception to policy." Pursuant to local rule, Defendants have provided their objections in advance of production to expedite resolution of any disputes. Unfortunately, Defendants' objections improperly limit the scope of discovery in at least two ways. First, Defendants have indicated that any discovery provided will be limited to what they are now calling the Department of Defense's ("DoD") "commissioning policy" regarding Service members who are HIV positive, because they believe the injury to Sgt. Harrison stems from this alone. Second, Defendants have refused to provide discovery from Military Departments other than the Army because Sgt. Harrison serves in the Army.

The limitations Defendants seek to impose are improper because Plaintiffs' claims cover more than Sgt. Harrison's as-applied challenge to the Military's refusal to allow him to commission as an officer. Indeed, Defendants have improperly ignored significant portions of the Complaint, the nature and scope of a facial challenge to a DoD Instruction, and the presence of Plaintiff OutServe-SLDN ("OutServe") in this case. As explained below, the Court has

recognized the significance of this case, the need for a complete record to adjudicate it properly, and the importance of OutServe's participation as a plaintiff, acknowledging that this case should go forward even without Sgt. Harrison as a plaintiff. Accordingly, Defendants' objections should be overruled and Defendants should be ordered to provide full discovery without the limitations Defendants have attempted to impose.

II. BACKGROUND

A. Plaintiffs' Claims Regarding Defendants' Discriminatory Policies

The Complaint details Plaintiffs' claims challenging the military's discriminatory policies regarding people living with HIV, including regulations governing the accession, deployment, and retention of such individuals. *See* Compl. at ¶1, ECF No. 1 ("This action challenges the constitutionality of these regulations that exclude or *limit the military service* of people living with HIV") (emphasis added); *see also* ¶¶ 3, 5, 13, 30, 33, 38-39, and 78 (discussing the military's deployment and/or retention policies). The as-applied part of that challenge focuses on the Army's refusal, under Department of Defense Instruction ("DoDI") 6485.01 and Army Regulation ("AR") 600-110, to commission Sgt. Harrison as an officer, so he could serve in a position he had already attained in the JAG Corps of the DC National Guard. However, Plaintiffs' Complaint also presents a *facial* challenge to the DoD regulation pertaining to "accessions," which includes appointment, enlistment, or induction, and that regulation applies in all of the branches of the Military. *See* Compl. ¶¶ 27-30 (citing DoDI 6485.01) and 71-72, ECF No. 1; DoDI 6485.01, at § 4.¹ Furthermore, the Complaint asserts the illegality of the Military's deployment policies for people living with HIV because the ability (or inability) to

¹ Department of Defense Instruction 6485.01, Human Immunodeficiency Virus (HIV) in Military Service Members (June 7, 2013), available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/648501p.pdf>

deploy on a worldwide basis is a key factor in the Military's determination that service members living with HIV are not allowed to commission, making it impossible to prosecute even the as-applied challenge to the Army's refusal to allow Sgt. Harrison to commission without also challenging the deployment policy. *See* Compl. at ¶¶ 37-39.

B. Plaintiffs' Discovery Requests to Defendants and Defendants' Objections

On October 24, 2018, Plaintiffs served their First Set of Requests for the Production ("RFPs") of Documents and Things (Nos. 1-15) on Defendants. *See* Ex. B, Pls.' First Set of RFPs to Defs. These RFPs sought discovery regarding certain of Defendants' policies regarding people living with HIV. First, Plaintiffs requested the documents Defendants relied upon in writing two reports that DoD submitted to Congress regarding DoD's policies regarding HIV, both of which Defendants submitted as part of the briefing on their motion to dismiss. *See id.* at RFP Nos. 3-4; *see also* Defs.' Reply Mem. in Supp. of Mot. to Dismiss, Ex. 2 and 3, ECF No. 53-2 and 53-3. Second, Plaintiffs requested documents relied upon in writing or amending six DoD policies that relate to the accession, retention, or deployment of people living with HIV. *See id.* at RFP Nos. 5-8, 10, and 12. Third, Plaintiffs requested documents related to medical waivers or exceptions to policies granted under the aforementioned DoD policies to allow people living with HIV to enlist, commission, or deploy. *See id.* at RFP Nos. 9, 11, 13-15.

On November 8, 2018, pursuant to Local Rule 26(C), Defendants provided timely objections. *See* Ex. C, Defs.' Obj. to Pls.' First Set of RFPs. Those objections, however, failed to comply with Rule 34, which requires a party providing objections to state "whether any

responsive materials are being withheld on the basis of that objection.” Fed. R. Civ. P. 34(b)(2)(C).²

First, Defendants objected to producing “information in the custody of the U.S. Navy, U.S. Marine Corps, U.S. Air Force, or U.S. Coast Guard” on the basis that Sgt. Harrison, who serves in the Army, is the only Plaintiff to have alleged an injury, such that documents from other Military Departments “have no bearing on this case and their production would impose a significant burden on these Military Departments.” *Id.* at 2 (Obj. Applicable to Each Request No. 4).³ Second, Defendants objected to each of RFP Nos. 3-6 and 8-15 as “overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case.” *Id.* at Objs. to RFP Nos. 3-6 and 8-15.

Plaintiffs notified Defendants that their attempt to limit discovery based on these objections was improper. During a meet and confer, Defendants confirmed they would be limiting any production of materials to those related to the Military’s “commissioning policy” and also would not provide documents from Military Departments other than the Army. The parties are thus at an impasse, and Plaintiffs move the Court to overrule Defendants’ objections and to order the production of the requested materials.

² This requirement was added in 2015 in an attempt to “end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.” Fed. R. Civ. P. 34 Advisory Committee’s Notes to 2015 Amendment.

³ Defendants’ objections inappropriately included “OBJECTIONS APPLICABLE TO EACH REQUEST,” *i.e.*, general objections, that should result in waiver of these objections. *See* Rule 16(b) Scheduling Order at ¶ 3, ECF No. 68.

III. LEGAL STANDARDS

“Parties may obtain discovery regarding nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). The scope of discovery is construed broadly. *See Gilbertson v. Jones*, No. 3:16-cv-255, 2016 WL 6518659, at *3 (E.D. Va. 2016) (“Within the bounds of proportionality, Rule 26(b)(1) grants broad discovery of all relevant information unprotected by privilege.”). While the burden of demonstrating relevance falls on the party seeking discovery, the party seeking to resist discovery on proportionality grounds must provide information regarding the proportionality factors. *See Nerium Skincare, Inc. v. Olson*, No. 3:16-cv-1217-B, 2017 WL 277634, at *3 (N.D. Tex. Jan. 20, 2017) (“a party seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by [Rule 26] by coming forward with specific information to address [the proportionality factors.]”).

IV. ARGUMENT

Plaintiffs’ RFPs seek highly relevant materials related to the policies being challenged in this action. By attempting to limit discovery to what—for the purposes of this case—Defendants call the DoD’s “commissioning policy,” Defendants have improperly ignored significant portions of the Complaint, the nature and scope of a facial challenge to a DoD Instruction, and the presence of OutServe as a plaintiff in this case.

Defendants’ objections are improper because Sgt. Harrison’s claims are not as narrow as Defendants want them to be. The Complaint states a cause of action that encompasses all of the policies that led to Defendants’ decision to deny Sgt. Harrison a commission and includes a facial constitutional challenge to the DoD Instruction on which that decision was based. As

made clear in the Complaint, Defendants have based their accessions policy for people living with HIV, which prevents them from being granted a commission, on their purported inability to deploy on a worldwide basis. In challenging the constitutionality of the decision to refuse Sgt. Harrison a commission, Plaintiffs are also challenging the constitutionality of the Military's deployment policies. At the very least, Defendants' continuing belief that people living with HIV are not worldwide deployable is undoubtedly relevant to the validity of the accessions policy. Furthermore, Sgt. Harrison is challenging the deployment policies of the Army and DoD directly, because a waiver to commission as an officer without the corresponding ability to accept positions that require deployment is similarly harmful to his career opportunities and an unacceptable violation of the equal protection guarantees of the Constitution.

Moreover, Defendants have acknowledged that policies other than the "commissioning policy" are at issue in this case. In responding to a request from Congress for review of its HIV-related personnel policies, the DoD described *one* policy and set of standards pertaining to "accession" and not separate or different policies or standards for enlistment versus commissioning. *See* DoD 2018 Report⁴ at 1, 7, ECF NO. 53-3. The report describes the DoD's personnel needs as "readiness, resilience, *deployability*, mission accomplishment, [and] retention." *Id.* at 6 (emphasis added). The report also explains that DoD's HIV-related personnel policies, including the application of the accessions policy to those desiring to commission, were "instituted to ensure military applicants can successfully complete rigorous military training and *deploy* to austere environments to accomplish the demanding missions of

⁴ *Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human Immunodeficiency Virus: Report to the Committees on the Armed Services of the Senate and House of Representatives* (Aug. 2018).

the military, including combat against enemy forces[.]”. *Id.* Though the DoD is careful in this report (issued after commencement of this litigation and after Plaintiffs sought a preliminary injunction) not to mention “deployability” in its direct answer to the question from Congress regarding the “feasibility of allowing enlisted members to become commissioned officers,” all of these policies are interconnected; deployability into combat zones is an important factor in setting policy regarding the commissioning of service members living with HIV.

Materials from branches of the Military other than the Army are also relevant to this case. In this equal protection claim, Plaintiffs will need to demonstrate that people living with HIV are treated differently, for unjustified reasons, from people who are not living with HIV. *See* Compl. at ¶¶ 77-78. To respond to Defendants’ purported justifications for this differential treatment, Plaintiffs not only need to uncover how the Military treats individuals with similar levels of healthcare needs, but also how the challenged DoD policies are implemented in other branches of the Military and the reasons behind those differing policies. For example, on paper at least, Army policy allows deployment to Europe and Korea, while the Navy permits deployment outside the continental United States to certain ship-based platforms on a case-by-case basis, and the Air Force apparently allows deployment to South America. *See* DoD 2018 Report at 25, ECF NO. 53-3; *see also* Soper Decl. at ¶ 9.c., ECF No. 40-2. Understanding how and why application of the same DoD Instruction results in such widely varying outcomes in policy and practice will help Plaintiffs establish whether the purported justifications are rationally related to a legitimate governmental interest or are simply arbitrary and discriminatory, as Plaintiffs have alleged.

Defendants themselves have acknowledged the significance of the HIV-related policies of branches of the Military other than the Army. In responding to Plaintiffs’ motion for a

preliminary injunction based on promulgation of the new DoD policy regarding “Retention Determinations for Non-Deployable Service Members,” Defendants offered declarations from relevant personnel in both the Air Force and the Army describing the deployment policies of each with respect to people living with HIV. *See* Lute Decl. and Soper Decl., ECF No. 40-1 and 40-2. Given the differing policies for each branch of the Military, Plaintiffs are entitled to discovery regarding the distinct HIV-related deployment policies and practices and to understand Defendants’ justifications for the same.

Furthermore, limiting discovery to the Army’s refusal to grant Sgt. Harrison a commission would ignore the interests OutServe represents as a plaintiff in this case. OutServe represents the interest of its members living with HIV who serve or wish to serve in *all* Military Departments (two of whom offered declarations in support of Plaintiffs’ motion for a preliminary injunction) and whose service is limited by the Military’s accessions, deployment, and retention policies. *See* ECF Nos. 26-6 and 26-7. The Court has already recognized as legitimate the interests OutServe represents in this case. In denying the Defendants’ motion to dismiss, the Court suggested the Government may want to consider resolving Sgt. Harrison’s claims and that the case could move forward without Sgt. Harrison as a plaintiff. *See* Ex. A, Hr’g Tr. at 18:8-12 (“In other words, you have an individual, and you have a group [OutServe], and there’d be nothing in my view that would prevent you from resolving perhaps the situation of Sgt. Harrison and then the group perhaps remaining the plaintiff in the case.”).

Finally, contrary to Defendants’ assertions otherwise, Plaintiffs’ RFPs are also proportional to the needs of the case. This is not a case on behalf of one individual; rather it is a facial constitutional challenge to the DoD’s accessions and deployment policies with respect to people living with HIV. Again, the Court has already recognized the significance of this case

and the need for a “fulsome record.” *See* Ex. A at 16:8-11, 18 (“This case really, it seems to me, because of the very significant issues involved, needs to have a complete record, and we don't have that yet because we haven't had discovery[.] . . . We need a fulsome record.”). And Plaintiffs are making reasonable discovery requests that are proportionate to the significant needs of the case. For example, with respect to RFP No. 4, seeking the documents upon which Defendants relied in drafting the August 2018 Report to Congress, the report lists forty-three DoD and Military Department-specific policies that apply to individuals living with HIV and fifteen “additional references.” *See* DoD 2018 Report at 28-31, ECF NO. 53-3 (listing “REFERENCED POLICIES” and “ADDITIONAL REFERENCES”). If these are indeed the materials that DoD relied upon in preparing its Report to Congress, it cannot reasonably argue that producing those fifty-eight documents is either unduly burdensome or disproportionate to the needs of the case. Moreover, Plaintiffs are seeking additional discovery regarding only *five* of the forty-three policies listed in the Report: (1) DoDI 1332.45; (2) DoDI 6485.01; (3) DoDI 6130.03; (4) DoDI 6490.07; and (5) Army Regulation 600-110. *See* Ex. B at RFP Nos. 5, 7-8, 10, and 12. These discovery requests are undeniably proportionate to the needs of this important case seeking to significantly alter DoD policies with respect to service members with HIV.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court compel Defendants to produce the documents responsive to Plaintiffs' RFP Nos. 3-15 without any of the aforementioned limitations invoked by Defendants, and for such further relief as this Court deems just and proper.

Dated: November 20, 2018

Respectfully submitted,

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: November 20, 2018

Respectfully submitted,

/s/ Andrew R. Sommer
Andrew R. Sommer

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICK HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	September 14, 2018
JAMES N. MATTIS, Secretary of	.	10:27 a.m.
the U.S. Department of	.	
Defense; MARK ESPER,	.	
Secretary of the Army; and	.	
U.S. DEPARTMENT OF DEFENSE,	.	
	.	
Defendants.	.	
	.	
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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 18)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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9 ALSO PRESENT:

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 18-641, Nick Harrison, et
3 al. v. OutServe-SLDN, Inc., et al. Would counsel please note
4 their appearances for the record.

5 MR. SOMMER: Hi, Your Honor. Andrew Sommer on behalf
6 of plaintiffs, and I'm joined by a cast of characters who I'll
7 introduce for the purposes of the record: Mr. Scott Schoettes
8 from Lambda Legal; our client, Nick Harrison; John Harding from
9 Winston & Strawn; Cyrus Frelinghuysen, also from Winston &
10 Strawn; and Peter Perkowski, on behalf of OutServe-SLDN.

11 THE COURT: Good morning.

12 Mr. McCotter, you're outnumbered.

13 MR. McCOTTER: Good morning, Your Honor. Trent
14 McCotter, Assistant U.S. Attorney, for defendants; and with me
15 and will be arguing this morning is Nathan Swinton from Federal
16 Programs, Your Honor.

17 THE COURT: All right, good morning.

18 MR. McCOTTER: Thank you.

19 THE COURT: Well, we have several motions before the
20 Court. We have the plaintiffs' motion for preliminary
21 injunction, the defendants' motion to dismiss for lack of
22 subject matter jurisdiction, and the defendants' motion to
23 dismiss for failure to state a claim.

24 This obviously is a very significant and interesting
25 case. I guess I want to ask the defense a couple of questions,

1 so, counsel, if you would answer? What -- are there any other
2 medical conditions that the Armed Forces point to that make
3 someone inherently un-deployable? For example, diabetes. If
4 somebody has diabetes, are they deployable?

5 MR. SWINTON: Your Honor, I don't know the answer as
6 to other conditions. There are, there are 339 conditions that
7 are included in DoD Instruction 6130.03 that prevent someone
8 from being appointed or enlisted into the military, and I
9 imagine at least some of those would prevent someone from being
10 deployable as well. I just don't know that off the top of my
11 head.

12 THE COURT: All right. All right, does plaintiffs
13 know that answer? If somebody has diabetes, is he deployable?

14 MR. SOMMER: I'm not absolutely certain of that
15 answer. I have heard that it was the case that people with
16 diabetes could not, could not be deployed but that the, that
17 the military services had reconsidered that policy in recent
18 years, but that is really hearsay at this point.

19 THE COURT: Because an insulin-dependent diabetic
20 would have some of the same issues that your client does in
21 terms of needing to get daily access to medicine. Unless
22 they've changed it, most insulins have to be refrigerated, so
23 you'd have to have access to refrigeration facilities, and so I
24 think some of the same arguments that are being made as to your
25 client's condition would apply to somebody who's

1 insulin-dependent diabetic.

2 MR. SOMMER: I would actually say that someone who is
3 an insulin-dependent diabetic has greater needs than my client.
4 For one thing, the medication that my client takes, it does not
5 require refrigeration. It does not require any kind of special
6 handling whatsoever. It has very few side effects, and it only
7 needs to be taken once a day.

8 THE COURT: And it's a pill; is that correct?

9 MR. SOMMER: That's right. It's a single pill, taken
10 once a day.

11 THE COURT: Um-hum.

12 MR. SOMMER: And then perhaps more important, the
13 continuous nature of the, of the need for the medication is
14 different. So someone who is insulin dependent needs their
15 insulin and they need it now. A person living with HIV, you
16 can miss a dose, and, in fact, you can miss several doses over
17 a long period of time before there's going to be any real
18 effect on your viral load and then down the road from that, any
19 effect on your actual health.

20 So as opposed to someone who needs insulin, when, you
21 know, they need it, they need it, a person living with HIV,
22 while it's important for it to be there on a consistent basis,
23 you can go long periods without it and you'll still be okay.

24 THE COURT: All right. Of course, as you know --
25 while you're there, counsel, Mr. Summer, just stay put. As you

1 know, the landscape changed slightly with the new regulations
2 that came down, and do you want to address that? Because I
3 think in particular, the impact that has on your request for a
4 preliminary injunction, that would seem to significantly
5 undercut that particular motion.

6 MR. SOMMER: So I think that we may need to modify
7 the, the actual request itself because the motion for a
8 preliminary injunction indeed discusses that guidance that was
9 the governing guidance at the time we filed the motion, but I
10 don't think that the policy itself presents any significant
11 change from what was announced.

12 I think that original announcement demonstrated
13 exactly what they intend to do, which is to remove anyone who
14 is considered a person who cannot deploy worldwide for 12
15 consecutive months from the military. Indeed, the defense has
16 come in and said that they may decide that people living with
17 HIV are in this other category, which is the first time that
18 I've seen that terminology used: deployable with limitations.
19 However, they won't commit to that.

20 Even though the policy seems to contemplate that
21 quite strongly, what we're seeing in these papers is, well, we
22 may do that, but we may not. And we may -- each branch of the
23 Service can do whatever they think is appropriate, which may
24 involve indeed classifying some of these people as
25 non-deployable and all of these people as non-deployable and

1 subjecting them to these retention reviews which could result
2 in their discharge from the military.

3 Secondly, I'll say that the, the deference -- or, I'm
4 sorry, the discretion that is seemingly included in this new
5 policy, because after there's a placement into a category,
6 there -- if you are in the category non-deployable, well, they
7 say you could appeal a determination as to whether or not you
8 were going to be discharged, but if past is prologue and we've
9 seen how a person living with HIV is assessed, under the
10 current military policies, I think it's very likely that people
11 living with HIV will not be able to show that it is in the best
12 interests of the military to be retained.

13 I think my client is a good example of that. If
14 anybody should have been allowed to become an officer, should
15 have been given the medical waiver or the exception necessary,
16 it would be Sergeant Nick Harrison. He is qualified in every
17 way. He had already been given the job. He went to law
18 school. He was -- that education was paid for by the military,
19 and yet they decided under the discretion that they have under
20 current policies that they were not going to allow him to
21 become an officer.

22 So I don't think that the new policy offers much
23 comfort to people living with HIV that the military will assess
24 their cases and their situation in a way that is fair.

25 THE COURT: Now, you referenced the Navy having had a

1 slightly more possibly progressive approach to the situation.
2 Can you give me more information about that?

3 MR. SOMMER: Yes. So from what I know about that,
4 that occurred in about 2012, and there had been some pushing, I
5 think, on, on this issue, and the Navy decided that indeed,
6 they could in more limited capacity allow people living with
7 HIV into some deployment situations on large ship platforms,
8 but that still does not allow them to deploy worldwide. That
9 does not allow them to deploy into any type of assignment, and
10 that's really what we're seeking here.

11 We are saying that there is no significant difference
12 for a person living with HIV as compared to a person who does
13 not have HIV. Today, given the current treatments, those very
14 simple treatments that do not require a lot of care beyond
15 taking that pill once a day, that there is no reason you
16 couldn't put a person living with HIV anywhere.

17 So having this unlevel playing field, where somehow
18 you have to go and prove that you should as an individual under
19 this policy be deployed because you're a person living with
20 HIV, flips what is the standard for everyone else, which is
21 there's going to be an assumption that you are deployable if
22 you are in the military.

23 So -- and the other thing about that Navy policy that
24 I think it's important to consider is there haven't been any
25 problems. So it is not, obviously, as fulsome as we think the

1 relief should be in this case in having this regulation
2 declared unconstitutional, but in the limited amount that they
3 did, we haven't seen any of the parade of horrors or concerns
4 that have been raised by the government as to what it would --
5 what would happen if we allowed people living with HIV to serve
6 without restriction.

7 THE COURT: All right. Do you want to respond?

8 MR. SWINTON: Sure, Your Honor. A few points. I
9 think plaintiffs mischaracterize or misconstrue DoDI 1332.45,
10 which is the recent regulation issued at the end of July, and
11 it doesn't present any sort of immediate irreparable threat of
12 discharge in this case for a few reasons.

13 First is plaintiffs do acknowledge it gives the
14 Services the discretion to determine what non-deployability is
15 and whether or not individuals with HIV or other medical
16 conditions could be considered deployable with limitations, and
17 the recent DoD report to Congress that was submitted at the end
18 of August specifically indicates that although HIV individuals
19 cannot be deployed to combat areas or in supportive contingency
20 operations, they could be deployed in other capacities, which
21 could make them deployable with limitations.

22 So now it's up to the Services to decide what works
23 best in terms of their service and their need to have all
24 individuals under their purview be ready to serve and perform
25 the duties of their jobs.

1 THE COURT: Well, let me just stop for a second. I
2 recognize we have two plaintiffs here. We have an individual,
3 and then we have a group, or a representative -- an
4 organization that represents groups. I'm more interesting in
5 focusing on Mr. Harrison, all right? Has he been reevaluated
6 under the new policy?

7 MR. SWINTON: No, because that policy-making process
8 is still, is still ongoing. The Services were given until
9 October 1 to implement DoDI 1332.45, which means as part of
10 that policy-making process, they will determine who is
11 non-deployable, who is deployable with limitations.

12 THE COURT: I mean, in the specific case of our
13 plaintiff, he's in the JAG Corps, or that's where he wants to
14 be, correct?

15 MR. SWINTON: Correct.

16 THE COURT: So he's a lawyer. My experience with
17 members of the JAG Corps is they often are sent to hot zones, I
18 know they've been to Iraq and Afghanistan, but aren't they
19 normally at a desk, doing things like helping with paperwork,
20 with wills, and legal advice to their, you know, to the Armed
21 Forces, and they're not out there at the very front with a
22 weapon, shooting at people?

23 MR. SWINTON: I mean, that's my understanding as
24 well, Your Honor, although I think it's possible --

25 THE COURT: It's always possible.

1 MR. SWINTON: It's always possible, and certainly
2 anybody who's deployed to that area must meet the medical
3 standards, regardless of the type of duties that they're
4 undergoing.

5 THE COURT: But other than being HIV-positive, hasn't
6 the plaintiff met all the other medical standards? Based on
7 what I read in the complaint, he passed everything else. The
8 only thing he doesn't pass is he happens to have that
9 particular illness.

10 MR. SWINTON: That's true, Your Honor, and that would
11 be the same for any medical condition that's disqualifying.
12 And again, I think -- I think it's important to separate that
13 the issue we're talking about with Mr. Harrison is specifically
14 about his inability to commission as an officer. That's very
15 different from the discharge question which plaintiffs have put
16 at issue in their preliminary injunction motion.

17 For him to be discharged, the Army would have --
18 there would have to be a number of steps that would occur. The
19 Army would have to determine that individuals with HIV are
20 non-deployable. That determination has yet to be made.

21 Second, the Army would have to then have Mr. Harrison
22 go through a retention review. At the end of that review,
23 there would have to be a determination that he should be either
24 separated or go through the disability evaluation system. He
25 would then have to go through either the DES or the

1 administrative separation process, which provide him with
2 several opportunities to contest the military's finding.

3 So in short, when we're thinking about discharge,
4 there's absolutely no threat of imminent or immediate harm that
5 he'll be discharged at any time in the future. We don't even
6 know yet if the Army will determine whether or not he --
7 whether he's non-deployable.

8 The commissioning issue is something separate, and
9 yes, he has sought to become a commissioned officer, a JAG
10 officer specifically, and for the reasons that we discussed in
11 our, in our papers, the accessions policy applied at the
12 commissioning stage. He's currently an infantryman in the
13 Reserve. He's not presently doing legal work for the Army, as
14 I understand it.

15 He's seeking a very different position, one that
16 entitles him to a lifetime commission were he to be accepted,
17 and DoD has reasonably decided to apply those accession
18 standards at the commissioning stage, basically looking at
19 someone with a clean slate, and the accession standards
20 preclude individuals who are HIV positive from enlisting in the
21 military unless they have a waiver, and that same standard
22 applies to him now at the commissioning stage, and that's
23 what's preventing him from being able to become a commissioned
24 officer.

25 THE COURT: And he has not gotten the waiver.

1 MR. SWINTON: Correct. He did seek a waiver, and
2 that, that request was denied.

3 THE COURT: But didn't he seek a waiver before this
4 new policy went into effect? We're calling it what, DOGO, but,
5 I mean, before that went into effect.

6 MR. SWINTON: Correct, because that pertains to his
7 commissioning decision. The military overall has a policy of
8 not allowing individuals who are HIV-positive or who have other
9 disqualifying medical conditions, there are 339, from enlisting
10 in the military. That standard also applies at the
11 commissioning stage.

12 That's separate from discharge. After an individual
13 has HIV specifically and other medical conditions as well, if
14 they, if they become diagnosed with that condition subsequent
15 to being enlisted --

16 THE COURT: That's what's happened here.

17 MR. SWINTON: -- as in Mr. Harrison's case, the
18 current policy is not to discharge or separate the individual
19 solely because of that medical condition.

20 So under current DoD policy, Mr. Harrison faces no
21 threat of being discharged.

22 Plaintiffs are assuming the outcome of the current
23 ongoing policy process will not -- will be negative for them,
24 but as I've explained, that's only if several steps happen. So
25 under -- as things stand currently, Mr. Harrison does not face

1 any sort of threat of being discharged.

2 THE COURT: But he also can't get commissioned.

3 MR. SWINTON: Correct. So he won't, he won't be
4 discharged or separated from the military under current policy,
5 but that current policy, because of the application of the
6 accession standards at the commissioning stage, he cannot
7 become a commissioned officer absent a waiver, and he wasn't
8 able to get a waiver.

9 THE COURT: All right. Now, the primary case, as I
10 understand it, upon which you rely for arguing that the Court
11 does not have subject matter jurisdiction is this *Mindes* case
12 out of the Fifth Circuit, but wouldn't you agree that the
13 Fourth Circuit has started to question and many other circuits
14 have rejected *Mindes*?

15 MR. SWINTON: Some circuits have not adopted the
16 test, Your Honor, and I know plaintiff cited, I think, a
17 footnote from a Fourth Circuit case, but, but the Fourth
18 Circuit has not expressly disclaimed the application of *Mindes*.
19 In any event, even if *Mindes* were not to apply, there still are
20 several Supreme Court cases that talk about the deference
21 entitled to the military and the deference being at its
22 strongest in issues of military affairs specifically with
23 respect to commissioning issues, and the decisions about how to
24 allocate resources and assign personnel to different duty
25 stations, I would encourage the Court to review the *Orloff*

1 case, for example, which talks specifically about the
2 commissioning of officers.

3 That is when, as the Supreme Court has said, the
4 executive and legislative power is at its strongest, and the
5 Court is in the -- of the three coordinate branches of
6 government, the Court is in the weakest position to review
7 those decisions.

8 THE COURT: I understand that, but even, even though
9 the Court must, obviously, give due deference to the military
10 when they make these types of decisions, that deference does
11 not mean that that military is immune from judicial review. I
12 mean, obviously, if you enacted a policy indicating that, you
13 know, no African Americans could be promoted above the rank of
14 lieutenant colonel, you know, we'd strike that down in a
15 heartbeat, and it wouldn't be any argument there that the Court
16 didn't have the authority to do so.

17 MR. SWINTON: Correct, Your Honor, and, and we're
18 certainly not suggesting that. I think as the *Rostker* case,
19 also out of the Supreme Court, makes clear, that although the
20 branches are still subject to constitutional limitations when
21 in context of these military decisions, the -- those
22 limitations are applied differently specifically because of the
23 military context.

24 So here, any sort of alleged discrimination based on
25 HIV status is subject to rational basis review, as the Fourth

1 Circuit has held, and that deference that the government is
2 ordinarily entitled to under rational basis of review, I think,
3 would be heightened because of the military judgment that's at
4 issue.

5 THE COURT: But you would agree that it's still a
6 rational basis, which means the military does have to have some
7 reasonable reasons to have this policy, and that is the segue
8 into the Court's concern. This case really, it seems to me,
9 because of the very significant issues involved, needs to have
10 a complete record, and we don't have that yet because we
11 haven't had discovery, and so what I'm going to do in this
12 case, I'm finding at this point that the, that the allegations
13 in the complaint do satisfy me that I have jurisdiction at this
14 point to continue to consider this case, and that in terms of
15 the 12(b)(6) claims, I think this complaint adequately alleges
16 causes of action sufficient to let this case go forward to
17 discovery.

18 We need to have a fulsome record. I mean, clearly,
19 the medical evidence here is important. It's important for
20 both sides. Look, let's face it: The military invested a
21 significant amount of money. What law school did Mr. Harrison
22 go to?

23 MR. SOMMER: University of Oklahoma.

24 THE COURT: All right. So I'm sure his tuition at
25 the University of Oklahoma was not -- wasn't gratis. The

1 United States government has invested significant actual
2 dollars in this man. He's also already served the country.
3 And other than him being in that medical condition, he would
4 appear to be perfectly fit for -- again, I'm not making that
5 decision, but, I mean, everything that's in the papers so far
6 would suggest that this is an individual who wants to serve his
7 country and who has developed skills in that respect, and the
8 government has invested money in him.

9 And so there has to be good reasons why someone like
10 Mr. Harrison is in the predicament that he's in, and I think
11 therefore this is a good case to develop that record. Let's
12 get the evidence out there. I'm not going to rule with any
13 prejudice if the government after the discovery has been done
14 will take another look at it probably in the summary judgment
15 context, but I'm going to let this case go forward.

16 At the same time, however, I am not granting the
17 motion for preliminary injunction. I don't find at this point
18 yet that there's sufficient evidence in this record to satisfy
19 me that the plaintiff necessarily is going to win this case.
20 I'm not convinced that you can make the first prong of the
21 *Winter* evaluation, and so we're going to let the case,
22 everything stay as it is.

23 The new policy does seem to undercut some of the
24 immediate concerns that the plaintiff had when first filing
25 this lawsuit, and I will look forward to seeing you down the

1 road when we have a full record.

2 Judge Davis is the magistrate judge assigned to this
3 case, so if there are discovery disputes, he'll be the one
4 working them out. And again, even in a case of this sort, this
5 Court always encourages parties to see whether or not there are
6 ways of settling, and there are two plaintiffs here. The fact
7 that you might settle with one plaintiff and not the other is
8 something that might be considered. In other words, you have
9 an individual, and you have a group, and there'd be nothing in
10 my view that would prevent you from resolving perhaps the
11 situation of Mr. Harrison and then the group perhaps remaining
12 the plaintiff in the case. Just think about that creatively,
13 all right?

14 But that's my ruling in this case. Thank you.

15 MR. SWINTON: Thank you, Your Honor.

16 MR. SOMMER: Thank you, Your Honor.

17 THE COURT: We'll recess court for the day.

18 (Which were all the proceedings
19 had at this time.)

20

21 CERTIFICATE OF THE REPORTER

22 I certify that the foregoing is a correct transcript of
23 the record of proceedings in the above-entitled matter.

24

25

/s/

Anneliese J. Thomson

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.
Plaintiffs,

v.

JAMES N. MATTIS, in his official capacity as
Secretary of Defense; MARK ESPER, in his
official capacity as the Secretary of the Army;
and the UNITED STATES DEPARTMENT OF
DEFENSE,
Defendants.

NO. 1:18-CV-00641-LMB-IDD

**PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS TO DEFENDANTS (NOS. 1-15)**

Pursuant to Federal Rule of Civil Procedure 34 and Local Civil Rule 26, Plaintiffs Nicholas Harrison and Outserve-SLDN, Inc., by and through their undersigned counsel, propound their First Set of Requests for Production of Documents and Things (Nos. 1-15), to which Defendants James N. Mattis, Mark Esper, and the United States Department of Defense (collectively "Defendants") shall respond within the time prescribed by the Federal Rules of Civil Procedure and the Local Rules, and produce to lead counsel for Plaintiffs the following documents and things within thirty (30) days of service hereof, or at such other time and place as may be mutually agreed upon by the parties, in accordance with the Definitions and Instructions set forth herein.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests for Production of Documents and Things (“Requests for Production”) is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. In these Requests for Production, the following terms are to be given their ascribed definitions:

1. The term “Plaintiffs” means Nicholas Harrison and Outserve-SLDN, Inc.
2. The term “Individual Defendants” means James N. Mattis and Mark Esper, including their predecessors.
3. The term “Military Services” means the United States Army, the United States Navy, the United States Marine Corps, the United States Air Force, or the United States Coast Guard.
4. The term “DoD” means the United States Department of Defense, including its various components and agencies (including but not limited to the Military Services), current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.
5. The terms “Defendants,” “you” and/or “your” means the Individual Defendants and the DoD.
6. The term “DoD 2014 Report to Congress” means the Report to Congressional Defense Committees on Department of Defense Personnel Policies Regarding Members of the Armed Forces with HIV or Hepatitis B (Sept. 2014) (ECF No. 53-2).
7. The term “DoD 2018 Report to Congress” means the Report to the Committees on the Armed Services of the Senate and House of Representatives on Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human

Immunodeficiency Virus (Aug. 2018) (ECF No. 53-3).

8. The term “DOGO Instruction” means DoD Instruction 1332.45, *Retention Determinations for Non-Deployable Service Members* (effective July 30, 2018) (ECF No. 53-1).

9. The term “DOGO Policy” means the Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Deputy Chief Management Officer; Chief, National Guard Bureau; Director of Cost Assessment and Program Evaluation regarding “DoD Retention Policy for Non-Deployable Service Members” (Feb. 14, 2018) (ECF No. 26-1).

10. The term “DoDI 6485.01” means DoD Instruction 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (June 7, 2013), including any prior versions or amendments thereof.

11. The term “DoDI 6130.03” means DoD Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction into the Military Services* (May 6, 2018), including any prior versions or amendments thereof.

12. The term “DoDI 6490.07” means DoD Instruction 6490.07, *Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees* (Aug. 11, 2006; Certified Current as of September 30, 2011), including any prior versions or amendments thereof.

13. The term “AR 600-110” means Army Regulation 600-110, *Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus* (Apr. 22, 2014), including any prior versions or amendments thereof.

14. The term “person” or “persons” means and includes any natural person, corporation, company, proprietorship, partnership, joint venture, association, firm, government

entity or any other entity recognized in law, and shall include the owners, officers, directors, agents, trustees, parents, subsidiaries, affiliates, assignees, predecessors, and successors of each such “person.”

15. The phrase “third party” means and includes any person or persons other than Plaintiffs or Defendants.

16. “Communication” means any oral, written, electronic, or other exchange of words, thoughts, information or ideas to another person or entity, whether in person, in a group, by telephone, by letter, by Telex, by facsimile, or by any other process, electric, electronic, otherwise. All such communications in writing shall include, without limitation, printed, typed, handwritten, or other readable documents, correspondence, memoranda, reports, contracts, drafts (both initial and subsequent), computer discs or transmissions, e-mails, instant messages, tape or video recordings, voicemails, diaries, log books, minutes, notes, studies, surveys and forecasts, and any and all copies thereof. The definition is not limited to transfers between persons, but also includes other transfers, such as records and memoranda to file; any written letter, memorandum, or other document that was sent by one or more individuals to another or others; any telephone call between one or more individuals and another or others, whether such call was by chance or prearranged or not, formal or informal; and any conversation or meeting between one or more individuals and another, whether such contact was by chance or prearranged or not, formal or informal.

17. “Document” and “documents” shall have the broadest possible meaning allowed by Rule 34(a) of the Federal Rules of Civil Procedure, and includes (without limitation) any writing of any kind, including originals and all non-identical copies (whether different from the original by reason of any notation made on such copies or otherwise). The terms “document” and

“document(s)” shall include electronically stored information (“ESI”) and shall also include, without limitation, the following items, whether printed or reproduced by any process, or written or produced by hand or stored in computer memory, magnetic or hard disk or other data storage medium, and whether or not claimed to be privileged, confidential or otherwise excludable from discovery, namely, notes, letters, correspondence, communications, telegrams, memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or meetings, diaries, reports, laboratory and research reports and notebooks, recorded experiments, charts, plans, drawings, diagrams, illustrations, requests for proposals, press releases, drafts of documents, and all other materials fixed in a tangible medium of whatever kind known to you or in your possession, custody, or control.

18. The terms “thing” and “things” mean and include any tangible item other than a Document, and includes objects of every kind and nature.

19. “Identify,” “identity,” or “identification” means:

- a. when used with reference to a natural person, to state the person's full name, address, and telephone number, and state the person's present or last known position and employer.
- b. when used with reference to any entity (including without limitation corporation, company, firm, partnership, joint venture, association, governmental body or agency, or persons other than a natural person), to state the full legal name of the entity, the place of incorporation or organization, the address and telephone number of the principal place of business, and the nature of the business conducted by that entity.

- c. when used with reference to any document or ESI, to summarize the substance of the document or ESI and state the document's or ESI's title, date, form (e.g., letter, memorandum, email, etc.), production number range, author(s), recipient(s), the present location of the document or ESI, and the name of its present custodian; if the document or ESI existed at one time but does not presently exist, the reason(s) why it no longer exists and the identity of the last person having custody of it; and, if the document or ESI is in a foreign language, whether an English translation of the document or ESI exists, whether partial or complete.
- d. when used with reference to a tangible thing, to provide: (i) any model or catalogue number; (ii) any article or model name; (iii) any technical or promotional materials describing the article or its use; and (iv) the dates and locations of its production.
- e. when used with reference to any communication, to (i) summarize the substance of the communication; (ii) state the date and place of the communication; (iii) identify each person who was present at, involved in, connected with or who participated in the communication; (iv) state the form of communication (e.g., telephone call, meeting, letter, etc.); and (v) identify each document and ESI memorializing or referring to the communication.

20. As used herein, the present tense includes the past and future tenses. The singular includes the plural, and the plural includes the singular. "All" means "any and all," "any" means "any and all." "Including" means "including but not limited to." "And" and "or" encompass both

“and” and “or.” Words in the masculine, feminine, or neutral form shall include each of the other genders.

21. The terms “reflect,” “reflecting,” “relate to,” “refer to,” “relating to,” and “referring to” shall mean relating to referring to, referencing, concerning, mentioning, reflecting, pertaining to, evidencing, involving, describing, discussing, commenting on, embodying, containing, comprising, consisting of, responding to, supporting, showing, summarizing, memorializing, contradicting, or constituting (in whole or in part), as the context makes appropriate, including having any legal, logical, or factual connection with the designated subject matter referred to in the request.

INSTRUCTIONS

1. These Requests for Production are continuing in nature, so as to require prompt supplemental production and/or written responses if further or different information, documents or things become known or available to Defendants.

2. If in responding to these Requests for Production, Defendants contend that an ambiguity exists with respect to construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in responding.

3. Whenever in these Requests you are asked to identify or produce a document which is deemed by you to be properly withheld from production:

(a) If you are withholding the document under a claim of privilege not covered by the exemptions covered by the parties' agreement set forth in the Joint Proposed Discovery Plan (ECF No. 67), please provide the information set forth in Federal Rule of Civil Procedure 26(b)(5), including:

- (i) The date of the privileged information;
- (ii) The author(s) of the privileged information;
- (iii) The recipient(s) of the privileged information;
- (iv) The subject matter of the privileged information; and
- (v) The basis of the claim of privilege.

(b) If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery;

(c) If you are withholding the document for any reason other than an objection that it is beyond the scope of discovery or that a request is unduly burdensome, please provide the

reason for withholding the document, and the information requested in sections 3(a) above. Regardless of whether a protective order is entered by the Court, in all instances in which you are withholding documents or things on the ground of confidentiality, please so indicate in your responses.

4. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, you must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration, the date of the redaction or alteration, and the person performing the redaction or alteration. Any redaction must be clearly visible on the redacted document.

5. To the extent that a particular Request for Production requires the production of any document that contains personal identifying information such as social security numbers, taxpayer identification numbers, birth dates, names, or financial account information, please redact that information prior to producing the document.

6. If the requested documents are maintained in a file, the file folder is to be included in the production of those documents.

7. If Defendants' response to a particular Request for Production is a statement that Defendants lack the ability to comply with that Request, Defendants must specify whether the inability to comply is because the particular item or category of information never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in Defendants' possession, custody, or control, in which case the name and address of any person or

entity known or believed by you to have possession, custody, or control of that information or category of information must be identified.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Documents and things concerning Plaintiff Nicholas Harrison.

DOCUMENT REQUEST NO. 2

All Documents and things concerning Plaintiff Outserve-SLDN, Inc.

DOCUMENT REQUEST NO. 3

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DoD 2014 Report to Congress.

DOCUMENT REQUEST NO. 4

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DoD 2018 Report to Congress.

DOCUMENT REQUEST NO. 5

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DOGO Instruction.

DOCUMENT REQUEST NO. 6

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DOGO Policy.

DOCUMENT REQUEST NO. 7

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6485.01.

DOCUMENT REQUEST NO. 8

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in

writing or amending DoDI 6130.03.

DOCUMENT REQUEST NO. 9

All Documents concerning any medical waivers granted under DoDI 6130.03 to individuals seeking admission to the Military Services who would otherwise be disqualified due to the presence of HIV.

DOCUMENT REQUEST NO. 10

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07.

DOCUMENT REQUEST NO. 11

All Documents concerning any medical waivers granted under DoDI 6490.07 to service members living with HIV.

DOCUMENT REQUEST NO. 12

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending AR 600-110.

DOCUMENT REQUEST NO. 13

All Documents regarding any exceptions or waivers granted under AR 600-110 by service members living with HIV.

DOCUMENT REQUEST NO. 14

All Documents concerning the waivers to deploy referenced in the Declaration of Lisa Lute. (ECF No. 43-1, at ¶ 4.)

DOCUMENT REQUEST NO. 15

All Documents regarding any Airman with an ALC-C3 code who has received a waiver to

deploy or be assigned overseas, as referenced in the Declaration of Ms. Martha Soper. (ECF No. 48, at ¶ 8.b.)

Dated: October 24, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 24th day of October, 2018 to the following counsel of record via electronic mail.

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/s/ Andrew R. Sommer

Exhibit C

1. Defendants object to Plaintiffs' requests to the extent they seek information that is obtainable from some other source that is more convenient, less burdensome, or less expensive, including, but not limited to, information previously provided to Plaintiffs or that Plaintiffs have or should have, and information that is equally available to Plaintiffs. In this regard, Defendants reserve the right to object to Plaintiffs' requests where they are unduly burdensome in both financial cost and manpower, especially in relation to the relevance of the sought information to Plaintiffs' claims and Defendants' defenses.

2. Defendants object to Plaintiffs' requests to the extent they seek information protected by the attorney-client privilege, the attorney work-product privilege, or the deliberative process privilege.

3. Defendants object to Plaintiffs' requests to the extent they seek information not relevant to the claims or defenses of either party to this action or disproportionate to the needs of this case, and thus not within the scope of permitted discovery under Federal Rule of Civil Procedure 26(b)(1).

4. Defendants object to Plaintiffs' Definition No. 3 to the extent it seeks information in the custody of the U.S. Navy, U.S. Marine Corps, U.S. Air Force, or U.S. Coast Guard. Plaintiff Harrison, who is a soldier in the Army, is the only Plaintiff to have alleged an injury in this case, which stems only from application of Department of Defense Instruction ("DoDI") 6485.01 § 3(a) to the commissioning of Service members who are HIV positive. *See* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Documents in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and their production would impose a significant burden on these Military Departments.

5. Defendants object to Plaintiffs' Definition No. 4 to the extent it seeks information in the custody of the U.S. Navy, U.S. Marine Corps, U.S. Air Force, or U.S. Coast Guard. Plaintiff Harrison, who is a soldier in the Army, is the only Plaintiff to have alleged an injury in this case, which stems only from application of Department of Defense Instruction ("DoDI") 6485.01 § 3(a) to the commissioning of Service members who are HIV positive. *See* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Documents in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and their production would impose a significant burden on these Military Departments.

6. Defendants object to Definition No. 10 to the extent it seeks drafts or any other documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 10 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

7. Defendants object to Definition No. 11 to the extent it seeks drafts or any other documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 11 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

8. Defendants object to Definition No. 12 to the extent it seeks drafts or any other documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 12 to the extent

it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

9. Defendants object to Definition No. 13 to the extent it seeks drafts or any other documents that are protected by the deliberative process privilege, as is inherent in the phrase “prior versions or amendments thereof.” Defendants further object to Definition 13 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

10. Defendants object to Definition No. 16 to the extent it seeks information that is protected by the deliberative process privilege, as is inherent in the inclusion of “thoughts,” “ideas,” “drafts,” “notes,” “memoranda to file,” and “any conversation or meeting between one or more individuals and another, whether such contact was by chance or prearrange or not, formal or informal.”

11. Defendants object to Definition No. 19, including its five subparts, to the extent it seeks to require Defendants to create or otherwise produce documents not already in existence. *See Fed. R. Civ. P. 34.*

12. Defendants object to Definition No. 21 to the extent it seeks information that is protected by the deliberative process privilege, as is inherent in “reflecting,” “discussing,” “commenting on,” and “memorializing.”

OBJECTIONS TO SPECIFIC REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Documents and things concerning Plaintiff Nicholas Harrison.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome as to “all documents and things concerning Plaintiff Nicholas Harrison” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request on the basis that the word “concerning” is vague and ambiguous.

DOCUMENT REQUEST NO. 2

All Documents and things concerning Plaintiff Outserve-SLDN, Inc.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome as to “all documents and things concerning Plaintiff Outserve-SLDN, Inc.” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request on the basis that the word “concerning” is vague and ambiguous. Defendants further object to this request to the extent it is duplicative of Document Request No. 1. Plaintiff Outserve-SLDN, Inc. has not alleged that it has suffered an injury itself and thus must establish that it has standing as an association; accordingly, Plaintiff Outserve-SLDN, Inc. has standing only to the extent that one or more of its members is suffering a cognizable injury, and the only Outserve-SLDN, Inc. member to have made such an allegation in this case is Plaintiff Harrison.

See Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 21, ECF No. 43.

DOCUMENT REQUEST NO. 3

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DoD 2014 Report to Congress.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case.

DOCUMENT REQUEST NO. 4

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DoD 2018 Report to Congress.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants

further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case.

DOCUMENT REQUEST NO. 5

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DOGO Instruction.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case.

DOCUMENT REQUEST NO. 6

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing the DOGO Policy.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case.

DOCUMENT REQUEST NO. 7

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6485.01.

OBJECTIONS: Defendants object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case. Defendants further object to this request to the extent it seeks materials “reviewed or relied upon” in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs’ claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 8

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6130.03.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants' policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants "reviewed" but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs' claims and is not proportional to the needs of the case. Defendants further object to this request to the extent it seeks materials "reviewed or relied upon" in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs' claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 9

All Documents concerning any medical waivers granted under DoDI 6130.03 to individuals seeking admission to the Military Services who would otherwise be disqualified due to the presence of HIV.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants' policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party's claim or

defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer—not from being admitted to the Military Services—because of his HIV status. *See* Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Defendants further object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case. Defendants further object to this request to the extent it seeks materials “reviewed or relied upon” in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs’ claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 10

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further

object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case. Defendants further object to this request to the extent it seeks materials “reviewed or relied upon” in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs’ claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 11

All Documents concerning any medical waivers granted under DoDI 6490.07 to service members living with HIV.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer—not from being deployed—because of his HIV status. *See* Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Defendants further object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants further object to this request to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the challenge policy in this case because such information is not relevant to Plaintiffs’ claims and is not proportional to the needs of the case. Defendants further object to this request to the extent it seeks materials “reviewed or relied

upon” in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs’ claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 12

All Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending AR 600-110.

OBJECTIONS: Defendants object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege. Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and to the extent it seeks information that Defendants “reviewed” but did not rely on to issue the policy, and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1).* Defendants further object to this request to the extent it seeks materials “reviewed or relied upon” in developing versions of policy documents that have been superseded and are thus no longer in effect because such materials are not relevant to Plaintiffs’ claims and are not proportional to the needs of the case.

DOCUMENT REQUEST NO. 13

All Documents concerning any exceptions or waivers granted under AR 600-110 by service members living with HIV.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants' policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer because of his HIV status. *See* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Whether or not Service members who are HIV positive are themselves able to grant waivers or exceptions has no bearing on this issue. Defendants further object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege, or protected from disclosure by the Privacy Act and/or the Health Insurance Portability and Accountability Act. Defendants further object to this request because the phrase "any exceptions or waivers granted under AR-110 by service members" is vague and confusing.

DOCUMENT REQUEST NO. 14

All Documents concerning the waivers to deploy referenced in the Declaration of Lisa Lute. (ECF No. 43-1, at ¶ 4.)

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants' policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from

becoming a commissioned officer—not from being deployed, which is the subject addressed in paragraph 4 of the Lute Declaration—because of his HIV status. *See* Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Defendants further object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege, or protected from disclosure by the Privacy Act and/or the Health Insurance Portability and Accountability Act.

DOCUMENT REQUEST NO. 15

All Documents regarding any Airman with an ALC-C3 code who has received a waiver to deploy or be assigned overseas, as referenced in the Declaration of Ms. Martha Soper. (ECF No. 48, at ¶ 8.b.)

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because it seeks information about Defendants’ policies other than 6485.01 § 3(a), and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). The only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer—not from being deployed, which is the subject addressed in paragraph 8.b of the Soper Declaration—because of his HIV status. *See* Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Defendants further object to this request to the extent this request seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants further object to this request to the extent it seeks information in the custody or control of the U.S. Air Force. Plaintiff Harrison, who is a soldier in the Army, is the only Plaintiff to have alleged an injury in this case. Documents in the custody and control of the Air

Force (to which Plaintiff Harrison does not belong and did not apply) have no bearing on this case and their production would impose a significant burden on the Air Force.

DATE: November 8, 2018

Respectfully submitted,

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