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## **INTRODUCTION**

After serving broad discovery requests touching on many, vaguely referenced policies of the Department of Defense (DoD) and each Military Department, as well as the Coast Guard,<sup>1</sup> Plaintiffs now seek a ruling from the Court that their claims—purported “facial” challenges to these policies and an as applied challenge to the Army’s decision not to grant Sgt. Harrison a waiver to the medical standards for appointment as a commissioned officer—permit Plaintiffs to seek discovery from all corners of the military. Plaintiffs’ sweeping discovery is unnecessary, not particularized or relevant to their claims, and out-of-proportion to the needs of this case.

As an initial matter, the Court should allow the government to compile a record of the bases supporting DoD’s decision to not allow applicants with HIV to access as a commissioned officer. Such record would allow the Court and Plaintiffs to test the government’s position against whatever evidence the Plaintiffs may submit in response. That is what is envisioned by rational basis review, and it is the most efficient means to move this case to final resolution.

Alternatively, if the Court were inclined to permit discovery, the Court should allow discovery into only the two policies that prevented Sgt. Harrison from becoming an officer. Anything beyond that is irrelevant, unnecessary, and not proportionate to the needs of the case.

## **BACKGROUND**

While Plaintiffs’ Complaint broadly refers to “current military policies that discriminate against people living with the human immunodeficiency virus (HIV),” *see* Compl. at 1, Dkt. 1, Plaintiffs allegations concern only one injury: the denial of Sgt. Harrison’s application for

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<sup>1</sup> Although the Coast Guard is “a military service and a branch of the armed forces of the United States at all times,” 14 U.S.C. § 1, it is not a military department unless operating as part of the Navy, as directed by the President or Congress as part of a declaration of war, *see* 5 U.S.C. § 102; 14 U.S.C. § 3(a) (“The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy.”). The Coast Guard is not a defendant here.

appointment as a commissioned officer in the National Guard. *See* Compl. at ¶¶ 71-74; Def.s' Opp. to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, Dkt. 43. Despite this, Plaintiffs served broad requests for production that sought documents about many policies issued by the DoD, the Army, and military services that are not defendants here. Defendants objected to these broad requests. *See* Defs.' Resp. to Pls.' First Set of Reqs. for Produc. of Docs. and Things to Defs. (Nos. 1-15), Ex. A. Based on these objections, and without waiting to receive Defendants' responses, Plaintiffs moved to compel. *See* Pls. Mot. To Compel Produc. of Docs. at 1-2, Dkt. 72; Pls.' Mem. In Supp. of Mot. To Compel Produc. of Docs. (Mem.), Dkt. 73.

**I. DoD And The Military Services Have Many Policies Governing Service Members With HIV.**

DoD and the military services have several policies governing service members with HIV. First, Department of Defense Instruction (DoDI) 6485.01 ("Human Immunodeficiency Virus (HIV) in Military Service Members") sets forth DoD's policy for the identification, surveillance, and management of service members infected with HIV, as well as for the prevention of further transmission of the disease. Under this policy, individuals with laboratory evidence of HIV infection are ineligible for "appointment, enlistment, pre-appointment, or initial entry training" in the military. DoDI 6485.01 § 3(a). This policy thus precludes individuals who are HIV-positive from enlisting in the military and from being appointed to positions within the military, including appointment as a commissioned officer. *Id.* (referencing DoDI 6130.03). All applicants for appointment, enlistment, and induction are screened for HIV infection, and all active-duty and reserve component personnel are routinely screened every two years. *Id.* Enclosure 3 § 1(a), (c). Active-duty and reserve component service members who test positive are not involuntarily separated from the military but are instead referred for "appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other

chronic or progressive illnesses. . . .” *Id.* Enclosure 3 § 2(c)-(d). If found to be fit for duty, active-duty service members who are HIV-positive may serve “in a manner that ensures access to appropriate medical care.” *Id.* Enclosure 3 § 2(c). HIV-positive service members cannot deploy without a waiver. *See* DoDI 6490.07 § 4(c); *see also id.* Enclosure 3 § (e)(2) (listing HIV infection as a medical condition precluding contingency deployment).

Another policy, DoDI 6130.03, provides the medical standards that must be satisfied by individuals for appointment, enlistment, or induction into the military services. Those standards include ensuring that each individual be:

- Free of contagious diseases that may endanger the health of other personnel;
- Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness;
- Medically capable of satisfactorily completing required training and initial period of contracted service;
- Medically adaptable to the military environment without geographical area limitations; and
- Medically capable of performing duties without aggravating existing physical defects or medical conditions.

DoDI 6130.03 § 1.2(c). Individuals who do not meet these physical and medical standards may request a medical waiver. *Id.* § 1.2(d). DoDI 6130.03 identifies medical conditions across twenty-nine different body systems that DoD considers to be disqualifying for military service. *Id.* § 5. Among these conditions is laboratory evidence of HIV infection, which is a disqualifying “systemic condition.” *Id.* § 5.23(b).

The military services have established HIV-related policies consistent with these DoD instructions. The military service to which Sgt. Harrison belongs—the Army—makes HIV-infected personnel ineligible for enlistment or appointment for either active duty or reserve duty, but prohibits the separation of infected soldiers solely because of a soldier’s HIV status. *See* Army

Reg. 600-110, § 1-16(a), (e). HIV-positive soldiers are, however, ineligible to serve outside the United States absent a medical waiver.<sup>2</sup> *Id.* § 1-16(f).

## **II. Plaintiffs' Claims Arise From The Alleged Injuries Of Sgt. Harrison.**

Although Plaintiffs discuss various HIV-related policies in their Complaint, their claims are based on the experience of Sgt. Harrison, a sergeant in the Army who was diagnosed in 2012 as being HIV-positive. Compl. ¶¶ 40, 47. In 2013, Sgt. Harrison applied for a position in the Judge Advocate General's ("JAG") office for the National Guard in Washington, D.C., but his application was ultimately rejected pursuant to DoDI 6485.01 § 3(a) (the "Commissioning Policy"), which precludes HIV-positive service members from commissioning as officers. *Id.* ¶ 63. Sgt. Harrison's request for a medical waiver from the Chief Surgeon of the Army National Guard, as well as his request for an exception to policy from USD(P&R), were denied, with the latter citing the Commissioning Policy as the justification for the denial. *Id.* ¶¶ 54-55, 63.

Plaintiffs contend that the Commissioning Policy discriminates against individuals living with HIV in violation of their equal protection rights, and they seek an injunction of "any separation, discharge, adverse action, or denial of promotion, reenlistment, continuation of service, accession, or appointment" because of a service member's HIV status. *Id.* ¶¶ 71-78, Prayer for Relief ¶ 2. In addition, Plaintiffs ask the Court to require the Army to commission Sgt. Harrison as a JAG officer with the rank of captain. *Id.*, Prayer for Relief ¶ 3. Plaintiff OutServe-SLDN alleges no injury to itself as an organization, asserting instead that it represents "the interests of [the group's] members currently living with HIV," but the only member it identifies is Sgt. Harrison, and it does not describe or put at issue the circumstances of any other service member claiming injury from a particular HIV policy. *See id.* ¶ 70.

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<sup>2</sup> In this regulation, "the United States" includes Alaska, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

## ARGUMENT

Rule 26(b)(1) of the Federal Rules of Civil Procedure limits the scope of discovery to matters that are “relevant to any party’s claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1) (emphasis added). The wide-ranging discovery sought by Plaintiffs has no bearing on Plaintiffs’ claims, which are subject to highly deferential review and are limited to two policies cited by Defendants in the denial of Sgt. Harrison request for an exception to policy. The broad discovery sought by Plaintiffs is also disproportionate to the limited scope of the claims.

### **I. The Overly Broad Discovery Sought By Plaintiffs Has No Bearing On Plaintiffs’ Claims.**

The broad discovery sought by Plaintiffs—from multiple government agencies that are not defendants here—is not relevant to Plaintiffs’ claims. In their motion, Plaintiffs admit that their as applied challenges are limited to two policies, DoDI 6485.01 and AR 600-110, and all but concede that their as applied challenges do not support the scope of their discovery requests. Mem. at 2. Rather than defend their broad discovery on those grounds, Plaintiffs rely exclusively on their “facial” challenges to justify the expansive discovery they seek of all HIV policies for all military services. *Id.* at 8-9. Plaintiffs’ facial constitutional challenges, however, do not provide a basis for wide-ranging discovery against officials, departments, and agencies that are not defendants in this case.

#### **A. Discovery Is Inappropriate Because Plaintiffs’ Claims Should Be Reviewed Under The APA.**

*First*, Plaintiffs’ claims should be reviewed by the Court on an administrative record and discovery should not be permitted. The Administrative Procedure Act (APA) provides the proper vehicle to raise constitutional challenges to agency action, including agency policies. *See* 5 U.S.C. § 706(2)(B) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity.”);

*see also Robbins v. BLM*, 438 F.3d 1074, 1085 (10th Cir. 2006) (reviewing a procedural due process claim “under the framework set forth in the APA”). The APA is generally the only avenue for judicial review of the actions of Executive Branch agencies. *See Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) (quoting *Webster v. Doe*, 486 U.S. 592, 607 (1988) (Scalia, J., dissenting) ([“A]t least with respect to all entities that come within the Chapter’s definition of ‘agency,’ *see* 5 U.S.C. § 701(b), if review is not available under the APA it is not available at all.”); *see also In re Dep’t of Commerce*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J., concurring in part and dissenting in part) (“Normally, judicial review of an agency action . . . is limited to the record the agency has compiled to support its decision.”). Challenges to agency action under the APA are limited to an administrative record, the Court’s review should be based on that record, and thus discovery should not be permitted. *See* 5 U.S.C. § 706 (in determining whether an agency action is unlawful because it is “contrary to [a] constitutional right,” the “court shall review the whole record or those parts of it cited by a party . . .”); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802–03 (E.D. Va. 2008) (finding that “the administrative record is sufficient for the Court to render a final decision as to the constitutionality of the Final Rules under the Patent Clause” of the Constitution and that “the wide-ranging discovery [the plaintiff] seeks exceeds the scope of what is permitted by 5 U.S.C. § 706(2)(B) review”); *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1171 (D. Wyo. 2015) (finding that “when conducting constitutional review of agency action, a court must limit its review to the administrative record unless an exception applies”). This rule applies even when a plaintiff has not properly labeled a claim as proceeding under the APA. *See Movimiento Democracia, Inc. v. Johnson*, 193 F. Supp. 3d 1353, 1364-65 (S.D. Fla. 2016) (court reviewed the plaintiffs’ due process and equal protection claims under the APA, even though plaintiffs had argued that the government’s actions did not qualify as

an agency adjudication); *Bellion Spirits, LLC v. United States*, No. 17-2538 (JEB), 2018 WL 4637013, at \*7 (D.D.C. Sept. 27, 2018) (rejecting plaintiffs’ argument that the APA did not apply to their constitutional claims).<sup>3</sup>

In part for this reason, courts generally prohibit extra-record evidence even when the military decisions at issue are challenged on constitutional grounds. *Harkness v. Sec’y of the Navy*, 858 F.3d 437, 449 (6th Cir. 2017) (upholding district court’s decision not to permit discovery beyond the administrative record) *cert. denied sub nom. Harkness v. Spencer*, 138 S. Ct. 2648 (2018); *Harkness v. United States*, 727 F.3d 465, 471 (6th Cir. 2013) (“[T]he review scheme does not carve out an exception for constitutional claims.”); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 403 (D. Mass. 2006) (rejecting Plaintiff’s attempt to proceed to discovery in an equal protection challenge to a military policy “so that there might be an inquiry into the legitimacy of Congress’ motivation.”) *aff’d sub nom. Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008).<sup>4</sup> And, when supplementation is allowed, it is when a Plaintiff can overcome the presumption of good faith

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<sup>3</sup> Other cases include *Chiayu Chang v. U.S. Citizenship & Immigration Services*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (“The APA’s restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery.” (quoting *Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004))), *Ketcham v. U.S. Nat’l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at \*2 (D. Wyo. Mar. 29, 2016) (holding that judicial review in First Amendment claim must proceed under the APA and reasoning that “[t]o distinguish between a ‘stand-alone constitutional challenge’ and an ‘APA challenge,’ as urged by Plaintiffs, would run afoul of Congress’s intent” of having review of agency actions governed by the APA).

<sup>4</sup> See also *Steffan v. Perry*, 41 F.3d 677, 699 (D.C. Cir. 1994) (Randolph, J., concurring) (“It is the military’s grounds for decision that are decisive. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.” (citation omitted)); *Pruitt v. Cheney*, 963 F.2d 1160, 1166–67 (9th Cir. 1992) (“Finally, the Army urges that we should defer to the military judgment. We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army’s discrimination against Pruitt are rationally related to any of the Army’s permissible goals.”) (citing *Rostker*, 453 U.S. at 64–69; *Goldman*, 475 U.S. at 507)

afforded military officials, *Hoffman v. United States*, 894 F.2d 380, 385 (Fed. Cir. 1990), and is limited to extra-record materials that are “necessary for an effective judicial review.” *Anderson v. United States*, 111 Fed. Cl. 572, 583 (C.F.C. 2013), *aff’d, sub nom. Allphin v. United States*, 758 F.3d 1336 (Fed. Cir. 2014). Plaintiffs cannot evade these principles by pointing to their constitutional claims. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

To the extent relied upon by Plaintiffs, the district court decision in *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), is not only in error but also distinguishable. In that case, plaintiffs challenged the President’s direction to the military to reconsider the military’s policy for service of transgender individuals. 275 F. Supp. 3d (D.D.C. 2017). Discovery started while the military reviewed its policies. *See Order at 1, Doe v. Trump*, No. 17-1597(CKK)), Ex. B. Then, at the end of this review, the Secretary of Defense presented recommended policy changes to the President. *Id.* at 1-2. While the President’s prior direction was not subject to the APA, the military’s new policy decision was, and so the government sought review the new policies under the APA. *Id.* The Court denied this request. *Id.*

Unlike *Doe*, the decisions challenged here have always been agency actions. And while the claims in *Doe* were held (incorrectly) to be subject to an intermediate level of scrutiny, 275 F. Supp. 3d at 208-10, Plaintiffs’ claims here, by contrast, are subject to rational basis review. Lastly, the *Doe* Court had concluded that plaintiffs had shown that the policy for military service of transgender individuals was infected by animus. *Id.* at 213. But even if the court’s disputed conclusion is correct in that still pending and unresolved *Doe* case,<sup>5</sup> Plaintiffs here have made no showing of animus or bad faith, and their requested discovery is inconsistent with the presumption of regularity, which requires courts to presume that executive officers act in good faith. *See United*

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<sup>5</sup> Defendants subsequently appealed the decisions of the *Doe* court not to dissolve a preliminary injunction. *See Doe v. Trump*, No. 18-5257 (D.C. Cir.).

*States v. Armstrong*, 517 U.S. 456, 464 (1996) ; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (recognizing an exception to record review of agency action if there is “a strong showing of bad faith or improper behavior”).

**B. Even If The Court Reviews Plaintiffs’ Claims Outside The Framework Of The APA, Plaintiffs’ Claims Are Subject To A Highly Deferential Standard Of Review.**

*Second*, Plaintiffs’ challenges are governed by a highly deferential standard of review under which a Court may consider only whether there is a rational basis for the challenged policy. To begin, the Fourth Circuit has held that rational basis review applies to Plaintiffs’ claims. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that the “alleged unequal treatment of HIV-positive [individuals]” is subject to rational basis review). And the Fourth Circuit’s holding in this regard follows decisions from other jurisdictions, which have explained that people with HIV do not constitute “a suspect class that is entitled to special consideration under the Equal Protection Clause.” *Mofield v. Bell*, 3 F. App’x 441, 443 (6th Cir. 2001); *see also* Dkt. 43 at 24-26 (collecting cites). Plaintiffs’ discovery is not appropriate given the applicable standard.

Plaintiffs’ discovery demands are also not appropriate because the military decisions challenged here are subject to a far more deferential standard. While the government is not “free to disregard the Constitution,” under military-deference principals, when acting “in the area of military affairs,” the “tests and limitations to be applied” by courts differ “because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations destined for civilian society.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The same is true for the constitutional “rights of servicemembers” more generally, including those within the Due Process Clause. *Weiss v. United States*, 510 U.S. 163,

177 (1994); *see also Solorio v. United States*, 483 U.S. 435, 448 (1987) (listing “variety of contexts” where deferential review applied).

Thus, “constitutional rights must be viewed in light of the special circumstances and needs of the armed forces,” and “[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities.” *Beller v. Middendorf*, 632 F.2d 788, 810–11 (9th Cir. 1980) (Kennedy, J.) (rejecting due-process challenge to Navy regulation requiring discharge of gay and lesbian service members). This different standard of review is necessary not only because the Constitution itself commits military decisions to “the political branches directly responsible—as the Judicial Branch is not—to the electoral process,” but also because “it is difficult to conceive of an area of governmental activity in which the courts have less competence.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Rostker*, 453 U.S. at 65–66. That is particularly true with respect to the “‘complex, subtle, and professional decisions as to the composition ... of a military force,’ which are ‘essentially professional military judgments.’” *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (citation omitted). Thus, “‘the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized’ that constitutional challenges to military personnel policies” are conducted differently than ordinary civil litigation. *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (citing *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983)); *see also Beller*, 632 F.2d at 810 (“While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces.”); *Cook v. Gates*, 528 F.3d 42, 57 (1st Cir. 2008) (“It is unquestionable that judicial deference to congressional decision-making in the area of

military affairs heavily influences the analysis and resolution of constitutional challenges that arise in this context.”).

The Supreme Court reaffirmed this point last Term, when it declined to import “the *de novo* ‘reasonable observer’ inquiry” under the Establishment Clause into “the national security ... context,” which includes “military actions.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 n.5 (2018). In *Hawaii*, plaintiffs brought constitutional claims against the third of a series of executive actions directing the Secretary of Homeland Security to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. *Id.* at 2403-06. The Supreme Court applied “rational basis review” to plaintiffs’ challenge, noting that judicial “inquiry into matters of ... national security is highly constrained,” *id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)), even when evaluating a “‘categorical’ ... classification that discriminate[s] on the basis of sex,” *id.* at 2419 (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)). The Supreme Court stressed that, in reviewing a policy affecting national security, a court “cannot substitute [its] own assessment for the Executive’s predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’” *Id.* at 2421 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). The Supreme Court also explained that this deferential review applies “across different contexts and constitutional claims.” *Id.* at 2419.

In sum, a deferential standard of review applies to Plaintiffs’ claims in which the Court should “uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* at 2420. Plaintiffs’ claims should thus turn on Defendants’ stated justifications for the challenged policies, discovery is therefore neither

necessary nor appropriate into how DoD's policies are implemented differently by military services that are not defendants here.

**C. The Scope Of Plaintiffs' Claims Is Limited To The Scope Of Sgt. Harrison's Claims.**

*Third*, the broad discovery Plaintiffs seek could not be based on their purported "facial" challenges in any event. The only injury alleged by Plaintiffs here is that Sgt. Harrison was precluded from becoming a commissioned officer because of his HIV status.<sup>6</sup> *See* Dkt. 43 at 20-21. No other action or military policy by another service is at issue. As should be obvious, Sgt. Harrison has no Article III standing to challenge the policies of the other military services and, as an Army soldier, he cannot claim any injury to himself from a Navy, Air Force, or Coast Guard policy. The mere incantation of a "facial" challenge does not grant Sgt. Harrison a license to seek discovery into policies that never have been or could be applied to him. Even a plaintiff bringing a "facial" challenge must show *some* injury to himself as a result of the challenged policies. *See, e.g. Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (holding that plaintiff had standing to raise a facial First Amendment overbreadth challenge on behalf of third-party charities to a limitation on how much charities could spend on expenses, even where plaintiff did not suffer the same injury, but had a business relationship injured by the challenged provision). Sgt. Harrison, therefore, cannot justify discovery of other military services and their policies on the theory that he has brought a "facial" challenge to policies that have never been applied to him.<sup>7</sup>

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<sup>6</sup> Contrary to Plaintiffs' assertion in their motion, the allegations about DoD's retention policy are found among the background allegations, *see* Mem. at 2-3 (citing Compl. ¶¶ 37-39), not the allegations of the complaint that set forth Plaintiffs' claims and injuries, *see* Compl. ¶¶ 71-74. And Plaintiffs do not allege in their claim that Sgt. Harrison has been injured by the deployment policy.

<sup>7</sup> At most, Sgt. Harrison could argue that the policies of other military services are relevant to his challenge to the Army policy on commissioning. But as set forth below, such discovery is not otherwise appropriate as a matter of law or proportionate to the needs of the case. And Defendants did not concede that the Air Forces' policies are relevant to Plaintiffs' claims, as Plaintiffs contend,

Similarly, Plaintiff OutServe-SLDN's injuries are derivative of, and limited to, that of Sgt. Harrison's because OutServe-SLDN has chosen to rely on Sgt. Harrison's injury to demonstrate its standing. *See* Compl. ¶ 70 (alleging to "represent[] the interests of its members currently living with HIV, including Sgt. Harrison . . ."). With no alleged injury to itself, OutServe-SLDN can proceed as a Plaintiff only because one or more of its members is suffering immediate or threatened injury as a result of the challenged action. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (an organization's injuries are limited to injuries of its members to the extent the organization relies on its members' injuries). And the only member and injuries it identifies are those related to Sgt. Harrison. OutServe-SLDN cannot obtain general discovery of the entire military establishment on the mere theory that perhaps another one of its unidentified members in another military service is being harmed by some other HIV policy than the one Sgt. Harrison challenges. Accordingly, the Complaint can be construed only as challenging the two policies that allegedly injured Mr. Harrison, DoDI 6485.01 and AR 600-110. For these reasons, Plaintiffs' purported facial challenges cannot justify the broad discovery they seek across the military services related to all manner of HIV policies not at issue in the facts as alleged.

**D. Plaintiffs' Facial Challenges Do Not Require A Factual Record Beyond DoD's Policy Decisions.**

*Fourth*, even if Plaintiffs' facial challenges could be a basis for extending discovery beyond the Army policy applied to Sgt. Harrison, the policies of the other military services that are not defendants here still would be irrelevant. Rather, the policy decisions of the military services are

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by opposing Plaintiffs' request for a preliminary injunction, the scope of which was disconnected from Plaintiffs' asserted claims. Mem. at 7-8. If that were so, a plaintiff could compel a defendant to choose between forgoing its opposition to the merits of an early, overly broad preliminary injunction request and conceding that the irrelevant assertions of fact in such a request are proportional to the claims pled in the complaint.

subject to and constrained by DoD’s policy directives.<sup>8</sup> The Navy’s judgment about its operational requirements and its capability to deploy sailors with HIV on a few ships is distinct from the Air Force’s decision about its operational requirements and its capacity to deploy airmen with HIV as well as from the Army’s decision about its operational requirements and its capability to support the deployment of soldiers with HIV. The judgments of the military services and the justifications for them do not shed light on DoD’s policies from which they derived. Since the military service’s accession policies are all derived from DoD’s overarching policy, discovery into the services-level policies that simply implement directives from DoD is unnecessary. Indeed, DoD’s 2018 report to Congress states that DoD established these policies, not the military services. *See* Dep’t of Def. 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), Ex. C at 1.

Furthermore, facial challenges to the constitutionality of government policies and statutes generally involve pure questions of law. A plaintiff bringing a facial challenge to a government policy does not have to develop a factual record. The success of such an attack requires “‘that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted). In fact, many well-known facial constitutional challenges have been decided without discovery. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567

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<sup>8</sup> DoD’s HIV policy is an example of this approach. *See, e.g.*, DoDI 6485.01 ¶ 1 (establishing DoD policy for the identification, surveillance, and management of members of the Military Services infected with HIV), ¶ 3 (establishing DoD policy in accordance with medical standards in DoDI 6130.03); DODI 6130.03 ¶ 2.3.a (directing the Secretaries of the Military Departments and the Commandant of the Coast Guard to implement the medical standards in DoDI 6130.03); DoDI 6130.03 ¶ 5.23.b (establishing that the “[p]resence of human immunodeficiency virus or laboratory evidence of infection or false-positive screening test(s) with ambiguous results by supplemental confirmation test(s)” is presumptively disqualifying).

U.S. 519 (2012) (challenge to the constitutionality of the Affordable Care Act decided on a summary judgment motion that followed the district court's ruling on a motion to dismiss); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765-67 (2014) (challenge to the contraception mandate of the Affordable Care Act decided on an appeal from a preliminary injunction motion, without either party conducting discovery *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (deciding constitutional challenge to the "Millionaire's Amendment" of the Bipartisan Campaign Reform Act despite the district court's rejection of FEC's assertion that it needed discovery).

*Shelby County v. Holder*, a lawsuit raising facial challenges to Sections 4(b) and 5 of the Voting Rights Act, was also decided without discovery relating to plaintiffs' facial constitutional claims. *Shelby Cty. v. Holder*, 270 F.R.D. 16, 19-20 (D.D.C. 2010). In that case, the district court explained that its role in resolving a facial challenge to the 2006 extension of the Voting Rights Act was "limited to the actual evidence Congress considered" in passing the 2006 extension. *Id.* at 19 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008) (three-judge court)). The district court rejected defendants' assertion that they needed discovery connected to plaintiff's facial challenges, reasoning that discovery of facts outside the legislative record was not only unnecessary but also embraced "massive factual inquiry" that "[n]o authority require[d] or permit[ted]." *Id.* at 20; *see also* 570 U.S. at 554 ("Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance."). On review, the Supreme Court reached the constitutional issue and abrogated Section 4's preclearance requirement despite the district court's limitation on discovery. *Shelby Cty.*, 570 U.S. 529, 557 (2013).

Similarly here, discovery outside the administrative records is not necessary or appropriate to test Plaintiffs' legal theory. Rather, Plaintiffs' claims should be decided on the records before Defendants when the decisions were made.<sup>9</sup>

## **II. Plaintiffs' Wide-Ranging Discovery Requests Are Not Proportionate To The Needs Of The Case.**

Even if the broad discovery sought by Plaintiffs could be relevant to their claims, the requested discovery is not proportionate to the limited needs of this case. Whether a discovery request is proportional is determined by "considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). And if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive," then the Court "must limit the frequency or extent of discovery otherwise allowed by these rules. . . ." Fed. R. Civ. P. 26(b)(2)(C).

Here, Plaintiffs have served fifteen discovery requests and defined 21 terms. The requests and definitions contain no reasonable time limitations. *See* Pls.' First Set of Reqs. For Producers Of Docs. And Things to Defs. (Nos. 1-15), Ex. E. The definitions purport to require Defendants to search for and obtain documents from (1) military services that are not defendants here as well as (2) DoD and the military services' nearly three millions military and civilian employees. *See* Ex. E Definitions 3, 4, 14. Plaintiffs' requests also purport to encompass all "prior versions and

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<sup>9</sup> For this reason, the claims of Plaintiffs here differ from the facial First Amendment challenges in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013). In that case, plaintiffs' facial First Amendment claims could succeed if the challenged ordinance was invalid in all or even a substantial number of its applications rather than the no-set-of-circumstances standard. *Id.* at 281-82.

amendments” of many policies. *See* Ex. E Definition 10-13. Many requests similarly seek all documents “reviewed or relied upon, either directly or indirectly” in Defendants’ policy making processes and in writing two reports to Congress. *See* Ex. E Reqs. 3-8, 10, 12.

These requirements purport to expand document discovery here well beyond the issues raised in Plaintiffs’ claims. As drafted, Plaintiffs’ requests “encompass all documents reviewed or relied on, either directly or indirectly,” in writing many policies. Because of the lack of any reasonable time limit, these requests would presumably encompass documents stretching back to the discovery that HIV was the infectious agent that caused AIDS in 1984. The search, collection, and review of documents created over a period of more than 30 years would impose significant burdens on Defendants and would be impossible to perform before the discovery deadline. Such a search would also be unduly burdensome because DoD and the military services employ nearly three million people throughout the world.<sup>10</sup> The search would also embrace superseded version of policies that have no bearing on the issues raised by Plaintiffs’ claims, which are limited by the applicable standard of review. The importance of documents so removed in time from Sgt. Harrison’s alleged injuries is negligible, and the obvious burden and expense of this discovery outweighs any benefit it may have.

Plaintiffs’ proposed discovery also sweeps in sources of documents that would provide few non-privileged, non-duplicative documents. For example, communications and draft material created during a policy making process are likely to receive deliberative process protection. *City of Virginia Beach v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (citing *Providence Journal Co. v. U.S. Dep’t of the Army*, 981 F.2d 552, 559 (1st Cir. 1992)). And much of this

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<sup>10</sup> The Defense Manpower Data Center publishes reports of the number of military and civilian personnel at [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) (lasted visited 11/28/18).

material would likely be duplicative of the discovery that Defendants have agreed to provide in response to Plaintiffs' requests.

As shown in Defendants' responses to Plaintiffs' document requests, Defendants have construed each of Plaintiffs' requests to include reasonable limitations on the dates of documents in searches and the location of documents. For example, Defendants construe Request number 3 to be limited to the period during which DoD prepared the 2014 report. Defendants have identified the proponents of the various policies subject to Plaintiffs' discovery requests, and have construed each request to be limited to documents in the custody of those DoD or Army offices. *See, e.g.*, Ex. A at 5 (identifying the sources of records), 7 (construing Request number 3 to be limited to documents "from the AP and OEPM directorates" of the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy). The proponents of Defendants' policy reviews are the most likely source of responsive documents, even from the military services. Discovery into services-level policies that simply implement DoD directives is unnecessary and duplicative.

For example, Request number 4, seeks "all documents reviewed or relied upon, either directly or indirectly, in writing the DoD 2018 Report to Congress." Defendants have construed this request as including documents referenced in the report. *See* Ex. A at 8. The documents referenced in the report include "Service-level information obtained from each of the Military Departments." Ex. C at 1. Thus, it is likely that documents in the custody of the services potentially responsive to Request number 4 would be duplicative of the documents that Defendants have already agreed to produce to Plaintiffs. What is more, the military services may possess a large volume of documents, all of which would require review by the services and DoD. And the overbreadth of Plaintiffs' requests is enlarged even more by their vague reference to documents "indirectly" reviewed—documents that could be identified only when after an extensive review.

The burden and expense of a large-scale document review is significant, and Defendants cannot complete such a sweeping collection and review of documents within the current discovery deadlines. Put simply, the burden and expense of such a review outweighs the needs of this case.

Plaintiffs' suggestion that the Court's comments supports their wide-ranging requests is wrong. Mem. At 8-9. Instead, the Court suggested that it was interested in focusing on Sgt. Harrison's alleged injuries. *See* Ex. D at 10:1-6. For this reason, when responding to Plaintiffs' requests, Defendants have construed the requests to comply with the Court's guidance—to provide discovery proportionate to Plaintiffs' claims—and mindful that duplicative, wide ranging discovery sought by Plaintiffs would impede, rather than promote, the “just, speedy, and inexpensive determination” of this case. Fed. R. Civ. P. 1.

### **III. Defendants' Objections And Responses Follow The Court's Local Rules And Local Practice.**

Lastly, Plaintiffs complain that Defendants' objections flouted the Local Rules and Rule 34. But Plaintiffs misconstrue these rules. First, Plaintiffs incorrectly contend that Defendants included “general objections,” in violation of L.R. 26(c). *See* Mem. at 4 n.3. The objections to which Plaintiffs refer are not general objections, but rather are objections to the separate definitions and “instructions” in Plaintiffs' requests. Because these objections are directed to the definitions and instruction portions of Plaintiffs' requests, Defendants objects properly complied with the Local Rule. In any event, Defendants properly objected within each specific discovery response, and so there is no merit to Plaintiffs' challenge to this practice.

Second, Plaintiffs contend that Defendants “failed to comply with Rule 34” by not stating in their L.R. 26(C) objections whether “any responsive materials are being withheld on the basis of that objection.” Mem. at 3-4. But this contention is inconsistent with the uniform practice in this District and is also illogical. Plaintiffs' argument confuses the preliminary “objections” due after

15 days under L.R. 26 with the final objections due after 30 days under Rule 34. When the L.R. 26(C) objections are due (*i.e.*, 15 days after a discovery request is served), no “responsive materials” are due yet under Rule 34, and thus it is impossible for a propounding party to claim that “responsive materials are being withheld” at that point. Fed. R. Civ. P. 34(b)(2)(C). Indeed, the Commentary to Rule 34 makes clear that requiring a statement about withholding materials was designed 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. That purpose cannot be served *before* a party is required to “produce[] information” in the first place. As a practical matter, after only 15 days, a responding party is still assessing what materials it has and whether it will ultimately waive any objections to producing those materials. For these reasons, it would be difficult, if not impossible, to state after only 15 days what materials exist and whether they will be withheld at the 30-day mark. Construed in this way, Rule 34’s requirement applies only to those objections on which the responding party stands (*i.e.*, where “relevant and responsive information has been withheld on the basis of the objections” after 30 days), thereby narrowing any dispute that may need to be addressed by the Court.

### **CONCLUSION**

For all these reasons, the Court should deny Plaintiffs’ motion to compel production of documents.

DATE: November 28, 2018

Respectfully submitted,

G. ZACHARY TERWILLIGER  
United States Attorney

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

JOSEPH H. HUNT  
Assistant Attorney General  
Civil Division

ANTHONY J. COPPOLINO  
Deputy Director  
Federal Programs Branch

/s/ Robert M. Norway  
NATHAN M. SWINTON  
Senior Trial Counsel  
ROBERT M. NORWAY  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., NW  
Washington, D.C. 20001  
Telephone: (202) 305-7667  
Facsimile: (202) 616-8460  
Nathan.M.Swinton@usdoj.gov

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

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

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

*Counsel for Plaintiffs*

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

*Counsel for Defendants*

# **Exhibit A**

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

NICHOLAS HARRISON, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:18-cv-641-LMB-IDD
	)	
JAMES N. MATTIS, <i>et al.</i> ,	)	
	)	
Defendants.	)	

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

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure and 34(b), Defendants, through undersigned counsel, provide the following objections and responses (“responses”) to Plaintiffs’ Requests for Production of Documents and Things to Defendants (Nos. 1-15).

**INTRODUCTION**

Defendants reserve the right to supplement, clarify, revise, or correct all or part of these Responses. Defendants’ investigation and search for responsive information is continuing. Defendants expressly reserve the right to rely in this action on subsequently discovered information and produce additional responsive documents or information. The information provided in these responses is submitted in accordance with Federal Rule 26(b)(1), which permits the discovery of any non-privileged information that is relevant to a party’s claim or defense and proportional to the needs of the case. Accordingly, Defendants do not, by providing such information, waive any objection to its admissibility on the grounds of relevance, materiality, or other appropriate grounds. These responses have been generated after a reasonable, good-faith search for information and records at the Department of Defense (“DoD”) and the Department of the Army (the “Army”).

**OBJECTIONS APPLICABLE TO EACH REQUEST**

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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking Mr. Harrison’s (1) official military personnel file that is in the custody of the Army, (2) application materials submitted to the Army’s Judge Advocate Recruiting Office, (3) local unit records in the custody of the District of Columbia National Guard, (4) request for a medical waiver in the custody of the National Guard Bureau, (5) requests for exception to policy in the custody of (a) the Chief, Health Promotions Policy, who is the Army’s policy proponent for AR 600-110 within the Office of the Deputy Chief of Staff, G-1, National Guard Bureau, the Accession Policy Directorate (AP directorate) of the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy (ODASD(MPP)), the Officer and Enlisted Personnel Management Directorate (OEPMD directorate) of ODASD(MPP), and the Office of the Assistant Secretary of Defense for Health Affairs – Health Services Policy and Oversight (OASD(HA)-HSPO), (6) application to the Army Board for Correction of Military Records, and (7) medical records in the possession of the Office of the Chief Surgeon of the Army National Guard, dated between January 1, 2013, and May 30, 2018, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants have confirmed that the Office of the Chief Surgeon of the Army National Guard may possess responsive medical records; however, that organization will not disclose those records absent Mr. Harrison’s written consent. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking records identical to those pertaining to Mr. Harrison outline in Defendants’ response to Document Request No. 1, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018, consistent with the records that will be produced in response to Document Request No. 1. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking (a) documents referenced in the 2014 Report to Congress, and (b) documents, dated between December 23, 2013, and September 22, 2014, used to prepare the 2014 Report to Congress, from the AP and OEPM directorates, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking (a) documents referenced in the 2018 Report to Congress, and (b) documents, dated between December 12, 2017, and August 27, 2018, used to prepare the 2018 Report to Congress, from the AP and OEPM directorates, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents dated between July 1, 2017, and July 30, 2018, that contain information about the retention of Service members with HIV from the OEPM directorate, and that were used during the review of the version of DoDI 1332.45 effective on July 30, 2018, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents dated between July 1, 2017, and February 14, 2018, that contain information about the retention of Service members with HIV from the OEPM directorate, and that

were used to prepare the DoD Retention Policy for Non-Deployable Service Members (February 14, 2018), Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents, dated before June 7, 2013, in the possession of OASD(HA)-HSPO and used during the review of the version of DoDI 6485.01 dated June 7, 2013, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents dated between May 6, 2017, and May 6, 2018, that contain information about the accession or retention of individuals with HIV from OASD(HA)-HSPO or the OEPM directorate, and that were used during the review of the version of DoDI 6130.03 dated May 6, 2018, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents from the National Guard Bureau, District of Columbia Army National Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army’s Office of the Deputy Chief of Staff, G-1, about Mr. Harrison’s request for a

waiver of DoDI 6485.01 § 3(a), Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents dated between February 5, 2009, and February 5, 2010, that contain information about the accession or retention of individuals with HIV from OASD(HA)-HSPO, and that were used during the review of the issuance of DoDI 6490.07 dated February 5, 2010,

Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018.

Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking documents from the Army, National Guard Bureau, District of Columbia Army National Guard, and OASD(HA)-HSPO about a request from Mr. Harrison for a waiver to deploy, Defendants respond that, so far as can be ascertained, Mr. Harrison has not sought a waiver to deploy and has not been prevented from deploying pursuant to any DoD or Army policy. Thus, Defendants have not identified any records responsive to this request. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking materials in the custody of the Chief, Health Promotions Policy, that the Army

relied upon when developing the current version of AR 600-110, effective May 22, 2014, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking materials from the National Guard Bureau, District of Columbia Army National

Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1, about Mr. Harrison's requests for a waiver or exceptions to policy, Defendants respond that non-privileged documents responsive to this Request will be produced on a rolling basis beginning November 23, 2018, and ending no later than December 15, 2018. In addition, subject to and without waiving the forgoing objections, Defendants will also provide a spreadsheet, Bates number US00000991 through US00000998, maintained by the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1, that tracks exceptions or waivers processed under AR 600-110, redacted to protect the privacy interests of non-plaintiff service members. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Subject to and without waiving the forgoing objections and construing the request as seeking materials from the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1, Defendants respond that the Chief, Health Promotions Policy, has no responsive documents in her possession, custody, or control. Defendants otherwise stand on their objections and have withheld documents pursuant to those objections.

**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.

**RESPONSE:** Defendant stands on its objections. Documents responsive to this request will be withheld pursuant to these objections.

DATE: November 23, 2018

Respectfully submitted,

G. ZACHARY TERWILLIGER  
United States Attorney

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

JOSEPH H. HUNT  
Assistant Attorney General  
Civil Division

ANTHONY J. COPPOLINO  
Deputy Director  
Federal Programs Branch

s/ Robert M. Norway  
NATHAN M. SWINTON  
Senior Trial Counsel  
ROBERT M. NORWAY  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., NW  
Washington, D.C. 20001  
Telephone: (202) 305-7667  
Facsimile: (202) 616-8460  
Nathan.M.Swinton@usdoj.gov

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above document was served on November 23, 2018, to the following counsel of record via electronic mail.

Andrew R. Sommer  
Virginia State Bar No. 70304  
ASommer@winston.com  
Cyrus T. Frelinghuysen\*  
CFrelinghuysen@winston.com  
John W.H. Harding  
Virginia State Bar No. 87602  
JWHarding@winston.com  
WINSTON & STRAWN LLP  
1700 K St., N.W.  
Washington, D.C. 20006

Scott A. Schoettes  
SSchoettes@lambdalegal.org  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
105 W. Adams, Suite 2600  
Chicago, IL 60603  
T: (312) 663-4413

s/ Robert M. Norway

# **Exhibit B**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs

v.

DONALD J. TRUMP, *et al.*,

Defendants

Civil Action No. 17-1597 (CKK)

**ORDER**

(April 18, 2018)

Presently before the Court is Defendants’ [97] Motion for a Protective Order (“Defs.’ Mot.”). Through this motion Defendants seek a stay of all discovery pending the resolution of Defendants’ Motion to Dissolve the Preliminary Injunction (including any interlocutory appeal of the Court’s ruling on that motion). Federal Rule of Civil Procedure 26(c) “confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court will exercise this broad discretion to DENY Defendants’ Motion for a Protective Order.

None of the reasons Defendants give for halting discovery at this point are persuasive. First, Defendants argue, in effect, that discovery should be stayed because they are likely to succeed on the merits of their Motion to Dissolve the Preliminary Injunction.<sup>1</sup> Defendants argue that “Plaintiffs’ challenge to the 2017 Presidential Memorandum is moot,” given that “[t]he President has withdrawn that Memorandum,” and that the “new policy” set forth in a recent memorandum prepared by Secretary of Defense James N. Mattis “withstands constitutional scrutiny.” Defs.’ Mot. at 6-7. Plaintiffs do not agree with either of these arguments, *see* Pls.’ Opp’n to Defs.’ Mot., ECF No. 108, at 5-9, and the Court will not resolve these disputes in the context of a discovery motion. These disputes are being fully briefed in Defendants’ pending Motion to Dissolve the Preliminary Injunction, and will presumably also be briefed in relation to Defendants’ upcoming Motion to Dismiss. The Court will wait to make a final decision on these important issues in the context of those substantive motions. In the context of this Motion for a Protective Order, the Court merely holds that—on the current record—it is not sufficiently persuaded by Defendants’ arguments such that it is inclined to halt all discovery pending the resolution of Defendants’ motions.<sup>2</sup>

Second, Defendants argue that discovery is no longer appropriate *at all* in this case and that “[f]urther litigation should be confined to the administrative record provided by the agency.”

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<sup>1</sup> In their reply brief, Defendants also argue that a stay of discovery is justified because Defendants are likely to succeed on a Motion to Dismiss that they will soon file. *See* Defs.’ Reply in Support of Mot. for a Protective Order, ECF No. 110, at 1.

<sup>2</sup> *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*6-7 (W.D. Wash. Apr. 13, 2018) (rejecting Defendants’ mootness argument).



# Exhibit C



PERSONNEL AND  
READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
4000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-4000

AUG 27 2018

The Honorable William M. "Mac" Thornberry  
Chairman  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This report is in response to House Report 115-200, pages 148-149, accompanying H.R. 2810, the National Defense Authorization Act for Fiscal Year 2018, which requests that the Department of Defense submit a report on its personnel policies regarding members of the Armed Forces infected with human immunodeficiency virus (HIV).

The enclosed report includes the following: (1) a description of policies addressing the enlistment or commissioning, retention, deployment, discharge, and disciplinary policies regarding individuals with this condition; (2) an update on the status of the Department of the Army's HIV policy; (3) an assessment of these policies, with reference to medical experts and literature, which includes how the policies reflect an evidence-based, medically accurate understanding of how this condition is contracted, how this condition can be transmitted to other individuals, the risk of transmission, and treatment regimens available; and (4) the feasibility of allowing an individual who is currently serving as an enlisted member of the Armed Forces to become a commissioned officer of the Armed Forces, and what restrictions are different for an officer.

Thank you for your continued support of our Service members. A similar letter is being sent to the Chairman of the Senate Committee on Armed Services.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephanie Barna". The signature is stylized and cursive.

Stephanie Barna  
Performing the Duties of the Under Secretary of  
Defense for Personnel and Readiness

Enclosure:  
As stated

cc:  
The Honorable Adam Smith  
Ranking Member



PERSONNEL AND  
READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
4000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-4000

AUG 27 2018

The Honorable John McCain  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This report is in response to House Report 115-200, pages 148-149, accompanying H.R. 2810, the National Defense Authorization Act for Fiscal Year 2018, which requests that the Department of Defense submit a report on its personnel policies regarding members of the Armed Forces infected with human immunodeficiency virus (HIV).

The enclosed report includes the following: (1) a description of policies addressing the enlistment or commissioning, retention, deployment, discharge, and disciplinary policies regarding individuals with this condition; (2) an update on the status of the Department of the Army's HIV policy; (3) an assessment of these policies, with reference to medical experts and literature, which includes how the policies reflect an evidence-based, medically accurate understanding of how this condition is contracted, how this condition can be transmitted to other individuals, the risk of transmission, and treatment regimens available; and (4) the feasibility of allowing an individual who is currently serving as an enlisted member of the Armed Forces to become a commissioned officer of the Armed Forces, and what restrictions are different for an officer.

Thank you for your continued support of our Service members. A similar letter is being sent to the Chairman of the House Committee on Armed Services.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephanie Barna".

Stephanie Barna  
Performing the Duties of the Under Secretary of  
Defense for Personnel and Readiness

Enclosure:  
As stated

cc:  
The Honorable Jack Reed  
Ranking Member

**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**



August 2018

The estimated cost of this report or study for the Department of Defense is approximately \$18,000 for the 2018 Fiscal Year. This includes \$100 in expenses and \$18,000 in DoD labor.  
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## EXECUTIVE SUMMARY

**INTRODUCTION:** House Report 115-200, pages 148-149, accompanying H.R. 2810, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018, requested that the Department of Defense (DoD) submit a report to the Committees on Armed Services of the Senate and House of Representatives on its personnel policies regarding members of the Armed Forces infected with human immunodeficiency virus (HIV). Specifically, the Committee requested DoD provide the following in its report:

- (1) A description of policies addressing the enlistment or commissioning, retention, deployment, discharge, and disciplinary policies regarding individuals with this condition.
- (2) An update on the status of the Department of the Army's HIV policy, which was under review during the issuance of a 2014 report.
- (3) An assessment of these policies, with reference to medical experts and literature, which includes how the policies reflect an evidence-based, medically accurate understanding of how this condition is contracted; how this condition can be transmitted to other individuals; the risk of transmission; and treatment regimens available.
- (4) The feasibility of allowing an individual who is currently serving as an enlisted member of the Armed Forces to become a commissioned officer of the Armed Forces, and what restrictions are different for an officer.

**DATA COLLECTION:** This report follows the Department's interim response submitted to the Committees on Armed Services of the Senate and House of Representatives on March 19, 2018, and includes DoD- and Service-level policies and assessments addressing the requirements specified in House Report 115-200. Service-level information was obtained from each of the Military Departments at the request of the Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)).

### PERSONNEL POLICIES PERTAINING TO HIV:

1. Enlistment and Commissioning (i.e., Accession): Grounded in statutory requirements for accessions of able-bodied and physically qualified individuals, recently reissued Department of Defense Instruction (DoDI) 6130.03, "Medical Standards for Appointment, Enlistment, or Induction into the Military Services," May 6, 2018, establishes DoD policy to ensure that individuals considered for appointment, enlistment, or induction into the Military Services are:

- Free of contagious diseases that may endanger the health of other personnel.
- Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness.
- Medically capable of satisfactorily completing required training and initial period of contracted service.

- Medically adaptable to the military environment without geographical area limitations.
- Medically capable of performing duties without aggravating existing physical defects or medical conditions.

That instruction also establishes a specific policy to allow applicants who do not meet the specified physical and medical standards to be considered for a medical waiver. The instruction addresses 29 body systems, and lists for each of those a number of conditions that do not meet medical accession standards. Under the heading "Systemic Conditions," there are 19 such conditions, including presence of HIV infection. Thus, HIV infection is a disqualifying medical condition for entry into the military service. Both prior service and non-prior service applicants undergo screening for HIV prior to entrance. As with all other disqualifying medical conditions, applicants may be considered for a medical waiver.

2. Retention and Discharge: DoD and Service policies restrict involuntary separation of a Service member solely due to being HIV positive. Service members who acquire HIV after joining the military are ensured access to appropriate medical care: DoD policy requires they receive counseling and treatment consistent with the standard of care, evidence-based HIV clinical practice standards, and medical management guidelines. HIV positive Service members receive a referral for medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses. Service members with HIV may continue their service as long as they are able to perform their military duties, taking into account the nature of their position. If they develop a disability, HIV-positive Service members undergo evaluation of fitness for continued service by the same process as those who are HIV-negative. Active duty (AD) and Reserve Component (RC) Service members with laboratory evidence of HIV infection who are determined to be unfit for further duty undergo separation or retirement. Military Departments and Combatant Commands (CCMD) limit assignments of HIV-infected individuals based on expert medical review, determination regarding the individual's fitness for duty, and the nature and location of the duties performed, in accordance with operational requirements.

3. Deployment: DoD policy establishing deployment-limiting medical conditions sets the minimum standard for all deploying and deployed DoD personnel. Military Department policy guidance, Service-specific readiness requirements, or Combatant Commander needs may involve additional restrictions. HIV antibody positive status is a deployment-limiting medical condition precluding contingency deployment.

DoDI 6490.07, "Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees," Enclosure 3, dated February 5, 2010, provides that individuals with a diagnosis of "human immunodeficiency virus (HIV) antibody positive with the presence of progressive [HIV related] clinical illness or immunological deficiency" shall not deploy unless a waiver is granted. All Service policies preclude HIV positive Service members from deploying to combat areas or in support of contingency operations due to the potential lack of access to needed medical care or medications in austere environments, as well as the military risks inherent in the mission assigned that could lead to illness exacerbation and compromise unit readiness and mission completion. For purposes of this report, a contingency deployment is one that is outside the continental United States (OCONUS), more than 30 days in duration, and in a

location with medical support from only non-fixed (temporary) military medical treatment facilities. A contingency deployment also includes the relocation of forces and materiel to an operational area in a situation requiring military operations in response to natural disasters, terrorists, or as otherwise directed.

All Services currently permit HIV positive Service members to deploy for purposes other than combat or a contingency operation, or to be assigned for duty in certain overseas locations, subject to receipt of a waiver. In view of this, members with HIV infection may be considered deployable with limitations. A waiver may be recommended on a case-by-case basis after review of the individual Service member's health and consideration of factors including the climate, altitude, rations, housing, nature of the duty assignment proposed, and medical services available in the location to which deployment or assignment is proposed. Further, the condition must not pose a significant risk of substantial harm to the individual or others, taking into account the condition of the deployed environment. The following table outlines the Service-specific policies for grant of a waiver to permit an HIV positive Service member to deploy for other than combat or a contingency, or to be assigned for duty in an overseas location:

Army	Waivable?	Yes
	By Whom?	Combatant Commander
	Under what conditions?	Soldier is determined to be fit and free of HIV-related illness.
	Host nation rules apply?	Yes, but deployments may be permitted <i>only</i> to Europe and Korea.
Navy/ Marine Corps	Waivable?	Yes
	By Whom?	<u>Sailors</u> : Treating HIV Evaluation and Treatment Unit (HETU), Navy Bloodborne Infection Management Center, PERS-82, and receiving command.  <u>Marines</u> : Deputy Commandant. Manpower & Reserve Affairs and receiving command.
	Under what conditions?	Agreement by all organizations/officials listed above and receiving command (including the CCMD, as appropriate). Sailors/Marines who have no viremia (i.e., there is no virus present in the bloodstream), do have an established history of medical compliance, and possess a professional attitude, may be considered on a case-by-case basis for large ship platform tours and OCONUS deployment/assignment.
	Host nation rules apply?	Yes
Air Force	Waivable?	Yes
	By Whom?	Air Force Medical Support Agency, with favorable coordination from receiving commander and CCMD approval.
	Under what conditions?	No HIV-related illness.
	Host nation rules apply?	Yes

DoD has recently issued a new policy, DoDI 1332.45, "Retention Determinations for Non-Deployable Service Members," July 30, 2018, for implementation October 1, 2018. The overarching policy is that to maximize the lethality and readiness of the Joint Force, all Service members are expected to be deployable. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for a retention determination by their respective Military Department, and, as appropriate, referral into the Disability Evaluation System (DES) or initiation of processing for administration separation, with the normal policies and procedures, including due process procedures, of those systems continuing to apply. The Military Departments will determine the deployability status of Service members and will make retention determinations for Service members who have been non-deployable for more than 12 consecutive months. They may retain such members if determined to be in the best interest of the Military Service. Under this DoDI, "non-deployable" and "deployable with limitations" are two separate categories; the retention determination process applying to the former but not the latter. The Military Departments have authority to determine the specific dividing line between the two categories most appropriate for the operational circumstances applicable to their respective Services.

4. **Disciplinary:** DoD policy provides that a HIV positive status is not a punishable offense and cannot be used as a sole basis for disciplinary action against an individual. DoD policy also prohibits the use of information obtained as a result of an epidemiologic assessment interview to support any adverse personnel action against a Service member. However, Service members with laboratory evidence of HIV infection may be subject to disciplinary action if they disobey an order to inform current or potential sexual partners of their infected status or do not engage in safe sex practices.

**ARMY POLICY STATUS UPDATE:** Initiated in 2015, a working group has reviewed Army Regulation (AR) 600-110, last updated in April 2014, to assess any need for changes to reflect an evidence-based, medically accurate understanding of HIV infectivity, transmission, and treatment. This process is expected to be completed in the near future.

**MEDICAL ASSESSMENT OF PERSONNEL POLICIES:** Currently, no vaccine exists to prevent HIV infection, and no treatment exists to cure it. Broad consensus regarding published medical evidence supports the notion that people living with HIV on antiretroviral therapy (ART) who have an undetectable viral load in their blood, have a "negligible risk" of sexually transmitting HIV. Depending on the ART drugs used, it may take as long as six months for an individual's viral load to reach an undetectable level. Thus, with the advent of ART, HIV infection has evolved from a once terminal condition to a chronic illness requiring regular management and strict adherence to treatment protocol. As a result, the Department's policies have evolved over time. They currently focus not only on minimizing risks of HIV exposure, but also on providing evidence-based care and support for Service members living with HIV, with the goal to maintain a Service member's fitness for duty, optimize retention and quality of life, and help avoid disease progression of HIV-positive Service members into potential disability. Recognizing the risk factors for HIV infection and transmission, DoD- and Service-level personnel policies intend to reflect current knowledge of: how HIV is contracted and transmitted to HIV-naïve individuals; the ability of an HIV-positive individual to continue service without exacerbating his or her condition or risking the military mission; the effect of

infected personnel on commands; and the safety of military blood supplies. Medical literature pertaining to HIV medicine rapidly evolves. Subject matter experts across the Military Services are aware of and have access to all available contemporary medical literature, practice guidelines, medications, and treatment modalities based on emerging and published evidence-based studies or expert opinion.

**FEASIBILITY OF ALLOWING ENLISTED SERVICE MEMBERS TO BECOME COMMISSIONED OFFICERS AND RESTRICTIONS DIFFERENT FOR OFFICERS:**

DoD policy has long maintained a difference between accession medical standards and retention medical standards. The rationale for this difference is that once a member has been fully trained and has experience in performing the duties of his or her position, whether as an enlisted member or officer, the needs of the Service incline decidedly toward allowing the member to continue to perform those duties and return the investment the Service has made in the member. At the accession stage, the needs of the Service incline toward selecting members in whom to make the training and mentoring investment who minimize any risk of inability due to medical conditions to complete an initial period of service and potentially a longer military commitment.

Longstanding DoD policy under DoDI 6130.03 has also held that in the case of an enlisted member seeking appointment as a commissioned officer, the accession standards are the appropriate ones to apply because it is a new position, involving a whole new set of duties and responsibilities and new training and mentorship. The needs of the Service do not necessarily favor an officer applicant with prior enlisted service compared to one without such service, in minimizing any risk of inability to perform satisfactorily in the commissioned officer position due to medical conditions. Yet, it is appropriate to note that a review of two individual officer candidates, one with and one without prior enlisted service, requesting a medical waiver for the same condition, the candidate with prior service may well have the advantage of a record of successful military service in the enlisted ranks. However, regarding which set of standards to apply to the initial medical screening, the accession medical standards are the more appropriate standards for all applicants, including applicants for enlistment or commissioning. This is long-established DoD policy for all medical conditions; there is no special or different rule for individuals with HIV infection.

**DISCUSSION:** The Department has a responsibility to ensure the health and well-being of Service members, and through its policies, aims to minimize the risk of Service members' exposure to HIV, while ensuring that those infected with HIV have access to appropriate care and management of their illness and are able to continue service. Military unique considerations; the rapidly evolving nature of medical evidence and understanding pertaining to the nature of HIV transmission, infectivity, associated risks, and treatment; evolving mission requirements; and Service member needs pertaining to health information privacy protections, as well as opportunities for career advancement, are key factors that influence personnel policy pertaining to HIV-infected members of the Armed Forces. Current DoD- and Service-level personnel policies pertaining to HIV-infected members of the Armed Forces:

- Are established to maintain military readiness and optimize lethality of the Armed Forces.

- Are instituted to ensure military applicants can successfully complete rigorous military training and deploy to austere environments to accomplish the demanding missions of the military, including combat against enemy forces, without jeopardizing their health, the health of their unit, or the military mission, as well as to respect host Nation laws where our forces are deployed.
- Support retention of Service members infected with HIV, unless there is evidence of deteriorating health or other factors that render the individuals unable or unfit to perform their duties.
- Require the same procedures for medically evaluating Service members who develop disability due to chronic illness to determine fitness for continued service, regardless of whether the Service member is HIV-positive.
- Aim to ensure that, except for assignment limitations, HIV-infected personnel are treated no differently than other Service members.
- Ensure that a Service member infected with HIV but able to fully perform duties is not retired or involuntarily separated solely based on being infected.
- Direct the protection of health information and privacy of HIV-infected personnel.
- Reflect existing evidence and adhere to current nationally-accepted, evidence-based guidelines, and assess evolving medical evidence and scientific understanding of the nature and risk of HIV transmission, available treatment regimens, and the latest HIV management approaches and practices.
- Stipulate clinical management to be consistent with standard of care, evidence-based HIV clinical practice standards, and medical management guidelines.

**CONCLUSIONS:** DoD- and Service-level personnel policies pertaining to members of the Armed Forces infected with HIV are evidence-based in accordance with current clinical guidelines and are reviewed and updated to align with evolving medical capabilities, technologies, evidence-based practices, and current scientific understanding of the nature of HIV infection, transmission, and management. Maintaining the health of military personnel is essential for force readiness. It is a strategic objective of the Military Health System (MHS) to sustain the health of Service members and restore the health and return to duty of Service members who become ill or injured, whenever possible. Once a Service member completes training, the goal is to retain members who acquire HIV and who are still capable of performing their duties in the rigorous military environment. Personnel policies aim to balance the need of the Services (e.g., readiness, resilience, deployability, mission accomplishment, retention) with the needs of Service members infected with HIV (e.g., access to quality care, counseling, support and educational services, privacy protections, option to continue service, if desired). As such, existing DoD- and Service-level personnel policies intend to maximize the lethality, readiness, and operational effectiveness of the Armed Forces, as well as help ensure the health and well-being of Service members, while mitigating the risk of HIV transmission.

**INTRODUCTION:**

In House Report 115-200, page 148-149, to accompany H.R. 2810, NDAA for FY 2018 (Public Law 115-91), the Committee on Armed Services of the House of Representatives requested that the DoD submit a report to the Committees on the Armed Services of the Senate and House of Representatives on its personnel policies regarding members of the Armed Forces infected with HIV. Specifically, the Committee requested that DoD provide the following in its report:

- (1) A description of policies addressing the enlistment or commissioning, retention, deployment, discharge, and disciplinary policies regarding individuals with this condition.
- (2) An update on the status of the Department of the Army's HIV policy, which was under review during the issuance of a 2014 report.
- (3) An assessment of these policies, with reference to medical experts and literature, which includes how the policies reflect an evidence-based, medically accurate understanding of how this condition is contracted; how this condition can be transmitted to other individuals; the risk of transmission; and treatment regimens available.
- (4) The feasibility of allowing an individual who is currently serving as an enlisted member of the Armed Forces to become a commissioned officer of the Armed Forces, and what restrictions are different for an officer.

The Committee indicated that the Department's previous report, submitted to Congress in response to section 572 of the NDAA for FY 2014, did outline the current DoD policies; however, it failed to include how current policies reflect the evidence base and medical advances in the field of HIV. The Committee also stated the report fell short in describing the criteria guiding the implementation of these policies throughout different branches and among commanding officers.

**DATA COLLECTION:** This report follows the Department's interim response submitted to the Committees on Armed Services of the Senate and House of Representatives on March 19, 2018, and includes DoD- and Service-level policies and assessments addressing the requirements specified in House Report 115-200. Service-level information was obtained from each of the Military Departments at the request of the OASD(HA).

**PERSONNEL POLICIES PERTAINING TO HIV:**1. Accession (Enlistment or Commissioning)

Accession standards require healthy recruits who are free of communicable diseases or medical conditions that will likely endanger the health of other personnel, require excessive time lost from duty for necessary treatment or hospitalization, or likely result in separation from service due to medical unfitness. DoDI 1304.26, "Qualification Standards for Enlistment, Appointment,

and Induction,” provides basic entrance qualification standards “designed to ensure that individuals under consideration for enlistment, appointment, or induction are able to perform military duties successfully, and to select those who are the most trainable and adaptable to Service life.” Recruits must also be capable of functioning in the demanding military environment without aggravation of existing medical conditions. DoDI 6130.03, “Medical Standards for Appointment, Enlistment, or Induction in the Military Services,” states that individuals under consideration for appointment, enlistment, or induction into the Military Services must be:

- Free of contagious diseases that probably will endanger the health of other personnel.
- Free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness.
- Medically capable of satisfactorily completing required training.
- Medically adaptable to the military environment without the necessity of geographical limitations.
- Medically capable of performing duties without aggravation of existing physical defects or medical conditions.

DoDI 6130.03 also establishes a specific policy to allow applicants who do not meet the specified physical and medical standards to be considered for a medical waiver. This instruction addresses 29 body systems and lists for each a number of conditions that do not meet medical accession standards. Under the heading “Systemic Conditions,” there are 19 such conditions, including presence of HIV infection. DoDI 6485.01, “Human Immunodeficiency Virus (HIV) in Military Service Members,” June 7, 2013, reiterates that individuals with laboratory evidence of HIV infection are denied eligibility for appointment, enlistment, pre-appointment, or initial entry training for military service pursuant to DoDI 6130.03. All applicants for appointment, enlistment, or individuals being inducted into the Military Services are screened for laboratory evidence of HIV infection. Applicants do not meet accession standards if they present with HIV or serologic evidence of infection, or false-positive screening test(s) with ambiguous results on confirmatory immunologic testing. Thus, HIV infection is a disqualifying medical condition for military service, and persons infected with HIV are neither enlisted nor commissioned into military service. As with all other disqualifying medical conditions, applicants may be considered for a medical waiver pursuant to DoDI 6130.03.

Additionally, DoDI 6485.01 requires applicants to the U.S. Service Academies, the Uniformed Services University of the Health Sciences, and other officer candidate programs undergo testing for laboratory evidence of HIV within 72 hours of arrival to the program, and denies entry to the program if the test result is positive. Reserve Officer Training Corps program cadets and midshipmen must be tested for laboratory evidence of HIV no later than during their commissioning physical examination, and are denied a commission if they test positive.

Applicants for active and reserve enlisted service undergo HIV testing typically at U.S. Military Entrance Processing Command Military Entrance Processing Stations (MEPS) or other authorized locations. Applicants not tested at the MEPS undergo testing as part of the physical examination conducted prior to accession.

Service accession policies comply with DoDI 6130.03 and DoDI 6485.01. Applicable Service policies are set forth in the following: AR 600-110 and AR 40-501 for the Army; Secretary of the Navy Instruction (SECNAVINST) 5300.30E for the Navy and Marine Corps; and Air Force Instruction (AFI) 48-123 for the Air Force.

DoD medical accession standards are reviewed periodically by the Accession Medical Standards Working Group (AMSWG), which evaluates and recommends updates to maintain the currency and validity of those standards. The AMSWG is co-chaired by representatives from the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs (M&RA) and OASD(HA). It includes a voting representative from each of the five Military Services, with additional support from the following DoD components/offices: Joint Staff Surgeon; Surgeons General of the Army, Navy, and Air Force; medical officers of the Coast Guard and National Guard Bureau; and personnel chiefs of the Army, Navy, Air Force, Marine Corps, Joint Staff, and National Guard Bureau. Among the functions of the AMSWG are to perform evidence-based assessments of the accession standards and provide direction in research initiatives for the Accession Medical Standards Research Activity, including evidence-based research in support of medical standards assessments.

Supported by the work of the medical and personnel experts of the AMSWG, the DoDI 6130.03 disqualification for accession for HIV infection does not reflect disagreement with the medical consensus that modern medication management of HIV infection produces very positive results. However, in the context of the extraordinary challenges of many aspects of military service, including potential mission needs under highly stressful combat conditions or in extremely austere and dangerous places worldwide, even well-managed HIV infection carries risks of complications and comorbidities, possibly with latent effects, immune system dysregulation, neurocognitive impairments (NCI) (discussed further below), disrupted medication maintenance and necessary monitoring for potential side-effects, possible military vaccination adverse effects, and potential communicability, including in circumstances of buddy-aid to a seriously injured member in combat and emergency whole blood battlefield transfusions. In view of these risks, the needs of the Service incline toward maintaining the longstanding medical standard disallowing accession of HIV infected individuals.

## 2. Retention/Discharge

Once a Service member completes initial training, the policy is to retain members who acquire HIV and are still capable of performing their duties in the rigorous military environment. Clinical management of an AD Service member and an RC Service member on AD for a period of more than 30 days with laboratory evidence of HIV infection is conducted consistent with standard of care, evidence-based HIV clinical practice standards, and medical management guidelines.

DoDI 6485.01 specifically addresses HIV in Service members, and prescribes procedures for the identification, surveillance, and management of members of the Military Services infected with HIV and for prevention activities to control transmission of HIV. An AD Service member with laboratory evidence of HIV infection is referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses, in accordance with DoDI 1332.18, "Disability Evaluation System." AD Service members with laboratory evidence of HIV infection determined to be fit for duty are allowed to serve in a manner that ensures access to appropriate medical care.

A RC Service member with laboratory evidence of HIV infection is referred for a medical evaluation of fitness for continued service in accordance with Service regulations, and in the same manner as an RC Service member with other chronic or progressive illnesses. Eligibility for AD for a period of more than 30 days is denied to those RC Service members with laboratory evidence of HIV infection (except under conditions of mobilization and on the decision of the Secretary of the Military Department concerned). RC Service members, either who are not on AD for a period of more than 30 days or who are not on full-time National Guard duty, and who show laboratory evidence of HIV infection, are transferred involuntarily to the Standby Reserve only if they cannot be used in the Selected Reserve.

In accordance with DoDI 6485.01, the privacy of a Service member with laboratory evidence of HIV infection is protected consistent with DoD 5400.11-R, "Department of Defense Privacy Program" and DoD 6025.18-R, "DoD Health Information Privacy Regulation."

A Service member infected with HIV but able to fully perform their duties is not retired or separated solely based on being infected. However, Service members, including those infected with HIV, whose condition deteriorates or otherwise interferes with their ability to perform their military occupation successfully, may be referred to the DES. The DES provides for the member to have a fair and full review to determine fitness for duty. The following DoD issuances establish policy for determining fitness for duty, and for retiring or separating Service members due to physical disability: Department of Defense Manual (DoDM) 1332.18, Vol 1, "Disability Evaluation System (DES) Manual: General Information and Legacy DES (LDES) Time Standards;" DoDM 1332.18, Vol 2, "Disability Evaluation System (DES) Manual: Integrated Disability Evaluation System (IDES);" and DoDM 1332.18, Vol 3, "Disability Evaluation System (DES) Manual: Quality Assurance Program (QAP)."

A medical evaluation is the first step in the disability evaluation process. A Medical Evaluation Board (MEB) documents a Service member's medical conditions and full clinical information. A summary of clinical information includes a medical history; appropriate physical examination; indicated medical tests and their results; medical and surgical consultations as necessary; diagnoses; ongoing or recommended treatment; and prognosis. The medical evaluation documents the medical status and duty limitations of Service members (subject to Service departmental regulations).

If the Service member cannot perform the duties of her or his military occupational specialty (MOS), the MEB refers the case to the DES. Criteria for referral of Service members into the DES include:

- Having one or more medical conditions that may, individually or collectively, prevent the Service member from reasonably performing the duties of his or her office, grade, rank, or rating, including those duties remaining on a Reserve obligation for more than one year after diagnosis;
- Having a medical condition that represents an obvious medical risk to the health of the member or to the health or safety of other members; or
- Having a medical condition that imposes unreasonable requirements on the military to maintain or protect the Service member.

A Service member is considered unfit when the evidence establishes that the member, due to physical disability, is unable to perform the duties of her or his office, grade, rank, or rating reasonably, to include duties during a remaining period of Reserve obligation. AD and RC Service members with laboratory evidence of HIV infection who, because of their disease progression, are determined to be unfit for further duty are medically separated or retired pursuant to DoDI 1332.18.

Service retention and discharge policies comply with the retention and discharge DoD policies described above.

Retention/Discharge - Army:

AR 600-110 stipulates that individuals confirmed to be HIV infected will be treated with dignity and understanding. Guidance for dealing with the psychosocial aspects of the disease may be obtained from command medical authorities and chaplains. Every effort will be made to ensure that, except for their assignment limitations, HIV infected personnel are treated no differently than other Soldiers. Commanders must ensure that information about the HIV infected Soldier's medical condition is provided only to those whose duties require knowledge of that information.

In AR 600-110, there is no medical reason for HIV-infected Soldiers' duties to change solely because of their infection (except in certain instances for health care providers). In instances where a Soldier performs duties as a member of a flight crew, or other position requiring a high degree of alertness or stability (for example, explosive ordnance disposal), a case-by-case determination is made by a MEB as to the Soldier's fitness to perform his or her duties. In the case of HIV-infected health care providers, their duties may be restricted if they present a risk of transmitting HIV to their patients. An expert medical review committee designated by the deputy commander for clinical services makes this determination. This committee makes recommendations on a case-by-case basis to the Medical and Dental Activity/United States Army Medical Center (MEDCEN)/Dental Activity commander per AR 40-68, "Clinical Quality Management," regarding the restriction of duties of HIV infected health care providers. The restriction may only apply until the risk is eliminated. In all other instances, HIV infected

Soldiers are utilized in their primary MOS, per normal utilization criteria contained in Army personnel regulations and the assignment limitations specified in AR 600-110.

Infectious disease specialists medically evaluate HIV-infected Soldiers at a participating MEDCEN supporting the health service region to determine their infection status. HIV infected Soldiers who meet medical retention standards outlined in AR 40-501, and who do not demonstrate progressive clinical illness or immunological deficiency during periodic evaluations (every six months or as directed), are not involuntarily separated solely based on HIV status.

HIV-infected RC Soldiers who wish to continue to serve in the RC must prove fitness for duty per medical retention standards of AR 40-501 and be found fit for duty. RC Soldiers are required to obtain the fit for duty medical examination from the civilian medical community at no expense to the Government. The required medical procedures are provided to the Soldier to give to his or her physician. This examination must be repeated at least annually after the initial evaluation. Medical follow-up and evaluation are conducted every six months and as directed by the infectious disease physician for all HIV infected Soldiers.

Except for those identified during the accession testing program, HIV infected AD Soldiers able to perform duties fully who do not demonstrate progressive clinical illness or immunological deficiency during periodic evaluations are not involuntarily separated solely because they are HIV infected. HIV infected Soldiers who demonstrate rapidly progressive clinical illness or immunological deficiency may not meet medical retention standards under AR 40-501, and are evaluated for physical disability processing under AR 635-40, "Disability Evaluation for Retention, Retirement, or Separation." AR 600-110 specifies procedures for officers (paragraph 6-13) and for enlisted personnel (paragraph 6-14). In accordance with AR 40-501, HIV-infected Soldiers who demonstrate progressive clinical illness or immunological deficiency are referred to a MEB. For Active Army Soldiers and RC Soldiers on AD for more than 30 days (except for training under 10 U.S.C. § 10148), a MEB must be accomplished and, if appropriate, the Soldier must be referred to a Physical Evaluation Board (PEB) under AR 635-40. For RC Soldiers not on AD for more than 30 days or on AD for training under 10 U.S.C. § 10148, referral to a PEB will be determined under AR 635-40. Records of official medical diagnoses provided by civilian medical providers concerning the presence of progressive clinical illness or immunological deficiency in RC Soldiers may be used as a basis for administrative action under, for example, AR 135-133, "Ready Reserve Screening, Qualification Records System, and Change of Address Reporting," AR 135-175, "Separation of Officers," AR 135-178, "Enlisted Administrative Separations," or AR 140-10, "Assignments, Attachments, Details, and Transfers," as appropriate. Additionally:

- Soldiers identified as HIV infected within 180 days of initial entry on AD are separated under the provisions of AR 635-200 for failure to meet accession medical fitness standards.
- HIV infected Army National Guard (ARNG) Soldiers who demonstrate progressive clinical illness or immunological deficiency, as determined by medical authorities, and who do not meet medical retention standards are processed under AR 40-501 and

National Guard Regulation (NGR) 600–200, “Enlisted Personnel Management,” or NGR 635–101, “Efficiency and Physical Fitness Boards,” as appropriate.

- HIV infected United States Army Reserve Soldiers who demonstrate progressive clinical illness or immunological deficiency, as determined by medical authorities, and who do not meet medical retention standards under AR 40–501 are processed in accordance with AR 135–178 (enlisted) or AR 135–175 (officer).

The Army National Guard implements guidance as prescribed by the AR 600-110 and AR 40-501 with regard to HIV positive personnel. AR 600-110 is administered by the G1 (Army Personnel) section; however, Army National Guard – Office of the Chief Surgeon (ARNG-CSG) has oversight with regard to monitoring the implementation of laboratory testing and re-testing of HIV positive Soldiers). HIV positive Soldiers are retained in current MOS/Area of Concentration, as long as medical fitness standards are maintained in accordance with AR 40-501. ARNG-CSG relies highly on the input of Army Directives, the U.S. Army Public Health Center, and the Centers for Disease Control and Prevention (CDC) when considering medical retentions.

Retention/Discharge - Navy and Marine Corps:

If an AC Sailor or Marine tests HIV antibody positive during routine screening, he or she is directed by the Chief, Bureau of Medicine and Surgery to an appropriate medical facility for evaluation and determination of fitness for duty, like all Service members with a chronic medical condition, in accordance with SECNAVINST 1850.4E, “Navy Disability Evaluation Manual,” and Chapter 18 of Naval Medical Command (NAVMED) P-117, “Manual of the Medical Department,” which pertains to DES. Members with HIV undergo additional evaluation in accordance with DoDI 6485.01. If found fit for full duty (i.e., physically qualified to remain on AD), they are referred, evaluated, treated, and followed by an HETU, and are subsequently retained, deployed, and returned to their unit for duty. Further, they are eligible for reenlistment following normal reenlistment procedures. RC Sailors undergo evaluation by their civilian providers, and are also evaluated for fitness for duty in the same manner as all RC members with a chronic medical condition. Marine Corps Order (MCO) 1300.8, “Marine Corps Personnel Assignment Policy,” is in accordance with SECNAVINST 5300.30E regarding the referral for medical evaluation for continued service, appropriate treatment, and determination of fitness for duty.

In SECNAVINST 5300.30E, if a Sailor or Marine is found unfit for continued service, he or she is processed for medical separation through the physical disability system and discharged. Sailors and Marines who have tested HIV positive also have the option to undergo voluntary separation, and are afforded the option of requesting a voluntary discharge under honorable conditions, unless there are other factors involved. Retention or discharge decisions are based on the determination of competent medical authority regarding fitness of service. SECNAVINST 5300.30E is currently under revision.

MCO 1900.16 Chapter 1, “Separation and Retirement Manual,” refers to SECNAVINST 5300.30E for voluntary separation of Marines who have tested positive for HIV. In MCO 1001R.1L, “Reserve Administration Manual,” Reserve Marines identified as HIV positive and

who, although deemed medically fit for duty, are unable to fill an appropriate billet within the Selected Reserve and are placed in the Standby Reserve-Inactive Status List. Under this status, such Marines are not eligible to participate, receive pay or retirement point credit, are not eligible for promotion consideration, and are not accountable for purposes of end strength or controlled grades.

SECNAVINST 5300.30E and DoDI 6485.01 permit members of the Marine Corps Ready Reserve who are HIV positive to continue to serve within the Marine Corps Reserve, barring any medically assessed unfitting conditions, such as immunologic deficiency, neurological deficiency, progressive clinical or laboratory abnormalities associated with HIV, or diagnosis of Acquired Immune Deficiency Syndrome (AIDS)-defining conditions.

Retention/Discharge - Air Force:

AFI 44-178, "Human Immunodeficiency Virus Program," instructs that "members with laboratory evidence of HIV infection who are able to perform the duties of their office, grade, rank and/or rating, may not be separated solely on the basis of laboratory evidence of HIV infection." AFI 48-123 stipulates that HIV is potentially a cause for denying continued service and requires a retention decision through a MEB or similar review."

AFI 44-178 guides the management of AD Service members with HIV and screening protocol routinely employed by the Air Force. In accordance with AFI 44-178, all AD Airmen with asymptomatic HIV are seen annually at the Air Force HIV Medical Evaluation Unit (MEU) in San Antonio. The MEU completes a narrative summary (NARSUM) for each Airman with HIV infection, which is forwarded to the Air Force Personnel Center (AFPC) for adjudication regarding retention.

In an effort to treat every Airman equitably and with dignity and respect, the Air Force refers Airmen with asymptomatic HIV infection into the DES in the same manner and process as any other Airman with a chronic medical condition. As outlined above, current Air Force policy requires that all Airmen with HIV have a NARSUM reviewed annually by AFPC. AFPC is the only entity that can assign Airmen an Assignment Limitation Code-C (ALC-C), which restricts permanent and temporary duty assignments to areas where appropriate medical care is available to the HIV-positive Service member. The intent of the ALC-C is to protect such members from being placed in environments where adequate medical care is not available. The benefit of assigning an ALC-C is that it ensures visibility at all levels that an Airman will require a waiver for OCONUS assignment or deployment.

3. Deployment

DoDI 6490.07, "Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees," includes HIV antibody positive diagnosis with the presence of progressive clinical illness or immunological deficiency as a medical condition that usually precludes contingency deployment. In all instances of HIV seropositivity, the policy requires that the cognizant CCMD surgeon be consulted before medical clearance for deployment. The Combatant Commander is the final approval authority for waivers. The medical standards in DoDI 6490.07 are mandatory for contingency deployments, and permissible for any other deployment, based on the commander's decision.

Medical evaluators must consider climate, altitude, rations, housing, duty assignment, and medical services available in theater when deciding whether an individual with a specific medical condition is deployable. DoD personnel with existing medical conditions may deploy based upon a medical assessment, if the following conditions are met:

- (1) The condition is not of such a nature or duration that an unexpected worsening or physical trauma is likely to have a grave medical outcome or negative impact on mission execution.
- (2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment in light of physical, physiological, psychological, and nutritional effects of the duties and location.
- (3) Any required, ongoing health care or medications anticipated to be needed for the duration of the deployment are available in theater within the MHS. Medication must have no special handling, storage, or other requirements (e.g., refrigeration, cold chain, or electrical power requirements). Medication must be well tolerated within harsh environmental conditions (e.g., heat or cold stress, sunlight) and should not cause significant side effects in the setting of moderate dehydration.
- (4) There is no need for routine evacuation out of theater for continuing diagnostics or other evaluations. (All such evaluations should be accomplished before deployment.)

DoDI 6490.07 sets the minimum standard for all deploying and deployed DoD personnel. Military Department policy guidance, Service-specific readiness needs, or CCMD requirements may involve additional deployment restrictions. Additionally, DoDI 6485.01 instructs compliance with host-nation requirements for screening and related matters for Service members. As outlined below, all Services currently permit HIV positive Service members to deploy for purposes other than combat or a contingency operation, or be assigned for duty in certain overseas locations, subject to receipt of a waiver. In view of this, members with HIV infection may be considered deployable with limitations.

#### Deployment - Army:

AR 40-501, paragraph 5-14, "Medical fitness standards for deployment and certain geographical areas," states a general rule that "all Soldiers considered medically qualified for continued military status and medically qualified to serve in all or certain areas of the continental United States (CONUS) are medically qualified to serve in similar or corresponding areas outside the continental United States (OCONUS)." However, the policy acknowledges, "because of certain medical conditions, some Soldiers may require administrative consideration when assignment to combat areas or certain geographical areas is contemplated. Such consideration of their medical conditions would ensure these Soldiers are used within their functional capabilities without undue hazard to their health and well-being as well as ensure they do not produce a hazard to the health or well-being of other Soldiers."

AR 40-501, paragraph 5-14, lists medical conditions requiring careful review prior to recommending whether the Soldier can deploy to duty in a combat zone or austere isolated area

where medical treatment may not be readily available. In accordance with AR 40-501, HIV infected Soldiers are not permitted to deploy into the combat theater of operations. Additionally, in accordance with AR 600-110 and AR 614-30, "Overseas Service," Soldiers confirmed to be HIV infected while stationed overseas are reassigned to the United States.

However, if found fit by a PEB, HIV infected Soldiers may be considered for overseas deployment to Europe or Korea (host Nation permitting), in accordance with AR 40-501. HIV infected AD Soldiers, including Active Guard and Reserve, are otherwise limited to duty within the United States (including Alaska, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands). In the United States (including Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands), HIV infected Soldiers are not assigned to:

- Any table of organization and equipment or modified table of organization and equipment unit. Installation commanders may reassign any HIV infected Soldier in such units to table of distribution and allowances (TDA) units on their installation, provided the Soldier has completed a normal tour in that unit (a normal tour for these purposes is three years from reporting date to the unit). After completion of a normal tour, reassignment to TDA units may be made, provided assignment can be made according to normal personnel management and assignment criteria in AR 614-100, "Officer Assignment Policies, Details, and Transfers," and AR 614-200, "Enlisted Assignments and Utilization Management." Reassignment must be to an authorized position for the Soldier's grade and primary or secondary MOS. Installation commanders unable to make appropriate reassignments report the names of HIV infected Soldiers to the Commander, Human Resource Command (HRC), Army Human Resource Command (AHRC)-EPD-I (enlisted), or Total Army Personnel Command (TAPC)-OPD-M (officer).
- Military-sponsored educational programs, regardless of length, but which would result in an additional service obligation. These programs include, but are not limited to, advanced civilian schooling, professional residency, fellowships, training with industry, and equivalent educational programs, regardless of whether the training is conducted in civilian or military organizations. HIV infected Soldiers assigned to these programs are disenrolled at the end of the academic term in which HIV infection is confirmed and may be reassigned without regard to Permanent Change of Station restrictions. Any financial support received by the Soldier may be retained through the end of the current term of enrollment and will not be subject to any recoupment. In addition, any additional service obligation incurred as a result of attendance at military sponsored educational programs is waived. Not included in this restriction are military schools required for career progression in a Soldier's MOS, branch, or functional area (such as, Noncommissioned Officer Education System schools, Captains Career Course, or intermediate level education).
- U.S. Army Recruiting Command, Cadet Command, MEPS, ARNG full time recruiting force, or ARNG full time attrition/retention force, if a Soldier's medical condition requires frequent medical follow-up (as determined by medical authorities), and if the Soldier's projected duty station is geographically isolated from an Army military treatment facility capable of providing that follow-up. These organizations report HIV-

infected Soldiers who cannot be assigned under this policy to the Commander, HRC, AHRC-EPD-I (enlisted) or TAPC-OPD-M (officer), for assignment instructions.

AR 600-110 stipulates that commanders may not change the assignment or use of HIV-infected Soldiers solely because of their infection, unless required by that regulation or the Soldier's medical condition. Grouping all HIV infected Soldiers within a command into the same subordinate unit, duty area, or living area is prohibited unless no other unrestricted units, positions, or accommodations are available.

HIV infected Service members may transfer to the Active Army from another Armed Force (inter-Service transfer), if they meet medical retention standards in AR 40-501. However, Service members who are HIV infected may not be transferred to the Army from another Armed Force, if they are required to meet accession medical standards in AR 40-501, except as specifically permitted in the Accession Testing Program, as described in AR 600-110.

Deployment - Navy/Marine Corps:

Deployment determinations for HIV-infected Service members are based on guidance articulated in DoDI 6490.07 and in CCMD Area of Responsibility specific Force Health Protection policies. SECNAVINST 5300.30E permits certain personnel on a case-by-case basis to be considered for OCONUS or large ship platform tours, in consultation with the treating HETU, Navy Bloodborne Infection Management Center, and PERS-82 (Temporary Disability Retirement List] (for Sailors), or the United States Marine Corps M&RA (for Marines). These cases apply to personnel with controlled HIV disease (as manifested by a reconstituted immune system, no viremia, an established history of medical compliance, and a history of professional attitude). This placement requires the receiving command's acceptance. These personnel are not considered for overseas individual augmentee tours, given the austere environments in which they potentially could be placed. This policy is based on the following considerations:

- There is no demonstrated risk of transmission of disease in normal daily activities.
- An investment in training of these members has been made.
- The previous policy of denying deployments has made this subset of personnel less competitive in achieving career milestones or warrior qualifications.

MCO 1300.8 is in accordance with SECNAVINST 5300.30E regarding assignment of HIV infected personnel.

Deployment - Air Force:

AFI 48-123 indicates, "conditions, which may seriously compromise the near-term well-being if an individual were to deploy, are disqualifying for mobility status or deployment duty." In accordance with DoDI 6490.07, AFI 48-123 also indicates, "medical evaluators must consider climate, altitude, rations, housing, duty assignment, and medical services available in theater when deciding whether an individual with a specific medical condition is deployable." However, AFI 48-123 also states, "in general, a member must be able to perform duty in austere environment with no special food, billeting, medical or equipment support for up to 179 days."

DoD has recently issued a new policy, DoDI 1332.45, "Retention Determinations for Non-Deployable Service Members," July 30, 2018, for implementation October 1, 2018. The overarching policy is that to maximize the lethality and readiness of the Joint Force, all Service members are expected to be deployable. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for a retention determination by their respective Military Department, and, as appropriate, referral into the DES or initiation of processing for administration separation, with the normal policies and procedures, including due process procedures, of those systems continuing to apply. The Military Departments will determine the deployability status of Service members and will make retention determinations for Service members who have been non-deployable for more than 12 consecutive months. They may retain such members if determined to be in the best interest of the Military Service. Under this DoDI, "non-deployable" and "deployable with limitations" are two separate categories; the retention determination process applying to the former but not the latter. The Military Departments have authority to determine the specific dividing line between the two categories most appropriate for the operational circumstances applicable to their respective Services.

#### 4. Disciplinary

In and of itself, being HIV positive is not a punishable offense and cannot be used as a basis for disciplinary action against the individual. DoDI 6485.01 directs that information obtained during or primarily as a result of an epidemiologic assessment interview, (which is defined in DoDI 6485.01 as the "questioning of a Service member who has been confirmed by DoD to have laboratory evidence of HIV infection for purposes of medical treatment or counseling or for epidemiologic or statistical purposes"), cannot be used to support any adverse personnel action against the Service member, in accordance with section 705(c) of Public Law 99-661, "National Defense Authorization Act for Fiscal Year 1987," November 14, 1986. DoDI 6485.01 defines "adverse personnel action" as "a court-martial, non-judicial punishment, involuntary separation for other than medical reasons, administrative or punitive reduction in grade, denial of promotion, an unfavorable entry in a personnel record (other than an accurate entry concerning an action that is not an adverse personnel action), or a bar to reenlistment other than for medical reasons."

DoDI 6485.01 also requires aggressive disease surveillance and implementation of health education programs for Service members. A Service member with laboratory evidence of HIV infection receives training on how to prevent further transmission of HIV infection to others, and the legal consequences of exposing others to HIV infection. In compliance with this policy, the Services provide counseling and training to Service members with HIV infection regarding the prevention of disease transmission to others and the legal consequences of intentional exposure to others, or failure to disclose status to sexual partners or blood donation centers.

However, infected Service members retained on AD who fail to comply with the directives given during preventive medicine counseling are subject to appropriate disciplinary actions for their disregard or disobedience. All Services hold HIV infected members accountable under the Uniform Code of Military Justice if they ignore orders to warn and protect others whose health might be jeopardized by sexual contact or other types of high-risk exposures. Commanders may recommend that personnel who violate such guidance be considered for involuntary discharge or separation.

**STATUS UPDATE ON THE DEPARTMENT OF THE ARMY'S HIV POLICY:**

Initiated in 2015, a working group has reviewed AR 600-110, last updated in April 2014, to assess any need for changes to reflect an evidence-based, medically accurate understanding of HIV infectivity, transmission, and treatment. This process is expected to be completed in the near future.

**MEDICAL ASSESSMENT OF POLICIES:**

Currently, no vaccine exists to prevent HIV infection, and no treatment exists to cure it. As such, the Department takes every effort to protect the health and well-being of Service members to minimize the risk of exposure to HIV through regular HIV screening and surveillance efforts. DoDI 6485.01 requires that the Secretaries of the Military Departments report HIV test results to the Defense Medical Surveillance System, pursuant to Department of Defense Directive (DoDD) 6490.02E, "Comprehensive Health Surveillance," and directs health care personnel providing medical care to follow the recommendations issued by the CDC for preventing HIV transmission in health-care settings.

DoD health surveillance policy also requires that medical surveillance systems continuously capture data on occupational and environmental exposures to potential and actual health hazards, and link with medical surveillance data to monitor the health of DoD's population and identify potential risks to health. Thus, this policy enables timely implementation of interventions to prevent, treat, or control disease and injury, and reinforces the provision of optimal medical care.

*Impact of Antiretroviral Therapy on Disease Management*

Viral suppression and AIDS are two ends of the spectrum of HIV infection. Virally-suppressed HIV infection usually requires an individual to take ART, alternatively referred to as combination Antiretroviral Therapy, regularly and to see an infectious disease specialist annually. ART consists of a combination of antiretroviral (ARV) drugs to suppress the HIV virus to undetectable levels and stop HIV disease progression. AIDS is usually the result of long-term non-adherence with medications and can be associated with impairment and disability (e.g., opportunistic infections, cancer, weakness).

There is broad consensus on evidence published in the medical literature to support the notion that people living with HIV on ART with an undetectable viral load in their blood have a "negligible risk" of sexually transmitting HIV. Depending on the ART drugs used, it may take as long as six months for the viral load to become undetectable. "Continued and reliable HIV suppression requires selection of appropriate agents and excellent adherence to treatment. HIV viral suppression should be monitored to assure both personal health and public health benefits."<sup>1</sup>

However, it is important to emphasize that despite undetectable viral loads, HIV transmission still can occur. According to the U.S. Public Health Service Guidelines for the Management of Occupational Exposures to Human Immunodeficiency Virus and Recommendations for Postexposure Prophylaxis, "exposure to a source patient with an undetectable serum viral load does not eliminate the possibility of HIV transmission or the need for (post-exposure prophylaxis) PEP and follow-up testing. While the risk of transmission from an occupational exposure to a source patient with an undetectable serum viral load is thought to be very low, PEP

should still be offered. Plasma viral load (e.g., HIV RNA [ribonucleic acid]) reflects only the level of cell-free virus in the peripheral blood; persistence of HIV in latently infected cells, despite patient treatment with ARV drugs, has been demonstrated, and such cells might transmit infection even in the absence of viremia. HIV transmission from exposure to a source person who had an undetectable viral load has been described in cases of sexual and mother-to-child transmissions.<sup>2</sup> It is also important to underscore that an “undetectable” viral load that confers a “negligible risk” of HIV transmission has no application in the setting of blood transfusion or needlestick (occupational) exposures.

Thus, with the advent of ART, HIV infection has evolved from a once terminal condition to a chronic illness requiring regular management and strict adherence to treatment protocol. As a result, the Department’s policies have evolved over time. They currently focus not only on minimizing risks of HIV exposure for HIV-naïve individuals, but also on providing evidence-based care and support for Service members living with HIV, with the goal to retain and maintain a Service member’s fitness for duty, optimize quality of life, as well as avoid any disability that might arise as a result of HIV infectivity.

*Recent Findings Signifying Impairments Despite Viral Suppression and Asymptomatic HIV: Potential Impact on Future Policy*

Despite virological suppression, long-term treated patients may experience memory difficulties, mental slowing, attention deficits, and other neurological impairment symptoms. Moreover, neurocognitive damage can occur without HIV-infected individuals experiencing related symptoms or interference in their daily functioning. The impact of HIV-associated neurocognitive disorder and asymptomatic NCI on fitness for duty, including resilience and readiness, is currently unknown.

According to a Department of Defense Infectious Disease Clinical Research Program cross-sectional study of 200 HIV-infected and 50 HIV-uninfected military beneficiaries including AD members, retirees, or dependents, HIV positive patients diagnosed and managed early during the course of HIV infection had a low prevalence of NCI. This is comparable to matched HIV-uninfected persons.<sup>3</sup> Based on these data, the early recognition and management of HIV infection may be important in limiting NCI.

Yet effective ART resulting in viral suppression and asymptomatic infection does not imply absence of HIV-associated injury or impairment. Some HIV-infected, virally suppressed patients on ART will develop illnesses associated with premature aging (e.g., cardiovascular disease, osteoporosis). As the HIV-positive population ages, there is greater recognition that cerebrovascular disease risk factors such as hypertension, diabetes, and hypercholesterolemia are becoming risk factors for cognitive impairment in HIV-positive patients on ART.<sup>4</sup>

Common neurocognitive symptoms experienced by HIV-infected patients potentially include changes in memory, concentration, attention, and motor skills, may present challenges for accurate diagnoses and assessments of functional capacity, and often require prolonged observation or reporting.<sup>5,6</sup> Some patients may experience a fluctuating course of NCI over time, including symptom normalization; however, it is unknown whether these changes reflect

biologic alterations induced by responses to (or failures) of ART, or occur independently of viral load and changes to ART regimens.<sup>7</sup> Despite effective systemic viral suppression among HIV-positive individuals on ART, scientific studies have indicated that a small subset of individuals show neurocognitive deterioration with evidence of persistent laboratory and neuroimaging abnormalities in the central nervous system.<sup>8</sup> A longitudinal cohort observation study found that numerous patients with asymptomatic NCI, even with a suppressed plasma viral load, eventually developed symptomatic NCI.<sup>9</sup> The impact of these potential NCIs on a Service member's readiness, resilience, and/or retention is currently unknown.

As the HIV-positive population on ART ages, there is greater recognition that cerebrovascular disease risk factors such as hypertension, diabetes, and hypercholesterolemia may become risk factors for cognitive impairment.<sup>10</sup> The future impact of HIV as a chronic disease on readiness, resiliency, and retention, as well as treatment and management approaches, are a part of ongoing DoD health surveillance efforts.

As stipulated in DoDD 6490.02E, DoD requires comprehensive, continuous and consistent health surveillance to enable continuous capture of individual and population data, including health status, occupational exposures, disease, and medical interventions (such as immunizations, treatments and medications), in order to implement early intervention and disease control strategies and reinforce provision of optimal medical care. As such, the policy enables DoD to be well-positioned to update policies and practices to appropriately identify and manage HIV infection among Service members as the HIV-positive population on ART ages.

#### *Military-Unique Considerations*

According to the Military Infectious Diseases Research Program (MIDRP), HIV “remains a significant threat to Service members deployed overseas, and is a major source of regional instability in areas of US force protection.”<sup>11</sup> Additionally, the MIDRP also recognized that infectious diseases can also impose “a significant burden on the medical logistical system for people requiring treatment” and “loss of personnel to infectious diseases reduces operational readiness and effectiveness by requiring replacement troops.” Therefore, the MIDRP indicates, preventing disease is “a force multiplier by keeping people healthy and by enhancing readiness,” and DoD must protect its forces from diseases that may compromise its ability to complete missions and to prevent troops from acquiring illnesses. As such, preventing disease through limiting risk of exposure to infectious disease is a key component to enhance military readiness and effectiveness.

It is important to note that DoD HIV screening policy is population-based, and accounts for unique operational military requirements. For example, protecting the safety of the U.S. military blood supply or health of potential donors and recipients (i.e., Service members) is of critical importance to DoD and therefore a central issue. Combat-related injuries, especially during mass casualty situations, require large supplies of blood for transfusions. The need for screening the blood supply is therefore critical. In certain cases, “battlefield transfusions” may be required to resuscitate casualties in life-threatening situations when the inventory of U.S. Food and Drug Administration (FDA)-compliant blood products is depleted in combat zones due to austere operating conditions and irregular resupply. In these cases, the U.S. Army Institute of Surgical

Research Joint Trauma System Clinical Practice Guideline on Fresh Whole Blood indicates that Service members may receive an emergency transfusion of fresh whole blood in life-saving or limb-sparing situations.<sup>12</sup> This Joint Trauma System Clinical Practice Guideline also indicates that even though fresh whole blood undergoes rapid testing for HIV to the greatest extent possible prior to transfusion, the potential risk for HIV transmission remains in battlefield circumstances. HIV infection is among a number of medical conditions that preclude blood donation. Early CDC data demonstrate that the highest risk of transmission of HIV infection is via blood transfusion (92.50 percent transmission rate, or 9250/10000 exposures).<sup>13</sup> Even though this data included cases involving transmission of very high viral loads as well as lower levels of viremia, it is conceivable that a unit of whole blood (as utilized used in a “walking blood bank” scenario) would pose a very high risk of transmission of HIV infection, even if from an HIV-infected Service member with an undetectable viral load.<sup>14</sup> To the extent possible, DoD adheres to FDA blood-borne pathogen screening guidelines requiring all donated blood products be tested for HIV types I and II.<sup>15</sup> DoD ensures the safety of the blood supply through policies of the Armed Services Blood Program Office and the accreditation requirements of the American Association of Blood Banks. However, in emergency battlefield circumstances it is impossible to eliminate all risk of communicability through blood transfusion.

### *Service Policies*

Service policies accurately reflect current medical literature and expert opinion (consensus standards) regarding transmission and treatment of HIV. The U.S. Air Force (USAF) management of Airmen with HIV is highly structured and achieves viral load suppression in over 90 percent of patients. AFI 44-178 is the underpinning of the USAF’s HIV management success. AR 600-110, “Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus,” and Headquarters, Department of the Army medical and personnel policies on HIV reflect current knowledge of the natural progression of HIV infection; the risks to the infected individual incident to military service; the risk of transmission of the disease to non-infected personnel; the overall impact of infected personnel in Army units and on readiness posture; and the safety of military blood supplies. The Assistant Secretary of the Navy (M&RA) established SECNAVINST 5300.30E to reflect current knowledge of the natural history of HIV; the risks to the infected individual incident to military service; the risk of transmission of HIV to non-infected personnel; the effect of infected personnel on commands; and the safety of military blood supplies. The Services are currently reviewing and updating several policies, to include SECNAVINST 5300.30E, AFI 44-178, AR 600-110, to reflect changes as medical capabilities, technologies, and evidence-based practices have evolved.

Medical literature pertaining to HIV medicine rapidly evolves. MHS subject matter experts are aware of and have access to all available contemporary medical literature, practice guidelines, medications, and treatment modalities based on emerging and published evidence-based studies or expert opinion, referenced in, but not limited to the following:

- “National HIV/AIDS Strategy for the United States.” U.S. Department of Health & Human Services. Available at: <https://www.hiv.gov>.
- Panel on Antiretroviral Guidelines for Adults and Adolescents. Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents Living with HIV. Department of Health

and Human Services. Available at:

<http://aidsinfo.nih.gov/contentfiles/lvguidelines/AdultandAdolescentGL.pdf>.

- Primary Care Guidelines for the Management of Persons Infected with HIV, issued by expert panel of the HIV Medicine Association of the Infectious Diseases Society of America. Update issued in: Aberg JA, Gallant JE, Ghanem KG, et al. Primary care guidelines for the management of persons infected with HIV: 2013 update by the HIV medicine association of the Infectious Diseases Society of America. *Clin Infect Dis.* 2014;58(1):e1-34. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/24235263/>.
- CDC. "Integrated prevention services for HIV infection, viral hepatitis, sexually transmitted diseases, and tuberculosis for persons who use drugs illicitly: summary guidance from CDC and the U.S. Department of Health and Human Services." *MMWR Recomm Rep.* 2012;61(RR-5):1-40. Available at: <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr6105a1.htm>.

**FEASIBILITY OF ALLOWING ENLISTED MEMBERS TO BECOME COMMISSIONED OFFICERS OF THE ARMED FORCES AND RESTRICTIONS DIFFERENT FOR OFFICERS:**

DoD policy has long maintained a difference between accession medical standards and retention medical standards. The rationale for the difference is that once a member has been fully trained to perform, and has experience in performing the duties of his or her position, whether as an enlisted member or officer, the needs of the Service incline decidedly toward allowing the member to continue to perform those duties and return the investment the Service has made in the member. At the accession stage, the needs of the Service incline toward selecting members in whom to make the training and mentoring investment, who minimize any risk of inability due to medical conditions to complete an initial period of service and potentially a longer military commitment. Longstanding DoD policy under DoDI 6130.03 has also held that in the case of an enlisted member seeking appointment as a commissioned officer, the accession standards are the appropriate ones to apply because it is a new position, involving a whole new set of duties and responsibilities and new training and mentorship. The needs of the Service do not necessarily favor an officer applicant with prior enlisted service, compared to one without such service, when it comes to minimizing any risk of inability due to medical conditions to perform satisfactorily in the commissioned officer position. However, it is appropriate to note that a review of two individual officer candidates, one with and one without prior enlisted service, requesting a medical waiver for the same condition, the candidate with prior service may well have the advantage of a record of successful military service in the enlisted ranks. However, regarding which set of standards to apply to the initial medical screening, the accession medical standards are the more appropriate standards for all applicants, including applicants for enlistment or commissioning. This is long-established DoD policy for all medical conditions; there is no special or different rule for individuals with HIV infection.

**DISCUSSION:**

The Department has a responsibility to ensure the health and well-being of Service members, and through its policies, aims to minimize the risk of Service members' exposure to HIV, while ensuring that those infected with HIV have access to appropriate care and management of their illness and are able to continue service. Military unique considerations; the rapidly evolving

nature of medical evidence and understanding pertaining to the nature of HIV transmission, infectivity, associated risks, and treatment; evolving mission requirements; and Service member needs pertaining to health information privacy protections, as well as opportunities for career advancement, are key factors that influence personnel policy pertaining to HIV-infected members of the Armed Forces.

Current DoD- and Service-level personnel policies pertaining to HIV-infected members of the Armed Forces:

- Are established to maintain military readiness and optimize lethality of the Armed Forces.
- Are instituted to ensure military applicants can successfully complete rigorous military training and deploy to austere environments to accomplish the demanding missions of the military, without jeopardizing their health, the health of their unit, or the military mission, as well as to respect host Nation laws where our forces are deployed.
- Support retention of Service members infected with HIV, unless there is evidence of deteriorating health or other factors that render the individuals unable or unfit to perform their duties.
- Require the same procedures for medically evaluating Service members who develop disability due to chronic illness to determine fitness for continued service, regardless of whether the Service member is HIV-positive.
- Aim to ensure that, except for assignment limitations, HIV-infected personnel are treated no differently than other Service members.
- Ensure that a Service member infected with HIV is not retired or involuntarily separated solely based on being infected.
- Recognize that in the unique circumstances of military combat operations, there remain significant risks that individuals with even well-controlled HIV infection may suffer adverse health effects and create additional mission risks for the military command.
- Direct the protection of health information and privacy of HIV-infected personnel.
- Reflect existing evidence and adhere to current nationally accepted, evidence-based guidelines, and assess evolving medical evidence and scientific understanding of the nature and risk of HIV transmission, available treatment regimens, and the latest HIV management approaches and practices.
- Stipulate clinical management to be consistent with standard of care, evidence-based HIV clinical practice standards, and medical management guidelines.

**CONCLUSIONS:**

DoD personnel policy for HIV-positive Service members is evidence-based, in accordance with state-of-the-art clinical guidelines, reviewed for currency, and updated accordingly as medical capabilities, technologies, and evidence-based practices evolve.

DoD accession policies align with the military's requirements to recruit healthy personnel who are able to complete demanding military training and to deploy to austere environments without exacerbating their health or compromising operational effectiveness and mission accomplishment.

For those who acquire HIV after accession, DoD policy emphasizes retention if the medical condition is stable with appropriate treatment and the Service member is found fit for duty. Service members with laboratory evidence of HIV infection who are able to perform the duties of their office, grade, rank and/or rating, cannot be separated solely based on laboratory evidence of HIV infection. Service members with medical illnesses or conditions that might limit their ability to perform military duties (including HIV infection) may undergo evaluation for either duty limitations or medical discharge.

A waiver is required for HIV-positive Service members to deploy; medical evaluators must consider climate, altitude, rations, housing, duty assignment, and available medical services in theater when deciding whether an individual is deployable. However, current Service policies do not permit HIV-infected Service members to deploy to combat theaters of operation or in support of other contingency operations, given the austere environment, potential exacerbation of illness and lack of access to needed medical care, as well as risk of compromising unit readiness and successful mission completion. Army policy currently allows deployment to Europe and Korea for HIV-infected soldiers found fit by a PEB (host Nation permitting). Navy policy currently permits case-by-case consideration for non-combat OCONUS or large ship platform tours for HIV-infected personnel with controlled HIV disease (as manifested by a reconstituted immune system, no viremia, an established history of medical compliance).

DoD policy prohibits adverse personnel actions based solely on HIV status, assuming ability to perform duties fully. However, as with any direct order, a Service member who violates the order to inform sexual partners of their HIV status or fails to use safe sexual practices, as instructed during face-to-face consultation, may be subject to disciplinary action.

Maintaining the health of military personnel is essential for force readiness. It is a strategic objective of the MHS to sustain the health of Service members, restore the health, and return to duty of Service members who become ill or injured, if possible. Once Service members complete training, the goal is to retain members who acquire HIV who are still capable of performing their duties in the rigorous military environment. Personnel policies aim to balance the need of the Services (e.g., readiness, resilience, deployability, mission accomplishment, retention) with the needs of Service members infected with HIV (access to quality care, counseling, support and educational services, privacy protections, and option to continue service, if desired). Existing personnel policies intend to maximize the lethality, readiness, and operational effectiveness of the Armed Forces, as well as to help ensure the health and well-being of Service members, while mitigating the risk of HIV transmission.

**ACRONYMS:**

<b>AD</b>	active duty
<b>AFI</b>	Air Force Instruction
<b>AFPC</b>	Air Force Personnel Center
<b>AHRC</b>	Army Human Resource Command
<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>ALC-C</b>	Assignment Limitation Code-C
<b>AMSWG</b>	Accession Medical Standards Working Group
<b>AR</b>	Army Regulation
<b>ARNG</b>	Army National Guard
<b>ARNG-CSG</b>	Army National Guard – Office of the Chief Surgeon
<b>ART</b>	antiretroviral therapy
<b>ARV</b>	antiretroviral
<b>CCMD</b>	Combatant Command
<b>CDC</b>	Centers for Disease Control and Prevention
<b>CONUS</b>	continental United States
<b>DES</b>	Disability Evaluation System
<b>DoD</b>	Department of Defense
<b>DoDD</b>	Department of Defense Directive
<b>DoDI</b>	Department of Defense Instruction
<b>DoDM</b>	Department of Defense Manual
<b>FDA</b>	U.S. Food and Drug Administration
<b>FY</b>	Fiscal Year
<b>HETU</b>	HIV Evaluation and Treatment
<b>HIV</b>	human immunodeficiency virus
<b>HRC</b>	Human Resource Command
<b>IDES</b>	Integrated Disability Evaluation System
<b>IMR</b>	individual medical readiness
<b>LDES</b>	Legacy Disability Evaluation System
<b>M&amp;RA</b>	Manpower and Reserve Affairs
<b>MCO</b>	Marine Corps Order

<b>MEB</b>	Medical Evaluation Board
<b>MEDCEN</b>	United States Army Medical Center
<b>MEPS</b>	Military Entrance Processing Stations
<b>MEU</b>	Medical Evaluation Unit
<b>MHS</b>	Military Health System
<b>MIDRP</b>	Military Infectious Diseases Research Program
<b>MOS</b>	military occupational specialty
<b>MQA</b>	medical quality assurance
<b>NARSUM</b>	narrative summary
<b>NAVMED</b>	Naval Medical Command
<b>NCI</b>	neurocognitive impairment
<b>NDAA</b>	National Defense Authorization Act
<b>NGR</b>	National Guard Regulation
<b>OASD(HA)</b>	Office of the Assistant Secretary of Defense for Health Affairs
<b>OCONUS</b>	outside the continental United States
<b>PEB</b>	Physical Evaluation Board
<b>QAP</b>	Quality Assurance Program
<b>RC</b>	Reserve Component
<b>SECNAVINST</b>	Secretary of the Navy Instruction
<b>TAPC</b>	Total Army Personnel Command
<b>TDA</b>	table of distribution and allowances
<b>USAF</b>	U.S. Air Force

**REFERENCED POLICIES:**1. DoD Issuances:

- DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007
- DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 2003
- DoDD 6490.02E, "Comprehensive Health Surveillance," February 8, 2012, as amended
- DoDI 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," March 23, 2015, as amended
- DoDI 1332.18, "Disability Evaluation System (DES)," August 5, 2014
- DoDI 1332.45, "Retention Determinations for Non-Deployable Service Members," July 30, 2018
- DoDI 6025.13, "Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)," February 17, 2011, as amended
- DoDI 6025.19, "Individual Medical Readiness (IMR)," June 9, 2014
- DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended
- DoDI 6485.01, "Human Immunodeficiency Virus (HIV) in Military Service Members," June 7, 2013
- DoDI 6490.03, "Deployment Health," August 11, 2006, as amended
- DoDI 6490.07, "Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees," February 5, 2010
- DoDM 1332.18, Volume 1, "Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards," August 5, 2014
- DoDM 1332.18, Volume 2, "Disability Evaluation System (DES) Manual: Integrated Disability Evaluation System (IDES)," August 5, 2014
- DoDM 1332.18, Volume 3, "Disability Evaluation System (DES) Manual: Quality Assurance Program (QAP)," November 21, 2014
- DoDM 6025.13, "Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)," October 29, 2013

2. Department of the Army:

- AR 40-501, "Standards of Medical Fitness," June 14, 2017
- AR 40-68, "Clinical Quality Management," Rapid Action Revision Issue Date: May 22, 2009
- AR 135-133, "Ready Reserve Screening, Qualification Records System, and Change of Address Reporting," December 22, 2016
- AR 135-175, "Separation of Officers," November 29, 2017
- AR 135-178, "Enlisted Administrative Separations," November 7, 2017
- AR 140-10, "Assignments, Attachments, Details, and Transfers," August 15, 2005
- AR 140-50, "Officer Candidate School, Army Reserve," October 15, 1999
- AR 350-51, "United States Army Officer Candidate School," June 11, 2001
- AR 600-8-24, "Officer Transfers and Discharges," Rapid Action Revision Issue Date: September 13, 2011

- AR 600-110, "Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus," April 22, 2014
  - AR 614-30, "Overseas Service," December 22, 2016
  - AR 614-100, "Officer Assignment Policies, Details, and Transfers," January 10, 2006
  - AR 614-200, "Enlisted Assignments and Utilization Management," November 29, 2017
  - AR 635-40, "Disability Evaluation for Retention, Retirement, or Separation," January 19, 2017
  - AR 635-200, "Active Duty Enlisted Administrative Separations," December 19, 2016
3. Departments of the Army and the Air Force National Guard Bureau:
- NGR 351-5, "State Military Academies," Incl Change 1, December 16, 1985
  - NGR 600-200, "Enlisted Personnel Management," July 31, 2009
  - NGR 635-101, "Efficiency and Physical Fitness Boards," August 15, 1977
4. Department of the Navy and United States Marine Corps:
- SECNAVINST 1850.4E, "Department of the Navy (DON) Disability Evaluation Manual," April 30, 2002
  - SECNAVINST 5300.30E, "Management of Human Immunodeficiency Virus, Hepatitis B Virus and Hepatitis C Virus Infection in the Navy and Marine Corps," August 13, 2012
  - NAVMED P-117, "Manual of the Medical Department (MANMED): Chapter 18: Medical Evaluation Boards," January 10, 2005
5. Department of the Air Force:
- AFI 44-178, "Human Immunodeficiency Virus Program," March 4, 2014; Certified Current June 28, 2016
  - AFI 48-123, "Medical Examinations Standards," November 5, 2013
  - AFI 48-123 – Air Force Medical Command Supplement (AFMCSUP), "Medical Examinations Standards," October 23, 2014
6. United States Marine Corps-Specific Policies:
- MCO 1300.8, "Marine Corps Personnel Assignment Policy," September 18, 2014
  - MCO 1900.16 CH 1, "Separation and Retirement Manual," August 7, 2015
  - MCO 1001R.1L, "Marine Corps Reserve Administration Manual," December 23, 2015

## ADDITIONAL REFERENCES

- <sup>1</sup> Prevention Access Campaign. Risk of Sexual Transmission of HIV from a Person Living with HIV Who Has An Undetectable Viral Load: Messaging Primer and Consensus Statement. Issued July 21, 2016. Endorsements updated January 8, 2018. Available at: <https://www.preventionaccess.org/consensus>
- <sup>2</sup> Kuhar DT, Henderson DK, Struble KA, Heneine W, Thomas V, Cheever LW et al. Updated U.S. Public Health Service Guidelines for the Management of Occupational Exposures to Human Immunodeficiency Virus and Recommendations for Postexposure Prophylaxis. *Infect Control Hosp Epidemiol.* 2013; 34(9):875-892. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/23917901>.
- <sup>3</sup> Crum-Cianflone NF, Moore DJ, Letendre S et al. Low prevalence of neurocognitive impairment in early diagnosed and managed HIV-infected persons. *Neurology.* 2013;80:371–379. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/23303852>.
- <sup>4</sup> Sacktor N. Changing clinical phenotypes of HIV-associated neurocognitive disorders. *J Neurovirol.* 2018;24(2):141-145. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/28752495>.
- <sup>5</sup> Price RW. HIV-associated neurocognitive disorders: Epidemiology, clinical manifestations, and diagnosis. UpToDate. Literature review current through May 2018. This topic last updated February 14, 2017. Available at: <https://www.uptodate.com/contents/hiv-associated-neurocognitive-disorders-epidemiology-clinical-manifestations-and-diagnosis>.
- <sup>6</sup> De Souza EM, Buoniconti CS, Valim FC, Moura AS. Risk factors for neurocognitive impairment in HIV-infected patients and comparison of different screening tools. *Dementia & Neuropsychologia.* 2016;10(1):42-46. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5674913/>.
- <sup>7</sup> Antinori A, Arendt G, Becker JT, et al. Updated research nosology for HIV-associated neurocognitive disorders. *Neurology.* 2007;69(18):1789-1799. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4472366/>.
- <sup>8</sup> Sacktor N. Changing clinical phenotypes of HIV-associated neurocognitive disorders. *J Neurovirol.* 2018;24(2):141-145. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/28752495>.
- <sup>9</sup> Grant I, Franklin DR Jr, Deutsch R, Woods SP, et al. Asymptomatic HIV-associated neurocognitive impairment increases risk for symptomatic decline. *Neurology.* 2014;82:2055–2062. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4118496/pdf/NEUROLOGY2013549501.pdf>.
- <sup>10</sup> Sacktor N. Changing clinical phenotypes of HIV-associated neurocognitive disorders. *J Neurovirol.* 2018;24(2):141-145. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/28752495>.

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<sup>11</sup> U.S. Army Medical Research and Materiel Command. Military Infectious Diseases Research Program (MIDRP). Background and Environment. Available at:  
[http://mrmc.amedd.army.mil/index.cfm?pageid\\_medical\\_r\\_and\\_d.midrp.overview](http://mrmc.amedd.army.mil/index.cfm?pageid_medical_r_and_d.midrp.overview)

<sup>12</sup> U.S. Army Institute of Surgical Research: Joint Trauma System Clinical Practice Guideline: Fresh Whole Blood (FWB) Transfusion. 2012. Available at:  
[http://www.usaisr.amedd.army.mil/cpgs/Fresh\\_Whole\\_Blood\\_Transfusion\\_24\\_Oct\\_12.pdf](http://www.usaisr.amedd.army.mil/cpgs/Fresh_Whole_Blood_Transfusion_24_Oct_12.pdf)

<sup>13</sup> Patel P, Borkowf CB, Brooks JT. Et al. Estimating per-act HIV transmission risk: a systematic review. *AIDS*. 2014. doi: 10.1097/QAD.000000000000298. Available at:  
<https://www.ncbi.nlm.nih.gov/pubmed/24809629>.

<sup>14</sup> Patel P, Borkowf CB, Brooks JT. Et al. Estimating per-act HIV transmission risk: a systematic review. *AIDS*. 2014. doi: 10.1097/QAD.000000000000298. Available at:  
<https://www.ncbi.nlm.nih.gov/pubmed/24809629>.

<sup>15</sup> U.S. Department of Health and Human Services, Food and Drug Administration: CFR- Code of Federal Regulations Title 21. Available at  
<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfCFR/CFRSearch.cfm?CFRPart=1271&showFR=1>

# Exhibit D

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.	.	
	.	
. . . . .	.	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	ANDREW R. SOMMER, ESQ.
	CYRUS T. FRELINGHUYSEN, ESQ.
	JOHN W.H. HARDING, ESQ.
	Winston & Strawn LLP
	1700 K Street, N.W.
	Washington, D.C. 20006
	and
	SCOTT A. SCHOETTES, ESQ.
	Lambda Legal Defense and
	Education Fund, Inc.
	105 West Adams, Suite 2600
	Chicago, IL 60603
	and
	PETER E. PERKOWSKI, ESQ.
	OutServe-SLDN, Inc.
	P.O. Box 65301
	Washington, D.C. 20035-5301

(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 18)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 FOR THE DEFENDANTS:

R. TRENT McCOTTER, AUSA  
U.S. Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314  
and  
NATHAN M. SWINTON  
Senior Trial Counsel  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20001

9 ALSO PRESENT:

NICK HARRISON

10

OFFICIAL COURT REPORTER:

ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Third Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

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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 E**

**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

Andrew R. Sommer  
Virginia State Bar No. 70304  
ASommer@winston.com  
Cyrus T. Frelinghuysen (pro hac vice)  
CFrelinghuysen@winston.com  
John W.H. Harding  
Virginia State Bar No. 87602  
JWHarding@winston.com  
WINSTON & STRAWN LLP  
1700 K St., NW  
Washington, DC 20006  
T: (202) 282-5000

Scott A. Schoettes (pro hac vice)  
SSchoettes@lambdalegal.org  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
105 W. Adams, Suite 2600  
Chicago, IL 60603  
T: (312) 663-4413

Anthony Pinggera (pro hac vice)  
APinggera@lambdalegal.org  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
4221 Wilshire Blvd, Suite 280  
Los Angeles, CA 90010  
T: (213) 382-7600

Peter E. Perkowski (pro hac vice)  
PeterP@outserve.org  
OUTSERVE-SLDN, INC.  
P.O. Box 65301  
Washington, DC 20035-5301  
T: (800) 538-7418

**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.

NATHAN M. SWINTON  
Senior Trial Counsel  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., NW  
Washington, D.C. 20001  
Telephone: (202) 305-7667  
Facsimile: (202) 616-8460  
Nathan.M.Swinton@usdoj.gov

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

/s/ Andrew R. Sommer