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' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS

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I. INTRODUCTION

Despite Defendants' protests to the contrary, the documents Plaintiffs seek are material to their equal protection claims. To probe whether Defendants' regulations and policies singling out people living with HIV for disparate treatment are justified by any legitimate governmental interest, Plaintiffs must obtain information that will allow them to understand Defendants' motivations and to assess the validity of their asserted justifications. In addition to providing support for Sgt. Harrison's claims—which Defendants' contend are the only claims at issue in this case—this discovery is needed to support the claims asserted by OutServe on behalf of its members. OutServe's claims include a facial challenge to the Defendants' policies regarding the accession, retention, and deployment of people living with HIV. The Court has already recognized the validity and broad scope of the claims asserted by OutServe, stated that a "fulsome record" must be developed to adjudicate those claims, and rejected Defendants' first attempt to limit discovery to the administrative record under the APA. To ensure the parties are able to create the fulsome record the Court has asked for, the Court should reject Defendants' arguments and compel them to produce the documents requested by Plaintiffs.

II. ARGUMENT

A. The Administrative Procedure Act (APA) Does Not Apply in this Case Challenging the Constitutionality of the Military's Policies.

Defendants' argument that discovery is inappropriate in this action because of the APA has been waived because Defendants did not make it in either their objections or responses. *See* Dkt. 73-3 (Defs.' Objs.) and Dkt. 78-1 (Defs.' Resp.); *Cardenas v. Dorel Juvenile Grp., Inc.*, 230 F.R.D. 611, 621 (D. Kan. 2005) ("It is also well settled that when a party fails to assert an objection in its initial response to the discovery request and raises it for the first time in response to a motion to compel, the objection is deemed waived.") (citations omitted).

Defendants' failure to lodge an objection based on the APA was surprising because Defendants raised the APA issue in the parties' Joint Proposed Discovery Plan.[1] *See* Dkt. 67 at 4-6. As Plaintiffs explained then, this case presents a constitutional challenge regarding the military's policies that discriminate against people living with HIV. Compl. ¶¶ 71-78, Dkt. 1. Plaintiffs' claims are therefore ***not*** subject to the APA's limitations on discovery. *See id.* at 1-3. Indeed, there is a party in this case—OutServe—representing interests beyond those of Sgt. Harrison. There is no administrative record that can be compiled that would allow OutServe to litigate the interests of its members living with HIV. While Defendants go to great lengths to suggest that resolution of this case as to Sgt. Harrison's claims would resolve all issues in this case, the Court has not seen it that way. *See* Dkt. 73-1, Hr'g Tr. at 18:2-13 ("[T]here's nothing in my view that would prevent you from resolving perhaps the situation of Mr. Harrison and then the group perhaps remaining as the plaintiff in the case."). Moreover, the range of cases cited by Defendants do not hold otherwise. This is underscored by Defendants' attempt to characterize a recent decision that is directly on point as "in error" and "distinguishable."[2] Dkt. 78 at 8.

The Court has explicitly recognized the need for discovery to develop a full record in this case. The Court indicated that, "because of the ***very significant issues involved***, [this case] needs

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[1] The Court also implicitly dismissed Defendants' argument regarding the applicability of the APA when issuing its Rule 16(b) Scheduling Order. Specifically, the parties' Joint Proposed Discovery Plan included a section titled "Agreed upon schedule ***if the APA does not apply***." Dkt. 67 at 6 (emphasis added). The Rule 16(b) Scheduling Order incorporated the provisions set forth in that section. *See* Dkt. 68 at ¶¶ 5-6, 8.

[2] Defendants are incorrect that the *Doe v. Trump* decision is distinguishable from this case. As in this case, the plaintiffs in *Doe* "assert claims under the Fifth Amendment to the United States Constitution. They do not assert any claim under the APA. None of the cases cited by Defendants hold that Plaintiffs are required to proceed under the APA, nor do they hold that discovery in this constitutional challenge should be limited to an administrative record." *Doe v. Trump*, Case No. (citations omitted) (Dkt. 78-2).

to have a complete record, and we don't have that yet because we haven't had discovery[.] . . . We need to have a fulsome record."). Dkt. 73-1, Hr'g Tr. at 16:9-19 (emphasis added). Defendants try to justify limiting discovery to Sgt. Harrison because they believe "the Court suggested that it was interested in focusing on Sgt. Harrison's alleged injuries." Dkt. 78 at 19. However, the Court's focus on Sgt. Harrison's situation during the preliminary injunction hearing does not indicate Defendants have license to unilaterally limit discovery. Indeed, the Court acknowledged there were two plaintiffs and recognized that one may continue the suit even if the other settles. *See* Dkt. 73-1, Hr'g Tr. at 18:2-13. Defendants approach to discovery would deny the "fulsome record" for deciding the significant issues in this case. *See* Dkt. 73-1, Hr'g Tr. at 16:9-19.

B. The Appropriate Standard of Review Remains Disputed and Nonetheless Does Not Control the Scope of Discovery.

Defendants attempt to avoid discovery by invoking "the applicable [review] standard." Dkt. 78 at 9. Plaintiffs in no way agree that a "rational basis" review applies here. And, as indicated by the briefing on Plaintiffs' Motion for a Preliminary Injunction, the issue is hotly contested and yet to be decided. Dkt. 26 at 9-21; Dkt. 40 at 19-29; Dkt. 51 at 11-18; Dkt. 53 at 10-18. This discovery motion is not the appropriate vehicle for the Defendants to obtain a substantive decision on the applicable standard of review.[3] Furthermore, the standard of review is not relevant to the scope of discovery, which must afford Plaintiffs the opportunity to probe

[3] Defendants cite *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) as supposedly holding that all claims regarding HIV discrimination are subject to rational basis review. For the reasons stated in their Reply in Support of their Motion for Preliminary Injunction (Dkt. 52 at 12-14), Plaintiffs disagree with this characterization of *Doe*. Nevertheless, the question of the applicable standard of review is no basis upon which Defendants can avoid discovery into the purported justifications for their discriminatory policies.

Defendants' justifications for the policies at issue, regardless of the level of scrutiny under which those justifications will be assessed.

C. Plaintiffs' Claims Are Not Limited in Scope to Sgt. Harrison's Requested Relief Related to Commissioning.

As explained fully in Plaintiffs' Motion, Defendants are incorrect that the scope of discovery—or the case—is limited to Sgt. Harrison's as applied challenge to the Army's decision on his request to commission as an officer. *See* Dkt. 78 at 12-13. First, the Complaint states a cause of action that encompasses all of the policies that led to Defendants' decision to deny Sgt. Harrison a commission and includes a facial constitutional challenge to the DoD Instructions on which that decision was based. Documents allowing Sgt. Harrison to probe the DoD's justifications for these regulations are within the scope of discovery on his claims.

Second, Plaintiff OutServe represents the interests of its members living with HIV who serve or wish to serve in ***all*** branches of the military covered by the Department of Defense regulations and whose service is limited by the military's various accessions, deployment, and retention policies. Two of OutServe's members offered declarations in support of Plaintiffs' Motion for a Preliminary Injunction. *See* Dkt. 30 and 31; *see also* Ex. A, Blevins Decl. In response, Defendants offered a declaration from an Air Force employee describing its policies regarding people living with HIV, thus acknowledging the relevance of the HIV-related policies of branches of the Military other than the Army. *See* Dkt. 48 (Soper Decl.). Finally, the Court explicitly recognized OutServe's standing to pursue its own claims separate and distinct from Sgt. Harrison. *See* Dkt. 73-1, Hr'g Tr. at 18:8-12.

Contrary to Defendants' claims otherwise, the members of OutServe—beyond Sgt. Harrison—have suffered and continue to suffer irreparable injury due to Defendants' discriminatory policies. *See* Ex. A, Blevins Decl. Indeed, one of the members of OutServe who

provided a declaration in support of Plaintiffs' Motion for a Preliminary Injunction has been notified he will be discharged, even though he has been found physically fit for duty and his commanding officer supports his retention. *See* Ex. A, Blevins Decl. This harsh reality stands in stark contrast with Defendants' claim in their Opposition that "[a]ctive-duty and reserve component service members who test positive are not involuntarily separated from the military" and may continue to serve "[i]f found fit for duty[.]" Dkt. 78 at 2. A similar claim was made to the Court in Defendants' brief on the Motion for a Preliminary Injunction, in the declaration from the Air Force mentioned above, and during oral arguments regarding Plaintiffs' Motion. *See* Dkt. 43 at 8-9 ("under the current DoD policy, not only are HIV-positive members *not* categorically deemed to be non-deployable, but even if they were, that still would not result in their automatic discharge from the military"); Dkt. 50 at 4 ("The fact that an Airman's medical condition prevents him from deploying to a particular location does not necessarily require the Airman to be found unfit for continued service."); Dkt. 73-1, Hr'g Tr. at 14:17-19 ("[T]he current policy is not to discharge or separate the individual solely because of that medical condition."). All of these assertions are belied by the discharges of service members living with HIV now taking place. *See* Ex. A, Blevins Decl. Indeed, this about-face coming on the heels of Defendants' representations to avoid a preliminary injunction smack of bad faith: while Plaintiffs' motion was pending, Defendants re-wrote their policies and suggested those new policies showed no imminent harm would befall any service members solely because they have HIV but after the motion for preliminary injunction was denied, started harming those very same people. Discovery is needed to probe the veracity of Defendants' assertions, which do not comport with the recent experiences of service members living with HIV, many who are members of OutServe.

D. Plaintiffs' Discovery Requests Are Narrowly Tailored and Proportionate to the Needs of the Case.

Defendants argue that Plaintiffs' requests are overly broad because: (1) they include "no reasonable time limitations," (2) there are as many as three million people in the military, (3) they "encompass all 'prior versions and amendments' of many polices," and (4) they seek materials subject to the deliberative process protection. *See* Dkt. 78 at 16-19. None of these arguments justify Defendants' withholding of critical discovery. First, with respect to time limitations, Defendants did not raise this specific objection, so it should be considered waived. *See* Dkt. 73-3 (Defs.' Objs.). It was only when Defendants served their responses that Defendants indicated Plaintiffs' requests contained no reasonable time limitations and sought to impose restrictions.[4] *See* Dkt. 78-1.

Moreover, Defendants claim undue burden without sufficiently articulating that burden. Plaintiffs have not asked Defendants to search all records "created over a period of more than 30 years" or that relate to "three million people throughout the world." Dkt. 78 at 17. Even if there are three million people world-wide serving in the military in some capacity, certainly a massive number of those people were not involved in setting the military's policies regarding the accession, deployment, or retention of people living with HIV. Defendants just offer a big number in hopes of fending off discovery, seemingly without investigating how many people *might actually have the requested materials.* Perhaps the true number of relevant document custodians is very small and underwhelming. Certainly it is orders of magnitude smaller than the

[4] Plaintiffs are willing to negotiate with Defendants regarding a reasonable time frame regarding certain requests. For example, the time limitations imposed by Defendants with respect to Request Nos. 3 and 4 may be appropriate to the extent Defendants' reports to Congress were prepared over those respective timeframes.

number with which Defendants are concerned. Plaintiffs merely request that Defendants search for and produce the documents that were considered in formulating its policies at issue in this case that are in its possession, custody, or control and that are located after a reasonable search. Yet Defendants refuse even to conduct such a search.

Third, with respect to prior versions of the policies at issue, these materials are also relevant, and Defendants have not sufficiently articulated the burden in searching for and producing relevant documents. The DoD has told Congress that their policies related to service members living with HIV "[r]eflect 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." DoD 2018 Report to Congress, Dkt. 53-3 at 10. Yet it is Plaintiffs' contention that the current policies have ***not*** kept up with advances in medicine and science. Dkt. 1 at ¶¶2-3. Exploring the evolution of Defendants' policies, including what specific materials Defendants previously considered and relied upon to formulate prior policies is material to understanding whether current policy is in accord with Constitutional requirements.

Fourth, with respect to materials allegedly covered by the deliberative process privilege, at this time, Plaintiffs cannot assess whether any documents have actually been withheld on this basis because Defendants have not yet produced a privilege log. However, to the extent that any documents are withheld, such withholding is improper because the privilege does not apply in cases involving claims where the government's intent is at issue, as in this case. *See, e.g.*, *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems

rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination."). Here, Plaintiffs are alleging intentional or purposeful discrimination and are entitled to documents that may otherwise be subject to the deliberative process privilege. Defendants' objections to producing materials on this basis are therefore improper.

E. Defendants' Objections Were Deficient and Their Responses Remain Deficient.

Defendants claim that their objections complied with the Local Rules of this Court and Fed. R. Civ. P. 34, although those objections did not specifically indicate what documents were being withheld. *See* Dkt. 78 at 19-20; Dkt. 73-3 (Defs.' Objs.). It was only when Defendants served their responses that Plaintiffs could fully assess what Defendants intended to produce or withhold. But the purpose of Local Civil Rule 26(C)'s requirement to serve objections 15 days prior to substantive responses is to promote the early resolution of discovery disputes. Plaintiffs were forced to read between the lines to determine what Defendants intended to withhold. Moreover, after receiving Defendants' responses, Plaintiffs have identified further deficiencies that may require resolution by the Court, including two issues mentioned above—Defendants withholding of documents related to prior versions of relevant regulations and documents allegedly subject to the deliberative process privilege. *See* Ex. B, Letter re Defs.' Deficient Resp. (Nov. 28, 2018).

III. CONCLUSION

For the reasons set forth in Plaintiff's Motion and above, Plaintiffs request that this Court compel Defendants to produce the documents responsive to Plaintiffs' RFP Nos. 3-15, and for such further relief as this Court deems just and proper.

Dated: November 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: November 29, 2018

Respectfully submitted,

/s/ *Andrew R. Sommer*
Andrew R. Sommer

Exhibit A

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.	Case No. 1:18-cv-00641 (LMB/IDD)

DECLARATION OF ANDY BLEVINS

1. My name is Andy Blevins. I am the Executive Director of Plaintiff OutServe-SLDN, Inc. ("OutServe-SLDN").

2. I am over 18 years of age, am competent to testify about the information contained in this declaration if needed, and offer this declaration based on my own actual, personal knowledge.

3. OutServe-SLDN is a non-partisan, non-profit, legal services, watchdog and policy organization that represents the U.S. LGBTQ+ and HIV+ military and veteran communities—service members, veterans, civilian Department of Defense, and their spouses and families—worldwide. The organization's mission is to address and end, through litigation, policy advocacy, and education, all forms of unequal or unfair treatment against members of its community on the bases of sexual orientation, gender identity, or HIV status.

4. OutServe-SLDN is, in part, a membership organization, or the functional equivalent of a membership organization. It has well over 7,000 members—veterans, active-duty and reserve-component service members, and civilian Department of Defense workers throughout the world who identify as LGBTQ or are living with HIV—and more than 54,000 supporters. OutServe-SLDN also has more than 54 chapters worldwide, including 35 in the United States, and 20 additional special group forums, one of which is the "Positive Forum" for people living with HIV. These chapters are not just social groups: because service members who are LGBTQ+ and/or living with HIV are minority groups that are still sometimes marginalized, stigmatized, or ostracized in the military, the chapter allow these service members to establish emotional support networks and to exchange information that is importance for career advancement and professional growth. The chapters also provide a direct link for service members to access services and programs that OutServe-SLDN offers.

5. OutServe-SLDN provides pro-bono advocacy and legal services for members of the military living with HIV. Advocacy work includes working with Congress to change or approve legislation and regulations affecting service members with HIV, as well as working directly with the Department of Defense, the Secretary of Defense, and the service Secretaries on the same issues. Legal services work includes writing and submitting amicus briefs in cases involving HIV-related issues (e.g., *United States v. Forbes*, Court of Appeals for the Armed Forces Case No. 18-0304/NA); filing and litigating impact litigation to change Department of Defense policies; directly representing service members with HIV in administrative-separation and court-martial proceedings; and providing cultural-competency assistance, education and information, and training to Judge Advocate General defense lawyers in all service branches.

6. I have reviewed the declarations in support of Plaintiffs' Motion for a Preliminary Injunction. *See* Mem. in Supp. of Pls.' Mot. for a Preliminary Injunction, Ex, F and G, ECF No. 30 (Declarant 1) and 31 (Declarant 2). The declarants are members of OutServe-SLDN.

7. I understand that in opposing the motion for preliminary injunction, Defendants represented that service members living with HIV were not being subject to involuntary separation solely because they are not deployable by regulation. This is not true. Earlier this month, Declarant 2 received notification from the Air Force that he will be involuntarily separated. Although the Air Force acknowledged that Declarant 2 has been compliant with all treatment, is currently asymptomatic, has an undetectable HIV viral load, is able to perform all garrison duties, has passed his most recent fitness assessment without any component exemption, and had the strong support of his command in favor of retention, Air Force authorities justified his separation by stating that Declarant 2's HIV status precludes him from being able to deploy worldwide without a waiver and renders him ineligible for deployment to the Central Command (CENTCOM) Area of Responsibility, allegedly where the majority of Air Force members are expected to deploy.

8. I am aware of at least one other member of OutServe-SLDN who is being separated on the same basis as Declarant 2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of November, 2018

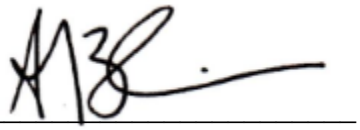

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Exhibit B

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, & Trent,

We write regarding Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents and Things (Nos. 1-15) served on November 23, 2018. Defendants' responses are deficient for at least the reasons set forth below.

I. Defendants' "General Objections"

As already explained in Plaintiffs' Motion to Compel Production of Documents (*see* ECF No. 73 at 4 n.3), although Defendants styled them as "Objections Applicable to Each Request," Defendants improperly included general objections despite the Court's instruction not to do so. *See* Rule 16(b) Scheduling Order, ECF No. 68 at ¶3. Defendants have therefore waived these objections.

II. Issues Applicable to Multiple Responses

Defendants' objections and responses indicate that materials may be withheld on the basis of attorney-client privilege, attorney work product, and/or deliberative process privilege. At this time, Plaintiffs cannot assess whether any documents have actually been withheld under the deliberative process privilege. However, to the extent that any documents are withheld on this basis, such withholding is improper because the privilege does not apply in cases involving claims where the government's intent is at issue, as here. *See, e.g.*, *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination."). Plaintiffs will further address this issue after receiving Defendants' log of documents that have been withheld.

Defendants' objections and responses also indicate that Defendants may have improperly withheld documents that were "reviewed" but not relied upon in preparing certain reports or policies. *See* RFP Nos. 3-12. Defendants' withholding of any such documents is improper because even documents considered but not relied upon remain relevant to Plaintiff's claims. By way of analogy, Rule 26(a)(2)(B)(ii) requires that an expert report contain "the facts or data ***considered*** by the witness in forming them," even if the expert did not rely upon those facts or data. Fed. R. Civ. P. 26(a)(2)(B)(ii) (emphasis added). This is because "information considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert's opinion." *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001). Similarly, here, information reviewed or considered by those who prepared the reports and policies at issue is important to understanding the validity of the views or findings set forth in the same reports or policies.

Defendants objections and responses further indicate that Defendants may have improperly withheld "materials 'reviewed or relied upon' in developing versions of policy documents that have been superseded and are thus no longer in effect." RFP Nos. 7-12. Defendants' withholding of any such documents is improper because materials reviewed or relied upon in developing prior versions of policy documents are relevant to Plaintiff's claims. Specifically, for example, Defendants claim that their policies related to service members living with HIV "[r]eflect 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." DoD 2018 Report to Congress, ECF No. 53-3 at 10. Plaintiffs must be allowed to understand and explore the evolution of Defendants' policies, including what specific materials Defendants previously considered and relied upon to formulate prior policies that, for example, placed even greater restrictions on the ability of service members with HIV to serve in the Military.

III. Defendants' Specific Objections

- **RFP No. 1:** Defendants' response indicates that at least some documents may have been improperly withheld, including but not limited to the following:
    - First, with respect to Mr. Harrison's application materials submitted to the Army's Judge Advocate Recruiting Office, please confirm that Defendants will produce not only the application materials but also any materials related to Mr. Harrison's application, such as documents that may have been prepared in response to Mr. Harrison's application or internal communications discussing Mr. Harrison's application.
    - Second, with respect to Mr. Harrison's request for a medical waiver, Defendants indicate they have limited the scope of documents to be produced to "records in the custody of the National Guard Bureau." Please confirm that all documents related to Mr. Harrison's request are in the custody of the National Guard Bureau or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.
    - Third, with respect to documents concerning Mr. Harrison's request for an exception to policy, Defendants' response indicates that documents from only certain directorates or offices will be produced. Plaintiffs have not agreed to limit this request in this manner. Accordingly, please confirm that all documents related to Mr. Harrison's request for an exception to policy are within the custody of the listed directorates or offices or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.
    - Fourth, with respect to documents concerning Mr. Harrison's application to the Army Board for Correction of Military Records, please confirm that Defendants will produce not only the application itself but also any materials related to Mr. Harrison's application, such as documents that may have been prepared in response to Mr. Harrison's application or internal communications discussing Mr. Harrison's application.
- **RFP No. 2:** Defendants' response indicates that the scope of responsive documents has been improperly limited to the same documents that Defendants will be producing in response to RFP No. 1. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Plaintiffs will follow up on the scope of this request following a ruling from the Court on Plaintiffs' Motion.
- **RFP No. 3:** Defendants' response indicates that responsive documents may have been improperly withheld. For example, Defendants have agreed to produce "documents, dated between December 23, 2013, and September 22, 2014, used to prepare the 2014 Report to Congress, from the AP [Accession Policy Directorate] and OEPM [Officer and Enlisted Personnel

Management Directorate] directorates[.]" To the extent that documents outside the AP and OEPM directorates were used to prepare the 2014 Report, Defendants' limitations are improper, as those documents are relevant and should be produced. Please confirm either that only documents within those directorates were used to prepare the DoD 2014 Report to Congress or that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control. For example, the DoD 2014 Report to Congress indicates that "The [Assistant Secretary of Defense for Health Affairs] ASD(HA) reviewed DoD-level policies for enlistment or commissioning, retention, deployment, discharge and discipline of individuals with HIV or HBV." ECF No. 53-2 at 10. Accordingly, any documents relied upon by the Assistant Secretary of Defense for Health Affairs should also be produced.

- **RFP No. 4:** For the same reasons set forth above with respect to RFP No. 3, Defendants' response indicates that responsive documents may have been improperly withheld. Please confirm either that only documents within the AP and OEPM directorates were used to prepare the DoD 2018 Report to Congress or that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control. For example, the DoD 2018 Report to Congress indicates that "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))." ECF No. 53-3 at 5. Accordingly, any documents relied upon by OASD(HA) should also be produced.

- **RFP No. 5:** With respect to documents Defendants reviewed or relied upon in writing the DOGO Instruction, Defendants indicate they have limited the scope of documents to be produced to information from the OEPM directorate "that were used during the review of the version of the DoDI 1332.45 effective July 30, 2018." Please confirm that all documents reviewed or relied upon by Defendants in writing the DOGO Instruction are in the custody of the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.

- **RFP No. 6:** With respect to documents Defendants reviewed or relied upon in writing the DOGO Policy, Defendants indicate they have limited the scope of documents to be produced to information from the OEPM directorate "that were used to prepare the DoD Retention Policy for Non-Deployable Service Members (February 14, 2018)." Please confirm that all documents reviewed or relied upon by Defendants in preparing the DOGO Policy are in the custody of the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.

- **RFP No. 7:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6485.01, Defendants indicate they have limited the scope of documents to be produced to 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." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of

DoDI 6485.01 are in the custody of the OASD(HA)-HSPO or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.[1] This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6485.01, as explained above.

- **RFP No. 8:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6130.03, Defendants indicate they have limited the scope of documents to be produced to 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." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of DoDI 6130.03 are in the custody of the OASD(HA)-HSPO or the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.[2] This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6130.03, as explained above.

- **RFP No. 9:** With respect to waivers granted under DoDI 6130.03 for people living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of "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 [sic] § 3(a)." These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to ***all*** waivers granted under DoDI 6130.03 across all Military Departments, not just Mr. Harrison's request for a waiver. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6130.03 in locations other than "the National Guard Bureau, District of Columbia

[1] DoDI 6485.01 (June 7, 2013), Enclosure 2 indicates that various components have "RESPONSIBILITIES" related to the implementation of DoDI 6485.01, including the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Under Secretary of Defense for Policy (USD(P)); and the Secretaries of the Military Departments. At a minimum, therefore, documents should be collected from these components.

[2] DoDI 6130.03 (May 6, 2018) indicates the "Originating Component" was the Office of the Under Secretary of Defense for Personnel and Readiness, and "Section 2: Responsibilities" indicates that various components have responsibilities related to the implementation of DoDI 6130.03, including the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Secretaries of the Military Departments and the Commandant, United States Coast Guard. At a minimum, therefore, documents should be collected from these components.

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," then such documents should be produced.

- **RFP No. 10:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6490.07, Defendants indicate they have limited the scope of documents to be produced to 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 version of DoDI 6490.07 dated February 5, 2010." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of DoDI 6490.07 are in the custody of the OASD(HA)-HSPO or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.[3] This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6490.07, as explained above.

- **RFP No. 11:** With respect to waivers granted under DoDI 6490.07 for service members living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of "the Army, National Guard Bureau, District of Columbia Army National Guard, and OASD(HA)-HSPO about Mr. Harrison's request for a waiver to deploy." These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to ***all*** waivers granted under DoDI 6490.07 across all Military Departments, not just Mr. Harrison's request for a waiver. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6490.07 in locations other than ""the Army, National Guard Bureau, District of Columbia Army National Guard, and OASD(HA)-HSPO," then such documents should be produced.

- **RFP No. 12:** With respect to documents Defendants reviewed or relied upon in writing or amending AR 600-110, Defendants indicate they have limited the scope of documents to be produced to "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." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of AR 600-110 are in the custody of the Chief, Health Promotions Policy, or otherwise

[3] DoDI 6490.07 (February 5, 2010) indicates in Enclosure 4 that indicates that various components have responsibilities related to the implementation of DoDI 6490.07, including the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Secretaries of the Military Departments, the Commandant of the United States Coast Guard, the Directors of the Defense Agencies, the Chairman of the Joint Chiefs of Staff, and the Commander, United States Special Operations Command. At a minimum, therefore, documents should be collected from these components.

confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.[4] This response is also deficient with respect to documents review or relied upon to prepare prior versions of AR 600-110, as explained above.

- **RFP No. 13:** With respect to exceptions or waivers granted under AR 600-110 for service members living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of "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 or exceptions to policy." These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to ***all*** exceptions or waivers granted under AR 600-110, not just Mr. Harrison's request for a waiver. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6490.07 in locations other than "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," then such documents should be produced.

- **RFP No. 14:** With respect to waivers to deploy referenced in the Lute Declaration (ECF No. 43-1), Defendants indicate there are no responsive documents in the possession, custody, or control of the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1. However, to the extent there are relevant documents related to waivers in locations other than "the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1," then such documents should be produced. Moreover, such documents ***must exist***, given Ms. Lute's statement that she is "aware of multiple soldiers who have been granted COCOM waivers to deploy." Please confirm that Defendants will produce these materials.

- **RFP No. 15:** Defendants' response indicates that "Defendant [sic] stands on its objections" and that no documents will be produced in response to this request. To the extent Defendants are refusing to produce documents based on their objection to producing documents outside the possession, custody, or control of the Army, as explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to the Army and not provide discovery from the other Military Departments is entirely misguided.

[4] AR 600-110 (effective May 22, 2014) indicates that it was issued by "Headquarters" of the "Department of the Army" and that "[t]he proponent of this regulation is the Deputy Chief of Staff, G-1" and that various components are responsible for its implementation, including the Deputy Chief of Staff, G-1, the Surgeon General, the Chief of Public Affairs, the Chief, National Guard Bureau, Commanding General, U.S. Army Human Resources Command, and Commanding General, U.S. Army Reserve Command. At a minimum, therefore, documents should be collected from these components.

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Plaintiffs will follow up on the scope of this request following a ruling from the Court on Plaintiffs' Motion.

As discussed during our last meet and confer, Plaintiffs are willing to try to work with Defendants to narrow the scope of certain of the aforementioned requests. For example, as you suggested, it may be possible to narrow the scope using search terms. But Defendants appear to have improperly limited many of these requests to exclude discovery to which Plaintiffs are entitled.

Please advise when you are available to meet and confer about the above deficiencies. We are available both tomorrow or Friday. Depending on the Court's ruling on Plaintiffs' Motion, we are also available early next week to continue the discussion.

Regards,

Cyrus T. Frelinghuysen

Cyrus T. Frelinghuysen

WINSTON & STRAWN LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 28th day of November, 2018 to the following counsel of record via electronic mail.

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