

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

NICHOLAS HARRISON, *et al.*,

Plaintiffs,

v.

JAMES N. MATTIS, *et al.*,

Defendants.

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No. 1:18-cv-641-LMB-IDD

**MEMORANDUM OF LAW IN SUPPORT OF NON-PARTIES
UNITED STATES NAVY, UNITED STATES COAST GUARD, UNITED
STATES AIR FORCE, AND UNITED STATES MARINE CORP’S RULE 72
OBJECTIONS TO MAGISTRATE JUDGE’S NON-DISPOSITIVE RULING**

Pursuant to Local Rule 7(F) and Federal Rule of Civil Procedure 72(a), non-parties United States Navy, United States Coast Guard, United States Air Force, and United States Marine Corp (collectively, “Non-Party Military Services”), through undersigned counsel, respectfully submit this memorandum of law in support of their Objections to the presiding Magistrate Judge’s grant, in part, of Plaintiffs’ motion to compel responses to their first set of requests for production of documents. Dkt. 73. For the reasons below, the District Judge should set aside the Magistrate Judge’s order compelling production of certain materials from the Non-Party Military Services because the decision is clearly erroneous and contrary to law.

BACKGROUND

Plaintiff Nick Harrison brings as applied and facial challenges to the two Army and Department of Defense (“DoD”) policies, DoDI 6485.01 and AR 600-110 (the “Army and DoD HIV policies”), that the Army relied on in its decision not to commission him as an Officer, and Plaintiff OutServe (an organization) brings facial challenges to those same policies. The Court

previously denied Plaintiffs' motion for a preliminary injunction and also Defendants' motion to dismiss. Dkt. 60. The parties have begun discovery into the claims raised in the Complaint. Although the parties have worked together to resolve some discovery disputes, one overarching disagreement remains: whether Plaintiffs are entitled to discovery from military services that are *not* named as Defendants and whose HIV policies have *not* been directly challenged in Plaintiffs' claims.

To be sure, the Complaint can be construed only as challenging the two policies that allegedly injured Sgt. Harrison, DoDI 6485.01 and AR 600-110. Plaintiffs do not cite the policies of the Non-Party Military Services in the Complaint, do not name the Non-Party Military Services as defendants, and do not seek relief against the Non-Party Military Services.

Nevertheless, Plaintiffs have already sought significant discovery from these Non-Party Military Services, and Plaintiffs have shown no indication that they intend to limit or cease future rolling discovery demands to these Services.¹ These demands shed no light on the challenges made by Plaintiffs in their Complaint (*i.e.*, to the Army's and DoD's HIV policies), and the scope of the demands impose an enormous burden on the Non-Party Military Services.

Plaintiffs' first request for production of documents demanded, for example, that the Non-Party Military Services turn over copies of all documents relied on (even "indirectly") in writing the 2014 report to Congress (Request 3), the 2018 Report to Congress (Request 4), DoD Instruction ("DoDI") 1332.45 concerning retention of non-deployable service members (Request 5), DoDI 6485.01 (Request 7), and DoDI 6130.03 (Request 8). Plaintiffs construe these requests so

¹ Besides the requests for production at issue in this particular Objection, Plaintiffs subsequently served far reaching interrogatories, *see* Ex. A, requests for admission, *see* Ex. B, a second set of requests for production, *see* Ex. C, and a notice of a Rule 30(b)(6) deposition, *see* Ex. D—all of which seek expansive discovery from the Non-Party Military Services. Those requests are currently still within the meet-and-confer timeframe but raise the same issues of relevance addressed in this Objection.

broadly that they include all current and former HIV policies of all the military services, with no time limitation, as well as copies of every single document relied on (even “indirectly”) in formulating those policies. Without even waiting for Defendants’ responses, Plaintiffs moved to compel production of all those documents.

At the hearing, the Magistrate Judge expressed uncertainty at first as to the breadth of Plaintiffs’ requests. However, after Plaintiffs stated that they had asserted facial challenges to *all* of the Non-Party Military Services’ HIV policies, the Magistrate Judge ruled that Plaintiffs were entitled to copies of those other Services’ current and former HIV policies, as well as all documents directly relied on in formulating those policies.

Respectfully, the Magistrate Judge’s premise was mistaken. Plaintiffs have *raised no* facial challenges to the Non-Party Military Services’ HIV policies—as shown most by Plaintiffs’ own decision not to sue any of those other Services or their leaders or Secretaries, as well as by the fact that the Complaint never directly cites any of those other Services’ HIV policies. Because the Magistrate Judge erroneously believed Plaintiffs had made such challenges, and because Federal Rule of Civil Procedure 26(b) and Fourth Circuit precedent allow discovery only into claims *actually* made against named Defendants, this Court should overrule that portion of the Magistrate Judge’s order. *See* Parts I.A-B *infra*.

Even if this Court concludes that the current and former HIV *policies* of the Non-Party Military Services are relevant to claims actually made, the Court should still overrule the portion of the Magistrate Judge’s order requiring production of all documents directly *relied on* in formulating those policies. It is unclear what value, if any, there could be to Plaintiffs in receiving the documents for policies that are not challenged in this case, that were promulgated by Services that are not defendants in this case, and which may no longer be in force. This minimal potential

value is clearly disproportionate to the tremendous burden of making the Non-Party Military Services sift through more than a decade of records to reconstruct the creation of numerous policies. Given that these policies no doubt arose from a continuous iterative process, culling this information may be nearly impossible. Thus, even if there is some theoretical value to this evidence, requiring production of these underlying materials is not proportional to the needs of this case and the Magistrate Judge's decision should be overruled to the extent that it orders such production. *See* Part I.C *infra*.

For these reasons, the Court should overrule the Magistrate Judge's order in part, and rule that the Non-Party Military Services need not produce any materials to Plaintiffs.

BACKGROUND

I. The Relevant HIV Policies.

Because of the Court's familiarity with this case, Defendants provide only an overview of the relevant HIV policies challenged by the Complaint here. 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, 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 Plaintiff 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.² *Id.* § 1-16(f).

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. Dkt. 1, ¶¶ 40, 47. In 2013, Sgt. Harrison applied for a position in the Judge Advocate General’s office for the National Guard in Washington, D.C., but his application was ultimately rejected under DoDI 6485.01 § 3(a) (the “Commissioning Policy”), which precludes HIV-positive service members from commissioning as officers. *Id.*, ¶¶ 51-63. 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.

II. This Court’s Rulings On Plaintiffs’ Motion For A Preliminary Injunction And Defendants’ Motion To Dismiss.

Plaintiffs filed a Complaint, Dkt. 1, and then a motion for a preliminary injunction, Dkt. 25. Defendants responded by opposing the motion for a preliminary injunction and by moving to dismiss the case. Dkt. 43.

At the hearing in September 2018, this Court denied both motions. The Court concluded, “I don’t find at this point yet that there’s sufficient evidence in this record to satisfy me that the plaintiff necessarily is going to win this case. I’m not convinced that you can make the first prong of the *Winter* evaluation” Tr. Of Mots. Hr’g (Sept. 14, 2018) at 17:17-21, Ex. E. Even so, the Court concluded that it did have jurisdiction over the case, subject to the government re-raising its claims after discovery. *Id.* at 16-17. The Court noted, “I recognize we have two plaintiffs here.

² In this regulation, “the United States” includes Alaska, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

We have an individual, and then we have a group, or a representative – an organization that represents groups. I’m more interest[ed] in focusing on Mr. Harrison, all right?” *Id.* at 10:1-5. The Court similarly stated, “[T]here has to be good reasons why someone like Mr. Harrison is in the predicament that he’s in, and I think therefore this is a good case to develop that record. Let’s get the evidence out there.” *Id.* at 17:9-12. Finally, although the Court suggested that Plaintiff OutServe had standing, the Court did not rule on the scope of OutServe’s standing—that is, whether OutServe’s standing was derivative of, and limited to, Sgt. Harrison’s standing. *Id.* at 18. Nevertheless, the only policies challenged in this complaint—whether from Harrison or OutServe’s perspective—are the DOD Instruction and the Army regulation

III. Plaintiffs’ Motion to Compel.

Plaintiffs served their first request for production of documents on October 24, 2018, seeking materials not just from the Army and DoD but also from *every* Military Service, as well as the Coast Guard. Ex. F at 2 (Plaintiffs’ first request for producing, seeking materials from the “United States Army, the United States Navy, the United States Marine Corps, the United States Air Force, [and] the United States Coast Guard”).³ Plaintiffs’ requests and definitions contain no reasonable time limitations and also purport to encompass all “prior versions and amendments” of many policies. *Id.* (Definitions 10-13). Many requests similarly seek all documents “reviewed or relied upon, either directly or indirectly” in policymaking processes. *Id.* at 11-12. Plaintiffs also sought “All Documents” about “medical waivers” granted to any “service members living with HIV,” regardless of which Military Service they belong to. *Id.* at 12.

³ 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.”).

Despite the overbreadth of the requests, Defendants construed the requests in a way that reflected this Court's guidance—to provide discovery proportionate to Plaintiffs' claims—while remaining mindful that the 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. Defendants timely served objections under Local Rule 26(C), *see* Ex. G, and repeatedly tried to narrow the scope of disagreement by construing each of Plaintiffs' requests to include reasonable limitations on the dates of documents in searches and the location of documents.

Despite Defendants' attempts to construe the requests reasonably, Plaintiffs moved to compel on November 20, 2018—*before* Defendants' responses were even due. Dkt. 73. Defendants filed an opposition arguing that Plaintiffs' sweeping discovery is unnecessary, not particularized or relevant to their claims, and out-of-proportion to the needs of this case. Dkt. 78. For example, Defendants contended that the Court should allow discovery into only the two policies that prevented Sgt. Harrison from becoming an officer, DoDI 6485.01 and AR 600-110; anything beyond that (*i.e.*, from the Non-Party Military Services) is irrelevant, unnecessary, and not proportionate to the needs of the case. *Id.* at 11-19. Defendants also objected to Plaintiffs' broad requests for “all documents reviewed or relied on, either directly or indirectly,” in writing the current and former HIV policies of the Non-Party Military Services. *Id.* at 18-19. 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, and would also sweep in sources of documents that would receive deliberative process protection. *Id.* at 17 (citing *City of Va. Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993)).⁴

⁴ As detailed in footnote 1, Plaintiffs have subsequently requested substantial additional discovery from the Non-Party Military Services.

IV. The Magistrate Judge's Ruling.

The Magistrate Judge heard Plaintiffs' motion to compel on November 30, 2018. He later issued a short Order stating that the motion had been denied in part and granted in part for the reasons stated in open Court. Dkt. 81. The substance of the Magistrate Judge's ruling is therefore reflected by the transcript of the hearing. *See* Tr. Of Mots. Hr'g (Nov. 30, 2018), Ex. H ("Tr."). At the hearing, Plaintiffs first acknowledged that "defendants have agreed to produce the documents relating to the current [DoD] policy," Tr. 9:11-12, and Defendants were also "willing to give [Plaintiffs] specifically how the Army deals with it under Army Regulation 600-110," Tr. 11:16-17.

When Plaintiffs argued that they needed similar materials from the Non-Party Military Services for their own separate HIV policies, the Magistrate Judge was skeptical at first. Plaintiffs demanded documents that had been relied on even "indirectly" in formulating the Non-Party Military Services' current and former HIV policies, but the Magistrate Judge quickly rejected that request. Tr. 18:3, 18:14-15 ("Don't say indirectly relied upon because I don't know what that means."). And while the Magistrate Judge initially stated that "information concerning deployment [from any Service] seems to this Court completely relevant," Tr. 33:15-16, he quickly clarified that he meant only that "the portion of any *policy* concerning deployment is ... relevant" and should be produced. Tr. 39:23-24 (emphasis added).

Similarly, Plaintiffs asked for documents showing every waiver and exception that every Military Service had granted to any individual with HIV, but the Magistrate Judge cabined that request only to the waivers granted by the Army because the waivers were relevant only to Sgt. Harrison's as applied challenge to the Army policies. *See* Tr. 12-13.⁵ Indeed, the Magistrate Judge

⁵ After Plaintiffs asked for waivers by the Navy, the Court stated: "[W]hatever way the Navy may be applying [its regulations], if it's different than the Army is applying them, that has no impact on

made abundantly clear that discovery from the Non-Party Military Services was inappropriate for the *as applied* challenge: “Once again, none of that discovery [from other Services] goes to facial constitutionality. So it can only go to the argument as applied to. As applied to can only be with the Army because the Air Force, the Marines, and the Navy didn’t apply this policy to Sgt. Harrison.” Tr. 40:22-41:1.

The Magistrate Judge then stated that discovery for the *facial* challenge would still be limited, given that facial challenges are a legal question rather than a fact-intensive one: “[W]e’re dealing with constitutionality based on the facts of this case. Even the second plaintiff [OutServe] has to deal with that. Facially constitutionally is essentially a legal argument.” Tr. 22:7-10. When the Magistrate Judge noted that “the only possible challenge you can have against the Navy, Marines, and Air Force’s policy is facially,” Tr. 42:13-15, Plaintiffs’ counsel stated that Plaintiff OutServe was facially challenging “*all* military policies that affect individuals” with HIV—not just those of the Army and DoD—and thus Plaintiffs were entitled to discovery into the Non-Party Military Services’ HIV policies, just as with the Army’s and DoD’s policies. Tr. 41 (emphasis added).

The Magistrate Judge expressed some uncertainty about whether that premise was true: “My question is, is the second plaintiff [OutServe] challenging the constitutionality of the Navy,

whether or not the regulation or instruction is unconstitutional or not, does it? At least not facially. Now, as applied to Sgt. Harrison, that may be a difference, but as applied to Sgt. Harrison, then you have to move into a similarly situated situation because it may be applied to Sgt. Harrison in the Army because he’s in the Army and the Army has certain things they have to do, certain obligations they have, and they have to do certain things a certain way. The Navy, on the other hand, may have to do certain things a certain way. It was like your argument about where he can be deployed. Well, different branches of the government deploy people differently because we have different bases in different places based on what those needs of those allies are.” Tr. 12:20-13:11; *see also* Tr. 40:22-41:1 (“Once again, none of that discovery goes to facial constitutionality. So it can only go to the argument as applied to. As applied to can only be with the Army because the Air Force, the Marines, and the Navy didn’t apply this policy to Sgt. Harrison.”).

Marines, and Air Force’s regulation concerning HIV? ... Because if they’re – if they are, then the second plaintiff has the right to discover information concerning on whether or not there was a justification for the adoption of those regulations as they exist today.” Tr. 44:19-45:1. The Magistrate Judge concluded, however, that Plaintiff OutServe was “challenging the constitutionality of the regulations that deal with HIV people for *every branch*” of the Military. Tr. 43:17-18 (emphasis added). When government counsel pointed out that Plaintiff had not even named the other Military Services as Defendants, the Magistrate Judge stated that this did not matter because OutServe had challenged every Military Service’s HIV policies: “the defendants are the regulations” of every Military Service. Tr. 45:23.

For these reasons, the Magistrate Judge ordered production of “information and documents relied upon by the Air Force, by the Navy, by the Marines in adopting that particular regulation.” Tr. 43:5-7. Defendants construe this order as compelling production of all current and former HIV policies of all of the Non-Party Military Services, as well as all documents directly relied on in forming those policies. *See* Tr. 18 (rejecting Plaintiffs’ request for materials “indirectly” relied on). The Magistrate Judge did not state how far back in time the Non-Party Military Services would have to produce their policies and documents directly relied on in forming them, but he did suggest that they go back to the date of the last “significant changes in how the medical profession has dealt with HIV....” Tr. 47:6-7. The Court ordered production to occur by December 28, 2018. Tr. 54:21-22.

This timely filed Objection challenges the portion of the Magistrate Judge’s order compelling production of documents from the Non-Party Military Services.

APPLICABLE LEGAL STANDARDS

A party challenging the decision of a magistrate judge on a non-dispositive matter must establish that the decision is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). “An order is contrary to law ‘when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.’” *Attard Indus., Inc. v. U.S. Fire Ins. Co.*, No. 1:10-cv-121 (AJT/TRJ), 2010 WL 3069799, at *1 (E.D. Va. Aug. 5, 2010) (Trenga, J.) (quoting *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y. 2006)).

ARGUMENT

Defendants’ objections are limited to part of the Magistrate Judge’s ruling: the requirement to produce discovery from the Non-Party Military Services. *See* Part I *infra*. If Plaintiffs’ discovery demands were more limited, the Magistrate Judge’s ruling would not warrant an objection. Plaintiffs, however, have not attempted appropriately to focus their discovery, and have instead served expansive demands for discovery from all corners of the military. And even though the Magistrate Judge admonished Plaintiffs for serving overbroad discovery, Plaintiffs have continued to proceed as if the Magistrate Judge approved of their overly broad and disproportionate discovery demands. Given this impasse, Defendants respectfully object to the Magistrate Judge’s ruling that Plaintiffs are entitled to discovery from the Non-Party Military Services.

The Magistrate Judge erred when he concluded that Plaintiffs had asserted facial challenges against the policies of all the Non-Party Military Services. And because those policies were not challenged by Plaintiffs in the Complaint, they are not relevant under Rule 26. Even if the Court

concludes those policies are relevant to Sgt. Harrison’s challenge to the Army policy on commissioning, such discovery is not otherwise appropriate as a matter of law or proportionate to the needs of the case.

The parties also disagree as to the Magistrate Judge’s decision regarding Plaintiffs’ requests to compel the Non-Party Military Services to produce materials concerning implementation of DoD’s HIV-related directives, such as waivers and exceptions to policy, as well as Plaintiffs’ request for materials that were indirectly relied on in formulating the Army and DoD’s HIV policies and the policies of the Non-Party Military Services. Defendants understand the Magistrate Judge to have correctly denied those requests. *See* Part II *infra*. If the Court construes the Magistrate Judge’s decision as ordering the production of those materials, Defendants also object to that portion of the Magistrate Judge’s decision.

I. The Magistrate Judge’s Ruling Compelling Production Of Materials From The Non-Party Military Services Was Clearly Erroneous And Contrary To Law

A. The Magistrate Judge Mistakenly Believed That The Complaint Raised Claims Against The Non-Party Military Services’ HIV Regulations.

The Magistrate Judge ordered Defendants to produce the current and prior HIV policies of the Navy, Coast Guard, Air Force, and Marines—as well as *all* documents directly relied on when creating each of those policies—going back to an unspecified date in time. Tr. 44-46.⁶ Because the Magistrate Judge’s decision depended on the mistaken belief that Plaintiffs have lodged a facial

⁶ The Magistrate Judge stated that the appropriate timeframe would be back to the date when the last “significant changes in how the medical profession has dealt with HIV” occurred. Tr. 47:6-7. Although Defendants object to providing discovery in this area, they did reach out to Plaintiffs and tentatively agreed that the appropriate date of the last significant medical change in HIV treatment was 2006. This agreement, of course, is subject to Defendants’ objections raised in this objection that the Non-Party Military Services should not be required to produce any documents.

challenge to those Non-Party Military Services' HIV policies in this case, this Court should overrule that portion of the Magistrate Judge's order.

Rule 26 makes clear that discovery is permitted only into matters that are "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). As the Fourth Circuit has held, "[r]elevance is thus the foundation for any request for production," *Cook v. Howard*, 484 F. App'x 805, 812 (4th Cir. 2012), and the required relevance is specifically to those *claims actually made against named defendants*. For example, in *Cook*, the plaintiffs directed discovery requests to the Baltimore Police Department, which had been dismissed in its entirety from the case. The district court quashed the discovery, and the Fourth Circuit praised the district court's decision, as Rule 26 does not permit discovery into "matters related to the dismissed claims." *Id.* at 812-13.

Here, during the hearing on Plaintiffs' motion to compel, the Magistrate Judge appeared unsure at first whether Plaintiffs' Complaint had made "claims" against the Non-Party Military Services' HIV policies, Tr. 44-45, but Plaintiffs' counsel stated that they had indeed made such claims, Tr. 41. This led the Magistrate Judge to conclude that discovery into *all* of the Non-Party Military Services' HIV policies was needed. Tr. 44-46. The Magistrate Judge's conclusion, however, was clearly mistaken because the Complaint repeatedly demonstrates that Plaintiffs have *not* raised claims against the HIV policies of the Navy, Air Force, Coast Guard, or Marines. Rather, Plaintiffs' Complaint raised a claim against *only* the Army's and DOD's HIV regulations.

The most obvious indication that Plaintiffs have not challenged the Non-Party Military Services' regulations is that Plaintiffs have not sued any of those other Military Services or their Secretaries. Plaintiffs have sued only the Secretary of the Army, the Department of Defense, and the Secretary of Defense. If Plaintiffs intended to challenge the Navy's regulations, for example, the proper way to do so would have been to name the Navy and/or its Secretary as a defendant—

just as Plaintiffs did for their challenge to the Army regulation. Plaintiffs are sophisticated litigants represented by competent counsel, and there is no reason to believe they were uninformed or unaware of how to properly join defendants or bring direct challenges in the Complaint. It is clear therefore that Plaintiffs chose not to name the other Services, their Secretaries, or other leaders.

To be sure, the Complaint mentions the Non-Party Military Services only in passing. The Navy is mentioned just twice, the Air Force is mentioned once, and the Coast Guard and Marines are not mentioned at all. And the Complaint does not even cite the Navy, Air Force, Coast Guard, or Marine policies.⁷ By comparison, Plaintiffs cite and discuss the Army's and DoD's HIV policies extensively. *See* Dkt. 1 at 9-12. Even more significantly, in the Cause of Action portion of the Complaint, *id.* at 17-19, Plaintiffs repeatedly challenge the actions and regulations of the "Defendants" (*i.e.*, the Army and DoD). For example: "Defendants' accessions policies and practices discriminate impermissibly," *id.*, ¶ 72; "Defendants routinely permit similarly situated individuals..." *id.*, ¶ 73; "Defendants have refused to grant Plaintiff Nick Harrison a commission," *id.*, ¶ 74; "Defendants' disparate treatment of Plaintiff Nick Harrison and other individuals..." *id.*, ¶ 77. Lastly, Plaintiffs seek relief against only the Defendants, not the Non-Party Military Services. *Id.* at 20. Accordingly, the Complaint can be construed only as challenging the two policies that allegedly injured Sgt. Harrison, DoDI 6485.01 and AR 600-110.

Put simply, Plaintiffs made a strategic decision not to assert claims against the Non-Party Military Services when they filed the Complaint. They chose to join a single individual plaintiff,

⁷ Although the Complaint broadly refers to "current military policies that discriminate against people living with the human immunodeficiency virus (HIV)," Dkt. 1 at 1, such vague and unspecified language—cited only in the background section of the Complaint—hardly can convey that Plaintiffs are challenging all such policies, especially when weighed against the substantial evidence in the Complaint that no such claims were actually brought and that the Non-Party Military Service's policies were not specifically cited in the Complaint.

Sgt. Harrison. Plaintiffs chose to rely only on Sgt. Harrison's injuries as a basis for their claims. *See* Dkt. 1, ¶ 74. And they chose to rely solely on Sgt. Harrison's injuries to establish standing. *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). Plaintiffs' claims are limited by those strategic decisions. Plaintiffs cannot obtain general discovery of the entire military establishment on the mere theory that perhaps another person in another military service is being harmed by some other HIV policy than the two that Sgt. Harrison challenges. Indeed, this is the very essence of the type of "fishing expedition" that the Fourth Circuit and other courts have held Rule 26 to preclude, even before more recent rule amendments intended to limit the scope of discovery. *See R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154, 159 (4th Cir. 1991) ("Discovery should not become a fishing expedition."); *see also Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1163 (10th Cir. 2010) ("Rule 26(b), although broad, has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition."). And Defendants and the Non-Party Military Services should not bear the burden of providing expensive discovery for claims that Plaintiffs voluntarily elected to forgo for strategic reasons.

Because Plaintiffs do not make a claim against the Non-Party Military Services or their HIV-related regulations, the Magistrate Judge's decision ordering a significant amount of discovery—on the mistaken premise that Plaintiffs had raised such claims—was clearly erroneous and contrary to Rule 26 and Fourth Circuit caselaw. *See Cook*, 484 F. App'x at 812-13. For these reasons, this Court should overrule that decision.

B. The Non-Party Military Services' HIV-Related Regulations, And All Documents Relied On In Producing Them, Are Not Relevant To The Claims Actually Alleged In The Complaint.

Plaintiffs may contend that even though their Complaint does not raise claims against the Non-Party Military Services' current HIV policies, discovery into those regulations (including *all* the documents used to create them) is still relevant because they could theoretically shed light on the Army's and DoD's own HIV policies, which Plaintiffs have actually challenged in their Complaint. The Magistrate Judge rejected this argument, and this Court should too.

First, as the Magistrate Judge ruled (and Plaintiffs have not challenged to this Court), the policies of the Non-Party Military Services have no relevance to Plaintiff Sgt. Harrison's *as applied* challenge to the Army and DoD HIV policies. Tr. 12:1-13:25, 40:5-41:4, 42:10-21. The policy decisions of the Non-Party Military Services are subject to and constrained by DoD's policy directives.⁸ Because each 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. Each Service's judgment about its operational requirements and its ability to deploy service members with HIV is distinct from every other Service's decision about its operational requirements and ability to deploy service members with HIV. *See* Tr. 12-13. The judgments of each Military Service and the justifications for them do not shed light on DoD's policies from which they are derived. Indeed, DoD's 2018 report to Congress states that DoD—not the Military

⁸ *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).

Services—established these policies. *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. I at 1.

Second, the binding standard of review likewise militates in favor of limited discovery. The Fourth Circuit has held that rational basis is the proper level of review here. *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). Plaintiffs may disagree with that decision, but it is binding all the same. *See* Ex. E at 16:5-6 (September 14 transcript where Court noted that “it’s still a rational basis [review]”). And unlike a policy or statute subjected to heightened scrutiny, where proper tailoring must be shown, rational basis requires no such tailoring. In fact, it does not even require the record to reflect a rational basis, as long as the Court or government can envision a rational basis after the fact. As the Supreme Court has made clear, on rational-basis review, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (alterations and citations omitted). This means that the underlying factual record in a rational basis review is far less important—and far less searching—than in cases with heightened scrutiny. The binding legal standard here points strongly in favor of limited discovery.

Third, discovery into the Non-Party Military Branches’ policies would have no relevance to Plaintiff OutServe’s *facial* challenge to the Army’s and DoD’s HIV policies. As the name implies,

facial challenges presume that the policies are unconstitutional on their face, regardless of the specific facts, and thus ““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). This explains why high-profile facial constitutional challenges are routinely conducted without discovery. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Affordable Care Act); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765-67 (2014) (contraception mandate of the Affordable Care Act); *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008) (Bipartisan Campaign Reform Act); *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (Voting Rights Act). In other words, Plaintiffs cannot have it both ways, simultaneously claiming to raise facial challenges while seeking extensive factual discovery on those challenges.

In sum, the current and past HIV policies of the Non-Party Military Services, and the documents that went into creating those policies, do not shed light onto the claims that Plaintiffs have *actually brought* against the Army and DoD. For these reasons, “the requests have every indicia of the quintessential fishing expedition,” *Cook*, 484 F. App’x at 813, and so discovery into those areas is not relevant.

C. Even If The Other Services’ Current And Former HIV Policies Were Relevant, Ordering Production Of All Materials Relied On To Create Those Policies Is Not Proportionate Under Rule 26(b).

Even if the current and former HIV policies of the Non-Party Military Services were somehow relevant, the Magistrate Judge clearly erred in his Rule 26(b) proportionality assessment by ordering production of *all* the documents directly relied on to formulate each of those policies. Tr. 43:4-46:11. Under Rule 26(b), even where discovery seeks material relevant to a claim or defense, the discovery must be “proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). In analyzing proportionality, the Court must consider, among other things, “the importance of the

discovery in resolving the issues” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* Defendants contend that none of the Non-Party Military Services’ HIV policies are relevant to claims actually made in the Complaint, *see* Part I.B, *supra*, but even if the Court disagrees on that point, the materials relied on to create those policies would yield only minimal relevant information, yet it would come at a tremendous burden to the Non-Party Military Services, and so the Magistrate Judge’s ruling on this matter should be overruled.

1. Importance Of The Discovery Is Minimal.

The materials underlying all of the current and former HIV policies of the Non-Party Military Services are removed from any claim asserted in this case (as well as a reasonable reading of the requests for production propounded by Plaintiffs), and thus any potential importance to the case is minimal. The Magistrate Judge ordered production of materials that went into formulating regulations that Plaintiffs do not challenge, that may no longer even be in effect, and from Services that are not defendants in this case. Neither Plaintiffs nor the Magistrate Judge explained, for example, why every document the Air Force relied on to create a policy a decade ago that is no longer even in effect (let alone being challenged here) could conceivably be relevant to Plaintiffs’ claims against the Army’s and DoD’s current HIV policies, especially given that these claims are based on the argument that the current state of medicine is not properly reflected in the Army’s and DoD’s current policies.

And even if the Complaint could somehow be construed as raising facial challenges to the Non-Party Military Services’ HIV policies, the documents underlying those policies would still be irrelevant for the reasons discussed above—that facial challenges are premised on the notion that the policies are unconstitutional on their face and “‘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*, 552 U.S. at 449 (citation omitted). Thus, discovery is unnecessary in facial challenges

because Plaintiffs' theory is necessarily that the policies are unconstitutional *regardless of the underlying facts*. Further, as discussed above, the rational basis standard of review here militates strongly in favor of limited discovery, as tailoring need not be shown, and a rational basis can even be determined after the fact.

The importance of the required discovery to the claims asserted in this case is negligible.⁹

2. The Burden On The Non-Party Military Services To Produce The Ordered Discovery Is Not Proportionate To The Needs Of The Case.

The search, collection, and review of documents created and relied on over a period of at least a decade would impose significant burdens on the Non-Party Military Services. This process is especially difficult because these policies no doubt arose from a continuous iterative process, with many drafts circulated among offices and individuals over a lengthy time period. Collection of all of these numerous (and almost certainly duplicative) records alone is a significant burden.¹⁰ But reviewing more than a decade of records just to determine who worked on the policies and what documents they directly relied on—assuming those individuals and records can even be identified—is unreasonable and not proportionate to the needs of the case. Such searches would

⁹ The same argument applies for copies of the policies themselves, although production of those policies is apparently moot because Plaintiffs' counsel stated at the hearing that they already had copies of all the policies. *See* Tr. 41:24-25 (“We have copies of their regulations, yes.”).

¹⁰ Defendants have identified the offices charged with developing or overseeing the policies, and have construed Plaintiffs' requests to be limited to documents in possession of those offices. Plaintiffs contend, on the other hand, that Defendants' searches should include many senior government officials, such as the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Health Affairs, the Under Secretary of Defense for Policy, and the Secretaries of the Military Departments, and the offices of those senior military leaders. *See* Ex. J at 5 fn.1, 2 (Nov. 28, 2018 Letter). Besides the extreme burden those searches would impose on the military, the searches of such a large number of DoD components would require review of an enormous volume of documents—a review that cannot be completed before discovery in this case closes.

embrace superseded version of policies that have no bearing on the issues raised by Plaintiffs' claims.

And when a party seeks discovery from non-parties, as the Magistrate Judge ordered here, courts balance "the burden on the party from which discovery is sought" against the "need for the information sought." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 323 F.R.D. 553, 560 (E.D. Va. 2018). The Magistrate Judge's decision to order production of all the materials that went into the current and former HIV-related policies from the Non-Party Military Services will amount to a substantial burden on many non-parties, with minimal "need for the information sought." *Id.*

The Magistrate Judge, however, did not appear to conduct any proportionality inquiry into the materials directly relied on for those policies. Rather, he had already (mistakenly, as discussed above) concluded that Plaintiffs had lodged facial challenges against those policies, and he simply concluded that Plaintiffs were therefore entitled to all documents directly relied on in forming them. Tr. 43:4-46:11. Because Rule 26(b) "cautions that all permissible discovery must be measured against the yardstick of proportionality," *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010), the failure to conduct a proportionality inquiry was legal error. *See* Fed. R. Civ. P. 26(b).

For these reasons, even if this Court finds that the current and former HIV policies of the Non-Party Military Services are relevant to claims actually raised in the Complaint, the Court should still overrule the Magistrate Judge's decision to require production of all materials directly relied on for all those policies.

II. The Magistrate Judge Correctly Denied Plaintiffs' Requests To Compel The Non-Party Military Services To Produce Other Materials.

Defendants understand the Magistrate Judge's decision as denying Plaintiffs' requests for materials from the Non-Party Military Services *beyond* copies of the current and former HIV

policies and the documents directly relied on in formulating those policies. For example, Plaintiffs sought documents showing individuals who received waivers and exceptions to the Non-Party Military Services' HIV-related policies in the past. But the Magistrate Judge noted that waivers and exceptions were relevant only to Sgt. Harrison's as applied challenge, and so only the Army's waivers and exceptions were discoverable. *See* Tr. 12:1-23:14. The other Services' waivers would shed no light into Sgt. Harrison's inability to receive a waiver from the Army. *See id.*¹¹

Defendants do not object to that ruling, nor have Plaintiffs done so. The Magistrate Judge also rejected Plaintiffs' request for copies of materials *indirectly* relied on by the Non-Party Military Services when forming their current and former HIV policies. Tr. 18:14-15 ("Don't say indirectly relied upon because I don't know what that means."). Again, Defendants do not object to that ruling, nor have Plaintiffs done so. And while the Magistrate Judge said at one point that "information concerning deployment seems to this Court completely relevant," Tr. 33:15-16, he quickly clarified that he meant the "Court has already [con]cluded that the *portion of any policy* concerning deployment is also relevant," Tr. 39:23-24 (emphasis added).

Even so, if this Court construes the Magistrate Judge's ruling as ordering the Non-Party Military Services to produce any other materials, Defendants object for the same reasons discussed

¹¹ After Plaintiffs asked for waivers by the Navy, the Court stated: "[W]hatever way the Navy may be applying [its regulations], if it's different than the Army is applying them, that has no impact on whether or not the regulation or instruction is unconstitutional or not, does it? At least not facially. Now, as applied to Sgt. Harrison, that may be a difference, but as applied to Sgt. Harrison, then you have to move into a similarly situated situation because it may be applied to Sgt. Harrison in the Army because he's in the Army and the Army has certain things they have to do, certain obligations they have, and they have to do certain things a certain way. The Navy, on the other hand, may have to do certain things a certain way. It was like your argument about where he can be deployed. Well, different branches of the government deploy people differently because we have different bases in different places based on what those needs of those allies are." Tr. 12:20-13:11; *see also* Tr. 40:22-41:1 ("Once again, none of that discovery goes to facial constitutionality. So it can only go to the argument as applied to. As applied to can only be with the Army because the Air Force, the Marines, and the Navy didn't apply this policy to Sgt. Harrison.")

above—namely, that the materials are not relevant to any “claims” in the case, and, in any event, the materials would not be “proportional” to the claims that *are* in the case. Fed. R. Civ. P. 26(b).¹²

CONCLUSION

For the reasons stated above and in Defendants’ opposition to the motion to compel, Dkt. 78, this Court should overrule the portion of the Magistrate Judge’s November 30, 2018, Order compelling the Non-Party Military Services to produce materials to Plaintiffs.

DATE: December 14, 2018

Respectfully submitted,

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¹² Defendants have steadfastly maintained that the claims in this case should be subject to review under an administrative record of Army and DoD materials. Dkt. 67 at 4-6; Dkt. 78 at 9-12. By ordering production into the Non-Party Military Services, the Magistrate Judge implicitly denied that argument in this particular discovery dispute. Defendants do not object to that specific ruling of the Magistrate Judge in connection with the dispute concerning Plaintiffs’ First Set of Requests for Production, but Defendants reserve the right to continue to raise that argument for preservation purposes and, if necessary, to bring the matter before this Court in a future discovery dispute.

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:

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**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 INTERROGATORIES TO DEFENDANTS (NOS. 1-23)

Pursuant to Federal Rule of Civil Procedure 33 and Local Civil Rule 26, Plaintiffs Nicholas Harrison and OutServe-SLDN, Inc., by and through their undersigned counsel, propound their First Set of Interrogatories to which Defendants James N. Mattis, Mark Esper, and the United States Department of Defense (collectively "Defendants") shall respond separately and fully, in writing and under oath, no later than thirty (30) days after service of these interrogatories, and thereafter seasonably supplement such responses pursuant to Fed. R. Civ. P. 26(e) through the date of any trial in this action.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these interrogatories is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. In these interrogatories, 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 “AR 40-501” means Army Regulation 40-501, Standards of Medical Fitness (June 14, 2017), including any prior versions or amendments thereof.

15. 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.”

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

17. “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.

18. “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.

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

20. “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.

21. 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.

22. 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 interrogatory.

INSTRUCTIONS

1. These interrogatories are intended to elicit as much information as possible concerning the issues, and to the extent any interrogatory could be interpreted in more than one way, you should employ the interpretation of the interrogatory most likely to encompass and elicit the greatest amount of information possible.

2. These instructions and the definitions above should be construed to require answers based upon the knowledge of, and information available to, you as well as your agents, representatives, and attorneys.

3. These interrogatories are continuing in nature, so as to require that supplemental answers be served promptly if further or different information is obtained with respect to any interrogatory.

4. No part of an interrogatory should be left unanswered merely because an objection is interposed to another part of the interrogatory. If a partial or incomplete answer is provided, you shall state that the answer is partial or incomplete.

5. If, in responding to these interrogatories, you contend that an ambiguity exists with respect to construing an interrogatory or definition, your response shall set forth the matter deemed ambiguous and the construction used in responding.

6. Whenever in these interrogatories you are asked to identify information or a document which is deemed by you to be properly withheld from production:

- a) If you are withholding information or documents 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:

1. The date of the privileged information;
2. The author(s) of the privileged information;
3. The recipient(s) of the privileged information;
4. The subject matter of the privileged information; and
5. The basis of the claim of privilege.

b) If production of any requested information or 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 information or document(s) 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 information or document, and the information requested in sections 6(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.

7. If you elect to specify and produce business records in answer to any interrogatory, the specification shall be in sufficient detail to permit the Plaintiffs to locate and identify, as readily as you can, the business records from which the answer may be ascertained.

INTERROGATORIES

INTERROGATORY NO. 1

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for a medical waiver under AR 40-501 and/or DoDI 6130.03, and identify all Documents or Communications generated as part of that process.

INTERROGATORY NO. 2

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for an exception to the policy under AR 600-110 and/or DoDI 6485.01, and identify all Documents or Communications generated as part of that process.

INTERROGATORY NO. 3

Identify the three individuals who made the most substantive contributions to the preparation of the DoD 2018 Report to Congress, as well as any Documents considered by such persons.

INTERROGATORY NO. 4

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6130.03, Section 5.23 (Systemic Conditions) (a) and DoDI 6130.03, Section 5.23 (Systemic Conditions) (b), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 5

Identify the three individuals who made the most substantive contributions to the creation,

promulgation, reconsideration and revision of DoDI 6485.01, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 6

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6490.07, Enclosure 3 (“Medical Conditions Usually Precluding Contingency Deployment”), section (e) (“Infectious Diseases”), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 7

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Instruction (*i.e.*, DoDI 1332.45), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 8

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Policy, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 9

Identify the three individuals who made the most substantive contributions to the creation, promulgation, and reconsideration of AR 600-110, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 10

Identify the three individuals who made the most substantive contributions in the promulgation and reconsideration of AR 40-501, Section 2-30 (“Systemic diseases”) (a) and AR

40-501, Section 3-7 (“Blood and blood-forming tissues diseases”) (h), Section 4-5 (“Blood and blood-forming tissue diseases”) (b), Section 4-33 (“Medical standards for ATC personnel”) (8), Section 5–14 (“Medical fitness standards for deployment and certain geographical areas”) (12) and (17), the role the persons identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 11

Identify the current members of the Accession Medical Standards Working Group and all Documents reviewed or relied upon, either directly or indirectly, by the Accession Medical Standards Working Group concerning DoD’s medical accession standards for individuals living with HIV.

INTERROGATORY NO. 12

For each year since 2000, identify for each of the Military Services: (a) the total number of applicants for each of the Military Services on a yearly basis since 2000; (b) the number of applicants who did not meet the standards under DoDI 6130.03, segregated by the specific disqualifying conditions; and (c) the number of applicants who were granted medical waivers, segregated by the specific conditions for which waivers were granted.

INTERROGATORY NO. 13

For each year since 2000, identify for each branch of the Military Services: (a) the number of service members living with HIV; (b) the number of those individuals who were granted or denied a waiver for a regular deployment; the number of those individuals who were granted or denied a waiver for a contingency deployment; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for duty based primarily on their HIV-diagnosis.

INTERROGATORY NO. 14

Identify for each of the Military Services: (a) the number of service members living with deployment-limiting medical conditions, including but not limited to HIV, diabetes, hepatitis C, hypertension, and asthma, on a yearly basis since 2000, segregated by condition; (b) the number of those individuals who were granted or denied a waiver to deploy; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for further duty.

INTERROGATORY NO. 15

Identify for each of the Military Services: (a) the number of service members who received blood transfusions while deployed since 2000, broken down on a yearly basis; (b) the number of such transfusions that involved “fresh whole blood” collected from other service members (e.g., from a “walking blood bank” program); and (c) the number of such transfusions that involved blood that did not undergo rapid infectious disease testing.

INTERROGATORY NO. 16

Identify any individuals or groups of individuals who have been allowed to deploy even though they cannot donate blood (e.g., individuals who recently completed treatment for malaria; individuals who recently received tattoos in states that do not regulate tattoo facilities; sexually active gay or bisexual men).

INTERROGATORY NO. 17

Explain in detail each of the reasons underlying DoD’s policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from enlisting in the Military Services, being inducted into the Military Services, or being appointed as an officer in the Military Services as set forth in, *inter alia*, DoDI 6485.01 and DoDI 6130.03.

INTERROGATORY NO. 18

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from deploying to regular operations or contingency operations areas, as set forth in, *inter alia*, DoDI 6480.07.

INTERROGATORY NO. 19

State all facts and identify any Documents that support your contention that "Defendants' policies are rationally related to their legitimate government interest in ensuring that every Service member is fit and capable of performing his or her job." Defs.' Answer at ¶3, ECF No. 62.

INTERROGATORY NO. 20

Identify all medical conditions other than HIV that require taking medication on a regular basis but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 21

Identify all medical conditions other than HIV that require medical monitoring through a visit with a healthcare provider one or more times a year but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 22

Identify all medical conditions other than HIV that require medical monitoring through blood testing one or more times a year but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 23

Identify any changes to any military regulations that were considered, implemented, or rejected based on the medical consensus that a person with well-controlled HIV has essentially no risk of transmitting HIV sexually.

Dated: November 16, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 16th day of November, 2018 to the following counsel of record via electronic mail.

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/s/ Andrew R. Sommer

**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 ADMISSION TO DEFENDANTS (NOS. 1-24)**

Pursuant to Federal Rule of Civil Procedure 36 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 Admission to which Defendants James N. Mattis, Mark Esper, and the United States Department of Defense (collectively "Defendants") shall respond separately and fully, in writing and under oath, no later than thirty (30) days after service of these requests, and thereafter seasonably supplement such responses pursuant to Fed. R. Civ. P. 26(e) through the date of any trial in this action.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. In these requests, 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 “AR 40-501” means Army Regulation 40-501, Standards of Medical Fitness (June 14, 2017), including any prior versions or amendments thereof.

15. 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.”

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

17. “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.

18. “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.

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

20. “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.

21. 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.

22. 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 interrogatory.

INSTRUCTIONS

1. Pursuant to Federal Rule of Civil Procedure 36(a)(4), if any matter in these Requests for Admission is not admitted, Defendants' answer must specifically deny the matter or state in detail why it cannot be truthfully admitted or denied.

2. Any denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of the matter, the answer must specify the part admitted and qualify or deny the rest.

3. Defendants may only assert lack of knowledge or information as a reason for failing to admit or deny if Defendants state that they have made reasonable inquiry and that the information known or that can be readily obtained is insufficient to enable admission or denial.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1.

Admit that Mr. Harrison was denied a commission to become an attorney in the Judge Advocate General Corps for the D.C. National Guard because he failed to meet medical accession standards due to his HIV status.

REQUEST FOR ADMISSION NO. 2.

Admit that Mr. Harrison failed to meet medical accession standards solely on the basis of his HIV status.

REQUEST FOR ADMISSION NO. 3.

Admit that Mr. Harrison was denied a commission as an attorney in the Judge Advocate General Corps for the D.C. National Guard based solely on his HIV status.

REQUEST FOR ADMISSION NO. 4.

Admit that waivers for medical conditions other than HIV have been granted to individuals seeking to commission as officers.

REQUEST FOR ADMISSION NO. 5.

Admit that a person with less than 400 copies of HIV RNA per milliliter is considered “virally suppressed.”

REQUEST FOR ADMISSION NO. 6.

Admit that a person with less than 48-50 copies of HIV RNA per milliliter is considered to have an “undetectable” viral load.

REQUEST FOR ADMISSION NO. 7.

Admit that a person with HIV who has an undetectable viral load has essentially no risk of sexually transmitting HIV.

REQUEST FOR ADMISSION NO. 8.

Admit that there is no demonstrated risk of transmission of HIV in normal daily activities.

REQUEST FOR ADMISSION NO. 9.

Admit that a person with HIV who has an undetectable viral load has only a theoretical risk of transmitting HIV via “blood splash.”

REQUEST FOR ADMISSION NO. 10.

Admit that with appropriate health care, HIV is now a chronic, manageable condition.

REQUEST FOR ADMISSION NO. 11.

Admit that all people living with HIV are able to achieve an undetectable viral load through adherence to an appropriate antiretroviral therapy regimen.

REQUEST FOR ADMISSION NO. 12.

Admit that HIV is a relatively weak and instable virus that is difficult to transmit compared to other blood-borne viruses.

REQUEST FOR ADMISSION NO. 13.

Admit that waivers of the medical accession standards have been granted to individuals with HIV.

REQUEST FOR ADMISSION NO. 14.

Admit that waivers of the medical accession standards have not been granted to individuals with HIV.

REQUEST FOR ADMISSION NO. 15.

Admit that waivers of the medical accession standards have been granted to individuals with disqualifying medical conditions other than HIV.

REQUEST FOR ADMISSION NO. 16.

Admit that waivers of the medical accession standards have not been granted to individuals with disqualifying medical conditions other than HIV.

REQUEST FOR ADMISSION NO. 17.

Admit that Defendants have granted waivers to Service members with an HIV diagnosis to deploy to certain geographic areas.

REQUEST FOR ADMISSION NO. 18.

Admit that a blood donor's blood type impacts the range of potential recipients.

REQUEST FOR ADMISSION NO. 19.

Admit that a blood recipient's blood type impacts the range of potential donors.

REQUEST FOR ADMISSION NO. 20.

Admit that there are a number of medical conditions other than HIV that preclude blood donation.

REQUEST FOR ADMISSION NO. 21.

Admit that Service members with medical conditions other than HIV who are precluded from donating blood have been deployed.

REQUEST FOR ADMISSION NO. 22.

Admit that Defendants have adequate screening measures in place to protect the safety of the U.S. Military blood supply.

REQUEST FOR ADMISSION NO. 23.

Admit that deployed Service members are often required to comply with anti-malaria chemoprophylaxis measures.

REQUEST FOR ADMISSION NO. 24.

Admit that to comply with anti-malaria chemoprophylaxis measures, Service members are frequently prescribed one-time daily medication.

Dated: November 27, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 27th day of November, 2018 to the following counsel of record via electronic mail.

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/s/ Andrew R. Sommer

**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' SECOND SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS TO DEFENDANTS (NOS. 16-36)**

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, propounds their First Set of Requests for Production of Documents and Things, 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 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).

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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 “AR 40-501” means Army Regulation 40-501, *Standards of Medical Fitness* (June 14, 2017), including any prior versions or amendments thereof.

15. 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.”

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

17. “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.

18. “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.

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

20. “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.

21. 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.

22. 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. 16

All Documents and Communications reviewed or relied upon, either directly or indirectly, by the “working group” responsible for assessing the need for any changes to AR 600-110, as described in the DoD 2018 Report to Congress “ARMY POLICY STATUS UPDATE” (ECF No. 53-3, at 8 of 35)

DOCUMENT REQUEST NO. 17

All “contemporary medical literature and practice guidelines” on which the “[s]ubject matter experts across the Military Services” relied to support the conclusion that the “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,” as described in the DoD 2018 Report to Congress (ECF No. 53-3, at 9-10 of 35).

DOCUMENT REQUEST NO. 18

All Documents that support DoD’s assertion that its “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,” as described in the DoD 2018 Report to Congress (ECF No. 53-3, at 10 of 35).

DOCUMENT REQUEST NO. 19

All Documents and things “obtained from each of the Military Departments at the request of [the Office of the Assistant Secretary of Defense for Health Affairs]” to prepare the DoD 2018 Report to Congress as described in the DoD 2018 Report to Congress “DATA COLLECTION” (ECF No. 53-3, at 11 of 35).

DOCUMENT REQUEST NO. 20

All Documents and things reviewed or relied upon, either directly or indirectly, by the Accession Medical Standards Working Group concerning DoD’s policies pertaining to HIV, as described in the DoD 2018 Report to Congress (ECF No. 53-3, at 13 of 35).

DOCUMENT REQUEST NO. 21

Documents sufficient to show the number of service members since 2000, broken down by Military Service, who have been diagnosed as HIV positive and: (a) have been deployed to a combat zone; (b) have been deployed on a contingency deployment; (c) have been deployed anywhere outside the continental United States.

DOCUMENT REQUEST NO. 22

Documents concerning medical evaluations performed for service members who are living with HIV who have been deployed outside the continental United States, with identifying information redacted pursuant to Paragraph 10 of the protective order entered by the Court in this matter (ECF No. 71).

DOCUMENT REQUEST NO. 23

Documents related to medical suitability screenings for service members living with HIV that the Navy has conducted since the implementation of Secretary of the Navy Instruction

5300.30E in August 2012, with identifying information redacted pursuant to Paragraph 10 of the protective order entered by the Court in this matter (ECF No. 71).

DOCUMENT REQUEST NO. 24

Documents regarding any medical evaluations or waivers sought under Air Force Instruction 44-178 by service members living with HIV, with identifying information redacted pursuant to Paragraph 10 of the protective order entered by the Court in this matter (ECF No. 71).

DOCUMENT REQUEST NO. 25

Documents from the Armed Services Blood Program concerning HIV policy, including but not limited to documents discussing HIV incidence.

DOCUMENT REQUEST NO. 26

Documents sufficient to show the total number of battlefield transfusions since January 1, 2000.

DOCUMENT REQUEST NO. 27

Documents sufficient to show the approximate percentage of service members with AB-negative blood and the approximate percentage of service members with AB-positive blood.

DOCUMENT REQUEST NO. 28

All Documents concerning bilateral agreements with provisions that prohibit deployment of service members to foreign nations based on an HIV diagnosis.

DOCUMENT REQUEST NO. 29

Documents regarding the policies and programs under which service members are provided with prophylactic medications during deployment, including but not limited to medications for prophylaxis of malaria.

DOCUMENT REQUEST NO. 30

All documents concerning Defendants' decisions to allow service members to deploy with chronic or intermittent medical conditions other than HIV that typically require taking medication on a regular basis.

DOCUMENT REQUEST NO. 31

All documents concerning policies allowing service members to enlist or be appointed as an officer with a chronic or intermittent medical condition that typically requires taking medication on a regular basis, including policies related to hypothyroidism, dyslipidemia, and medical conditions requiring hormone replacement therapy.

DOCUMENT REQUEST NO. 32

All documents concerning policies allowing service members to deploy to a combat zone or on a contingency deployment with a chronic or intermittent medical condition that typically requires taking medication on a regular basis, including policies related to service members with hypertension, hypothyroidism, dyslipidemia, and medical conditions requiring hormone replacement therapy.

DOCUMENT REQUEST NO. 33

All documents concerning policies allowing service members to deploy to a combat zone or on a contingency deployment with a chronic or intermittent medical condition that typically requires medical monitoring through a visit with a healthcare provider one or more times a year.

DOCUMENT REQUEST NO. 34

All documents concerning policies allowing service members to deploy with a chronic or intermittent medical condition that typically requires medical monitoring through blood testing

one or more times a year.

DOCUMENT REQUEST NO. 35

All documents concerning past, present, and potential changes to policies regarding the accession or deployment of service members with diabetes.

DOCUMENT REQUEST NO. 36

All Documents upon which you will rely to support any defense in this action or to rebut any claim made in this action.

Dated: November 27, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 27th day of November, 2018 to the following counsel of record via electronic mail.

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/s/ Andrew R. Sommer

**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' NOTICE OF DEPOSITION
OF DEFENDANTS PURSUANT TO FED. R. CIV. P. 30(B)(6)**

PLEASE TAKE NOTICE that, under Federal Rule of Civil Procedure 30(b)(6), Plaintiffs Nicholas Harrison and Outserve-SLDN, Inc., by and through their undersigned counsel, intend to take testimony by deposition upon oral examination of Defendants James N. Mattis, Mark Esper, and the United States Department of Defense (collectively "Defendants") on January 8, 2019, at 9:00 a.m. at the offices of Winston & Strawn LLP, 1700 K Street NW, Washington, DC, 20006, or at such other time and place as may be agreed upon by counsel.

Pursuant to Rule 30(b)(6), Defendants shall designate one or more officers, directors, managing agents, or other persons most knowledgeable and best qualified to testify concerning the subject matter identified in Attachment A. The definitions identified below govern the topics set forth in Attachment A. No later than seven days before the deposition, Defendants are requested to designate to Plaintiffs in writing the persons who will testify on their behalf, specifying the matters as to which each person will testify.

The oral examination will be conducted before a court reporter, notary public, or other person authorized by law to administer oaths under the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Virginia. The oral examination will be recorded by stenographic and video-graphic means, and will continue from day to day until completed. All counsel of record are invited to attend the depositions and examine the deponent(s) in accordance with the Rules.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in the topics set forth in Attachment A is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. In the topics set forth in Attachment A, 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.

Attachment A

In accordance with Fed. R. Civ. P. 30(b)(6), Defendants shall identify, designate, and produce for deposition one or more officers, directors, managing agents, or other person(s) most knowledgeable to testify on their behalf regarding the subject matter of the following:

1. The factual bases for the statements made in the DoD 2018 Report to Congress and, in particular, the factual bases for the Department of Defense's assertion that its "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."

2. The factual bases for DoDI 6485.01, including the factual bases for the DoD policy set forth in Section 4 that denies "eligibility for Military Service to individuals with serologic evidence of HIV infection for appointment, enlistment, pre-appointment, or initial entry training for Military Service according to DoD Directive 6130.3."

3. The factual bases for DoDI 6130.03 in general and specifically for the DoD policy set forth in Section 1.2 and Section 5.23 ("Systemic Conditions").

4. The factual bases for DoDI 6490.07 in general and specifically for the DoD policy set forth in Section 4 and Enclosure 3 ("Medical Conditions Usually Precluding Contingency Deployment"), section (e) ("Infectious Diseases").

5. The factual bases for Army Regulation 600-110, including the factual bases for the policies set forth in Chapter 1, Section III.

6. The factual bases for Army Regulation 40-501, including the factual bases for the policies set forth in Section 2-30 ("Systemic diseases") (a) and AR 40-501, Section 3-7

(“Blood and blood-forming tissues diseases”) (h), Section 4-5 (“Blood and blood-forming tissue diseases”) (b), Section 4-33 (“Medical standards for ATC personnel”) (8), Section 5–14 (“Medical fitness standards for deployment and certain geographical areas”) (12) and (17).

7. The factual bases for Defendants’ contention that a person living with HIV is not fit or capable of performing his or her duties in the military.

8. The reasons that Nick Harrison did not receive a medical waiver or an exception to policy, including all reasons the Army believes Nick Harrison is not fit or capable of performing as an officer.

9. The work of the Accession Medical Standards Working Group concerning the medical accession standards for individuals living with HIV.

10. The facts concerning any waivers and/or exceptions to policy granted with respect to DoDI 6485.01, DoDI 6130.03, DoDI 6490.07, Army Regulation 600-110, and Army Regulation 40-501, including the number of such waivers granted and the factual circumstances regarding each such request for waiver or exception to policy.

11. The reasoning behind the manner in which DoDI 6485.01, DoDI 6130.03 (Section 5.23) and DoDI 6490.07 (with respect to HIV) are implemented in the Army, including the process and standards by which waivers and exceptions to policy are granted or denied.

12. The reasoning behind the manner in which DoDI 6485.01, DoDI 6130.03 (Section 5.23) and DoDI 6490.07 (with respect to HIV) are implemented in the Air Force, including the process and standards by which waivers and exceptions to policy are granted or denied.

13. The reasoning behind the manner in which DoDI 6485.01, DoDI 6130.03 (Section 5.23) and DoDI 6490.07 (with respect to HIV) are implemented in the Navy, including the process and standards by which waivers and exceptions to policy are granted or denied.

14. The reasoning behind the manner in which DoDI 6485.01, DoDI 6130.03 (Section 5.23) and DoDI 6490.07 (with respect to HIV) are implemented in the Marines, including the process and standards by which waivers and exceptions to policy are granted or denied.

15. The reasoning behind the manner in which DoDI 1332.45 is being implemented in the Army, including the process and standards by which retention determinations are made for service members who are classified as non-deployable.

16. The reasoning behind the manner in which DoDI 1332.45 is being implemented in the Air Force, including the process and standards by which retention determinations are made for service members who are classified as non-deployable.

17. The reasoning behind the manner in which DoDI 1332.45 is being implemented in the Navy, including the process and standards by which retention determinations are made for service members who are classified as non-deployable.

18. The reasoning behind the manner in which DoDI 1332.45 is being implemented in the Marines, including the process by which retention determinations are made for service members who are classified as non-deployable.

19. The process by which deployed service members are provided with healthcare, including annual physicals and any semi-annual or tri-annual or quarterly visits with healthcare providers.

20. The process by which diagnostic and other blood tests are handled for service members deployed by the Army to foreign bases, including those in combat zones.

21. The process by which service members requiring daily medication are provided with that medication.

22. Any purported concerns the Defendants have about providing the necessary health care to a service member living with HIV while deployed overseas, including in a combat zone.

23. The accessions and deployment policies with respect to people who have dyslipidemia, hypothyroidism, diabetes, medical conditions requiring hormone replacement therapy, and any medical condition requiring medication on a daily or weekly basis.

24. The Military Services' blood collection program, battlefield transfusions, any individuals or groups of individuals who are allowed to deploy even though they cannot donate blood.

25. The factual bases for any concerns the Army or Department of Defense have that a transmission of HIV could occur in a combat situation.

26. The bilateral agreements with provisions that prohibit deployment of service members to foreign nations based on an HIV diagnosis.

27. The factual bases for your statement that "Defendants' policies are rationally related to their legitimate government interest in ensuring that every Service member is fit and capable of performing his or her job." Defs.' Answer at ¶3, ECF No. 62.

28. The factual bases for the denials set forth in Defendants' Answer to Plaintiffs' Complaint in this action.

29. The factual bases for any affirmative defenses you will rely on in this action.

Dated: December 5, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 5th day of December, 2018 to the following counsel of record via electronic mail.

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/s/ Andrew R. Sommer

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

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

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 18)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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ALSO PRESENT:

NICK HARRISON

OFFICIAL COURT REPORTER:

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P R O C E E D I N G S

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

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

THE COURT: Good morning.

Mr. McCotter, you're outnumbered.

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

THE COURT: All right, good morning.

MR. McCOTTER: Thank you.

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

This obviously is a very significant and interesting 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

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

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.
Plaintiffs,

v.

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Documents and things concerning Plaintiff Nicholas Harrison.

DOCUMENT REQUEST NO. 2

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

DOCUMENT REQUEST NO. 3

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

DOCUMENT REQUEST NO. 4

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

DOCUMENT REQUEST NO. 5

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

DOCUMENT REQUEST NO. 6

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

DOCUMENT REQUEST NO. 7

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

DOCUMENT REQUEST NO. 8

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

writing or amending DoDI 6130.03.

DOCUMENT REQUEST NO. 9

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

DOCUMENT REQUEST NO. 10

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

DOCUMENT REQUEST NO. 11

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

DOCUMENT REQUEST NO. 12

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

DOCUMENT REQUEST NO. 13

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

DOCUMENT REQUEST NO. 14

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

DOCUMENT REQUEST NO. 15

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

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

Dated: October 24, 2018

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

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

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/s/ Andrew R. Sommer

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

NICHOLAS HARRISON, *et al.*,)
)
Plaintiffs,)
)
v.)
)
JAMES N. MATTIS, *et al.*,) No. 1:18-CV-00641-LMB-IDD
)
Defendants.)
)
)
)
)
)
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)
)
)

**DEFENDANTS’ OBJECTIONS 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, note the following objections to Plaintiffs’ Requests for Production of Documents and Things to Defendants (Nos. 1-15).

INTRODUCTION

Although these objections are being filed within the period provided by Local Rule 26(C), Defendants’ counsel have not yet had a sufficient opportunity to review all material and information that may be responsive to Plaintiffs’ requests for production. Defendants may later elect to waive any of the below objections with respect to any particular fact. Such waiver, should it occur, shall not be construed as a waiver of objections to other information. In accordance with Local Rule 37(E), counsel will also endeavor in good faith to resolve with Plaintiffs any controversy that may arise with respect to any discovery matter or to narrow any issue in dispute.

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.

DOCUMENT REQUEST NO. 2

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

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

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

DOCUMENT REQUEST NO. 3

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

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

DOCUMENT REQUEST NO. 4

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

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

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

DOCUMENT REQUEST NO. 5

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

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

DOCUMENT REQUEST NO. 6

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

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

DOCUMENT REQUEST NO. 7

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

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

DOCUMENT REQUEST NO. 8

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

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

DOCUMENT REQUEST NO. 9

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

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

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

DOCUMENT REQUEST NO. 10

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

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

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

DOCUMENT REQUEST NO. 11

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

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

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

DOCUMENT REQUEST NO. 12

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

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

DOCUMENT REQUEST NO. 13

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

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

DOCUMENT REQUEST NO. 14

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

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

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

DOCUMENT REQUEST NO. 15

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

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

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

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

DATE: November 8, 2018

Respectfully submitted,

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Counsel for Defendants

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
	.	November 30, 2018
JAMES N. MATTIS, Secretary of	.	10:45 a.m.
the U.S. Department of	.	
Defense; MARK ESPER,	.	
Secretary of the Army; and	.	
U.S. DEPARTMENT OF DEFENSE,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Pages 1 - 55)

(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

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THE TRANSCRIBER:

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P R O C E E D I N G S

THE CLERK: Civil Action No. 18cv641, Nick Harrison, et al. v. James Mattis, et al. Will counsel please come to the podium and state your name for the record.

MS. KIMBALL: Good morning, Your Honor. I'm Assistant U.S. Attorney Kimere Kimball, here today on behalf of the defendants. With me is Robert Norway from the Department of Justice, Federal Programs Branch, who will be arguing for defendants today.

THE COURT: Good morning.

MR. HARDING: Good morning, Your Honor. My name is John Harding, from the law firm of Winston & Strawn, and I am representing Nicholas Harrison and OutServe-SLDN. With me today is my colleague, Cyrus Frelinghuysen.

THE COURT: Good morning. This matter is before the Court on the plaintiffs' motion to compel production of documents. The Court has had an opportunity to review the motion, the memoranda in support of the motion, the opposition to that motion, and the reply to that opposition. Is there anything the plaintiff would like to add to your motion at this time?

MR. HARDING: Yes, Your Honor. Your Honor, approximately a month-and-a-half ago, we were before Judge Brinkema, and she ordered that the parties create a complete record, a, quote, complete record and, quote, fulsome record in

1 this case, which she found to be a very important case, and,
2 and we, we believe that we have done that currently with the --
3 our initial requests for production, which is for 15 requests.
4 All these requests relate either to plaintiffs, to the
5 challenged DoDI instructions or policies, and to, and to
6 waivers of those policies that have occurred, and also to two
7 congressional reports that deal with the military and HIV.

8 We believe that all of these materials are relevant.
9 We do not believe that it is burdensome on, on defendants to
10 produce their --

11 THE COURT: The question is why. Your belief that
12 it's relevant doesn't mean that it's relevant. This Court --
13 you have to prove to this Court that they're relevant.

14 MR. HARDING: Correct, Your Honor. And I'm happy to
15 go through each one of them for you if you want, or we can also
16 talk about I think there is actually a -- the objections are
17 categorized very simply. What is your preference?

18 THE COURT: We're not going to go through --

19 MR. HARDING: Okay.

20 THE COURT: -- every request individually.
21 That would not be judicially efficient.

22 MR. HARDING: Yes, Your Honor. As far as the
23 DoDI's -- the DoDI instructions, there are several instructions
24 that are at issue. The first one is DoDI 6130.03, and this is
25 the general accessions policy, and it relates to many diseases

1 or conditions that would prohibit individuals from joining the
2 military or being commissioned, and that policy is relevant and
3 it specifically relates to HIV, and Judge Brinkema discussed
4 this policy actually in, in the hearing.

5 She specifically asked defendants what the rules were
6 for diabetes, which she found to be a comparator to HIV because
7 it requires daily medication, and defendants didn't have an
8 answer. They couldn't explain the --

9 THE COURT: This is the DoD instruction.

10 MR. HARDING: The DoD instruction, correct, Your
11 Honor.

12 THE COURT: Have they refused to give you discovery
13 on the DoD instruction?

14 MR. HARDING: They have -- so, Your Honor, what
15 they've done is they have limited the evidence that they are
16 willing to produce on that DoDI instruction only to HIV, not to
17 any other comparator diseases, which is what Judge Brinkema
18 suggested.

19 THE COURT: But your complaint is about HIV.

20 MR. HARDING: Correct, Your Honor, but Judge
21 Brinkema, rightly, I believe, asked, asked why -- used diabetes
22 in this example as a comparator. We don't -- and we've made
23 this point to --

24 THE COURT: Yes, she was using it as an example. We
25 don't get discovery based on any example that a court wants to

1 use to try to prove its point.

2 MR. HARDING: I understand that, Your Honor, and I
3 think it's relevant because, for instance, one of the defenses
4 that, that defendants are raising is that the medication is not
5 going to be readily available for plaintiffs in areas of
6 deployment, and if that is the case for diabetes, which is
7 actually a more difficult medication because it needs to be
8 cooled, needs refrigeration, that, that basis would not --

9 THE COURT: Well, where do you get your information
10 that suggests that it's easier to get diabetic medication than
11 it is to get HIV medication? Because you're basing your, your
12 request on an assumption that -- you're trying to argue that
13 they're saying it's more difficult to get HIV medication, and
14 you're trying to argue as a comparator, it's more difficult to
15 get diabetic medication.

16 My simple question is upon which -- upon what
17 information are you basing that comparison on? Because you
18 haven't seemed to have requested from them any information
19 concerning the difficulty of getting diabetic medication versus
20 the difficulty of getting HIV medication. That would seem to
21 be a proper request if that's their argument.

22 MR. HARDING: Okay, Your Honor. Yeah, I understand
23 your point. I do think it's a -- I do think at least some
24 comparator conditions are important, that where, where the
25 military has decided to limit accessions in DoDI 6130.03, we've

1 offered to the government that we're willing to limit those to
2 a handful, but we think that what the, what the government has
3 done with other conditions and what they -- compared to what
4 they do with HIV is relevant to this case.

5 THE COURT: What does their answer say?

6 MR. HARDING: That --

7 THE COURT: I mean, you made a complaint. What are
8 you using as an answer? Because it doesn't seem to this Court
9 that those comparisons would, would assist you in proving your
10 claims. So it only appears that it could possibly assist them
11 in proving their defenses.

12 What are their defenses?

13 MR. HARDING: Well, Your Honor, their answer is
14 actually a little bit interesting because we have two
15 plaintiffs in this case. We have Sgt. Nicholas Harrison, but
16 then we also have OutServe-SLDN, which represents multiple
17 people in the military who, who have HIV, and they've decided
18 to focus specifically on Sgt. Harrison and, and basically have
19 written out our second plaintiff in this case, and so their
20 answers are related to Sgt. Harrison and, and not to any of the
21 other individuals -- or any -- sorry, any of the other
22 individuals in the military with HIV that OutServe-SLDN
23 represents.

24 THE COURT: That's probably because the second
25 plaintiff used Sgt. Harrison --

1 MR. HARDING: As an example.

2 THE COURT: -- in order to become a second plaintiff.

3 MR. HARDING: Sgt. Harrison is a, is a member of
4 OutServe-SLDN; that's correct, Your Honor; but in the
5 complaint, we also specified that we are representing other
6 people in the military and individuals who have not yet even --

7 THE COURT: Well, no, Sgt. Harrison isn't
8 representing anybody but Sgt. Harrison.

9 MR. HARDING: I'm sorry. I'm sorry, I misspoke, Your
10 Honor. OutServe-SLDN was filing the complaint on behalf of
11 other individuals in the military as well as individuals who
12 had not yet enlisted in the military because of the accessions
13 prohibition, which is a different one, DoDI 6485.01, and this
14 is one where plaintiffs --

15 THE COURT: This isn't a collective action or an
16 objection based on individuals similarly situated, is it?

17 MR. HARDING: No, Your Honor. This is a
18 constitutional challenge under the Fifth Amendment, a facial
19 and as-applied challenge under the Fifth Amendment.

20 THE COURT: So a determination on whether or not
21 these -- this instruction or the regulations are constitutional
22 as to Mr. Harrison -- or Sgt. Harrison would be a determination
23 by a court on whether or not they're constitutional to these
24 similarly situated other individuals, wouldn't it?

25 MR. HARDING: Your Honor, I, I understand --

1 THE COURT: I asked a simple question.

2 MR. HARDING: Yes. Yes, Your Honor, I think that --

3 THE COURT: Okay. Then we don't need to discuss all
4 those in the other individuals. Something is either
5 constitutional -- I mean, you made it a facial constitutional
6 argument and an as-applied. Facial unconstitutionality would
7 apply if it applies to Sgt. Harrison, it applies to everybody
8 else in the military who's similarly situated.

9 MR. HARDING: I understand that, Your Honor. Turning
10 to DoDI 6485.01, which is the accessions policy specifically
11 related to HIV, defendants have agreed to produce the documents
12 relating to the current policy. Our argument in the complaint
13 is that the policy has not advanced over time consistent with
14 the medical and scientific advancements in treating HIV, and so
15 something that we, we have asked for is we have asked for
16 basically the evolution of the policy over time and the
17 documents that defendants relied on when, when drafting and
18 amending that policy.

19 They have --

20 THE COURT: I'm a little confused about your
21 argument. You're saying that your complaint is saying or your
22 argument is that they started out with a policy, medical
23 information and medical -- how we dealt with HIV in the past is
24 different than the way we dealt with it in the future, and
25 you're trying to see whether or not their policies have evolved

1 in the same way that the medical part of this case has evolved.

2 MR. HARDING: Correct, Your Honor. That's, that's
3 exactly right, and we believe that they have not evolved as
4 they should based on the medical advances that have occurred.

5 THE COURT: Because you're trying to argue that
6 their, their bases for the current policy, I guess, to say
7 their reasons underlined why they created the current policy is
8 a pretext.

9 MR. HARDING: Correct, Your Honor. And so we, we
10 need that -- those, those older versions and the documents that
11 they relied on directly and indirectly in drafting those and in
12 amending those to help us show that the policy has not been
13 updated as it should based on the medical advances, you know.
14 Twenty-thirty years ago, HIV was, was basically a death
15 sentence. Now that's not the case as all. It's a very
16 treatable disease. People will -- Sgt. Harrison, for example,
17 passed the physical fitness test with flying colors and, but
18 for HIV, was not commissioned as, as an officer.

19 Next, we've requested documents relating to DoDI
20 649.07. This is the deployment policy. Your Honor, we think
21 that deployment is really at the heart of all of these
22 policies. The military is concerned about making sure that
23 they have individuals who can be deployed, and we believe that
24 the limitations on deployment affect the accessions policy
25 65- -- 6485.01, which we just discussed, and also the other

1 retention policies that we'll be discussing.

2 THE COURT: But based on my reading of everything
3 that was filed, it seems that seems like what the policy says.
4 If there's an issue with your deployment, there's an issue with
5 you being commissioned.

6 MR. HARDING: Correct. And so we want, we want --

7 THE COURT: Well, it's a simple connection.

8 MR. HARDING: We want documents relating to both.
9 Defendants think that that policy, the deployment policy is not
10 relevant to the accessions determination, which we, we disagree
11 with.

12 And then finally, relating to -- I guess this is an
13 overall objection that the defendants have is they do not
14 believe that they need to produce documents from other military
15 branches in how they apply the DoDI instructions. They are
16 willing to give us specifically how the Army deals with it
17 under Army Regulation 600-110 but not the military branches,
18 and this is a very -- this is a point that Judge Brinkema
19 actually grabbed hold of during, during argument, and she
20 specifically noted that the Navy's policy and how the Navy
21 treats individuals with HIV is more progressive than the Army,
22 and so we think that by being able to look at the other
23 branches of the military, their policies and how they
24 implemented them, the Navy, they allowed deployment in certain
25 areas with people living with HIV, same with the Air Force --

1 THE COURT: But what does the implementation of the
2 regulation have to do with whether or not the regulation is
3 constitutional or not?

4 MR. HARDING: Your Honor --

5 THE COURT: People can -- people implement the same
6 rules differently all the time. It doesn't mean they're
7 implementing them correctly.

8 MR. HARDING: I understand that, Your Honor, and I
9 think that, that, that is exactly the point, right? If, if
10 they -- if the Navy believes that they can effectively deploy
11 and commission individuals with HIV and are providing waivers
12 for that, that, that is relevant to what the Army is doing,
13 which is not doing that. They are, they are not providing
14 waivers. They are not allowing the commissioning to happen.

15 THE COURT: But then your complaint would be that the
16 Army is improperly applying its own regulations, but that's not
17 your argument in your complaint. Your complaint is these
18 regulations are unconstitutional.

19 MR. HARDING: And --

20 THE COURT: So it doesn't -- whatever way the Navy
21 may be applying them, if it's different than the Army is
22 applying them, that has no impact on whether or not the
23 regulation or instruction is unconstitutional or not, does it?
24 At least not facially.

25 Now, as applied to Sgt. Harrison, that may be a

1 difference, but as applied to Sgt. Harrison, then you have to
2 move into a similarly situated situation because it may be
3 applied to Sgt. Harrison in the Army because he's in the Army
4 and the Army has certain things they have to do, certain
5 obligations they have, and they have to do certain things a
6 certain way.

7 The Navy, on the other hand, may have to do certain
8 things a certain way. It was like your argument about where he
9 can be deployed. Well, different branches of the government
10 deploy people differently because we have different bases in
11 different places based on what those needs of those allies are.
12 You know, we, we don't -- you know, we have an Air Force base
13 in Incirlik.

14 MR. HARDING: No, I --

15 THE COURT: We don't necessarily need Marines in
16 Incirlik.

17 MR. HARDING: And that, that point I understand, Your
18 Honor, but the military branches and how they have implemented
19 the DoDI instruction goes to -- again goes to this argument
20 that I was making earlier about whether or not that DoDI
21 instruction has, has been advanced consistent with the medical
22 advancements that --

23 THE COURT: No. You can't make that argument until
24 you get discovery on the advancement of the regulation, which
25 you have not yet gotten, so you can't make that argument yet.

1 MR. HARDING: Well, I mean, we are trying to get, get
2 it all in one fell swoop because of, I guess, the timing of
3 the, of the case, and, and the limited amount of discovery time
4 that we have, but we do think it is relevant. We think that
5 other military branches and how they apply the DoDI, and
6 specifically because we are also challenging the Army
7 regulation and how it is applied and also the facial challenge
8 in the Army regulation, that, that the other branches of the
9 military and how, how they treat individuals with HIV is
10 relevant to this case.

11 THE COURT: Well, my question -- I'm still not
12 getting the answers to the question.

13 MR. HARDING: I'm sorry, Your Honor. I'm trying to
14 understand.

15 THE COURT: Why, why is how the Navy or the Marines
16 or the Air Force, how they implement a DoD instruction in the
17 regulations that they executed based on that instruction, have
18 anything to do with whether or not the instruction or the
19 regulations are facially unconstitutional or unconstitutional
20 as applied to Sgt. Harrison?

21 MR. HARDING: Your Honor, because I think it goes to
22 the point that, that -- whether or not it's rationally related
23 to their bases for doing that, and the example that I want to
24 give --

25 THE COURT: But the rational relation is based on as

1 applied to Sergeant Harrison, so the rational relation was it
2 wasn't the Army -- I mean, the Navy and the Air Force and the
3 Marines didn't apply this regulation to Sergeant Harrison; only
4 the Army did.

5 MR. HARDING: Yeah, well, if I can provide an example
6 for Your Honor real quick, let's look at DoDI 1332.45, which
7 the example is, is the deploy-or-get-out instruction is what we
8 call it in, in our briefs, right? And, and defendants
9 represented before Judge Brinkema that there was no expectation
10 of individuals in the Air Force being, being discharged solely
11 because of their HIV status and --

12 THE COURT: Has Sergeant Harrison been discharged?

13 MR. HARDING: Sergeant Harrison has not but --

14 THE COURT: Well, what's the point then?

15 MR. HARDING: -- other individuals had, and we
16 have --

17 THE COURT: If he had been discharged --

18 MR. HARDING: Um-hum.

19 THE COURT: -- then it will be good to get
20 information or relevant to get information to show, well, the
21 Army improperly discharged him because you're not required to
22 discharge him based on this DoD instruction because Air Force
23 doesn't, doesn't discharge their people, and they have, they
24 have to follow the same DoD instruction.

25 MR. HARDING: And I understand that, but I think it

1 goes, Your Honor, to animus, that, that these individuals are
2 being discharged from the military even though -- I mean, I
3 have -- I actually have the decision before me. I can provide
4 it. Basically, they are only being discharged solely because
5 they have HIV. They are perfectly fit. Their, their leaders
6 want them to stay in the military. They have done everything
7 they, they can to fulfill their duties, and they are discharged
8 solely because of their HIV status.

9 THE COURT: But how can you say that if your client
10 hasn't been discharged and he's HIV-positive?

11 MR. HARDING: Your Honor, I think it just hasn't
12 happened to him yet.

13 THE COURT: Do you have any information that suggests
14 that anybody else in the Army has been discharged based on
15 their HIV status?

16 MR. HARDING: I do not at this time. I have
17 information --

18 THE COURT: Well, then you have to get that
19 information in order to make that argument or this is a fishing
20 expedition. I mean, you, you can't say -- if you have no
21 evidence that anybody has been discharged based on their HIV
22 status, then you can't make the argument that they're being
23 discharged based on their HIV status, and that has nothing to
24 do with facial constitutionality. The only way it could have
25 anything to do with it is as applied to Sgt. Harrison, and you

1 can't say it's applied to Sgt. Harrison unconstitutionally
2 because he was discharged based solely upon his HIV status
3 because, because he hasn't been.

4 MR. HARDING: But, but we do know that Sgt. Harrison
5 was denied his commission based solely on his --

6 THE COURT: And that information is completely
7 relevant, and so is the information concerning deployment,
8 because he could not be commissioned because he could not
9 deploy because of his HIV status.

10 MR. HARDING: Okay. Let me just look through my
11 notes, if you can give me one second, to make sure I made all
12 my points. I don't want to go around in circles, as has been
13 done previously today.

14 THE COURT: Sometimes we have to go around in circles
15 to get back to the point.

16 MR. HARDING: Thank you, Your Honor.

17 So, Your Honor, I want to go back to -- we already
18 discussed prior versions, and I think you understand that
19 argument. Something that we also asked for is the --

20 THE COURT: We discussed?

21 MR. HARDING: Sorry.

22 THE COURT: I didn't understand the last statement.

23 MR. HARDING: Oh, I'm sorry. I want to get back to
24 the discussion about prior versions and drafts that we
25 discussed earlier and why those are irrelevant.

1 THE COURT: All right.

2 MR. HARDING: Something that we have also asked for
3 is documents that were indirectly relied upon when making --
4 when drafting those, those policies and reports.

5 THE COURT: What does that mean, indirectly relied
6 upon?

7 MR. HARDING: Your Honor, I think it actually -- it's
8 consistent with Rule 26 regarding expert reports, where experts
9 are required to provide documents that they, quote, considered
10 as well as relied on, so whether they, they reviewed it but it
11 doesn't end up in the, you know, the documents that they
12 cited --

13 THE COURT: Well, then say considered and relied
14 upon. Don't say indirectly relied upon because I don't know
15 what that means.

16 MR. HARDING: Okay. We're, we're happy to work with
17 defendants if they're willing to, to understand that as the
18 meaning of that, but they've objected to, to producing
19 documents that were not cited in, in those reports and
20 policies.

21 THE COURT: Because they're required to defend the
22 constitutionality based on legitimate government reasons, which
23 means you have an absolute right to try to prove that the
24 reasons that they are saying they use are not justified or not
25 have a legitimate basis, are only pretextual.

1 MR. HARDING: And that's what we're trying to do,
2 Your Honor, with this discovery. I mean, I understand their
3 position, but hopefully, we can work through that, but I wanted
4 to make that point before, before Your Honor.

5 So we, we discussed a little bit about deployment and
6 how it is relevant to this case. We've asked for evidence of
7 waivers specifically for the Army but also for all military
8 branches where waivers have been granted for deployment, and we
9 think that that is relevant to the case.

10 THE COURT: For people with HIV.

11 MR. HARDING: For people with HIV, correct, with that
12 limitation. We think that that's relevant to the case. We
13 think just as Your Honor says, that deployment relates to
14 accessions in commissioning, and so we, we would request that
15 that -- those be produced as well.

16 Let me just confer with him and see if there's
17 anything else.

18 Your Honor, my colleague just reminded me just to, to
19 again mention that there are two plaintiffs in this case.
20 There is Sgt. Nicholas Harrison, and there is OutServe-SLDN,
21 who represents not only Sgt. Harrison but other members of the
22 military, including Declarant 2, who we discussed in our reply
23 brief, who has been discharged specifically because of his HIV,
24 and we believe that --

25 THE COURT: But that's not a claim in this case, so

1 you --

2 MR. HARDING: Well, I actually think -- Your Honor, I
3 think it is a claim in this case because -- and I, I can find
4 the complaint but -- just give me one second.

5 THE COURT: I mean, how does that -- how does being
6 discharged because you have HIV have anything to do with
7 whether or not the DoD regulation -- or the DoD instruction and
8 the Army regulation or any other regulation of any other branch
9 is unconstitutional or constitutional on its face?

10 MR. HARDING: I think that's a good question, Your
11 Honor, and I appreciate it. So in our complaint -- sorry, I'm
12 shuffling the papers here. In our complaint, we specifically
13 identify the instructions and the policies that we are
14 challenging. One of the ones that we did challenge was we
15 talked about the deploy-or-get-out policy.

16 At that point, the DoDI instruction on, on deploy or
17 get out had not yet come about, and then -- so we actually
18 identify all of the, the instructions that we are challenging
19 facially, and then we say in paragraph 70: "In this" --

20 THE COURT: Are you saying the DoD instruction says
21 if you can't deploy, we will discharge you?

22 MR. HARDING: That was the initial policy, and then
23 they -- after we filed our complaint, they, they came out with
24 a more fulsome instruction, but yes, that was the policy at the
25 time. And so in --

1 THE COURT: Okay. Well, is, is that the policy now?
2 Because we're challenging the current policy's
3 constitutionality.

4 MR. HARDING: Well, Your Honor, and that's an
5 interesting point because defendants came out with this new
6 instruction. They suggested to the Court that nobody would be
7 discharged solely because of their HIV status, and then --

8 THE COURT: Does a DoD instruction say that?

9 MR. HARDING: DoDI instruction provides -- well,
10 basically informs the different military branches to come up
11 with their own policies.

12 THE COURT: Because they said "solely" probably in
13 the instruction.

14 MR. HARDING: Um-hum. And I can --

15 THE COURT: It obviously gives them the right to
16 someone who has HIV who maybe can't -- well, it's different in
17 the military because they're required to give you that
18 medication.

19 MR. HARDING: Yeah.

20 THE COURT: But let's say, for example, if someone
21 could not afford their medication, an employer could say, well,
22 okay, if you can't afford it, then your medical condition may
23 deteriorate in such a way that you can't perform your job, then
24 they'd have the right to discharge you or terminate you from
25 employment not because of your HIV status, but because you

1 can't perform the description of your job anymore.

2 MR. HARDING: And I, and I understand that, and I
3 agree with Your Honor, but that's not what happened here. I
4 can actually provide you the decision for Declarant 2 --

5 THE COURT: Exactly.

6 MR. HARDING: -- who is a member of OutServe-SLDN.

7 THE COURT: So that we're dealing with
8 constitutionality based on the facts of this case. Even the
9 second plaintiff has to deal with that. Facially
10 constitutionally is essentially a legal argument.

11 MR. HARDING: I understand that, Your Honor. I mean,
12 I just think that again, it goes to animus, the fact that they
13 have stated one position and then have basically done an
14 about-face, where this individual actually has now been
15 discharged solely because of his HIV status, and it says that
16 in the decision, but we are also challenging this case is not
17 only facially --

18 THE COURT: Well, was that individual discharged
19 prior to or subsequent to the execution of the current DoD
20 instruction?

21 MR. HARDING: Subsequent to, Your Honor. After
22 defendants stated that they had no intention to discharge
23 anybody solely because of their HIV status.

24 THE COURT: And you have information that that was
25 the sole reason?

1 MR. HARDING: I can provide you the decision. I
2 actually have a redacted version of the decision right here I
3 can give you and give counsel if you want to take a look at it.
4 It's only a page and a half.

5 THE COURT: Why do I need the decision to determine
6 whether --

7 MR. HARDING: Yes.

8 THE COURT: I mean, you already have the decision --

9 MR. HARDING: Yes.

10 THE COURT: -- so what, what discovery are you
11 looking for?

12 MR. HARDING: Solely -- sorry.

13 THE COURT: Because we're not here to argue the
14 merits of the case.

15 MR. HARDING: I, I understand that, Your Honor. I'm
16 just going to read parts of it that do not identify the
17 individual. The individual has asked that he not be
18 identified, but it says -- and I should probably provide
19 defense counsel a copy so they can look at it.

20 MR. NORWAY: Just for the record, Your Honor, I've
21 never seen this before. It hasn't been provided to the defense
22 before this hearing.

23 MR. HARDING: It says: The board considered the
24 member's contention that he is fit and should be returned to
25 duty. The board noted the member had been compliant with all

1 treatment, is currently asymptomatic, and has an undetectable
2 human immunodeficiency virus, HIV, viral load. Additionally,
3 he is able to perform all in garrison duties, has passed his
4 most recent fitness assessment without any component
5 exemptions, and his commander strongly supports his deploy
6 worldwide without a waiver, and renders him -- sorry. However,
7 his commander --

8 THE COURT: That sounds familiar.

9 MR. HARDING: Excuse me?

10 THE COURT: I said that sounds familiar. Was that in
11 your reply?

12 MR. HARDING: We, we -- yes, we used some of that
13 language in the reply, Your Honor.

14 THE COURT: Okay. Well, you have seen it before
15 then.

16 MR. HARDING: He's seen --

17 THE COURT: They had it in their reply.

18 MR. HARDING: Yeah. So -- and his commander strongly
19 supports his retention. However, the board noted the member's
20 condition precludes him from being able to deploy worldwide
21 without a waiver and renders him ineligible for deployment to
22 the Central Command (CENTCOM) area of responsibility.

23 THE COURT: And that's why the deployment issue is
24 relevant.

25 MR. HARDING: Correct, Your Honor. And I -- and I'm

1 asking for, for exemptions specifically for, for the waiver for
2 deployment.

3 THE COURT: What do you mean?

4 MR. HARDING: So, so they actually could, if the
5 military wanted to and this, this policy allows it, they could
6 waive the deployment restrictions for individuals with HIV, and
7 they just haven't in this case, for no reason.

8 THE COURT: And how does that go to prove
9 constitutionality? See, we're -- we're mixing apples and
10 oranges here.

11 MR. HARDING: I know.

12 THE COURT: I mean, the complaint is, is dealing with
13 constitutionality. It's not dealing with the fact that they
14 violated their own rules or regulations or somehow terminated
15 your client in violation of the law. That's what it seems like
16 you're arguing.

17 MR. HARDING: Well --

18 THE COURT: They terminated your client in, in
19 violation of their own DoD instruction or their own Army
20 regulation. That appears what we're talking about here, but
21 that's not what this case is about. This case is about whether
22 or not the DoD instruction and the Army regulation is
23 constitutional on its face or and as applied to your client.

24 MR. HARDING: And, Your Honor, I think that goes to
25 that because this individual is perfectly healthy, has done

1 everything he possibly could, and was denied and was discharged
2 specifically because of HIV status.

3 THE COURT: So then you're going to the justification
4 aspect of whether or not their concerns or whatever why they,
5 why they adopted the instruction and the regulation is
6 legitimate government interest.

7 MR. HARDING: Correct, Your Honor.

8 THE COURT: All right.

9 MR. HARDING: And, and we believe that it is, it is
10 not, and, and we thank you for your time.

11 THE COURT: So what were you actually looking for
12 from a discovery standpoint to prove that?

13 MR. HARDING: The interests specifically? Well,
14 we're asking for all the supporting documents, the
15 documentation they relied on when creating their policies.
16 We're also asking for -- Congress is actually very involved in
17 this, in this situation. In 2014, they requested that the DoD
18 provide them a report on whether or not their policies were
19 consistent with the medical advances. Then after, after the
20 Department of Defense provided that, that report, Congress
21 again said that report was insufficient, you didn't fulfill
22 your duties, provide us another report in 2018, and they just
23 did that after we filed our case, and we're asking for all the
24 documents that they relied on, and, and those reports
25 specifically deal with --

1 THE COURT: Aren't -- they're not in the report?

2 MR. HARDING: Relied on, not only cited to but
3 considered, as we discussed, and for Rule 26 purposes, and not
4 all of those are, and we believe that the information --

5 THE COURT: And Congress didn't ask them about that.
6 Are there -- are any documents or any information that you
7 relied upon in coming up with this DoD instruction or Army
8 regulation that are not in this report? No congressman or
9 senator asked them that.

10 MR. HARDING: I'm sorry, can you repeat the question?
11 I'm not sure if I understand.

12 THE COURT: I mean, I'm sure when they provide the
13 report -- was there a hearing, or did they just provide the
14 report? Because --

15 MR. HARDING: I'm not sure if there's been a hearing
16 on the 2018 report. It's just submitted in August.

17 THE COURT: -- if they're trying to determine why --
18 what justifies this instruction or what justifies this
19 regulation and you're giving me a report that has information
20 on it that suggests this is what you relied upon, my first
21 question, as it is now here as a judge, would have been the
22 same as if I was in Congress: Is there any information that
23 the Department of Defense relied upon in coming up with this
24 instruction or is there any information that the Army relied
25 upon in coming up with this regulation, which they were

1 required to come up with based on the DoD instruction, that
2 justifies this instruction or this regulation that was relied
3 upon that is not in the report you have just handed us?

4 MR. HARDING: That -- and, and we're asking for that.
5 Anything else, if it's not included in the report, all this --
6 we want all the, the documents that supported it, right, the
7 background information that they used to write that report and
8 consider -- the documents they considered, as we've already
9 discussed, not just cited.

10 THE COURT: Because the purpose of the report was to
11 explain to Congress why they came up with a justification for
12 the DoD instruction and the Army regulation.

13 MR. HARDING: Exactly. They, they were asked why
14 hasn't the policy changed because the medical advances have,
15 and they had to, to, to provide that to Congress, and we want
16 that information as well.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. NORWAY: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. NORWAY: I want to focus, there are two, two
22 aspects to this discovery dispute, the relevancy and
23 proportionality, and I want to go straight to the
24 proportionality because I think that is the big focus here.
25 Their discovery requests, both the ones that are before you now

1 and, and several requests have been filed -- or have been
2 served after, after this dispute arose, are not restricted at
3 all.

4 There is no time limits on them. There are no limits
5 on what part of the military establishment they want us to go
6 find the information, and that is a significant problem for the
7 government. The military establishment is very large. The,
8 the citation in our, in our papers says that it's almost 3
9 million people, civilian and military employees.

10 THE COURT: You're talking to a former Air Force JAG.
11 You don't have to give the background information.

12 MR. NORWAY: And, and, and that is a significant
13 problem for the government not only because while we recognize
14 that the Court expects discovery to move forward in this case
15 expeditiously, we won't be able to do that if we have to go out
16 and search through all of the corners of the military.

17 THE COURT: So give me an example.

18 MR. NORWAY: So, so here's a good, good example, Your
19 Honor: We have to search for medical records or medical
20 information about serving Coast Guard Member No. 1.

21 THE COURT: For what purpose?

22 MR. NORWAY: If we have to respond to the discovery
23 requests as they have requested us.

24 THE COURT: What was the request aimed to get at?
25 Did you talk to them in a good faith meet and confer sit-down

1 and say: Why, why is this information relevant?

2 And they said: Well, this is why it's relevant.

3 And then you said: Well, we don't think it's
4 relevant, and this is why.

5 MR. NORWAY: Right, Your Honor.

6 THE COURT: That discussion occurred, correct?

7 MR. NORWAY: Yes. Yes, Your Honor, the discussion
8 occurred. The relevancy portion of that goes -- and this is in
9 our papers -- goes towards the, the standard that is applied to
10 the military decisions that are being challenged here, and that
11 is the *Rostker, Goldman*, and most recently the *Trump v. Hawaii*
12 case, and that made it very clear that --

13 THE COURT: Well, that sounds like an argument for
14 trial or an argument for a motion for summary judgment.
15 That -- you're talking about essentially what's admissible or
16 not admissible at trial to prove the proper standard.

17 First you've got to prove what standard applies,
18 which this Court's not here to decide. That's something for a
19 district judge to decide, and that seems to be -- to the Court
20 to be a legal question.

21 MR. NORWAY: Yes, Your Honor.

22 THE COURT: And then what information is required to
23 support that or not.

24 We're at the discovery stage.

25 MR. NORWAY: And in the, in the *Hawaii* decision, Your

1 Honor, the majority decision there, they do go into the
2 relevancy of some of the very issues and some of the reason --

3 THE COURT: Relevance for trial or relevance for
4 discovery? There are two definitions.

5 MR. NORWAY: Yes.

6 THE COURT: Relevance for -- relevance for trial is
7 information that is more or less -- that will prove more or
8 less likely the elements of the claim. Relevance for discovery
9 is what is reasonably calculated to lead to the discovery of
10 admissible evidence. It doesn't even have to lead to the
11 discovery of admissible evidence as long as it's reasonably
12 calculated to do so.

13 MR. NORWAY: Yes, Your Honor. And in the *Hawaii*
14 decision, the majority decision of the Supreme Court, they
15 specifically said, for instance, when it came to the prior
16 policies that were being -- or that had been challenged and
17 were superseded, the Supreme Court majority said those
18 decisions don't matter. What matters is the policy that is
19 currently in place, and the Court is to look at that policy and
20 the reasons for that policy.

21 So that is one of the reasons --

22 THE COURT: Right, the justification for that policy.

23 MR. NORWAY: Correct.

24 THE COURT: And if the justification for the policy
25 is that current medical opinion says you probably need a policy

1 like this because this is where we are with HIV, and previous
2 policies, if you were at the same place with HIV from a medical
3 standpoint but the previous policies were different, that would
4 seem to belie the statement of the individual representing
5 that.

6 If you're saying this is the reason we have the
7 policy today but the medical stuff today was the same as the --
8 was the same essentially with the policy you had in 19- -- or
9 2016, which was only two years ago, and medical advancements
10 haven't done anything in the last two years when it comes to
11 HIV, then the previous 2016 policy would seem to be relevant
12 concerning the -- in regards to the justification for the 2018
13 policy to determine whether that justification is pretextual or
14 not, because it's inconsistent with the 2016 policy, which the
15 medical information was the same when that policy was executed.

16 So that request could be reasonably calculated to
17 lead to discovery of admissible evidence. Whether they
18 discovered any evidence, irrelevant. Whether they got the
19 evidence and whether it's admissible at trial, irrelevant, but
20 for purposes of discovery, if it's reasonably calculated to
21 lead to discovery of admissible evidence, then it's
22 discoverable.

23 MR. NORWAY: And, and, Your Honor, I think the --

24 THE COURT: You don't, you don't go -- you don't get
25 very far in, in this court at least when you're arguing

1 discovery motions when you start citing a whole bunch of
2 cases --

3 MR. NORWAY: Yes, Your Honor.

4 THE COURT: -- because it's based independently on
5 the allegations contained in this complaint and the defenses.

6 That's what makes something discoverable or relevant
7 from a discovery standpoint.

8 MR. NORWAY: And if you look at the, the defendants'
9 responses to the discovery requests that are at issue in this
10 motion, that's what we have attempted to do. We have, we have
11 focused on the injuries --

12 THE COURT: Well, you said you didn't want to give
13 them any information concerning deployment, and the deployment,
14 you don't get commissioned because you can't deploy. So
15 information concerning deployment seems to this Court
16 completely relevant from a discovery standpoint.

17 MR. NORWAY: So, so we, we disagree with that, that
18 contention from --

19 THE COURT: Well, I just said it sounds to the Court
20 it's completely relevant.

21 MR. NORWAY: I --

22 THE COURT: So your disagreement would be irrelevant.

23 MR. NORWAY: No, we disagree with the assertion of,
24 of the plaintiffs, Your Honor. What we have done is we have
25 for the policies that they have sought discovery for, the

1 Pentagon is a very big place. They assign responsibilities to
2 people. So we've found the offices who were responsible for
3 those policies. We've identified those individuals. We've
4 identified those offices. We have focused on collecting the
5 records from those individuals, and, and that is where we've
6 focused our discovery, where we have identified them in -- and
7 folks outside of those offices may have --

8 THE COURT: Let's see if we can move this along.

9 MR. NORWAY: Okay.

10 THE COURT: Give me an example of one of the requests
11 that you've objected to because you don't believe it's relevant
12 from a discovery standpoint.

13 MR. NORWAY: It's the second request: Any document
14 mentioning or referring to OutServe, one of the plaintiffs
15 here. There's no restrictions.

16 THE COURT: I didn't hear what you said. Any, any
17 document referring to or?

18 MR. NORWAY: Mentioning OutServe.

19 THE COURT: Mentioning OutServe.

20 MR. NORWAY: And I might have the language
21 slightly -- there's, there's no restriction. The relevancy of
22 a document that may --

23 THE COURT: I like to do this piece by piece, because
24 you get up and by the time you're finished -- I'm getting old.
25 I may not remember everything you said in order to ask them

1 questions. So let's, let's talk to plaintiffs.

2 Why would any document mentioning or whatever
3 OutServe have to do with proving the claims of, of the
4 plaintiff or the defenses of the defendants?

5 MR. HARDING: Thank you, Your Honor.

6 THE COURT: Any document mentioning OutServe.

7 MR. HARDING: First, I'd just like to point out we
8 actually didn't move to compel specifically on this request.
9 We're happy to talk about it right now.

10 Regarding documents concerning OutServe, first,
11 OutServe --

12 THE COURT: Well, if you didn't move to compel, it's
13 irrelevant because we're here on a motion to compel.

14 MR. HARDING: I mean, yeah. We were, we were meeting
15 and conferring on this one still, and so I'm not sure why
16 defendants brought this specific --

17 THE COURT: Well, so, do you intend -- if he says
18 we're not going to give you that information, do you intend to
19 file a motion to compel? Because I can tell you right now
20 that's overly broad.

21 MR. HARDING: And --

22 THE COURT: At this juncture, I don't even see why
23 it's relevant, but you can prove that later on during your meet
24 and confer.

25 MR. HARDING: Yeah, well --

1 THE COURT: But any document mentioning or whatever
2 OutServe is not reasonably calculated to lead to discovery of
3 evidence that will help you prove your claims in this matter.

4 MR. HARDING: We, we, we certainly are willing to, to
5 limit it to a certain extent, and we discussed that with
6 plaintiffs on our meet and confer, that we were willing to do
7 that.

8 THE COURT: In fact, from a general standpoint, any
9 request that says "any and all" is overly broad.

10 MR. HARDING: I understand, Your Honor, but with
11 regards to OutServe, OutServe is a plaintiff. For instance, if
12 the, the Department of Defense had a, a file on this interest
13 group, right, OutServe-SLDN --

14 THE COURT: What difference does it make?

15 MR. HARDING: Because it can go towards --

16 THE COURT: They can have a file that says, you know,
17 we hate those guys because they get on our nerves. How does
18 that help you prove the constitutionality facially or as it
19 applies to your client in this case?

20 MR. HARDING: Because it goes towards animus and
21 whether the government has animus towards people living with
22 HIV.

23 THE COURT: No. No, that's OutServe.

24 MR. HARDING: Who, who represents HIV individuals.

25 THE COURT: Just because they don't like OutServe

1 doesn't mean they -- and what does -- you keep using that word,
2 "animus."

3 MR. HARDING: Yes.

4 THE COURT: That doesn't mean that the policies are
5 constitutional or not.

6 MR. HARDING: I --

7 THE COURT: You know, you -- you go to work. Here's
8 an example. You go to work. There's, like, five employees.
9 You don't like one of them. You're still required to perform
10 your job, aren't you? And if performing your job requires you
11 to speak to that person on a daily basis, you either do that or
12 you get terminated. Because you don't like them is irrelevant.

13 MR. HARDING: Your Honor, I, I do think that
14 animus -- if a policy is put in place because of animus, that
15 is relevant to the determination under the Constitution.

16 THE COURT: But any and all documents mentioning
17 OutServe has absolutely nothing to do with that.

18 MR. HARDING: And as I, as I said previously we're
19 happy to -- and we didn't move to compel specifically on this
20 because we told plaintiffs -- or we told defendants that we
21 were willing to negotiate in good faith, but we do think that
22 if there is key documents on OutServe, if there are documents
23 discussing OutServe, you know, beyond just OutServe has filed
24 amicus briefs and other things in other cases, we think that
25 that would be relevant, just as documents relating to

1 Sgt. Harrison, who's a plaintiff in this case, are relevant.

2 Do you, do you want to --

3 THE COURT: Any document that they have that talks
4 about Sgt. Harrison?

5 MR. HARDING: We, we, we limited it to his --

6 THE COURT: You mean, like, his --

7 MR. HARDING: His employment record, his military
8 record --

9 THE COURT: A document in his PIF, his personal
10 information file, that says his birthday is this date right
11 here is relevant to prove the constitutionality facially or as
12 applied to Sgt. Harrison? It would not be.

13 MR. HARDING: We, we believe certainly his medical
14 record, his fitness records, his service records, because those
15 were all taken into consideration for his commissioning. So if
16 we're doing facially --

17 THE COURT: Well, then that's the request you make:
18 any and all documents that were taken into consideration in
19 regards to why he was not commissioned.

20 MR. HARDING: We actually -- we've already limited
21 number -- that one, so it may be a bad example but -- yeah.

22 THE COURT: And we couldn't limit it that way in a
23 good faith meet and confer?

24 MR. HARDING: No, we did. We limited it.

25 THE COURT: Okay.

1 MR. HARDING: Yeah. Correct, Your Honor.

2 Do you want to turn it back over to defendants, or do
3 you have -- okay.

4 THE COURT: Yes. Give me another example.

5 MR. NORWAY: Thank you, Your Honor. The, the next
6 example of the overbreadth is the request for, for documents
7 and the policies of all the other service branches.

8 THE COURT: We, we -- you weren't listening very
9 well, were you? You didn't get the hint that the Court also
10 believed that that was improper?

11 MR. NORWAY: I, I just wanted to raise that one more,
12 one more time, Your Honor.

13 And, and I think in closing, this is something you've
14 already also mentioned, but we are here on the claims that were
15 in the complaint, and that is for Sgt. Harrison, the policies
16 that affect him. They've conceded in their motion that there
17 are two policies that affected him, and that affects his -- or
18 that impacted his ability to commission, going from enlisted
19 to, to becoming a JAG officer.

20 So that's -- those are -- that's the standing, the
21 constitutional standing that OutServe has here today, and
22 that --

23 THE COURT: The Court has already included that the
24 portion of any policy concerning deployment is also relevant.

25 MR. NORWAY: Okay. Thank you, Your Honor. I have

1 nothing further.

2 MR. HARDING: Your Honor, just to just quickly
3 discuss some of defendants' statements regarding
4 proportionality --

5 THE COURT: Well, their argument is -- their argument
6 isn't as important now that the Court has determined that all
7 the documents relating to the other branches, because that was
8 a major part of their argument, and the Court has already
9 concluded that it also concurs with them that all of those
10 documents are not relevant, at least not at this juncture.

11 MR. HARDING: If you're, if you're going to agree on
12 that, the remainder -- that the requests are proportional and
13 defendants are going to, to make that -- to agree with that,
14 then we're, we're fine, but this is not -- we're not dealing
15 with -- and this goes actually back to the, the other branches
16 of the military.

17 We're not dealing with 3 million individuals, which
18 is what plaintiffs assert. We're dealing with maybe a couple
19 hundred when you consider all the military branches who deal
20 with these policies and these regulations. It's very limited.
21 There's only a couple thousand --

22 THE COURT: Once again, none of that discovery goes
23 to facial constitutionality. So it can only go to the argument
24 as applied to. As applied to can only be with the Army because
25 the Air Force, the Marines, and the Navy didn't apply this

1 policy to Sgt. Harrison.

2 MR. HARDING: I understand, Your Honor.

3 THE COURT: So it can only be the way the Army
4 applied it to Sgt. Harrison that could be unconstitutional.

5 MR. HARDING: And, and we would just refer Your Honor
6 back to the, the complaint, where we do allege not only the
7 Army's policies but also all military policies that affect
8 individuals, and let me just grab my complaint.

9 Right. OutServe represents the interests of its
10 members currently living with HIV, including Sgt. Harrison, as
11 well as those who may acquire HIV in the future.

12 THE COURT: But all the other branches have a
13 regulation, too, don't they? Is it your position that their
14 regulations are different than the Army's regulation? Because
15 all of their regulations had to be based on the DoD
16 instruction.

17 MR. HARDING: They are all different because, for
18 instance, the Navy allows --

19 THE COURT: Do you have a copy of their regulations?

20 MR. HARDING: I, I can provide it to the Court. I do
21 not have it here today.

22 THE COURT: No, I don't -- I'm just asking you do you
23 have a copy of their regulations?

24 MR. HARDING: We have copies of their regulations,
25 yes. And the Navy --

1 THE COURT: And what's the difference?

2 MR. HARDING: As Judge Brinkema said, the Navy is
3 more progressive. The Navy allows individuals with HIV to be
4 deployed in certain -- on certain vessels.

5 The Air Force is more progressive than the Army
6 because it allows individuals to be deployed in certain areas
7 beyond the continental United States, which the Army's policy
8 prohibits. So these policies are very relevant because -- and
9 we're challenging them. We're specifically --

10 THE COURT: But you have the policy. You're, you're
11 challenging the policies facially or as applied to your client.
12 The, the Navy, the Air Force, and the Marines didn't apply any
13 policy to Sgt. Harrison. So the only possible challenge you
14 can have against the Navy, Marines, and Air Force's policy is
15 facially when you have the policies.

16 What other information do you need about those
17 policies that would assist you to prove that those
18 regulations -- stop saying "policies."

19 MR. HARDING: I'm sorry, Your Honor.

20 THE COURT: Those regulations are facially
21 unconstitutional?

22 MR. HARDING: For, for example, the, when -- let's
23 use the Navy, who allows individuals living with HIV to be
24 stationed on specific vessels. If they have evidence, which we
25 believe that they do, that many of the concerns that the Army

1 say are rationally related to their policy are, in fact, not --
2 do -- are not relevant to their determination because of the
3 medical advances --

4 THE COURT: Then you ask for the same thing that I
5 said that was relevant for the Army: information and documents
6 relied upon by the Air Force, by the Navy, by the Marines in
7 adopting that particular regulation.

8 MR. HARDING: We, we will make that request, Your
9 Honor, and I think that that, that guidance is very helpful.
10 Thank you.

11 MR. NORWAY: Your Honor, I, I think I need a little
12 bit of clarification here. Earlier, the -- I understood the
13 Court to be saying that the policies of, of the other services
14 were not, were not relevant and the discovery into those
15 policies were not relevant.

16 THE COURT: For as applied to. They're, they're
17 challenging the constitutionality of the regulations that deal
18 with HIV people for every branch, which would be the second
19 plaintiff, I'm assuming, because it can't be Sgt. Harrison. It
20 would be OutServe.

21 If OutServe is arguing that the, the Navy's
22 regulation, the Marines' regulation, and the Air Force
23 regulation concerning how we commission or deploy, whatever,
24 people who have HIV, then they have the right to get
25 information concerning what was considered in coming up with

1 that regulation to determine whether or not there's a
2 legitimate government interest that justifies that regulation
3 in those other branches as well because their justification may
4 be pretext.

5 MR. NORWAY: So, so those agencies are not defendants
6 in this action, Your Honor.

7 THE COURT: But the regulation is.

8 MR. NORWAY: Well, the -- those, those are those
9 agencies' regulations. The Department of Defense's overall
10 policy has been challenged, and they are a defendant in this
11 action but --

12 THE COURT: So the second plaintiff is not
13 challenging the Marine regulation concerning it, the Air
14 Force's regulation concerning it, or the Navy's regulations
15 concerning it.

16 MR. NORWAY: They have not brought claims against
17 those agencies here.

18 THE COURT: No, that's not the answer to my question.
19 My question is, is the second plaintiff challenging the
20 constitutionality of the Navy, Marines, and Air Force's
21 regulation concerning HIV?

22 MR. NORWAY: And --

23 THE COURT: Because if they're -- if they are, then
24 the second plaintiff has the right to discover information
25 concerning on whether or not there was a justification for the

1 adoption of those regulations as they exist today.

2 MR. NORWAY: And none of those regulations, Your
3 Honor, are mentioned in the allegations that are pointed --
4 that are in their claims. Those, those are that Sgt. Harrison
5 was injured when he wasn't allowed to commission or to transfer
6 into that position.

7 THE COURT: No, I'm saying OC (inaudible). Does
8 anywhere in the complaint mention the Navy regulation, the
9 Marine regulation, or the Air Force regulation and how they
10 deal with HIV individuals?

11 MR. NORWAY: So I, I can't answer that directly --

12 THE COURT: That's --

13 MR. NORWAY: -- but I do know that the -- or I don't
14 recall the allegations in the complaint precisely, but they do
15 generally make allegations about challenging any HIV regulation
16 or policy from --

17 THE COURT: Well, if they're challenging any
18 regulation, they have the right to information upon which those
19 branches say they use to justify that regulation.

20 MR. NORWAY: Even if those branches are not
21 defendants in this action, Your Honor?

22 THE COURT: But the regulation -- when -- no -- the
23 defendants are the regulations, but they can't sue regulations.
24 They've got to sue some body or an organization, but if that
25 organization is saying we're challenging the regulation, that

1 makes the regulation itself the true defendant.

2 MR. NORWAY: Okay, Your Honor. I just wanted to --

3 THE COURT: And therefore, the justification of that
4 regulation becomes relevant because the government is required
5 in order to defend to prove that it had a legitimate basis in
6 interest, governmental, in developing that regulation, and if
7 they can show through discovery that no, you didn't, then you
8 can't defend their attack on the constitutionality of those
9 regulations.

10 MR. NORWAY: Okay. I -- we understand your -- the,
11 the position of the Court, Your Honor.

12 Another point of clarification that I, I'd like to,
13 to understand is the Court did make some comments regarding the
14 discovery into prior policies, the prior regulations, and I
15 want to get an understanding of, of what exactly that means,
16 and I, and I say that because, I mean, this is, this is a
17 large organiza- -- the Army has had these policies for many,
18 many years, and the plaintiffs have placed no limitations
19 whatsoever. We've asked them to consider limitations. They
20 haven't volunteered any.

21 HIV was, was determined to be --

22 THE COURT: Well, they're going to be required to.

23 MR. NORWAY: So, so it would be impractical and very
24 burdensome for, for defendants to attempt to locate records for
25 all of the policies going back to through the agencies.

1 THE COURT: Here's a suggestion: Why doesn't someone
2 look at the change in the development of medicine concerning
3 HIV and then focus the requests for the policies around the
4 time in which those medical opinions changed? Because that's
5 the only argument you have. I mean, if there have been no
6 significant changes in how the medical profession has dealt
7 with HIV or medicine in regards to HIV between 2010 and 2018,
8 then we don't need the information prior to that. We need to
9 have something focused around at very least Sgt. Harrison.

10 MR. NORWAY: Okay. That is a very useful guidance,
11 Your Honor. I think that we can take that and we can go back
12 to plaintiffs and negotiate.

13 THE COURT: Because I'm sure if he's been in the Army
14 for 16 years, the Army or Air Force or anybody else has
15 probably changed its policy 16 times.

16 MR. NORWAY: Yes, Your Honor.

17 THE COURT: That's just not how the military works.
18 That's not how the government works.

19 MR. NORWAY: There, there, there are -- is one other
20 point, Your Honor.

21 THE COURT: So let's -- instead of just giving that,
22 when -- what was the span of Sgt. Harrison's career?

23 MR. NORWAY: So as I understand it, Your Honor,
24 Sgt. Harrison was an active duty soldier. Around 2000, he
25 served as an active duty soldier, then he subsequently several

1 years later joined the National Guard, and he's been a National
2 Guard soldier since. So he has -- I might be wrong -- then had
3 a military career of approximately 18 years, maybe a little bit
4 more than that.

5 Is that correct?

6 MR. HARDING: That, that's correct, Your Honor. He
7 joined the military in 2000. However, antiretroviral
8 medication, which is the medication that allows for the
9 treatment of HIV, has really furthered the advancement of that,
10 that began in 1996. So we don't think that -- we think we
11 would probably need to go back further than that because of the
12 advances that occurred in the medication prior to Sgt. Harrison
13 joining the military.

14 And, and just to go to defendants' point, these
15 policies actually need -- are only examined every --

16 THE COURT: But we're challenging the
17 constitutionality of it based on Sgt. Harrison.

18 MR. HARDING: Correct, Your Honor, but if, if, if the
19 policy didn't change after -- as you've said just a few minutes
20 ago, the advancement is really the issue, when, when did
21 antiretroviral medication really allow people with HIV to live
22 normal lives, that began as early as 1996, and we mention that
23 in the complaint, and so we think that that is, is the relevant
24 time period because that is really when, when everything
25 changed for individuals living with HIV.

1 MR. NORWAY: Your Honor, we, we disagree regarding
2 the, the relevancy of medicine and, and the policies going back
3 to '95. The, the medications, in fact, protease --
4 antiprotease inhibitors --

5 THE COURT: Answer this question if you know: Is a
6 part of the decision for the underlying policies that we're
7 dealing with is the advancement in medication?

8 MR. NORWAY: I believe the advancement in, in
9 medicine was, was discussed in the 2018 congressional report,
10 and it is the basis of --

11 THE COURT: Well, tell me about what that report says
12 in regards to the justification of the, of the DoD instruction
13 and the Army regulation.

14 MR. NORWAY: The DoD instruction for accessions, Your
15 Honor?

16 THE COURT: Is that all the report talked about?

17 MR. NORWAY: So the, the report talked about the, the
18 DoD instruction that relates to the management of -- and, and
19 advancement and retention of individuals with HIV who, who have
20 laboratory evidence of HIV. It also mentions the accessions
21 policy. The accessions policy itself, I think as, as you're
22 aware, is a broad document, covers hundreds and hundreds of
23 conditions. HIV is one of them.

24 THE COURT: Did it mention commissioning and
25 deployment?

1 MR. NORWAY: The, the 2018 report, Your Honor, has a
2 specific question -- or specific section on this exact issue of
3 moving -- or of an enlisted soldier who would like to receive a
4 commission, and there is a discussion in there concerning that
5 issue. So, for instance, going back to the --

6 THE COURT: And does that section discuss the
7 development of the current policy based -- and what was the
8 basis for it, and was it based on an advancement in medicine?

9 MR. NORWAY: I don't recall standing here today if
10 that section does, but the report certainly mentions the
11 advancements of medicine and acknowledges the advancements
12 and -- that have occurred in medication.

13 THE COURT: And does it acknowledge that our policies
14 change based on the advancements of medicine?

15 MR. NORWAY: It, it specifically acknowledges that,
16 for instance, the Army is currently reconsidering its policy
17 based on the advancements.

18 THE COURT: When was the first new medication after
19 the 1996 medication introduced to treat HIV, if anyone knows?

20 MR. HARDING: I'm sorry, Your Honor, I do not know
21 that. I can provide that to you at a later date.

22 MR. NORWAY: So, so, Your -- Your Honor, I'm going to
23 take that question, maybe turn it a little bit, and I think
24 their, their claims are based on access to what would be called
25 combination antiretroviral therapy, and just as a very brief

1 synopsis, there are essentially three basic types of drugs that
2 you can use to treat HIV, and from those three drugs, what
3 they've done is they've -- they've been able to essentially
4 take them and put them into one pill, and that pill then makes
5 it more convenient and easier for people who have HIV to take
6 these medications.

7 So what I would suggest perhaps that maybe we should
8 go back and talk about if it goes to a time frame -- and I
9 don't know when the combination antiretroviral therapy drugs
10 were available, were commonly available. I think -- I do think
11 it was sometime after the '90s, but I'll have to check my --

12 THE COURT: See, what I'm trying to get at is if
13 we're trying to say we base the policy on, say, our deployment
14 portion of our policy that we believe the person was fit or
15 non-fit for deployment and the reason they were a -- an HIV
16 person was fit or non-fit was based on this medical information
17 that suggests that they can't do this or do that because of the
18 medication that they're taking in the current set of
19 circumstances, in the change -- when the change in medicine
20 occurred that then authorized them to be fit to do those other
21 things that before they could not do because they didn't have
22 medicine that can treat them well enough, that's the time frame
23 that will be important, because if the medicine changed in
24 order to allow you to then do everything that you could do that
25 a person was necessary to do to deploy but yet you didn't

1 authorize and deploy anyway an HIV person, then that goes to
2 pretext.

3 MR. NORWAY: Thank you, Your Honor. I understand
4 now.

5 There, there is one other point, Your Honor. Just to
6 preserve the record, we're going to have to order a transcript
7 of this, and I understand that it would be useful -- or, or
8 that it's appropriate in these circumstances to ask the Court
9 to, to stay -- okay. Never mind.

10 THE COURT: This doesn't make any -- I hope the
11 parties were taking copious notes because the order from this
12 Court is going to say motion granted in part and denied in
13 part.

14 MR. NORWAY: Okay. Thank you.

15 So, so, Your Honor, what I was -- what I was trying
16 to say is that we would request a stay of the portion that is
17 granted so that we may consider taking an objection.

18 THE COURT: You can -- so you're waiting for a
19 transcript?

20 MR. NORWAY: Yes, Your Honor. It's, it's, it's a --
21 we need the transcript so we can consider taking it and also --
22 and this is, this is --

23 THE COURT: So what am I staying, a motion that says
24 granted in part and denied in part?

25 MR. NORWAY: We're -- no. We're staying production

1 of, of the documents to the other services, Your Honor, and as
2 a practical matter, we, we need that stay both to consider that
3 and we also need that stay so that we can -- I can then go back
4 to my clients and, and, and understand --

5 THE COURT: So then later on, we can request an
6 extension of the discovery cutoff?

7 MR. NORWAY: Well, I need to understand what they
8 need to do to actually collect those documents because now
9 you're asking us to go out and collect from the Air Force, the
10 Navy, the Marine Corps, and, and I don't have that information
11 here today, but I do expect that it will take some time to do
12 that.

13 THE COURT: Everything with the government takes
14 time. We take a lot less time in the Eastern District of
15 Virginia. They need to be made well aware of that.

16 MR. NORWAY: Yes, Your Honor. Thank you.

17 THE COURT: We don't -- we don't stay cases for 12
18 months because the United States military or the United States
19 government feels the need to move at its own pace.

20 MR. NORWAY: And, and, and that is not what we are
21 requesting, Your Honor. It was just a request to stay the
22 production of documents that are, that are subject to the
23 Court's grant of, of the motion.

24 THE COURT: I didn't give you a time in which to
25 produce them, so what's to stay? When's discovery cutoff?

1 MR. NORWAY: The discovery cutoff is in mid-February,
2 Your Honor.

3 MR. HARDING: Sorry, Your Honor. I think our big
4 concern is that we intend to use the discovery for our experts,
5 and our expert reports are due the 24th of December. So we --
6 that's correct. We're fast approaching that cutoff is our, is
7 our major concern.

8 THE COURT: Well, that's not as much as the Court's
9 problem as it is counsel's problem because you picked those
10 cutoff dates.

11 MR. HARDING: We're happy to --

12 THE COURT: Why would you pick such an early cutoff
13 date if discovery cutoff wasn't until February?

14 MR. HARDING: Just for an opportunity to depose --

15 THE COURT: Well, the federal rules and the local
16 rules of this Court provide for a procedure by which to handle
17 that.

18 MR. HARDING: Correct, Your Honor. We're happy to
19 work with defendants. Thank you.

20 MR. NORWAY: Thank you, Your Honor.

21 THE COURT: Court is going to request -- or require
22 production by close of business December 28.

23 Anything further in this matter?

24 MR. HARDING: No, Your Honor.

25 MR. NORWAY: No, Your Honor.

1 THE COURT: All right. There appearing nothing
2 further, this Court stands in recess.

3 (Which were all the proceedings
4 had at this time.)

5
6 CERTIFICATE OF THE TRANSCRIBER

7 I certify that the foregoing is a correct transcript from
8 the official electronic sound recording of the proceedings in
9 the above-entitled matter.

10
11 /s/

12 _____
Anneliese J. Thomson

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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".

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



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

PERSONNEL AND
READINESS

AUG 27 2018

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

Dear Mr. Chairman:

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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.
Generated on 2018Apr27 RefID: D-13AF836

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."¹

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.² 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.³ 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.⁴

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.^{5,6} 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.⁷ 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.⁸ A longitudinal cohort observation study found that numerous patients with asymptomatic NCI, even with a suppressed plasma viral load, eventually developed symptomatic NCI.⁹ 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.¹⁰ 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.”¹¹ 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.¹² 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).¹³ 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.¹⁴ 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.¹⁵ 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:

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

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

- ¹ 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>
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¹¹ 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

¹² 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

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<https://www.ncbi.nlm.nih.gov/pubmed/24809629>.

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<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfCFR/CFRSearch.cfm?CFRPart=1271&showFR=1>



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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.



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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.



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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



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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



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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.



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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



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CERTIFICATE OF SERVICE

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

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