

**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' RESPONSE TO THE GOVERNMENT'S RULE 72 OBJECTIONS
TO MAGISTRATE JUDGE'S NON-DISPOSITIVE RULING**

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I. INTRODUCTION

The principal question presented by the Government's objections is: Are documents regarding the manner in which the Department of Defense ("DoD") implements its challenged regulations at the Service level likely to lead to the discovery of admissible evidence? The Magistrate Judge correctly answered "yes" to this question because Plaintiffs have mounted a broad facial challenge to the DoD regulations (*i.e.*, instructions), including those promulgated and implemented by the four Military Departments of the DoD, calling for the disparate treatment of people living with HIV. As Plaintiffs demonstrate below, their Complaint lays out this facial challenge to regulations promulgated throughout the DoD, thus showing the relevance of the discovery ordered by the Magistrate Judge. This alone is adequate to overrule the Government's objections.

In addition, there are separate grounds upon which the Government's objections could be overruled. Documents regarding how the Military Departments other than the Army implement the challenged DoD instructions provide the best opportunity to probe the validity of the justifications the DoD provides for the disparate treatment of people living with HIV embodied in its regulations. If the reasoning underlying and practices of the Military Departments with respect to their regulations belie or contradict the justifications provided by those promulgating and enforcing the challenged DoD instructions, that would be highly relevant to whether those justifications are real and are substantially or rationally related to the governmental interests they are purported to serve. Undermining the justifications for disparate treatment proffered by Defendants, by revealing their inability to withstand examination of the actual facts through the lens of the appropriate standard of review, is key to Plaintiffs' success.

The discovery requests at issue seek documents under the control of the DoD by way of the Secretary of Defense. But the Government says that only “non-parties” have objected. The Secretary of Defense, DoD, and Army have not filed objections. Because neither the DoD nor the Secretary of Defense objected to the Magistrate Judge’s ruling, they must produce responsive documents by December 28th, as the Magistrate Judge ordered. It is unclear why DoD and the Secretary of Defense did not object to the Magistrate Judge’s ruling, but the time has passed for such objections now. Because the DoD and Secretary of Defense have the legal authority to obtain all of the documents ordered to be produced by the Magistrate Judge, the Court would be within its power to rule in Plaintiffs’ favor on purely procedural grounds.

II. BACKGROUND

A. Plaintiffs’ Allegations in Their Complaint

There are two Plaintiffs in this case—Sgt. Harrison and OutServe-SLDN—and two challenges, an as-applied challenge to the decision not to commission Sgt. Harrison and a facial challenge to the DoD regulations, and their implementation at the Service level, that deny service members with HIV equal protection under the law. The Complaint sets forth Plaintiffs’ claims challenging the military’s discriminatory policies regarding people living with HIV, including regulations governing the accession, deployment, and retention of such individuals. *See* Compl. at ¶1, Dkt. 1 (“This action challenges the constitutionality of these *regulations that exclude or limit the military service of people living with HIV . . .*”) (emphasis added); *see also* ¶¶ 3, 5, 13, 30, 33, 38-39, and 78 (discussing the military’s deployment and retention policies). The regulations at issue consist in large part of Department of Defense (“DoD”) Instructions (“DoDI”), including but not limited to: (1) DoDI 6485.01 (Human Immunodeficiency Virus

(HIV) in Military Service Members);¹ (2) DoDI 6130.03 (Medical Standards for Appointment, Enlistment, or Induction into the Military Services);² (3) DoDI 6490.07 (Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees);³ and (4) DoDI 1332.45 (Retention Determinations for Non-Deployable Service Members).⁴ Pursuant to all of these policies, the DoD—a Defendant in this action—requires each of the Military Departments to implement the instructions and/or report certain information to DoD. *See* DoDI 6485.01, Encl. 2 at ¶ 4; DoDI 6130.03 § 2.3; DoDI 6490.07, Encl. 4 at ¶ 2; and DoDI 1332.45 at § 2.4.

Plaintiffs are challenging these DoD regulations as violative of the equal protection guarantees of the Constitution. Compl. Dkt. 1 ¶¶71-78. The as-applied challenge addresses the Army’s refusal to commission Sgt. Harrison as an officer. This as-applied challenge involves direct challenges to DoDI 6485.01 and Army Regulation (“AR”) 600-110, as well as challenges to the DoD instructions supporting DoDI 6485.01, such as DoDI 6490.07 and DoDI 6130.03.

In addition, Plaintiffs present a *facial* challenge to the aforementioned DoD regulations, which necessarily apply to all the Military Departments within the DoD. *See, e.g.*, Compl. Dkt. 1 ¶ 5 (discussing the “Deploy or Get Out” policy that resulted in issuance of DoDI 1332.45), ¶¶ 27-30 (explicitly citing DoDI 6485.01 and DoDI 6490.07), and ¶ 63 (discussing the DoDI

¹ DoDI 6485.01, Human Immunodeficiency Virus (HIV) in Military Service Members (June 7, 2013), available at

<http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/648501p.pdf>

² DoDI 6130.03, Medical Standards for Appointment, Enlistment, or Induction into the Military Services (May 6, 2018), available at

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf>.

³ DoDI 6490.07, Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees (Feb. 5, 2010), available at

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649007p.pdf>.

⁴ DoDI 1332.45, Retention Determinations for Non-Deployable Service Members (July 30, 2018), available at

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133245p.pdf>.

“regarding accessions,” *i.e.*, DoDI 6130.03). Plaintiffs explicitly state that application of the DoD’s policies results in discrimination broadly against service members living with HIV. *See id.* at ¶ 72. (“Defendants’ accessions policies and practices discriminate impermissibly against people living with HIV both on their face and as applied[.]”). In short, Plaintiffs have named the DoD as a Defendant in this action, and have facially challenged DoD regulations, including the Service-level iterations through which the DOD regulations are implemented in each of the four Military Departments.

B. Defendants’ Objections and Plaintiffs’ Motion to Compel

More than half the available discovery period has passed since Plaintiffs served their First Set of Requests for the Production (“RFPs”) of Documents and Things (Nos. 1-15) on Defendants on October 24, 2018. *See* Dkt. 85-6, Pls.’ First Set of RFPs to Defs. These 15 RFPs sought basic discovery regarding the military regulations that discriminate against people living with HIV, including: (1) documents DoD relied upon in writing the two reports that DoD submitted to Congress explaining DoD’s HIV-related regulations; (2) documents relied upon in writing or amending six DoD regulations that relate to the accession, deployment, or retention of people living with HIV; and (3) documents related to medical waivers or exceptions to policies granted under the aforementioned DoD policies to allow people living with HIV to enlist, commission, or deploy. *See id.*

Defendants raised numerous objections, despite guidance from this Court regarding the need to develop a “fulsome record.” Dkt. 85-5 at 16:18. Specifically, Defendants objected to:

- Providing discovery from any of the Military Departments other than the Army. *See* Dkt. 85-7 at 2.
- Providing discovery regarding any DoD Instruction other than the one ultimately identified to deny Sgt. Harrison a commission, *i.e.*, DoDI 6485.01. *See id.*
- Producing materials Defendants reviewed but did not rely on in creating the DoD reports and policies. *See id.* at Objs. to RFP Nos. 3-8, 10, and 12. [This objection

was apparently lodged in response to Plaintiffs' request for documents "indirectly" relied upon, *i.e.*, considered, by DoD or the Military Departments.]

- Producing "policy documents that have been superseded and are thus no longer in effect." *See id.* at Objs. to RFP Nos. 7-12.
- Producing information protected by the deliberative process privilege. *See id.* at Objs. to RFP Nos. 1-15.

Plaintiffs quickly sought to confer with Defendants. During the conference, Plaintiffs agreed to limit for example, the scope of documents concerning Sgt. Harrison's records, but Defendants refused to budge on their objections. Of particular relevance for the motion at hand, Defendants categorically refused to produce documents from Military Departments other than the Army. Plaintiffs promptly filed a motion to compel. Dkt. 72.

C. The Magistrate Judge's Ruling on Plaintiffs' Motion to Compel

The Magistrate Judge resolved all of Defendants' objections except for the one regarding materials withheld on the basis of the deliberative process privilege, which was not included in Plaintiffs' motion.⁵ First, with respect to materials from Military Departments other than the Army, the Magistrate Judge appropriately ordered the production of "information and documents relied upon by the Air Force, by the Navy, by the Marines in adopting that particular regulation." 11/30/18 Tr. 43:5-7, Dkt. 85-8. He explained: "If OutServe is arguing that the, the Navy's regulation, the Marines' regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information

⁵ At time their motion was filed, Plaintiffs did not know whether Defendants were going to be withholding any materials on the basis of the deliberative process privilege. Now that Defendants have done so, Plaintiffs anticipate they may need to move to compel on this issue, given that the privilege does not apply in cases involving government intent. *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 [deliberative process] privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination.").

concerning what was considered in coming up with that regulation to determine whether or not there's a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext." *Id.* 43:21-44:4.

Second, regarding regulations other than DoDI 6485.01, the Magistrate Judge also overruled Defendants' objections. He found: "If there's an issue with your deployment, there's an issue with you being commissioned," adding "it's a simple connection." *Id.* 11:2-

7. Information about Sgt. Harrison's denial of a commission "is completely relevant, and so is the information concerning deployment." *Id.* 17:6-9. The Magistrate Judge also explained to Defendants: "Well, you said you didn't want to give them any information concerning deployment, and the deployment, you don't get commissioned because you can't deploy. So information concerning deployment seems to this Court completely relevant from a discovery standpoint." *Id.* 33:8-16.

Third, with respect to materials that were "indirectly" relied upon, the Magistrate Judge agreed that materials "considered" in preparing and/or revising the DoD reports and policies must be produced. The Magistrate Judge took issue with the word "indirectly," which Plaintiffs had used in their RFPs to describe materials considered but not relied upon.⁶ *See id.* 18:13-15 ("Well, then say considered and relied upon. Don't say indirectly relied upon because I don't know what that means."). But he ultimately recognized that Plaintiffs had requested and were entitled to documents Defendants had considered in formulating their HIV-related policies. *See id.* at 43:21-44:4 ("If OutServe is arguing that the, the Navy's regulation, the Marines' regulation, and the Air Force regulation concerning how we commission or deploy, whatever,

⁶ As indicated in their objections, Defendants understood "indirectly" to mean materials reviewed but not relied upon. *See* Objs. to RFP Nos. 3-8, 10, and 12, Dkt. No. 85-7.

people who have HIV, then they have the right to get information concerning *what was considered in coming up with that regulation* to determine whether or not there's a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext." (emphasis added).

Fourth, regarding prior versions of DoD policies, the Magistrate Judge overruled Defendants' objections but also indicated that a time limitation should be imposed. *See id.* 46:12-47:9. Following the hearing, the parties agreed to limit discovery to the materials the DoD considered or relied upon for all prior versions of the relevant regulations issued since 2006. *See Ex. A, Letter from Harding at 3 (Dec. 12, 2018)*. Now, however, Defendants appear to have conditioned their agreement on the resolution of their objections to the Magistrate Judge's ruling. *See Dkt. No. 85 at 13 n.6.*

There was a final issue raised during the hearing related to waivers granted under the DoD and the Military Departments' HIV policies. The Government provisionally appeals this issue. Specifically, Defendants claim that the Magistrate Judge ruled that only "the Army's waivers and exceptions were discoverable." Dkt. 85 at 23. The Government views the Magistrate Judge's ruling too narrowly. During the hearing, the Magistrate Judge initially determined that because Harrison's as-applied challenge was applicable only to the decision of the Army, discovery should be limited to the Army. But the Magistrate Judge subsequently determined that discovery should be permitted into application of the DoDI to the various Military Departments, based on the facial challenge to those regulations. For example, the Magistrate Judge found that Plaintiffs "have the right to get information concerning what was considered in coming up with that regulation to determine whether or not there's a legitimate

government interest that justifies *that regulation in those other branches* as well because their justification may be pretext.” 11/30/18 Tr. 43:21-44:4, Dkt. 85-8 (emphasis added).

At the hearing before the Magistrate Judge, Defendants indicated they wanted to “consider taking an objection.” 11/30/2018 Tr. at 52:15-17, Dkt. 85-8. Following the ruling, the parties conferred, and Defendants would neither confirm whether they would file any objections, nor advise as to which portions of the Magistrate’s Judge ruling they might object. Ultimately, Defendants DoD, the Army, and the Secretary of Defense filed no objections. Yet Defendants’ objections to discovery responses served since that time still contain the same exact objections that have been overruled by the Magistrate Judge and remain unchallenged by Defendants. *See* Ex. B, Defs.’ Obj. to Pls.’ Second Set of RFPs (Dec. 12, 2018); Ex. C, Defs.’ Obj. to Pls. First Set of Req. for Admission (Dec. 12, 2018).

III. LEGAL STANDARDS

Review of a non-dispositive magistrate’s order is “properly governed by the clearly erroneous or contrary to law standard of review.” *Montanile v. Botticelli*, No. 1:08CV716 (JCC), 2009 WL 2378684, at *2 (E.D. Va. Jul. 28, 2009). “Only if a magistrate judge’s decision is ‘clearly erroneous or contrary to law’ may a district court modify or set aside any portion of the decision.” *Id.* Meeting this standard is “extremely difficult to justify.” *Id.* (quoting 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3069 (2d. ed. 1991)).

IV. ARGUMENT

A. The Department of Defense and Secretary of Defense Were Ordered to Produce Documents and Have Not Filed Any Objections.

Defendants DoD and the Secretary of Defense have not filed any objections to the Magistrate Judge’s ruling, thereby waiving any of their potential objections. *See* Fed. R. Civ. P. 72(a) (“A *party* may not assign as error a defect in the order not timely objected to.”) (emphasis

added). Instead, objections were purportedly filed on behalf of “non-parties,” *see* Dkt. 85 at 1, 12, although the Magistrate Judge’s Order was not directed to “non-parties.”⁷ Nor did what the Government now calls “non-parties” appear before the Magistrate Judge to lodge objections to the sought after discovery. If the Government’s characterization of the Military Departments as being “non-parties” is correct, it is unclear how they have standing to object to the Magistrate Judge’s ruling given that they did not appear before the Magistrate Judge to lodge objections in the first place.

The reality is, however, that all of the documents ordered to be produced by the Secretary of Defense and DoD are under their control. As alleged in the Complaint, Dkt. 1, ¶ 10, and admitted by Defendants in their Answer, Dkt. 62, ¶ 10, “[t]he U.S. Department of Defense is an executive branch department of the U.S. federal government comprising the office of the Secretary of Defense . . . [and] the Departments of the Army, Navy, and Air Force[.]” The Secretaries of each Military Department are, by statute, subject to the authority of the Secretary of Defense.

The Secretary of each military department, and the civilian employees and members of the armed forces under the jurisdiction of the Secretary, shall cooperate fully with personnel of the Office of the Secretary of Defense to achieve efficient administration of the Department of Defense and to carry out effectively the authority, direction, and control of the Secretary of Defense.

10 U.S.C. § 131(d); *see also* 10 U.S.C. § 8013(a)-(d) (activities required of the Secretary of the Navy which are prescribed by the Secretary of Defense); 10 U.S.C. § 9013(a)-(d) (similar provisions for Air Force).

⁷ Defendants’ counsel furthers the charade by changing its signature block to give the appearance non-parties have lodged objections. *Compare* Dkt. 53 at 18 (listing “Counsel for Defendants”) *with* Dkt. 85 at 24 (listing same as “Counsel for the Government”).

This case is therefore nothing like *Cook v. Howard*, in which a dismissed party quashed discovery requests directed to it. 484 F. App'x 805, 811-813. There is no parallel here because the Military Departments are subdivisions of DoD and are subordinate to the Secretary of Defense, who can obtain the requested documents as a matter of statutory authority. *See Walls v. Paulson*, 250 F.R.D. 48, 50 (D.D.C. 2008) (collecting cases for the proposition that “[f]ederal courts have consistently held that documents are deemed to be within the ‘possession, custody or control’ for purposes of Rule 34 if the party has . . . the legal right to obtain the documents on demand.”). The Secretary of Defense may readily obtain the documents upon request from the Military Departments he oversees. The discovery that Defendants have been ordered to produce, therefore, is not of “non-parties” as repeatedly stressed in the Government’s objections.

The documents the Magistrate Judge ordered Defendants to produce are material to the claims at issue here, as explained above and in the following sections. Defendants put them at issue. *See* Dkt. 53 at 9-10. In trying to have this case dismissed, Defendants pointed to a 2018 Report that the DoD provided to Congress to explain “how current policies reflect the evidence base and medical advanced in the field[] of HIV” *Id.* at 10 (citing H.R. Rep. No. 115-200 at 148-149 (2017)). DoD’s 2018 Report demonstrated that documents and data regarding the Military Departments’ implementation of the various DoD Instructions regarding people living with HIV were well within the Secretary’s control. *See* Dkt. 53-3 (DoD Report to Congress providing updates on HIV policies for all Military Departments). Thus, the DoD and Secretary are readily able to provide information related to the HIV policies of the various Military Departments and how they have implemented the various DoD Instructions directly challenged here. Indeed, as Plaintiffs expect, the evidence collected from the various Departments will

show that there is simply no legitimate or rational basis behind the discriminatory practices challenged in this case.

B. The Individual Military Departments' Implementations of the DoD Instructions Are Squarely Implicated by the Allegations in this Case.

1. The Complaint Adequately Puts the Secretary of Defense on Notice That the HIV Regulations Enforced by the Military Departments He Oversees Are at Issue.

The Complaint is not nearly as narrow as the Government would have this Court believe. The Government claims that the only regulations challenged by Plaintiffs are DoDI 6485.01 and AR 600-110. However, the Complaint makes clear that a number of other DoD policies and Service-level regulations are being challenged, as described above *supra* Section II.A. In particular, Plaintiffs point to DoDI 6490.07, the instruction that classifies HIV as a deployment-limiting condition, as a primary basis for DoD 6485.01, the instruction barring the accession of people living with HIV. Compl. Dkt. 1, ¶ 30 (“Lending support to those interpretations of DoDI 6485.01, Department of Defense Instruction 6490.07 specifically identifies HIV as a medical condition that limits a service member’s deployability. Dep’t of Defense, Instruction No. 6490.07 (Feb. 5, 2010”).) Similarly, the Complaint points to the then-recently announced “Retention Policy”—now subsumed by issuance of DoDI 1332.45, commonly referred to as the “Deploy or Get Out (or “DOGO”) Instruction”—as directly at issue in the case. Dkt. 1, ¶¶ 37-39. The Magistrate Judge certainly understood that the regulations and policies pertaining to deployment are integral to the challenges being mounted by Plaintiffs, (11/30/2018 Tr. 17:6-9, Dkt. 85-8), and neither Defendants nor the “non-parties” have objected to that portion of the Magistrate Judge’s ruling.

Furthermore, contrary to assertions made by the the Government, the Complaint mounts a facial challenge to the Service-level instructions of the other Military Departments within the

DoD. Dkt. 1, ¶¶ 28, 39, 72. As the Government itself has stated, “[t]he military services have established HIV-related policies consistent with these DoD instructions” and “each Service’s accession policies are all derived from DoD’s overarching policy[.]” Dkt. 85 at 5 and 17.

Recognizing this, Plaintiffs alleged that “[u]nder the regulations of both the Department of Defense and the Department of the Army, all service members living with HIV currently serving in the Army are by default non-deployable. On information and belief, *the same is true for every other branch of the Armed Forces.*” Dkt. 1, ¶ 37. They also alleged that “the Retention Policy, in tandem with existing instructions and regulations, *creates a de facto prohibition against individuals living with HIV serving in any branch of the armed forces in any capacity*, absent a special waiver allowing them to deploy.” Dkt. 1, ¶ 39. Within the single count articulated in the Complaint, Plaintiffs allege: “Thus, the *enlistment ban and service restrictions* cannot withstand any form of scrutiny and are invalid.” Dkt. 1, ¶ 78. Contrary to what the Defendants or the “non-parties” suggest, these regulations are plainly at issue in this case as set forth in the Complaint. That Sergeant Harrison’s claim is against the Secretary of Defense, the DoD, and the Army does not mean that the policies related to the treatment of those living with HIV is wholly irrelevant to this claim. And, in the prayer for relief, Plaintiffs seek an order enjoining:

Defendants, their agents, . . . and ***any other person or entity subject to their control or acting directly or indirectly in concert with them from enforcing the accessions bar or service restrictions, including by enjoining any separation discharge, adverse action, or denial of promotion, reenlistment, continuation of service, accession, or appointment because an individual is living with HIV.***

Dkt. 1, Prayer for Relief, ¶ 2 (emphases added). While it is true, by definition, that “Plaintiffs seek relief against only the Defendants,” Dkt. 85 at 15, “the Defendants” would include their agents and any other person or entity subject to their control. Defendants cannot deny that the Secretaries of the Military Departments are subject to the control of the Secretary of Defense and

thus would be bound by any judgment in this case. *See* 10 U.S.C. § 131(d); *see also* 10 U.S.C. § 8013; 10 U.S.C. § 9013.⁸

Indeed, as alleged in the Complaint, OutServe is a plaintiff in this case specifically to “represent[] the interest of its members currently living with HIV” that “are or will be adversely affected by the challenged regulations and policies.” Dkt. 1, ¶ 70. The members of OutServe are found in all branches of the military, and their presence as service members in these various branches is sufficient to establish an injury as a result of a facially discriminatory policy. Dkt. 1, ¶ 7; *see also* Dkt. 60 (denying Defendant’s motion to dismiss for failure to state a claim). It is not a “fishing expedition” to seek discovery regarding how those other branches are implementing regulations to which Plaintiff OutServe has mounted a facial challenge. A “fishing expedition” would involve a speculative⁹ inquiry to learn whether Defendants were engaged in activity that was contrary to law; but in this case, Plaintiff OutServe is asserting that the regulations implementing DoD policies in the other Services are illegal (*i.e.*, unconstitutional) on their face.

⁸ Taken to its logical conclusion, the Government’s argument would mean that the Air Force, Navy, Marines, and Coast Guard would not be bound by a ruling concluding that the Army regulation and the DoD Instruction upon which it is based are unconstitutional because their regulations are entirely irrelevant to this case. To be clear, contrary to Defendants’ implications, the departments subordinate to the Secretary of Defense would not be able to side-step the relief sought in this case.

⁹ There is nothing speculative about Plaintiffs’ claims concerning other Military Departments. Other members of Plaintiff OutServe are being harmed as result of Defendants’ discriminatory policies in the Air Force. After providing a declaration in support of Plaintiffs’ Motion for a Preliminary Injunction, this individual was notified that he will be discharged even though he was found to be physically fit for duty and his commanding officer supported his retention. Dkt. 79-1. This harsh reality stands in stark contrast with Defendants’ claim in oral argument before this Court that “[T]he current policy is not to discharge of separate the individual solely because of [their HIV status].” 9/14/18 Tr. 14:17-19, Dkt. 73-1. Apparently, the Air Force’s position lasted only so long as it was under a threat of a preliminary injunction. This unconstitutional discharge is being challenged in a case filed in this Court today. *See Roe et al. v. Defense et al.*, Case No. 1:18-cv-01565-LMB-IDD (E.D. Va. Dec. 19, 2018).

Dkt. 1, ¶¶ 37, 39, 72. Plaintiffs are not “fishing” to determine whether those policies are constitutionally problematic, and discovery requests regarding the motivation of Defendants and Defendants’ agents and/or whether the proffered justifications for the disparate treatment will withstand the appropriate level of scrutiny (discussed further below) are unquestionably relevant to those claims, as the Magistrate Judge recognized. 11/30/18 Tr. at 43:21-44:4, Dkt. 85-8. And this Court has already recognized that OutServe’s facial challenges to the aforementioned policies and regulations could continue even if Plaintiff Harrison’s claims were resolved. 9/14/18 Hr’g Tr. at 18:6-13, Dkt. 73-1.

2. The Discovery Requests at Issue Will Allow Plaintiffs to Establish That Defendants’ Proffered Justifications for the Disparate Treatment of People Living with HIV Do Not Withstand Constitutional Scrutiny.

Documents regarding how the DoD’s HIV-related instructions are implemented in the Military Departments within the DoD are likely to lead to the discovery of admissible evidence. As the Magistrate Judge reminded Defendants at the hearing regarding these requests, the standard by which the discovery requests are evaluated is not whether the documents requested will themselves be admissible at trial but, rather, whether they are likely to lead to the discovery of admissible evidence. 11/30/18 Tr. 31:6-12, Dkt. 85-8. In addition to information regarding the motivation for the Service-level regulations themselves, which would be directly relevant to the validity and adequacy of the justifications proffered by Defendants and their agents for those regulations, the discovery requests at issue would also help establish whether the justifications for the DoD Instructions themselves are valid and adequate.

The Government attempts to limit the realm of discoverable evidence by deciding for this Court the appropriate level of scrutiny to apply to the disparate treatment of people living with HIV in Plaintiffs’ equal protection claim. Dkt. 85 at 18. As the Magistrate Judge observed, that

is not how litigation or the discovery process work. 11/30/18 Tr. 31: 6-12, 32:16-22, Dkt. 85-5; *see also Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 287-89 (4th Cir. 2013) (noting with approval that “evidence adduced in future discovery proceedings might render [a different level of] scrutiny appropriate”).

Plaintiffs have alleged in good faith that Defendants’ policies with respect to service members living with HIV should be evaluated under heightened scrutiny. Compl., Dkt. 1 at ¶¶75-76; Dkt. 26 at 9-22. That claim has not been dismissed, and this Court has not determined the appropriate level of scrutiny to be applied. The portion of the transcript to which the Government cites in support of its argument that the Court has already determined rational basis is the appropriate level of scrutiny for this equal protection claim merely states that the Defendants must *at least* have a rational basis for the disparate treatment of people living with HIV and, in particular, Sgt. Harrison. 9/14/18 Tr. 16:5-17. What the Government actually seeks is summary judgment for Defendants on the open question of the standard of review under the guise of a discovery dispute. But, as the Magistrate Judge properly told the Defendants, “that sounds like an argument for trial or an argument for a motion for summary judgment,” but “[w]e’re at the discovery stage.” 11/30/18 Tr. 30:13-24. The actual motivations and intent of the decision-makers are relevant if heightened scrutiny is applied, and any animus uncovered would be relevant even under rational basis review. *See Romer v. Evans*, 517 U.S. 620, 632 (“[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (“if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a

legitimate government interest”). Therefore, while the applicable level of scrutiny is not to be decided now, it is irrelevant to whether the discovery sought by Plaintiffs is discoverable; it is discoverable under any standard.

As Plaintiffs have explained above, they have mounted facial challenges to the regulations of the Military Departments other than the Army. The Government has all but conceded that, if Plaintiffs have challenged the regulations of the other Military Departments, Plaintiffs are entitled to the discovery at issue. Dkt. 85 at 14. But even if the Court disagrees with the Magistrate Judge and decides that Plaintiffs have not challenged the Service-level regulations of the other departments, the discovery sought is relevant to the facial challenge to the DoD Instructions at issue, which includes DoDI 6485.01, DoDI 6490.07, and now DoDI 1332.45. Dkt. 1, ¶¶ 27-39. For instance, because a purported inability to provide adequate healthcare to deployed service members living with HIV is one justification for the DoD policy (Dkt. 40 at 27-28; Dkt. 43 at 27-28), documents revealing that the Navy has determined it can relatively easily provide care to members of the Navy deployed across the world will assist Plaintiffs in demonstrating that the proffered justification is not substantially or rationally related to the governmental interest in troop readiness.

Similarly, because purported restrictions on the ability to deploy are a key reason the DoD does not allow people to enlist or commission under DoDI 6485.01 (Dkt. 40 at 30)), the extent to which the various Military Departments are granting deployment waivers to service members living with HIV is important information for the Plaintiffs to collect. The same arguments could be made with respect to other justifications offered by Defendant DoD, such as the purported risk of transmission in a deployed environment, the alleged risk to the blood supply, or the barriers presented by Status of Forces agreements. Dkt. 43 at 26-30. If Plaintiffs

are going to meet their burden to show the Government's justifications are inadequate and do not pass constitutional muster, Plaintiffs must be provided the opportunity to probe and test those justifications against the motivations and practices that Defendant DoD has approved, permitted, and carried out in the other branches under the challenged DoD Instructions.

C. The Requested Discovery Is Proportional to the Needs of this Important Case, and Defendants Have Not Carried Their Burden to Show Otherwise.

In terms of proportionality, the Government offers nothing more than attorney argument to contend that the discovery is disproportionate. But, once relevance is established, the entity seeking to avoid discovery bears the burden of showing that discovery should be denied. *See, e.g., Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012) (“the burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted”); *Desrosiers v. MAG Industrial Automation Sys., LLC*, 675 F.Supp.2d 598, 601 (D. Md. 2009) (explaining that where a prima facie showing of discoverability has been made by the party seeking discovery, “the burden shifts ... to the resisting party to show ‘lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption of broad discovery’”) (citations omitted). The Government's vague attorney argument about disproportionate discovery simply does not cut the mustard.

The Government offers the Court no real insight into the burden it claims the requested discovery places upon it. But the Government tried to leave an impression upon the Magistrate Judge. Defendants made the preposterous claim that Plaintiffs' requests would have them searching for documents from “nearly three million military and civilian employees.” Dkt. 78 at 16. During the hearing on Plaintiffs' motion, Defendants argued that the requests required them

to “search through all corners of the military.” 11/30/18 Tr. 29:12-16. Defendants have retreated from their hyperbole but still fail to offer anything concrete about the burden involved. Certainly, not every military and civilian employee has been involved with the setting of the Defendants’ policies regarding the treatment of service members living with HIV. The Court is therefore only left with vague claims of disproportionate discovery.

That the DoD has a number of regulations targeting people living with HIV and impacting their ability to serve, and that those policies get commented on by various people, and undergo revisions along the way, does not make collecting the documents disproportionate to the needs of this case. Those regulations are squarely at issue in this case. And it is Plaintiffs’ position that these regulations have failed to keep up with medical advances over the last 20 years and have done so in a manner that results in discrimination against service members living with HIV. Plaintiffs believe that these documents will bear that out. On this record, Defendants cannot possibly have met their burden to show that discovery is disproportionate to the needs of this important case involving “significant issues.” 9/14/2018 Tr. at 16:8-17, Dkt. 85-5.

V. CONCLUSION

Plaintiffs have already agreed to limit the timeframe of certain requests to 2006 and later, as described above, and will continue to engage with the Government to reach appropriate compromises when provided the opportunity. The solution, however, to the alleged problem in terms of completing discovery according to the scheduling order in this case is certainly not to categorically refuse to produce documents from other Military Departments, stonewall Plaintiffs on just about every front, and complicate the discovery process at every turn. Plaintiffs are working hard to move this case along according to the Court’s schedule, and now the Government must be required to do the same.

For the foregoing reasons, Plaintiffs request that this Court affirm the Magistrate Judge's ruling.

Dated: December 19, 2018

Respectfully submitted,

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: December 19, 2018

Respectfully submitted,

/s/ Andrew R. Sommer
Andrew R. Sommer

Exhibit A



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December 12, 2018

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

Rob, Nate, Carrie, & Trent:

We write to follow up on our meet and confer call yesterday, December 10, and memorialize what was discussed and provide responses to any outstanding issues.

I. Modifying Expert Dates

As Judge Davis recommended, the parties met and conferred about moving expert dates in light of the Court's production deadline. The Government's initial position is that, under Judge Davis' Order, all that it is required to produce is the other branches HIV regulations and this material would not be necessary for expert reports. Plaintiffs disagree and offered to provide citations to the transcript were that position is refuted:

Regarding waivers, "So then you're going to the justification aspect of whether or not their concerns or whatever why they, why they adopted the

instruction and the regulation is legitimate government interest.
MR. HARDING: Correct, Your Honor.
THE COURT: All right. Tr. 26:3-8.

“If OutServe is arguing that the, the Navy’s regulation, the Marines’ regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information concerning *what was considered in coming up with that regulation to determine whether or not there’s a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext.*” Tr. 43:21-44:4 (emphasis added).

[T]he justification of that regulation becomes relevant because the government is required in order to defend to prove that it had a legitimate basis in interest, governmental, in developing that regulation, and if they can show through discovery that no, you didn't, then you can't defend their attack on the constitutionality of those regulations. Tr. 46:3-9.

Additionally, at the Government’s request, Plaintiffs provide the following proposed schedule for experts that will allow the experts to consider the material produced by the Government:

- Plaintiffs’ reports – January 9, 2019
- Defendants’ reports – January 30, 2019
- Rebuttal – February 6, 2019

Plaintiffs intend to call 3-4 experts.

III. 30(b)(6) Depositions Deadline

The Government requested that the noticed 30(b)(6) deposition be rescheduled to January 21, 2019. The Plaintiffs do not agree to the Defendants’ proposal because the deposition should occur prior to the deadline for expert reports, which may necessitate supplementing reports. Plaintiffs remain willing to find an alternative date prior to the date expert reports are due.

IV. Errors in Initial Production

The parties discussed several errors in Defendants’ initial production. Defendants noted that the “File Unreadable / Technical Issue” emails are encrypted and the Government is working to unencrypt those emails and include them in subsequent productions. Plaintiffs also informed the Government that they believed there was an error in the metadata in the production because the “extracted text” was still visible in withheld documents. The Government believed this was in error and Plaintiffs agreed not to

review the extracted text from the production until new data can be provided. Plaintiffs confirm that they will return the DVD containing the load file and delete all copies.

Additionally, Plaintiffs noted that many documents were withheld as non-responsive. The Government explained that these were actually privileged communications that did not need to be logged consistent with the Parties' Protective Order. Plaintiffs requested and the Government agreed that these documents will be marked privileged (but not logged) in the future instead of marked non-responsive.

V. Deliberative Process Privilege

Each party stated their position on the deliberative process privilege. The Government stated that they originally intended to produce documents on December 15, but, because December 15 is a Saturday, the Government would produce on December 14 or December 16. Plaintiffs agreed that December 16 was acceptable. The Government stated they thought it would be best to table the issue until after a more fulsome production has occurred. Plaintiffs recognized the benefit of waiting for additional production, but noted the need to get through discovery quickly and that they may need to raise this with the Court sooner rather than later.

VI. Objections to Interrogatories

Plaintiffs noted that the Government waived their APA objection because it wasn't raised in the initial objections or at oral argument before Judge Davis. The Government is continuing to object under the APA to preserve the issue, but will not withhold documents based on this objection. Plaintiffs believe many of the Government's objections fly in the face of Judge Davis' ruling. The Government cannot at this time state whether it will object to the Magistrate's ruling for certain, and, if it does, the extent of the objections. However, the Government stated that it would not object to the Magistrate's ruling that documents relating to the regulation(s) regarding deployment (DoDI 6490.07) are discoverable. The Government stated it will produce documents and respond to interrogatories consistent with any objections it files with Judge Brinkema.

Regarding their sub-part objection, the Government noted that it will likely not respond to some of the interrogatories based on its sub-part objection. The Government suggested that Plaintiffs prioritize their interrogatories, which Plaintiffs have done. For purposes of this prioritization, the Government should ignore the portion of the interrogatories asking for the identification of documents and should answer the interrogatories in the following order: 1-11, 16-23, 13, 15, 12, and 14. Plaintiffs are still contemplating moving to compel based on the government's sub-part objections.

VII. Time Limitation on Versions

Based on the Government's representation regarding the cycles under which the HIV-related regulations and policies are reviewed, the Plaintiffs assent to limiting the discovery regarding prior versions of regulations and policies to 2006 and later. Plaintiffs note, however, that their claims do not hinge upon the availability of single tablet regimens (STRs) to treat HIV, but rather on the relative ease of providing and adhering to most, if not all, of the antiretroviral therapy regimens currently prescribed to members of the military.

WINSTON
& STRAWN
LLP

December 12, 2018
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Sincerely,

John W.H. Harding
John W.H. Harding

Exhibit B

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

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

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

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure and 34(b), Defendants, James N. Mattis, in his official capacity as Secretary of Defense, the Department of Defense (together, the “Department of Defense”) and Dr. Mark T. Esper, in his official capacity as Secretary of the U.S. Army (“U.S. Army”) (collectively, “Defendants”), through undersigned counsel, note the following objections to Plaintiffs’ Requests for Production of Documents and Things to Defendants (Nos. 1-15).

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.

Additionally, Defendants hereby reaffirm that the Administrative Procedure Act provides the proper vehicle for Plaintiffs' constitutional challenges to agency action, including agency policies, and therefore Plaintiffs' claims should be reviewed by the Court on an administrative record and discovery should not be permitted. *See* 5 U.S.C. § 706.

**OBJECTIONS APPLICABLE TO DEFINITIONS AND INSTRUCTIONS
THAT PLAINTIFFS STATE WILL APPLY TO EACH REQUEST**

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

2. 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 U.S. 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. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and responding to requests for that information would impose a significant burden on these Military Departments.

3. 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 U.S. 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. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and responding to requests for that information would impose a significant burden on these Military Departments. Defendants further object further to Plaintiffs’ Definition No. 4 as overly broad and unduly burdensome to the extent that it encompass all “current or former officials, subordinates, employees, contractors, agents, and attorney.” The Department of Defense is a large, worldwide organizations with millions of employees. The U.S. Army alone is engaged in over 140 countries around the world, to include combat operations in Afghanistan and Iraq. There is no way to gather information or records from every military unit, every Navy ship, every Air Force wing, and every Coast Guard cutter. And the time, expenses, and effort to conduct such a worldwide search is not proportionate to the needs of this case.

4. Defendants object to Definition No. 10 to the extent it seeks drafts or any other information or 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.

5. Defendants object to Definition No. 11 to the extent it seeks drafts or any other information or 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.

6. Defendants object to Definition No. 12 to the extent it seeks drafts or any other information or 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.

7. Defendants object to Definition No. 13 to the extent it seeks drafts or any other information or 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.

8. Defendants object to Definition No. 14 to the extent it seeks drafts or any other information or 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 14 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. 17 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 prearranged or not, formal or informal.” Defendants also object to this definition on the ground that the category of information it seeks is overly broad and

unduly burdensome given the size of the organizations identified by Plaintiffs and the time period encompassed by the interrogatories.

10. Defendants object to Definition No. 20, 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.

11. Defendants object to Definition No. 22 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. 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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 it is overly broad and unduly burdensome because it seeks information about Defendant’s policies other than the current version of AR 600-110, in effect at the time of plaintiff Harrison’s alleged injury, and therefore does

not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the basis that it is overly broad and unduly burdensome as to "all documents and communications reviewed or relied upon...indirectly" and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrase "reviewed or relied upon...indirectly" is vague and ambiguous.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 it is overly broad and unduly burdensome to the extent it seeks the requested documents from any entity other than the author of the DoD 2018 Report to Congress. Any such documents are duplicative to those that will be produced from the author of the report and therefore the request does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, the documents sought by this request are duplicative of the documents sought by Plaintiffs' Request for Production No. 4. *See* Plaintiffs' First Set of Requests for Production of Documents and Things to Defendants.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 it is overly broad and unduly burdensome as

to “all documents that support DoD’s assertion” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request to the extent that it seeks documents from any entity other than the author of the DoD 2018 Report to Congress as that information would be duplicative and therefore the request does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, the documents sought by this request are duplicative of the documents sought by Plaintiffs’ Request for Production No. 4. *See* Plaintiffs’ First Set of Requests for Production of Documents and Things to Defendants. Defendants further object that the phrase “documents that support DoD’s assertion” is vague and ambiguous.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome to the extent it seeks the requested documents from any entity other than the author of the DoD 2018 Report to Congress. Any such documents are duplicative to those that will be produced from the author of the report and therefore the request does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, the documents sought by this request are duplicative of the documents sought by Plaintiffs’ Request for Production No. 4. *See* Plaintiffs’ First Set of Requests for Production of Documents and Things to Defendants. Defendants further object to this request on the ground that the phrase “to prepare the DoD 2018 Report to Congress” is vague and ambiguous.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that

discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 it is overly broad and unduly burdensome as to “all documents and things reviewed or relied upon...indirectly” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the basis that it is overly broad and unduly burdensome as to “DoD’s policies pertaining to HIV” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, the documents sought by this request are duplicative of the documents sought by Plaintiffs’ Request for Production No. 8 because the purpose of the Accession Medical Standards Working Group is to consider DoDI 6130.03. *See* Plaintiffs’ First Set of Requests for Production of Documents and Things to Defendants. Defendants further object to this request on the ground that the phrases “reviewed or relied upon...indirectly,” “concerning,” and “DoD’s policies pertaining to HIV” are vague and ambiguous.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the request embraces the primary medical records for service members over an 18 year period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy

Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrases “diagnosed as HIV positive” and “contingency deployment” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence

of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments concerning medical evaluations performed for service members” embraces the primary medical records for service members over an unlimited time period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrases “documents concerning medical evaluations,” “concerning,” and “living with HIV” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments related to medical suitability screenings for service members" embraces the primary medical records for service members over a six year period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191,

100 Stat. 2548. Defendants further object to this request on the ground that the phrases “documents related to medical suitability screenings” and “living with HIV” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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).

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments regarding any medical evaluations or waivers sought” embraces the primary medical records for service members over an unlimited time period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrases “documents regarding any medical evaluations or waivers” and “living with HIV” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

DOCUMENT REQUEST NO. 25

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and 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 information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrases "concerning HIV policy" and "HIV incidence" are vague and ambiguous.

DOCUMENT REQUEST NO. 26

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants also object to the extent this request seeks to require Defendants to create or otherwise produce documents not already in existence. *See* Fed. R. Civ. P. 34. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for

“[d]ocuments sufficient to show the total number of battlefield transfusions” embraces the primary medical records for service members over an 18 year period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrase “battlefield transfusions” is vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *See* Defs.’ Opp. to Pls.’ Mot. For Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Defendants also object to the extent this request seeks to require Defendants to create or otherwise produce documents not already in existence. *See* Fed. R. Civ. P. 34. Defendants further object to this request on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the approximate percentage of service members with AB-negative blood and...with AB-positive blood” embraces the primary medical records for service members over an unlimited time period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and

irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object that this request is overly broad and unduly

burdensome to the extent it seeks documents that are classified or otherwise sensitive. In addition, this request is overly broad and unduly burdensome because it potentially encompasses agreements with numerous foreign states where there is no current or anticipated prospect of deployment. Defendants further object to this request on the ground that the phrases “provisions that prohibit deployment,” “concerning,” and “based on an HIV diagnosis” are vague and ambiguous.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that

it is overly broad and unduly burdensome because it is not limited to a reasonable and relevant period of time and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrases "policies and programs," "regarding," "prophylactic medications," and "medications for prophylaxis of malaria" are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome as to “all documents concerning” deployment decisions for any “chronic or intermittent medical conditions other than HIV that typically require taking medication on a regular basis,” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). It is neither relevant to this matter nor practicable to review the records of the more than 50,000 service members that are deployed at any given time over an unlimited period of time. Moreover, a request for “[a]ll documents concerning Defendants’ decisions to allow service members to deploy with chronic or intermittent medical conditions” embraces the primary medical records for service members over an unlimited time period, requiring a search of potentially thousands of individual medical records. Thus, this request impinges upon the personal privacy of potentially thousands of current and former service members. Defendants object to producing medical records from any individual other than Plaintiff Harrison because such records are covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548. Defendants further object to this request on the ground that the phrases “chronic or intermittent medical conditions,” “typically,” “concerning,” and “taking medication on a regular basis” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and

defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome as to "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,” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrases “chronic or intermittent medical conditions,” “typically,” “concerning,” “medical conditions requiring hormone replacement therapy,” and “taking medication on a regular basis” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome as to “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,” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrases “contingency deployment,” “chronic or intermittent medical conditions,” “typically,” “concerning,” “medical conditions requiring hormone replacement therapy,” and “taking medication on a regular basis” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome as to "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," and therefore does not seek information that is both relevant to any party's claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrases "contingency deployment," "chronic or intermittent medical conditions," "typically," "concerning," and "medical monitoring" are vague and ambiguous. Defendants also object to this

request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence of HIV. *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 on the basis that it is overly broad and unduly burdensome as to "All documents concerning policies allowing service members to deploy with a chronic or intermittent medical condition that

typically requires medical monitoring,” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object to this request on the ground that the phrases “contingency deployment,” “chronic or intermittent medical conditions,” “typically,” “concerning,” and “medical monitoring” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

DOCUMENT REQUEST NO. 35

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 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 U.S. 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 have laboratory evidence

of HIV. *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 on the basis that it is overly broad and unduly burdensome as to “all documents concerning past, present, and potential changes to policies,” and “the accession or deployment of service members with diabetes,” and therefore does not seek information that is both relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Defendants further object that production of past policies concerning diabetes is neither relevant nor proportional to the needs of this case because there is no evidence that the treatment of diabetes has changed. Defendants further object to this request on the ground that the phrases “potential changes,” “policies regarding the accession...of service members with diabetes,” “concerning,” and “policies regarding the... deployment of service members with diabetes” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants

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 object to this request as a premature contention request and also to the extent it seeks to impose obligations greater than those set forth in Federal Rule of Civil Procedure 26(a) and 26(b) and the Court's scheduling order. Defendant further objects to this request on the ground that "rely" is vague and ambiguous.

DATE: December 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on December 12, 2018, to the following counsel of record via electronic mail:

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Exhibit C

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

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

**DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ FIRST SET OF
REQUESTS FOR ADMISSION TO DEFENDANTS (NOS. 1-24)**

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 36, Defendants, James N. Mattis, in his official capacity as Secretary of Defense, the Department of Defense (together, the “Department of Defense”) and Dr. Mark T. Esper, in his official capacity as Secretary of the U.S. Army (“U.S. Army”) (collectively, “Defendants”), through undersigned counsel, provide the following objections to Plaintiffs’ First Set of Requests for Admissions to Defendants (Nos. 1-24). In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Additionally, Defendants hereby reaffirm that the Administrative Procedure Act provides the proper vehicle for Plaintiffs’ constitutional challenges to agency action, including agency policies, and therefore Plaintiffs’ claims should be reviewed by the Court on an administrative record and discovery should not be permitted. *See* 5 U.S.C. § 706.

**OBJECTIONS APPLICABLE TO DEFINITIONS AND INSTRUCTIONS
THAT PLAINTIFFS STATE WILL APPLY TO EACH REQUEST**

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

2. 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 U.S. 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 have laboratory evidence of HIV infection. *See* Defs.' Opp. to Pls.' Mot. For Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and responding to requests for that information would impose a significant burden on these Military Departments.

3. 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 U.S. 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 have laboratory evidence of HIV infection. *See* Defs.' Opp. to Pls.' Mot. For Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no

bearing on this case and responding to requests for that information would impose a significant burden on these Military Departments. Defendants further object further to Plaintiffs' Definition No. 4 as overly broad and unduly burdensome to the extent that it encompass all "current or former officials, subordinates, employees, contractors, agents, and attorney." The Department of Defense is a large, worldwide organizations with millions of employees. The U.S. Army alone is engaged in over 140 countries around the world, to include combat operations in Afghanistan and Iraq. There is no way to gather information or records from every military unit, every Navy ship, every Air Force wing, and every Coast Guard cutter. And the time, expenses, and effort to conduct such a worldwide search is not proportionate to the needs of this case.

4. Defendants object to Definition No. 10 to the extent it seeks drafts or any other information or 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.

5. Defendants object to Definition No. 11 to the extent it seeks drafts or any other information or 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.

6. Defendants object to Definition No. 12 to the extent it seeks drafts or any other information or 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.

7. Defendants object to Definition No. 13 to the extent it seeks drafts or any other information or 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.

8. Defendants object to Definition No. 14 to the extent it seeks drafts or any other information or 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 14 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. 17 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 prearranged or not, formal or informal.” Defendants also object to this definition on the ground that the category of information it seeks is overly broad and unduly burdensome given the size of the organizations identified by Plaintiffs and the time period encompassed by the requests for admissions.

10. Defendants object to Definition No. 20, 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.*

11. Defendants object to Definition No. 22 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 REQUEST 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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 as overbroad, vague, and ambiguous because it is not limited to any particular timeframe or particular attempt to commission as an officer, and it is therefore unclear as to what event the request is referring.

REQUEST FOR ADMISSION NO. 2

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an

administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 as overbroad, vague, and ambiguous because it is not limited to any particular timeframe or particular attempt to commission as an officer, and it is therefore unclear as to what event the request is referring.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 as overbroad, vague, and ambiguous because it is not limited to any particular timeframe or particular attempt to commission as an officer, and it is therefore unclear as to what event the request is referring.

REQUEST FOR ADMISSION NO. 4

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the use of the undefined term "waivers" is vague and ambiguous. Defendants also object to this request because the phrase "medical conditions other than HIV" is overly broad. The Department of Defense instruction ("DoDI") that provides guidance to the military service for the appointment, enlistment, or induction of personnel, DoDI 6130.03, identifies hundreds of conditions that, by virtue of a current

diagnosis or a verified past medical history, presumptively disqualify an individual from military service. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

REQUEST FOR ADMISSION NO. 5

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because the use of the terms “less than 400 copies of HIV RNA per milliliter,” “considered,” and “virally suppressed” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion or refer to a standard adopted or accepted by a particular organization. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants' to disclose such testimony.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because the use of the terms “less than 48-50 copies of HIV RNA per milliliter,” “considered,” “undetectable,” and “viral load” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion or refer to a standard adopted or accepted by a particular organization. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants

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 object to this request because the terms “undetectable,” “viral load,” “essentially no risk,” and “sexually transmitting” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

REQUEST FOR ADMISSION NO. 8

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “no demonstrated risk,” “transmission of HIV,” and “normal daily activities” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

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.”

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “undetectable,” “viral load,” “theoretical risk,” “transmitting,” and “blood splash” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

REQUEST FOR ADMISSION NO. 10

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “appropriate health care,” “chronic,” and “manageable” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “living with HIV,” “undetectable,” “viral load,” “adherence,” and “and appropriate antiretroviral therapy regimen” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because "relatively weak and unstable," and "difficult to transmit" are vague and ambiguous phrases. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants' to disclose such testimony.

REQUEST FOR ADMISSION NO. 13

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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

object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the use of the undefined term “waivers” and the phrase “individuals with HIV” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

REQUEST FOR ADMISSION NO. 14

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants

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 object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the use of the undefined term “waivers” and the phrase “individuals with HIV” are vague and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of 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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an

administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the use of the undefined term “waivers” is vague and ambiguous. Defendants also object to this request because the phrase “medical conditions other than HIV” is overly broad. The Department of Defense instruction (“DoDI”) that provides guidance to the military service for the appointment, enlistment, or induction of personnel, DoDI 6130.03, identifies hundreds of conditions that, by virtue of a current diagnosis or a verified past medical history, presumptively disqualify an individual from military service. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of 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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. 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 because the use of the undefined term "waivers" is vague and ambiguous. Defendants also object to this request because the phrase "medical conditions other than HIV" is overly broad. The Department of Defense instruction ("DoDI") that provides guidance to the military service for the appointment, enlistment, or induction of

personnel, DoDI 6130.03, identifies hundreds of conditions that, by virtue of a current diagnosis or a verified past medical history, presumptively disqualify an individual from military service. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of 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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague and ambiguous because it does not include a reasonable time limit and because it does not identify the waiver authority from whom the request seeks an admission. Defendants object to this request 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 U.S. 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 have

laboratory evidence of HIV infection. *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 because Plaintiff Harrison has not applied for, and has not been denied, a waiver or an exception to policy to deploy. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV. Defendants further object to this request because the use of the undefined term “waivers” and the phrase “certain geographic areas” are vague and ambiguous.

REQUEST FOR ADMISSION NO. 18

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “blood type,” “impacts,” and “range of potential recipients” are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants’ to disclose such testimony.

REQUEST FOR ADMISSION NO. 19

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because "blood type," "impacts," and "range of potential donors" are vague and ambiguous, and because the request does not identify the person or persons who hold the stated opinion. Defendants further object to this request because it calls for expert testimony before the court-ordered deadline for Defendants' to disclose such testimony.

REQUEST FOR ADMISSION NO. 20

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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

object to this request because the phrase “medical conditions other than HIV” and the term “preclude” are undefined, vague, and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

REQUEST FOR ADMISSION NO. 21

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague, ambiguous, and overly broad because it does not include a reasonable time limit. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the phrases “medical conditions other than HIV” and “precluded from donating,” and “have been deployed” are undefined, vague, and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military’s accession policy for individuals with laboratory evidence of HIV.

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.

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs’ claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request because “adequate screening measures,” “protect,” and “blood supply” are undefined, vague, and ambiguous.

REQUEST FOR ADMISSION NO. 23

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague, ambiguous, and overly broad. The request does not include a reasonable time limit. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the terms or phrases "deployed," "often," "required to comply," and "anti-malaria chemoprophylaxis measures" are undefined, vague, and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

REQUEST FOR ADMISSION NO. 24

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

OBJECTIONS: Defendants object to this request on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants 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 object to this request as vague, ambiguous, and overly broad. The request does not include a reasonable time limit. Defendants object to this request 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 U.S. 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 have laboratory evidence of HIV infection. *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 because the "anti-malaria chemoprophylaxis measures," and "frequently prescribed" are undefined, vague, and ambiguous. Defendants also object to this request as overbroad, disproportionate to the needs of the case, and irrelevant to the applicable claims and defenses in this case relating to the facial and as-applied constitutional challenges to the military's accession policy for individuals with laboratory evidence of HIV.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on December 12, 2018, to the following counsel of record via electronic mail:

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