

**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' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
PRODUCTION OF INTERROGATORY RESPONSES**

Plaintiffs' Motion to Compel Production of Interrogatory Responses, ECF No. 82, should be denied. After an extensive meet-and-confer process, which began with a conference call on December 10, 2018 and continued by letter and email correspondence through December 13, 2018, the parties discussed—and reached impasse on—only one issue raised in Plaintiffs' motion: Whether a number of Plaintiffs' interrogatories contain at least two discrete subparts. Plaintiffs improperly combined requests for information with requests for documents in some interrogatories, and included multiple discrete questions requiring separate and independent inquires within other interrogatories. Defendants timely objected to these tactics because it is well-established that such litigants "cannot evade th[e] presumptive limitation" of Rule 33 "through the device of joining as 'subparts' questions that seek information about discrete separate subjects." Advisory Committee Notes (1993) to Fed. R. Civ. P. 33(a). For the reasons stated herein, the Court should find that the Plaintiffs served in excess of 30 interrogatories, including all discrete subparts, and that the Defendants have responded to the first 30 interrogatories propounded by Plaintiffs. Therefore, Plaintiffs' motion to compel on that ground should be denied.

Plaintiffs' motion, however, is not limited to the issue of discrete subparts. Surprisingly, Plaintiffs also moved to compel responses to certain contention interrogatories. Because Plaintiffs did not meet and confer with Defendants concerning their contention interrogatories, their motion on that ground is prohibited under Eastern District of Virginia Local Rule 37(E) and should be denied. Moreover, Defendants did respond to these contention interrogatories to the extent possible at the current stage of the litigation. Had Plaintiff not rushed to compel responses before Defendants' responses were even due, it would have been unnecessary to even bring this issue before the Court.

I. Procedural Background

Plaintiffs served their First Set of Interrogatories, designated Interrogatories 1-23, on November 16, 2018. ECF No. 84-1. Defendants timely served objections pursuant to the local rules. Objs., ECF No. 84-2. Defendants objected to Plaintiffs' interrogatories on a number of grounds, including privilege, relevance, overbreadth, vagueness, ambiguity, prematurity, and exceeding the number of interrogatories permitted by the Court's Scheduling Order. *Id.*

A. The Parties' Meet and Confer Process

The parties met and conferred on December 10, 2018 in a conference call. During that call, Defendants informed Plaintiffs that they would respond to Plaintiffs' interrogatories up to the limit of 30 interrogatories, including all discrete subparts. Plaintiffs demanded that Defendants respond to all interrogatories fully. As a way to narrow the number of interrogatories in dispute, Defendants offered to respond to the interrogatories in any order Plaintiffs preferred. Defendants also suggested that Plaintiffs could withdraw the separate requests for documents contained in each of the first 11 interrogatories.

The next morning, Defendants followed up on the meet and confer with an email memorializing several issues raised by Defendants on the call. Email from Dec. 11, 2018, attached as Exh. A. Plaintiffs responded by sending Defendants a letter memorializing the agreements and disagreements reached in the conference on December 10. Pls.' Letter, ECF No. 84-4. In their letter, Plaintiffs agreed that Defendants could respond to the interrogatories as follows: 1-11, 16-23, 13, 15, 12, and 14. *Id.* Plaintiffs' letter also directed Defendants to "ignore the portion of the interrogatories asking for the identification of documents." *Id.* Later on December 12, 2018, Plaintiffs sent several emails demanding that Defendants withdraw their objections to the many discrete subparts in Plaintiffs interrogatories and "answer all

interrogatories fully.” Email Correspondence, Dec. 12-13, 2018, attached as Exh. B. Defendants declined to withdraw their objections and suggested Plaintiffs reconsider moving to compel until after Defendants’ responses to Plaintiffs interrogatories were served on December 17, 2018. *Id.* Defendants also asked for clarification of the inconsistency between Plaintiffs’ letter instructing Defendants to “ignore the portion of the interrogatories asking for the identification of documents” and Plaintiffs’ email demanding that Defendant’s “answer all interrogatories fully.” *Id.* Plaintiffs responded that they “expect[ed] a complete response to every interrogatory,” and would “move to compel tomorrow if Defendants refuse[d] to answer all of the interrogatories based on this objection.” *Id.* On December 14, 2018, prior to the service of Defendants’ responses to Plaintiffs’ interrogatories, Plaintiffs moved to compel. Mot. to Compel, ECF No. 82.

At no point during this extended meet and confer process, including a lengthy conference call, a letter memorializing the call, and multiple days of email correspondence, did Plaintiffs raise the issue of Defendants’ objections to Plaintiffs’ contention interrogatories.

B. Defendants’ Timely Served Interrogatory Responses

Defendants served responses to Plaintiffs’ interrogatories on December 17, 2018, a single business day after Plaintiffs filed their motion. In those responses, Defendants provided responses to Interrogatories 1-11, including identification of responsive documents as requested, and Interrogatories 16-23, for a total of 30 interrogatories, including all discrete subparts. Defs.’ Resp. and Objs. to Pls.’ Interrogatories, attached as Exh. C.¹ Defendants properly withheld information responsive to the interrogatories designated 12-15 because those interrogatories

¹ Defendants’ responses to these interrogatories were made subject to other objections not challenged by Plaintiffs in this motion. *See* Objs., ECF No. 84-2.

exceed the 30 interrogatory (including all discrete subparts) limit imposed by the scheduling order, and because those interrogatories are objectionable on other grounds. *See* Exh. C pp. 47-55. Defendants provided responses to Plaintiffs' contention interrogatories, in particular Interrogatories 17-19, on the basis of the information available at this stage of discovery. *See* Exh. C pp. 33-40.

The table below summarizes Defendants' final objections as to the discrete subparts in Plaintiffs' interrogatories. In responding to Plaintiffs' interrogatories, Defendants counted discrete subparts as follows, in the order preferred by Plaintiffs, and did not respond beyond the point at which 30 discrete subparts was reached.

Interrogatory Number	Number of Discrete Subparts	Cumulative Total of Discrete Subparts
Interrogatory No. 1	2	2
Interrogatory No. 2	2	4
Interrogatory No. 3	2	6
Interrogatory No. 4	2	8
Interrogatory No. 5	2	10
Interrogatory No. 6	2	12
Interrogatory No. 7	2	14
Interrogatory No. 8	2	16
Interrogatory No. 9	2	18
Interrogatory No. 10	2	20
Interrogatory No. 11	2	22
Interrogatory No. 16	1	23
Interrogatory No. 17	1	24
Interrogatory No. 18	1	25
Interrogatory No. 19	1	26
Interrogatory No. 20	1	27
Interrogatory No. 21	1	28
Interrogatory No. 22	1	29
Interrogatory No. 23	1	30
Interrogatory No. 13	20	50
Interrogatory No. 15	15	65
Interrogatory No. 12	15	80
Interrogatory No. 14	75	155

II. Legal Standard

Federal Rule of Civil Procedure 33(a)(1) provides that “a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.” Although the Rule does not define the term “discrete,” Courts in the Fourth Circuit and D.C. Circuit have generally tested interrogatory subparts by whether “they are logically or factually subsumed within and necessarily related to the primary question.” *Hoover v. Trent*, Case No. 1:07CV47, 2008 WL 2308079, at *2 (N.D. W. Va., June 4, 2008) (quoting 10A Fed. Proc., L. Ed. §26:537 (Apr. 2008)); *see also Rawl ex rel. Estate of Clark v. S.C. Dep’t of Soc. Servs.*, Case No. 2:14-cv-02772, 2015 WL 6725169 at *2 (D.S.C., Nov. 3, 2015) (“Cases within the Fourth Circuit apply the test outlined in *Kendall v. GES Exposition Servs.*”); *Kline v. Berry*, 287 F.R.D. 75, 79 (D.D.C. 2012). “[T]he court should decide whether a given question is primary and subsequent questions are secondary to the primary question or whether the subsequent question could stand alone...and is independent of the first question so that it should be counted as a separate question.” *Hoover*, 2008 WL 2308079, at *5. Although “[g]enuine subparts should not be counted as separate interrogatories...discrete or separate questions should be counted as separate interrogatories, notwithstanding they...may be related.” *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997)).

III. Requests for Information and Requests for Documents Related to that Information are Separate Interrogatories

Although designated as 11 interrogatories, Plaintiffs' first 11 interrogatories in fact consist of at least 22 separate, discrete subparts.² This is because each interrogatory asks both for the identification of a group of individuals related to a certain event, and for documents reviewed or created by those individuals pertaining to that event.³ Plaintiffs' assertion that a request for both information and documents does not create two separate interrogatories because they "involve a single subject" ignores the cases that directly address this issue. Mem. In Supp. of Pls.' Mot. to Compel, ECF No. 84 at 6.

Courts have squarely rejected Plaintiffs' argument, calling the "combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event" the "most obvious example" of an "approach[] [that] threaten[s] the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate." *Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper*, 222 F.R.D. 7, 10 (D.D.C. 2004). This is so because "'a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories,' not one." *Willingham v. Ashcroft*, 226 F.R.D.

² Upon collecting the necessary information to respond to Plaintiffs' Interrogatory 2, defendants determined that that interrogatory actually contains eight discrete subparts because it requests both information and documents for Plaintiff Harrison's requests for exception to policy. Plaintiff Harrison made four separate requests for an exception to policy, each of which requires a separate inquiry and each of which is entirely independent of the others. However, Defendants have counted Interrogatory 2 as only two interrogatories because Defendants previously informed Plaintiffs in their Objections that they considered Interrogatory 2 to contain only two subparts.

³ For example, Interrogatory 1 states: "Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for a medical waiver under AR 40-501 and/or DoDI 6130.03, and identify all Documents or Communications generated as part of that process."

57, 60 (D.D.C. 2005) (quoting *Banks*, 222 F.R.D. at 10.). Certainly, an “interrogatory may properly seek identification of documents and facts supporting a contention, but it may not do so in a single interrogatory.” *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 235 F.R.D. 521, 524 (D.D.C. 2006); *see also, In re ULLICO Inc.*, Case No. 03-01556, 2006 WL 2398745, at *5 (D.D.C., June 30, 2006) (*ULLICO 1*) (“The Court finds that the inquiry about harm involves a ‘common theme’ but that the request for documents is a separate inquiry, and accordingly, Interrogatory No. 11 counts as two interrogatories.”); *In re ULLICO Inc.*, Case No. 03-01556, 2006 WL 2398744, at *4 (D.D.C., June 30, 2006) (*ULLICO 2*) (“For purposes of counting, Interrogatory No. 13 is treated as two interrogatories because of the document request contained therein.”). The Court should, therefore, count each of Plaintiffs’ first 11 interrogatories as having two discrete subparts.

Plaintiffs’ argument that their requests for both information and documents should not be considered separate interrogatories because they request only “identification” and not a “substantive narrative answer” also misses the mark. Mem., ECF No. 84 at 8. Plaintiffs contend that the Court in *Smith v. Café Asia*, 256 F.R.D. 247 (D.D.C. 2009), only considered the challenged interrogatories to have multiple parts because the information sought required a “substantive narrative answer.” This is incorrect. The *Smith* Court actually noted that it did not see any reason to deviate from the general rule articulated in *Banks* that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.” *Smith*, 256 F.R.D. at 254. *Smith* states in the broadest terms that “an interrogatory asking for information about something and a request for documents relating to the subject are two separate inquiries,” and that “[e]ach interrogatory propounded by the plaintiff in

this case seeks documents, so each interrogatory counts as at least two.” *Id.* There is no further parsing of the nature of information sought or the documents. *See id.*

For these reasons, and because Plaintiffs concede that each of their first 11 interrogatories include both a request for information and a request for the identification of documents, the Court should deny Plaintiffs’ motion, hold that Plaintiffs’ first 11 interrogatories are properly counted as 22 discrete subparts, and find that Defendants have responded to a total of 30 interrogatories including discrete subparts.

IV. Plaintiffs’ Interrogatories Contain Multiple Discrete Subparts and Far Exceed the Permissible Number of Interrogatories

If the Court concludes that Plaintiffs’ first 11 interrogatories should be counted as only 11 interrogatories when considering discrete subparts, then the Court must also determine the number of discrete subparts in interrogatories 13, 15, 12, and 14.⁴ Each of these interrogatories is objectionable and contains multiple discrete subparts in excess of the 30 permitted interrogatories for the following reasons.⁵

First, Interrogatories 12-15 seek to discover information from Military Services other than the Army that this Court has already determined to be irrelevant and undiscoverable. During the November 30, 2018 hearing, the Court ruled that the only as-applied constitutional challenge Plaintiffs could make was against the Army. Nov. 30, 2018 Hearing Tr., 14:25-15:4 (Judge Davis: “But the rational relation is based on as applied to Sergeant Harrison, so the rational relation was it wasn’t the Army – I mean, the Navy and the Air Force and the Marines

⁴ As noted above, Plaintiffs agreed that Defendants could respond to the interrogatories as follows: 1-11, 16-23, 13, 15, 12, and 14. (ECF No. 84-3).

⁵ Defendants do not waive any additional objections to these interrogatories contained in their previously served Objections, (ECF No. 83-2), by limiting this discussion to the objections Plaintiffs have challenged in this motion.

didn't apply this regulation to Sergeant Harrison; only the Army did.""). Thus, the Court held that any remaining claims must be facial challenges. Exh. D at 42:10-15 (Judge Davis: "[Y]ou're challenging the policies facially or as applied to your client. The...Navy, the Air Force, and the Marines didn't apply any policy to Sgt. Harrison. So the only possible challenge you can have against the Navy, Marines, and Air Force's policy is facially when you have the policies.""). With this understanding, the Court held that Plaintiffs were entitled to discovery from Military Services other than the Army only to the extent that the discovery related to those Services' asserted justifications for promulgating those regulations. Exh. D at 45:17-19 (Judge Davis: "Well if they're challenging any regulation, they have the right to information upon which those branches say they use to justify that regulation.""). The Court specifically held that Plaintiffs were not entitled to information about the implementation or administration of the other Military Services' regulations because that information was irrelevant to the facial constitutionality of those regulations. *See* Exh. D at 11-15; *id.* at 12:20-24 (Judge Davis: "[W]hatever way the Navy may be applying them, if it's different than the Army is applying them, that has no impact on whether or not the regulation or instruction is unconstitutional or not, does it? At least not facially."); *id.* at 39:5-7 (Defense Counsel: "The...next example of the overbreadth is the request for...documents and the policies of all the other service branches."); Judge Davis: "[Y]ou weren't listening very well were you? You didn't get the hint that the Court also believed that that was improper?").

For purposes of the present motion, Defendants have assumed that Plaintiffs may discover information concerning justifications for the non-party Military Services regulations. Defendants acknowledge that the Court has ruled that Plaintiffs may discover information concerning the facial constitutionality of the regulations of non-party Military Services.

However, Defendants note that they have objected to that ruling, Mem. in Supp. of Mot. Obj. to Mag. Judge R&R, ECF No. 85, because the Plaintiffs have not challenged the constitutionality of any regulation or policy not expressly identified in their complaint. The only defendants in this case are the United States Department of Defense and the Secretaries of the United States Department of Defense and the United States Army. The only regulations or policies challenged by the Plaintiffs in this case are those of the Department of Defense and the Army. Therefore, any discovery into the regulations or policies of any other entity, including the United States Navy, Air Force, Marines, and Coast Guard, is not relevant to the claims or defenses of any party and not proportionate to the needs of the case. Fed. R. Civ. P. 26(b)(1).

Because any challenges against the policies or regulations of other Military Services are exclusively facial challenges, information about the implementation or administration of those policies is irrelevant to the claims and defenses raised in this case. Facial challenges presume that the policies are unconstitutional on their face, regardless of the specific facts, and thus ““that no set of circumstances exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted). This same reasoning applies to Interrogatories 12-15.

Each of these interrogatories asks for information about how the other Military Services are applying and implementing their regulations. For example, in Interrogatory 12, Plaintiffs ask Defendants to identify for each Military Service 1) the total number of applicants to that service on a yearly basis, 2) the number of applicants who did not meet the standards under DoDI 6130.03 segregated by condition, and 3) the number of applicants who were granted medical waivers by condition. The information sought by Interrogatory 12 does not concern the Military

Services' stated justifications for the promulgation of their regulations. Rather, the information sought concerns how the Services have been and are applying their regulations.

Further, there is no basis on which to argue that these facts concerning the implementation or administration of the implicated regulations are relevant to determining the facial constitutionality of those regulations. The number of applicants to each Military Service and the total number of applicants to each Service who are not eligible to serve due to medical conditions are irrelevant to the facial constitutionality of each Services' regulations. The same is true for all of the information demanded by Interrogatories 12-15.

Second, even if the Court had not already determined that this type of information was irrelevant and undiscoverable in this case, interrogatories 12-15 contain multiple, discrete subparts because those interrogatories request information from or about different individuals or entities. Interrogatories that seek information from or about different individuals or entities, even if they concern the same topic, are separate lines of inquiry that are counted as separate, discrete subparts. For example, in *ULLICO 2*, the Court addressed an interrogatory that "request[ed] a description of actions taken by [a party]...with respect to 'retention and payment to Sidley Austin, LLP, AON Consulting, Robert Juliano, and ten different law firms.'" 2006 WL 2398744, at *5. The answering party argued that this interrogatory contained 13 discrete subparts, one for each of the entities identified. The *ULLICO 2* Court determined that the "ten different law firms" could only be considered a single entity because they were treated as an undifferentiated unit in all case filings, but found that the interrogatory should "be counted as four interrogatories to correspond to the four different entities, because such responses are separable." *Id.* Similarly, in *StoneEagle Servs.v. Gillman*, the Court found that an interrogatory directed at 11 individuals was in fact 11 interrogatories because "each individual or entity

identified should be counted as one interrogatory.” Case No. 3:11-CV-2408-P, 2013 WL 12124329, at *2 (N.D. Tex. Dec. 23, 2013). The Court held that “[i]f the first question can be answered fully and completely without answering the second question, then the second question is totally independent of the first and not factually subsumed within and necessarily related to the primary question.” *Id.* (citation omitted). Consequently, because the interrogatory “asked the question as to several individuals, and each one can be answered without having to answer as to another individual,” the interrogatory contained as many discrete subparts as there were individuals. *Id.*

Obtaining answers to the questions raised by Interrogatories 12-15 requires separate inquiries to separate military organizations. For example, subpart “(c)” of Interrogatory 12 can only be answered independently by each of the Military Services, because each of the Services maintains authority over processing and granting of medical waivers to accession standards within that Service. *See* DoDI 6130.03 at 10.

Moreover, the responses to each of these inquiries by one Military Service are separable and do not depend in any way on the response of any other Military Service to the same question. *See Hoover*, 2008 WL 2308079, at *2. For example, under Interrogatory 12 subpart “(b)”, the number of applicants to the Air Force who did not meet the standards of DoDI 6130.03 in any given year will be the same regardless of the number of applicants to the Marines who did not meet the standards of DoDI 6130.03 in that year or any other. For this reason, each subpart requesting information from each Military Service in Interrogatories 12-15 is in fact at least five discrete and independent inquiries and should be counted as such. *See id.*

Third, even if Interrogatories 12-15 are construed to request information only from the Army, in compliance with this Court’s November 30, 2018 ruling, each interrogatory contains

several discrete subparts which are not logically subsumed by a primary question. Although Plaintiffs attempt to disguise the structure of these independent subparts in their motion to compel by adding language that does not appear in the interrogatories,⁶ each subpart of each of these interrogatories can be answered without reference to any other. Contrary to Plaintiffs' assertions otherwise, it is the independence of the subparts and not whether the questions are "convoluted" or "narrowly-tailored" that determined whether they are discrete and should be counted separately. Mem. ECF No. 84 at 9.

Again referring to Interrogatory 12, Defendants need not determine the total number of applicants to a Military Service in a given year to determine the total yearly number of applicants to that Military Service who did not meet the standards of DoDI 6130.03 or the total number of yearly applicants to that Military Service who were granted medical waivers, and vice versa. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, Case No. 1:00CV00113, 2002 WL 534459, at *3 (W.D. Va., Mar. 18, 2002) ("Although the theme of the requests is similar, each may be fully and completely answered without reference to the others."). Each of these inquiries can be answered without determining the answers to the other; thus, they are independent and discrete inquiries even though they are related. *See Mezu*, 269 F.R.D. at 573.

Similarly, in Interrogatory 13, although Plaintiffs have styled their subparts so that they rely on each other grammatically, it is not necessary for the Defendants to determine the total number of individuals "living with HIV" in a Military Service to determine the total number of

⁶ "For example, Interrogatory No. 12 seeks data regarding (a) the total number of applicants to the military; (b) the number of applicants who did not meet medical accession standards (*which is a subset of the total number of applicants*); and (c) the number of applicants who were granted waivers (*which is a subset of the applicants who did not meet the standards*).” Mem. at 7, ECF No. 84 (italics indicate Plaintiffs' alterations to the text of their interrogatory).

individuals in a Service who were granted a deployment waiver for HIV in a given year, or the number of individuals in a Service in a given year who were involuntarily separated based on a determination related to an HIV diagnosis that they were unfit for duty. Each subpart is again an independent inquiry.

Interrogatory 14 goes farther still. That interrogatory asks for the number of individuals each year in each Military Service who have at least one of five “deployment-limiting medical conditions,” or any of an undetermined, unnamed number of other medical conditions. The preceding argument applies here as well. A request for information about the number of individuals with each of these medical conditions who were granted or denied deployment waivers in any given year is independent from a request for information about the number of individuals with each of these medical conditions who were involuntarily separated in any given year.

Not only are these categories of questions independently answerable from each other, but they each also require a separate, independent, and burdensome inquiry for *each medical condition*. As noted in the Declaration of Douglas Badzik, attached as Exh. E, Defendants would have to undertake individual, discrete data requests to each Military Service for each medical condition for each year. Exh. E, at 3. Each separate request of this type is expected to “require two weeks of time from submission of the request to the Service to responding to the Plaintiffs, eighty (80) man-hours of work to submit the request, review the data, and produce it in a readable format, and would cost approximately \$10,000.” Interrogatory 14 therefore “require[s] extensive research to answer each sub-part” and is an “inappropriate” attempt by Plaintiffs to “extend[] the number of interrogatories [they] may require [their] opponent to answer.” *Pogue*, 235 F.R.D. at 527.

Put simply, Defendants have already answered the maximum number of interrogatories permitted by the Court in this matter, but even if they had not, Interrogatories 12-15 in and of themselves exceed the total number of interrogatories allowed. Therefore, the Court should deny Plaintiffs' motion to compel.

V. Plaintiffs' Motion Should Be Denied to the Extent They Seek Relief Relating to Contention Interrogatories Because They Did Not Meet-And-Confer As Required by Local Rule 37(E)

Plaintiffs' motion should be denied to the extent they seek relief related to Defendants' objections to Plaintiffs' premature contention interrogatories. The meet-and-confer process related to Plaintiffs' motion covered several days: the parties held a call on Monday, December 10, 2018; Defendants followed up with an email on December 12, 2018; Plaintiffs then responded by letter that evening; and the parties' subsequent email exchange extended to December 13, 2018. Despite this lengthy exchange, Plaintiffs did not notify Defendants that they intended to seek relief related to Defendants' objections to Plaintiffs' premature contention interrogatories. Accordingly, no agreement or disagreement between the parties concerning Defendants' objections to Plaintiffs' contention interrogatories is contained in Plaintiffs' letter memorializing the telephonic conference. Email Correspondence, ECF No. 84-3. Had Plaintiffs raised this issue, Defendants would have explained that they intended to respond to Plaintiffs' contention interrogatories to the extent possible at the current stage of litigation, reserving the right to supplement their responses after the record was appropriately developed. Indeed, when

Defendants served their responses on Plaintiffs on December 17, 2018, they included responses to Plaintiffs' contention interrogatories, in particular Interrogatories 17-19. *See* Exh. C at 33-40.⁷

Eastern District of Virginia Local Rule 37(E) states that “[n]o motion concerning discovery matters may be filed until counsel shall have conferred in person or by telephone to explore with opposing counsel the possibility of resolving the discovery matters in controversy.” Because Plaintiffs failed to confer as required concerning Defendants' objections to Plaintiffs' contention interrogatories, the Court should deny Plaintiffs' motion to compel on that ground. *See Kolon Indus., Inc. v. E.I. Dupont De Nemours & Co.*, No. 3:11CV622, 2012 WL 1289484, at *3-4 (E.D. Va. Feb. 23, 2012); *Rainey v. Anderson*, Case No. 17CV444, 2018 WL 3636596, at *3 (E.D. Va. Apr. 11, 2018). As they intended, Defendants responded to Plaintiffs' contention interrogatories to the extent possible at the current stage of the litigation. Proper consultation, as required by the rules, would have rendered this part of Plaintiffs' motion to compel unnecessary.

VI. Plaintiffs' Contention Interrogatories are Premature.

Even if the Plaintiffs had not waived their ability to challenge Defendants' contention interrogatory objections under Local Rule 37(E), their motion to compel should be denied because Defendants have responded to Plaintiffs' contention interrogatories to the extent possible at this stage of the litigation. Plaintiffs' Motion misunderstands Defendants' objection to their contention interrogatories. Defendants do not argue that Plaintiffs' contention interrogatories are impermissible under Rule 33, but rather that they are “premature in light of

⁷ Similarly, if Plaintiffs had waited to file their motion to compel until after Defendants had actually responded to their interrogatories, that could have obviated the need to bring this matter before the Court.

the present stage of discovery.” Objs., ECF No. 84-2 at 30-33. Had the Plaintiffs met and conferred with Defendants, Defendants would have explained that they intended to answer these interrogatories to the extent possible with presently available information, reserving the right to supplement, in an attempt to cooperate with Plaintiffs’ discovery objectives. *See* Exh. C at 33-40.

The fact that a contention interrogatory may not be appropriate at an early stage of discovery is clearly contemplated by Rule 33, which states that for contentions, “the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” Fed. R. Civ. P. 33(a)(2).

Contention interrogatories “may ask a party to state what it contends, or to provide all the facts on which it bases its contentions, or to identify any evidence on which it bases its contentions, or to explain how the law applies to the facts of the case.” *Bonutti Skeletal Innovations LLC v. Linvatec Corp.*, Case No. 6:12-cv-1379, 2014 WL 186123, at *2 (M.D. Fla., Jan. 16, 2014). “[M]ost courts agree that ‘[d]ue to the nature of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted – typically, at the end of the discovery period.’” *Sigman v. CSX Corp.*, Case No. 3:15-cv-13328, 2016 WL 7444947, at *2 (S.D. W. Va. Dec. 27, 2016) (quoting *Cappachione v. Charlotte-Mecklenburg Bd. Of Educ.*, 182 F.R.D. 486, 489 (W.D.N.C. 1998)); *see also, e.g., BB&T Corp. v. United States*, 233 F.R.D. 447, 450 (M.D.N.C. 2006) (“[C]ontention interrogatories should normally be conducted at the end of discovery.”); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 3 (D.D.C. 1995) (“[T]he obligation to respond to [contention interrogatories] is often postponed until near the end of the discovery period unless the proponent carries its burden of demonstrating why they are necessary earlier on.”). Premature contention interrogatories are

improper because of “the unfairness of requiring a party to prematurely articulate theories which have not yet been fully developed.” *Sigman*, 2016 WL 7444947, at *2 (quoting *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. 55, 66 (N.D.N.Y. 2003)). Moreover, when “parties anticipate the production of ‘an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.’” *Id.* (quoting *BB&T Corp.*, 233 F.R.D. at 450-51).

It is clear that several of Plaintiffs’ interrogatories - in particular interrogatories 17, 18, and 19 - are contention interrogatories, regardless of how they are designated. Although Defendants agree that contention interrogatories are generally permissible under the Rules of Procedure, these go to the heart of the legal theory of the case and are premature at this time. These interrogatories ask Defendants to identify all of the facts and explain all of the reasons underlying the principal legal issues in the case.^{8,9,10} An early contention interrogatory which “does not target specific claims [Plaintiffs] believe[] [to be] unclear, or which might be subject to early resolution [but is] [i]nstead...all-encompassing,” is “premature, oppressive, and overbroad,” and does not permit the party to “efficiently and meaningfully answer the

⁸ Interrogatory 17: “Explain in detail each of the reasons underlying DoD’s policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from enlisting in the Military Services, being inducted into the Military Services, or being appointed as an officer in the Military Services as set forth in, *inter alia*, DoDI 6485.01 and DoDI 6130.03.”

⁹ Interrogatory 18: “Explain in detail each of the reasons underlying DoD’s policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from deploying to regular operations or contingency operations areas, as set forth in, *inter alia*, DoDI 6480.07.”

¹⁰ Interrogatory 19: “State all facts and identify any Documents that support your contention that ‘Defendants’ policies are rationally related to their legitimate government interest in ensuring that every Service member is fit and capable of performing his or her job.’” Defs.’ Answer at ¶3, ECF No. 62.”

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CERTIFICATE OF SERVICE

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

ANDREW R. SOMMER
Va. Bar Number 70304
WINSTON & STRAWN LLP
1700 K St., NW
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ASommer@winston.com

Counsel for Plaintiffs

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

Counsel for the Government

Norway, Robert M. (CIV)

From: Harding, John <JWHarding@winston.com>
Sent: Wednesday, December 12, 2018 10:09 AM
To: Norway, Robert M. (CIV)
Cc: Frelinghuysen, Cyrus T.; Berman, Keri L. (CIV); McCotter, Trent (USAVAE); Swinton, Nathan M. (CIV); Hemmings, Allie; Sommer, Andrew R.; Scott Schoettes; Anthony Pinggera; peterp@outserve.org
Subject: RE: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log
Attachments: 2018.12.12 Correspondence from J. Harding.pdf

Hi Rob,

See attached correspondence.

Thanks,
John

John Harding

Winston & Strawn LLP

D: +1 202-282-5774

winston.com



From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Tuesday, December 11, 2018 12:22 PM
To: Harding, John <JWHarding@winston.com>
Cc: Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>
Subject: RE: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log

Hi John,

Thank you for following up, and thank you again for speaking with us yesterday regarding discovery in *Harrison v. Mattis*. As I indicated, Nate will be transitioning off of this case. Trent and I will be joined by Keri Berman, who is copied on this email. Please copy Keri on all correspondence and include her on certificates of service going forward.

I would also confirm that, as contemplated by the Magistrate Judge at the hearing on 11/30, the parties have conferred about dates on which advances in medication occurred. The parties have agreed (subject to any objection Defendants may file to the Magistrate Judge's 11/30 rulings) that 2006 is the year in which fixed-combination therapy was approved by the FDA. We understand that this date corresponds with the FDA approval of Atripla tablets. Please confirm that our understanding is correct.

We also discussed Plaintiffs' Rule 30(b)(6) deposition notice, which was served without first coordinating with Defendants. As I indicated on the call, due to the holiday's and our client's leave policies, it will not be possible to prepare a Rule 30 (b)(6) witness for a deposition on January 8, 2019, especially in view of the numerous broad topics that were included in the notice. We proposed January 22 through 24 as alternative dates. Please indicate if Plaintiffs will serve an amended deposition notice for one of Defendants' proposed dates.

We also discussed some technical details concerning Defendants' first production. First, we confirm that approximately 40 of the records marked "File Unreadable / Technical Issue" are encrypted emails. We are taking steps to unencrypt these emails, and will include them in a subsequent production. The remaining 7 records are unreadable to Defendants and will not be produced.

Second, you indicated that our production load file appeared to contain extracted text for records that were marked not responsive. You also indicated that, following this discovery, Plaintiffs stopped accessing the extracted text included in our production. Based on your representations, we asked our staff to audit the production load file. Our staff has confirmed that the load file that we provided to you inadvertently contains extracted text for records marked as not responsive as well as for records that were withheld as privileged. Each of these documents are included in the production with slip sheets, and the privileged documents are identified on the privilege log that Defendants served on 11/30. Please confirm that Plaintiffs will comply with the inadvertent disclosure provision of the parties' discovery plan (paragraph 7.a), promptly return the DVD containing the load file, and delete all copies of the load file for Defendants' production. Please also confirm that you have deleted all of the original document-level text files from your litigation database. As we discussed, we will provide a replacement set of document-level text files for Defendant's production.

Best,
Rob Norway

From: Harding, John <JWHarding@winston.com>
Sent: Tuesday, December 11, 2018 11:48 AM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>
Subject: RE: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log

Hi Rob,

Can you send over Carrie's contact info?

Thanks,
John

John Harding

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Thursday, December 06, 2018 11:27 AM
To: Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Harding, John <JWHarding@winston.com>
Cc: Sommer, Andrew R. <ASommer@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <Nathan.M.Swinton@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>
Subject: Re: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log

Cyrus,

We are not available for a call this afternoon or tomorrow. We are available after 1 PM on Monday.

Best,
Rob N.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: "Frelinghuysen, Cyrus T." <CFrelinghuysen@winston.com>

Date: 12/5/18 7:51 PM (GMT-05:00)

To: "Norway, Robert M. (CIV)" <rnorway@CIV.USDOJ.GOV>, "Harding, John" <JWHarding@winston.com>

Cc: "Sommer, Andrew R." <ASommer@winston.com>, "Hemmings, Allie" <AHemmings@winston.com>, Scott Schoettes <sschoettes@lambdalegal.org>, peterp@outserve.org, Anthony Pinggera <anthony.pinggera@lambdalegal.org>, "Swinton, Nathan M. (CIV)" <NSwinton@civ.usdoj.gov>, "McCotter, Trent (USAVAE)" <Trent.McCotter@usdoj.gov>

Subject: RE: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log

Rob, Nate, and Trent,

Please see the attached letter and let us know if you're available to meet and confer tomorrow at 2 pm ET.

We would also like to discuss Defendants' objections to Plaintiffs' First Set of Interrogatories that were served on Monday.

Thanks,
Cyrus

Cyrus T. Frelinghuysen

Associate Attorney

Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817

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F: +1 202-282-5100

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>

Sent: Monday, December 3, 2018 8:14 PM

To: Harding, John <JWHarding@winston.com>

Cc: Sommer, Andrew R. <ASommer@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <Nathan.M.Swinton@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>

Subject: Harrison v. Mattis

John,

Attached please find Defendants' objections to Plaintiffs' first set of interrogatories to Defendants (Nos. 1-23).

Best,
Robert M. Norway
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-353-0889 | robert.m.norway@usdoj.gov

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Norway, Robert M. (CIV)

From: Harding, John <JWHarding@winston.com>
Sent: Thursday, December 13, 2018 5:08 PM
To: Norway, Robert M. (CIV); Sommer, Andrew R.; Frelinghuysen, Cyrus T.; Hemmings, Allie; Scott Schoettes; peterp@outserve.org; Anthony Pinggera; Swinton, Nathan M. (CIV); McCotter, Trent (USAVAE); Berman, Keri L. (CIV)
Subject: RE: Harrison v. Mattis - Subpart Objection

Hi Rob,

Our position has always been consistent: we believe Defendants' subpart objection is meritless. Your unwillingness to even identify which subparts you intend to respond to is especially troubling and demonstrates your unwillingness to substantively meet and confer on this issue.

Nor is it too soon to burden the Court with this dispute. The purpose of the local rule requiring objections be served two weeks before responses is to quickly resolve discovery disputes. We received your objections last week and asked to meet and confer last week so that we could move forward with a motion if necessary. That motion should have been argued tomorrow. We are now a week behind where we should be on this issue because of the Government's delay. As Judge Davis explained, "Everything with the government takes time. We take a lot less time in the Eastern District of Virginia. They need to be made well aware of that." Nov. 30 Tr. 53:13-15.

Based on your suggestion during our call on Monday, our letter yesterday merely provided a priority order (with some portions to be ignored) to allow Plaintiffs to receive certain information first based on your representation that Defendants may not answer all interrogatories on the basis of this objection. To the extent we are forced to file another motion to compel and, as we expect, Defendants are required to respond to all the interrogatories, we expect a complete response to every interrogatory.

Are Defendants standing on their objection, or will Defendants respond to each and every interrogatory? Please let us know ASAP, as we intend to move to compel tomorrow if Defendants refuse to answer all of the interrogatories based on this objection.

Thanks,
John

John Harding

Winston & Strawn LLP

D: +1 202-282-5774

winston.com



From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Thursday, December 13, 2018 3:34 PM
To: Harding, John <JWHarding@winston.com>; Sommer, Andrew R. <ASommer@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <Nathan.M.Swinton@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Subject: RE: Harrison v. Mattis - Subpart Objection

John,

Defendants believe that it is too soon to burden the Court with this dispute. As we indicated on Monday's call, we will not know what subpart objections we will stand on until after our clients have provided responses. Our responses are due next week, and we are still working on them.

Your recent correspondence to us, however, has left Plaintiffs' position unclear. Yesterday morning you sent us a letter indicating that we should "ignore the portion of the interrogatories asking for the identification of documents." We understood this to mean that Plaintiffs had withdrawn the discrete subparts from each interrogatory that called for the identification of documents because, if those subparts were not withdrawn, then we would still need to count those subparts in our responses. Your email from yesterday afternoon suggests, however, that Plaintiffs' have not withdrawn those portions of their interrogatories. The cases are clear that a interrogatory containing a demand for information and a demand for the documents are two distinct subparts.

We are also confused by the statement in your email from today that asks if we will reconsider our subpart objections "and answer all of the interrogatories fully." We understood from you letter that Plaintiffs had agreed to a particular order (1-11, 16-23, 13, 15, 12, and 14) in which Defendants should respond to and count Plaintiffs' interrogatories. This offer presumes that Defendants will stand on at least some of our subpart objections. Your email suggests that Plaintiffs position now is that Defendants should answer all the interrogatories.

Please clarify Plaintiffs' positions.

Best,
Robert M. Norway
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-353-0889 | robert.m.norway@usdoj.gov

From: Harding, John <JWHarding@winston.com>
Sent: Thursday, December 13, 2018 12:58 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Sommer, Andrew R. <ASommer@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <NSwinton@civ.usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>
Subject: RE: Harrison v. Mattis - Subpart Objection

Rob,

We would prefer not to burden the Judge with another motion to compel, so please let us know if you will reconsider your objection regarding subparts and answer all of the interrogatories fully. If you believe it would be helpful to discuss, please let us know. We are generally available this afternoon.

Thanks,
John

John Harding
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D: +1 202-282-5774

winston.com



From: Harding, John

Sent: Wednesday, December 12, 2018 10:05 PM

To: 'Norway, Robert M. (CIV)' <Robert.M.Norway@usdoj.gov>; Sommer, Andrew R. <ASommer@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <Nathan.M.Swinton@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>

Subject: Harrison v. Mattis - Subpart Objection

Rob,

We just wanted to follow-up on Defendant's objection regarding our Interrogatories and the use of subparts that was discussed in the meet and confer. Plaintiffs maintain that the use of subparts is consistent with the Federal Rules because each subpart is "logically and necessarily related to the primary question." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2] (3d ed. 1999) ("The better view is that subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question."); *see also* Fed. R. Civ. P. 33(a) advisory committee's note (1993 Amendments) ("[A] question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication."). The majority of cases you cite are in the minority view and not in circuit. *Mezu*, the only in circuit case, deals with real compound questions (*i.e.*, inquiring into separate and discrete areas), and not the related subparts at issue here. We urge you to reconsider your subpart objection and fully answer the interrogatories. If not, we plan to move to compel on Friday.

Thanks,
John

John W.H. Harding

Associate Attorney

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**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 AND RESPONSES TO PLAINTIFFS’
FIRST SET OF INTERROGATORIES TO DEFENDANTS (NOS. 1-23)**

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 33, Defendants, through undersigned counsel, provide the following objections and responses to Plaintiffs’ Interrogatories (Nos. 1-23). Defendants reserve the right to supplement, clarify, revise, or correct all or part of these Responses. Defendants’ investigation and search for responsive information is continuing. Defendants expressly reserve the right to rely on subsequently discovered information and produce additional responsive documents or information. The information provided in these responses is submitted in accordance with Federal Rule 26(b)(1), which permits the discovery of any non-privileged information that is relevant to a party’s claim or defense and proportional to the needs of the case. Accordingly, Defendants do not, by providing such information, waive any objection to its admissibility on the grounds of relevance, materiality, or other appropriate grounds. These responses have been generated after a reasonable, good-faith search for information and records at the Department of Defense (“DoD”) and the United States Army.

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 PLAINTIFFS' INSTRUCTIONS THAT PLAINTIFFS STATE WILL APPLY TO EACH INTERROGATORY

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.

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 INTERROGATORIES

The parties have agreed that Plaintiffs' interrogatories shall be counted as being served in the following order: 1-11; 16-23, 13, 15, 12, and 14. *See* Dec. 12, 2018 Letter from J. Harding at 3. Defendants will respond to Plaintiffs' interrogatories in this order based on the parties' agreement.

INTERROGATORY NO. 1

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who "reviewed, contributed, or reached a determination regarding" Plaintiff Harrison's request for a medical waiver and identification of all documents and communications generated by that process. Thus, this interrogatory contains at least two distinct subparts,

and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith v. Café Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Furthermore, because the answer to this interrogatory can be derived from documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See Fed. R. Civ. P. 33(d)*.

Defendants further object to this interrogatory’s use of the term “medical waiver” as vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify of individuals involved in the processing of the request for an accession waiver from Sgt. Harrison that was disapproved on December 30, 2014, and (2) a separate request to identify documents associated with the Training Support-Material Army-wide Tracking System (TS-MATS) record of Sgt. Harrison’s request for a medical accessions waiver as well as the documents associated with that request in the custody of the Office of the Chief Surgeon of the National Guard Bureau, Defendants respond that information concerning individuals connected to the disapproval of Sgt. Harrison’s request for an accession waiver was included in the Memorandum for the Adjutant General, District of Columbia, dated December 30, 2014, which is Bates numbered US00003219. Specifically, Lt. Col. Paul D. Tumminello signed the disapproval for Col. Eric D. Morgan, who was Chief Surgeon, Army National Guard. The records list Messrs. Kinney Simpkins, John Fano-

Schultz, and Randy Dodson as administrative points of contact who reviewed the accession waiver, and Lt. Col. Tumminello and Lt. Col. Edith Fraley, the delegate waiver authority, as clinical points of contact. In addition, Captain Nicole Ono and Sgt. 1st Cl. Scott M. Lichtsinn submitted Sgt. Harrison's request for an accession waiver to the National Guard Bureau.

Documents associated with the TS-MATS record of Sgt. Harrison's request for a medical accessions waiver as well as documents associated with that request in the custody of the Office of the Chief Surgeon of the National Guard Bureau are Bates numbered US0003219 through US0003257.

INTERROGATORY NO. 2

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories,

inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who “reviewed, contributed, or reached a determination regarding” Plaintiff Harrison’s request for an exception to the policy and identification of all documents and communications generated by that process. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory’s use of the term “request for an exception to the policy” as vague and ambiguous. Plaintiff Harrison made several separate requests and this interrogatory does not specify to which request it refers. Moreover, if this interrogatory refers to more than one request for an exception, it contains additional discrete subparts and Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1), as described above. Defendants also object to this interrogatory on the basis that that the phrase “reviewed, contributed, or reached a determination” is vague, ambiguous, and unduly burdensome.

Furthermore, because the answer to this interrogatory can be derived from documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See Fed. R. Civ. P. 33(d)*.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify individuals within the Army who

had an official duty to review Plaintiff Harrison's requests for exceptions to policy directed to the Army Deputy Chief of Staff, G-1; the Assistant Secretary of the Army, Manpower & Reserve Affairs; the Secretary of the Army; and the Secretary of Defense, as well as the identity of the DoD official who reviewed Sgt. Harrison's request for an exception to policy under DoDI 6485.01, and (2) a separate request to identify the official records of those requests in the custody of the Health Promotion Officer, Office of the Deputy Chief of Staff, G-1, the Army responds that information responsive to this interrogatory may be derived from documents that have been produced to Plaintiffs in this case, and the burden of deriving the answer is substantially the same for both Plaintiffs and the Defendants. The individuals within the Army who had an official duty to review Plaintiff Harrison's requests for exceptions to policy may be derived from the four staffing forms provided in Defendants' document production on October 24, 2018, located at Bates numbers US00001057 through US00001058, US00002236 through US00002238, US00001123 through US00001124, and US00002233 through US00002235.

DoD responds that the DoD authority who reviewed Sgt. Harrison's request for an exception to policy under DoDI 6485.01 was Ms. Stephanie Barna, Principal Deputy Assistant Secretary of Defense for Manpower and Reserve Affairs.

The Army further responds that the records of Sgt. Harrison's requests for exceptions to policy in the custody of the Health Promotion Officer, Office of the Deputy Chief of Staff, G-1, are Bates numbered US00000649 through US00000824, US00000991 through US00001966, and US00001968 through US00003135.

INTERROGATORY NO. 3

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the preparation of the DoD 2018 Report to Congress and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify three individuals involved in the preparation of the 2018 report to Congress, and (2) a separate request to identify documents in the custody of the Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Defendants respond that the individual with primary responsibility for drafting the August 2018 Report to Congress was Dr. Donald Shell, M.D., M.A., Director, Disease Prevention, Disease Management and Population, Health Policy and Oversight. He was informed and advised by U.S. Army Lieutenant Colonel Jason M. Blaylock, M.D. FACP, FIDSA; U.S. Air Force Lieutenant Colonel Jason F. Okulicz, M.D.; and U.S. Navy Commander Todd D. Gleeson, M.D., M.P.H.

Documents from the files of OASD(HA) are Bates numbered US00003465 through US00005339, and documents from Dr. Shell’s official email account are Bates numbered US00010744 through US00011921.

INTERROGATORY NO. 4

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

OBJECTIONS: Defendants object to this interrogatory 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 Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of the individuals who contributed to the "creation, promulgation, reconsideration, and revision" of both DoDI 6130.03, Section 5.23(a) and DoDI 6130.03, Section 5.23(b). *See Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572-73 (D. Md. 2010) ("[D]iscrete or separate questions should be

counted as separate interrogatories notwithstanding they...may be related.” (omission in original) (quoting *Kendall v. GES Expositions Servs.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997)). Additionally, Plaintiffs request identification of both the individuals who participated in the creation, promulgation, reconsideration, and revision of both DoDI 6130.03, Section 5.23(a) and DoDI 6130.03, Section 5.23(b) and identification of any documents considered by those individuals. Thus, this interrogatory contains at least four distinct subparts per version of each regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify the organizations responsible for the most recent revision of DoDI 6130.03, and (2) a separate request to identify

documents in the custody of the Accession Policy Directorate (AP directorate) of the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy (ODASD(MPP)) concerning the most recent revision of DoDI 6130.03, Defendants respond that the most recent revisions to DoDI 6130.03 were a cooperative endeavor between the AP directorate and the Office of the Assistant Secretary of Defense for Health Affairs (HA) after a review by the Accessions Medical Standards Working Group (AMSWG). The current co-chairs of the AMSWG are Dr. Paul Ciminera, M.D., M.P.H, and U.S. Army Lieutenant Colonel Peggy J. Urbano. Prior to Lieutenant Colonel Peggy J. Urbano's arrival to the AP directorate and appointment to the AMSWG, the AP directorate representative to the AMSWG was U.S. Army Lieutenant Colonel Gary W. Brown. The HA representative during the AMSWG review of this section was Dr. Jules Delaune.

Documents in the custody of the Accession Policy Directorate (AP directorate) of the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy (ODASD(MPP)) concerning the most recent revision of Section 5.23(a) and Section 5.23(b) of DoDI 6130.03 are Bates numbered US00006129 through US00006135, and documents from Dr. Ciminera's official email account are Bates numbered US00005764 through US00006128.

INTERROGATORY NO. 5

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration and revision of DoDI 6485.01, the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the "creation, promulgation, reconsideration, and revision of DoDI 6485.01," and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify three individuals involved in the most recent revision of DoDI 6485.01, and (2) a separate request to identify documents in the custody of OASD(HA) concerning the most recent revision of DoDI 6485.01, Defendants respond that the most recent version of DoDI 6485.01 was enacted in June 7, 2013. The office responsible for promulgation of this DoDI is HA. The individual within that office that was responsible for DoDI 6485.01 at the time it was released has retired. The individual with primary responsibility for this DoDI within HA is currently Dr. Donald Shell, M.D., M.A., Director, Disease Prevention, Disease Management and Population, Health Policy and Oversight. Dr. Shell's supervisor is Dr. Terry Adirim, M.D., M.P.H., M.B.A., Deputy Assistant Secretary of Defense for Health Services Policy and Oversight. Dr. Adirim's supervisor is Mr. Thomas McCaffery, Principal Deputy Assistant Secretary of Defense for Health Affairs.

Documents from the files of OASD(HA) are Bates numbered US00003465 through US00005339, and documents from Dr. Shell's official email account are Bates numbered US00010744 through US00011921.

INTERROGATORY NO. 6

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the “creation, promulgation, reconsideration, and revision” of DoDI 6490.07, Enclosure 3, section (e), and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30

interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify individuals responsible for the revision of DoDI 6490.07, and (2) a separate request to identify documents in the custody of HA concerning the most recent revision of DoDI 6490.07, Defendants respond that the most recent version of DoDI 6490.07 was enacted on February 5, 2010. The office responsible for promulgation of this DoDI is HA. The individual within that office that was responsible for DoDI 6490.07 at the time it was released has retired. The individual responsible for this DoDI within HA is currently U.S. Army Colonel Andrew Wiesen, M.D., M.P.H., Director of Preventive Medicine, Office of the Deputy Assistant Secretary of Defense for Health Affairs. His supervisor is Dr. Terry M. Rauch, Acting

Deputy Assistant Secretary of Defense for Health Readiness Policy and Oversight. Dr. Rauch's supervisor is Mr. Thomas McCaffery, Principal Deputy Assistant Secretary of Defense for Health Affairs.

Documents concerning the most recent revision of DoDI 6490.07, if any, will be produced by Defendants on or before December 28, 2018.

INTERROGATORY NO. 7

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who

contributed to the “creation and promulgation of the DOGO Instruction (*i.e.*, DoDI 1332.45),” and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify individuals responsible for the promulgation of DoDI 1332.45, and (2) a separate request to identify documents in the custody of the Officer and Enlisted Personnel Management Directorate (OEPM directorate) of ODASD(MPP) concerning the promulgation of DoDI 1332.45, Defendants respond that the office responsible for promulgation of DoDI 1332.45 is the OEPM directorate of ODASD(MPP). The individual responsible for this DoDI within

OEPM directorate is currently Mr. Michael Melillo, Deputy Director, Force Management, Officer and Enlisted Personnel Management. His supervisor is Ms. Patricia Mulcahy, Director, Officer and Enlisted Personnel Management. Ms. Mulcahy's supervisor is Mr. Lernes Hebert, Acting Deputy Assistant Secretary of Defense for Military Personnel Policy.

Documents in the custody of the Officer and Enlisted Personnel Management Directorate (OEPM directorate) of ODASD(MPP) concerning the promulgation of DoDI 1332.45 are Bates number US00006509 through US00006850.

INTERROGATORY NO. 8

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the “creation and promulgation of the DOGO Policy,” and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify the individuals responsible for promulgating the Memorandum for Secretaries of the Military Departments, Chairman of

the Joint Chiefs of Staff, Under Secretaries of Defense, Deputy Chief Management Officer; Chief, National Guard Bureau; Director of Cost Assessment and Program Evaluation regarding “DoD Retention Policy for Non-Deployable Service Members” (Feb. 14, 2018), and (2) a separate request to identify documents in the custody of HA concerning the promulgation of that memorandum, Defendants respond that the office responsible for promulgation of the policy memorialized in DoDI 1332.45 is the OEPM directorate. The individual responsible for this DoDI within OEPM directorate is currently Mr. Michael Melillo, Deputy Director, Force Management, Officer and Enlisted Personnel Management. His supervisor is Ms. Patricia Mulcahy, Director, Officer and Enlisted Personnel Management. Ms. Mulcahy’s supervisor is Mr. Lernes Hebert, Acting Deputy Assistant Secretary of Defense for Military Personnel Policy.

Documents in the custody of the OEPM directorate concerning the promulgation of the memorandum are Bates number US00006509 through US00006850.

INTERROGATORY NO. 9

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the “creation, promulgation, and reconsideration of AR 600-110,” and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request for the three primary contributing sources for developing HIV policy within the Department of the Army, including the promulgation of AR 600-110, and (2) a separate request to identify the materials relied upon when promulgating AR 600-110 in the custody of the Health Promotion Officer, Office of the Deputy Chief of Staff, G-1, the official staff proponent for promulgating AR 600-110, Defendants respond that the three primary contributing sources for developing HIV policy within the Department of the Army are:

- The Health Promotion Division, Army Resiliency Directorate, Office of the Deputy Chief of Staff, G-1;
- The Disease Epidemiology Division, Army Institute of Public Health, Army Public Health Center;
- The Infectious Disease Service, Walter Reed National Military Medical Center.

The general nature of the responsibilities for the contributors listed above regarding their duties and participation in the promulgation of AR 600-110 correspond to the responsibilities and duties of the offices to which they are assigned.

Publications relied on, cited in, or related to AR 600-110 are identified in Appendix A of that regulation. Additional materials in the custody of the Health Promotion Officer, Office of the Deputy Chief of Staff, G-1, including those relied on

when promulgating the current version of AR 600-110, were previously produced to Plaintiffs as Bates numbers US00000991 through US00001966.

INTERROGATORY NO. 10

Identify the three individuals who made the most substantive contributions in the promulgation and reconsideration of AR 40-501, Section 2-30 (“Systemic diseases”) (a) and AR 40-501, Section 3-7 (“Blood and blood-forming tissues diseases”) (h), Section 4-5 (“Blood and blood-forming tissue diseases”) (b), Section 4-33 (“Medical standards for ATC personnel”) (8), Section 5–14 (“Medical fitness standards for deployment and certain geographical areas”) (12) and (17), the role the persons identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure

33(a)(1). Specifically, Plaintiffs request identification of the individuals who contributed to the “promulgation and reconsideration” of AR 40-501, Section 2-30(a), AR 40-501, Section 3-7(h), AR 40-501, Section 4-5(b), AR 40-501, Section 4-33(8), AR 40-501, Section 5-14(12), and AR 40-501, Section 5-14(17). *See Mezu*, 269 F.R.D. at 572-73 (“[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they...may be related.”). Additionally, Plaintiffs request identification of both the individuals who participated in the promulgation and reconsideration of these various sections and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of each of these six regulations, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 (“each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.”).

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to “any Documents considered by such persons” and therefore does not seek information that is both (1) relevant to any party’s claim or defense and (2) proportional to the needs of the case. *See Fed. R. Civ. P. 26(b)(1)*. Plaintiffs’ interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase “most substantive contribution” is not defined by the interrogatories and is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request for the three primary contributing sources for promulgating the policies within AR 40-501 concerning HIV, and (2) a separate request to identify the materials relied upon when promulgating AR 40-501 in the custody of the Office of the Surgeon General of the Army, the official staff proponent for promulgating AR 40-501, Defendants respond that the three primary contributing sources for promulgating the policies within AR 40-501 within the Department of the Army are:

- The Health Promotion Division, Army Resiliency Directorate, Office of the Deputy Chief of Staff, G-1;
- The Disease Epidemiology Division, Army Institute of Public Health, Army Public Health Center;
- The G-37 Medical Readiness Division, Healthcare Operations, Army Office of the Surgeon General.

The general nature of the responsibilities for the contributors listed above regarding their duties and participation in the promulgation of AR 40-501 correspond to the responsibilities and duties of the offices to which they are assigned.

Publications relied on, cited in, or related to AR 40-501 are identified in Appendix A of that regulation.

INTERROGATORY NO. 11

Identify the current members of the Accession Medical Standards Working Group and all Documents reviewed or relied upon, either directly or indirectly, by the

Accession Medical Standards Working Group concerning DoD's medical accession standards for individuals living with HIV.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who are current members of the Accession Medical Standards Working Group and identification of "all Documents reviewed or relied upon, either directly or indirectly" by the Working Group concerning "medical accession standards for individuals living with HIV." Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory the extent it seeks information that the Working Group "reviewed but did not rely on concerning DoD's medical accession standards for individuals living with HIV" because such information is not (1) relevant to any party's claim or defense or (2) proportional to the needs of the case. *See Fed. R. Civ.*

P. 26(b)(1). Additionally, the phrase “reviewed or relied upon...indirectly” is problematic to the extent that it could be construed to apply to documents with mere peripheral connections to the claims and defenses of this case, and identifying all such documents would be excessively burdensome and disproportionate to the needs of the case.

Defendants further object to this interrogatory’s use of “individuals living with HIV” because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to this interrogatory because “DoD’s medical accession standards” is vague and ambiguous.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as (1) a request to identify the organizations with representatives on the Accessions Medical Standards Working Group (AMSWG), and (2) a separate request to identify documents in the custody of the AP directorate of ODASD(MPP) concerning the most recent revision of DoDI 6130.03, Defendants respond that the AMSWG is currently comprised of representatives from the following offices:

Voting Members:

- DASD (MPP) - Co-chair
- PDASD (HA)- Co-chair
- Manpower and Reserve Affairs, Army
- Manpower and Reserve Affairs, Navy
- Manpower and Reserve Affairs, Air Force
- Manpower and Reserve Affairs, Marine Corps
- Director of Reserve and Military Personnel, Coast Guard

Non-Voting Advisory Members:

- Joint Staff Surgeon
- Surgeon General of the Army

- Surgeon General of the Navy
- Surgeon General of the Air Force
- Chief Medical Officer, U.S. Coast Guard
- Joint Surgeon, National Guard Bureau
- Director, Manpower and Personnel, Joint Staff (J-1)
- Deputy Chief of Staff for Personnel Army
- Deputy Chief of Staff for Personnel Navy
- Deputy Chief of Staff for Personnel Air Force
- Deputy Chief of Staff for Personnel Marine Corps
- National Guard Bureau (J-1)

Documents in the custody of the AP directorate of ODASD(MPP), including those concerning the most recent revision of DoDI 6130.03, are Bates numbered US00006129 through US00006135, and documents from Dr. Ciminera's official email account are Bates numbered US00005764 through US00006128.

INTERROGATORY NO. 16

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. This interrogatory

places no time limits whatsoever on the information it seeks and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, this interrogatory places no limits whatsoever on the deploying agency or type of deployment, and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case.

Defendants further object to this interrogatory 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 interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request directed to the Armed Services Blood Program ("ASBPO") to identify categories of Service members who have been allowed to serve during a contingency deployment, as defined in DoDI 6490.07, and who are not eligible to donate blood, Defendants respond that DoD does not maintain a list of categories of individuals who have been permitted to deploy even though they cannot donate blood due to the variables presented in the donation of blood.

The ASBPO is chartered by the DoD to coordinate the provisions of blood products throughout the Services to meet medical requirements during national

emergencies and overseas military operations. ASBP Blood Program Letters (BPLs) are issued by ASBPO on items that affect one or multiple components of the ASBP.

Addressed within the BPLs are updates to the Standardized Donor Deferral Lists, which are used to determine donor eligibility. While the BPLs address several areas including tattoos, foreign travel, medication, and medical conditions, they do not expressly address deployment in support of contingency or combat operations.

INTERROGATORY NO. 17

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery. Defendants expect to receive further documents through discovery that will concern and provide responsive information. Because Fed. R. Civ. P. 26 imposes a duty of supplementation, complying

with such interrogatories would require defendants to continually supplement their responses each time they receive an additional document or information concerning the subject or contention on which the interrogatory seeks information. Doing so would cause defendants to suffer unnecessary burden and expense and would not serve to narrow the issues that are in dispute. Accordingly, Defendants will provide a response encompassing the current state of their knowledge, belief, and understanding, but reserve the right to supplement their interrogatory response pursuant to Fed. R. Civ. P. 26 at the conclusion of discovery, both as to the merits of this action and with respect to experts designated to testify at trial.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer in the Army, not from enlisting or being inducted into the Army or any of the other Military Services identified by Plaintiffs in their First Set of Interrogatories. Requests for this substantial amount of unrelated information from the Army and the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1).

Defendants further object to this interrogatory's use of "HIV-positive persons" because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to this interrogatory because it's use of "DoD's policies" and "*inter alia*" are vague, undefined, overly broad and unduly burdensome.

Subject to Defendants' construction of this request, as stated in the response below, Defendants withdraw their objection that this interrogatory contains distinct subparts, but continue to object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify DoD's rationale for the enlisted and officer medical accession policies for individuals with laboratory evidence of HIV contained in DoDI 6485.01 and DoDI 6130.03, Defendants respond that DoD set forth its complete reasoning underlying the policies on the prohibition of persons with laboratory evidence of HIV from enlisting in the Military Services, being inducted into the Military Services, or being appointed as an officer in the Military Services in the 2014 and 2018 reports to Congress. The 2014 report to Congress is publically available at: <https://health.mil/Reference-Center/Reports/2014/09/22/DoD-Personnel-Policies-Regarding-Members-of-the-Armed-Forces-with-HIV-or-Hepatitis-B>. H.R. 3304, NDAA for FY 2014, Sec. 572. The 2018 report to Congress is publically available at: <https://www.health.mil/Reference-Center/Congressional-Testimonies/2018/08/27/Personnel-Policies-Regarding-Members-of-the-Armed-Forces-Infected-with-HIV>. H.R. 2810, HASC Report for FY 2018, 115-200, Pg. 148-149.

INTERROGATORY NO. 18

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from deploying to

regular operations or contingency operations areas, as set forth in, *inter alia*,
DoDI 6480.07.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery. Defendants expect to receive further documents through discovery that will concern and provide responsive information. Because Fed. R. Civ. P. 26 imposes a duty of supplementation, complying with such interrogatories would require defendants to continually supplement their responses each time they receive an additional document or information concerning the subject or contention on which the interrogatory seeks information. Doing so would cause defendants to suffer unnecessary burden and expense and would not serve to narrow the issues that are in dispute. Accordingly, Defendants will provide a response encompassing the current state of their knowledge, belief, and understanding, but reserve the right to supplement their interrogatory response pursuant to Fed. R. Civ. P. 26 at the conclusion of discovery, both as to the merits of this action and with respect to experts designated to testify at trial.

Defendants object to this interrogatory's use of "regular deployment" and "contingency deployment" which are vague and ambiguous. Defendants further object to

this interrogatory's use of "HIV-positive persons" because that phrase is vague and undefined. Defendants also object to this interrogatory because "DoD's policies" and "*inter alia*" are vague and ambiguous, and also because those phrases are overly broad and unduly burdensome.

Subject to Defendants' construction of this request, as stated in the response below, Defendants withdraw their objection that this interrogatory contains distinct subparts, but continue to object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify DoD's rationale for the policies governing the availability of Service members to serve during a contingency deployment, as defined in DoDI 6490.07, Defendants respond that DoD set forth its complete reasoning underlying its policies in the 2014 and 2018 reports to Congress. The 2014 report to Congress is publically available at: <https://health.mil/Reference-Center/Reports/2014/09/22/DoD-Personnel-Policies-Regarding-Members-of-the-Armed-Forces-with-HIV-or-Hepatitis-B>. H.R. 3304, NDAA for FY 2014, Sec. 572. The 2018 report to Congress is publically available at: <https://www.health.mil/Reference-Center/Congressional-Testimonies/2018/08/27/Personnel-Policies-Regarding-Members-of-the-Armed-Forces-Infected-with-HIV>. H.R. 2810, HASC Report for FY 2018, 115-200, Pg. 148-149.

INTERROGATORY NO. 19

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery. Defendants expect to receive further documents through discovery that will concern and provide responsive information. Because Fed. R. Civ. P. 26 imposes a duty of supplementation, complying with such interrogatories would require defendants to continually supplement their responses each time they receive an additional document or information concerning the subject or contention on which the interrogatory seeks information. Doing so would cause defendants to suffer unnecessary burden and expense and would not serve to narrow the issues that are in dispute. Accordingly, Defendants will provide a response encompassing the current state of their knowledge, belief, and understanding, but reserve the right to supplement their interrogatory response pursuant to Fed. R. Civ. P. 26 at the

conclusion of discovery, both as to the merits of this action and with respect to experts designated to testify at trial.

Defendants further object to this interrogatory to the extent that it is properly the subject of expert testimony. Defendants will disclose and permit discovery in connection with the opinions of the experts that they intend to call at trial only as required by the schedule established by the Court and in accordance with Rule 26 of the Federal Rules of Civil Procedure. Defendants' investigation and search for responsive information is continuing. Defendants expressly reserve the right to rely on subsequently discovered information and produce additional responsive information.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiffs' interrogatory does not limit its request to any particular policies of the defendant, whereas the Plaintiffs' statement to which the Defendants were responding in ¶ 3 of their answer is limited to DoD and the Army's "bar to enlistment and appointment of people living with HIV, as well as the restrictions on deployment." Compl. ¶ 3, (ECF No.1). Therefore this interrogatory requests information that is neither relevant to the claims or defenses of either party nor proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

Subject to Defendants' construction of this request, as stated in the response below, Defendants withdraw their objection that this interrogatory contains distinct subparts, but continue to object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify DoD's rationale for the policies governing Service members who have laboratory evidence of HIV, Defendants respond that DoD set forth its complete reasoning underlying its policies in the 2014 and 2018 reports to Congress. The 2014 report to Congress is publically available at: <https://health.mil/Reference-Center/Reports/2014/09/22/DoD-Personnel-Policies-Regarding-Members-of-the-Armed-Forces-with-HIV-or-Hepatitis-B>. H.R. 3304, NDAA for FY 2014, Sec. 572. The 2018 report to Congress is publically available at: <https://www.health.mil/Reference-Center/Congressional-Testimonies/2018/08/27/Personnel-Policies-Regarding-Members-of-the-Armed-Forces-Infected-with-HIV>. H.R. 2810, HASC Report for FY 2018, 115-200, Pg. 148-149.

INTERROGATORY NO. 20

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is

premature in light of the present stage of discovery. Defendants' investigation and search for responsive information is continuing. Defendants expressly reserve the right to rely on subsequently discovered information and produce additional responsive information.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

Defendants further object to this interrogatory on the ground that the terms "regular basis," "inhibit or restrict," and "ability to deploy" are undefined, vague, ambiguous, overly broad, and unduly burdensome.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify medical conditions that usually preclude service during contingency deployments, as defined in DoDI 6490.07,

Defendants respond that Enclosure 3 to DoDI 6490.07 sets forth a non-exhaustive list of medical conditions that usually preclude contingency deployment. As stated in that document, “[a] list of all possible diagnoses and their severity that may cause an individual to be potentially non-deployable, pending further evaluation, would be too extensive. Medical evaluators must consider climate, altitude, rations, housing, duty assignment, and medical services available in theater when deciding whether an individual with a specific medical condition is deployable. In general, individuals with the conditions in paragraphs a. through h. of this enclosure, based upon a medical assessment as described in Enclosure 2 and Reference (1), shall not deploy unless a waiver is granted.”

INTERROGATORY NO. 21

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify medical conditions that do not usually preclude service during contingency deployments, as defined in DoDI 6490.07, Defendants respond that it is not possible to identify all medical conditions that require medical monitoring through a visit with a healthcare provider one or more times a year due to the individualized nature of healthcare. Enclosure 3 to DoDI 6490.07 enumerates

the conditions that preclude deployment without a waiver from the Service and the Combatant Command to which the service member will deploy.

INTERROGATORY NO. 22

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery. Defendants' investigation and search for responsive information is continuing. Defendants expressly reserve the right to rely on subsequently discovered information and produce additional responsive information.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's

claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify medical conditions that require blood testing and that do not usually preclude service during contingency deployments, as defined in DoDI 6490.07, Defendants respond that it is not possible to categorically state that any particular medical condition requiring medical monitoring through blood testing one or more times a year does not inhibit or restrict a service member's ability to deploy. Based on an individual's diagnosis and treatment for their medical condition(s), blood testing may be required one or more times a year to monitor the status of an acute or chronic disease state, and or for medication treatment adverse drug reactions. Determinations of deployability are made by trained DoD health-care providers based on information obtained in the medical assessment described in section 1 of Enclosure 2 of DoDI 6490.07. DoD personnel with any of the medical conditions in Enclosure 3, and based on a medical assessment, shall not deploy unless a waiver is granted. Enclosure 3

to DoDI 6490.07 sets forth a non-exhaustive list of medical conditions that preclude deployment in support or a contingency or combat operation.

INTERROGATORY NO. 23

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants further object to this interrogatory on the ground that "any changes to any military regulations" and "considered" are vague, overly broad, and unduly burdensome. Consequently this interrogatory seeks information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. This interrogatory

places no time limits whatsoever on the information it seeks and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ.

P. 26(b)(1). Defendants object to this interrogatory on the basis that the phrase "any changes" is vague, undefined, and is not limited to information that is relevant to any party's claims or defenses. Defendants further object to this interrogatory on the basis that the phrase "military regulation" is vague, undefined, and overly broad. Defendants object to this interrogatory on the basis that the phrase "considered, implemented, or rejected" is overly broad and unduly burdensome, and because that phrase is directed to information that is protected from disclosure by the deliberative process privilege. Defendants object to this interrogatory on the basis that the phrase "medical consensus" is vague, ambiguous, and undefined by Plaintiffs. Defendants object further to this interrogatory on the basis that the phrase "well-controlled" is vague, ambiguous, and undefined by Plaintiffs.

RESPONSE: Subject to and without waiving the foregoing objections and construing this interrogatory as a single request to identify changes to DoD policy, Defendants respond that there have been no changes in policy contemplated by the DoD based on the risk of transmitting HIV sexually.

INTERROGATORY NO. 13

For each year since 2000, identify for each branch of the Military Services: (a) the number of service members living with HIV; (b) the number of those individuals who were granted or denied a waiver for a regular deployment; the number of those

individuals who were granted or denied a waiver for a contingency deployment; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for duty based primarily on their HIV-diagnosis.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of four separate and independent categories of information, including HIV status of service members, the status of those members' waivers for regular deployment, the status of those members' waivers for contingency deployment, and those members' involuntary separation records based on HIV diagnosis, for each of the five Military Services defined by Plaintiffs' First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 20 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 (“[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they...may be related.”).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff

Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory 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 interrogatory's use of "individuals living with HIV" because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to this interrogatory's use of "regular deployment" and "contingency deployment" which are vague and ambiguous.

RESPONSE: Defendants stand on their objections and have withheld information pursuant to those objections.

INTERROGATORY NO. 15

Identify for each of the Military Services: (a) the number of service members who received blood transfusions while deployed since 2000, broken down on a yearly basis;

(b) the number of such transfusions that involved “fresh whole blood” collected from other service members (e.g., from a “walking blood bank” program); and (c) the number of such transfusions that involved blood that did not undergo rapid infectious disease testing.

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of blood transfusion information for each of the five Military Services defined by their First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 15 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 (“[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they...may be related.”).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants’ regulations

and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information from the other four services identified is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory 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 interrogatory's use of "while deployed" as vague and ambiguous.

RESPONSE: Defendants stand on their objections and have withheld information pursuant to those objections.

INTERROGATORY NO. 12

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of application information for each of the five Military Services defined by their First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 15 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 (“[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they...may be related.”).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P.

26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory 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.

RESPONSE: Defendants stand on their objections and have withheld information pursuant to those objections.

INTERROGATORY NO. 14

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

OBJECTIONS: Defendants object to this interrogatory 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 interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of information including, medical condition status of service members, deployment waiver status of those service members, and those members' involuntary separation records, for each of at least five conditions, for each of the five Military Services defined by Plaintiffs' First Set of Interrogatories, for each of the preceding 18 years. Thus, this interrogatory contains at least 75 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 (“[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they...may be related.”).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See Fed. R. Civ. P. 26(b)(1)*. Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case. Additionally, Plaintiff's request for involuntary separation records for individuals with deployment-limiting medical conditions encompasses

determinations that those members were “unfit for further duty” for any reason. This information is not relevant to any party’s claims or defenses nor proportional to the needs of this case.

Defendants further object to this interrogatory 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 interrogatory’s use of “waiver to deploy” as vague and ambiguous.

RESPONSE: Defendants stand on their objections and have withheld information pursuant to those objections.

As to responses to the interrogatories, see Attachment A.

As to objections:

DATE: December 17, 2018

Respectfully submitted,

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/s/

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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 17, 2018, to the following counsel of record via electronic mail:

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

NICK HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	November 30, 2018
JAMES N. MATTIS, Secretary of	.	10:45 a.m.
the U.S. Department of	.	
Defense; MARK ESPER,	.	
Secretary of the Army; and	.	
U.S. DEPARTMENT OF DEFENSE,	.	
	.	
Defendants.	.	
	.	
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	CYRUS T. FRELINGHUYSEN, ESQ. JOHN W.H. HARDING, ESQ. Winston & Strawn LLP 1700 K Street, N.W. Washington, D.C. 20006
FOR THE DEFENDANTS:	KIMERE KIMBALL, AUSA U.S. Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314 and ROBERT M. NORWAY, Trial Attorney U.S. Department of Justice Civil Division Federal Programs Branch 20 Massachusetts Avenue, N.W. Washington, D.C. 20001

(Pages 1 - 55)

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

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THE TRANSCRIBER:

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P R O C E E D I N G S

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

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

THE COURT: Good morning.

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

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

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

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

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

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

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

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

19 MR. HARDING: Okay.

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

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

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

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

9 THE COURT: This is the DoD instruction.

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

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

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

19 THE COURT: But your complaint is about HIV.

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

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

1 use to try to prove its point.

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

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

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

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

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

5 THE COURT: What does their answer say?

6 MR. HARDING: That --

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

12 What are their defenses?

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

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

1 MR. HARDING: As an example.

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

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

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

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

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

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

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

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

1 THE COURT: I asked a simple question.

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

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

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

19 They have --

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

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

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

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

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

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

1 retention policies that we'll be discussing.

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

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

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

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

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

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

4 MR. HARDING: Your Honor --

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

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

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

19 MR. HARDING: And --

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

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

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

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

14 MR. HARDING: No, I --

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Has Sergeant Harrison been discharged?

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

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

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

17 THE COURT: If he had been discharged --

18 MR. HARDING: Um-hum.

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. HARDING: Thank you, Your Honor.

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

20 THE COURT: We discussed?

21 MR. HARDING: Sorry.

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

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

1 THE COURT: All right.

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

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

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

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

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

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

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

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

10 THE COURT: For people with HIV.

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

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

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

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

1 you --

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

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

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

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

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

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

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

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

8 THE COURT: Does a DoD instruction say that?

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

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

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

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

19 MR. HARDING: Yeah.

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

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

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

5 THE COURT: Exactly.

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

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

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

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

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

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

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

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

7 MR. HARDING: Yes.

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

9 MR. HARDING: Yes.

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

12 MR. HARDING: Solely -- sorry.

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

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

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

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

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

8 THE COURT: That sounds familiar.

9 MR. HARDING: Excuse me?

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

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

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

16 MR. HARDING: He's seen --

17 THE COURT: They had it in their reply.

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

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

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

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

3 THE COURT: What do you mean?

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

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

11 MR. HARDING: I know.

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

17 MR. HARDING: Well --

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

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

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

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

7 MR. HARDING: Correct, Your Honor.

8 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. NORWAY: Good morning, Your Honor.

20 THE COURT: Good morning.

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

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

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

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

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

17 THE COURT: So give me an example.

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

21 THE COURT: For what purpose?

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

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

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

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

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

5 MR. NORWAY: Right, Your Honor.

6 THE COURT: That discussion occurred, correct?

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

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

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

21 MR. NORWAY: Yes, Your Honor.

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

24 We're at the discovery stage.

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

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

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

5 MR. NORWAY: Yes.

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

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

21 So that is one of the reasons --

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

23 MR. NORWAY: Correct.

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

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

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

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

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

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

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

3 MR. NORWAY: Yes, Your Honor.

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

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

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

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

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

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

21 MR. NORWAY: I --

22 THE COURT: So your disagreement would be irrelevant.

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

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

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

9 MR. NORWAY: Okay.

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

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

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

18 MR. NORWAY: Mentioning OutServe.

19 THE COURT: Mentioning OutServe.

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

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

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

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

5 MR. HARDING: Thank you, Your Honor.

6 THE COURT: Any document mentioning OutServe.

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

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

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

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

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

21 MR. HARDING: And --

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

25 MR. HARDING: Yeah, well --

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

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

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

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

14 THE COURT: What difference does it make?

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

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

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

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

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

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

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

3 MR. HARDING: Yes.

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

6 MR. HARDING: I --

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

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

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

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

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

2 Do you, do you want to --

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

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

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

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

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

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

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

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

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

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

25 THE COURT: Okay.

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

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

4 THE COURT: Yes. Give me another example.

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

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

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

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

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

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

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

1 nothing further.

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

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

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

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

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

1 policy to Sgt. Harrison.

2 MR. HARDING: I understand, Your Honor.

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

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

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

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

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

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

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

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

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

1 THE COURT: And what's the difference?

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

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

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

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

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

20 THE COURT: Those regulations are facially
21 unconstitutional?

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

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

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

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

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

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

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

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

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

7 THE COURT: But the regulation is.

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

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

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

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

22 MR. NORWAY: And --

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

1 adoption of those regulations as they exist today.

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

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

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

12 THE COURT: That's --

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

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

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

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

1 makes the regulation itself the true defendant.

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

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

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

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

21 HIV was, was determined to be --

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

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

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

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

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

16 MR. NORWAY: Yes, Your Honor.

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

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

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

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

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

5 Is that correct?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. NORWAY: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. NORWAY: Thank you, Your Honor.

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

23 Anything further in this matter?

24 MR. HARDING: No, Your Honor.

25 MR. NORWAY: No, Your Honor.

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

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

5
6 CERTIFICATE OF THE TRANSCRIBER

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

10
11 /s/

12 _____
Anneliese J. Thomson

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The Honorable Leonie M. Brinkema

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

NICHOLAS HARRISON, *et al.*,

Plaintiffs,

v.

JAMES N. MATTIS, *et al.*,

Defendants.

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

**DECLARATION OF DOUGLAS
BADZIK IN SUPPORT OF
DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO
COMPEL**

DECLARATION OF DOUGLAS BADZIK

I, Douglas Badzik, do hereby declare as follows:

1. I currently serve as the Director of the Armed Forces Health Surveillance Branch, within the Department of Defense (“DoD”) Armed Forces Health Surveillance Branch (“AFHSB”). I have held this position since 2016. In this capacity, I direct all activities of the AFHSB, the mission of which is to conduct medical surveillance to protect those who serve our nation in uniform and allies who are critical to our national security interests.

2. In the exercise of my duties, I have been made aware of this lawsuit by counsel from the DOD Office of the General Counsel.

3. I submit this declaration in support of the Defendant's Response to the Plaintiffs' December 17, 2018 Motion to Compel. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties.

Purpose of this Declaration

4. This declaration is submitted in support of Defendant's Reply to Plaintiffs' Motion to Compel. In their November 27, 2018 First Request for Interrogatories, specifically, Interrogatory No. 14, Plaintiffs sought "for each of the Military Services: (a) the number of service members living with deployment-limiting medical conditions, including but not limited to HIV, diabetes, hepatitis C, hypertension, and asthma, on a yearly basis since 2000, segregated by condition; (b) the number of those individuals who were granted or denied a waiver to deploy; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for further duty."

Information not currently in the Possession, Custody, or Control of the AFHSB

5. AFHSB does not possess non-public information that would be considered responsive to subparts (b) and (c) of Interrogatory No. 14.

6. Regarding subpart (a) of Interrogatory No. 14, AFHSB cannot properly respond to the Plaintiffs' question due to the overly-board nature of the request. Enclosure 3 to DoD Instruction 6490.07 states, "[a] list of all possible diagnoses and their severity that may cause an individual to be potentially non-deployable, pending further evaluation, would be too extensive."

7. To the extent that Plaintiffs did specify conditions in subpart (a) to Interrogatory No. 14, AFHSB routinely makes publically available data that is considered responsive to Plaintiffs' request. For example, AFHSB collected data on HIV prevalence among civilian applicants for military service from January 1, 2013 to June 30, 2018 and published it in a

Medical Surveillance Monthly Report (“MSMR”) on September 24, 2018. This MSMR is available at: <https://www.health.mil/News/Gallery/Infographics/2018/09/24/HIV>. Many other AFHSB reports on diagnoses which may cause an individual to be non-deployable are public and available on the website: [https://www.health.mil/Military-Health-Topics/Health-Readiness/Armed-Forces-Health-Surveillance-Branch/Reports-and-Publications/~link.aspx?id=534E26BD8E5D4ECC8CAA8ABA47679691&z=z](https://www.health.mil/Military-Health-Topics/Health-Readiness/Armed-Forces-Health-Surveillance-Branch/Reports-and-Publications/~/link.aspx?id=534E26BD8E5D4ECC8CAA8ABA47679691&z=z)

8. AFHSB does not currently possess, have in its custody or in its control responsive data to assess who was granted or denied a waiver to deploy. These data would need to come from the specific Geographic Combatant Command from which the waiver was requested. Similarly, AFHSB does not have access to data to determine the number of individuals who were involuntarily separated after a determination they were unfit for further duty. These data would need to come from the disability agency at each respective military service component.

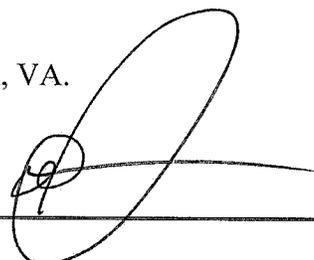
9. To credibly gather, review, and produce the data Plaintiffs are seeking, each request would be considered a new, separate request. For example, just one of the Plaintiffs’ requests would be treated as a new request and be construed as a request to the Armed Forces Health Surveillance Branch of the Defense Health Agency seeking data for the prevalence of Hepatitis C, for the years 2000 through 2018.

10. I estimate, based on historical data requests, that each new specific and separate request would require two weeks of time from submission of the request to the Service to responding to the Plaintiffs, eighty (80) man-hours of work to submit the request, review the data, and produce it in a readable format, and would cost approximately \$10,000. This is because of the need to obtain, extract, clean, analyze, and interpret the data from a large, complex database.

11. Compiling this data for this subpart would affect my office by degrading the ability of our organization to support our core mission of ensuring military medical readiness and protecting the health of the force.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 19 day of December 2018, Arlington, VA.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

DOUGLAS A. BADZIK
Director, AFHSB