

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

NICHOLAS HARRISON; and OUTSERVE-
SLDN, INC.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as Acting Secretary of Defense;
MARK T. ESPER, in his official capacity as
Secretary of the Army; and the UNITED
STATES DEPARTMENT OF DEFENSE,

Defendants.

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

RICHARD ROE; VICTOR VOE; and
OUTSERVE-SDLN, INC.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as Acting Secretary of Defense;
HEATHER A. WILSON, in her official
capacity as Secretary of the Air Force; and the
UNITED STATES DEPARTMENT OF
DEFENSE,

Defendants.

No. 1:18-cv-1565-LMB-IDD

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
RENEWED MOTIONS TO DISMISS PLAINTIFF OUTSERVE-SLDN**

Defendants move to dismiss Plaintiff OutServe-SLDN, Inc. (“OutServe”) from these lawsuits because OutServe lacks standing to bring its claims.

To assert associational standing on behalf of its members, the Supreme Court requires that an organization be a traditional voluntary membership organization or the functional equivalent of one. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 344 (1977). OutServe is neither. OutServe makes no provisions for a general membership in its Bylaws nor in its Certificate of Incorporation. OutServe is governed by a Board of Directors who are unelected by its general membership. The Board of Directors appoints OutServe’s President, who, in turn, unilaterally appoints its remaining leaders. OutServe collects no dues, takes no votes on matters of policy, maintains no membership roster, and has no documented definition of membership. Rather, OutServe relies on a “common understanding” to define its members. The “common understanding” defines membership using dubious criteria, such as subscribing to a Facebook group or an e-mail list, or accessing OutServe’s legal services.

With such an informal notion of membership, OutServe’s rationalization that it can represent the interests of HIV-positive service members fails. Indeed, OutServe looked the other way when at least one of its members did not want the relief that it sought. Defendants had to intervene on behalf of some HIV-positive Airmen so that the military would not retain them contrary to their wishes.

Now, after the close of fact discovery, OutServe has failed to meet its evidentiary burden to show that it was either directly injured or that it is a membership organization or a functional equivalent of one. Accordingly, OutServe lacks standing to bring its claims and should be dismissed for lack of subject matter jurisdiction.

Even with OutServe dismissed, the Court can still proceed to address the claims of the individual plaintiffs, Nicholas Harrison, Richard Roe, and Victor Voe. Without the organizational

plaintiff, the Court must focus its analysis and relief on the individual plaintiffs' specific situations, just as the military did when making the decisions in their cases by considering the needs of the service, the progression of their HIV infection, and the trajectory of their careers.

BACKGROUND

OutServe-SLDN, Inc. ("OutServe") joined with individual military service members as a plaintiff in two lawsuits making Equal Protection and Administrative Procedures Act challenges to the military's policies on accession and retention of HIV-positive individuals.¹ OutServe describes itself as a "non-partisan, non-profit, legal services, watchdog and policy organization that represents the U.S. LGBTQ+ military community—Service members, veterans, civilian Department of Defense, and their spouses and families—worldwide." Ex. A, Pl. OutServe's Resp. to Defs.' Interrogs. No. 2 ("OutServe Interrog."). But it has no formal membership structure or any of the indicia of membership.

I. OutServe has no formal structure for membership.

OutServe is not structured as a membership organization. OutServe is a non-profit corporation, governed by bylaws and incorporated under the laws the State of Delaware. *See* Ex. B, First Am. & Restated Bylaws of OutServe-SLDN, Inc. ("OutServe Bylaws"); Ex. C, Certificate of Incorporation of Servicemembers Legal Defense Network, Inc. ("Certificate of Incorporation"). But there is no provision in the Bylaws, the Certificate of Incorporation, or in any form of organizational documentation describing any form of general membership.² *Id.*; Ex. D, Deposition of Anthony Blevins ("Blevins Dep.") 111:17-112: 22.

¹ The evidence and legal arguments in support of the motion to dismiss OutServe are nearly identical in both *Harrison* and *Roe*. Accordingly, in the interests of judicial efficiency and to minimize duplicative briefing, Defendants have combined their arguments into a single motion and memorandum which will be filed in both cases.

² By contrast, OutServe's Bylaws define "members of the Corporation" who "shall be the directors

Instead, OutServe believes there is a “common understanding” that it has members. According to OutServe, the “common understanding” is that only individuals who possess a Lesbian, Gay, Bisexual, Transgender, or Queer (“LGBTQ”) or HIV-positive identity and are current, former, or prospective members of the U.S. Armed Forces, qualify as members. Blevins Dep. 111:22-24, 112:21-22; Ex. A, OutServe Interrog. No. 2. Further, this “common understanding” of its membership includes any individual within this identity community that also: (1) joins one of OutServe’s local chapters or Facebook “forums,” (2) subscribes to OutServe’s mailing list, (3) donates, (4) accesses OutServe’s legal services, or (5) serves on OutServe’s Board of Directors or Board of Advisors. Blevins Dep. 111-113; Ex. A, OutServe Interrog. No. 2. Specifically, OutServe relies on a Facebook group that it moderates, its “Positive Forum” Facebook group, to establish “membership.” *See, e.g.*, Ex. A, OutServe Interrog. No. 1; Blevins Dep. 175:2-6, 181:24-182:2; 183:4-9, 187:5-7. As set forth below, these facts weigh against finding that OutServe is a membership organization.

II. OutServe primarily relies on Facebook group membership and accessing its legal services to establish membership.

OutServe has identified eight individuals whom it claims as members. *See Ex. A, OutServe Interrog.* No. 1; *Harrison* Compl. ¶ 68, Declarations in Support of Motion for Preliminary Injunction, *Harrison* ECF No. 26, Exs. F-G; *Roe* Compl. ¶ 23, Declaration of Peter Perkowski in Support of Motion for Preliminary Injunction ¶¶ 8-28; *Roe* ECF No. 40. In the *Harrison* case, OutServe claims that plaintiff Nicholas Harrison, who serves in the Army National Guard, and *Harrison* Declarant 1

of the Board of Directors.” Defendants will refer to the members of the corporation as “Board Members.” When OutServe claims to represent purported general members of its organization in these suits, such as plaintiffs Harrison, Roe, and Voe, it is not referring to just the twelve Board Members defined in the OutServe Bylaws as “members” of the corporation. *See* Blevins Dep. 77:9-16; 111:8-112:22.

(“D1”)³ who serves in the Army, are OutServe members. *Harrison* Compl. ¶ 68; Ex. A; *Harrison* Pls.’ Mot. for a Prelim. Inj., ECF No. 26, Exs. -G; OutServe Interrog. No. 1. Harrison testified that he joined OutServe’s Network Facebook group in March 2012 and OutServe’s Positive Forum Facebook group in February 2014, subscribed to OutServe’s mailing list, made donations to OutServe, and serves as a member of OutServe’s Board of Advisors. Ex. E, Deposition of Nicholas Harrison (“Harrison Dep.”) 290:15-291:3, 294:6-22, 296:1-20, 328:17-329:8, 314:2-6; Ex. A, OutServe Interrog. No. 1. D1’s first and only affiliation with OutServe is by accessing OutServe’s legal services. Ex. F, Deposition of D1 (“D1 Dep.”) 37:13-39:12, 40:11-21, 43:1-6, 43:16-24; Ex. A, OutServe Interrog. No. 1. D1’s first contact with OutServe’s legal services was on June 21, 2018. Ex. A, OutServe Interrog. No. 1.

In the *Roe* case, OutServe claims that plaintiffs Roe and Voe, and S.H., D.N., Q.S., and K.R.,⁴ who each serve in the Air Force, are OutServe members. Roe first made contact with OutServe on May 31, 2018 to access OutServe’s legal services and OutServe subscribed Roe to its mailing list on that day. Ex. G, Deposition of Richard Roe (“Roe Dep.”) 52:1-22, 83:6-10; Ex. A, OutServe Interrog. No. 1. Roe joined OutServe’s Positive Forum Facebook group on December 19, 2018, the same day that the *Roe* suit was filed. *Roe* Dep. 59:10-17; Ex. A, OutServe Interrog. No. 1. Voe first made contact with OutServe by accessing its legal services and joining its Positive Forum on the same day, June 21, 2018. Ex. A, OutServe Interrog. No. 1.⁵ K.R.’s first contact with OutServe involved participating in a local chapter of OutServe, beginning in 2015. Ex. I,

³ Defendants identify the HIV-positive service members using abbreviations or initials to protect their anonymity.

⁴ OutServe also initially identified a fifth Airman, J.B., but later withdrew its reliance on him. *See* OutServe Interrog. No. 1.

⁵ OutServe claims that Voe accessed its legal services and joined the Positive Forum on the same day. OutServe Interrog. No. 1. But, Voe testified he joined the Positive Forum prior to accessing OutServe’s legal services. Ex. H, Deposition of Victor Voe (“Voe Dep.”) 70:2-18, 73:19-21.

Deposition of K.R. (“K.R. Dep.”) 28:12-17; Ex. J, Pl. OutServe’s Supp. Resp. to Defs.’ First Set of Interrogs. No. 1 (“OutServe Supp. Interrog.”). K.R. then accessed OutServe’s legal services in December 2018 and was subsequently added to OutServe’s Positive Forum Facebook group. K.R. Dep. 30:8-11, 31:9-15. S.H., D.N., and Q.S., all initiated contact with OutServe by requesting its legal services between December 2018 and February 2019. Ex. K, Deposition of S.H. (“S.H. Dep.”) 25:9-26:12, 27:15-24, 28:7-29:2; Ex. L, Deposition of D.N. (“D.N. Dep.”) 28:24-2, 29:24-30:2, 30:20-31:18; Ex. M, Deposition of Q.S. (“Q.S. Dep.”) 39:20-40:5, 42:3-5, 42:12-14; OutServe Interrog No. 1. Each subsequently joined OutServe’s Positive Forum on the request of OutServe’s counsel. *Id.* Again, the facts undercut OutServe’s claim to be a membership organization.

STANDARD OF REVIEW

Defendants bring a factual challenge to the Court’s subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).⁶ In a factual challenge, “the defendant argues ‘that the jurisdictional allegations of the complaint [are] not true,’ providing the trial court the discretion to ‘go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.’” *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Kerns v. United States* 585 F.3d 187, 192 (4th Cir. 2009)), *cert denied*, 137 S. Ct. 2307 (2017). Because the Court may consider facts outside of the pleadings to determine if it in fact possesses jurisdiction to consider the case, “the presumption of truthfulness normally accorded a complaint’s allegations does not apply.” *Id.*

“When the facts are not intertwined (meaning the facts necessary to prove jurisdiction are unrelated to the facts necessary to prove the merits of the plaintiff’s claim), the trial court may weigh evidence and make findings of fact to resolve the jurisdictional dispute.” *Kuntze v. Josh Enters., Inc.*, --

⁶ On March 15, 2019, consolidated fact discovery closed. Based on the evidence offered by OutServe during fact discovery, Defendants now bring this motion.

-F. Supp. 3d---, 2019 WL 959598, at *9 (E.D. Va. Feb. 27, 2019) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). The district court “may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991)); *Adams*, 697 F.2d at 1219 (the district court “may consider evidence by affidavit, depositions or live testimony” and “weigh[] the evidence to determine its jurisdiction”).

The burden “[w]hen, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proving the truth of such facts by a preponderance of the evidence.” *Unites States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (holding that the party invoking federal subject matter jurisdiction “bears the burden of proof ... with the manner and degree of evidence required at the successive stages of the litigation.”).

ARGUMENT

OutServe has failed to establish that it has standing to invoke this Court’s subject matter jurisdiction either on behalf of its purported members or on behalf of itself. “No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). “[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan*, 504 U.S. at 560.

An association has standing either (1) by “its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy,” *Warth v. Seldin*, 422 U.S. 490, 511 (1975), or (2) “as the representative of its members who have been harmed,” *Md. Highways Contractors Ass’n v. Maryland*, 933 F.2d 1246, 1250 (4th Cir. 1991) (citing *Hunt*,

432 U.S. at 333).⁷ If an organizational plaintiff is suing as a representative of its members, it must show that: “(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purposes; and, (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Tower S. Prop. Owners Ass’n v. Summey Bldg. Sys., Inc.*, 47 F.3d 1165 (4th Cir. 1995) (citing *Hunt*, 432 at 343).

OutServe brings its claim as a representative of its purported members who have been allegedly been harmed. *Harrison* Compl. ¶ 70; *Roe* Compl. ¶ 27. But OutServe lacks constitutional standing to sue on behalf of its members because: (1) Most of the purported members identified by OutServe were not associated with the organization at the time the suits were filed; and (2) OutServe failed to show that it has members at all, because it is neither a traditional membership organization nor the functional equivalent of one. Further, in *Roe*, OutServe lacks prudential standing because some individuals it claims to represent wish to be separated from the Air Force and OutServe is not protecting their interest in the suit.

As for direct injury, the Complaints in these cases include no allegations of direct harm to OutServe. Indeed, OutServe provided no indication that it may rely on a direct injury to establish standing until 5:14 p.m. on the last day of fact discovery. At that time, OutServe served a single interrogatory response containing conclusory assertions that it was injured. *See* Ex. A, OutServe Interrog. No. 3. But OutServe failed to comply with its other discovery obligations related to this allegation, such as timely responding to Defendants’ production requests with evidence of a direct

⁷“The Fourth Circuit has made it clear that there is no distinction between general ‘associational’ and ‘organizational’ standing and that there is only one test: that outlined by the Supreme Court in *Hunt* and its progeny.” *Roe 1 v. Prince William Cty.*, 525 F. Supp. 2d 799, 807 (E.D. Va. 2007) (citing *White Tail Park*, 413 F.3d at 459 (“We have generally labeled an organization’s standing to bring a claim on behalf of its members ‘associational standing.’ However, . . . we have used the term ‘organizational standing’ inter-changeably with ‘associational standing.’”))

injury. As a result, OutServe's eleventh-hour assertions are too little and too late. It has failed to produce evidence that it has suffered any direct injury from Defendants' policies and practices.

Because OutServe failed to demonstrate by a preponderance of evidence that it has standing to sue on behalf of its purported members or itself, the court lacks subject matter jurisdiction to hear its claims. OutServe should be dismissed as a plaintiff from both the *Harrison* and *Roe* cases.

I. OutServe lacks constitutional standing to bring suit on behalf of its purported members.

As noted, an organization seeking to litigate can do so as a representative of its members. *See Hunt*, 432 U.S. at 344-45. But OutServe has failed to meet its burden to show it has standing to represent its purported members because (1) some of the individuals it identified were not affiliated with OutServe at the time suit was filed; (2) OutServe lacks the requisite indicia of membership; and (3) OutServe is not a traditional membership organization.

A. OutServe cannot rely on D1, S.H., D.N., and Q.S. to establish standing.

As an initial matter, OutServe cannot rely on D1, S.H., D.N., and Q.S. to establish associational standing because none of these individuals were members of OutServe before these lawsuits were filed. First, it is well-established that an organizational plaintiff purporting to bring claims on behalf of its members must "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *see S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). Second, it is well-established law that standing is established at the time the suit is filed. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."). If "the undisputed record makes clear that [the individuals] became members . . . *after* [the] litigation began," then those members cannot

be used to establish that associational standing exists. *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 667 (E.D. Va. 2004).

OutServe offers two individuals, plaintiff Harrison and D1, as purported OutServe members in the *Harrison* case; and OutSeve offers six individuals, plaintiffs Roe and Voe, S.H., D.N., Q.S., and K.R., as purported OutServe members in the *Roe* case. Ex. A, OutServe Interrog. No. 1. OutServe admits that its first contact with D1 was in June 2018, which was after it filed suit in *Harrison* on May 30, 2018. Ex. A, OutServe Interrog. No. 1; *see also* D1 Dep. 37:13-23. None of these individuals were identified by OutServe until Plaintiffs moved for a preliminary injunction. *See Harrison* Cmpl., *Roe* Cmpl. And D1 admitted that he did not suffer the same harm as plaintiff Harrison—a denial of an accession—because he was commissioned as an Army officer long before his HIV diagnosis, and the Army continues to retain him in active duty service. D1 Dep. 67:2-5, 67:21-68:2, 69:2-3. Turning to the individuals identified in the *Roe* case, OutServe admits that its first contact with S.H., D.N., and Q.S. occurred between December 2018 and January 2019, after it filed suit on December 19, 2018. Ex. A, OutServe Interrog. No. 1; S.H. Dep. 25:9-26:9, 27:15-24, 28:4-5; D.N. Dep. 28:7-29:12, 29:24-30:2, 30:20-31:18; Q.S. Dep. 39:20-40:5, 42:3-5, 42:12-14.

Accordingly, OutServe cannot rely on D1, S.H., D.N., and Q.S. to support its claim of associational standing in these suits.

B. OutServe is not a traditional membership organization or its functional equivalent.

More fundamentally, OutServe cannot establish that it is a traditional voluntary membership organization or “is the functional equivalent” of one. *Heap v. Carter*, 112 F. Supp. 3d 402, 418 (E.D. Va. 2015) (quoting *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007)). In support of its standing, OutServe equivocally states that it “is, in part, a membership organization, or the

functional equivalent of a membership organization.”⁸ Ex. A, OutServe Interrog. No. 2; *see also* *Roe* Compl. ¶ 25. OutServe has not met its burden to show either circumstance and, accordingly, cannot assert associational standing to sue on behalf of its purported members.

1. OutServe is not the “functional equivalent” of a membership organization.

If an organization claims to be the functional equivalent of a membership organization, then, the organization has associational standing where it possesses the “indicia of membership.” *Hunt*, 432 U.S. at 344. In *Hunt*, the Supreme Court held that the organization’s purported members “possess *all* of the indicia of membership in an organization” including (a) electing the entity’s leadership, (b) serving in the entity’s leadership or influence its direction, and (c) financing the entity’s activities, including the costs of the law suit. *Hunt*, 432 U.S. at 344-45 (emphasis added); *see e.g., Heap*, 112 F. Supp. 3d at 418. Here, OutServe’s purported members lack the requisite indicia of membership, and therefore OutServe failed to establish that it is the functional equivalent of a membership organization.

a. Members do not elect OutServe’s leadership.

Using the broadest possible definition, OutServe’s leadership consists of a Board of Directors, Corporate Officers, a Board of Advisors, and Local Chapter and Forum leaders. Ex. B, OutServe Bylaws, Ex. N, Pl. OutServe’s List of Leadership (“Leadership List”). OutServe’s purported members elect none of these leaders.

As a non-profit corporation, a Board of Directors governs OutServe. Ex. B, OutServe Bylaws, Art. II; Blevins Dep. 41-42. A Nominating Committee, which is comprised of existing Board Members, nominates new Board Members annually, and then the existing Board votes in new

⁸ OutServe’s assertion should not be accepted on its face. The Supreme Court, in commenting on the court’s “independent obligation to assure that standing exists” held that it is “[a] major problem” to “accept[] the organizations’ self-descriptions of their membership, on the simple ground that ‘no one denies’ them.” *Summers*, 555 U.S. at 499.

members from that candidate list. Ex. B, OutServe Bylaws, Art. II, Sec. 7; Blevins Dep. 44:5-17.

General members, as a whole, are not involved in the election of the Board. *Id.* Because none of the eight individuals identified in these suits have ever served on the Board, none of these individuals has voted to elect a Board Member. In these circumstances—when members do not elect their leadership—an organization is not a functional equivalent of a membership organization. *See e.g., Conservative Baptist Ass’n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 133 (D.D.C. 2014) (holding that an organization was not the functional equivalent of a membership organization because the members identified in the law suit did not elect the organization’s leadership); *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 307 (D.D.C.), *aff’d on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019) (finding no evidence that members “have any role in electing the leadership of the organization”); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (holding an organization’s “supporters” do not possess the indicia of membership because they play no role in selecting the organization’s leadership).

A court considered a similar Board structure in *AARP v. United States Equal Employment Opportunity Comm’n*. 226 F. Supp. 3d 7, 17 (D.D.C. 2016). Like OutServe’s Board Members, AARP Board Members were also chosen by existing Board members rather than the “wider” membership. *Id.* In that case, the court was persuaded that members were still involved in the election of the Board because AARP’s Bylaws required Board Members to also be general members of AARP. *Id.* Therefore, the *AARP* court reasoned, at least some sub-set of the general membership, while serving as Board Members, were solely responsible for electing the leadership. Unlike AARP, OutServe’s Bylaws do not contain any requirement that its Board Members be general members of OutServe. Ex. B, OutServe Bylaws, Art. II. Indeed, even non-members can submit an individual

for consideration by the Nominating Committee to serve on the OutServe Board. Blevins Dep. 135:5-7.

What is more, OutServe's Board Members, not its purported members, select its corporate officers: Treasurer, Secretary, and Co-Chairs of the Board, and its President,⁹. Ex. B, OutServe Bylaws, Art. III; Blevins Dep. 49:13-16. These corporate leaders are also unelected by the general membership.

As to OutServe's Board of Advisors (also called its "Advisory Council," "Board of Military Advisors," or "Military & Veterans Advisory Committee"), these Advisors, if they can even be considered leaders of the organization, are also unelected. Rather, the President handpicks the Advisors following an application and interview process that he manages with the assistance of his staff. Blevins Dep. 81:1-8; 82:8-15, 83:10- 84: 8.

Lastly, OutServe claims that it has at least 74 local chapters and Facebook forums, each with a local leader. Ex. A, OutServe Interrog. No. 2; Blevins Dep. 148:5-8 (stating there are at least 81 chapters). These local chapter and online forum leaders, too, are unelected. Sometimes, OutServe simply fills these leadership positions with its staff. Blevins Dep. 114:13-25. Other times, the local leaders apply for their position or are nominated, but then they are interviewed by OutServe's staff and are selected by OutServe's President. Blevins Dep. 102:7-103:1 (admitting that local chapter members may make a "recommend[ation]" regarding their leadership, but the OutServe President has "final say" in the selection of chapter leaders), 135:8-15, 226:8-16.

On this basis, OutServe cannot establish that it possesses the first indicia of a membership organization.

⁹ This position was formerly called "Executive Director." Blevins Dep. 41:13-16.

b. Members do not serve as OutServe's leadership or influence OutServe's direction.

OutServe has also failed to establish the second indicia: whether its members serve in leadership positions or influence OutServe's direction. First, none of the individuals identified as purported members by OutServe serve on the Board of Directors, as corporate officers, or as are members of OutServe's staff. Ex. N, Pl. OutServe's List of Leadership ("Leadership List").

Moreover, OutServe's Bylaws do not require its Board Members, officers, or staff members to meet the identity requirements to qualify under OutServe's proffered membership definition. Ex. B, OutServe Bylaws, Art. II-III. OutServe asserts that a member must identify as either LGBTQ or HIV-positive, and as a prospective, current, or former member of the military. Ex. A, OutServe Interrog. No. 2; Blevins Dep. 112:8-12. But a non-military donor (such as a spouse, family member, or ally) might readily be included on OutServe's Board. The lack of a membership requirement for a leadership position in the Bylaws is fatal to being a membership organization. In *AARP*, for example, the court relied on the fact that AARP's Board Members were required, *by the bylaws*, to be AARP general members, and meet the 50 year old age criteria for membership at the time of their election. 226 F. Supp. 3d at 17. Here, the Bylaws contain no similar requirements.

Second, while some courts consider whether members can influence the direction or strategy of an organization as part of this indicia, *see e.g., id.*, OutServe's general members do not have a meaningful say in running the organization. For instance, in *AARP*, the court relied on the existence of member-driven committees, which advised AARP's board on policy, and considered AARP's practice of taking annual membership opinion polls before forming policy positions. *Id.* OutServe's purported members are not given similar opportunities. Rather, OutServe's attempts to engage in "consensus-based decision-making" (at least at the local level) are limited to polls such as "Where do you want to go eat for this event," rather than voting on the organizations' strategic

direction or policy initiatives. Blevins Dep. 132:18-26, 133:1-5. Indeed, OutServe admits that its purported members have very little influence in its strategic direction. The OutServe Board sets OutServe's mission and strategic goals. Blevins Dep. 45:8-17. The OutServe President implements these goals with broad, unilateral authority. Blevins Dep. 22:7-11; 93:10-15.

Recently, OutServe has constituted a Board of Advisors to provide advice to its leadership, though there is no provision for the Advisors in its Bylaws. Blevins Dep. 79:16-25, 80:1-2; 81:9-11; Ex. B, OutServe Bylaws. The Advisors are handpicked by the President, based no articulated criteria other than the President's interpretation of which identity groups the Advisors represent. Blevins Dep. 81:1-8; 82:8-15, 83:10-22, 84:1-8. Of the eight purported members of OutServe identified in these two suits, only plaintiff Harrison serves as an Advisor. Ex. N, Pl. OutServe's List of Leadership ("Leadership List"); Blevins Dep. 88:6-25. And, despite the existence of this advisory group, the Board of Directors and the President control the organization's direction and decision-making. Blevins Dep. 45:8-17; 22:7-11; 93:10-15. Even when "advisory board members exert substantial influence over the affairs of the organization, including by influencing the matters in which the organization participates, and that advisory board members are expected to contribute to the organization, either financially or by offering their time and expertise," it is insufficient evidence to establish an organization is a functional equivalent of a membership organization. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 307. Here, OutServe's Advisory Board does not exercise such influence. Likewise, OutServe admits it takes no strategic direction from its local chapters or Facebook forums, except to potentially react to an individual complaint or concern. Blevins Dep. 96:18-25 (programs are "pushed down" from the national organization to the chapters); 97:1-2 (chapters report "back up" "issues or concerns"), 101:1-12 (chapters are involved in OutServe's national leadership to the extent that they "have a dialog"); 227:7-16.

The *Harrison* and *Roe* suits are illustrative of OutServe’s approach—OutServe’s decisions to enter the suits as a plaintiff was not member-driven. OutServe’s President unilaterally decided to enter the suits with his organization *after* OutServe offered legal services to the individual plaintiffs. Blevins Dep. 42:14-18. Neither OutServe’s Board of Directors nor its Board of Advisors was involved in the decision for OutServe to become an organizational plaintiff, except that the Board ensured that the suits conformed with the organization’s objectives. Blevins Dep. 48:16-25, 49:1-7, 78:16-24, 79:7-12, 86:14-17. Neither OutServe’s Board of Directors nor its Board of Advisors are consulted regarding litigation strategy—the President merely briefs these groups on the litigation status. *Id.* And although OutServe maintains a “Positive Forum” Facebook group specifically for HIV-positive service members or aspiring service members, the Positive Forum did not weigh in on OutServe’s decision to enter into the *Harrison* or *Roe* litigation. Blevins Dep. 106:12-21. Moreover, Positive Forum participants’ involvement in the suit is now limited to “armchair quarterbacking.” Blevins Dep. 161:5-19.

In sum, the evidence fails to demonstrate that OutServe possesses the second indicia of membership because its members do not serve as leaders or influence OutServe’s direction.

c. OutServe is not financed by its members.

OutServe also admits that it is not primarily financed by its members. Rather, the vast majority of OutServe’s funding—\$4.5 million last year—comes from donations of pro bono legal services. Blevins Dep. 163:25, 164:1-6. These are in-kind donations, which come from law firms such as the counsel in the present cases, not from OutServe’s purported members. The Supreme Court in *Hunt* considered not just whether the association’s members financed its activities generally, but also whether its members “*alone finance[d] its activities, including the costs of this lawsuit.*” 432 U.S. 333 at 344 (emphasis added). Based on this factor, OutServe has made no showing that its purported members are financing the costs of the *Roe* and *Harrison* suits.

OutServe's remaining operating budget is approximately \$250,000 annually, which is about 5% of OutServe's total budget when considered proportionally with its legal service budget. Blevins Dep. 161:23-25. OutServe does not collect dues. Blevins Dep. 136:9-15. OutServe raises this miniscule portion of its budget primarily through personal donations. Blevins Dep. 164:10-11. Much of these donations come from OutServe's Board Members, who each have a minimum \$2,500 annual "give/get" requirement. Blevins Dep. 164:24-25.

OutServe has offered no evidence as to the source of its remaining donations, asserting only an assumption that it receives about 75% of its personal donations from purported members and 25% from non-members. Blevins Dep. 167:9-21. But OutServe provided no documentation to support this bald assertion. Indeed, given its large number of non-member supporters—OutServe also that it has 7,000 members, and "more than 54,000 supporters," *Harrison* Compl. ¶ 69; *Roe* Comp. ¶ 25—OutServe's assertion is likely incorrect.

OutServe also claims that any current, former, or prospective service member who identifies as LGBTQ or HIV-positive becomes a member of OutServe, perhaps unknowingly, by virtue of their donation. Blevins Dep. 114:20-25; 115:1-4; 230:10-18. But OutServe has no way to track which of its donors are already purported members or qualify to become members through their donations, except when they have "firsthand knowledge of the individual." Blevins Dep. 168:6-20. Of the eight individuals identified by OutServe as purported members of its organization, only plaintiff Harrison and K.R. have ever made even a de minimis donation to OutServe. *Harrison* Dep. 328:17-329:8, K.R. Dep. 39:8-14, *Roe* Dep. 68:8-9, *Voe* Dep. 77:5-7, S.H. Dep. 33:7-9, D.N. Dep 36:2-4, Q.S. Dep. 43:17-18. Thus, OutServe has no way of knowing whether or how much members finance its organization.

OutServe's funding situation stands in stark contrast to *Hunt*, in which the association members paid for the entirety of their lawsuit, or even *AARP*, in which membership dues accounted

for 19% of the organization's total revenue. *See Hunt*, 432 U.S. at 344; *AARP*, 226 F. Supp. 3d at 17. Accordingly, OutServe also failed to demonstrate that it possesses the third indicia of membership because its members do not finance its activities.

In sum, OutServe failed to prove by a preponderance of evidence that its purported members possess the three indicia of membership. Accordingly, OutServe does not have standing to represent such individuals as the functional equivalent of a membership organization.

2. OutServe is not a traditional voluntary membership organization.

As set forth above, OutServe is clearly not the functional equivalent of a membership organization, and that alone should be sufficient to defeat its representational standing. But to the extent OutServe may argue that it is a traditional voluntary membership organization to which *Hunt's* indicia-of-membership should not be applied, that argument would also lack merit.¹⁰ In the course of this litigation, OutServe has asserted a general definition of its membership, and applied it to eight identified individuals. OutServe Interog. Nos. 1-2. A self-serving contention of membership does not, however, satisfy OutServe's burden.

It is "clear that a mere assertion that an individual is a 'member' of an organization is not sufficient to establish membership." *AARP*, 226 F. Supp. 3d at 16; *see e.g., Heap*, 112 F. Supp. 3d at 418 (holding that an organization's statement that "it maintains an active membership, including members who are enlisted in the United States Navy" with no additional details is insufficient to

¹⁰ Some courts have questioned whether *Hunt's* indicia-of-membership test can or should be undertaken in connection with associations that actually have identifiable members. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F. Supp. 3d 99, 107 (D. Mass. 2017) (collecting cases); *see, e.g., Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, No. 1:14CV954, 2018 WL 4688388, at *4 (M.D.N.C. Sept. 29, 2018) (finding the indicia-of-membership analysis inapplicable when it is clear that the organization is a traditional membership organization); *But see Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 598 (D.C. Cir. 2015) (using the indicia of membership analysis to conclude a plaintiff is a "traditional membership organization"); *AARP*, 226 F. Supp. 3d at 16 (asking "what then defines a 'traditional membership organization,' if not the 'indicia of membership' identified in *Hunt*?").

determine whether they are a voluntary membership organization or the functional equivalent)(citation omitted); *Wash. Legal Found.*, 477 F. Supp. 2d at 210 (rejecting the assertion that if “individuals view themselves as members of the organization and . . . are viewed by the organization as members,” then it establishes general membership)(citation omitted).

As set forth below, even if the Court considers the question, OutServe has failed to establish that it is a traditional membership organization.

a. OutServe does not maintain membership lists, collect dues, or present itself to the public as a membership organization.

First, OutServe lacks some of the common characteristics of a traditional voluntary membership organization—it lacks a provision for general members in its Bylaws, it does not collect dues, and it does not necessarily present itself to the public as a membership organization.

Courts that have considered whether *Hunt*’s indicia of membership test was applicable to membership organizations ask if the organization’s Bylaws provide for the existence “general members,” and or if the organization’s web site indicated whether individuals can voluntarily associate as a member. *See, e.g., SFFA*, 2018 WL 4688388, at *4. For example, the district court in *Brady Campaign to Prevent Gun Violence v. Salazar*, concluded an organization was a traditional membership organization because the organization’s President submitted a declaration stating the organization is a “grassroots membership organization” and that its articles of incorporation specified the organization would have members with “voting rights as prescribed in the By-Laws.” 612 F. Supp. 2d 1, 28–29 (D.D.C. 2009). Unlike in these cases, the OutServe Bylaws and Certificate of Incorporation fail to provide for the existence of a general membership. *See* Ex. B, OutServe Bylaws; Ex. C, Certificate of Incorporation. OutServe admits its descriptions of membership is based on a “common understanding,” which is not documented anywhere. Blevins Dep. 112:19-22. Likewise, OutServe’s web site does not advertise a way to “join” or “become a member.” Instead,

the web site directs interested individuals to “Get Involved,” directing visitors equally to a Chapter or Forum or to donate (both of which OutServe claims will make certain individuals members) or to Jobs & Internships and Events (neither of which are associated with membership). Ex. O, Selected Pages from www.outserve-sldn.org (“OutServe Website”) 11-17.

Because OutServe does not publish a membership criteria, it is perhaps unsurprising that OutServe also does not maintain a membership roster. *See e.g., Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 599 (E.D. Va. 2004) (accepting that an association was a traditional membership organization because it maintained a membership roster and had begun to host regular meetings of members). OutServe does maintain a list of its donors and those who subscribe to its newsletter. Blevins Dep. 168:6-8, 169:5-7. But this is not an indicia of membership under the law. Indeed, OutServe has no way to determine which individuals on those lists are even members of the military community, LGBTQ or HIV-positive—all characteristics required of what OutServe considers its purported “members.” Blevins Dep. 168:9-20.

Likewise, OutServe states that local chapters and Facebook forums have membership rosters, primarily because Facebook groups “automatically” create lists of its participants. Blevins Dep. 133:1-13. But this does not constitute a membership so much as a group of followers on a Facebook page; moreover, Facebook forums allow spouses or allies to join, so again OutServe cannot possibly determine which individuals in those groups qualify as its purported members either. *See, e.g.,* Ex. P, Various OutServe Facebook Pages (“Facebook Pages”) 5, 7.

Finally, collecting dues would be the simplest way to maintain a list of individual members who voluntarily choose to associate themselves with its organization, but OutServe does not collect dues. Blevins Dep. 136:9-15. Though failure to collect dues is not a fatal flaw in defining a traditional membership organization, courts have considered dues collection a factor in whether the organization was functioning as a traditional membership organization. *See, e.g., SFFA*, 2018 WL

4688388, at *4 (refusing to disqualify an organization for not collecting dues, but considering that it had “has since amended its Bylaws to establish a dues policy”).

In sum, OutServe lacks a provision for general members in its Bylaws, it does not collect dues, it does not maintain a membership roster, and it does not necessarily present itself to the public as a membership organization, all of which weigh against a finding that it is a traditional membership organization.

b. OutServe’s assertion of a purported “common understanding” of its membership is not sufficient to establish OutServe as a membership organization.

Because OutServe lacks some of the obvious characteristics of a traditional membership organization, it finds itself in a position of claiming individuals as members even if they did not voluntarily choose to associate themselves with the organization. *See Hunt*, 432 U.S. 344-45 (determining the Commission was not a “traditional voluntary membership organization” because dues were levied on them by the state); *see e.g., Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 675–76 (E.D. La. 2010) (considering membership is acquired through “active, voluntary” involvement); *SFFA*, 2018 WL 4688388, at *4 (emphasizing “voluntary membership”); *Heap*, 112 F. Supp. 3d at 418–19 (same).

OutServe contends that the purported “common understanding” of its membership is that if an individual identifies as in the military, prospective military, or former military and is LGBTQ or HIV-positive and does one of four things: donates, joins a local chapter or Facebook group, subscribes to the newsletter, or requests legal services, *then* that person becomes a member. Ex. A, OutServe Interrog. No. 2. This “common understanding,” however, is not sufficient to establish that OutServe is a voluntary membership association.

First, OutServe admits that no part of its communication with donors includes a statement that by donating, that individual (if they possess a certain identity), will become a member of

OutServe. Blevins Dep. 115:1-4. Indeed, when OutServe collects a donation, it does not request any information about the donor's identity to determine if they could be a member. Blevins Dep. 168:6-20; Ex. Q, OutServe's Donation Request Forms ("Donation Forms") 1, 2, 7, 9. It is possible, under this definition, that a LGBTQ or HIV-positive service member who gives \$5 to participate in a local OutServe fundraiser might find themselves a member of a national organization, which purports to represent their interests in a law suit, without even knowing it. This is not how courts define voluntary association. *See e.g., Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) (finding that if members also elect their leaders and define the strategy of the organization under the *Hunt* analysis, and in the context of a "clearly articulated and understandable membership structure" only then can membership be defined by donations).

Second, joining a Facebook group should be insufficient to turn an individual into a member of a national organization for representational standing purposes. Facebook groups exist for many purposes, including "your family reunion, your after-work sports team, your book club." Groups | Facebook Help Center, https://www.facebook.com/help/1629740080681586/?helpref=hc_fnav (last visited May 1, 2019). As of 2010, one study found that there were at least 620 million groups on Facebook. Nick O'Neill, *Google Now Indexes 620 Million Facebook Groups*, AdWeek (Feb. 1, 2010), <https://www.adweek.com/digital/google-now-indexes-620-million-facebook-groups>. The average Facebook user can freely create, join, and exit Facebook groups. Given the informality of these forums, joining a Facebook group, in general, is not a significant enough voluntary affiliation with an organization to allow that group to represent a group members' legal interests. *See Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 225 (D.C. Cir. 2018) (holding that an organization's attempt to "invoke as 'members' the passive subscribers to its e-mail list and individuals who 'follow' the group's Facebook page" falls "too short of the mark" to assert associational standing).

More specifically considering OutServe's Facebook groups, those groups offer no indication that joining is different than casually participating in the millions of other Facebook groups. OutServe's "About this Group" information, which vary from group to group, never reference that by joining, a Facebook user is becoming a member of its national organization. *See e.g.*, Ex. P, Facebook Pages at 5 ("[This group]" is open to both American and Belgian military members" and is "mainly a support and social group."), 7 ("This group is for Active Duty, Guard, Reserve, DoD Civilians, DoD contractors and their spouses/partners of the LGBTQ community" for participants to "connect, rant, rave, and share ideas").¹¹ Indeed, in the course of this litigation, at least one HIV-positive Airman identified himself to the Air Force as a member of the OutServe Positive Forum Facebook group and, yet, he does not consider himself a member of OutServe. *Roe* ECF No. 109, Ex. C. This is not the type of voluntary association that should be expected of a traditional membership organization.

Though OutServe contends that its Facebook groups are substantially the same as its local chapters, Blevins Dep. 106:1-7, they are not. The members of the Facebook groups rarely or never meet in person. Blevins 99:3-6. Many of the individuals identified by OutServe admit that they only occasionally read or participate in the online groups. *Roe* Dep. 65:6-21, *Voe* Dep. 71:17-19, 72:3-13, S.H. Dep. 31:1-19, D.N. Dep. 34:7-17, K.R. Dep. 35:21-36:14; D1 Dep. 42:7-12 (not a participate of

¹¹ Even when some Facebook groups do reference "members," the word is used in a context that implies that the individuals would already consider themselves an OutServe "member" prior to joining the Facebook group. The context of does not convey that the individual becomes a member by deciding to join the Facebook group. *See e.g.*, Ex. P, Facebook Pages at 6 ("This forum is for all OutServe-SLDN members who follow Christian (traditionally Protestant) faiths . . ."), 8 ("We provide a safe space for our members. . ."). Similarly, to a Facebook user, the term "member" could easily be interpreted as a "member" of the Facebook group, not a member of a national organization because Facebook itself uses the term "join" when subscribing to a group and describes the subscribers of that group as "members." *See* Join an Interact with Groups, Facebook, https://www.facebook.com/help/1210322209008185/?helpref=hc_fnav (last visited Apr. 29, 2019).

OutServe’s Facebook groups). Thus, at best, the Facebook groups are for OutServe to disseminate information. Further, joining a Facebook group is more analogous to subscribing to a newsletter or a magazine than voluntarily becoming a member of a national organization. *See* Blevins Dep. 133:14-18 (OutServe communicates via “[s]ocial media largely”); 105:10-19 (information is “pushed out” via social media).

Third, OutServe erroneously claims all its newsletter subscribers (who also possess the required military and LGBTQ or HIV-positive identity) are its members. But, like its donors, OutServe does not notify its electronic newsletter subscribers that their choice to subscribe makes them a member of OutServe until after they have subscribed. Blevins 114:3-19. Other associations have tried a similar gambit by broadly describing newsletter readers and magazine subscribers as members for the purpose of associational standing. Courts have roundly rejected these claims. *See e.g., Gettman v. Drug Enf’t Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) (holding that readership in a magazine is not the same as membership); *Am. Legal Found.*, 808 F.2d at 89–90 (holding that regular news watchers are not members of media watchdog group for associational standing purposes); *Wash. Legal Found.*, 477 F. Supp. 2d at 210–11 (members on a mailing list, without more, did not constitute members for purposes of associational standing). Subscribing to a newsletter alone does not establish a membership for the purposes of associational standing.

Fourth, OutServe’s so-called “local chapters” do not establish that it is a membership organization.¹² The local chapters themselves are organized with Facebook groups, centered around a geographic region rather than a particular interest or identity. Blevins Dep. 98:2-22. Their leadership is unilaterally selected by OutServe’s President; local chapters have no apparent

¹² Only two of the purported members of OutServe involved in this litigation participate in a geographically local chapter—K.R. and plaintiff Harrison. Harrison Dep. 329:17-331:9; K.R. Dep. 37:8-39:7. *But see* Roe Dep. 94:3-13; Voe Dep. 77:18-20; S.H. Dep. 34:7-12; D.N. Dep. 36:13-19; Q.S. Dep. 43:22-44:6, D1 Dep. 40:13-14.

meaningful influence in OutServe's strategy or direction; and there is no provision for the existence of local chapters in OutServe's Bylaws or Certificate of Incorporation. Ex. B, OutServe Bylaws. Even more problematic, the geographically-oriented groups allow spouses, allies, friends and family, civilians, and members of foreign militaries—all of whom do not fit even OutServe's purported membership description—to freely join and benefit from the local chapter's activities. *See, e.g.*, Ex. P, Facebook Pages 5, 7; Blevins Dep. 130:15-131:24. When it comes to participation in local chapters, there is no practical difference between *anyone* who simply logs onto their Facebook forum, so the existence of these local chapters cannot be used to establish OutServe as a traditional membership organization.

Lastly, OutServe's assertion that those who access its legal services become members turns the notion of associational standing on its head. OutServe *first* has to show that individuals on whose behalf an organization purports to sue are already *members* of the organization, not simply that they become members *by suing*. If offering legal services for persons were sufficient for an organization to establish organizational standing, the doctrine of organizational standing would be a mere tautology: an organization would have standing to sue because it is suing. Indeed, if this were the law, there would be little need for class action, as legal services providers could simply sue as an association. *See APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1253 (D.C. Cir. 2005) (Sentelle, J., concurring in part and dissenting in part) (rejecting the notion that clients of a firm can be members.), *cert. granted, judgment vacated on other grounds sub nom.*, 550 U.S. 901 (2007). When an individual contacts OutServe for legal help, usually through a telephone hotline or e-mail form, OutServe does not inform that person, by virtue of even one telephone conversation, that they joined a national advocacy organization. Blevins Dep. 113:9-25-114:2. Consulting an attorney should not turn an individual into a part of an association that can then attempt to represent that person's interests in court without consent.

c. OutServe's description of membership appears ad hoc and subject to unilateral termination.

As a final consideration, OutServe's description of its membership appears ad hoc at best, and at worst, defined in support of OutServe's position in this litigation.

Adding weight to this concern is the timing of the individuals' decisions to affiliate themselves with OutServe relative to the present litigation. *See Wash. Legal Found.*, 477 F. Supp. 2d at 211 (an "associational standing claim is further weakened by the fact that [the organization] manufactured 'members' for the purposes of this lawsuit after the fact"). Plaintiff Roe admits that he was directed by OutServe's attorney to join the Positive Forum Facebook group the day that OutServe filed suit. Roe Dep. 63:4-64:3; Ex. A, OutServe Interrog. No. 1. Prior to that, Roe's only contact with OutServe was to request its legal services, and he was simultaneously subscribed to its newsletter. Roe Dep. 49:5-10, 52:16-22; 68:10-21; Ex. A, OutServe Interrog. No. 1. S.H., D.N., and Q.S., all had similar experiences. In each case, OutServe's lawyer requested that they join the Positive Forum Facebook group, *after* they contacted OutServe requesting legal services, and *after* OutServe filed suit in *Roe*. S.H. Dep. 27:15-28:17; D.N. Dep. 30:11-31:25; Q.S. Dep. 42:12-17. Even in the case of Voe, OutServe claims him as a member only by virtue of seeking legal services and his membership in OutServe's Positive Forum Facebook group. Voe Dep. 79:8-19; Ex. A, OutServe Interrog. 1.

Another fact that undermines OutServe's assertion that it is a voluntary membership organization is that continued membership in OutServe is completely at the discretion of OutServe's President. There is no specified term for expiration of a membership or a published procedure to resign a membership. Blevins Dep. 137-145. Instead, memberships expire at various intervals based on ill-defined circumstances. *Id.* For instance, a donor's membership might expire in a year, except if he attends an OutServe event, then it might be extended longer. Blevins Dep 143. A Facebook

participant may resign their membership by leaving the Facebook group, but only after a two to three month “grace period” following their exit. Blevins Dep. 143:1-7. On the other hand, unsubscribing from OutServe’s newsletter results in an immediate termination of membership, without any grace period. Blevins Dep. 143:8-18.

And OutServe also reserves the right to unilaterally terminate memberships as it sees fit. For example, the OutServe President might email an individual that has taken a public position contrary to OutServe’s interests to let them know that they are no longer a member. Blevins Dep. 147:11-19. Indeed, the individual might not even be aware they *were* a member of OutServe to begin with.

The lack of any clear policy or procedure involved in losing or resigning a membership also serves as further evidence that OutServe is not a traditional membership organization.

II. In *Roe*, OutServe lacks prudential standing to bring suit on behalf of its purported members because of conflicts of interest between those members’ interests.

The third prong of *Hunt*’s associational standing test requires that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” 432 U.S. at 343.¹³ “This prong is not met when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests.” *Md. Highways Contractors*, 933 F.2d at 1252.

¹³ This third element of the associational standing test is prudential. *See Hunt*, 432 U.S. at 344. “The third prong is best seen as focusing on matters of administrative convenience and efficiency, not on elements of a case or controversy. Circumstantial evidence of that prong’s prudential nature is seen in the wide variety of other contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another, even where damages are sought.” *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 545 (1996). The standing inquiry may include “prudential considerations” which “add to the constitutional minima a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed . . . that the courts are neither well equipped nor well advised to adjudicate.” *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998) (citation omitted).

Yet, here, OutServe finds itself with a conflict of interest among its purported members. OutServe is seeking global relief by asking the Court to require the Air Force and the DoD to change their policies to consider service members with HIV “to be considered deployable” and prohibit the Air Force from implementing any of its instructions “in a manner that limits the deployability of Airmen diagnosed with HIV while on active duty.” *Roe* Compl. Request for Relief ¶¶E-H. This relief will necessitate that the Air Force retain, rather than separate, certain Airmen in highly deployable positions following an HIV diagnosis. But OutServe is fully aware that not all the Airmen that it holds out as members of its organization wish to be retained or deployed. *See, e.g., Roe* ECF No. 34 at 1 (“Plaintiff OutServe-SLDN, Inc. . . represents the interests of members of the military or those seeking to serve in the military who are living with HIV”). J.B., for example, was one of the Airmen initially disclosed by OutServe as a member in support of its case. *Ex. A, OutServe Interrog. No. 1.* J.B., however, decided he wished to separate. Declaration of Colonel Damon Menendez (“Menendez Dec.”) ¶ 7, *Roe* ECF No. 105-1. Despite OutServe’s awareness that the relief it sought ran counter to at least one of their purported member’s interests, OutServe made no attempt to request a modification to the nationwide relief to protect J.B.’s interests, or the 4 HIV-positive Airmen that wished to separate. *Roe* ECF No. 105. At the time the Court issued its injunction, there were 11 HIV-positive Airmen with separation dates. Menendez Dec. ¶ 7. Five Airmen, wished to separate rather than be retained, and at least one Airman wanted to continue his Disability Evaluation System process so that he could separate if that was the outcome. *Id.* ¶ 11. These Airmen seeking a separation are not isolated exceptions—they comprise nearly half the group that OutServe purports to represent.

Each of the six Airmen had their own reasons for wishing to separate. *See Roe* ECF No. 109. But OutServe claimed that the only reasons Airmen wanted to separate is because “have accepted that that’s going to happen and no longer want to fight it.” Blevins Dep. 171:6-8; 222:11-16. But

this is not so. As the Court can see from four of the Airmen's written statements, their decisions to proceed with a separation are nuanced and individualized, reflecting their desires to relocate home, continue their education, or simply discontinue their military service. *Roe* ECF No. 109. Four of the Airmen accepted the decision of the Informal Physical Evaluation Board, which is the very first level of review, with no appeal or argument. *Menendez* Dec. ¶ 11.

In at least one case, an organization was allowed to maintain its associational standing despite internal conflicts of interest because the members "uniformly endorsed the present litigation," the Board was fully representative, "and the Board the board voted *unanimously* to prosecute this action." *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007). OutServe's decision to enter the *Roe* litigation possesses none of these characteristics: (1) its Board was barely consulted except to confirm the lawsuit aligned with the organization's strategic goals, *see* Blevins Dep. 48:16-25, 49:1-7, 78:16-24, 79:7-12; (2) its Board is not a representative body of the membership, *see supra* Part I.B.1; (3) OutServe did not consult with its member's Advisory Council, *see* Blevins Dep. 86:14-49:9; and (4) OutServe did not consult with its local chapters or its Facebook Positive Forum about joining the litigation, *see* Blevins Dep. 106:12-21.

Put simply, OutServe's refusal to acknowledge that an HIV-positive Airmen might *want* to be separated under the Disability Evaluation System is not tenable. Even looking to prospective future Airmen with an HIV diagnosis, it is not difficult to imagine that a young Airman, recently diagnosed with a serious and chronic disease, might not want to deploy to a dangerous region and risk their health in austere conditions, or that such an individual might want to end their term of enlistment early and return home. Plaintiffs argue that an HIV-positive Airman might suffer a stigma from their discharge. But a discharged Airman would never have to reveal the reason for his medical discharge. And, depending on the individual circumstances, medical discharge carries with it significant benefits, including a severance package, a lifetime disability payment, education benefits,

and even preferred hiring in certain civilian jobs that favor hiring disabled veterans. *See, e.g.*, 38 C.F.R. § 17.37(b) (medical benefits from the Department of Veterans Affairs), 10 U.S.C. § 1212 (severance pay); 10 U.S.C. §§ 1201, 1401 (retirement pay); 38 U.S.C. § 1131 (disability pay); 38 U.S.C. § 3311(b)(2) (post-9/11 GI Bill), 5 U.S.C. § 2108 (disabled veteran's preference in federal hiring).

OutServe's self-serving assertion ignores these Airmen's interests. Indeed, *Defendants* had to intercede on the behalf of HIV-positive Airmen to request a modification to the Court's relief to reflect their wishes because OutServe was not representing their interests in the suit. *Roe* ECF No. 105. This is a classic conflict of interest: Airmen who wish to be medically separated, despite OutServe's litigation, will need to come forward and enter this case as plaintiffs to avoid being subject to the relief OutServe is seeking. Accordingly, OutServe's cannot maintain associational standing under the third prong of the *Hunt* test.

III. OutServe failed to prove it has been directly injured, so it lacks constitutional standing to bring suit on its own behalf.

An organizational plaintiff which alleges that it suffered a direct injury is subject to the same rigorous standard for standing as an individual plaintiff. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). OutServe has not offered any evidence that it suffered a direct injury and therefore, should not be able to assert standing on this basis.

OutServe's Complaints lack any allegation of a direct injury. *See Harrison* Cmpl.; *Roe* Cmpl. OutServe alleges only that it “*represents* the interests of its members currently living with HIV . . . as well as those who may acquire HIV in the future, and therefore are or will be adversely affected by the challenged regulations and policies.” *Harrison* Cmpl. ¶ 70; *Roe* Cmpl. ¶ 27 (emphasis added). Likewise, in the *Roe* case, in response to Defendants' Motion to Dismiss, OutServe argued its standing based only on its representation of membership. *See Roe* ECF No. 61 at 21-22. The Court accepted that argument, stating that OutServe was seeking “relief on behalf of its

members.” *Roe v. Shanahan*, 359 F. Supp. 3d 382, 422 (E.D. Va. 2019), *Roe* ECF No. 72.

Throughout this litigation OutServe relied on its representation of its purported members to establish its standing. However, in a response to Defendants’ Interrogatories that it did not serve until 5:14 p.m. on the final day of fact discovery, OutServe asserted that it also suffered a direct injury from Defendants’ policies. Ex. A, OutServe Interrog. No. 3. But this conclusory, single interrogatory answer is nothing more than a bare bones assertion of an abstract injury that does not satisfy OutServe’s burden of proof. *See Havens*, 455 U.S. at 379 (a “simpl[e] setback to the organization’s abstract social interests” does not give rise to standing); *Maryland Highways Contractors Ass’n, Inc.*, 933 F.2d at 1250-51 (“non-economic injury” to an association’s “‘organizational purpose’ “ produced by [a] statute is insufficient to confer Article III standing”); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). (“[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.”).

Critically, except for the bare assertions in a single interrogatory answer, OutServe has failed to produce any evidence that it was injured. In fact, even though Defendants requested that OutServe produce all document on which it relies on to support its claims and also all documents describing OutServe’s financing, OutServe produced no financial documents, budgets, or audit statements. Ex. R, Defs.’ First Set of Req. for Produc. Nos. 3, 25. Put simply, OutServe produced no evidence of concrete injury, financial or otherwise, by the close of fact discovery.

CONCLUSION

For the foregoing reasons, the court lacks subject matter jurisdiction over OutServe’s claims, and OutServe should be dismissed as a plaintiff in the *Harrison* and *Roe* cases.

DATE: May 3, 2019

Respectfully submitted,

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/s/

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Counsel for Defendants

CERTIFICATE OF SERVICE

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

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EXHIBIT B

*First Am. & Restated Bylaws of OutServe-
SLDN, Inc.*

FIRST AMENDED AND RESTATED BYLAWS
of
OUTSERVE-SLDN INC.

ARTICLE I
OFFICES

Section 1. REGISTERED OFFICE – The registered office of OutServe-SLDN Inc. (the “Corporation”) shall be established and maintained at the office of The Corporation Trust Company and The Corporation Trust Center, 1209 Orange Street in the city of Wilmington, County of New Castle, State of Delaware, and said Corporation Trust Company shall be the registered agent of the Corporation in charge thereof.

Section 2. OTHER OFFICES – The Corporation may have other offices, either within or without the State of Delaware, at such places or places as the Board of Directors may from time to time select or the business of the Corporation may require.

ARTICLE II
DIRECTORS

Section 1. NUMBER AND TERM – The business and affairs of the Corporation shall be managed under the direction of the board of directors of the Corporation (the “Board of Directors”), which shall consist of no fewer than seven persons and no more than 25 persons. The exact number of directors shall be fixed from time to time by the Board of Directors. Directors shall be elected by the affirmative vote of a majority of the Members. Each director shall be elected to serve for a term of three (3) years, beginning from the effective date of election, which term may be renewed for one successive three-year period and until their successors are elected and qualified by the affirmative vote of the majority of the Members. Directors may be elected to two additional three-year terms after a break in service of at least one full year after the expiration of his or her most recently completed term on the Board of Directors. The President shall be an ex officio non-voting member of the Board of Directors.

Exemption from the consecutive term limit may be recommended to the Board of Directors.

Section 2. RESIGNATIONS – Any director may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified therein or, if no time be specified, at the time of its receipt by both co-chairs of the Board of Directors (the “Co-Chairs”). The acceptance of a resignation shall not be necessary to make it effective.

Section 3. REMOVAL – It will take an affirmative vote of a majority of the Members to remove a director from the Board of Directors. A director will be notified of the Members’ intent to proceed with a vote of removal. Directors subject to removal will have the option to submit a statement either verbally or in writing before the Members’ vote.

Section 4. VACANCIES – Any vacancy occurring caused by the death, resignation, removal, or disqualification of any director or by reason of an increase in the number of directors on the Board of Directors, may be filled by the Board of Directors. A director selected to fill a vacancy shall serve the remaining, unexpired term of his or her predecessor in office.

Section 5. LEAVES OF ABSENCE – Any director may, without resigning his or her office, apply to the Board of Directors for a leave of absence from all or part of his or her duties as a director. Leaves of absence shall be addressed in writing to the Board of Directors and shall be granted by the affirmative vote of a majority thereof. Leaves of absence so granted shall run for a period not to exceed six months, unless the leave of absence is renewed from time-to-time at the discretion of the Board of Directors. The resolution of the Board of Directors granting such a leave of absence shall specify those duties from which the Board of Directors member is relieved and those duties which the director is required to fulfill during the period of absence.

Section 6. COMMITTEES – The Board of Directors may, by resolution or resolutions passed by a majority of the whole Board of Directors (excluding any director on a leave of absence), designate one or more committees, each committee to consist of one or more directors of the Corporation. Any such committee, with respect to the matters delegated to it and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it. The Board of Directors may also, by resolution or resolutions passed by a majority of the whole Board of Directors, designate one or more advisory committees, each consisting of such directors and non-directors as may be appointed by the Board of Directors, provided that such advisory committee does not have and may not exercise the power and authority of the Board of Directors.

The Co-Chairs of the Board of Directors, as needed, may form ad hoc committees at any time that may not last more than 6 months without the approval of the full Board of Directors.

The Co-Chairs of the Board of Directors will be responsible for appointing directors, and with the consultation of the President and CEO, staff members, to serve on committees.

Section 7. STANDING COMMITTEES – The Corporation must have the following committees and they cannot be dissolved by the Board of Directors: audit and nomination.

AUDIT COMMITTEE: The audit committee of the Corporation (the “Audit Committee”) is responsible for reviewing the annual audit performed of the Corporation’s finances. The chair of the Audit Committee will not be any officer of the corporation and the Audit Committee must be comprised entirely of directors of the corporation. The Audit Committee will review the findings of the independent auditor annually. The committee chair will report their findings to the Board of Directors at least annually and as requested by the Board of Directors.

NOMINATIONS COMMITTEE: The nominations committee of the Corporation (the “Nominations Committee”) is responsible for accepting nominations to the Board of Directors and recommending potential board candidates to the entire Board of Directors. The chair of the Nominations Committee will not be any officer of the corporation and the Nominations Committee must be comprised entirely of directors of the corporation.

Section 8. MEETINGS – At least two meetings of the Board of Directors per year must be held face-to-face. Regular meetings of the Board of Directors may be held at such times and places as may be determined from time to time by resolution of the Board of Directors adopted at a meeting thereof. Special meetings of the Board of Directors may be called by a Co-Chair of the Board of

Directors or on the written request of any two directors, at such times and places as shall be stated in the call of the meeting.

Section 9. MEETING FORMAT – Any one or more directors may attend and participate in any meeting of the Board of Directors by means of a conference telephone, video conference or other communications equipment by means of which all persons participating in the meeting can hear each other. The attendance or participation by a director by any such means shall constitute the presence of such director in person at such meeting of the Board of Directors.

Section 10. QUORUM & VOTING– The presence of a majority of the directors then in office at any meeting (excluding any director on a leave of absence) shall constitute a quorum for the transaction of business at such meeting. If no quorum is established at any meeting of the Board of Directors, then the meeting may continue but any business which requires an official vote may not be conducted. A majority of those present may adjourn the meeting until a quorum is obtained, and no further notice thereof need be given other than by announcement at the meeting which shall be so adjourned. The vote of the majority of the directors present at a meeting at which a quorum has been established shall be the act of the Board of Directors unless the Certificate of Incorporation of the Corporation or these Bylaws shall require the vote of a greater number.

Section 11. COMPENSATION – Directors shall not receive any payment for their services as directors or as members of committees. Nothing herein shall be construed to preclude any director from serving the Corporation in any other capacity as an officer, agent or otherwise, and receiving reasonable compensation therefor. If there is a conflict, then a director will be required to recuse themselves.

Section 12. ACTION WITHOUT MEETING – Any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting if a written consent thereto is signed by all of the members of the Board of Directors or of such committee, as the case may be, and such written consent is filed with the minutes of proceedings of the Board of Directors or such committee.

Section 13. DUTIES – The duties of a director shall include, without limitation, (1) attendance at 75% of all Board meetings, (2) financial support of the Corporation which will be determined at the beginning of each year and in which all board members are required to participate, (3) fundraising on behalf of the Corporation in at least such amount as may from time to time be established by the Board of Directors, (4) review and approval of an annual budget for the corporation, (5) hiring, reviewing and providing oversight of the President and CEO and (6) by the start of each fiscal year, the completion of a conflict of interest and non-disclosure form.

ARTICLE III OFFICERS

Section 1. OFFICERS –The Corporation’s officers (the “Officers”) will consist of (2) Co-Chairs of the Board of Directors, a Treasurer, and a Secretary. Such Officers shall hold such powers, duties and responsibilities as are set forth in these Bylaws and as may be further established by resolution of the Board of Directors.

Section 2. OFFICER ELECTIONS – The Board of Directors will elect Officers per the schedule below no later than the start of each fiscal year. Each Officer will serve a two-year term in that office and may be elected to one additional term for a total of no more than four years in that position. One Co-Chair and the secretary will start their term at the beginning of even-numbered fiscal years, the other Co-Chair and treasurer will start their term at the beginning of odd-numbered fiscal years. To qualify for nomination, Officers must have served on the Corporation’s board for no less than one year. Any director may nominate another director for an Officer position and directors may self-nominate for Officer positions.

Section 3. CO-CHAIRS OF THE BOARD OF DIRECTORS – The Co-Chairs shall give, or cause to be given, notice of all meetings of directors and all other notices required by law or these Bylaws and shall preside at all meetings of the Board of Directors and shall have and perform such other duties as may be assigned by the Board of Directors. Unless the Board of Directors otherwise directs, the Co-chairs of the Board of Directors shall have the power to authorize the seal of the Corporation to be affixed to any instrument requiring it, and when so affixed, the seal shall be attested to by the signature of the Secretary or the Treasurer. The Co-Chairs will be responsible for assigning directors to committees.

Section 4. TREASURER – The treasurer of the Corporation (the “Treasurer”) shall review the financial statements of the Corporation on at least a quarterly basis to ensure the financial health and integrity of the Corporation. In case of the Secretary’s absence or failure to do so, the Treasurer shall affix the seal of the Corporation to all instruments requiring it, when so authorized by the Board of Directors or, unless the Board of Directors otherwise directs, when authorized by the Co-Chairs of the Board of Directors, by the President and CEO, or by a committee of the Board of Directors acting pursuant to a delegation of authority from the Board of Directors, and shall attest to the same.

Section 5. SECRETARY – The secretary of the Corporation (the “Secretary”) shall record all the proceedings of the meetings of the Board of Directors and any committees thereof to be kept for that purpose and provide them to the Board of Directors no less than seven days before the next meeting of the directors, and shall perform such other duties as may be assigned by the Board of Directors or the Co-Chairs of the Board of Directors. The Secretary shall have the custody of the seal of the Corporation and shall affix the same to all instruments requiring it, when so authorized by the Board of Directors or, unless the Board of Directors otherwise directs, when authorized by the Co-Chairs of the Board of Directors, by the President and CEO, or by a committee of the Board of Directors acting pursuant to a delegation of authority from the Board of Directors, and shall attest to the same.

Section 6. PRESIDENT AND CEO – The president and chief executive officer of the Corporation (the “President” and “CEO”) shall have the authority to enter into contracts on behalf of the Corporation without board approval for up to \$10,000 with the exception of Corporation staffing and will notify and provide a copy to the Corporation’s Officers of such action. The President and CEO shall also have the power to authorize the seal of the Corporation to be affixed to any instrument requiring it, and when so affixed, the seal shall be attested to by the signature of the Secretary or the Treasurer. As well they will develop a yearly budget for the Corporation to be presented to the Board of Directors in the final quarter of each fiscal year. They are also responsible for the hiring and managing of the Corporation’s staff. The President and CEO shall be authorized

to attend all meetings of the Board of Directors, except those that the Co-Chairs call in executive session.

Section 7. OTHER OFFICERS AND AGENTS – The Board of Directors may appoint such other Officers and agents as it may deem advisable, who shall hold their offices and exercise such duties and responsibilities as shall be determined by majority vote of the Board of Directors then in office (excluding any director on a leave of absence).

Section 8. REMOVAL OF OFFICERS AND AGENTS – Any Officer elected or appointed may be removed at any time, with or without cause, by a majority vote of the Board of Directors then in office (excluding any director on a leave of absence).

Section 9. COMPENSATION – The contract and employment of the President and CEO shall require the affirmative vote of a majority of the Board of Directors then in office (excluding any director on a leave of absence).

ARTICLE IV MEMBERSHIP

Section 1. DETERMINATION OF MEMBERS – The members of the Corporation (the “Members”) shall be the directors of the Board of Directors. The election of a person as a director (an individual on the Board of Directors) shall be an admission to membership in the Corporation, and the membership in the Corporation shall terminate for each Member, respectively, upon such person ceasing to be a director of the Corporation for any reason.

Section 2. FEES AND DUES – The annual dues payable to the Corporation by each Member shall be \$0.

Section 3. MEETINGS – An annual meeting of the Members (“Annual Meeting”) shall be held for the election of directors and the transaction of such other business as may properly come before the meeting. Special meetings of the Members may be called at any time by the Co-Chairs or the Board of Directors. Each meeting of the Members shall be held at such date, time and place as shall be designated in a notice of the meeting. Notice of each meeting of the Members shall be sent to each Member not less than ten (10) and no more than sixty (60) calendar days before the time set for such meeting and shall include the time, date, and place of such meeting and, in the case of a special meeting, the purposes of the meeting. The Annual Meeting will be held each year at a time and place set by the Board of Directors.

Section 4. QUORUM & VOTING – Each Member shall have one vote on all matters submitted to the Members for approval. Except as otherwise provided by law or by these Bylaws, the presence of a majority of the Members, in person or by proxy, at a meeting of the Members shall constitute a quorum at all at meetings of the Members. The affirmative vote or consent of a majority of the Members present at a meeting at which a quorum is present shall be an act of the Members.

Section 5. MEETING FORMAT – Any one or more Members may attend and participate in any meeting of the Members by means of a conference telephone, video conference or other communications equipment by means of which all persons participating in the meeting can hear

each other. The attendance or participation by a Member by any such means shall constitute the presence of such Member in person at such meeting of the Members.

Section 6. ACTION WITHOUT A MEETING – Any action required or permitted to be taken at any meeting of the Members may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the minimum number of Members which would be required to take such action at a meeting at which all Members were present and voted, and such written consent is delivered within sixty (60) days to the Corporation at its registered office in the State of Delaware or its principal place of business or to an employee or agent of the Corporation having custody of the book in which proceedings of meetings of Members are recorded. Prompt notice of such action shall be given to those Members who have not signed the consent.

ARTICLE V MISCELLANEOUS

Section 1. SEAL – The corporate seal of the Corporation shall be in such form as shall be determined by resolution of the Board of Directors. Said seal may be used by causing it or a facsimile thereof to be impressed or affixed, reproduced or otherwise imprinted upon the subject document or paper.

Section 2. FISCAL YEAR – The fiscal year of the Corporation shall begin on the 1st of January and end on the 31st of December.

Section 3. CHECKS AND RECEIPTS – All receipts, checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the Corporation shall be signed by such Officer or Officers, agent or agents of the Corporation, and in such manner as shall be determined from time to time by resolution of the Board of Directors and these Bylaws.

Section 4. NOTICE AND WAIVER OF NOTICE – Unless otherwise expressly required by law, whenever any notice is required to be given under the provision of any law, or under the provisions of the Certificate of Incorporation of the Corporation or of these Bylaws, personal receipt of notice is not required. Any notice so required shall be deemed sufficient if given (1) by depositing the same in the United States mail, postage prepaid, addressed to the person entitled thereto at the address furnished to the Corporation by him or her for that purpose, (2) by transmitting the same to the person entitled thereto at such address by telegraph, telecopy, cable, wireless, or other means of electronic transmission, with confirmation of delivery, (3) by overnight courier or (4) by personal delivery. Notice shall be deemed to have been given on the day of such mailing, transmission, or delivery. Notwithstanding the foregoing, a waiver of any notice so required, in writing and signed by the person or persons otherwise entitled thereto, whether before or after the time notice was required to be given, shall be deemed equivalent to such required notice. The presence of any person, in person or by proxy, at any meeting referenced herein, shall be deemed a waiver by such person of notice of such meeting, unless such person is present for the sole purpose of objecting (and does so object) to the conduct of business at the meeting.

ARTICLE VI
AMENDMENTS

Except as otherwise provided in the Certificate of Incorporation, the Board of Directors may, by the affirmative vote of a majority of the directors then in office, alter, amend or repeal these Bylaws or enact such other Bylaws as in their judgment may be advisable for the regulation and conduct of the affairs of the Corporation.

These First Amended and Restated Bylaws were adopted by the Directors of the Corporation on June 9, 2018.

EXHIBIT C

*Certificate of Incorporation of
Servicemembers Legal Defense Network, Inc.*

CERTIFICATE OF INCORPORATION
OF
SERVICEMEMBERS LEGAL DEFENSE NETWORK, INC.

I, the undersigned, desiring to form a corporation pursuant to the General Corporation Law of the State of Delaware, do hereby make, affirm and file this certificate for that purpose.

1. The name of the corporation is Servicemembers Legal Defense Network Inc.

2. The address of the Corporation's registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is THE CORPORATION TRUST COMPANY.

3. The exclusive objects and purposes of the Corporation shall be the promotion of social welfare within the meaning of section 501(c)(3) of the Internal Revenue Code. The objects and purposes of the Corporation shall include the following: to provide advocacy assistance to service members who have come under investigation or other harassment, who are being processed for discharge or have been discharged due to their sexual orientation.

As a means of accomplishing these purposes, the Corporation, in furtherance and not by way of limitation of its statutory powers, shall have the power to solicit, raise, accept, hold and administer funds exclusively for its objects and purposes, and to that and to take and receive, by purchase, grant, gift, bequest or devise, or as

beneficiary of any trust, any property, real or personal, tangible or intangible, wheresoever located; to make donations in furtherance of such purposes; to invest and reinvest the funds and other property of the Corporation, including the power to invest and reinvest such funds and property in furtherance of such purposes, without regard to whether such investments would be considered as desirable or prudent by an investor interested solely in profit and not interested in promoting such purposes; and to collect and receive the income, if any, from any investment or reinvestment of such funds or property, and to apply the income and, if the Corporation so decides the principal of such property as the Corporation may from time to time possess, to the purposes of the Corporation.

Notwithstanding any other provision of the Certificate of Incorporation, the Corporation shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income tax as an organization described in section 501(c)(3) of the Internal Revenue Code.

4. The Corporation is a non-stock, nonprofit corporation.

5. The Corporation shall have no members.

6. The Corporation is a nonprofit corporation, and no part of its assets, income, profits or net earnings shall be distributed to, or inure to the benefit of, any director, officer, employee or member of a committee of, or person connected with, the Corporation; provided, however, that this shall not prevent the payment to any such person

of reasonable compensation for services rendered to or for the Corporation in effecting any of its purposes.

7. In the event of the liquidation, dissolution or winding up of the Corporation (whether voluntary, involuntary or by operation of law), the Corporation's property or assets shall not be conveyed or distributed to any director, officer, employee or member of a committee of, or person connected with, the Corporation, or any other private individual, nor to any organization created or operated for profit; but, after deducting all necessary expenses of liquidation, dissolution or winding up, as the case may be, all the remaining property and assets of the Corporation shall be distributed only to such other organizations as shall then qualify under section 501(c)(3) of the Internal Revenue Code, as the directors of the Corporation shall in their direction determine.

8. Except to the extent permitted by the Internal Revenue Code, the Corporation shall not carry on propaganda or otherwise attempt to influence legislation. The Corporation shall not participate in or intervene in (including by the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

9. During any period that the Corporation is determined to be a "private foundation" as defined in section 509 of the Internal Revenue Code, the Corporation, in accordance with the following sections thereof, shall: (a) distribute such amounts for each taxable year at such time and in such manner as not to subject the Corporation to tax on undistributed income under section 4942; (b) not

engage in any act which is subject to tax as self-dealing under section 4941; (c) not retain any holdings which are subject to tax as excess business holdings under section 4943; (d) not make any investments in such manner as to subject the Corporation to tax under section 4944; and (e) not make any taxable expenditures which are subject to tax under section 4945.

10. All references in the Certificate of Incorporation to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall be deemed to include to any future United States internal revenue law, and all referenced to sections of that Code shall be deemed to include such sections as amended from time to time, or corresponding provisions of any future internal revenue law.

11. The name and address of the incorporator of the Corporation is as follows:

Marc Wolinsky, Esq.
c/o Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10171

12. The Corporation shall have perpetual existence.

13. Elections of directors need not be by written ballot unless the By-laws of the Corporation so provide. In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter or repeal the By-laws of the Corporation.

14. The books of the Corporation may be kept (subject to any provision of law) outside the State of Delaware at

such place or places as may be designated from time to time by the Board of Directors or in the By-laws.

IN WITNESS WHEREOF, the undersigned, being the incorporator hereinbefore named, for the purpose of forming a corporation pursuant to the General Corporation Law of Delaware, does make this certificate, hereby declaring and certifying that this is my act and deed and the facts herein stated are true, and accordingly have hereunto set my hand this 17th day of August, 1993.

Marc Wolinsky

EXHIBIT E

Harrison Deposition

Alderson®

COURT REPORTING



A Trustpoint Company

Transcript of **Nicholas Harrison**

Thursday, March 7, 2019

Harrison, et al. v. Shanahan

Alderson Court Reporting
1-800-FOR-DEPO (367-3376)
Info@AldersonReporting.com
www.AldersonReporting.com

Alderson Reference Number: 84362

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA

3

4 -----

5 NICHOLAS HARRISON, et al.,

6 Plaintiffs,

7 v.

8 PATRICK M. SHANAHAN, in his

9 official capacity as Acting

10 Secretary of Defense, et al.,

11 Defendants.

12 -----

13

14 Deposition of NICHOLAS HARRISON, a Plaintiff

15 herein, at the offices of United States Department of

16 Justice, 1100 L Street, N.W., Washington, D.C.,

17 commencing at 9:38 a.m. on Thursday, March 7, 2019

18 and the proceedings being taken down by stenotype and

19 transcribed by Catherine B. Crump, a Notary Public in

20 and for the District of Columbia.

21

22

1 APPEARANCES:

2 On behalf of the Plaintiffs:

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9

10 On behalf of the Defendants:

11 JOSHUA C. ABBUHL, ESQ.

12 ROBERT M. NORWAY, ESQ.

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22

1 I N D E X

2 WITNESS: Nicholas Harrison

3 EXAMINATION PAGE

4 By Mr. Abbuhl: 4

5 By Mr Schoette: 346

6 CONFIDENTIAL DESIGNATION:

7 Begins at Page 309

8 Ends at Page 313

9	EXHIBIT NO.	DESCRIPTION	IDENTIFIED
10	1:	Notice of Deposition	6
11	2:	October 29, 2010 Letter to JAG	
12		Recruiting Office	148
13	3:	2011 JAG Application	169
14	4:	Complaint	174
15	5:	Active Duty and Army Reserve Application	195
16	6:	June 9, 2017 Recommendation Regarding	
17		Exception to Policy	234
18	7:	February 1, 2008 Army Board of Correction	
19		of Military Records Memorandum	259
20	8:	OutServe-SLDN Leaders and Locations	308

21

22 [Exhibit No. 8 is marked confidential.]

1 Commanders at the time were trying to push
2 back. So there were all these troop already in the
3 queue to go over there, already mobilized, already
4 getting deployed, already going through that whole
5 process.

6 So it was like what are going to do with all
7 these troops; you told us we can only have 11,000 in
8 Afghanistan, but we have 20,000 ready to go. He was
9 kind of like, Well, I don't care what you do with
10 them, but you can't send them to Afghanistan.

11 So for about a year, there was a whole bunch
12 of battalions, mine included, that were stuck out in
13 the middle of Kuwait. We just sort of sat there and
14 trained on individual Army tasks.

15 Q. And how did you first contact OutServe?
16 Was it by looking at a website? Facebook? Something
17 else?

18 A. I think it might have been Facebook. I
19 know there were a lot of locations apps that were
20 kind of coming into modern use around that time, but
21 Facebook was a big connector for a lot of us.

22 Q. And that was -- you connected with them

1 via Facebook sometime during your deployment to
2 Kuwait in 2011-2012?

3 A. Right.

4 Q. And this was before OutServe and SLDN
5 had merged, right?

6 A. Right. They were both very sort of
7 vibrant organizations of their own before Don't Ask,
8 Don't Tell policy was repealed. So they were both
9 sort of operating independently.

10 Q. In 2011 and 2012, did you ever reach out
11 to OutServe for legal advice?

12 A. No, I didn't.

13 Q. Do you know -- did you know any of the
14 other service members who were either in this case --
15 excuse me -- who were in the other case, Roe v.
16 Shanahan, before this case was filed?

17 A. I don't know. It's possible. I have
18 never been made purview to the identities of the
19 other plaintiffs. I mean, my attorneys keep a very
20 solid wall.

21 Q. You don't even know their true names?

22 A. That's correct, but it's possible. I

1 mean, we have a closed Facebook group, a Poz group,
2 where we discuss issues and talk about issues, and
3 it's more than likely that whoever the unnamed
4 plaintiffs are, they are a probably member of that
5 group.

6 Q. And when you went to the Facebook group,
7 what happened? Did you have to request to be a
8 member?

9 MR. SCHOETTES: Objection, vague.

10 You can answer.

11 THE WITNESS: Yeah. Around 2014, I think I
12 started reaching out to different people and
13 different organizations, and I was looking for
14 resources as to how do I go about this process, is
15 there anybody else that has ever gotten a waiver or
16 an exception to policy for HIV and reached out to
17 OutServe, I can't remember who to initially, probably
18 a group moderator or something, and they told me that
19 there was this Poz Facebook group that, basically,
20 positive service members had slowly built and put
21 together with other people in the service who were
22 dealing with similar issues.

1 So I asked to be added to that group and
2 started interacting with them.

3 Q. Going back to your initial contact to
4 OutServe in 2011 --

5 A. '11 and '12.

6 Q. You said the closed Facebook group.
7 Correct?

8 A. Correct.

9 Q. Does that mean you have to ask to be a
10 member and then someone will say yes or no?

11 A. Yeah. I believe there was a closed
12 Facebook group for LGBT service members in Kuwait
13 that was run by OutServe.

14 Q. Would you characterize it as a local
15 chapter of the OutServe Facebook group?

16 MR. SCHOETTES: Objection, mischaracterizes
17 prior testimony.

18 THE WITNESS: Yeah. It could be construed as
19 a local chapter of OutServe, a local Facebook group.

20 BY MR. ABBUHL:

21 Q. Did you join any other -- aside from the
22 positive group, that you just mentioned, have you

1 joined any other OutServe-related Facebook group?

2 MR. SCHOETTES: Objection, mischaracterizes
3 prior testimony to the extent that I'm just confused
4 which closed group you're talking about.

5 BY MR. ABBUHL:

6 Q. Maybe I'll rephrase. How many Facebook
7 groups are you a member of that are related to
8 OutServe?

9 A. I believe I was a member of the Kuwait
10 Facebook group while I was deployed to Kuwait.
11 Whenever I left Kuwait, I think I left that group.
12 There's a closed Poz group that I'm currently a
13 member of.

14 Q. Sorry. Close what group?

15 A. OutServe Poz group that I'm currently a
16 member of, and then the broader Facebook group or
17 page, I think is open, and I think -- I'm a member of
18 that. I follow that. It shows up in my likes or my
19 feeds or whatever, but I'm not sure that that's a
20 closed group or if it's just a general page where
21 they post stuff, people interact with stuff, people
22 post stuff.

1 It seems like it's more of a page, I think, at
2 this point. Since Don't Ask, Don't Tell, I don't
3 think the OutServe page is closed anymore.

4 I'm not sure how many of the groups are
5 closed. I know the Poz group is closed for obvious
6 reasons, but a lot of the groups that were closed
7 back in 2011 and 2012 may no longer be -- they may
8 just be pages out there.

9 Q. When you say Poz group, you mean
10 positive group. Correct?

11 A. Correct.

12 Q. As in HIV-positive?

13 A. HIV-positive.

14 MR. SCHOETTES: And for the court reporter,
15 it's P-O-Z, is what is used for Poz.

16 BY MR. ABBUHL:

17 Q. When you refer to the broader OutServe
18 group, do you mean like overall organization?

19 A. Yeah. The organization that encompasses
20 all LGBT service members, both current members,
21 veterans, and I believe military spouses and partners
22 as well, sort of fall under that broad umbrella.

1 Q. Have you -- are you -- do you follow
2 OutServe on any other social media platform besides
3 Facebook?

4 A. I believe I receive their newsletter.
5 Any type of a press release, I usually get that. I'm
6 also on their Military Advisory Committee.

7 So I don't think that that's a closed group.
8 I know we have periodic meetings where we talk about
9 community relations and stuff along those lines, but
10 I believe those are all teleconferences so far. I
11 guess they use the -- I want to say they use a Blue
12 Jeans platform or something.

13 Q. What is the Blue Jeans platform?

14 A. I think that's what it's called. It's
15 an online teleconference platform. You hop on your
16 computer and it's just a phone except for with you
17 can see the cam too. You can turn off the cam and
18 just use phone if you want to, but I think it also
19 allows for sometimes chat things to put up or
20 documents to be put up, whatever.

21 Q. When you joined the Kuwait Facebook
22 group, was there any information about the group that

1 you could read before you joined?

2 MR. SCHOETTES: Objection, calls for
3 speculation.

4 You can answer.

5 THE WITNESS: I'm not sure if there was any
6 information on the group itself at the time, like the
7 Facebook group. There was information about
8 OutServe. I mean, I remember whenever I heard it
9 mentioned by President Obama in his State of the
10 Union, that that was kind of a flare-up in social
11 media at the time. A lot of people Googled what is
12 OutServe, and a lot of us found out what the
13 organization was, what it does, what they are, things
14 like that.

15 BY MR. ABBUHL:

16 Q. But when you specifically requested to
17 join the Facebook group, did any windows pop up on
18 your computer giving you information, anything like
19 that?

20 A. I don't know. Can't remember, again,
21 how I found the closed group or where I found it or
22 any of that stuff, but yeah.

1 BY MR. ABBUHL:

2 Q. Did you say, earlier, when you became a
3 member of the Military Advisory Council or Board of
4 Advisors?

5 A. I didn't. I believe it was sometime in
6 2018.

7 Q. 2018, and what was the name of the
8 person who contacted you again to become a member?

9 A. It was Andy Blevins. He's the current
10 executive director. The previous executive director
11 was Matt Thorn.

12 Q. Does the Board of Advisors have regular
13 meetings?

14 A. Yes, they do. They don't meet in
15 person. They tend to do teleconferences. We had a
16 couple of big kickoff meetings, one where the
17 executive director came and sort of presented about
18 the organization, told us about what he would like to
19 see the group do, sort of the -- I guess a chapter
20 session.

21 Then the second meeting, the group sort of
22 talked in general, introducing themselves, things

1 that they would like to see and, more recently,
2 they've kind broken off into two working groups. One
3 focused on community relations and the other focused
4 on chapter building.

5 Q. Are you in one or both of those groups?

6 A. I kind of can be on either of them.
7 I've kind of focused more on the community relations
8 lately, but I may end up bridging over to the chapter
9 relations just based on some of the ideas that I have
10 for chapters in the D.C. area.

11 I'm also on the board of the directors for the
12 D.C. Center, which is the LGBT community center that
13 serves the Washington, D.C. area, and we have a
14 Center veterans group and have been looking at a
15 Center military group that serves similar roles and
16 similar function as what I think OutServe does.

17 So there's been a lot of talk about maybe we
18 should host a chapter of OutServe under the D.C.
19 Center. That's sort of an ongoing process that might
20 lead me into the chapter portion.

21 Q. To clarify, though, the D.C. Center is
22 not currently associated with OutServe?

1 A. That's correct.

2 Q. How often does the Board of Advisors
3 meet?

4 A. It seems like it's been every month or
5 two so far.

6 Q. Are they regularly scheduled?

7 MR. SCHOETTES: Objection, vague.

8 THE WITNESS: Not quite yet. We've been
9 setting up meetings as we go along and determining
10 how often we want to meet and, as the working groups,
11 how often they want to meet and so forth.

12 BY MR. ABBUHL:

13 Q. The next meeting, has it already been
14 scheduled?

15 A. I believe so.

16 Q. Have the next two meetings been
17 scheduled?

18 A. Maybe. I'm aware of the next meeting.
19 I'm not aware of the next two meetings, but somebody
20 might have put together a calendar.

21 Q. What do you -- does the Board of
22 Advisors discuss pending lawsuits of which OutServe

1 is a part of?

2 A. Not formally. I mean, it's not like --
3 I mean, I've never participated on the Board of
4 Directors of OutServe.

5 Q. I'm sorry. I meant the Board of
6 Advisors.

7 A. Okay. I'm guessing that like the Board
8 of Directors would probably have a section that talks
9 about pending lawsuits and pending projects and stuff
10 like that. They'd have a status report and update.

11 The Board of Advisors doesn't have any type of
12 section. We talk about community relations and each
13 individual member sort of brings issues, things that
14 they're working on or would like to work on and stuff
15 like that back to the group.

16 So while they don't necessarily talk about the
17 lawsuit, I have periodically given them updates that,
18 yeah, this is the progress and so forth.

19 Q. What do you generally say about the
20 lawsuits? Are they status updates or something else?

21 MR. SCHOETTES: Objection, vague.

22 THE WITNESS: I generally tell them anything

1 recently exciting that has happened or not. Like I
2 think I would have told them about some of the
3 initial discovery hearings and some of the comments
4 that the judge would make or responses that just sort
5 of stuck out in my mind.

6 BY MR. ABBUHL:

7 Q. Does the Board of Advisors have any role
8 in strategizing about litigation?

9 A. Not really. It's more of a sharing
10 discussion. I guess our Board of Advisors is more
11 looking at an overall strategy for the organization
12 as far as community relations, how to build bridges
13 with other organizations and sort of increase our
14 standing or our -- in the communities that we're in,
15 and the chapter relations is about building
16 membership and making the chapters more responsive
17 and productive to the service members who are a part
18 of it.

19 Q. Does the Board of Advisors recommend to
20 OutServe about what lawsuits to initiate?

21 MR. SCHOETTES: Objection, asked and
22 answered.

1 THE WITNESS: I don't know. I mean, not in
2 the sense where they give us a list, do you want to
3 take these.

4 BY MR. ABBUHL:

5 Q. What about any other sense?

6 A. I'm on the Board of Advisors and I went
7 to OutServe and recommended or asked them to take my
8 case. So, I mean, in a literal sense of your
9 question, I did that, but I don't think the Board of
10 Advisors has that role or that function.

11 Q. When did you have that discussion with
12 OutServe?

13 A. I reached out at one of the conferences
14 to Matt Thorn and had some conversations with him
15 about my case and the issue and asked for OutServe's
16 assistance. He connected me with Peter Perkowski,
17 who is their legal director, and they got involved
18 and sort of worked with Lambda Legal as well to help.

19 Q. Which conference was this at?

20 A. OutServe has had several national
21 conferences. I believe they're up to two or three
22 that I attended. I think it was a couple of years

1 ago whenever I first raised the issue. I brought it
2 to Matt Thorn's attention and he was actually very --
3 he was very thankful because it wasn't an issue that
4 was necessarily on his radar, that HIV-positive
5 service members were having problems or that this
6 policy was out there, and so he heard about it.

7 He started thinking about it, making
8 connections, talking to people about it, and it sort
9 of became part of their portfolio, things that they
10 want to advocate for or want to address.

11 Q. I'm sorry. You said this was two or
12 three years ago. Correct?

13 A. I believe so.

14 Q. The 2016 to 2017 range?

15 A. I think so. It might have been 2015 or
16 2014. It's hard to remember how far back it was,
17 because I know that I interacted with OutServe
18 initially probably around 2014 and that the
19 conferences might have been 2015 or 2016.

20 Q. When you say you interacted with them
21 initially in 2014, what do you mean by that?

22 A. I mean whenever I was sending off a

1 bunch of letters and E-mails to people about the
2 issue that I was having in getting commissioning.
3 OutServe was one of the groups that I reached out to
4 for resources and information to see if they had ever
5 looked at this issue before, had any issues, had any
6 thoughts on how to deal with it, if they ever had
7 service members who were HIV-positive successfully
8 navigate the process. Stuff like that is what I was
9 initially reaching to these organizations and asking
10 them.

11 Q. So you, basically, asked if anyone had
12 information that could be useful to you; is that
13 correct?

14 A. Right. Right.

15 Q. And what did -- what responses did you
16 get?

17 MR. SCHOETTES: Objection to the extent any
18 of them call for information that would be protected
19 by the attorney-client privilege; otherwise, other
20 than that, you can answer.

21 THE WITNESS: Initially, a lot of my
22 interactions was -- that was whenever they linked me

1 with the Poz group, and it wasn't legal counsel who
2 initially responded to it. It was other group peers.

3 They told me -- they kind of gave me a, Well,
4 best of luck with that, that the military doesn't
5 give waivers or exceptions to policy for HIV. I
6 mean, they never heard of it. They had never
7 experienced it, but they were very interested in it.

8 I think around that time, I also -- the
9 lieutenant colonel that I was interacting with at the
10 Army G1, I know that she was in the process of
11 revising the Army regulation. I think I asked the
12 Poz group for any comments they might have on how
13 that policy should be revised or changed and got some
14 pretty substantial feedback from a few of them that I
15 sent up and that I helped them submit through the
16 proper channels in the G1 for incorporation into the
17 regulation. I'm not sure whatever happened with that
18 on the Army side of things though.

19 Q. Did OutServe help in any other way with
20 your waiver or exception to policy requests?

21 A. I don't think they officially got
22 involved in a legal sense as an attorney-client

1 situation until after the exceptions to -- I'm not
2 sure if it was after the exceptions to policy or
3 before. It was about that time. I think it was
4 after the exception to policy, that the denials that
5 came, that that happened and I started talking to
6 them.

7 I would have to go back and look at when the
8 meeting was that was with HRC, because that's
9 probably the defining date that I would put on that
10 relationship.

11 Q. Were they -- excuse me. Was OutServe
12 involved in a nonlegal sense before you got your
13 denial letters?

14 A. Yes. I had conversations with them.
15 There was a -- at one of their conferences, they had
16 speaking the highest ranking trans official in the
17 Obama Administration, Amanda Simpson. I can remember
18 after she got done speaking to the entire group, I
19 pulled her aside and had a conversation about my
20 situation and I asked her advice on how she would
21 navigate DoD and the process.

22 I guess she wasn't an official member of

1 OutServe, but it was an OutServe forum when I met her
2 and asked for advice and sort of got that feedback.

3 Q. Did OutServe assist in any other way?

4 A. I can't think of anything off the top of
5 my head.

6 Q. And you had said earlier that HRC or the
7 Human Rights Council --

8 A. Campaign.

9 Q. Campaign, a meeting with the Human
10 Rights Campaign was a defining date. Correct?

11 A. Right.

12 Q. What do you mean by "defining date"?

13 A. My JAG attorney who had been assigned to
14 me from the D.C. National Guard -- he also, just
15 happened to be the vice president of the Urban League
16 -- set up that meeting with HRC, and HRC had a couple
17 of conversations with me on the phone about my case
18 and what involvement they could have. I think it
19 initially started, those phone calls, before the 2016
20 election and then continued even after the election.

21 I could be mistaken on the dates, but there
22 was a series of phone calls and then they decided

1 that if they were going to be involved, they were
2 going to provide any assistance, advocacy or whatnot,
3 they felt that they needed to get all the HIV groups
4 in a room and talk about this so that everybody was
5 on the same page and everybody decided what the same
6 thing was.

7 At that time, there was a variety of different
8 HIV organizations, one I think you were on the phone.

9 Q. But you should not, obviously, mention
10 any privileged information.

11 A. One of them was Lambda Legal, and that
12 is the defining moment, I would say, in which I
13 talked to Lambda Legal on the phone in general about
14 some of the advocacy work that I had been doing in
15 Congress about the HIV policy, and he said --

16 MR. SCHOETTES: I'm just going to make sure
17 that, yeah, if this is conversations with the whole
18 group --

19 THE WITNESS: Right.

20 MR. SCHOETTES: Feel free. If it's a
21 conversation that you and I had, then that's
22 protected by attorney-client privilege.

1 THE WITNESS: So we had the conversation with
2 the whole group in which we were talking about
3 Congress and where the HIV policy was and amendments
4 that had been put in the NDAA that DoD had responded
5 to, but not responded to in any substantive fashion
6 and what they were going to do to follow up on that.
7 At that point is whenever I met the fellow on the
8 phone and we decided that we needed to have an
9 offline conversation and, at that point, sort of the
10 attorney-client, I guess, relationship formed or
11 kicked in.

12 BY MR. ABBUHL:

13 Q. Roughly, when was that?

14 A. I want to say 2015 or 2016, maybe 2016.
15 I'd have to look it up.

16 Q. I believe in your previous testimony, I
17 believe you said the NDAA. Is that the National
18 Defense Authorization Act?

19 A. That's correct. The National Defense
20 Authorization Act is kind of the one bill that
21 everybody is aware of that will always pass Congress.
22 So that's the bill that they incorporate any

1 language; and back in, I want to say 2013, there was
2 a representative, Barbara Lee out of California, that
3 asked DoD for a report on HIV personnel policies and
4 why they were the way they were and what the military
5 was doing to change them, sort of the gist of what
6 she was trying to get at.

7 DoD provided a very nonanswer to her, to
8 Congress, which was that the military policies
9 reflect the latest medical evidence. I mean, it was
10 basically a card stock answer that they give to
11 everybody. It didn't really answer any questions.

12 So whenever they found out about my case and
13 about me going to Congress and bringing up different
14 issues, they talked about the 2013. They talked
15 about anything they wanted to try to get into the
16 next NDAA and what avenues or angles that they should
17 take.

18 Q. Returning to your personal role, the --
19 excuse me.

20 Returning to the Board of Advisors for
21 OutServe, does the Board of Advisors play a role in
22 selecting potential plaintiffs in lawsuits?

1 A. No.

2 Q. It does not?

3 A. No.

4 Q. Did the Board of Advisors of OutServe
5 play a role in selecting you as a potential plaintiff
6 in this lawsuit?

7 A. No.

8 Q. What other duties does the Board of
9 Advisors of OutServe have?

10 A. I can't think of anything else other
11 than what I've already explained. I think they're
12 primarily a group to give the organization sort of a
13 continuous perspective, different perspectives that
14 are important and help with community relations and
15 help build chapter numbers and stuff, figure out ways
16 to develop both of those aspects of the organization.

17 Q. Have you ever personally donated to
18 OutServe?

19 A. Yes, I have.

20 Q. How many times?

21 A. At least once, possibly twice. I can
22 remember, whenever the trans tweet came out, both

1 donating and posting a fundraiser on my page that
2 OutServe was something that other LGBT and my
3 community, if they were angry or concerned about it,
4 that they consider donating to OutServe because that
5 was to support people in this particular predicament.

6 Q. Do you remember how much you donated to
7 OutServe?

8 A. I don't know off the top of my head.

9 Q. Have you ever read OutServe's blog?

10 A. "Blog" is a very ambiguous term. There
11 are posts on Facebook regularly that I read all the
12 time. There's newsletters that come out in E-mail
13 all the time. I read those. I read a significant
14 amount of content that's put out regularly by
15 OutServe, but I'm not sure what qualifies as their
16 official blog.

17 Q. Are you involved in a local chapter of
18 OutServe?

19 A. Not yet. As I mentioned earlier, I have
20 been looking at the possibility of consolidating the
21 D.C. Center, Center of Veterans Military Efforts, and
22 sort of hosting an OutServe chapter and using that as

1 sort of a -- it might be a good way to get at the
2 larger Washington, D.C. community.

3 Q. Is there currently a Washington, D.C.
4 chapter of OutServe?

5 A. I think so. I know that there's a
6 chapter leader who was PCS. I'm not sure how vibrant
7 that chapter is.

8 I kind of got the impression that it was
9 lacking a little in participation, but there's still
10 people that are interested in it. So I figured that
11 the best way might be to consolidate everything under
12 the OutServe brand, and maybe the D.C. Center since
13 it's the LGBT community center, that that might be a
14 good option, rather than having a bunch of individual
15 veterans and military groups, have one sort of come
16 together and share resources.

17 Q. But as of now, though, you're not a
18 member of the D.C. Chapter of OutServe?

19 A. Yeah, not a brick and mortar chapter
20 like here in D.C. I guess virtually a member of the
21 Poz chapter, so to speak.

22 Q. Is there a local D.C. Poz chapter?

1 A. It's not a bricks and mortar. It's not
2 a physical chapter here. It's a virtual online sort
3 of chapter.

4 Q. But is there a Facebook group that is
5 both a Poz group and D.C. group?

6 A. No, there isn't.

7 Q. Just the overall Poz group is what
8 you're referring to?

9 A. Yeah.

10 Q. Are you involved in any other OutServe
11 forums besides the Poz forum?

12 A. I think I'm involved in the general
13 forum, which I don't think is a formal like close
14 group anymore. I think it's part of a page.

15 Q. Any others?

16 A. Not that I can think of right now.

17 Q. Have you ever been employed by OutServe?

18 A. No.

19 Q. Have you ever been paid by OutServe?

20 A. No.

21 Q. Have you ever had expenses reimbursed by
22 OutServe?

1 A. No.

2 Q. Besides your service on the Board of
3 Advisors, have you ever volunteered on behalf of
4 OutServe?

5 A. I don't think so. I mean, I attend
6 their events, and whenever I was in Kuwait, I helped
7 organize some of the activities and functions. I was
8 kind of an informal leader in Kuwait, helping put
9 some of the stuff together, organizing that chapter
10 at least on camp, but I don't think I ever held any
11 official title.

12 Q. When you say activities and functions,
13 you're referring to the birthday parties and similar
14 events. Correct?

15 A. Yes. That's correct.

16 Q. Social in nature. Right?

17 A. Right.

18 Q. Do you follow OutServe on Instagram?

19 A. No, I don't. I don't even really know
20 how to use Instagram.

21 Q. Twitter?

22 A. No. The same thing with Twitter.

1 Q. Do you follow OutServe on LinkedIn?

2 A. I don't think so. I do have a LinkedIn
3 page, but I don't think I've ever -- I might have.
4 I'd have to get back to you. It's been a while since
5 I've been on LinkedIn.

6 Q. Do you follow OutServe on any other
7 social media that you can think of?

8 A. No. Facebook is my primary interaction
9 with them.

10 Q. Do you participate with OutServe in any
11 other way that we have not already discussed?

12 A. I use their legal services.

13 Q. Any other way?

14 A. I think we've already talked about the
15 national conferences that I participate in as well.
16 I think that we talked about just about everything.

17 Q. How many people attend the national
18 conferences, in general?

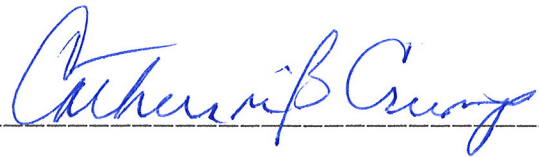
19 MR. SCHOETTES: Objection, vague. You can
20 answer.

21 BY MR. ABBUHL:

22 Q. I'll actually rephrase. Remind me how

CERTIFICATE OF NOTARY PUBLIC

I, CATHERINE B. CRUMP, the officer before whom the foregoing deposition was taken, do hereby testify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.



CATHERINE B. CRUMP

Notary Public in and for the
District of Columbia

My Commission Expires: October 31, 2022

EXHIBIT N

Pl. OutServe's List of Leadership

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Washington, DC

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Meg Yamoto
Washington, DC

Ashley Carothers, ex-officio
Kaiserslautern, Germany

Matthew Hardwig, ex-officio
Big Lake, Minnesota

STAFF

Anthony "Andy" Blevins
Executive Director
District Heights, MD

Peter Perkowski
Legal & Policy Director
Los Angeles, CA

Kai River Blevins
Education and Veteran
Services Director
District Heights, MD

Corrine Cole (nee Allain)
Legal & Policy Manager
Salem, OR

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Our Mission

Defending LGBTQ Service Members

We've Got Your Six





Our Mission

Provide legal defense services for LGBTQ servicemembers

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Frugal Life, Happy Wife! – Winter Creations!

Where are all my snow peeps at? I absolutely LOVE Snow people. I not quite sure I understand why they... more

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November 1, 2018

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Donation Completed

Raised	Group Goal
\$6,202	\$15,000



November 1, 2018

Advancing Care through Education (ACE)

Donation Completed

Raised	Group Goal
\$7,001	\$25,000



November 1, 2018

Restore Honor, Restore Dignity

Donation Completed

Raised	Group Goal
\$5,051	\$15,000

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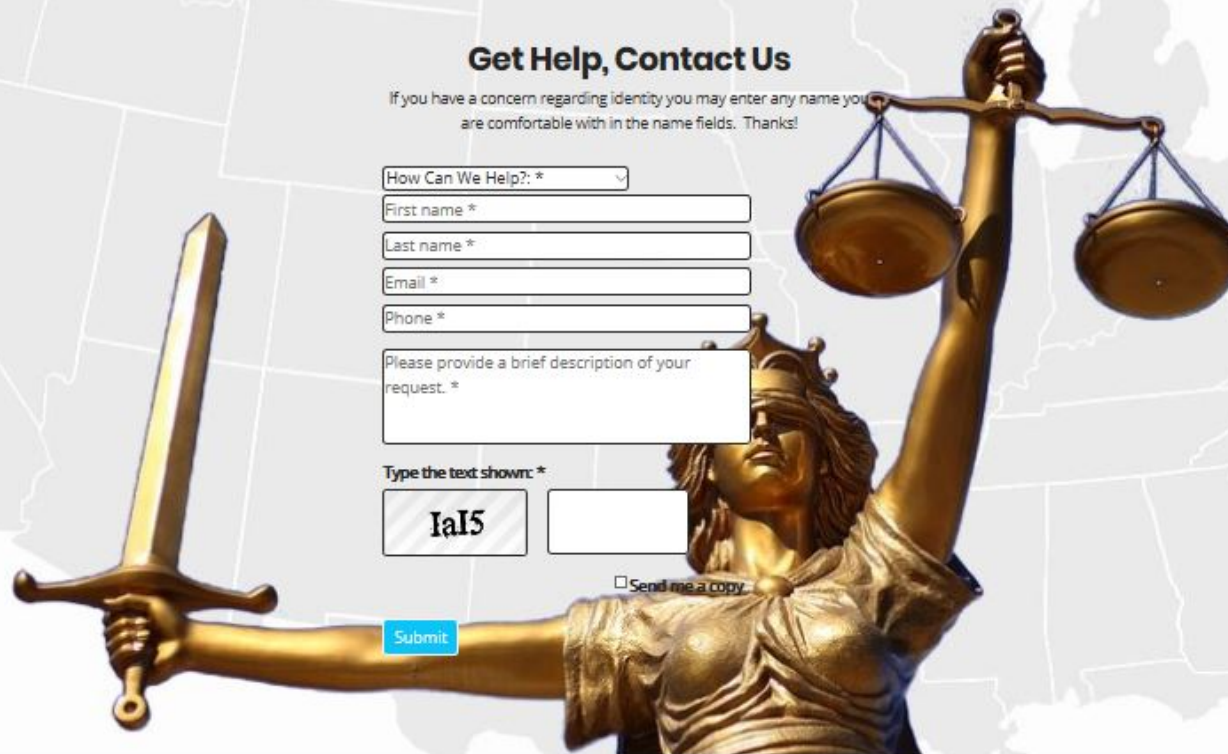
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It makes me very sad to read this.

Trans student set to lose Army scholarship following new military policy
nbcnews.com

The military's new transgender policy, which took effect on April 12, has been equated to a "don't ask, don't tell" rule for trans service members.

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Tomorrow, for National GIVE OUT DAY, we hope you will join us in supporting our community partner Sparta - A Transgender Military Advocacy Organization by donating through this link: www.giveoutday.org/GO/a/spartapride

OutServe-SLDN, SPARTA, and The American Military Partner Association have banded together to defend our nation's transgender service members and hopeful recruits both in the courts and on Capitol Hill. By uniting our efforts during this #NationalGiveOutDay, we are working to ensure that 100% of donations given to the LGBTQ military community tomorrow go directly to pushing back against this unwarranted and discriminatory ban.

All qualified, able, and willing individuals should be able to serve this country openly and authentically.

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#SupportTransTroops #RightTheBan [📷](#)

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Andres Camilo [@andres__camilo](#) · 12 Apr

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All qualified, able, and willing individuals should be able to serve this country openly and authentically. Together, with your help, we can make that happen. #StrongerTogether
 #SupportTransTroops #TransMilitaryBan
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About Us

OutServe-SLDN represents the U.S. LGBT military community worldwide. Our mission is to: educate the community, provide legal services, advocate for authentic transgender service, provide developmental opportunities, support members and local chapters, communicate effectively, and work towards equality for all.

OutServe-SLDN is the largest association for actively serving the LGBTQ military and veteran communities. We are a non-partisan, non-profit, legal services, watchdog and policy organization dedicated to bringing about full LGBTQ equality to America's military and ending all forms of discrimination and harassment of military personnel on the basis of sexual orientation and gender identity. OS-SLDN provides free and direct legal assistance to service members and veterans

affected by the repealed "Don't Ask, Don't Tell" law and the prior regulatory ban on open service, as well as those currently serving who may experience harassment or discrimination. Since 1993, our in-house legal team has responded to more than 12,000 requests for assistance.



Our History

While open service for lesbian, gay, and bisexual individuals is relatively recent, and transgender open service still being fought for, there is a long history of LGBT individuals serving in the United States military. For example, the U.S. Naval Institute notes that the first person discharged for homosexuality was Lieutenant Gotthold Frederick Enslin in 1778. LGBT individuals have continued to serve in the military throughout American history, though not with impunity. Homosexuality was first criminalized by the military in 1917 under Article 93, which was approved by Congress in 1920.

As the homophile movement began in the United States in the 1940s, so too did the use of psychiatry to attack homosexuality through the government. As

historian Michael Bronski notes, "a direct link was being made between homosexual behavior and a threat to national security." With the approval and authority of the psychiatric discipline, the government began to systematically codify homophobia. Shortly after the prohibition on sodomy was added to the UCMJ in 1951, President Dwight D. Eisenhower signed an Executive Order listing "sexual perversion," which included homosexuality, "as a security risk and grounds for termination or denial of employment. Scholars today note that this was applied, at least as early as 1960, to ban transgender individuals from serving as well. These policies continued over the next few decades, with explicit homophobia finding its ultimate expression in 1981 with the Department of Defense Directive making clear that "homosexuality is incompatible with military service." In terms of transgender individuals, the 1980s were a time when "the military was applying its medical regulations more forcefully" to exclude this population from service.

Although anti-LGBT laws and policies continued to be enforced since the time of President Eisenhower, a significant report, commissioned by the Department of Defense and published in 1988, found that homosexuality was not a threat to national security. While there was no talk of removing bans on transgender individuals, there was renewed hope that bans on homosexuality would be lifted, especially after then-Governor Bill Clinton promised in his campaign for presidency to lift the ban. However, President Bill Clinton never fulfilled that promise, signing the controversial "Don't Ask, Don't Tell" (DADT) policy into law in 1993. Although President Clinton portrayed this policy as "a dramatic step forward,"



HOME

ABOUT US

OUR WORK

GET INVOLVED

NEWS

DONATE

controversial "Don't Ask, Don't Tell" (DADT) policy into law in 1993. Although President Clinton portrayed this policy as "a dramatic step forward," his compromise created a policy that forced LGB servicemembers to remain closeted in order to join and serve in the military.

Despite this major setback, there was hope: the creation of the Servicemembers Legal Defense Network (SLDN). SLDN began working in 1993 as a nonprofit providing free legal services to lesbian, gay, and bisexual servicemembers and veterans. The organization represented LGB servicemembers under DADT, challenging both the DADT policy and the "Defense of Marriage Act" (DOMA) as unconstitutional. After 17 years of fighting for LGB servicemembers under this policy, Congress finally took action in December, 2010, voting to repeal the DADT policy. The bill repealing DADT was signed into law by openly supportive President Barack Obama before the year's end. During the process and aftermath of repealing DADT, two other organizations were founded to address the inequalities LGB servicemembers were facing: OutServe and the Military Partners and Families Coalition, both of which have since merged with the Servicemembers Legal Defense Network.

Founded in 2010 under the name "Citizens for Repeal," OutServe was the first member-based organization to represent the interests of LGB servicemembers. It wasn't long until these two crucial organizations combined their efforts through a merger in 2012, forming what is now known as OutServe-SLDN, "a non-partisan, non-profit, legal services, watchdog and policy organization dedicated to bringing about full LGBT equality to America's military and ending all forms of discrimination and harassment of military personnel on the basis of sexual orientation and gender identity."

The Military Partners and Families Coalition (MPFC) was the only organization founded by the partners of actively-serving military personnel. Their mission was to provide support, education, resources, and advocacy for the LGBT military family community. They proudly represented and served all aspects of the military family from parents to partners/spouses to children, as well as all branches and components of the United States Armed Forces from active duty to the National Guard and Reserves to Veterans.

Although the repeal of DADT and organizations such as OutServe-SLDN as advocates were great achievements for LGB servicemembers and veterans, there were still federal laws and policies preventing open and equal service. For starters, transgender individuals continued to be banned from military service, a policy that continues today despite a short commitment to open service (for more, see the "Transgender Service" section below). Another prominent issue for LGB servicemembers was DOMA, which provided a federal definition of marriage as being between one man and one woman. Though this was challenged many times, it was the case of *U.S. v. Windsor* which ruled the federal definition unconstitutional. This historic victory meant that same-sex couples could have their marriage recognized by the federal government, and could access a plethora of military benefits previously unavailable to them, though they could only seek marriage licenses in certain states. It wasn't until the Supreme Court's ruling in *Obergefell v. Hodges* in 2015 that same-sex marriage became a reality for all Americans, and LGB military families receiving full recognition and benefits as a result. With these rulings as law, as well as updates to the Military Equal Opportunity program and the UCMJ, LGB servicemembers are now able to serve freely in the military without formal laws or policies preventing them from joining or punishing them on the basis of sexual orientation. In light of these victories, we continue to fight for the rights of transgender individuals to serve openly in the military, with the hopes that the LGBT community will gain full equality to serve in the military.

Contact Us.

OutServe-SLDN

1133 19th St. NW
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800-538-7418

admin@outserve-sldn.org

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🕒 2018/11/11 12:00

Annual Wreath Laying for LGBT Veterans

Each year as Americans we pause to remember the men and women who have given their lives in defense of our freedom. Once again this year on Veteran's Day, The DC LGBT community will come together to hold a wreath laying ceremony and memorial service at the Congressional Cemetery.

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OUR WORK

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NEWS

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OutServe-SLDN currently has thousands of members in 81 chapters worldwide. Chapter locations and e-mail addresses are listed below. If you have trouble contacting a chapter, the chapter leader is listed as vacant or there is not a chapter listed near you please e-mail admin@outserve-sldn.org and we will forward your request via our network.

We also have a number of forums for specialized interests. If you are interested in joining those forums please contact the forum leader or admin@outserve-sldn.org.

If you are interested in joining our chapter leadership team, please check the vacancies through the pages linked below and fill out [this application form](#).

PLEASE CLICK BELOW FOR YOUR AREA OF INTEREST:

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Jobs

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Internships

We accept full- and part-time interns throughout the year for the spring (typically early January to mid-May), summer (late May to mid-August), and fall (early September to mid-December) semesters in the following program areas.

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Positions will be filled on a rolling basis. This is an unpaid position. There is an opportunity for school credit if allowed by the college/university of applicant. Position offers excellent opportunity to work on substantive projects and can result in a great reference.

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Annual Wreath Laying for LGBT Veterans

Each year as Americans we pause to remember the men and women who have given their lives in defense of our freedom. Once again this year on Veteran's Day, The DC LGBT community will come together to hold a wreath laying ceremony and memorial service at the Congressional Cemetery.

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The warrior creed goes "leave no soldier behind." This is the mission of Fort Meade Army Reserves lawyer Deirdre Hendrick and Navy Petty Officer First Class Alice Ashton in their effort to save as many careers as they can of the thousands of fellow transgender military members left behind in the ban on transgender service members.

Meet the Fort Meade trans women fighting the transgender military ban
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Having both faced challenges transitioning to the gender they identify with while in the military, Deirdre Hendrick and Alice Ashton jumped in with peer support network SPART*A (Servicemembers Partners Allies for Respect and Tolerance for All), to help transgender service members keep their job

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For #GiveOUTDay, we are banding together w/ @OutServeSLDN to raise funds for our partners at @sparta_pride. Help us ensure the voices of our #transgender #military members continue to be heard on Capitol Hill & beyond: <https://t.co/Btkcnu9btwm>

#SupportTransTroops #FightTheBan

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Dear (first name),

It is an honor to write to you, for the first time, at this critical point for OutServe-SLDN.

Nearly a decade ago, a young Navy Sailor was under investigation for *Don't Ask, Don't Tell* (DADT). He had served in support of Operations Iraqi and Enduring Freedom as a cryptologic technician for the previous four years and was our founding Chapter Leader for Guam and the Marianas Islands. Despite his impeccable service, he was threatened with an unfavorable discharge simply because of his sexual orientation -- a black mark that would have blighted his family's long history of naval service.

Through OutServe-SLDN, he found a network of people dedicated to ending all forms of discrimination and harassment in the military and veteran communities on the basis of their actual or perceived identities.

Thanks to the free legal assistance OutServe-SLDN provided, this young Sailor obtained an honorable discharge and access to his earned veterans benefits.



Emboldened by OutServe-SLDN's support during what was undoubtedly one of the most difficult times of his life, he continued to advocate for the LGBTQ and military and veteran communities as a City Commissioner for Oregon's Capitol city; on the Boards of several, national nonprofit organizations; and as a staff member in the Obama White House. He also had the opportunity to complete his law and business degrees, earlier this year, with the intention of using the skill sets he developed to continue supporting and defending our LGBTQ military and veteran communities.

While in graduate school, he clerked for the Oregon Department of Justice and served on the legal and policy team for the organization that fought for his honorable discharge.

My name is Andy Blevins. I am that Sailor and I would not be here today if it were not for the assistance and advocacy that OutServe-SLDN provided on my behalf.



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When you support OutServe-SLDN, you make a difference in people's lives.

Through your generosity, we assist service members, veterans, and their families with advocacy efforts and direct services programs challenging harassment and discrimination that they face simply because of their sexual orientation and gender identity.

This year, thanks to your support, our team provided **free and direct legal and advocacy services to more than 600 service members and veterans.** That is nearly a 20% increase in direct services from our efforts last year!

With your help, many of these service members and veterans have retained the right to serve the nation they love in an open and authentic manner, and they gained access to their earned veterans' benefits. On behalf of them all, I want to thank you.

Meet Edna.

Earlier this year, I was contacted by a transgender woman, Edna, who served in the Army during the Korean War. Edna received an unfavorable discharge based on her perceived sexual orientation.

Following her years in the Army, Edna worked as a registered nurse and was a tireless volunteer; in many ways, she never stopped serving her community or her country.

It's been 60 years since her discharge. She never felt comfortable publicly identifying as a veteran and she never received her earned veterans' benefits.

Through the help of a family member, Edna reached out to ask for our help. She is in a nursing home and, like so many of our most distinguished veterans, is thinking about the end of her life. Edna has a simple wish: when her time comes, she wants to be buried in a veteran's memorial cemetery.

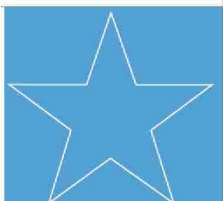
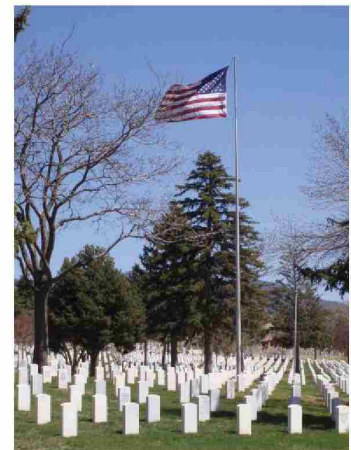
Our mission is to ensure that Edna's wish comes true.

What seemed like a simple request actually presented a complex, multi-layered challenge. In addition to restoring her discharge, she needed her records updated to reflect her post-transition name.

In helping Edna, we faced a few, important, questions:

- Could we get her discharge updated to honorable?
- Would the Army recognize her legal name change?
- Would we be able to restore her benefits?

Edna, we've got your six!



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In the months since Edna originally contacted us, we've been advocating on her behalf and have been able to restore her discharge status to Honorable. We were also able to ensure that her true name appears prominently on her discharge paperwork.

There's just one last hurdle to make it over -- we are now in the process of helping her get set up with due veterans' benefits and care. We will keep fighting on Edna's behalf until she gets her dream -- becoming eligible for burial in a veteran's cemetery.

Your generous donation today will help Edna and so many others regain honor and dignity for their service and earned benefits for their sacrifice.

Will you help us reach our goal of \$25,000 between now and year end so that we can help even more people in 2019?



Edna is just one of the more than 600 individuals that we were able to help through our direct advocacy and services programs in 2018.

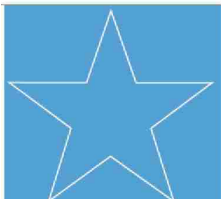
In addition to our direct advocacy programs, OutServe-SLDN has had some big accomplishments in terms of programming: we merged with the Military Partners and Families Coalition, officially adding support of our military and veteran families to the organization's mission. We also successfully launched our Rainbow Shield program, providing cultural competency certifications to service providers and direct services for veterans seeking their benefits. Finally, we announced our Military & Veterans Advisory Council, a group of dedicated service members, veterans, and military spouses that look forward to helping Team OutServe-SLDN better support you and your family!

We've got your six!

OutServe-SLDN is the largest association of the LGBTQ military and veteran communities. We are dedicated to bringing about full LGBTQ equality to America's military and ending all forms of discrimination and harassment of military personnel because of an individual's actual or perceived sexual orientation, gender identity, or HIV status.

Advocacy is at the heart of all our programs -- whether we are advocating on behalf of an individual, a family, or the LGBTQ military and veteran family as a whole. Since 1993, our in-house legal team has responded to more than 12,000 requests for assistance.

We work tirelessly towards equality for all. Will you join us by making a donation today?



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You can help.

Today, we are beginning the year-end campaign for OutServe-SLDN. Our goal is to provide free and direct legal services to 100 additional service members, veterans, and their families next year by raising \$25,000 or more by December 31, but we can't do it without help.

I am reaching out to you because you've already shown how much you care about people like Edna having their service properly recognized and gaining their access to due benefits.

Would you be willing to make a special, year-end contribution of \$25, \$50, \$100 or even \$1,000 or more?

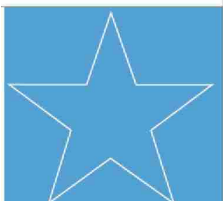
Through your generous contribution today, you will ensure that OutServe-SLDN can provide assistance to even more service members and veterans in 2019.

Thank for your continued support. I look forward to serving alongside you!

Yours in the Fight,

Andy Blevins
Executive Director
Navy Veteran & Trans Army Veteran Spouse

P.S. When you join us in making your gift today, you will be making a difference for thousands of LGBTQ service members, veterans, and their families. Please give as generously as you can.



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Friends,

I am excited to announce the release of our much-anticipated, second installment of the *Freedom to Serve Guide*. The publication pulls its name from our organization's vision. It was first released at the repeal of "Don't Ask, Don't Tell," providing immediate guidance as lesbian, gay, and bisexual members began serving openly and without fear of reprisal or separation. Since the Guide's first installment, there have been many changes that have affected the service of our LGBTQ service members and their families. This new update reflects those changes and the impacts they had.



In this era of open service for LGB service members—and uncertain open service for transgender service members—this guide is intended to help the LGBTQ military community make informed decisions about how to lead their lives and serve equally. It may also help LGBTQ service members understand how to protect themselves and respond if they feel they have been targeted. This guide does not, however, provide comprehensive counseling for service members, nor is it intended to be a substitute for seeking assistance from an attorney familiar with military law. Each service member's situation is different and must be evaluated and handled based on its own facts. Service members who need an in-depth assessment of their unique circumstances should [contact our legal department](#) directly.

All LGBTQ service members and their allies should be aware of the information contained in this publication. It is important to review the entire guide before studying individual sections. This will provide an overview of the laws and policies, which is necessary to understand individual sections and how they work together, both on paper and in practice. It is also important to know that this guide was created using

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work together, both on paper and in practice. It is also important to know that this guide was created using research of Defense Department directives. Regulations of the individual services generally mirror the Defense Department's directives, though some differ in minor but sometimes significant ways.

You can download the Guide through this link: [Freedom to Serve Guide \(2018\)](#)

Stronger Together,
Peter Perkowski
Legal & Policy Director

P.S. You can help us continue to support and advocate for the LGBTQ and HIV+ military and veteran communities by making a tax-deductible contribution today. Together, we can continue to make a difference!

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EXHIBIT R

Defs.' First Set of Req. for Produc.

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

NICHOLAS HARRISON, *et al.*,

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as Acting Secretary of Defense;, *et*
al.,

Defendants.

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

RICHARD ROE; VICTOR VOE; and
OUTSERVE-SDLN, INC.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as Acting Secretary of Defense;
HEATHER A. WILSON, in her official
capacity as Secretary of the Air Force; and
the UNITED STATES DEPARTMENT OF
DEFENSE,

Defendants.

No. 1:18-cv-1565-LMB-IDD

**DEFENDANTS' FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO PLAINTIFFS**

Pursuant to Fed. R. Civ. P. 34, Defendants propound these requests for production of documents, to which Plaintiffs shall respond separately and fully, within thirty (30) days and in the manner prescribed by the Federal Rules of Civil Procedure and the Local Rules, and in accordance with the instructions and definitions set forth below. All definitions, instructions, and interrogatories are applicable to both above captioned cases, pursuant to the January 4, 2019 Orders in *Harrison v. Mattis*, Case No. 1:18-cv-641 (E.D. Va.), Dkt No. 106, and *Roe v. Shanahan*,

1:18-cv-1565 (E.D. Va.), Dkt. No. 32, consolidating discovery for both matters, except where otherwise identified.

DEFINITIONS

1. “Any” or “Each” shall be understood to include “all”; “or” shall be understood to include “and”; and “and” shall be understood to include “or.”
2. The connectives “and” and “or” shall be understood either conjunctively or disjunctively as necessary to bring within the scope of the Interrogatories all responses that might otherwise be construed to be outside of its scope.
3. The singular shall be understood to include the plural and vice versa.
4. The terms and phrases “constituting,” “reflecting,” “evidencing,” “concerning,” “regarding,” and similar terms mean in whole or in any part alluding to, responding to, concerning, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, or tending to support or discredit.
5. The term “communication” means any communication between two or more people or entities and includes, among other things, conversations, telephone calls, meetings, letters, correspondence, facsimiles, e-mails, web pages, and posts on social media sites, such as Twitter and Facebook.
6. The term “identify” when referring to a document means that document’s title, date, author, recipient(s), and a brief summary of the document.
7. The term “identify” when referring to a person means that person’s full name, last known home or business address, and last known home or business telephone number.

8. Whenever in these requests for production there is a request to “identify with specificity,” include “a detailed description,” “describe fully each and every,” “describe in detail,” or “describe with as much particularity as possible,” a condition, act, event, instance, transaction, fact, set of facts or basis of an answer, your response should include, at a minimum: (a) a description of the underlying, supporting facts, (b) a statement of the date, location and manner of each occurrence; and (c) the identity of each person participating or engaging therein.

9. The term “entity” shall mean any individual, partnership, incorporated or unincorporated association, foundation, non-profit, organization, government, association, and/or other legal, governmental, or private entity.

10. The term “document” shall be understood to be coextensive with the meaning of the term in Federal Rules of Civil Procedure 26 and 34. A draft or non-identical copy of a document is a separate document within the meaning of this term. The term “document” or “documents” shall further mean anything discoverable under Federal Rule of Civil Procedure 34(a), including but not limited to, any tangible thing upon which any expression, communication, or representation has been recorded by any means, including but not limited to, handwriting, typewriting, printing, photostating, photographing, mimeographing, magnetic impulse, or mechanical or electronic recording, and any non-identical copies (whether different from the original because of notes made on such copies, because of indications that said copies were sent to different individuals than were the originals, or because of any other reason), including but not limited to working papers, preliminary, intermediate, or final drafts, correspondence, memoranda, charts, notes, records of any sort of meetings, invoices, financial statements, financial calculations, diaries, reports of telephone or other oral conversations, desk calendars, appointment books, audio or video tape recordings, microfilm, microfiche, computer tape, computer disk, computer printout,

computer card, electronic mail, and all other writings and recordings of every kind that are in your actual or constructive possession, custody, or control.

11. The term “date” means the exact date, month, and year, if ascertainable, or, if not, the best approximation of the date (either in terms of its relationship to other events or its approximate date, whichever is more precise).

12. “Complaints” shall be understood to mean the complaint in both cases consolidated here for discovery, *Harrison v. Mattis*, Case No. 1:18-cv-641 (E.D. Va.), Dkt No. 1, and *Roe v. Shanahan*, 1:18-cv-1565 (E.D. Va. Jan. 19, 2019), Dkt. No. 1.

13. “Harrison Complaint” shall be understood to mean the Plaintiffs’ Complaint in *Harrison v. Mattis*, Case No. 1:18-cv-641 (E.D. Va. May 30, 2018), Dkt. No. 1.

14. “Roe Complaint” shall be understood to mean the Plaintiffs’ Complaint in *Roe v. Shanahan*, 1:18-cv-1565 (E.D. Va. Jan. 19, 2019), Dkt. No. 1.

15. “You” and “your” shall be understood to mean the plaintiffs, Nicholas Harrison, Richard Roe, Victor Voe, OutServe-SDLN, Inc., collectively as a group, or individually, as well as any person or entity over which either exercises authority with regard to the information sought, including but not limited to legal counsel

16. “Individual plaintiffs” shall be understood to mean the non-organizational plaintiffs, Nicholas Harrison, Richard Roe, and Victor Voe, collectively as a group or individually.

INSTRUCTIONS

1. If you assert a claim of privilege in objecting to any document request, or to any part thereof, and information is not provided on the basis of such assertion, please describe the basis of such privilege.

2. With respect to each document request, if you are able to provide some, but not all, of the documents or things requested, please provide such items as you can, and specifically identify the items that you cannot or will not produce.

3. If, in responding to these document requests, you encounter what you deem to be an ambiguity when construing any document request, instruction, or definition, please set forth the matter deemed ambiguous and the construction used in answering.

4. In the event that Plaintiff objects to answering any of these requests for production of documents, Plaintiff should state the precise ground for objection and the basis for asserting that such ground is applicable. The objection and basis should be made separately for each contested document request. Plaintiff should answer any part of the request and provide any document or portion thereof to which the objection does not apply, and specify the portion to which Plaintiff is responding.

5. These document requests seek all responsive documents in your possession, custody, or control, or in the possession, custody, or control of your attorneys, agents, representatives, and any other person acting for you or on your behalf. If a document once in Plaintiff's custody or control is the subject of a request for production, and the document is no longer in Plaintiff's custody or control, state when the document was most recently in Plaintiff's possession or control and what disposition was made of it, including the identification of the person now in possession of or exercising control over the document. If the document has been destroyed, state when and where it was destroyed, and identify the person or persons who directed its destruction.

6. If the contention is made that any requested document is not subject to disclosure in whole or part by reason of privilege or otherwise, please prepare and provide a privilege log in accordance with the requirements of Federal Rule of Civil Procedure 26(b)(5)(A). 7.

7. These discovery requests constitute a continuing request for information and documents so as to require responses and production to be supplemented in accordance with Rule 26(e) of the Federal Rules of Civil Procedure. Consequently, you must supplement your responses and production to Defendants as soon as possible after any new information or undisclosed documents become available.

DOCUMENT REQUESTS IN BOTH CASES

Request No. 1. All documents, including categories of documents, identified in your initial disclosures.

Request No. 2. Documents that describe the method by which OutServe's governing body is selected.

Request No. 3. Documents that describe the methods used by OutServe to finance its activities.

Request No. 4. Documents that describe the relationship between OutServe and its members.

Request No. 5. All documents reflecting facts or data considered by Dr. Carlos Del Rio, Dr. Craig Hendrix, or Trevor Hoppe, MPH, Ph.D., in forming their expert opinions.

DOCUMENT REQUESTS IN ONLY *HARRISON v. SHANAHAN*

Request No. 6. All documents that support the allegations in paragraph 2 of the Harrison Complaint, including that "[s]cientific innovation and medical advances have radically changed the landscape of HIV treatment and prevention," "[s]hortly after the of antiretroviral therapy, medical researchers discovered that treatment of an HIV-negative person with the same medications before or after an exposure generally prevents an HIV infection from taking hold," and "those in successful treatment are incapable of transmitting HIV."

Request No. 7. All documents that support the allegations in paragraph 19 of the Harrison Complaint, including documents describing the “new antiretroviral medications . . . that transformed the landscape of HIV treatment and prevention.”

Request No. 8. All documents that describe the testing methodology used to determine the “effectiveness of antiretroviral medications” alleged in paragraph 20 of the Harrison Complaint.

Request No. 9. All documents that support the allegations in paragraph 21 of the Harrison Complaint that for “the first time, an AIDS diagnosis could be reversed.”

Request No. 10. All documents that support the allegations in paragraph 22 of the Harrison Complaint that the “side effects of the initial antiretroviral medications were generally tolerable,” and that “the standard practice of waiting to provide antiretroviral medications until a patient began showing signs of immune system deterioration was modified to starting treatment with antiretroviral medications almost immediately after diagnosis.”

Request No. 11. Documents that support the allegations in paragraph 24 of the Harrison Complaint.

Request No. 12. Documents that support the allegations in paragraph 25 of the Harrison Complaint, including the allegation that the “theoretical possibility of HIV transmission in these other contexts is eliminated entirely by adherence to medications and the viral suppression that results.”

Request No. 13. All documents that describe or relate to Sgt. Harrison’s viral load.

Request No. 14. All documents that describe or relate to any drug resistance panels used to monitor Sgt. Harrison’s disease progression.

Request No. 15. All documents that relate to the allegations in paragraph 49 of the Harrison Complaint that Sgt. Harrison was “offered . . . a position as a Judge Advocate General (JAG) officer for the Oklahoma National Guard.”

Request No. 16. All documents that relate to any past, ongoing, or planned applications or requests for accession or appointment as a commissioned officer, including into the U.S. Army Judge Advocate General’s Corps.

Request No. 17. All documents that relate to the allegations in paragraph 51 of the Harrison Complaint, including documents concerning the “relatively short application,” the “interview process,” and the decision to choose Sgt. Harrison for an “open position in the JAG Corps for the D.C. National Guard.”

Request No. 18. All documents that relate to the allegations in paragraph 52 of the Harrison Complaint about Sgt. Harrison’s “process of assessment and qualification.”

Request No. 19. All documents related to the commission medical exam mentioned in paragraph 53 of the Harrison Complaint.

Request No. 20. All documents concerning the request for medical waiver described in paragraph 54 of the Harrison Complaint.

Request No. 21. All documents concerning the request(s) for an exception to policy described in paragraphs 56 through 63 of the Harrison Complaint.

Request No. 22. All documents concerning the application for review and correction submitted by Sgt. Harrison to the Army Board for the Correction of Military Records.

Request No. 23. Documents that support the allegation in paragraph 68 of the Harrison Complaint that “Sgt. Harrison is a member of OutServe-SLDN.”

Request No. 24. All documents that support the allegations in paragraph 76 of the Harrison Complaint that “[p]eople living with HIV have suffered through a unique history of misinformation, stigma and discrimination for decades, and continue to suffer such discrimination to this day, and “[p]eople living with HIV are a discrete and insular group and lack the political power to protect their rights through the legislative process.”

Request No. 25. All document on which you will rely to support your claims in this action or rebut Defendants’ defenses.

DOCUMENT REQUESTS IN ONLY ROE v. SHANAHAN

Request No. 26. All documents that support the allegations in paragraph 3 of the Roe Complaint that “as of late 2017, the Air Force allowed at least 13 Airmen living with HIV to serve overseas and support vital missions,” “from 2011 to 2016, the Air Force diagnosed 181 Airmen and the Navy diagnosed 388 sailors with HIV,” “119 of those Airmen . . . were still serving” in 2016, and “[i]n 2011, the U.S. Army counted 480 soldiers with HIV serving on active duty, with some serving for more than 20 years after they were diagnosed.”

Request No. 27. Documents that support the allegations in paragraph 23 of the Roe Complaint that “Roe and Voe are members of Plaintiff OutServe-SLDN, Inc.”

Request No. 28. All documents that support the allegations in paragraph 50 of the Roe Complaint, including documents describing the “new antiretroviral medications . . . that transformed the landscape of HIV treatment and prevention.”

Request No. 29. All documents that describe the testing methodology used to determine the “effectiveness of antiretroviral medications” alleged in paragraph 51 of the Complaint.

Request No. 30. All documents that support the allegations in paragraph 52 of the Complaint that the “side effects of the initial antiretroviral medications were generally tolerable,” “new

medications that have few or no discernible side effects for most people,” and that “the standard care shifted to starting treatment with antiretroviral drugs almost immediately after diagnosis.”

Request No. 31. Documents that support the allegations in paragraph 54 of the Roe Complaint, including “medical researchers have now established that a person with a suppressed viral load is incapable of transmitting HIV,” “[e]ven without viral suppression, . . . HIV is not easily transmitted,” and “with adherence to HIV medications and the resulting viral suppression, the risk of transmission is essentially zero for any sexual activity.”

Request No. 32. All documents that support the allegations in paragraph 55 of the Roe Complaint.

Request No. 33. All documents that support the allegations in paragraph 98 of the complaint that “[p]eople living with HIV have suffered through a unique history of misinformation, stigma and discrimination for decades, and continue to suffer such discrimination to this day, and “[p]eople living with HIV are a discrete and insular group and lack the political power to protect their rights through the legislative process.”

Request No. 34. All document on which you will rely to support your claims in this action or rebut Defendants’ defenses.

February 13, 2019:

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 13th day of February, 2019, to the following counsel of record via electronic mail.

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