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-SLDN, 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' REPLY IN SUPPORT OF THEIR
RENEWED MOTIONS TO DISMISS PLAINTIFF OUTSERVE-SLDN

Plaintiff OutServe-SLDN, Inc. ("OutServe") invites the court to adopt a notion of a membership organization far beyond any allowed by a previous court. OutServe is governed by unelected and unaccountable leadership that has brought this externally-financed litigation without any feedback from its purported members, to advance its own policy objectives which run counter to at least some of its members' interests. Moreover, OutServe asks the Court to accept that it is a traditional membership organization or the functional equivalent of one even though it makes no provisions for general members in its governing documents, it is governed by an unelected Board of Directors which includes non-members, at least 96% of its financing comes from non-members, it collects no dues, and it maintains no membership roster.

When this is all stripped all away there is little left besides (1) OutServe's claim that its leaders "listen" to their constituents before unilaterally making decisions (even though OutServe did not consult the participants of its HIV-positive Facebook forum before entering this litigation), and (2) OutServe's dubious "common understanding" of its criteria for membership. That criteria means that every person with a certain identity that joins one of its Facebook groups, calls a legal helpline, or makes a singular and minimal donation, is transformed into a member, perhaps without their knowledge, and that OutServe can claim to represent that person's interest in court. When taken together, these flaws negate OutServe's associational standing claim. Perhaps realizing that it has stretched its standing too far, OutServe has made a last minute gambit to assert that it has suffered a direct injury. It is too late for OutServe to insert a new theory of standing, but even if it could, it would fail as a matter of law.

ARGUMENT

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). OutServe has failed to meet its burden of prove it has associational standing by a preponderance of evidence. *See Unites States ex rel.*

Vuyyuru v. Jadhav, 555 F.3d 337, 347 (4th Cir. 2009). Though OutServe now raises a new theory of standing by asserting a direct injury, that theory fails because it is improperly brought after the close of discovery and is deficient as a matter of law. Accordingly, the Court should grant Defendants' motion to dismiss OutServe as a plaintiff in the *Harrison* and *Roe* cases.

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

As an initial matter, just because the Court has already opined at the pleading stage on OutServe's associational standing to bring suit as a representative of its members, Pls.' Opp'n to Defs.' Renewed Motions to Dismiss Pl. OutServe-SLDN, at 2, *Roe* ECF No. 131, *Harrison* ECF No. 168 ("Pls.' Opp'n") (citing *Roe* ECF No. 72 ¶¶ 29-30), that does not foreclose Defendants from raising or the Court from considering it again now after discovery. Standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Likewise, OutServe cannot rely on nearly every individual it identified, including D1, S.H., D.N., and Q.S., to establish its standing because they were not members of OutServe at the time the suit was filed: standing must exist at the time the complaint is filed. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). Instead OutServe rests on its contention that at least the individual plaintiffs, Harrison, Roe, and Voe,[1] were members of OutServe at the

[1] Roe's only connection to OutServe prior to the day *Roe* suit was filed was accessing legal services and to be simultaneously subscribed to its newsletter. Deposition of Richard Roe, 59:10-17, *Roe* ECF No. 123, *Harrison* ECF No. 159, Ex. G ("Roe Dep."); Pl. OutServe's Resp. to Defs.' Interrogs. No. 1, *Roe* ECF No. 123, *Harrison* ECF No. 159, Ex. A ("OutServe Interrog."). Though Voe was a declarant in the *Harrison* case, he did not purportedly join OutServe by accessing its legal services and subscribing to its Facebook group until after the *Harrison* suit was filed. OutServe Interrog. No. 1. As discussed *infra* and in Defendants' Renewed Motion to Dismiss, these contacts are wholly inadequate to establish membership.

time the lawsuits were filed. Pls.' Opp'n at 19-20. But OutServe previously represented that its claims were separate and independent from the claims brought by the individual plaintiffs in these lawsuits.[2] Joint Proposed Discovery Plan, at 3, *Harrison* ECF No. 67; Pls.' Opp'n to the Mot. to Dismiss & Reply in Supp. of their Mot. for a Prelim. Inj., at 16, *Roe* ECF No. 60.

Now that discovery is closed, OutServe failed to meet its burden to prove that OutServe is a traditional membership organization or the functional equivalent of one with associational standing to represent its members.

A. OutServe is not the "functional equivalent" of a membership organization.

In *Hunt*, the Supreme Court held that an organization is the functional equivalent of a membership organization when its 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 influencing its direction, and (c) financing the entity's activities, including the costs of the lawsuit. *Wash. State Apple Advert. Comm'n v. Hunt*, 432 U.S. 333, 344-45 (1977) (emphasis added). OutServe's purported members do not possess *any* of the indicia of membership. Instead, OutServe invites the Court to depart from following the *Hunt* indicia-of-membership test by adopting a broadened formulation that courts have thus far only applied to a narrow subset of advocacy groups representing the mentally ill and developmentally disabled. See Pls.' Opp. at 16-18. The Court should decline OutServe's invitation.

1. Members do not elect OutServe's leadership.

First, OutServe admits that its purported general members do not elect its leadership. Decl. of Anthony Blevins ¶ 20, *Roe* ECF No. 131-4, *Harrison* ECF No. 168-4 ("Blevins Decl."). OutServe

[2] "[S]tanding is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008)). Rather, a plaintiff "must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought." *Id.*

suggests that compliance with this indicia of membership by requiring that its members elect its leaders or even by meeting the lower standard suggested by the *AARP* court which accepted that a subset of members can elect their leaders, is simply "too-strict." Pls.' Opp'n at 12; *See AARP v.* EEOC, 226 F. Supp. 3d 7, 17 (D.D.C. 2016)*("AARP* I*")* ("[D]irectors are required to be AARP members, and are chosen by other members of the Board, i.e., by other AARP members."); *AARP v.* EEOC, 267 F. Supp. 3d 14, 23 (D.D.C, on reconsideration, 292 F. Supp. 3d 238 (D.D.C. 2017) *("AARP II")* (acknowledging that "whether AARP satisfies the indicia of membership criteria is a close question").

Plaintiffs offer no legal authority to suggest that this Court may waive this indicia of membership as "too-strict." Outside of the clearly distinguishable Protection and Advocacy System ("P&A System") context for advocacy groups representing the mentally ill and developmentally disabled, discussed *infra*, Plaintiffs only offer two other cases finding organizations with unelected leadership to have associational standing, both of which are not applicable to this analysis because those courts did not even consider the indicia of membership. *See* Pls.' Opp'n at 12-13; *Air All. Hous. v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 129 (D.D.C.), *appeal filed*, No. 19-5089 (D.C. Cir. Apr. 8, 2019) (holding that it "need not" inquire into the indicia of membership because it found that the organization was a traditional membership organization); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 7 (1st Cir. 1986) (assuming the six corporate members of the organization formed a traditional membership organization and not inquiring into how their leadership was selected). Courts, indeed, have found just the opposite—that unelected leaders mean that the organization is not the 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); *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); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987).

2. Members do not serve as OutServe's leadership or set OutServe's direction.

Second, though some of OutServe's Board of Directors and corporate officers may also qualify as members, that is nothing more than happenstance because there is no formal requirement that they must possess the identity requirement for membership. Even if the court does consider this argument, Plaintiffs provide scant evidence that some of its leaders are members, except for providing the self-serving declaration that "the majority of OutServe's Board members" meet its identity requirements. Pls.' Opp'n at 14 (citing Blevins Decl. ¶ 21). Plaintiffs failed to produce other evidence either in its opposition or during discovery, such as the precise number of Board members that meet OutServe's identity requirements, declarations from individual Board members or staff, nomination forms, voting records, or Board meeting minutes. More critically, though, there is no *requirement* that OutServe's Board Members, Executive Director, or other corporate officers and staff be members. Plaintiffs cannot escape that the *AARP* court considered it dispositive that AARP's bylaws required *all* its Board members to meet the age requirement for membership. *See AARP I,* 226 F. Supp. 3d at 17. Unlike AARP, neither OutServe's bylaws nor its common practice result in a Board comprised of members only.

Next, OutServe attempts to rely on the existence of its Military Advisory Council as the means by which its members to influence the organization's direction and leadership. In considering the indicia of membership test, one court opined that an Advisory Council possessed two attributes which established that it "influence[d] the priorities and activities of [the organization.]" *State of Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 283 (D. Conn. 2010). "First, [t]he Council considers, nominates, and appoints its own members, including its chairperson. [The] Executive Director does not control or take part in the election of new

members to the Council. Members may be removed only upon recommendation by the Council to the Executive Director." *Id.* "Second, the Advisory Council is the final decision-maker with respect to grievances" brought by the organization's members. *Id.* OutServe's Military Advisory Council possesses neither attribute. Instead, the Advisory Council members are hand-selected by the Executive Director. Blevins Dep. 81:1-8; 82:8-15, 83:10- 84:8. The OutServe Advisory Council plays no role in formally mediating grievances of members and is not the final decisionmaker. Blevins Dep. 87-88; Blevins Decl. ¶ 21. Instead, informally, members "are free to reach out" to offer the Advisory Council "input or feedback" which the Council may use to "advise" the unelected Executive Director to "influence" his final decision. Blevins Decl. ¶ 21. In fact, there is no requirement that OutServe's leadership listen to the Advisory Council at all and there is not even a provision in its governing documents that the Advisory Council exist.[3] *See* Blevins Dep. 85:11-86:17 (confirming that the Advisory Council was not consulted before entering the present litigation). In any event, the existence of an Advisory Council alone is insufficient to establish the organization is the functional equivalent of a membership organization. *See Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 307.

Finally, OutServe claims that its purported members can influence its activities by "contacting headquarters directly, contacting their chapter leaders, [and] contacting members of the [Advisory Council]." Pls.' Opp'n at 13-14 (quoting Blevins Decl. ¶ 21). The Executive Director claims he "listens" to these contacts. *Id.* This type of influence hardly rises to the level of members

[3] Of all the individuals identified by Plaintiffs, only Harrison serves on the Advisory Council. OutServe has not identified any member of the Advisory Council with the types of injuries brought in the *Roe* suit. To the extent that the Court believes that the individuals serving on the Advisory Council possess sufficient indicia of membership to be members of OutServe even if the other individuals, such as members of a Facebook group, do not, OutServe could only maintain associational standing in the *Harrison* suit but not the *Roe* suit, and only as to claims for which Harrison would have standing, if any.

setting the direction of their own organization. Indeed, Plaintiffs offer no evidence in the form of meeting minutes, emails, program plans, or any other documentation that member-driven ideas are collected, discussed, or actually acted upon. *See, e.g.*, *Disability Advocates, Inc. v. N. Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 158-59 (2d Cir. 2012) (finding "scant evidence" that purported members influence the organizations' "activities or litigation strategies" because the record does not "contain agendas, minutes, or other evidence regarding the quarterly meetings between [the leadership and the] Advisory Council; names and descriptions of the members of the Advisory Council; or ways that [constituents] convey information, requests, or inquiries to the Advisory Council. Finally, the record does not establish that [the organization] ever notified its 'constituents' . . . that it was filing this suit purportedly on their behalf."). If OutServe is as responsive to member input as it claims, it is particularly surprising that it did not consult its Facebook forum dedicated to HIV-positive service members prior to entering this litigation and it refers to any ongoing feedback from this group as "[a]rmchair quarterbacking." Blevins Dep. 161:5-19.

3. OutServe is not financed by its members

Third, OutServe asks the Court to simply ignore the external 4.5 million dollars in donated litigation services and only focus on the $250,000 that represents the remainder of its annual operating budget to prove that it is financed by its members. Pls.' Opp'n at 14. OutServe offers no legal authority that renders the *Hunt* Court's consideration that members of the organization financed the litigation itself inapplicable to this case. *See Hunt,* 432 U.S. at 344 (noting that the organization's members "alone finance[d] its activities, including the costs of this lawsuit").

OutServe rests on its unsupported claim that 75% of the $250,000 operating budget comes from member donations. Pls.' Opp'n at 14. But OutServe admits that it does not track whether its donors are eligible for membership. Blevins Dep. 168:6-20. And, this claim is contrary to its other claims regarding its 54,000 non-member supporters and its donation requirement for Board

members. Blevins Dep. 164:24-25; *Harrison* Compl. ¶ 69; *Roe* Compl. ¶ 25. Even accepting this assertion as true, it means that only 3.9% of OutServe's annual budget comes from member donations. OutServe failed to establish that it is financed by its members.

4. The Court should reject Plaintiffs' less "rigid" approach to the indicia of membership analysis.

Lastly, the Court should decline to broaden its standing analysis based on two out-of-circuit decisions which carve out an exception to a formulistic application of the *Hunt* indicia of membership test to find associational standing for P&A systems. P&A systems are federally-established and funded state-level advocacy organizations which represent mentally ill and developmentally disabled clients. *See* Pls.' Opp'n at 16-18 (citing *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003), and *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999)). Even though the Ninth and Eleventh Circuits broadened their interpretation of the indicia of membership analysis to confer associational standing to P&A systems, the Fifth and Eighth Circuit have rejected the same arguments. *See Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.,* 19 F.3d 241, 244 (5th Cir. 1994) (concluding that the P&A system bore "no relationship to [a] traditional membership group[ ], because most of its 'clients' . . . are unable to participate in and guide the organization's efforts"); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007) (same). The Second Circuit also opined that if any exception to the formulistic application of the indicia of membership test exists based on *Mink* and *Stincer*, that exception applies "exclusively" to P&A systems. *N. Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d at 158.

Resolving this Circuit split is unnecessary, because OutServe is nothing like a P&A system. P&A systems are designed, by statute, to create legal advocacy organizations, affording those organizations a special status when it comes to associational standing analysis. *See* Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801–10851. "[T]he sole basis

cited in both *Stincer* (Eleventh Circuit) and *Mink* (Ninth Circuit) for finding that P&A systems have associational standing to sue on behalf of individuals with mental illness is that § 10805 affords individuals with mental illness (and their families and representatives) the requisite 'indicia of membership' in the administration of the system." *N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d at 158. The *Mink* and *Stincer* courts considered the P&A organization's "statutory mission and focus," along with the *Hunt* indicia of membership test to find standing. *Mink*, 322 F.3d at 1110; *see Stincer*, 175 F.3d at 886. Both courts considered the following statutory requirements imposed on the P&A systems: The organization must governed by a Board comprised of individuals who are knowledgeable about the needs of its clients; the Board's composition must be at least 60% clients of the system or representatives of the clients (such as family members and guardians); and the organization must maintain a formal grievance process to assure that the clients have full access to the services of the system. *Mink,* 322 F.3d at 1110 (citing 42 U.S.C. § 10805); *Stincer*, 175 F.3d at 886 (same). These requirements, the *Mink* and *Stincer* courts concluded, are sufficient to ensure that the P&A systems are set up to protect the collective interests of its clients.[4] *Mink,* 322 F.3d at 1110; *Stincer*, 175 F.3d at 886.

Unlike the P&A systems, no statute, bylaw, article of incorporation, or even informal practice requires OutServe's organization to possess any of the characteristics that define P&A systems. *See* First Am. & Restated Bylaws of Outserve-SLDN, Inc., *Roe* ECF No. 119, *Harrison* ECF No. 155, Ex. B ("Bylaws"); Certificate of Incorporation of Servicemembers Legal Defense Network, Inc., *Roe* ECF No. 119, *Harrison* ECF No. 155, Ex. C. OutServe admits that some of its Board

[4] Plaintiffs also point to a case which relied on *Mink* and *Stincer* to find that an organization that represents developmentally disabled clients had associational standing despite not strictly meeting all the indicia of membership criteria. Though this non-profit does not appear to be a P&A system, it had analogous characteristics, including a Board that was entirely made up of its clients (and family members representing clients). *See Ball by Burba v. Kasich*, 244 F. Supp. 3d 662, 683 (S.D. Ohio 2017). *Ball* is distinguishable for the same reasons as *Mink* and *Stincer*.

Members serve simply because they have "certain skill sets or corporate and financial connections," which does not necessarily confer any special knowledge about the needs of OutServe's clients. Pls.' Opp. at 13 (citing Blevins Dep. ¶ 21). Even if presently "the majority" of OutServe's current Board Members possess the identity required of general OutServe members, it certainly is not a requirement of its organizational structure. *Id.* Likewise, OutServe's assertion that members can express a complaint or concern by contacting leaders directly is not the same sort of system as a formal and accountable grievance process offered by the P&A systems.

The Court should not abandon the application of the indicia of membership test in exchange for a broadened standard used in the special circumstances of P&A systems in the Ninth and Eleventh Circuits. But even applying this broader standard, OutServe would still not even qualify as a functional equivalent of a membership organization.

B. OutServe is not a traditional voluntary membership organization.

The authority remains unclear about whether the court can find that an organization is a traditional membership organization if it does not possess the requisite indicia of membership. *See AARP I*, 226 F. Supp. 3d at 16 ("There appears to be a gap in the associational standing case law about when or how the indicia of membership inquiry should be applied."), *see also* Mem. in Supp. of Defs.' Renewed Mot. to Dismiss, at 17 n. 10, *Roe* ECF No. 119, *Harrison* ECF No. 155 ("Defs.' Mem."). But OutServe fails in this regard too because it does not possess any characteristics of traditional membership organizations, its membership is not voluntary, and its definition of membership is flawed.

1. No court has extended the definition of a traditional membership organization to include an organization such as OutServe.

OutServe argues that it is a traditional membership organization because it is analogous to another organization, LBB, which was recently found to be a traditional membership organization

despite its lack of elected leadership. *See* Pls.' Opp'n 6-7 (citing *Air All. Hous. v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d at 129). In *Air Alliance*, the court considered that LBB was a traditional membership organization because: the organization's founder claimed that it was a membership organization in a declaration; its Bylaws defined who would be considered a member; its Bylaws set up "committees of the organization" for members to make recommendation to the Board; and its Board members were all also members of LBB. *Air All. Hous.,* 365 F. Supp. 3d at 129. Because of these defining characteristics, the court found LBB's the lack of elections was "not fatal" to its status as a traditional membership organization. *Id.*

Though both OutServe and LBB's executive directors declare that they have members, the similarities between the two organizations end there. Unlike LBB, OutServe's bylaws do not define its members or create a membership committees. *See* Bylaws. Unlike LBB, OutServe's Board Members, staff, and executive directors are not required to be members of its organization. *Id.*; *Air All. Hous.*, 365 F. Supp. 3d at 129 (citing *AARP II*, 267 F. Supp.3d at 23). OutServe's assertion that its unelected leaders "seek[ ] advice" from members and that some, but not all, of its Board Members might also qualify as members, falls flat in comparison to LBB's all-member leadership. Pls.' Opp'n at 7.

Next, OutServe suggests a misreading of *Hunt* to argue that a traditional membership organization is not required to have its members *voluntarily* join or exit its organization, by comparing itself to organizations in which membership is mandatory.[5] Pls.' Opp'n at 8. The Supreme Court expressly rejected defining a state trade association with compulsory membership as a traditional voluntary membership organizations. *See Hunt*, 432 U.S. at 345. Instead, it established the indicia of

[5] Defendants also dispute that an organization such as OutServe can properly require mandatory membership in the manner of a Bar association, union, or state trade association.

membership test for the express purpose of determining if the trade association is a functional equivalent of traditional voluntary membership organization. *Id.*

2. OutServe does not possess any of the features of a traditional membership organization.

OutServe simply does not possess any of the features of a traditional voluntary membership organization: it does not provide for general members in its bylaws, it does not collect dues, and it does not maintain a roster. Though if considered alone, the lack of any one of these characteristics may not be fatal, when considered together, they weigh strongly against a finding that OutServe is a traditional membership organization.

OutServe claims it does not need a membership roster by pointing to *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 676 (E.D. La. 2010), which applied the indicia of membership test to find that an organization was the functional equivalent of a traditional membership organization even though it linked its members through informal email networks rather than with a formal roster. The court accepted that the organization did not have to maintain a membership roster because its "decisions are made by consensus, its officers are elected, and voting is open to all members," it receives "no external financing, [and] it is entirely dependent on members' contributions, volunteer efforts and continued good-will." *Id.* (acknowledging "the more informal an association, the less likely it may be to express its members' views or respond to their interests.") Unlike the organization in *Concerned Citizens*, OutServe's leaders have unilateral decision-making authority, its officers are not elected, there is no voting, and there is substantial external financing. *Concerned Citizens* is inapposite.

3. OutServe's assertion of a "common understanding" of its membership is not sufficient to establish OutServe as a membership organization.

OutServe's "common understanding" of membership lacks the voluntary characteristics required for a traditional membership organization, allowing it to broadly claim members who may

not even know that they are joining its organization OutServe responds that all its methods of joining require an "affirmative, voluntary act." Pls.' Opp'n at 9. But an individual might take an action (such as joining a Facebook group or making a donation) without knowing, and without the intention, of joining a nationwide advocacy membership organization. And, except for Harrison and K.R., Facebook group membership and access to legal services are the only two means by which all the individuals identified in these suits interact with OutServe.

OutServe's membership criteria based on Facebook is particularly troubling from a voluntary membership perspective. None of OutServe's Facebook pages provide its subscribers any indication that they have become a member of OutServe. Indeed, there is at least one person who did not realize that he became a purported member of OutServe by joining OutServe's Positive Forum. *Roe* ECF No. 109, Ex. C. OutServe argues that because it uses Facebook's "secret group" feature, which requires knowledge of the existence of the group and moderator approval to join the group, its groups are somehow different that Facebook's public groups with respect to establishing membership. *See* Pls.' Opp'n at 9. However, Plaintiffs offer no evidence or authority that joining a secret group rather than a public group makes an individual a member for associational standing purposes. Indeed, OutServe's Facebook groups function largely as an electronic newsletter, where information is "pushed out" to subscribers. *See* Blevins Dep. 133:14-18; 105:10-19. Plaintiffs offer no rebuttal that subscription to a newsletter is legally insufficient to establish membership. *See* Defs.' Mem. at 23.

OutServe instead argues that disallowing the use of Facebook to establish and connect membership is "unduly limiting" in the age of technology. Pls.' Opp'n at 10. But OutServe's advances an interpretation that is unduly broad. With the proliferation of internet forums, the Court should not permit social media groups to claim associational standing if their subscribers lack the other indicia of membership and the group bears no other characteristics of traditional voluntary

membership organizations. *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).

Next, Plaintiffs reaffirm that if an individual who possess a certain identity makes a single donation to OutServe, then they become a member because "donating is a quintessential indicator of membership." Pls.' Opp'n at 9. Plaintiffs point to no case law that allows an organization to claim its donors as members, without also possessing other characteristics of traditional membership organizations or indicia of membership. If donations alone could define membership, it would turn every non-profit and organization that accepts donations into a membership organization. And even if donating were sufficient to establish membership, OutServe has not met its burden of proof to establish that any of the individuals it has identified became a member through donation. *See* Blevins Dep. 143 (noting that donors memberships may lapse a year after donation). Harrison was unable to recall how much or when he donated to OutServe and he produced no documentary evidence of his donation. Deposition of Nicholas Harrison 328:20-329:8, *Roe* ECF No. 119, *Harrison* ECF No. 155, Ex. E ("Harrison Dep.") (stating he donated "at least once, possibly twice."). K.R. donated $10 in 2015. Deposition of K.R. 39:8-13, *Roe* ECF No. 123, *Harrison* ECF No. 159, Ex. I ("K.R. Dep."). None of the other individuals identified as purported OutServe members have made a donation.

Finally, OutServe continues to advance its baseless theory that accessing its legal services makes an individual a member. It is simply untenable to accept that one telephone call to a legal services help line should transform a curious prospective client into a member of an organization, which can then bring suit claiming to represent their interests, without their knowledge or consent.

OutServe's "common understanding" of defining members is insufficient to establish that it is a traditional voluntary 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.

OutServe incorrectly asserts that Defendants did not contest the third prong of the *Hunt* test—whether the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See* Pls.' Opp'n at 5. But Defendants squarely contested that issue. Defs.' Mem. at 26-29. It is well-settled that associational standing is not appropriate when there are actual and potential conflicts among the members of an association. *Md. Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1252 (4th Cir. 1991). In *Maryland Highways Contractors*, the court determined an organization lacked associational standing because some of the organization's members would benefit from having the statute in question declared unconstitutional, while other members would benefit from having the statute upheld and because the organization's board made the decision to litigate without consulting its members. *Id.* at 1253.

Like the members in *Maryland Highways Contractors*, OutServe's purported members have conflicting interests. Some purported members, like Roe and Voe, wish to enjoin the Air Force from medically discharging Airmen in highly deployable positions following an HIV diagnosis. Other purported members—like J.B.[6] and the Airman identified in *Roe* ECF No. 109, Ex. C, who subscribes to the OutServe Positive Forum Facebook group but does not consider himself a member of OutServe—wish to receive a medical discharge. OutServe's claims and requested relief benefit the former and hurt the latter. And, like *Maryland Highways Contractors*, OutServe's president

[6] The declaration OutServe filed from J.B. should not be considered because Plaintiffs' represented that they would "not rely on the testimony of [J.B.] at all" even in the context of a renewed motion to dismiss and thus he has not been deposed. Ex. S, Email from Andrew Sommer to Robert Norway & Julie Bauer.

unilaterally made the decision to litigate without consulting its members, Blevins Dep. 48:16-25, 49:1-7, 78:16-24, 79:7-12; 86:14-17; 106:12-21—even though he knew that some of OutServe's purported members wished to accept medical discharges. Blevins Dep. 171:2-8; 222:7-223:1. Though Plaintiffs later agreed to Defendants' proposed modification to the injunction to allow HIV-positive Airmen with scheduled separation dates to proceed with their separation if they wish, there is no indication that OutServe has altered its position regarding prospective relief.[7]

Consequently, because there are conflicts of interest which would require individual members come into the lawsuit to protect their interests to be discharged through the disability system, OutServe does not satisfy the third prong of the *Hunt* test.

III. OutServe's theory of direct injury is meritless.

The final section of OutServe's brief consists of a futile attempt to introduce a new theory of standing premised on direct organizational injury. That theory was not alleged in either Complaint, is unsupported by timely evidence, and is legally incorrect.

A. OutServe did not allege direct injury in the Complaints.

Nowhere in the Complaints did OutServe allege direct injury; rather, OutServe made clear that it sought to ground its standing solely as a representative of its members. *See Harrison* Compl.; *Roe* Compl. That omission is fatal: OutServe may not now introduce an entirely new theory of standing based on direct injury to itself.

A Ninth Circuit case is squarely on point. In *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, the court noted that the pleadings indicated that NDLON, one of the organizations in question, "intended to assert standing on behalf of its members rather than on behalf of itself as an

[7] OutServe states that it does not wish to block the separation of an Airman who chooses to "voluntarily" separate. Pls.' Opp'n at 20. But if the Court were to order the DoD or Air Force to abandon their policy, Airmen in J.B.'s situation would be ineligible for a disability discharge unless the affected Airman or the military sought individualized relief from the injunction.

organization." 624 F.3d 1083, 1089 (9th Cir. 2010). However, like OutServe here, "[n]owhere in the complaint . . . d[id] NDLON assert a frustration of its purpose or diversion of its resources that would allow the Court to conclude that NDLON had pleaded organizational standing on its own behalf." *Id.* Thus, "[g]iven its inadequate pleading regarding organizational standing," the Ninth Circuit held that "NDLON may not effectively amend its Complaint by raising a new theory of standing in its response to a motion for summary judgment." *Id.* For the same reason, OutServe cannot now raise an entirely novel theory of standing.[8] *See also Md. Highways Contractors*, 933 F.2d at 1251 ("Since they allege no injury to themselves as organizations . . . they can establish standing only as representatives of those of their members who have been injured in fact[.]") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)); *von*Rosenberg *v. Lawrence*, 849 F.3d 163, 167 n.1 (4th Cir. 2017) (declining to consider plaintiff's "new argument [that would] require[] proving a separate set of facts than required to prove his original allegations").

B. OutServe did not timely produce evidence of direct injury.

Even if OutServe could now rely on its new theory of direct injury to establish standing (which it cannot), OutServe would still lack standing because it has failed to produce timely evidence supporting its theory of direct injury.

[8] This Court previously expressed doubt regarding Defendants' reliance on *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013), for the proposition that "parties cannot amend their complaints through briefing or oral advocacy." *See Roe* ECF No. 72 at 29 & n.27. The Court pointed out that it may, in a factual challenge to jurisdiction, "go beyond the allegations of the complaint and . . . determine if there are facts *to support the jurisdictional allegations*." *Id.* at 29-30 (quoting *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir.), *cert. denied*, 137 S. Ct. 2307 (2017)) (emphasis added). Because OutServe's Complaints had "assert[ed] associational standing on behalf of its members who face imminent separation because of their HIV status," the Court found it appropriate to consider whether individuals not mentioned in OutServe's Complaints could support the pleaded jurisdictional allegations. *Id.* at 30. The situation here is wholly different. Rather than pointing to additional evidence supporting an already pleaded theory of associational standing, OutServe is now attempting to introduce an *entirely new* theory of direct standing that was nowhere mentioned in the Complaints. This they cannot do.

It is OutServe's burden to demonstrate it has standing to sue, *Jadhav*, 555 F.3d at 347, and because fact discovery is closed, OutServe must be able to point to evidence supporting its standing that is sufficient to survive dismissal, *see Lujan*, 504 U.S. at 561. Yet OutServe's brief fails to do so. The only cited evidence that was produced before the close of fact discovery are selected deposition excerpts from Mr. Andy Blevins, OutServe's Executive Director, and a single interrogatory response. *See* Pls.' Opp'n at 21-27. None of the deposition excerpts allege any direct injury to OutServe, and the single interrogatory response is conclusory, self-serving, and unsupported by any documentary evidence. Nor does the brief cite any produced document supporting OutServe's claim of direct injury because no such documents were produced (even though Defendants requested documents describing OutServe's financing and all documents that OutServe would use to support its claims, *see* Ex. T, Defs.' First Set of Requests for Production of Documents to Pls. Nos. 3, 25, 34)

Apparently realizing the complete lack of evidence in support of a theory of direct liability, OutServe attached an uncorroborated ten-page declaration by Mr. Blevins to its opposition to the pending motion to dismiss. Blevins Decl. But OutServe should not be allowed to rely on this untimely declaration, produced more than two months after the close of fact discovery. Doing so would substantially prejudice Defendants. OutServe's Complaints and motions practice entirely relied on a theory of representational standing, so Defendants had no reason to explore potential direct injury to OutServe at any deposition (nor did Defendants receive documents relating to direct injury that could have been used in those depositions). Defendants had no indication that OutServe might rely on a theory of direct injury until OutServe submitted a single interrogatory response on the last day of fact discovery.[9] In short, OutServe's failure to produce evidence of direct injury

[9] The Court shared Defendants' understanding that OutServe was not asserting a direct injury. *See*

should make that theory of standing unavailable. *Cf. Md. Highways Contractors*, 933 F.2d at 1250 (declining to find standing when "during discovery, the Association came forward with no evidence that it had been . . . injured" as described by the Association's complaint).

C. None of OutServe's untimely evidence would constitute direct injury.

Notwithstanding OutServe's failure to plead direct injury (or to produce evidence in support of it), OutServe's theory of direct injury suffers from a more fundamental defect: OutServe's newly-alleged harms cannot give rise to standing as a matter of law.

OutServe argues that an organization suffers direct injury and can sue whenever it reallocates any money, time, or resources to respond to a government policy with which it disagrees. *See* Pls.' Opp'n at 21-27. This sweeping proposition implies that an organization has standing to sue to enjoin a government policy any time the organization counseled its members, organized a protest, lobbied Congress, or filed a lawsuit, because doing so would necessarily entail a "diversion" of resources that the organization could have spent some other way. This is not the law.

Indeed, OutServe's expansive view of organizational standing has been squarely rejected by the Fourth Circuit. In *Lane v. Holder*, a gun-rights organization whose purposes included "education, research, publishing and legal action" sought to challenge various laws restricting interstate gun transfers. 703 F.3d 668, 671 (4th Cir. 2012). Like OutServe here, the organization alleged that it suffered direct injury because "resources [were] taxed by inquiries into the operation and consequences of" the challenged provisions. *Id.* at 675. But the Fourth Circuit made clear that such harms cannot constitute an injury in fact: "Although a diversion of resources might harm the organization by reducing the funds available for other purposes, 'it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices.'" *Id.* (quoting

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Feb. 15, 2019 Memorandum Op., *Roe* ECF No. 72 at 29 ("OutServe does not allege any injury to itself qua institutional entity.").

Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1276 (D.C. Cir. 1994)). Observing that the organization's theory of standing swept much too far, the Court explained that "[t]o determine that an organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an adjudication.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 40. "Such a rule would not comport with the case or controversy requirement of Article III of the Constitution." *Id.*

Diverting resources to educating members, responding to member inquiries, and undertaking litigation are precisely the types of harms that OutServe says it incurs because of the Defendants' challenged policies. *See* Pls.' Opp'n at 23-26. Those harms are legally insufficient. *Lane*, 703 F.3d at 675. As multiple courts have recognized, if an organization's stated purpose (like OutServe's) is to challenge certain government policies or to counsel its members with respect to those policies, then the organization's decision to reallocate resources between litigation and non-litigation responses to those policies do not constitute legal injury to the organization. *See, e.g.*, *Lane*, 703 F.3d at 675; *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015); *Nat'l All. for Accessibility, Inc. v. Belk, Inc.*, No. 5:12-cv-00386-FL, 2013 WL 1614672, at *5 (E.D.N.C. Apr. 15, 2013).

CONCLUSION

For the foregoing reasons and those set forth in Defendants' memorandum in support of their renewed motion to dismiss, 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 23, 2019

Respectfully submitted,

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Counsel for Defendants

EXHIBIT S

Email from Andrew Sommer to Robert Norway & Julie Bauer

From: Sommer, Andrew R.
To: Norway, Robert M. (CIV); Bauer, Julie A.
Cc: Cutri-Kohart, Rebecca (CIV); Berman, Keri L. (CIV); McCotter, Trent (USAVAE); Scott Schoettes; peterp@outserve.org; Cooley, Laura
Subject: RE: Harrison, Roe/Voe v. Shanahan
Date: Thursday, February 21, 2019 12:40:49 PM
Attachments: image013.png
image015.png
image016.png
image018.png
image002.png

Rob,

In response to your request about reliance on the four declarants (exhibits C-1 to C-4) that you requested, Plaintiffs will agree that they will not rely on the testimony of declarants C-1, C-2, or C-3 at trial or to support any motion that they brought. Plaintiffs will not rely on the testimony of declarant C4 at all (SSgt. J.B.). Plaintiffs do not, however, agree that they will not use the testimony of declarants C-1, C-2, or C-3 to rebut an argument that the government has made in a motion such as a motion for summary judgment or a renewed motion to dismiss. Should such a declarant be needed, Plaintiffs would reserve the ability to present a declaration from any one of the four declarants you mentioned in your earlier email. At that time, however, Plaintiffs would also make any declarant relied upon available for deposition on their declarations before any subsequent filing by the government would be due.
Plaintiffs are still trying to reach to get an answer for you about him.
The above offer regarding declarants C-1, C-2, and C-3 does not extend to QS at this time.
Therefore, we are working on securing deposition dates for QS and will revert when we have them.
Please let us know if the proposals on declarants C-1 to C-4 are acceptable to Defendants.
Regards,

Drew

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Wednesday, February 20, 2019 7:52 PM
To: Bauer, Julie A. <JBauer@winston.com>; Sommer, Andrew R. <ASommer@winston.com>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Cooley, Laura <LCooley@winston.com>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Julie,

We will depose Mr. Harrison on March 7th.

We also would like to follow up on my email from yesterday regarding the depositions of the non-party witnesses listed on plaintiffs' initial disclosures in *Harrison* and *Roe*. As I indicated yesterday, Defendants may be amendable to a stipulation to narrow discovery by stipulating to the removal of the non-party witnesses from trial and summary judgment. We asked if you could verify that we understand plaintiffs' offer correctly. We understand plaintiffs' offer to be that you will not offer testimony from Declarants 1-4 on any issue for which plaintiffs bear the burden of proof, including the issue of OutServe's standing, at trial and on summary judgment. Is that correct?

We also asked plaintiffs to verify what witnesses plaintiffs intended to withdraw. Your email referred to "Declarants 1-4." The declaration attached to the Roe plaintiffs' motion for a preliminary injunction identifies five individuals: SrA K.R. (Exhibit C1); SrA S.H. (Exhibit C2); SrA D.N. (Exhibit C3); SSgt J.B. (Exhibit C4); and SrA Q.S. Further, the plaintiffs in *Harrison* identified another individual. Did Plaintiffs intend to include all six of these individuals in the offer, or only four? If not, we need to coordinate dates for those non-party witnesses that OutServe intends to call.

Lastly, will plaintiffs offer either Roe or Voe for deposition on March 11 or 12, or would plaintiffs prefer to seek leave the court to depose any remaining Navy deponent the week of March 18 and set a plaintiff deposition on March 14?

Best,

Rob

From: Bauer, Julie A. <JBauer@winston.com>
Sent: Wednesday, February 20, 2019 4:46 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Sommer, Andrew R. <ASommer@winston.com>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <TMcCotter@usa.doj.gov>; Scott

Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Cooley, Laura <LCooley@winston.com>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Rob—

Harrison is available any day the week of March 4. Do you want to pick one?

Julie

From: roevoeteam@outserve.org <roevoeteam@outserve.org> **On Behalf Of** Norway, Robert M. (CIV)
Sent: Wednesday, February 20, 2019 2:14 PM
To: Sommer, Andrew R. <ASommer@winston.com>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Thanks Drew. We will push Mr. Melillo's deposition to Tuesday, February 26.

From: Sommer, Andrew R. <ASommer@winston.com>
Sent: Wednesday, February 20, 2019 3:01 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <TMcCotter@usa.doj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

I can cover that.

Drew

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Wednesday, February 20, 2019 2:45 PM
To: Sommer, Andrew R. <ASommer@winston.com>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Drew,

Defendants are willing to move Mr. Melillo's deposition to February 26.

Best,
Rob N.

From: Sommer, Andrew R. <ASommer@winston.com>
Sent: Wednesday, February 20, 2019 11:15 AM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <TMcCotter@usa.doj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Rob,

Thank you for the clarification. Will the Army and Air Force be providing a witness on topics 15 and 16, respectively? If so, that's not in my notes from the meet and confer.

Regarding your reservation of objections to keeping the deposition open, I don't understand how reducing the number of documents that you claim necessitate further processing and review created a greater burden on Defendants than having to review those 700 documents further. That does not seem to be a logical basis for the multiple week delay in getting the documents, which were improperly withheld to begin with, to us. Therefore, we will be calling the witness back once we get

these documents. And, we reserve the right to seek to have the government pay for having to do this twice and for the expenses and fees in having to bring any motion to compel such testimony under Fed. R. Civ. P. 37.

Of course if you want to try to reschedule this to a time after the documents have been produced, I am comfortable doing that. I am not interested in having to take two depositions of Mr. Melillo but will do what is needed in light of the failure to produce these documents in a timely fashion and in accordance with the courts November 30, 2018 order. I'm happy to discuss this, and other deposition matters by phone if you think it would be productive. I am available after 4 PM today.

Regards,

Drew

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From: roevoeteam@outserve.org <roevoeteam@outserve.org> **On Behalf Of** Norway, Robert M. (CIV)
Sent: Wednesday, February 20, 2019 10:55 AM
To: Sommer, Andrew R. <ASommer@winston.com>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Drew,

As I indicated on the call last week, Mr. Melillo will be providing testimony on DoD's behalf

concerning DoDI 1332.45, the subject of topics 15-18, to the extent those topics cover DoD's policy. Mr. Michael Melillo is the Deputy Director, Force Management, Officer and Enlisted Personnel Management, and is responsible for DoDI 1332.45 within the OEPM directorate. Mr. Melillo is not being offered to provide testimony for the services, which is consistent with Defendants' objections. I will be attending the deposition. Other attendees may include Keri Berman, Rebecca Cutri-Kohart, Joshua Abbuhl, and Michael Fucci.

As I also indicated on last week's call, because of the breadth of the topics directed to the Navy in the *Harrison* notice, the Navy would likely present two witnesses. We proposed two dates for these witnesses: March 7th and March 14th. After that call, you served a subpoena that added an additional topic, and on Sunday, plaintiffs in *Roe* served a second subpoena that expanded the topics yet again. Given the increasing scope of the testimony from the Navy sought by plaintiffs, and the limited time to prepare witnesses on these new topics, Plaintiffs should plan on at least two Navy witnesses, the first of which can appear on March 7th. If plaintiffs are unable to accommodate a second day of testimony on March 14th, then we suggest seeking leave of court to take the remaining portions of the Navy deposition the week of March 18th. We confirm receipt of the subpoenas.

With regard to the non-deployability statistic spreadsheets, our lab was not able to prepare a production of those documents before Mr. Melillo's deposition because of volume of spreadsheets and the time it takes to prepare each spreadsheet for production. The earliest we can produce those documents is Friday, assuming that our lab's operations are not significantly interrupted by the weather. Defendants are still reviewing the documents that remained after plaintiffs withdrew their challenges to more than 700 documents relating to military personnel policy. Given plaintiffs' decision to withdraw their challenges to the majority of the privileged documents from the OEPM directorate, Defendants reserve their objections to holding open Mr. Melillo's deposition.

Best,
Rob Norway

From: Sommer, Andrew R. <ASommer@winston.com>
Sent: Tuesday, February 19, 2019 9:33 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <TMcCotter@usa.doj.gov>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: RE: Harrison, Roe/Voe v. Shanahan

Rob,

I see that OPM has closed the federal government in DC tomorrow due to inclement weather. I need a response on this and the documents that have been promised. I need this no later than noon

tomorrow. I also suggest that even if you are able to provide this by the time I requested, the deposition begin at 10 AM because I'll need to have the materials printed and that will take time. If you cannot get me a response and these documents by then, I am reserving the ability to recall this witness at the government's expense.

Regards,

Drew

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From: Sommer, Andrew R.
Sent: Tuesday, February 19, 2019 2:32 PM
To: 'Norway, Robert M. (CIV)' <Robert.M.Norway@usdoj.gov>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; 'peterp@outserve.org' <peterp@outserve.org>; 'Harrison Impact Litigation Group' <harrisonteam@outserve.org>; 'Roe & Voe Impact Litigation Group' <roevoeteam@outserve.org>
Subject: Harrison, Roe/Voe v. Shanahan

Rob,

I am writing to confirm the scope of the testimony that is being offered in Mr. Melillo's deposition on the 21st. As I understood it, he's being offered up on topics 15-18, each of which pertains to the implementation of DoDI 1332.45 by various military departments. In reviewing the objections to these topics, however, we note that Defendants were not planning on providing witnesses on Topics 16-18 without receiving subpoenas. I understand that this position may have changed in light of the complaint brought by Roe and Voe as to the Air Force. I also understand that we have issued

subpoenas to the Navy as to topics 17 and 18 at your request. That testimony is scheduled to proceed on March 7th, subject to the confirmation that you have accepted service of those subpoenas. (We requested that you confirm this when we sent the first subpoena on Friday of last week.) In light of this, can you please clarify the scope of the testimony that you expect to be offering Mr. Melillo on?

Additionally, I understand that there were numerous spreadsheets that track the number of nondeployable military personnel that Defendants agreed to produce as part of the meet and confer over the deliberative process privilege claims. We have been waiting for these for a couple of weeks now. They need to be produced today if we are going to have them in time for Mr. Melillo's deposition. Additionally, with the weather scheduled to deteriorate over night tonight and the possibility that nobody will be in the office to receive a disc including the materials tomorrow, we ask that they be produced via secure FTP it at all possible. If these documents cannot get out today, we reserve the right to recall Mr. Melillo.

Finally, during the meeting regarding the random selection of materials for *in camera* review, we asked that Defendants consider producing the 4-5 documents related to DoDI 1332.45 as it pertains to HIV. As I understand it, you had informed John that you would get back to him about whether Defendants would produce those. If Defendants will not be standing on their claim of privilege as to those documents, please produce those along with the spreadsheets.

Finally, please provide a list of people that will be in attendance on Thursday's deposition at our offices.

Drew

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You received this message because you are subscribed to the Google Groups "Roe & Voe Impact Litigation Group" group.
To unsubscribe from this group and stop receiving emails from it, send an email to RoeVoeTeam+unsubscribe@outserve.org.

EXHIBIT T

Defs.' First Set of Requests for Production of Documents to Pls.

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, photostatting, 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 h ere 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" hall 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 Cmplaint 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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