

**No. 19-1410**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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<b>RICHARD ROE, et al.,</b>	)	
	)	
Plaintiffs-Appellees,	)	Appeal from the United States District
	)	Court for the Eastern District
	)	of Virginia
	)	
v.	)	Case No.: 1:18-cv-01565
	)	
<b>UNITED STATES</b>	)	
<b>DEPARTMENT OF</b>	)	
<b>DEFENSE, et al.,</b>	)	
	)	
Defendants-Appellants.	)	

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**PLAINTIFFS-APPELLEES' MOTION  
FOR EXTENSION OF TIME TO FILE BRIEF**

Pursuant to Federal Rule of Appellate Procedure 26(b) and Fourth Circuit Local Rule 31(c), Plaintiffs-Appellees Richard Roe, Victor Voe, and OutServe-SLDN, Inc. (collectively, "Plaintiffs") respectfully request an additional 30 days to file their opening brief, extending the deadline for filing from June 27, 2019, to July 29, 2019. Counsel for Defendants-Appellants (the "Government") have indicated that they take no position on this request for an extension of time.

This is Plaintiffs' first request for an extension of time. The requested extension is not sought for the purpose of delay. To the contrary, Plaintiffs have good cause for requesting this motion:

1. This appeal arises from a preliminary injunction entered in the Eastern District of Virginia on February 15, 2019 (Order Granting in Part Plaintiffs’ Motion for Preliminary Injunction, *Roe v. Shanahan*, No. 18-cv-1565 (E.D. Va. Feb. 15, 2019), ECF No. 73), related to Plaintiffs’ complaint alleging that the Government is violating the Equal Protection Clause and the Administrative Procedure Act by ordering the separation of Service members living with HIV. Complaint, *Roe*, ECF No. 1.

2. Although the Government timely appealed the preliminary injunction on April 18, 2019 (Dkt. 1), the underlying case—along with the related case of *Harrison v. Shanahan*, No. 1:18-cv-641 (E.D. Va. May 30, 2018)—remain set for trial on September 9, 2019. Minute Entry, *Roe*, ECF No. 129; Minute Entry, *Harrison*, ECF No. 166.

3. Six of the seven attorneys representing Plaintiffs on this appeal—Scott Schoettes, Peter Perkowski, Lauren Gailey, John Harding, Laura Cooley, and Kara Ingelhart—are also representing Plaintiffs in this case and Plaintiffs in *Harrison* at the joint trial. Preparations for trial are well under way, and have required, and will continue to require, counsels’ attention to several time-sensitive matters:

- a. On June 5, 2019, Plaintiffs were required to file their trial exhibit list and their trial witness list. Counsel for Plaintiffs spent significant time and resources on reviewing documents to determine

whether they might be used as exhibits at trial. Counsel for Plaintiffs reviewed thousands of pages of documents and created an exhibit list of 369 documents.

- b. Counsel for Plaintiffs must file objections to the Government's lists of 15 witnesses and 343 exhibits on June 17, 2019. These objections—and in particular, the objections to the 343 exhibits—will require significant time and resources.
- c. Discovery for this case and *Harrison* has also been reopened by the district court. On May 31, 2019, the court ordered the Parties to conduct an additional 30 days of discovery, to close on July 1, 2019. On June 7, 2019, the Government served 19 requests for production and 10 interrogatories on Plaintiffs. Counsel for Plaintiffs will need to dedicate significant time and resources to objecting and responding to these interrogatories, and to identifying, collecting, redacting, logging as privileged, and producing the non-privileged documents by the court-ordered close of additional discovery on July 1, 2019.
- d. Related to the reopening of discovery, the Government will be re-deposing Andy Blevins, the Executive Director of Plaintiff Out-Serve-SLDN on June 2, 2019. Counsel for Plaintiffs will need to

prepare Mr. Blevins for and defend him in this deposition. The government is also considering whether to re-depose another of Plaintiffs' witnesses—J.B.—who served as a declarant in their motion for preliminary injunction. Should the Government move forward with this deposition, counsel for Plaintiffs will need to prepare J.B. for and defend him in this deposition before the close of discovery on July 1, 2019.

- e. Further, on June 3 and 4, 2019, the Government produced 265 documents and recordings responsive to requests for production made in *Harrison* that they previously withheld on the grounds of deliberative process privilege—including three MP3s that amount to over 14 hours of audio recording—pursuant to a court order and memorandum opinion in *Harrison* finding that the deliberative process privilege does not apply to these documents and recordings. Memorandum Opinion and Order, *Harrison*, ECF No. 175–76. Counsel for Plaintiffs are dedicating significant time and resources to reviewing these documents and recordings so that they can supplement their exhibit list, which was previously filed pursuant to a court-ordered deadline of June 5, 2019 (*see* Order, *Harrison*, ECF No. 181),

and so that they can determine whether additional depositions will be necessary.

- f. Counsel for Plaintiffs further expect that some subset of an additional 89 documents responsive to requests for production in this case—which the Government is withholding on the same claims of deliberative process privilege—will similarly be ordered to be produced in the near future. Plaintiffs filed a motion to compel the production of these documents on March 22, 2019 (Plaintiffs’ Motion to Compel and Memorandum in Support, *Roe*, ECF No. 95–96), which was held in abeyance by the magistrate judge on March 29, 2019, pending the court’s order in *Harrison*. Order, *Roe*, ECF No. 101. The Parties have informed the magistrate judge of the court’s order in *Harrison*, and the Government provided the magistrate judge with a sample of the withheld documents for in camera review on May 29, 2019. Joint Status Report and Motion to File Under Seal, *Roe*, ECF No. 138–39. Plaintiffs expect the court’s order in *Harrison* to apply to at least some of the withheld documents, and will need to dedicate additional time and resources to reviewing these documents in order to further supplement their exhibit list, and to decide whether additional depositions are needed.

4. Scott Schoettes, HIV Project Director and Counsel at Lambda Legal—and one of Plaintiffs’ primary counsel in this case—underwent major surgery on May 24, 2019 and remains on a four-week medical leave during his recovery. He is scheduled to return to work just three days before the current due date for Plaintiffs’ brief. The proposed 30-day extension is needed to allow Mr. Schoettes to participate fully in the preparation of the brief.

5. The undersigned contacted counsel for the Government to request consent for the proposed extension. Counsel for the Government indicated it takes no position on the request.

For all these reasons, Plaintiffs respectfully request that the Court grant this motion, and enter an order extending by 30 days—from June 27, 2019, to July 29, 2019—the deadline for filing their response to the Government’s opening brief.

Dated: June 14, 2019

Respectfully submitted,

/s/ Geoffrey P. Eaton

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2019, I caused the foregoing document to be electronically filed with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 14, 2019

/s/ Geoffrey P. Eaton

Geoffrey P. Eaton