

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

v.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
RENEWED MOTIONS TO DISMISS PLAINTIFF OUTSERVE-SLDN**

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INTRODUCTION

Defendants' Renewed Motion to Dismiss should be denied. Defendants raise three challenges to OutServe's standing and therefore this Court's subject matter jurisdiction: First, they claim OutServe lacks constitutional standing to sue on behalf of its members. Second, they argue OutServe lacks prudential standing to sue on behalf of its members. Finally, Defendants assert OutServe lacks constitutional standing to sue on its own behalf. Each of these challenges lacks merit.

OutServe protects and advances the rights of Service members and veterans who are LGBTQ or living with HIV.¹ This Court has already acknowledged that OutServe has standing to bring suit on behalf of its members. The calculus on this issue has not changed. Precedent from both the Fourth Circuit and the United States Supreme Court recognizes that organizations can and do take many shapes, and that when an organization can demonstrate certain indicia of membership, organizational standing is appropriate. As either a traditional membership organization or a non-traditional functional equivalent of such, OutServe is empowered to bring suit to protect the interests of its members.

Regardless of which judicially endorsed method is used to assess OutServe's membership, it is uncontested that those members are suffering ongoing harm due to Defendants' retrograde policies. For associational organizational standing purposes, an injury to one is an injury to the whole.

OutServe also has direct organizational standing because it has suffered harm. Because Defendants have failed to bring their HIV-related personnel policies in line with the current

¹ OutServe recently merged with another non-profit that focuses its work on military partners, spouses, and families—the American Military Partner Association—and is now known as the Modern Military Association of America. This change is not believed to alter the issues raised in these motions.

medical science of HIV—or a modern understanding of HIV as a chronic but manageable condition—OutServe has had to dedicate significant additional resources to mitigating the effects of Defendants’ policies through non-litigation work. As a small organization with limited capital, diverting resources to addressing these misguided policies has meant taking time, money, and energy away from OutServe’s other projects and programs. Additionally, in terms of its capacity to do legal work, this litigation has become a significant drag on OutServe’s resources and the time of its attorneys—time which could otherwise be spent providing direct services to its members. This is a frustration of OutServe’s purpose, and sufficient on its own to grant organizational standing.

For these reasons and those discussed below, Defendants’ renewed motions to dismiss should be denied.

STATEMENT OF FACTS

OutServe 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 or policies. Exhibit A. Plaintiffs’ Response to Defendants’ Interrogatories, No. 3 (“Pls.’ Resp. Interrog. No. 3”). In its opinion granting Plaintiffs’ motion for a preliminary injunction, this Court recognized that Plaintiff OutServe has associational standing to bring suit on behalf of those it represents and that its standing is not coterminous with that of Plaintiffs Roe and Voe. Memorandum Opinion ¶¶ 29–30, *Roe*, ECF No. 72.

Not every member of the community OutServe serves is a member. OutServe’s current Executive Director, Andy Blevins, testified at length about the organizational and membership structure. The community served by OutServe is people who both: (a) identify as LGBTQ or live with HIV; and (b) are serving, have served, or want to serve in the U.S. Armed Forces.

Exhibit B. Deposition of Anthony Blevins (“Blevins Dep.”) 111:20–24, 118:5–120:14; Exhibit C. Plaintiffs’ Response to Defendants’ Interrogatories, No. 2 (“Pls.’ Resp. Interrog. No. 2”). If an individual who fulfills both requirements wants to become a member, they must do one or more of the following: (1) join one of OutServe’s Chapters or Forums (Blevins Dep. 105:20–23, 106:1–7, 111:20–112:2); (2) sign up to OutServe’s mailing list (Blevins Dep. 111:20–112:4); (3) donate to OutServe (Blevins Dep. 111:20–25, 114:23–25, 117:18–118:22); (4) access OutServe services (Blevins Dep. 111:20–112:7, 118:1–22); or (5) serve on OutServe’s Board of Directors or Military & Veterans Advisory Committee (Blevins Dep. 80:15–25, 111:20–112:12). Blevins Dep. 120:15–121:2; Pls.’ Resp. Interrog. No. 2. A member maintains good standing through their continuing participation via at least one of these five avenues. Blevins Dep. 140:9–15, 141:3–14, 142:21–25; Exhibit D. Plaintiffs’ Response to Defendants’ Interrogatories, No. 5 (“Pls.’ Resp. Interrog. No. 5”). Plaintiffs Nicholas Harrison, Richard Roe, and Victor Voe as well as declarants and Airmen Q.S., S.H., S.N., D.L. and K.R. have taken the necessary steps to become members of OutServe-SLDN. Exhibit L. Plaintiffs’ Response to Defendants’ Interrogatories, No. 1 (“Pls.’ Resp. Interrog. No. 1”).

Defendants served only one set of discovery requests and waited until the last possible day to do so. In a set of interrogatories served exactly 30 days before the close of fact discovery, Defendants requested that OutServe “[d]escribe in detail how OutServe has suffered direct injury in *Harrison* or *Roe*.” Pls.’ Resp. Interrog. No. 3. In response, Plaintiff explained that “it has been required to divert the organization’s resources, at a minimum in the form of dollars and personnel time, to address and counteract policies, actions, and decisions from the Department of Defense and Service branches that harm its members who are living with HIV.” Pls.’ Resp. Interrog. No. 3. Addressing and counteracting the challenged policies has in fact diverted

resources from OutServe’s other programs, services, and initiatives. (Blevins Dec. ¶ 19.)

Defendants now challenge OutServe’s ability to assert the harm it is suffering as a result of this diversion of resources.

STANDARD OF REVIEW

Defendants have raised a factual challenge to the existence of subject matter jurisdiction for OutServe. “[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). “In that event, a trial court may look beyond the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.” *Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) (internal citations omitted). “[T]he district court may . . . resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits.” *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009). In addition to affidavits, “the plaintiff . . . may present . . . depositions or live testimony to meet its burden.” *Kuntze v. Josh Enters, Inc.*, 365 F. Supp. 3d 630, 636-37 (E.D. Va. 2019) (internal citations omitted). The Court’s ability to resolve such factual disputes is broad: “[D]istrict courts may typically resolve factual disputes in 12(b)(1) motions unless the jurisdictional and merits facts are intertwined.” *Id.* at 637; *see Gilmore v. Jones*, ___ F. Supp. 3d ___, 2019 WL 1418291, at *4–6 (W.D. Va. Mar. 29, 2019) (weighing evidence included as part of plaintiff’s opposition to defendant’s motion to dismiss in determining if complete diversity existed between the parties).

ARGUMENT

Defendants’ motion should be denied. OutServe has standing to assert its claims both as a representative on behalf of its members and in its own right as a party directly injured by Defendants’ discriminatory policies.

I. OUTSERVE HAS STANDING TO ASSERT CLAIMS ON BEHALF OF ITS MEMBERS

An organizational plaintiff has standing to assert claims on behalf of its members if it is either a traditional membership organization or the functional equivalent of one. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343–344 (1977). Properly analyzed, OutServe qualifies as a traditional membership organization. But even if it did not, OutServe satisfies the requirements to be considered the functional equivalent of one.

A. OutServe Qualifies as a Traditional Membership Organization for Associational Standing

Under the doctrine of associational organizational standing, an organization has standing to sue on behalf of its members when: “(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, 1995 WL 60765 at *4 (4th Cir. 1995) (unpublished table decision) (citing *Hunt*, 432 U.S. at 343). Defendants do not contest the second factor, and it is clear the relief sought and claims asserted here are germane to OutServe’s purpose. Likewise, Defendants do not contest that Plaintiffs Harrison, Roe, and Voe, as well as individual declarants D1, D.L., Q.S., S.H., D.N., and K.R., have standing to sue in their own right, nor do they claim that their participation in the suit is necessary. Defendants argue only that OutServe does not have members. They are wrong.

1. OutServe Is a Membership Organization

“[T]he associational standing caselaw is unclear as to what, exactly, constitutes a ‘membership’ organization.” *AARP v. EEOC*, 267 F. Supp. 3d 14, 22 (D.D.C. 2017), *on reconsideration*, 292 F. Supp. 3d 238 (D.D.C. 2017) (*AARP II*). And “no court has precisely defined” what traditional membership organization means. *AARP II*, 267 F. Supp. 3d at 22.

Whatever the definition, though, precedent establishes that OutServe is in fact a traditional membership organization.

In *Air Alliance Houston v. U.S. Chemical & Safety Hazard Investigation Board*, 365 F. Supp. 3d 118 (D.D.C. 2019), the court held that the Louisiana Bucket Brigade (“LBB”), a nonprofit environmental health and justice organization that worked with communities neighboring Louisiana’s oil refineries and chemical plants, was a membership organization. *See id.* at 129. There, LBB had shown through declaration that its membership consisted of contributors, volunteers, members of certain community groups, the Board of Directors, and staff. *See id.* Though they lacked voting rights, members participated in the organization through service on committees and by recommending Board members; in addition, the organization was operated through the Board, which set policy and direction, and supervised the Executive Director. *See id.* Defendant contended that LBB was not a membership organization because the by-laws did not provide for members to join, or to participate meaningfully in developing policies and goals; the court rejected the argument: while true to some extent, “those features do not render LBB a non-membership organization.” *Id.*

The same is true here. As with LLB, OutServe’s membership includes donors, volunteers, and other members of the community that OutServe serves. Blevins Dep. 111: 20–25, 112: 1–12. Though OutServe members do not formally elect the Board of Directors or choose staff, members participate in OutServe in various significant and impactful ways: by serving as Chapter Leaders, members of the Military Advisory Committee (“MAC”)—all of whom are members—and on the Board itself. Exhibit E. Declaration of Anthony Blevins in Support of Plaintiffs’ Opposition to Defendants’ Renewed Motion to Dismiss Plaintiff OutServe-SLDN (“Blevins Dec.”) ¶ 21; Blevins Dep. 80:15–25, 82:12–83:9. The Board—the majority of

whom are OutServe members (Blevins Dec. ¶ 21)—is responsible for setting the organization’s strategic goals. And members further participate in developing policies and goals because the Executive Director consults with and seeks advice from the Chapter Leaders, who interact directly with a vastly dispersed membership, and the MAC. Blevins Dep. 85:11–86:2, 95:2–15. The facts here are indistinguishable in any material way from *Air Alliance*.

Under this authority, OutServe qualifies as a traditional membership organization, and the motion should be denied.

2. Defendants’ Objections to OutServe’s Membership Definition Fail

Defendants do not argue that OutServe has not adequately identified its members. Rather, they assert—almost entirely without legal authority—that OutServe’s membership definition should be rejected. These arguments also fail.

Defendants first claim that OutServe cannot be a traditional membership organization because it “lacks a provision for general members in its Bylaws, it does not collect dues, it does not maintain a membership roster [sic], and its [sic] does not necessarily present itself to the public as a membership organization.” Memorandum in Support of Defendants’ Renewed Motion to Dismiss Plaintiff OutServe-SLDN (“Defs.’ Br.”) at 20, *Roe*, ECF No. 119. To support their proposed standard, Defendants present no legal support from any federal court of appeals and little persuasive authority from district courts. *See* Defs. Br. at 18–19. But while Defendants’ authority set forth what is sufficient to establish a membership organization, they do not declare what is the minimum necessary. They do not, for example, state that an organization *must* have provisions for general members in its bylaws, *must* collect dues, or *must* maintain a membership roster to be considered a membership organization. *Id.* In fact, another case cited by Defendants finds that a group is a traditional membership organization even though “a formal list of members is not maintained.” *Concerned Citizens Around Murphy v. Murphy Oil USA*,

Inc., 686 F. Supp. 2d 663, 675–76 (E.D. La. 2010). Indeed, it was sufficient there that “members are linked through informal networks, and email contact lists.” *Id.* OutServe meets this lower threshold: members are linked through informal networks (Facebook groups) and other lists (donors, subscribers).

Defendants further contend that OutServe cannot be a traditional membership organization because it lacks “any clear policy or procedure [for] losing or resigning a membership.” Defs.’ Br. at 26. But they cite no authority to support the assertion that such policies and procedures are required, and Plaintiffs are aware of none. Defendants suggest that an organization may serve as a representative of its members only if the members consent to it. Defs.’ Br. at 24. But Defendants’ own authority makes clear that this is not true. In *Hunt*, the Supreme Court noted that membership in a union or a bar association is often mandatory, but it would not “be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.” 432 U.S. at 345. That is, an organization can be a membership organization and represent its members’ interests not only without their consent, but without even the ability to disassociate if one disagrees. Even so, as a factual matter, members of OutServe *are* capable of disassociating from OutServe if they so desire. Blevins Dep. 137:19–145:8.

Defendants are also wrong in asserting that OutServe does not present itself to the public as a membership organization. In fact, on the “About Us” page of its website, OutServe states that it was “the first *member-based* organization to represent the interest of LGB servicemembers.” Ex. O to Defs.’ Br. at 8 (emphasis added). In the “Get Help, Contact Us” section of its website, one of the drop down menu options is “Chapter and *Member* Services.” *Id.* at 10 (emphasis added). And on the “Worldwide Chapters and Online Forums” page,

OutServe states that it “currently has thousands of *members* in 81 chapters worldwide.” *Id.* at 13 (emphasis added). There is therefore no support for Defendants’ assertion that OutServe does not hold itself out as a membership organization.

Accepting Defendants’ assertion that “‘active, voluntary’ involvement” is required to create membership—a dubious proposition given the case law—that requirement is met here. All the methods of becoming an OutServe member—donating, joining a chapter or Facebook group, becoming involved in leadership, accessing services, or subscribing to the newsletter—require an affirmative, voluntary act. And nearly all indicate support for the organization itself.

Many of the methods of becoming an OutServe member have been positively endorsed by case law, alone or in combination. Donating is a quintessential indicator of membership.² *E.g.*, *Concerned Citizens*, 686 F. Supp. 2d at 676 (noting that members “chip in to cover expenses” and “also ‘pay’ for [organization’s activities] through their own volunteer efforts”). So is participation. *See id.* Here, joining private Facebook groups—which require an invitation or approval (Blevins Dep. 128:23–129:6, 147:22–149:10)—and formal Chapters is even more rigorous than the “informal networks” and “email contact lists that were found significant in *Concerned Citizens*. *See Concerned Citizens*, 686 F. Supp. 2d at 677. Not just any Facebook user can “freely join,” as Defendants’ claim. Defs.’ Br. at 21. And there is no legal support for Defendants’ assertion that individuals must “meet in person” (Defs.’ Br. at 22) to be considered

² Contrary to Defendants’ assertion, *Friends of the Earth, Inc. v. Chevron Chem. Co.* does not state that membership can *only* be defined by donations 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.’” Defs.’ Br. at 21 (quoting *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997)). The court instead simply found that the combination of members electing the governing body of an organization, financing the activities, voluntarily associating, and having an organizational membership structure meant that the organization had satisfied the “indicia of membership” test. *Friends of the Earth*, 129 F.3d at 829.

members of an organization. Adopting Defendants' interpretation would be unduly limiting in this age of technology, internet, and social media by preventing geographically dispersed individuals who share common interests from coming together to advance their interests. This is particularly true for organizations aimed at advocating for members of the military, who may well be deployed to various corners of the world. But even when individuals do "meet in person"—as with OutServe's Chapters—Defendants decry that too. There simply is no pleasing them.

Additionally, establishing membership based on accessing legal services is not the tautology that Defendants claim it is. Defs.' Br. at 24. OutServe is a legal services organization that provides its members with a wide range of legal services beyond this suit, including direct representation of its members in administrative, disciplinary, and criminal proceedings. Blevins Dep. 26:15-22; Pls.' Resp. to Defs.' Interrog. No. 2. Defining membership by virtue of those you assist is not unusual. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003) (finding organizational standing for a legal services organization that provided legal representation to its constituents, who were "the functional equivalent of members for the purpose of associational standing"). The only legal support that Defendants provide for its assertion is a concurring opinion in a case out of the D.C. Circuit.

Finally, OutServe did not "manufacture[] members for the purposes of this lawsuit after the fact." Defs.' Br. at 25. But this is not a case of manufacturing membership after filing of the suits. In the case cited by Defendants, *all* of the "members" on whose behalf the suit was brought were not identified until after the lawsuit was filed. *Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 211 (D.D.C. 2007). Here, there were at least two members of the military—Plaintiff Victor Voe and Plaintiff Nicholas Harrison—who *were* already in the

Facebook groups and local chapters before these lawsuits were filed. *See* Exhibit F. Deposition of Victor Voe 79:8-19; Pls.’ Resp. Interrog. No. 1.

Furthermore, this case presents unique circumstances, as the Air Force started separating people with HIV on the basis of their limited deployability only after the first of these lawsuits was filed—and *after* Defendants told this Court that separations were not planned. Thus, most of the represented members became aware of OutServe and decided to become members *because* they received notice they were being separated based on their HIV status and were seeking out an organization dedicated to their interests. *See, e.g.*, Exhibit G. Deposition of S.H. 25:9–26:4 (“I learned of [OutServe] when my supervisor, . . . when I first told him about my diagnostics, . . . was . . . helping me with my process and . . . he found OutServe . . .”); Exhibit H. Deposition of D.N. 27:20–28:6 (“I had told my mom that the Air Force was trying to separate me, so we [were] looking for lawyers and like legal representation and my mom found OutServe.”); Exhibit I. Deposition of Richard Roe 45:22–48:7; Exhibit J. Deposition of D.L. 9:3–20. The fact that *additional* individuals became aware of OutServe and its mission after the organization gained publicity through these cases, and as the military began issuing more separation decisions, does not mean that OutServe is not a membership organization seeking to protect the interests of all its members with HIV. Defendants’ contention that OutServe fails to meet the criteria of a traditional membership organization therefore fails.

B. OutServe Also Meets the Criteria of a Non-Traditional Membership Organization

Even if the Court concludes that OutServe is not a traditional membership organization, Defendants’ motion should nonetheless be denied because OutServe has standing as a non-traditional membership organization. The U.S. Supreme Court has held that a non-traditional organizational plaintiff still may have associational organizational standing if it is the “functional

equivalent of a traditional membership organization.” *Hunt*, 432 U.S. at 344. The test of functional equivalency generally includes examination of three factors: “(1) [the organization] must serve a specialized segment of the community; (2) it must represent individuals that have all the ‘indicia of membership’ including (i) electing the entity’s leadership (ii) serving in the entity, and (iii) financing the entity’s activities; and (3) its fortunes must be tied closely to those of its constituency.” *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 307 (D.D.C.), *aff’d*, 878 F.3d 371 (D.C. Cir. 2017). Defendants do not contest the first factor; rather, their motion focuses on the second and third factors. Again, their arguments fail.

1. OutServe Meets All the *Hunt* Indicia of Membership Elements

As to the second *Hunt* factor: OutServe satisfies all three elements of “indicia of membership”. Defendants target for attack each prong of the membership indicia identified in *Hunt*: (1) electing the entity's leadership (2) serving in the entity, and (3) financing the entity's activities. Each attack fails.

First, Defendants’ advance a too-strict standard for the element of electing the entity’s leadership. Defendants argue that either every individual member must have voting rights to elect Board Members or that, if Board Members are responsible for electing the Board, every Board Member must be a member of the organization. Defs.’ Br. at 10–11. Additionally, although they cite no authority, Defendants take issue with the fact that OutServe’s Board Members are responsible for selecting corporate officers and that OutServe’s Executive Director and staff select OutServe’s Board of Advisors and Chapter and Forum leaders. But courts have repeatedly found non-traditional organizational standing in instances where the organizational plaintiff did not have general voting members, but instead had boards of directors consisting of at least some members. *Mink*, 322 F.3d 1101 (agency with no voting members); *Doe v. Stincer*,

175 F.3d 879 (11th Cir. 1999) (agency with no voting members); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6 (1st Cir. 1986) (organization consisted only of five board members with vested interests, and no other members); *Air All. Houston*, 365 F. Supp. 3d 118 (organization’s general members had no voting rights); *Ball v. Kasich*, 244 F. Supp. 3d 662 (S.D. Ohio. 2017) (nonprofit organization without members with voting rights). Like the organizations in these cases, OutServe meets this standard because a majority of its Board members are general members. Blevins Dec. ¶ 21.

Second, OutServe satisfies the second “indicia of membership” element because its members “serv[e] in the entity” and influence its direction. Blevins Dec. ¶ 21; Blevins Dep. 79:13–80:12, 95:2–15. OutServe Members are on the Board of Directors, on the staff, leading chapters, and on advisory committees. Blevins Dec. ¶ 21; Blevins Dep. 46:6–47:8, 79:13–80:2, 83:23–84:22, 95:5–15, 158:25–159:22. Defendants’ argument about this element focuses only on the individual Plaintiffs and Declarants in these lawsuits. Defs.’ Br. at 13. But this is a misdirection: OutServe’s membership of course goes well beyond that small group of people. Blevins Dep. 95:22–96:12, 154:17–25; Blevins Dec. ¶ 7; Pls.’ Resp. Interrog. No. 2. In addition, Defendants ignore that Plaintiff Nick Harrison serves on OutServe’s Advisory Board, which provides guidance to OutServe staff and officers to influence the direction of the organization. Blevins Dep. 88:12–16; Blevins Dec. ¶ 21. Defendants further argue that no one—besides staff—was consulted before the lawsuits were filed. Defs.’ Br. at 18. But that does *not* mean that members do not have input or influence in the goals and direction of the organization—and, in fact, they do. *See, e.g.*, Blevins Dep. 75:18–76:8 (members at large and Board Members can serve on committees); Blevins Dep. 135:24–136:8 (membership is involved in deciding OutServe projects and initiatives through “contacting headquarters directly, contacting their

chapter leaders, [and] contacting members of the [MAC] ”); Blevins Dec. ¶ 21 detailing how Chapter Leaders, MAC, and general members influence the priorities and direction of the organization).³ Finally, Defendants state that “OutServe’s Bylaws do not require its Board Members, officers, or staff to meet the identity requirements to qualify under OutServe’s [] membership definition.” Defs.’ Br. at 13. But again, the majority of OutServe’s Board Members, the entire MAC, and all Chapter Leaders do meet those identity requirements. Blevins Dec. ¶ 21. The second “indicia of membership” element is met.

Third, despite Defendants’ portrayal of OutServe as an organization with a 4.5-million-dollar budget, based on financial disclosures including millions in in-kind donations of legal services, in fact OutServe’s operational budget is a mere \$250,000, nearly three-quarters of which is derived from membership donation (Blevins Dep. 224:8–10; Blevins Dec. ¶ 8). Defs.’ Br. at 15–16 (characterizing the value of the pro bono legal services donated to OutServe as part of the cash flow of the organization). Without question, through their individual contributions, OutServe members primarily finance the entity’s activities. Blevins Dep. 224:8–10, 230:10–18. Therefore, the third “indicia of membership” element is satisfied.

Precedent supports the conclusion that OutServe satisfies the “indicia of membership” factor here. On similar facts, the court in *AARP* reached that result regarding standing as a functional equivalent of a membership organization. *AARP v. EEOC*, 226 F. Supp. 3d 7, 17–18 (D.D.C. 2016); *see also AARP II*, 267 F. Supp. at 23 (granting *AARP* summary judgment, denying motion to dismiss for lack of jurisdiction finding that *AARP* had associational standing).

³ It is irrelevant that the Board, MAC, Chapter Leaders, and membership did not have input into the decision to file these lawsuits. Defs.’ Br. at 28. No authority requires that membership have input into specific organizational decisions, only that they influence organizational priorities and direction. Here, they do.

In *AARP*, the court acknowledged that “the associational standing cases are not specific about what it means for members to ‘play a role’ in the leadership of an organization, the financing of an organization, or in guiding the activities of an organization.” *AARP II*, 267 F. Supp. 3d at 23. The court recognized that “even if [AARP members] could play a stronger role,” they nonetheless played a role in all of those activities. *Id.* First, the court noted that AARP served a “discrete, stable membership with a definable set of common interests” and has a “defined mission.” *Id.* at 17 (internal citations omitted). It also found that members played a role in the organization’s leadership because, even without all members having voting rights to elect the Board of Directors, AARP’s Board (which consisted of members) chose other members of the board, and advisory committees also included AARP members. *Id.* Therefore, members both elected leadership and served within the entity. *Id.* And those members could, through voluntary completion of opinion polls and surveys, guide AARP activities. *Id.* Finally, AARP’s membership dues, which were not required from all members and accounted for just 19% of AARP’s total revenue, were recognized as financing the organization’s activities. *Id.*

All of these factors—decisive in finding AARP to be a functional equivalent to a membership organization—are present in OutServe’s organizational structure, sometimes to an even greater degree. OutServe has a defined mission and a discrete, stable membership with a definable set of common interests. Blevins Dec. ¶¶ 7, 12; Blevins Dep. 119:22–120:11; Pls.’ Resp. Interrog. No. 2 (defining mission and membership). Under OutServe Bylaws, board members on the existing board vote on new members to the board. Blevins Dep. 44:14–17. OutServe’s Board of Directors is predominantly composed of OutServe members. Blevins Dec. ¶ 21. Members serve on elected leadership and in advisory and staff positions. Blevins Dep. 79:13–80:2; Blevins Decl. ¶ 21; *see also* Blevins Dep. 95:5–15 (chapter and forum leaders are

“eyes and ears on the ground” to whom OutServe’s Executive Director speaks frequently to be “sure that the concerns that are seen are being addressed.”). And about 75% of OutServe’s donations come from people OutServe considers to be members—far more than the 19% in *AARP II*. Blevins Dep. 167:16–20. Under *AARP II*, OutServe qualifies as a functional equivalent of a membership organization.

When all of the facts are properly considered—and the law properly interpreted and applied—OutServe satisfies all three elements of the “indicia of membership” factor of the *Hunt* analysis.

2. The “Indicia of Membership” Elements Are Not Rigidly Applied, Especially to Advocacy Organizations Like OutServe

Defendants’ argument that OutServe fails to satisfy the three “indicia of membership” elements is further undermined by recent case law applying *Hunt*. Though analyzing all three indicia, recent cases have held it is possible to satisfy the functional equivalence test without establishing all of them—especially when the organizational plaintiff is an advocacy group. *Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 282 (D. Conn. 2010) (finding that “most of the same elements [were] present” when determining that the organizational plaintiff was functionally equivalent to a traditional organization). OutServe certainly meets this more relaxed standard.

Mink, is instructive. 322 F.3d 1101. There, the Ninth Circuit held that the organizational plaintiff OAC—which was a legal services organization representing people with disabilities—was the functional equivalent of a membership organization even though it did “not have all the indicia of membership that the *Hunt* apple growers and dealers possessed.” *Id.* at 1111. Nevertheless, OAC’s constituents “possess[ed] . . . enough [indicia of membership] to satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently

identified with and subject to the influence of those it seeks to represent as to have a ‘personal stake in the outcome of the controversy.’” *Id.* at 1111. Among them: (1) OAC’s governing board was composed of people “who broadly represent or are knowledgeable about the needs of the clients served by the system,” in such a way that the board shared a marginalized identity common with the membership and germane to OAC’s mission; (2) OAC had established an advisory council that also was made of people who share a marginalized identity in common with the membership and or had lived experience germane to the mission of the organization; and (3) establishment of a structure within the organization that allows for or facilitates direct contact with the organization to ensure that its constituency or members have full access to the organization’s services. *See id.* “Together,” the court held, “these circumstances suggest that, [m]uch like members of a traditional association, the constituents of [OAC] possess the means to influence the priorities and activities [OAC] undertakes.” *Id.* at 1112 (citing *Stincer*, 175 F.3d at 886).

As in *Mink*, OutServe is—at least in substantial part—a legal services organization. OutServe’s board is made up of people who are knowledgeable about the needs of the clients it serves, and a majority of them are members themselves. Blevins Dec. ¶ 21; Blevins Dep. 46:6–47:8. OutServe has established a Military Advisory Council, which like OAC’s is made up of people who share the same marginalized identity as OutServe’s membership and share a similar lived experience with those whom OutServe serves. Blevins Dep. 84:16–22; Blevins Dec. ¶ 21. In fact, those who serve on OutServe’s MAC are all members. Blevins Dec. ¶ 21. And finally, OutServe is structured to facilitate membership contact, input, and access to services: specifically, OutServe has a Legal Help Desk that members can use to access services; as well as a Chapter and Forum system, by which members participate in the organizations, but also by

which they may influence the priorities and activities that OutServe undertakes. Blevins Dep. 70:19–22; Blevins Dec. ¶¶ 7, 13, 21. As with OAC in *Mink*, OutServe “[i]n a very real sense . . . represents [its members] and provides the means by which they express their collective views and protect their collective interests.” *Mink*, 322 F.3d 1101 (citing *Hunt*, 432 U.S. at 345 (internal quotation marks omitted)).

Similarly, the Eleventh Circuit held that an advocacy organization “may sue on behalf of its constituents like a more traditional association may sue on behalf of its members” where the *Hunt* factors were not all present but there were other indicia of membership. *See Stincer*, 175 F.3d at 886. The circumstances there were similar to those here: the governing board was composed of “members who broadly represent or are knowledgeable about the needs of the clients served” by the organization; there was an “advisory council[, sixty percent of whose membership as well as a chair of the council [was] comprised of individuals who have received or are receiving [services of the type provided by the organization] or who are family members of such individuals”; and there was a structure that allows for or facilitates contact with the organization to ensure that its constituency or members have full access to the organization’s services. *Id.* (internal quotations omitted); *see also Ball*, 244 F. Supp. 3d at 682–83 (finding functional equivalent where there were loose formal connections between the putative members and the board, but 50% of board members were constituents of the community served and the remainder were family members).

Given that OutServe’s membership structure, activities, and governance together create indicia of membership similar to those found in these two cases, it too should be considered the functional equivalent of a traditional membership organization.

3. **OutServe's Fortunes Are Closely Tied to Those of Its Constituency**

The third factor of the *Hunt* test is also satisfied. An organization and its membership must be closely tied. *Hunt*, 432 U.S. at 345. Here OutServe's mission is, in part, to end through litigation unequal or unfair treatment against Service Members, veterans, or people aspiring to serve in the military who live with HIV. Pls.' Resp. Interrog. No. 2. OutServe's interest is therefore entirely consistent, if not coextensive, with those of its members here. Defendants do not seriously contest this factor of the *Hunt* test, except to argue that there is a conflict with a single OutServe member. As discussed below, that's not accurate.

C. None of Defendants' Other Attacks on OutServe's Associational Standing Pass Muster

Defendants attack OutServe's associational standing for two other reasons, only one of which is germane to an analysis of organizational standing. Neither attack affects OutServe's standing in this case.

Defendants first attack OutServe's organizational standing by arguing that some OutServe members identified in the course of this litigation were not associated with the organization at the time the suits were filed. Defs.' Br. at 7. But "it is enough for the representative entity to allege that *one* of its members or constituents has suffered an injury that would allow it to bring suit in its own right[.]". *Stincer*, 175 F.3d at 884 (emphasis added). Here, OutServe has identified three: Nick Harrison, Richard Roe, and Victor Voe.⁴ That's all that is required, and Defendants' argument is moot.

⁴ Defendants' effort to delegitimize OutServe's standing on the basis of these new members disincentivizes people, who could potentially be members of organizations seeking to vindicate their rights along with those of similarly situated people, from joining such organizations. Their argument theorizes a worldview that limits individuals, whose constitutional rights have been violated, from participating in litigation that would vindicate those rights if they had been previously unaware of their rights under the law or of the advocacy groups that enforce those rights. It would be contrary to the public interest if an organizational plaintiff were required to

Defendants also assert that OutServe lacks standing as an organizational plaintiff because one member, who OutServe relied upon as a declarant in Plaintiffs' motion for a preliminary injunction in *Roe*, ultimately decided he wanted to be separated from the Air Force. Defs.' Br. at 7, 27. However, associational organizational standing does not require that all members suffered injuries; in fact, only one such member is necessary. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 284 (1986) (finding that some members suffering injuries sufficed to establish associational organizational standing); *see also Schweiker v. Gray Panthers*, 453 U.S. 34, 41 n.8 (1981) ("The District Court correctly found that respondent had standing to sue because respondent alleged and proved that some of its members are persons adversely affected by the Secretary's regulations."). In fact, the member that Defendants refer to, Staff Sergeant J.B., changed his mind after contacting OutServe, but he never notified OutServe of his decision. *See* Exhibit K. Declaration of J.B. ("J.B. Dec.") ¶¶ 3–5. There was no "conflict of interest," as Defendants argue; only indecision and miscommunication on the part of the member. *Id.* Once OutServe became aware that the injunction was preventing some Airmen from *voluntarily* separating, it agreed immediately to a modification.

identify all affected individual members before filing suit, and then for such an organizational plaintiff to be inhibited from cultivating new membership—individuals who have experienced the very same harms the organizational plaintiff has set out to remedy through litigation—and from potentially allowing them to join the lawsuit as individual plaintiffs. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (2001) ("[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.") (internal quotation marks omitted). Indeed, litigation shines light upon legal harms and illuminates the rights of individuals to be protected from future similar harm, as in the case here.

Furthermore, J.B.'s decision to accept separation does not necessarily indicate he disagrees with the aims of the lawsuit or with the continuing mission of OutServe to allow for unrestricted service on behalf of its members living with HIV. J.B. Dec. ¶ 7. It would be perfectly reasonable for a Service member in J.B.'s position to decide, based on his personal circumstances, that he no longer wanted to be a part of a military organization that did not value his contributions enough to retain him, as they have hundreds of others living with HIV. In fact, it is a testament to the dedication and determination of the Plaintiffs and other declarants in these cases that they still desire to serve and are willing to fight for their right to do so.

If Plaintiff OutServe and its counsel had earlier recognized the possibility that some OutServe members might prefer to accept separation—or if Defendants had raised this issue during the briefing on the motion for a preliminary injunction—Plaintiffs would have readily agreed to the modification at that time. The fact that one member of OutServe changed his mind and chose to be separated from service—and OutServe agreed to a modification that would allow any member living with HIV to opt out of application of the preliminary injunction—does not establish that a conflict of interest exists between OutServe and its members or between the members themselves. Perhaps most important, this purported conflict on behalf of one member—even if it has been established—would not have affected OutServe's standing to bring suit on behalf of the remainder of its members.

II. OUTSERVE HAS DIRECT ORGANIZATIONAL STANDING

OutServe also has standing because it has been directly harmed by Defendants' policies.⁵ For standing purposes, there are two ways that direct organizational injury is cognizable: (1) a

⁵ Defendants complain that an allegation of direct injury did not appear in either Complaint. (Defs.' Br. at 29) Yet Defendants cite no authority for the proposition that there is a heightened pleading standard or that a plaintiff must provide anything more than the usual type of facts that support standing under a regime of notice pleading. OutServe met its burden on this issue in the

diversion of resources to identify or counteract the unlawful action; or (2) frustration of the organization’s mission or purpose. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 461 (4th Cir. 2005); *Nnebe v. Daus*, 644 F.3d 147, 157 (2nd Cir. 2011) (recognizing that “only a perceptible impairment of an organization’s activities is necessary for there to be an injury in fact”).

A. The Challenged Policies Have Required OutServe to Divert Resources from Other Programs and Services

OutServe has direct standing because it has had to divert organizational resources to identify and counteract the challenged policies. *E.g., Nnebe*, 644 F.3d at 157 (holding that even if only “a few” individuals were counseled as a result of the challenged policy in a year, “there [was] some perceptible opportunity cost expended by the [organization], because the expenditure of resources that could be spent on other activities ‘constitutes far more than simply a setback to [the organization’s] abstract social interests’”); *see also Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). OutServe’s mitigation efforts have required it to take valuable time and monetary resources to assist people affected by the challenged policies, all at the expense of its other programs. OutServe has also been required to increase expenditures on litigation-based advocacy, to combat the individual and group harms being suffered by its members.

1. OutServe Has Diverted Resources to Mitigate the Effect of the Policy with Non-Litigation Based Services

OutServe engages in multi-directional service work on behalf of its members, which includes not just people living with HIV but also LGBTQ Service members, veterans, future warriors (those who wish to serve), and their families. Blevins Dep. 118:7–120:11; Pls.’ Resp. to

Complaint—and indeed survived a motion to dismiss on these same grounds. And, as stated earlier, on a motion to dismiss, the Court may examine facts beyond those alleged in the Complaint. *See supra* at 6.

Interrog. No. 2. In addition, its programs include more than legal services: it provides educational services and membership and chapter services as well. Blevins Dep. 22:14–21, 26:1–28:3; Pls.’ Resp. to Interrog. No. 2; Blevins Dec. ¶¶ 4, 6. At the same time, OutServe’s resources are limited: its budget is only \$250,000 annually, and it has only three staff members. Blevins Dep. 89:21–23, 161:23–25; Blevins Dec. ¶ 8. Because of these limitations, every dollar and every moment of staff time is essentially accounted for; shifting attention from an existing issue to a new problem requires either delaying or abandoning the existing issue, and OutServe’s small staff is constantly required to triage between competing programs, priorities and problems. Blevins Dec. ¶¶ 13–19; Pls.’ Resp. to Interrog. No. 3.

Since 2015, when OutServe expanded its legal services beyond just LGB issues, there have been steady increases in the number of members calling OutServe’s Legal Help Desk seeking assistance with the issues that arise based on their HIV status. Blevins Dec. ¶ 13. Those issues include: (1) being denied entry into the military, or being separated soon after enlisting because of a positive HIV test during initial medical evaluation; (2) being placed on restricted duties, such a losing flight status, because of a positive HIV test; (3) being denied a commission, either from enlisted to officer ranks or after completion of education at a military academy, because of a positive HIV test; (4) being denied re-enlistment, or being subject to discharge, because their HIV status restricts them from deploying; and (5) being unable to obtain the waivers or approvals necessary to deploy or go temporary duty.⁶ Blevins Dec. ¶ 14. Assisting these new clients has involved providing non-litigation support, counsel, consultation, advice,

⁶ OutServe also assists its members in other way not related to the challenged policies, such as providing direct legal services to Service members subject to court martial or administrative separation based on alleged violations of antiquated regulations governing their sex lives. Blevins Dec. ¶ 15.

and services, such as engaging in lengthy phone calls, conducting research and investigation, engaging with Judge Advocate counsel, writing letters, preparing administrative appeals, and even providing emotional and social support. Blevins Dec. ¶ 18. Doing that work has required that OutServe delay other programs and projects, including the following as just a few examples:

- Preparation and publication of supplemental editions of OutServe’s *Freedom to Serve* guide, including a supplement directed to OutServe’s members living with HIV and a supplement focused on the military’s policies and regulations around sex and how they affect OutServe’s members;
- Preparation of an “HIV 101” educational program to be used for cultural-competency training for OutServe’s partners, including VA providers, so that OutServe’s members can be better served; and
- Preparation of an LGBT- and HIV-focused cultural-competency education and training program for the Marine Corps Defense Services Organization West Region. Blevins Dec. ¶ 18.

In addition to the above, the diversion of resources to assist its members with HIV affected by the policies challenged in these cases has resulted in challenges to OutServe’s efforts to assist its other clients and potential clients, such as transgender Service members who are currently being subject to a renewed ban on their ability to serve openly and authentically. Blevins Dec. ¶ 19.

Other clients have experienced delays in obtaining assistance with their legal issues. Blevins Dec. ¶ 19.

These kinds of programmatic modifications satisfy the “diversion of resources” test for organizational standing. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding direct organizational standing where defendant’s conduct prevented the organization from providing counseling and referral services, as well as required the organization to devote significant resources combatting the defendant’s conduct). In *California v. Ross*, 362 F. Supp. 3d 727, 740 (N.D. Cal. 2018), for example, an organization that fostered “racial, economic, and social equality for Black immigrants” had to divert its “limited resources to address and

counteract the anticipated effects” of the decision to include a citizenship question on the census—efforts that included providing “dialogues, presentations, workshops, publications, technical assistance, and trainings to build alliances between African American and immigrant communities.” *Id.* at 740. Because they diverted from other programs, these efforts to “address and counteract” were sufficient to confer organizational standing. *Id.*; *see also Nat’l Fair Housing Alliance v. Fed. Nat’l Mortgage Assoc.*, 294 F. Supp. 3d 940 (N.D. Cal. 2018) (holding that an organization that combated unfair housing practices had standing because it diverted resources away from the organization’s counseling and referral sources to counteract the negative impact of a law).⁷ OutServe’s shifting of programs and resources in response to Defendants’ unlawful policies are just as—if not more—substantial, particularly relative to the size of the organization.

2. OutServe Engages in Litigation-Based Advocacy and Has Suffered Increased Expenditures to Litigate the Challenged Policies

The diversion of non-litigation resources described above is sufficient for direct organizational standing. Defendants’ actions, however, have also required OutServe to divert

⁷ *See also Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019) (standing existed when census citizenship question would force organization to divert resources to encourage its constituencies to still participate in the census); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013) (standing existed for association running homeless shelters and offering transportation for unauthorized immigrants that diverted resources to educating members impacted by the new immigration law about its effect); *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409 (S.D.N.Y. 2012) (standing existed for organization that was required to spend resources counseling constituents, gathering and coordinating information, and documenting problems with the city’s plans rather than assisting persons with disabilities); *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 223 F. Supp. 3d 1008 (C.D. Cal. 2016) (organization whose mission was to prevent animal cruelty had standing when it had to counteract law by expending resources to write press releases, create letter-writing campaigns to educate the public, and filing other administrative petitions to ban the practice); *Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482 (D. Md. 2007) (organization whose mission included protecting the rights of persons with disabilities had standing when it had to investigate defendant’s conduct instead of providing education, counseling, advocacy, enforcement and referral services to aid members).

legal resources from programs and projects to litigation-based advocacy on behalf of its members living with HIV. This diversion is an independent—or additional—basis to find standing here.

OutServe is, in significant part, a legal-services organization with a long history of litigation-based advocacy—as a plaintiff, as an amicus, and as counsel of record representing its members in impact litigation. Pls.’ Resp. Interrog. No. 2; Blevins Dec. ¶ 5. Examples of impact litigation date back at least to 2011, when predecessor Servicemembers Legal Defense Network represented lawfully married same-sex Service members and veterans in suing the Department of Defense and Department of Veterans Affairs in a challenge to the so-called Defense of Marriage Act. *See McLaughlin v. Panetta*, No. 1:11-cv-11905-RGS (D. Mass. Oct. 27, 2011). And those efforts continued in 2017, when OutServe became counsel of record in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Aug. 28, 2017), challenging the Trump administration’s ban on transgender service. And now, because of Defendants’ policies, OutServe has had to sue Defendants three times to vindicate the legal rights of its members with HIV.⁸ These efforts have resulted in litigation-related costs and expenses, as well as attorney time that could be devoted to other matters, all of which has taken away from OutServe’s ability to provide its other programs and services.

Defendants maintain that an organization cannot “manufacture” injury necessary to maintain a suit by expending resources on “that very suit.” (Defs.’ Br. at 30, quoting *Spann v.*

⁸ OutServe has brought suit in the present two cases, *Harrison* and *Roe*, as well as in a third case *Deese, et al. v. Shanahan, et al.* on behalf of Kevin Deese and John Doe (a pseudonym), who the Navy and Air Force refused to commission as officers based on their HIV-positive status after they graduated from the respective military academy for each branch of the Armed Services. *See Harrison, et al. v. Shanahan, et al.*, No. 18-cv-641 (E.D. Va. filed May 30, 2018); *Roe, et al. v. Shanahan, et al.*, No. 18-cv-641 (E.D. Va. filed Dec. 19, 2018); *Deese, et al. v. Shanahan, et al.*, No. 18-cv-2669 (D. Md. Filed Aug. 28, 2018).

Colonial Vill., Inc., 899 F.2d 24, 27 (D.C. Cir. 1990)). But as a legal-services and litigation-advocacy organization, OutServe is not manufacturing anything—it is doing its job. The cases are in support: Particularly where the organization’s mission and programs include litigation-based advocacy and legal services—as it does for OutServe here—a response that requires an increase of organizational resources to provide litigation and advocacy efforts on behalf of affected members can be sufficient organizational standing for frustration of purpose. *See. E.g., Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018) (standing existed where organization, whose mission was to provide advocacy and legal representation for individuals in asylum had to divert time and resources away from non-refugee programs to address new government action); *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 325 F.R.D. 671 (W.D. Wash. 2016) (organization with mission to provide legal services to asylum seekers had standing when it had to divert scarce resources to adjudicate delays in administrative hearings created by the law instead of helping clients in other legal matters); *Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC*, 835 F. Supp. 2d 965 (D. Idaho 2011) (organization advocating fair housing had standing when it had to incur increased litigation expenses that diverted resources from other fair housing related education and activities); *Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009) (organization whose mission included legal and social issues for immigrant rights had standing where it had to “expend time and resources engaging in a practice to end the challenged practices at issue in this action”). OutServe’s need to shift resources and to increase its expenditures in challenging these policies is no different. It is therefore clear that OutServe has direct organizational standing in these cases.

CONCLUSION

For the foregoing reasons, the court should deny Defendants’ renewed motion to dismiss.

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CERTIFICATE OF SERVICE

I certify that, on the 17th day of May, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: May 17, 2019

Respectfully submitted,

/s/ John Harding

EXHIBIT A

*Plaintiffs' Response to Defendants'
Interrogatories, No. 3*

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

V.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

**PLAINTIFF OUTSERVE-SLDN. INC.'S OBJECTIONS TO
DEFENDANTS' FIRST SET OF INTERROGATORIES**

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 33, Plaintiff OutServe-SLDN, Inc., through undersigned counsel, provides the following objections and responses to Defendant's First Set of Interrogatories. In presenting these objections, Plaintiff does not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on any appropriate ground.

OBJECTIONS TO SPECIFIC INTERROGATORIES

Interrogatory No. 1. Explain in detail the basis of the allegations or assertions that each individual plaintiff in *Harrison v. Shanahan*, Case No. 1:18-cv-641 (E.D. Va.), and *Roe v. Shanahan*, 1:18-cv-1565 (E.D. Va.), and each declarant identified by OutServe in those cases, are members of OutServe.

Membership requirements: Although OutServe-SLDN provides services to the broader LGBTQ/HIV+ military and veteran communities—including spouses and families, and civilian Department of Defense workers—as well as to partnership organizations who provide complementary services to the military and veteran communities, membership in OutServe-SLDN is limited to people who: (a) identify as LGBTQ or live with HIV and (b) are serving, have served, or want to serve in the U.S. Armed Forces, including the Army, Navy, Air Force, Marines, and Coast Guard. To become a member, a person who falls within those demographics need only take one or more of the following actions: (1) join one of OutServe-SLDN’s Chapters or Forums, (2) sign up to OutServe-SLDN’s mailing list, (3) donate, (4) access OutServe-SLDN’s services, or (5) serve on OutServe-SLDN’s Board of Directors or Military & Veterans Advisory Committee.

Interrogatory No. 3. Describe in detail how OutServe has suffered direct injury in *Harrison* or *Roe*.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege.

Response: OutServe-SLDN has suffered direct organizational injury at least in the following way: it has been required to divert the organization’s resources, at a minimum in the form of dollars and personnel time, to address and counteract policies, actions, and decisions from the Department of Defense and Service branches that harm its members who are living with HIV. Specifically, as related to the allegations of the Complaints in *Harrison v. Shanahan* and *Roe v. Shanahan*, OutServe-SLDN personnel have been required to divert organizational resources, funds, and personnel time as follows:

- Advocating before Congress to bring awareness to, request investigations about, and pass legislation concerning policies that limit Service members with HIV from deploying worldwide without a waiver, and the adverse effects of those policies;
- Interfacing with individuals within the Department of Defense (DoD) and Service branches on behalf of Service members with HIV who are adversely affected by the challenged policies;
- Assisting Service members with HIV who are adversely affected by the challenged policies to navigate and self-advocate before the Disability Evaluation System;
- Assisting Service members with HIV who are adversely affected by the challenged policies to prepare, submit, monitor, and press forward with waiver and/or exception-to-policy requests to avoid or minimize the effects of the challenged policies;
- Assisting Service members with HIV facing adverse administrative action as a result of the challenged policies; and
- Litigating against the DoD and Service branches to change policies that harm Service members with HIV.

In addition to the above, OutServe-SLDN's mission including programs and services designed to assist and support Service members who identify as lesbian, gay, bisexual, transgender, or queer and/or who are living with HIV. These programs and services include at least legal and quasi-legal administrative assistance, education, and social support. According to estimates, approximately 1,200 Service members are living with HIV, and there are approximately 350 new diagnoses every year among all branches of the Armed Forces. By involuntarily separating Service members with HIV, OutServe loses a constituency to provide services. That is, current government policy prevents OutServe from providing support and assistance—in the form of

legal and quasi-legal administrative assistance, education, and social support—to its members with HIV. Thus, government policy directly harms OutServe-SLDN’s ability to accomplish its mission.

Interrogatory No. 4. Explain when the individual plaintiffs in *Harrison* or *Roe* joined and became members of OutServe.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege. Plaintiff objects that this interrogatory is vague and ambiguous with respect to its use of the phrase “joined and became members of OutServe.” As Defendants have not defined the terms “joined” and “became,” it is unclear how they are different. Plaintiff will interpret this phrase to mean “became members of OutServe.”

Response: See OutServe-SLDN’s Response to Interrogatory No. 1.

Interrogatory No. 5. Describe in detail how members of OutServe maintain good standing.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege.

Response: To maintain good standing as a member of OutServe-SLDN, a member merely needs to take one of the following actions: (1) continue being a member of one of OutServe-SLDN’s Chapters or Forums, (2) continue receiving OutServe-SLDN’s mailing list, (3) make additional donations, (4) continue using OutServe-SLDN’s services, or access such services again, or (5) continue serving on OutServe-SLDN’s Board of Directors or Military & Veterans Advisory Committee.

EXHIBIT C

*Plaintiffs' Response to Defendants'
Interrogatories, No. 2*

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

V.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

**PLAINTIFF OUTSERVE-SLDN. INC.'S OBJECTIONS TO
DEFENDANTS' FIRST SET OF INTERROGATORIES**

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 33, Plaintiff OutServe-SLDN, Inc., through undersigned counsel, provides the following objections and responses to Defendant's First Set of Interrogatories. In presenting these objections, Plaintiff does not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on any appropriate ground.

OBJECTIONS TO SPECIFIC INTERROGATORIES

Interrogatory No. 1. Explain in detail the basis of the allegations or assertions that each individual plaintiff in *Harrison v. Shanahan*, Case No. 1:18-cv-641 (E.D. Va.), and *Roe v. Shanahan*, 1:18-cv-1565 (E.D. Va.), and each declarant identified by OutServe in those cases, are members of OutServe.

Interrogatory No. 2. Describe in detail when OutServe was created, its purpose and mission, and its membership requirements.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege. Plaintiff further objects that this interrogatory is vague and ambiguous with respect to its use of the terms “created,” “purpose,” “mission,” and “membership requirements.” Plaintiff will interpret this interrogatory to be asking when OutServe was established under its bylaws, the mission that OutServe was established to accomplish, the work that OutServe performs on behalf of its members, and who is permitted to become a member of OutServe and by what process.

Response: OutServe-SLDN was created on or about October 2012 through the merger of two organizations: Servicemembers Legal Defense Network, and OutServe. Servicemembers Legal Defense Network had been in existence since 1993; it was formed to advocate for the end of the policy commonly known as Don’t Ask Don’t Tell, and to provide free legal services to lesbian, gay, bisexual (“LGB”) Service members and veterans affected by the policies prohibiting open and authentic service by people identifying as LGB. OutServe began in 2010; first known as “Citizens for Repeal,” it was one of the first member-based organizations to represent the interests of LGB people who were serving in uniform. On 31 December 2017, the non-profit organization known as the Military Partners and Families Coalition merged into OutServe-SLDN.

OutServe-SLDN is 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. The organization’s purpose and mission combine the missions, goals, and purposes of its constituent organizations

and expands them: to address and end, through litigation, policy advocacy, and education, all forms of unequal or unfair treatment against members of its community based on sexual orientation, gender identity, or HIV status. To accomplish this, the agency engages in activities that fall into three main buckets: legal services and advocacy; education; and membership and chapter services.

Legal services and advocacy: OutServe-SLDN provides pro-bono advocacy and legal services for people in the communities it serves. Advocacy or policy work includes interfacing with members of Congress, their staff, and Congressional Committees to change or approve legislation and regulations affecting Service members who identify as LGBTQ or who are living with HIV, as well as working directly with the Department of Defense, the Secretary of Defense, and the Service Secretaries on the same issues. Legal services work includes writing and submitting amicus briefs in cases involving issues of concern to its communities; filing and litigating impact litigation to change Department of Defense policies; directly representing—in administrative, disciplinary, and criminal proceedings—service members who identify as LGBTQ or who are living with HIV; and providing legal assistance, cultural-competency consultation, education and information, and training to Judge Advocate General defense lawyers in all Service branches.

Education: OutServe-SLDN provides education services to its members, to the broader LGBTQ/HIV+ military and veteran communities, and to partner organizations that provide services to the LGBTQ/HIV+ military and veteran communities, such as the Veterans Administration. OutServe-SLDN's educational products include: (1) OutServe Knowledge Online (OSKO), a monthly online podcast featuring prominent speakers that brings critical information to our members by creating an online repository of information and resources

specific to the LGBTQ/HIV+ military and veteran communities; (2) Advancing Care through Education (ACE), a portfolio of educational workshops and trainings—within and outside military community, including non-profits, social-service and health-care providers, government agencies, universities, and community groups—tailored to serve and advocate for the broader LGBTQ/HIV+ military and veteran communities and covering topics from the basics of what it means to be an LGBTQ and/or HIV+ Service member or veteran, trauma-informed-care practices, client-provider interaction best practices, and more; and (3) Rainbow Shield, a certification program that bridges the gap in culturally competent services for the LGBTQ/HIV+ veteran community by educating Veteran Service Organizations (VSOs) and other veteran service providers and advocates with training and information relevant to the communities we serve.

Membership and Chapter services: OutServe-SLDN is, in part, a membership organization, or the functional equivalent of a membership organization. OutServe-SLDN administers 54 chapters worldwide, including 35 in the continental United States and 19 outside the continental U.S., that are geographically based. OutServe-SLDN also has 20 additional special group forums, which are identity based, one of which is the “Positive Forum” for people living with HIV. All of OutServe-SLDN’s chapters and forums are listed here:

https://www.outserve-sldn.org/chap_forum/. The chapters and forums are not just social groups: because Service members who are LGBTQ+ and/or living with HIV are minority groups that are still sometimes marginalized, stigmatized, or ostracized in the military, the chapters allow these Service members to establish emotional support networks and to exchange information that is importance for career advancement and professional growth. The chapters also provide a direct link for Service members to access services and programs that OutServe-SLDN offers.

Membership requirements: Although OutServe-SLDN provides services to the broader LGBTQ/HIV+ military and veteran communities—including spouses and families, and civilian Department of Defense workers—as well as to partnership organizations who provide complementary services to the military and veteran communities, membership in OutServe-SLDN is limited to people who: (a) identify as LGBTQ or live with HIV and (b) are serving, have served, or want to serve in the U.S. Armed Forces, including the Army, Navy, Air Force, Marines, and Coast Guard. To become a member, a person who falls within those demographics need only take one or more of the following actions: (1) join one of OutServe-SLDN’s Chapters or Forums, (2) sign up to OutServe-SLDN’s mailing list, (3) donate, (4) access OutServe-SLDN’s services, or (5) serve on OutServe-SLDN’s Board of Directors or Military & Veterans Advisory Committee.

Interrogatory No. 3. Describe in detail how OutServe has suffered direct injury in *Harrison* or *Roe*.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege.

Response: OutServe-SLDN has suffered direct organizational injury at least in the following way: it has been required to divert the organization’s resources, at a minimum in the form of dollars and personnel time, to address and counteract policies, actions, and decisions from the Department of Defense and Service branches that harm its members who are living with HIV. Specifically, as related to the allegations of the Complaints in *Harrison v. Shanahan* and *Roe v. Shanahan*, OutServe-SLDN personnel have been required to divert organizational resources, funds, and personnel time as follows:

EXHIBIT D

*Plaintiffs' Response to Defendants'
Interrogatories, No. 5*

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

NICHOLAS HARRISON, ET AL.,

PLAINTIFFS,

V.

PATRICK M. SHANAHAN, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-CV-00641

**PLAINTIFF OUTSERVE-SLDN. INC.'S OBJECTIONS TO
DEFENDANTS' FIRST SET OF INTERROGATORIES**

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 33, Plaintiff OutServe-SLDN, Inc., through undersigned counsel, provides the following objections and responses to Defendant's First Set of Interrogatories. In presenting these objections, Plaintiff does not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on any appropriate ground.

OBJECTIONS TO SPECIFIC INTERROGATORIES

Interrogatory No. 1. Explain in detail the basis of the allegations or assertions that each individual plaintiff in *Harrison v. Shanahan*, Case No. 1:18-cv-641 (E.D. Va.), and *Roe v. Shanahan*, 1:18-cv-1565 (E.D. Va.), and each declarant identified by OutServe in those cases, are members of OutServe.

legal and quasi-legal administrative assistance, education, and social support—to its members with HIV. Thus, government policy directly harms OutServe-SLDN’s ability to accomplish its mission.

Interrogatory No. 4. Explain when the individual plaintiffs in *Harrison* or *Roe* joined and became members of OutServe.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege. Plaintiff objects that this interrogatory is vague and ambiguous with respect to its use of the phrase “joined and became members of OutServe.” As Defendants have not defined the terms “joined” and “became,” it is unclear how they are different. Plaintiff will interpret this phrase to mean “became members of OutServe.”

Response: See OutServe-SLDN’s Response to Interrogatory No. 1.

Interrogatory No. 5. Describe in detail how members of OutServe maintain good standing.

Objection: Plaintiff OutServe objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and the work product privilege.

Response: To maintain good standing as a member of OutServe-SLDN, a member merely needs to take one of the following actions: (1) continue being a member of one of OutServe-SLDN’s Chapters or Forums, (2) continue receiving OutServe-SLDN’s mailing list, (3) make additional donations, (4) continue using OutServe-SLDN’s services, or access such services again, or (5) continue serving on OutServe-SLDN’s Board of Directors or Military & Veterans Advisory Committee.

EXHIBIT E

*Declaration of Anthony Blevins in Support
of Plaintiffs' Opposition to Defendants'
Renewed Motion to Dismiss Plaintiff
OutServe-SLDN*

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

RICHARD ROE et al.,

Plaintiffs,

v.

PATRICK SHANAHAN et al.,

Defendants.

Case No. 1:18-cv-01565 (LMB/IDD)

NICHOLAS HARRISON et al.,

Plaintiffs,

v.

PATRICK SHANAHAN et al.,

Defendants.

Case No. 1:18-cv-00641 (LMB/IDD)

**DECLARATION OF ANDY BLEVINS IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS**

1. My name is Andy Blevins. I am the Executive Director of Plaintiff OutServe-SLDN, Inc., now known as Modern Military Association of America, Inc.

2. I am over 18 years of age, am competent to testify about the information contained in this declaration if needed, and offer this declaration based on my own actual, personal knowledge, or knowledge learned in my role of an employee of OutServe-SLDN.

OutServe's History

3. OutServe-SLDN was created on or about October 2012 through the merger of two organizations: Servicemembers Legal Defense Network (SLDN), and OutServe. SLDN had

been in existence since 1993; it was formed to advocate for the end of the policy commonly known as Don't Ask Don't Tell (DADT), and to provide free legal services to lesbian, gay, bisexual (LGB) Service members and veterans affected by the policies prohibiting open and authentic service by people identifying as LGB. OutServe began in 2010; it was one of the first member-based organizations to represent the interests of LGB people who were serving in uniform. On 31 December 2017, the non-profit organization known as the Military Partners and Families Coalition merged into OutServe-SLDN.

OutServe-SLDN's Programs and Services

4. Generally, OutServe-SLDN engages in activities that fall into three main buckets: legal services and advocacy; education; and membership and chapter services.

5. ***Legal Services and Advocacy:*** OutServe-SLDN provides pro-bono advocacy and legal services for people in the communities it serves.

a. Advocacy or policy work includes working with Congress to change or approve legislation and regulations affecting Service members, as well as working directly with the military agencies on these issues.

b. Legal services work includes writing and submitting amicus briefs in cases involving issues of concern to its communities; filing and litigating impact litigation to change Department of Defense policies; directly representing—in administrative, disciplinary, and criminal proceedings—service members who identify as LGBTQ or who are living with HIV; and providing legal assistance, cultural-competency consultation, education and information, and training to Judge Advocate General (JAG) defense lawyers in all Service branches. OutServe-SLDN takes all comers—meaning it

provides legal services, within its capabilities and areas of expertise—to all members who ask for help.

c. One of the legal-services programs that OutServe-SLDN's offers is the Restore Honor, Restore Dignity program. Among other things, this program assists veterans who were discharged under Don't Ask Don't Tell—or earlier policies that prohibited LGB people from serving in the Armed Forces—in obtaining an “upgrade” to discharge paperwork that (a) reflects a discharge characterization that is less than Honorable, (b) reflects stigmatizing or offensive language as a narrative reason for discharge, or (c) reflects a “re-enlist” code that improperly shows the veteran is ineligible for re-enlistment. Colloquially we call these applications “discharge upgrades.”

d. Finally, through its Legal Director Peter Perkowski, OutServe-SLDN is a Veterans Services Organization (VSO) and assists LGBT veterans with benefits processing issues with the Department of Veterans Affairs.

6. **Education:** OutServe-SLDN provides education services to its members, to the broader LGBTQ/HIV+ military and veteran communities, and to partner organizations that provide services to the LGBTQ/HIV+ military and veteran communities, such as the Veterans Administration. OutServe-SLDN's educational products include:

a. OutServe Knowledge Online (OSKO), a monthly online podcast that brings critical information to our members by creating an online repository specific to the LGBTQ/HIV+ military and veteran communities;

b. Advancing Care through Education (ACE), a portfolio of educational workshops and trainings—within and outside military community—tailored to serve and advocate for the broader LGBTQ/HIV+ military and veteran communities;

c. Rainbow Shield, a certification program that bridges the gap in culturally competent services for the LGBTQ/HIV+ veteran community by educating VSOs and other service providers with information relevant to the communities we serve.

d. Freedom to Serve: The Definitive Guide to LGBTQ Military Service, an online publication that provides critically important information about military service to the populations that OutServe-SLDN serves. (The publication is available here:

https://www.outserve-sldn.org/wp-content/uploads/2018/12/FREEDOM-TO-SERVE_-FINAL.pdf.)

7. ***Membership and Chapter Services:*** OutServe-SLDN administers 54 chapters worldwide, including 35 in the continental United States and 19 outside the continental U.S., that are geographically based. OutServe-SLDN also has 20 additional special group forums, which are identity based, one of which is the “Positive Forum” for people living with HIV. The chapters and forums are not just social groups: because Service members who are LGBTQ+ and/or living with HIV are minority groups that are still sometimes marginalized, isolated, stigmatized, or ostracized within the military, the chapters allow these Service members to establish emotional support networks and to exchange information that is important for career advancement and professional growth. The chapters also provide a direct link for Service members to access the services and programs that OutServe-SLDN offers.

8. Though the number of programs and services it offers is extensive, OutServe-SLDN has a very small staff. When the Complaints in these cases were filed, there were just four paid staff members and a handful of unpaid, part-time volunteers. One staff member switched to volunteer status, so currently there are just three paid staff: the Executive Director, the Legal Director, and a Legal Manager (who is part-time). Accordingly, staff time and

availability are extremely limited resources. OutServe-SLDN's operating budget—about \$250,000—also means that money is a limited resource as well.

Expansion of OutServe-SLDN's Mission to Include HIV

9. Before their merger, both SLDN and OutServe had focused primarily on issues facing LGB people in the military—namely, DADT's prohibition on open military service. After DADT's repeal, and the merger to form OutServe-SLDN, the organization started to broaden its focus to include additional constituencies: for example, advocating for open and authentic military service by transgender people. But the organization lost all its staff in 2013, making further expansion of programs and services all but impossible. For a period, OutServe-SLDN was operated by a volunteer board assisted by ad hoc consultants.

10. Nevertheless, some time after the merger OutServe-SLDN adopted a mission “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.” The part of the mission directed to “work[ing] toward equality for all” was intended to allow for expansion of programs and services when needed to address the unequal, discriminatory, or unfair treatment of members of the communities that OutServe-SLDN serves.

11. In 2015, OutServe-SLDN started to re-hire permanent staff: an Interim Executive Director in February; and a Counsel, who later became Legal Director, in November. In December 2015, OutServe hired me as a Legal & Policy Associate with duties primarily focused on providing legal services to individual clients. Dedicated staff, particularly legal staff, facilitated the expansion of legal services to include not just legacy programs—mainly Restore Honor, Restore Dignity—but also individual members who needed the assistance of legal staff

because of issues they were facing based on their sexual orientation, gender identity, or HIV status.

12. Based on the work that OutServe-SLDN is actually currently doing, its de facto mission is as follows: “To address and end, through litigation, policy advocacy, and education, all forms of unequal or unfair treatment against members of its community on the basis of sexual orientation, gender identity, or HIV status.”

Increasing HIV-Related Caseload Causing Diversion of Resources

13. The calls to OutServe-SLDN’s Legal Help Desk from Service members living with HIV have steadily increased since OutServe-SLDN expanded its legal services function in 2015 and after. What used to be a call every couple of months from a Service member with HIV and now become, on average, one or two calls per month. As shown below, at least part of this is due to the military’s policy restrictions on people living with HIV.

14. The calls we receive from Service members with HIV fall into the categories below. The members calling OutServe-SLDN with these issues are experiencing the problem and need our help because of Defendants’ policies and regulations that are being challenged in these lawsuits:

- a. People being denied entry into the military, or being separated soon after enlistment because of a positive HIV test during initial medical evaluation;
- b. People being denied a commission, either from enlisted to officer ranks or after completing education at a military academy, because of a positive HIV test;
- c. People being placed on restricted duties, such as losing flight status, because of a positive HIV test;

d. People being denied re-enlistment or being subject to administrative discharge because their HIV status restricts them from deploying;

e. People being unable to obtain the waivers or approvals necessary to deploy or go temporary duty.

15. In addition to the above, OutServe-SLDN also receives calls from and provides assistance (including direct representation) to Service members with HIV who are being subject to discipline, including criminal prosecution in a court-martial, because of antiquated regulations that govern their sex lives.

16. Because of the scarcity of resources (staff time/availability, and financial/budget, discussed above), OutServe-SLDN must make difficult choices in terms of prioritizing clients, programs, and services. Typically, OutServe-SLDN chooses to focus on tasks that have the highest impact—i.e., that will help the largest number of people or result in the most significant systemic changes—or that attempts to help individuals in the direst need, such as those who are in legal jeopardy (e.g., court-martial) or in danger of involuntary separation (e.g., administrative separation board hearings, appeals, and disciplinary proceedings). This “triage” system ensures that some people aren’t left behind while OutServe-SLDN spend valuable resources on matters that are less important, less urgent, or less critical.

17. Because of the nature of the calls OutServe-SLDN receives from Service members with HIV, under this “triage” system, OutServe-SLDN must prioritize them over other programs and services, and sometimes over other clients. This is because these members are often in the direst situations (e.g., on the verge of being separated) and/or their problems are affecting a large number of other OutServe-SLDN members.

18. When Service members with HIV call us with the problems listed above, assisting them is almost always time- and resource-intensive. It involves providing non-litigation support, counseling on strategies, legal advice and consultation, and other services such as engaging in lengthy phone calls, conducting research and investigations, writing letter, engaging with detailed JAG counsel, preparing administrative appeal documents, and even providing emotional and social support. Doing this work has required that OutServe-SLDN delay or curtail other projects, programs, and services, including the following:

a. Preparing and publishing supplemental editions of OutServe's *Freedom to Serve* guide, including a supplement directed to OutServe's members living with HIV and a supplement focused on the military's policies and regulations around sex and how they affect OutServe's members;

b. Preparation of an "HIV 101" educational program to be used for cultural-competency training for OutServe's partners, including VA providers, so that OutServe's members can be better served; and

c. Preparation of an LGBT- and HIV-focused cultural-competency education and training program for the Marine Corps Defense Services Organization West Region.

19. In addition to the above, the diversion of resources to assist its members with HIV has resulted in challenges to OutServe-SLDN's efforts to assist its other clients and potential clients, such as transgender service members who are currently being subject to a renewed ban on their ability to serve openly and authentically. Although we assist every client we can, some clients experience delays in receiving assistance due to the "triage" system.

Staff, Board, and Member Participation

20. OutServe-SLDN's Bylaws defined its "members" as the members of the Board of

Directors. This is because OutServe-SLDN is a Delaware corporation, and to my understanding Delaware law requires that for membership organizations, the members elect the Board.

OutServe-SLDN simply does not have the resources to conduct annual Board elections through a vote of its broader membership ranks, which are spread throughout the world.

21. Though OutServe-SLDN's broader members do not formally elect the Board of Directors or choose staff, members participate in OutServe-SLDN in various significant and impactful ways:

a. Members serve as Chapter Leaders, who lead the various chapters throughout the United States and the world. Chapter Leaders interact directly with OutServe-SLDN members locally, they hear about what issues members are facing and what needs the organization can meet, and they report back to OutServe-SLDN management about those needs and issues. The Chapter Leaders report to the Executive Director, who (in consultation with the Board of Directors) uses this member feedback to decide whether changes need to be made in the programs, services, or activities of the organization. In this way, members and Chapter Leaders influence the priorities and direction of the organization in a grassroots way.

b. Members also serve on the Military Advisory Committee (MAC). All of the people who serve on the MAC are members of OutServe-SLDN. Based on their experience as actively serving members of the military or veterans, the MAC advises the Executive Director on matters important to Service members and veterans. In consultation with the Board of Directors, the Executive Director uses this information to decide on whether changes need to be made in OutServe-SLDN's programs, services, or activities. In this way, they influence the priorities and direction of the organization.

c. Members also serve on the Board of Directors. The Board is responsible for setting OutServe-SLDN strategic goals and its mission, and for supervising the Executive Director, who implements the Board's priorities. Not all directors are members: some did not serve in the military and were called on to join the Board because of certain skill sets or corporate and financial connections that could be beneficial to the organization. But going back to the merger in 2012, when OutServe-SLDN became a membership organization, a majority of the Board of Directors has always comprised members of OutServe-SLDN.

d. Members who avail themselves of OutServe-SLDN's legal services and advocacy activities also steer the direction of the organization. Clients who call with problems that require intervention of our legal or advocacy staff are one of the primary ways that OutServe-SLDN identifies issues that are likely of concern to a broader segment of the populations we serve, and therefore signal that we may need to adjust the priorities or direction of the organization.

e. All members can nominate people (including themselves) to be candidates for the Board of Directors. All members are free to reach out directly to the Board, to staff, or to the MAC to provide input or feedback on the performance of leaders, on the organization itself, or suggestions about its priorities or direction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of May, 2019.



Andy Blevins