

**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

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO FILE UNDER SEAL
EXHIBITS B AND F-L FILED SIMULTANEOUSLY WITH PLAINTIFFS'
OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS PLAINTIFF
OUTSERVE-SLDN**

Plaintiffs respectfully request that Exhibits B and F-L to Plaintiffs' Opposition to Defendants' Renewed Motion to Dismiss Plaintiff OutServe-SLDN be filed under seal pursuant to Local Civil Rule 5. Plaintiffs will also file redacted versions of these Exhibits. In support of this request, Plaintiffs state as follows:

1. Plaintiffs have moved the Court to file under seal a declaration and five depositions in support of their Opposition to Defendants' Renewed Motion to Dismiss Plaintiff OutServe-SLDN.

2. Exhibit B is the deposition of Anthony Blevins, Executive Director of Plaintiff OutServe-SLDN. The deposition contains discussion of the HIV status of at least one of Plaintiff OutServe's members.

3. Exhibit F is the deposition of Victor Voe, an active duty Service member who has been targeted for discharge by the Air Force because of his HIV status and the Air Force's determination that he is less than worldwide deployable because of his HIV. Plaintiff Voe previously made a declaration in support of Plaintiffs' Motion for a Preliminary Injunction. *See* (Ex. B to Pls.' Mot. For Prelim. Inj., ECF No. 44). Plaintiff Voe also made a second declaration in connection with Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of the Motion for Preliminary Injunction. *See* (Ex. B to Pls.' Opp. To Mot. To Dismiss And Reply In Support Of Prelim. Inj., ECF No. 61). This declaration supplements the information provided by Plaintiff Victor Voe in those declarations.

4. Exhibit G is the deposition of S.H., an active duty Service member who has been targeted for discharge by the Air Force as a result of his HIV status and the Air Force's determination that he is not worldwide deployable. S.H. previously had his information included as part of the Declaration of Peter Perkowski in Support of Motion for Preliminary Injunction in *Roe, et al. v. Shanahan, et al.* *See* (Ex. C2 to Dec. Of Peter Perkowski In Support Of Mot. For Prelim. Inj., ECF No. 40).

5. Exhibit H is the deposition of D.N., an active duty Service member who has been targeted for discharge by the Air Force as a result of his HIV status and the Air Force's determination that he is not worldwide deployable. D.N. previously had his information included as part of the Declaration of Peter Perkowski in Support of Motion for Preliminary

Injunction in *Roe, et al. v. Shanahan, et al.*. See (Ex. C3 to Dec. Of Peter Perkowski In Support Of Mot. For Prelim. Inj., ECF No. 40).

6. Exhibit I is the deposition of Richard Roe, an active duty Service member who has been targeted for discharge by the Air Force because of his HIV status. Plaintiff Roe previously made a declaration in *Harrison, et al. v. Shanahan, et al.*, and a supplemental declaration in connection with Plaintiffs' Motion for a Preliminary Injunction, both of which were attached as exhibits to Plaintiffs' Motion for Preliminary Injunction. See (Exs. A & A1 to Pls.' Mot. For Prelim. Inj., ECF No. 44). Plaintiff Roe also made a third declaration in connection with Plaintiffs' Opposition to the Motion to Dismiss and Reply in Support of the Motion for Preliminary Injunction in *Roe, et al. v. Shanahan, et al.* See (Ex. A to Pls.' Opp. To Mot. To Dismiss And Reply In Support Of Prelim. Inj., ECF No. 60-1). This deposition supplements the information provided by Plaintiff Richard Roe in those declarations.

7. Exhibit J is the deposition of D.L., an active duty Service member who was denied a promotion to a command position based on his HIV status and the Army's determination that he is not worldwide deployable. D.L. previously provided a declaration in support of Plaintiff's Motion for Preliminary Injunction in *Harrison, et al. v. Shanahan, et al.* See (Ex. F to Pls.' Mot. for Prelim. Inj., ECF No. 26-6).

8. Exhibit K is a supplemental declaration from J.B, who was, until recently, a Staff Sergeant in the U.S. Air Force before being separated based on his HIV status. Declarant J.B. previously had his information included as part of the Declaration of Peter Perkowski in Support of Motion for Preliminary Injunction in *Roe, et al. v. Shanahan, et al.*, ECF No. 40.

9. Exhibit L is Plaintiff OutServe's Response to Defendants' Interrogatory No. 1. This response contains information about a member of OutServe that could be used to identify this individual.

10. With this Memorandum in Support of Plaintiffs' Motion to File Under Seal, Plaintiffs have also filed a Notice of Motion to File Under Seal, Motion to File Under Seal, and a Proposed Order to seal the materials pursuant to Local Rule 5.

11. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000). Plaintiffs have complied with these requirements.

12. Plaintiffs are requesting to file these exhibits under seal primarily so that the Court and Defendants in this matter have access to the identifying information provided in the exhibits for their own use, without subjecting these individuals to the very real risk of stigma and discrimination that those living openly with HIV face. Although Plaintiffs are requesting the Court's permission to file under seal, Plaintiffs are willing to provide redacted exhibits to ensure compliance with the second *Ashcraft* factor.

13. Considering the identities revealed in the depositions and declaration, the decision to seal is supported by existing Fourth Circuit precedent and numerous previous orders from this Court in the present litigation, including, most recently, the Court's May 6th Order, ECF No. 125, that ordered a number of the same documents to be sealed.

Accordingly, Plaintiffs respectfully request that the Court enter an order sealing the unredacted versions of Exhibits B and F-L, and allowing Plaintiffs to publicly file redacted version by May 29, 2019.

Dated: May 17, 2019

/s/ Scott Schoettes

Scott Schoettes*

SSchoettes@lambdalegal.org

Kara Ingelhart*

KIngelhart@lambdalegal.org

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

105 W. Adams St., Suite 2600

Chicago, IL 60603

T: (312) 663-4413

Anthony Pinggera

apinggera@lambdalegal.org

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

4221 Wilshire Blvd., Suite 280

Los Angeles, CA 90005

T: (213) 382-7600

Peter E. Perkowski*

peter@modernmilitary.org

OUTSERVE-SLDN, INC.

P.O. Box 65301

Washington, DC 20035-5301

T: (800) 538-7418

Attorneys for Plaintiffs

**pro hac vice*

Respectfully submitted,

/s/ John Harding

John Harding

Virginia State Bar No. 87602

Lauren Gailey*

LGailey@winston.com

Laura Cooley

Virginia State Bar No. 93446

LCooley@winston.com

WINSTON & STRAWN LLP

1700 K St., NW

Washington, DC 20006

T: (202) 282-5000

Andrew R. Sommer

Virginia State Bar No. 70304

sommer@gtlaw.com

GREENBERG TRAURIG LLP

1750 Tysons Blvd., Suite 1000

McLean, VA 22102

T: (703) 749-1300

Julie A. Bauer*

JBauer@winston.com

WINSTON & STRAWN LLP

35 W. Wacker Dr.

Chicago, IL 60601

T: (312) 558-5600

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,

John Harding

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