

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

RICHARD ROE et al.,

Plaintiffs,

v.

MARK T. ESPER et al.,

Defendants.

Civil No. 1:18-cv-01565

NICHOLAS HARRISON et al.,

Plaintiffs,

v.

MARK T. ESPER et al.,

Defendants.

Civil No. 1:18-cv-00641

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

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INTRODUCTION

Plaintiffs submit this supplemental brief in accordance with the Court’s May 31, 2019 order holding in abeyance Defendants’ Renewed Motions to Dismiss Plaintiff OutServe-SLDN (“OutServe”)¹ for lack of standing and inviting additional briefing. Parties have conducted additional discovery with respect to Plaintiff OutServe’s direct and associational standing.

Additional evidence confirms that Defendants’ motion should be denied. OutServe has standing to bring claims against Defendants on its own behalf, as it has experienced direct injury, and on behalf of its members as the functional equivalent of a membership organization. Because OutServe has both direct and associational organizational standing, Defendants’ Renewed Motion to Dismiss should be denied.

ARGUMENT

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

I. OUTSERVE HAS STANDING TO ASSERT CLAIMS ON ITS OWN BEHALF.

The additional discovery confirms that OutServe has standing because it has been directly harmed by Defendants’ policies. OutServe is experiencing an injury in fact “fairly ... trace[able] to the challenged action of the defendant[s]”—namely, a diversion of resources toward efforts to address and counteract Defendants’ policies affecting service members living with HIV—which can “be redressed by a favorable decision” enjoining Defendants from applying or enforcing the

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 the motions.

underlying policies discriminating against people living with HIV. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And because OutServe is sufficiently identified with and subject to the influence of those it seeks to represent, it has demonstrated that it “has a sufficiently personal stake in the lawsuit to justify federal court jurisdiction.” *Id.* at 461 (internal citations omitted).

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

Because of Defendants’ policies and actions, OutServe’s limited resources have been strained and shifted. Defendants’ policies and actions have affected OutServe’s policy and advocacy priorities, delayed previously planned educational initiatives and programmatic efforts, and affected OutServe’s ability to provide timely legal services to members and clients.

Direct organizational standing may be established when an organization experiences “more than simply a setback to the organization’s abstract social interests” such that a “concrete and demonstrable injury to the organization’s activities—with [a] consequent drain on the organization’s resources.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). “[O]nly a perceptible impairment of an organization’s activities is necessary for there to be injury in fact.” *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011).

The standard is met here. Beginning in 2017, there was an increase in the number of service members (and “future warriors”—people wanting to enlist or commission in the military) with HIV contacting OutServe about Defendants’ restrictive accessions policies. *See* Ex. A, Plaintiff OutServe-SLDN, Inc.’s Second Supplemental Response to Defendants’ First Set of Interrogatories, No. 3, at 5 (“OutServe’s Second Supp. to Interrog. No. 3”). In 2018, beginning with Defendants’ “Deploy or Get Out” policy issued in February, the number of service

members with HIV calling about deployment restrictions and retention issues also dramatically increased. *See* Ex. A, OutServe’s Second Supp. to Interrog. No. 3, at 6. Being an organization attuned to its members’ needs, OutServe responded in three ways: by increasing its policy and advocacy efforts for service members with HIV, by delaying strategic other education and programming activities, and by providing legal services, as necessary—filing three lawsuits, and providing consultation, advice, and direct representation to affected service members. *See* Ex. A, OutServe’s Second Supp. to Interrog. No. 3, at 8-13. That organizational response required OutServe to shift efforts and resources away from other matters and constituencies. This shift in priorities has affected OutServe’s policy and advocacy work, its educational and programmatic work, and its legal work for other clients.

Policy and Advocacy: Because of the policies challenged here, OutServe has been forced to use its limited resources to advocate for service members with HIV rather than advance other policy initiatives. *See* Ex. A, OutServe’s Second Supp. to Interrog. No. 3, at 9-10; Ex. B, Plaintiff OutServe-SLDN, Inc.’s Responses to Defendants’ Second Set of Interrogatories, Nos. 9-10, 13-14 (“OutServe’s Resp. to Second Interrog.”); Ex. C, July 2, 2019 Deposition of Anthony Blevins (“Blevins 7.2.19 Dep.”) 181:19-183:8; 257:14-261:3; 264:7-267:9; 280:3-281:10; 281:19-285:7. This shift of priorities has resulted in the following policies initiatives being delayed in favor of HIV advocacy:

- Advocacy on military sexual trauma policy reform was delayed from the first quarter of 2018 to the anticipated start date in the second quarter of 2019.
- Advocacy on access to veterans’ benefits (especially for those discharged under policies prohibiting open service by lesbian, bisexual, and gay people) was delayed from the fourth quarter of 2018 to the second quarter of 2019.
- Advocacy on military “spouse tax” policy reform has been indefinitely delayed.

See Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 10; Ex. C, Blevins 7.2.19 Dep.

181:19-183:8; 257:14-261:3; 264:7-267:9; 280:3-281:10; 281:19-285:7.

Education and Programmatic Activities: The diversion of resources to respond to Defendants' policies has affected OutServe's educational initiatives and other programs as well.

See Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 9-12; Ex. B, OutServe's Resp. to

Second Interrog. Nos. 9-10, 13-14; Ex. C, Blevins 7.2.19 Dep. 250:3-254:10; 269:3-13; 285:8-

290:11. The following projects were delayed as a result:

- OutServe's online organizational magazine specifically for the LGBTQ military community was delayed a year, from the third quarter of 2018 to the third quarter of 2019.
- Supplements to OutServe's *Freedom to Serve* informational guide were delayed; some supplements were delayed a year, and one was delayed indefinitely.
- OutServe's online host of resources for its regional directors and their key volunteers—the Regional Director's Toolbox—was delayed from the second quarter of 2018 to the second quarter of 2019.
- OutServe's "HIV 101" educational program has been on hold since February 2019.
- OutServe's training on LGBTQ and HIV to JAG defense lawyers has been on hold since fall 2018 due to the lack of time resources needed to create a program.

See Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 9-10, 12; Ex. C, Blevins 7.2.19 Dep.

251:4-254:10; 269:3-13; 285:8-290:11.

Legal Services: OutServe's legal work for its members in need has also been affected. Some work had to be deprioritized or eliminated, while non-critical work for some members was delayed. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 10-13; Ex. B, OutServe's Resp. to Second Interrog. Nos. 9-10, 13-14; Ex. C, Blevins 7.2.19 Dep. 217:8-218:4; 281:19-283:17. The following programs and projects were affected:

- Legal services, including research and preparing documents for submission, to two OutServe member clients have been delayed several months due to the lack of resources necessary to do the work.
- A new legal services project that would assist veterans who were court martialled or administratively discharged because of regulations regulating sexual activity has been delayed because of the lack of resources to organize and implement it.
- A new legal services project that would assist veterans who were discharged involuntarily under Don't Ask Don't Tell (and other policies prohibiting the open service of lesbian, gay, and bisexual people) before they had acquired the minimum time-in-service to qualify for certain veterans' benefits has been delayed since early 2018 due to the lack of personnel resources.

See Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 12-13; Ex. C, Blevins 7.2.19 Dep.

217:8-218:4; 281:19-283:17.

In short, OutServe has had a steady increase in HIV-related inquiries, the vast majority pertaining to accessions, retention, and deployment. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 6-8, 11-12; Ex. B, OutServe's Resp. to Second Interrog. Nos. 9-10, 13-14. These inquiries have required personnel to provide non-legal support, undertake lengthy phone calls, do research and investigations, assist in preparing documents, and even provide emotional support. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 8-12; Ex. B, OutServe's Resp. to Second Interrog. Nos. 9-10, 13-14. OutServe staff resources are limited, *see* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 4, so delays and reprioritizations of other work has occurred. Supported mostly by unpaid interns, OutServe's staff must make tough choices about which policy initiatives to push in Congress, and what legal work must take priority. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 4-5, 8-9; Ex. C, Blevins 7.2.19 Dep. 25:18-26:5; 251:19-256:12. OutServe always prioritizes initiatives based on the measure of their impact to its members, with critical needs (imminent harm or separation) and large magnitude harms (affecting many members) being triaged ahead of other work. *See* Ex. A, OutServe's

Second Supp. to Interrog. No. 3, at 8-9; Ex. C, Blevins 7.2.19 Dep. 25:18-26:5; 251:19-256:12.

The adjustments and sacrifices listed above represent that result of that calculus. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 8-13.

A long line of decisional authority recognizes direct organizational standing in situations like those set forth above. The Ninth Circuit, for example, found that standing existed for an association running homeless shelters and offering transportation for unauthorized immigrants when that organization diverted resources to educate members about the effects of a new immigration law. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19 (9th Cir. 2013). Similarly, OutServe has had to counsel, advise, and assist members affected by Defendants' policies restricting enlistment, commissioning, and deployment because of HIV, as well as members worried about or being threatened with separation due to HIV. *See* Ex. A, OutServe's Second Supp. to Interrog. No. 3, at 8-9, 11-12; Ex. B. OutServe's Resp. to Second Interrog. Nos. 9-10, 13-14. It has had to devote resources to educating and counseling members about policies and, where possible, avoid their effects (for example, by attempting to stave off involuntary separation). Clearly, this work constitutes "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.'" *Nnebe*, 644 F.3d at 157;² *see also Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019) (standing existed when a proposed citizenship question on the census

² Notably, in *Nnebe* redressability was important: a positive outcome in the case would directly benefit the organization because it would avoid future suits on similar claims. Here, without OutServe's participation in these suits, it could otherwise be required to file a multitude of lawsuits, prepare and submit dozens of waiver requests and administrative appeals, and represent many individual plaintiffs in the military administrative system and federal courts. OutServe is doing some of that work now, but if the relief in this case is not applied to its other members, OutServe would undoubtedly have to do much more.

forced an organization to divert resources to encourage its constituencies to still participate in the census); *California v. Ross*, 362 F. Supp. 3d 727, 740 (N.D. Cal. 2018) (sum of new efforts to advance dialogue, make presentations, conduct workshops, develop publications, provide technical assistance, and give trainings to affected constituents impacted by a proposed citizenship question on the U.S. census constituted injury for standing); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 223 F. Supp. 3d 1008 (C.D. Cal. 2016) (animal cruelty prevention organization 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).

“[A]nalysis of plaintiff’s standing focuses not on the claim itself, but on the party bringing the challenge.” *White Tail Park*, 413 F.3d at 461. Here, OutServe is the only organization providing legal advice and assistance to service members with HIV:

We’re very lucky to have a lot of community partners helping us with the transgender service members right now. Like I mentioned earlier, we are the subject matter experts for those that are living with HIV and nobody’s really prepared to help us, so nobody else is helping that community either. So when we were doing our strategic plan, we decided that we needed to prioritize this community because nobody else was.

Ex. C, Blevins 7.2.19 Dep. 31:18-32:4. Without the support of other organizations in this space, OutServe must prioritize its HIV-related work, and dealing with these inquiries has required it to divert resources from other policies and programs. This is sufficient to demonstrate direct injury. *See Nat’l Fair Housing Alliance v. Fed. Nat’l Mortgage Assoc.*, 294 F. Supp. 3d 940 (N.D. Cal. 2018) (diverting resources away from the organization’s fair housing counseling and referral sources to counteract the negative impact of a law as sufficient for direct standing); *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); *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 rights had standing when it had to investigate defendant's conduct instead of providing education, counseling, advocacy, enforcement and referral services to aid members). "[I]t would be difficult to think of a more appropriate plaintiff than [OutServe], which is surely one of the few organizations . . . if not the only one, affected by" the challenged policies. *White Tail Park*, 413 F.3d at 461.

B. OutServe's Injury is Factually Distinct from the Organizational Plaintiff in *Lane v. Holder*.

Defendants rely on *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), to support their position that OutServe lacks standing, but their arguments are unavailing. *Lane* is inapposite; the circumstances here are both factually and legally distinguishable, and *Lane* does not preclude a finding that OutServe has standing.

Lane was a "pre-enforcement challenge to the constitutionality of a federal statute restricting interstate transfer of handguns" and other federal and state gun-sale restrictions. *Id.* at 670. Two people challenged the restrictions, along with a non-profit membership organization whose "purposes included 'promoting the exercise of the right to keep and bear arms; and education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.'" *Id.* at 671. As pertinent here, the district court concluded that the organizational plaintiff—the Second Amendment Foundation, or SAF—lacked standing, and the Fourth Circuit affirmed. *Id.* at 670. But *Lane* says nothing about the circumstances here. Direct organizational standing was found not to exist for reasons that are entirely distinguishable.

First, the organizational plaintiff in *Lane* did not allege a diversion of resources. Rather, SAF alleged a “drain on resources”—namely, that “its ‘resources are taxed by inquiries into the operation and consequences of interstate handgun transfer provisions.’” *Id.* at 675. Unlike OutServe, that is, SAF did not allege that any other work did not get done because it had to address the as-yet-unimplemented regulations. The Fourth Circuit characterized this as a “mere expense” to SAF, a “budgetary decision” on how to “spend its money.” *Id.* By contrast, OutServe has identified a raft of programs and projects that were delayed or deprioritized because resources were shifted to deal with Defendants’ HIV policies.

Second, the organizational plaintiff in *Lane* was not a legal services organization like OutServe. Legal, policy, and advocacy services on behalf of its members is OutServe’s core programmatic activity. SAF’s mission, by contrast, was more abstract: protection of the right to bear arms. SAF’s “purposes” included “promoting,” and “education, research, publishing and legal action.” There are no factual allegations about SAF’s legal efforts on behalf of members. Thus, it is not surprising that the court would conclude that “undertaking litigation” would be an “abstract concern” for SAF. For OutServe, though, it is part-and-parcel of its legal-services program.

Third, the *Lane* court’s concern about “bootstrap[ing]” standing by “expending ... resources in response to actions of another” is not present here. *Lane*, 703 F.3d at 674. OutServe did not bring itself to the problem here, Defendants brought the problem to OutServe: by denying a commission to Harrison (and others), by threatening to separate Roe and Voe (and others), and by issuing the “Deploy or Get Out Policy,” Defendants created the circumstances that led directly to a massive increase in legal-services requests by members to OutServe. OutServe’s actions were not mission creep; OutServe was acting *within* its mission of “work[ing]

toward equality for all” in the military community. Ex. A, OutServe’s Second Supp. to Interrog. No. 3, at 2. In this sense, Defendants’ policies caused OutServe’s response. For standing purposes, courts recognize the importance of a causal relationship between a defendant’s action and plaintiff’s incurred harms: “Of course, [a]n organization cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that would not otherwise affect the organization,” but that concern is not present where, as here, resources were diverted “to provide individualized assistance and coordination of legal and social services, including individual screenings and in-depth trainings to educate” constituents specifically about the underlying challenged conduct by defendants. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1296-97 (S.D. Cal. 2018) (internal quotation marks omitted). This isn’t bootstrapping; nor is it a mere “abstract concern,” or “special interest” in a particular issue,³ or “mere interest in a problem.”⁴ This is OutServe fulfilling its mission. *See Havens*, 455 U.S. at 379 (organization dedicated to promoting equal opportunity in housing had direct standing to sue a real estate company for racial steering because that action “perceptibly impaired [organization’s] ability to provide counseling and referral services for low- and moderate-income homeseekers,” which was a key component of the organization’s mission).

In short, OutServe did not “abstractly” shift internal resources to respond to Defendants’ policies; it did not, as in *Lane*, “decide” of its own accord to spend money in response to some external event. Rather, OutServe faced increased demand from its members to provide counseling, advice, and legal support—including by acting as an organizational plaintiff. *See* Ex. A, OutServe’s Second Suppl. to Interrog. No. 3, at 8-12. And unlike in *Lane*, OutServe’s

³ *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

⁴ *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

shift in resources has come with associated opportunity costs of foregone or delayed projects and initiatives. *See* Ex. A, OutServe's Second Suppl. to Interrog. No. 3, at 8-10, 12-13; Ex. B, OutServe's Resp. to Second Interrog. Nos. 9-10, 13-14; Ex. C, Blevins 7.2.19 Dep. 181:19-183:8; 217:8-218:4; 251:4-254:10; 257:14-261:3; 264:7-267:9; 269:3-13; 280:3-281:10; 281:19-290:11. Thus, OutServe has standing to proceed as a directly harmed organizational plaintiff, and *Lane* is not to the contrary.⁵

Other more analogous cases recognize that, for legal services and advocacy organizations like OutServe, direct standing can be established by the need to employ litigation resources on behalf of their members in response to new government actions. In *Al Otro Lado*, for example, an immigration-focused legal advocacy group had direct standing because it was forced to divert resources from its non-refugee programs to address a new policy impacting its refugee members. *Al Otro Lado, Inc.*, 327 F. Supp. 3d at 1296-97. Another immigration-focused legal services organization serving asylum seekers had direct standing because it was forced to divert scarce resources to adjudicate delays in administrative hearings caused by the enactment of a new law instead of performing its usual case load. *See Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 325 F.R.D. 671, 685-86 (W.D. Wash. 2016). Similarly, an organization with a mission to advance access to fair housing was found to have direct organizational standing because it incurred increased litigation expenses that diverted resources from other fair housing related education and activities. *See Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC*, 835 F. Supp. 2d 965, 972-73 (D. Idaho 2011). And an organization whose mission also included legal and social issues for immigrant rights had standing where it

⁵ Another case Defendants cite, *La Asociation de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010), is not to the contrary. That case did not involve any allegations that the organizational plaintiff was forced to divert resources. *Id.* at 1088.

had to “expend time and resources engaging in a practice to end the challenged practices at issue in this action.” *Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1195-96 (N.D. Cal. 2009). These cases, not *Lane*, are analogous and persuasive.

II. OUTSERVE HAS ASSOCIATIONAL ORGANIZATIONAL STANDING.

The additional discovery also confirms that OutServe has associational standing as the functional equivalent of a traditional membership organization. As a reminder, the dispute here centers on whether OutServe represents individuals who have the “indicia of membership.”⁶ In addition to the evidence already presented, additional discovery confirms that the individuals OutServe represents do in fact meet the standard for non-traditional standing involving advocacy organizations.⁷

As discussed in initial briefing, courts have found non-traditional membership organizations that do not strictly possess all of the “indicia of membership” criteria can nonetheless have standing as the functional equivalent of a membership organization. *See Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) (finding associational standing even though plaintiff organization did “not have all the indicia of membership that the *Hunt* apple growers and dealers possessed”); *Doe v. Stincer*, 175 F.3d 879, 885-86 (11th Cir. 1999); *Ball v. Kasich*, 244 F. Supp. 3d 662, 682-83 (S.D. Ohio 2017) (holding that “*Hunt* need not be read . . . strictly” and finding that “constituent membership on [an organization’s] Board[]

⁶ *See, e.g., 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) (setting forth three factors considered under *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343-44 (1977)). The first factor—that OutServe serves a specialized segment of the community—is not contested. The third factor—that OutServe’s fortunes are closely tied to those of its constituency—is not seriously in dispute.

⁷ OutServe is not abandoning its previous arguments that it meets traditional standing requirements. Rather, OutServe highlights the additional evidence showing that it easily meets the alternative test for legal-services and advocacy organizations.

satisfies the indicia of membership”); *Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 280 (D. Conn. 2010).

These cases address organizational plaintiffs that, like OutServe, function as legal advocacy organizations protecting the interests of socially marginalized communities. In them, courts recognized the key to finding association standing was the presence of “enough” evidence 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.”

Mink, 322 F.3d at 1111. In *Mink*, the following evidence was satisfactory: (1) a governing board comprising people who represent or are knowledgeable about the needs of the clients served; (2) an advisory council also made up of the community served; and (3) an organizational structure that allowed for direct contact to ensure members had access to the organization’s services. *Id.* This evidence, and more, is present here and should be just as satisfactory for standing purposes.

First, as in *Mink*, OutServe’s Board of Directors is, and always has been, made up of a majority of people that meet OutServe’s definition of member. See Ex. B, OutServe’s Resp. to Second Interrog. No. 7; Ex. C, Blevins 7.2.19 Dep. 81:3-84:10. At all times, most of the Board—sometimes a significant majority—either were currently serving in the military, previously served, or wanted to serve, and were LGBTQ and/or living with HIV. See Ex. B, OutServe’s Resp. to Second Interrog. No. 7. Even those that were not military connected “were knowledgeable about the needs of the clients served,” *Mink*, 322 F.3d at 1111, because they were family members of service members and identified as allies of the LGBTQ community. See *id.*

Second, as in *Mink*, OutServe has an advisory council—the Military and Veterans Advisory Council or MAC—made up almost entirely of current and former service members who are LGBTQ and/or living with HIV. *See* Ex. C, Blevins 7.2.19 Dep. 95:22-97:4; Ex. D, OutServe-SLDN Leaders and Locations. The MAC is specifically charged with providing OutServe’s Executive Director with input concerning the direction of the organization. *See* Ex. C, Blevins 7.2.19 Dep. 72:12-73:2, 94:21-95:17; Ex. E, OutServe-SLDN Military Advisory Council Mission and Responsibilities.

Third, there are additional facts beyond those in *Mink* demonstrating that OutServe is “sufficiently identified with and subject to the influence of those it seeks to represent.” *Mink*, 322 F.3d at 1111. OutServe’s Executive Director holds monthly online “family meetings” where members can interact directly with him about the organization. *See* Ex. C, Blevins 7.2.19 Dep. 70:1-71:8. OutServe conducts periodic surveys of its membership—one in 2014, and another just this year. *See* Ex. C, Blevins 7.2.19 Dep. 57:15-62:19, 95:22-97:4; Ex. F, OutServe-SLDN 2014 Survey. OutServe’s Executive Director also receives input and feedback from Chapter Leaders (now known as Regional Directors), who interact directly with members who are part of OutServe’s extensive chapter network. *See* Ex. C, Blevins 7.2.19 Dep. 71:9-72:10. And members are welcome to provide feedback on OutServe’s numerous private Facebook groups, public Facebook pages, or other social media. Ex. C, Blevins 7.2.19 Dep. 70:9-71:21.

Fourth, as in *Mink*, there is organizational structure that allows for direct contact to ensure members have access to OutServe’s services: the Help Desk. *See*, Ex. G, Modern Military Association of America Help Desk Webpage. Any member can reach out to OutServe for advice and consultation on any matter. *Id.*

Given this evidence, there is no question that OutServe’s membership “possess ... enough [indicia of membership] to satisfy the purposes that undergird the concept of associational standing.” *Mink*, 322 F.3d at 1111; *see also Stincer*, 175 F.3d at 886 (“possess[ing] the means to influence the priorities and activities the [organization] undertakes” positions its constituents “[m]uch like members of a traditional association”).

Though the cases discussed above arise in the context of legal services organizations protecting the rights of people living with intellectual disabilities, there is no requirement their holdings be limited solely to that context. Those courts did not cite diminished cognitive capacity or reduced ability for self-advocacy as reasons—much less necessary or sufficient reasons—for analyzing “indicia of membership” differently than in other contexts. In fact, the discussion in these cases shows that members of the served community were still required to provide feedback, input, direction, and governance to the organization itself, suggesting that some level of self-advocacy and intellectual ability was expected. *Mink*, 322 F.3d at 1111-12; *Stincer*, 175 F.3d at 886; *Connecticut Office of Prot. & Advocacy*, 706 F. Supp. 2d at 273; *Ball*, 244 F. Supp. at 682 (people with intellectual disability on staff and in leadership positions).⁸

What mattered, rather, was that the organizations in these cases were legal-services and

⁸ By contrast, cases concluding that organizations lacked standing under this alternative test did so because courts made a distinction between a “member” and a “constituent.” *See Ass’n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Health Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994); *Missouri Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 809 (8th Cir. 2007). But “the fact that [an organizational plaintiff] has constituents rather than members does not deprive it of Article III standing,” and, indeed, other courts have recognized as much. *Stincer*, 175 F.3d at 885 (discussing *Ass’n for Retarded Citizens of Dallas*).

advocacy organizations, like OutServe. OutServe’s standing should be considered on the same grounds, and it clearly meets the test.⁹

III. CONCLUSION

For these reasons, the court should deny the renewed motion to dismiss.

Dated: July 12, 2019

/s/ Scott Schoettes

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⁹ Defendants previously argued that “if any exception to the formulistic application of the indicia of membership test exists based on *Mink* and *Stincer*, that exception applies ‘exclusively’ to [policy and advocacy] systems.” See Defs Reply Dkt. No. 137 (*Roe*) at 8 (citing *Disability Advocates, Inc. v. N.Y. Coal. For Quality of Assisted Living, Inc.*, 675 F.3d 149, 158 (2d Cir. 2012)). Importantly, however, the cited case says “almost exclusively,” and further notes that not all such rulings were in that context. See *Disability Advocates, Inc.*, 675 F.3d at 158. In any event, the organization in *Disability Advocates* did not even meet the less formulistic application of the indicia of membership test, so the case is inapposite.

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CERTIFICATE OF SERVICE

I certify that, on the 12th day of July, 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: July 12, 2019

Respectfully submitted,

/s/ John Harding

EXHIBIT D

OutServe-SLDN Leaders and Locations

OUTSERVE-SLDN LEADERS AND LOCATIONS

BOARD OF DIRECTORS

Jeffrey Mueller, Co-Chair
Los Angeles, CA

Wesley Reynolds, MD, Co-Chair
Denver, CO

Joshua Fontanez, Secretary
Kileen, TX

Jeffry Priela, Treasurer
Jacksonville, NC

Shaina Barnes
Baltimore, MD

Ariana Bostian-Kentes
Seattle, WA

Sharon Brackett
Laurel, MD

Monique Clarke
Bronx, NY

Robert Dockendorff
San Francisco, CA

Ben Finzel
Washington, DC

Tracey Hepner
Arlington, VA

Bryan Hlavinka
Houston, TX

John Klenert
Washington, DC

Lee Reinhart
Manitou Springs, CO

Mica Willis
Washington, DC

BOARD OF ADVISORS

Lindsay Church, Co-Chair
Seattle, WA

Steven Proctor, Co-Chair
Nashville, TN

Sarah Alder
Denver, CO

Amanda Brewer
Elwood, IN

Ashley Broadway-Mack
Alexandria, VA

Todd Burton
Rockford, IL

Charlotte Clymer
Washington, DC

Jennifer Dane
Tucson, AZ

Blake Dremann
Washington, DC

John Fiorentine
Washington, DC

Jessica Girven
Albuquerque, NM

Nick Harrison
Washington, DC

Andres Hernandez
Los Angeles, CA

Laila Ireland
Colorado Springs, CO

Gene Silvestri
Los Angeles, CA

EJ Smith
Washington, DC

Meg Yamoto
Washington, DC

Ashley Carothers, ex-officio
Kaiserslautern, Germany

Matthew Hardwig, ex-officio
Big Lake, Minnesota

STAFF

Anthony "Andy" Blevins
Executive Director
District Heights, MD

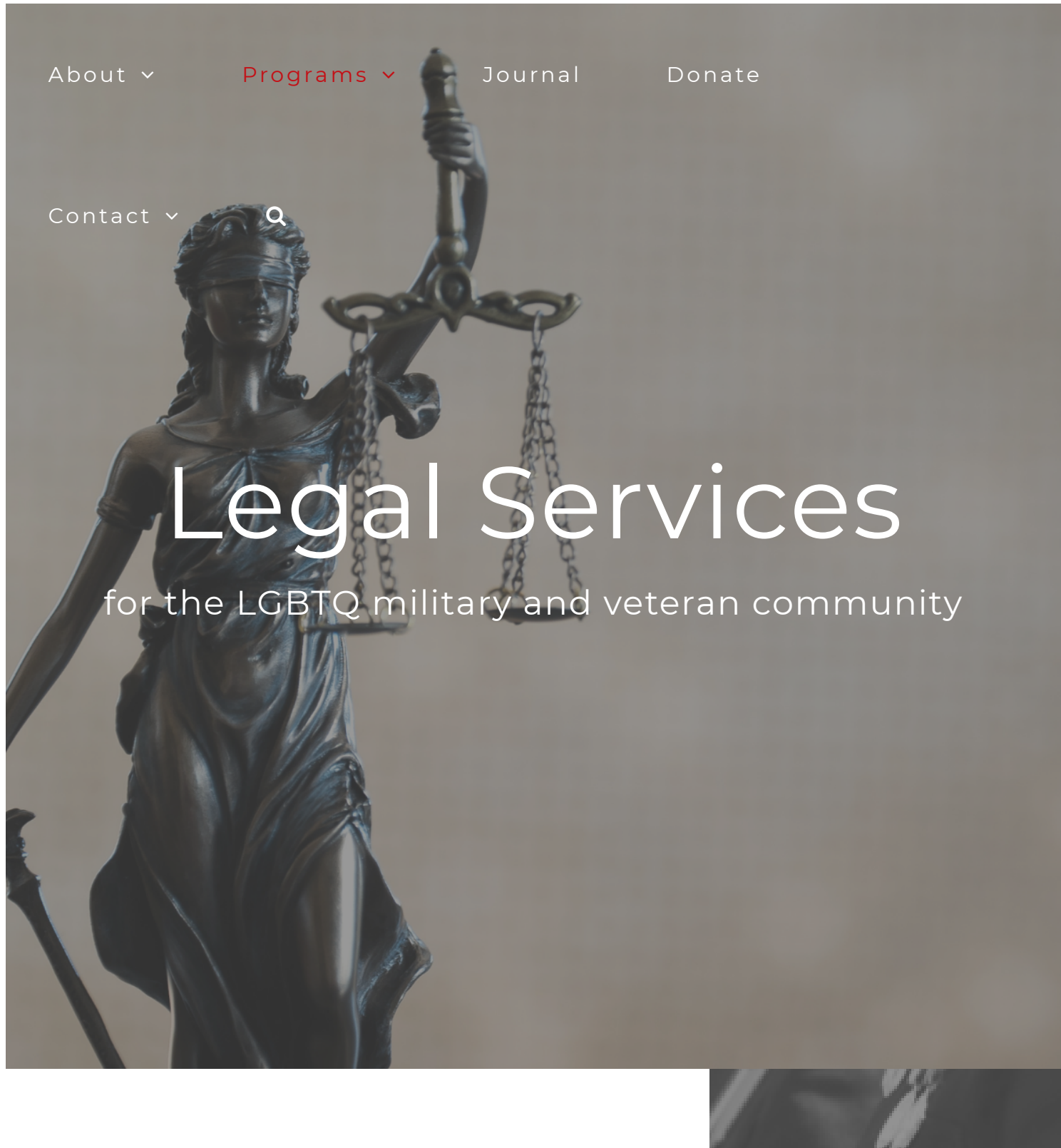
Peter Perkowski
Legal & Policy Director
Los Angeles, CA

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

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

EXHIBIT G

*Modern Military Association of America
Help Desk Webpage*



Free and direct legal services

Through our legal services program, we assist members of the LGBTQ military and veteran community with discharge upgrades, legal name changes and a wide range of other legal issues. MMAA also currently has four high-profile lawsuits against the Trump-Pence administration for various discriminatory policies — including the administration's unconscionable transgender military ban.

- **Legal Help Desk**

- We assist the LGBTQ military and veteran community on many legal issues — from bias and unequal treatment to access to benefits.

- **Restore Honor, Restore Dignity**

- We assist lesbian, gay and bisexual veterans who were discharged under "Don't Ask, Don't Tell" and prior policies in removing offensive evidence of those defunct policies from DD214s. We also



12500
clients helped



4
high-profile
lawsuits

DONATE NOW

assist transgender veterans in changing
the name and gender marker on their
military records.

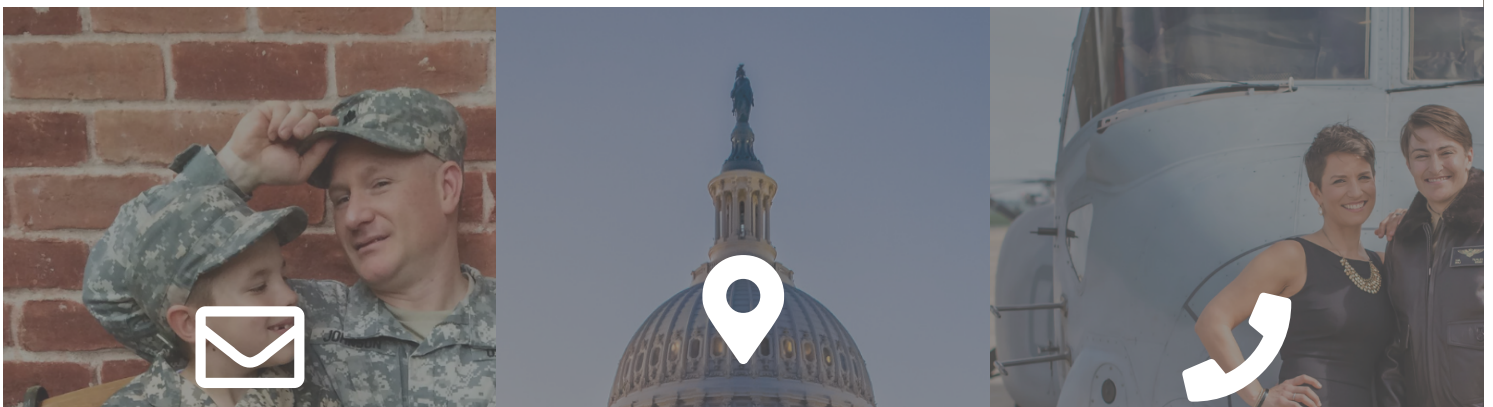
- **Direct Representation**

- We assist individuals who may need direct legal representation in administrative separation and other disciplinary matters, court martial proceedings, and other legal issues related to sexual orientation, gender identity or HIV status

- **Lawsuits**

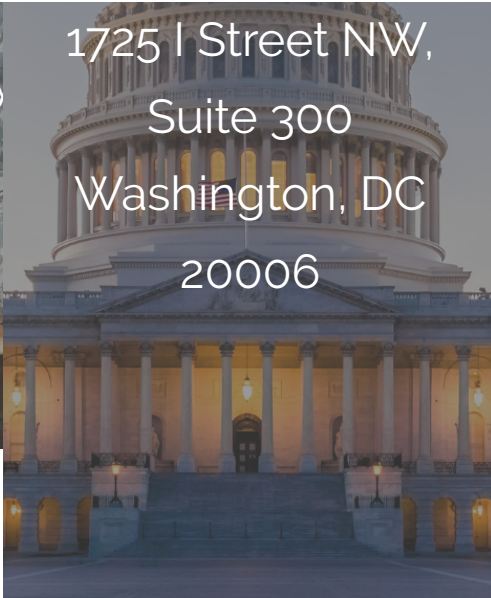
- We currently have four lawsuits challenging discriminatory policies impacting the LGBTQ military and veteran community and service members living with HIV.

Need assistance? Call us at 202-328-3244 or email us at legal@modernmilitary.org.





info@modernmilitary.org



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Legal Services

for the LGBTQ military and veteran community